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Racial capitalism with Chinese Characteristics: analyzing the political economy of racialized dispossession and exploitation in Xinjiang

Vincent Wong¹

Abstract: *While human rights remains the predominant lens used to analyze the Chinese government's recent intensification of surveillance, incarceration, and control over Uyghurs and other non-Han native populations in the Xinjiang Uyghur Autonomous Region (XUAR), racial capitalism provides a more useful analytic in understanding the governing logics of political economy behind the development and justification of technologies of repression in the region.*

In this article, I argue that the severe intensification of discriminatory repression in the XUAR is not merely a question of political authoritarianism, but rather a phenomenon directly linked to Chinese state capitalism: the rise of the corporate state, greater integration of the region's economy into domestic and international energy and trade markets, the colonial imperative to eradicate Indigenous claims to the land. Most recently, the massive investments to transform the XUAR into a key global trade hub for the Belt and Road Initiative has spurred the development of a 'terror capitalism' security industrial complex that uses anti-Muslim counter-terrorism discourses to justify the expropriation and exploitation of Uyghurs and other non-Han native populations in data and labour-intensive private-public partnerships. These developments also have major implications for African publics, given that AI-enabled digital surveillance solutions perfected in the XUAR are now being sold by Chinese companies to African governments looking to bolster their own policing and state intelligence infrastructures.

This emergence of a "racial capitalism with Chinese Characteristics" during the development of China's highly ambitious Belt and Road Initiative poses a new and challenging questions for international economic law, which has traditionally elided questions of law and political economy.

1 Assistant Professor, University of Windsor Faculty of Law. Email: vwwong@uwindsor.ca. The author wishes to thank the organizers and participants of the workshops for the Special Edition of the Journal of International Economic Law on Racial Capitalism. The author also wishes to thank in particular Ntina Tzouvala, Amar Bhatia, Sujith Xavier, James Thuo Gathii, Olabisi Akinkugbe, Kori Cooper, Szu-Yun Hsu, Fay Faraday, and members of the Lausan Collective for their invaluable editorial comments and guidance.

I. Introduction: Racial Capitalism, China, and the Uyghurs

‘With the vocational skills education and training centres as the carrier, a large number of coastal and inland enterprises have been attracted to invest and built factories in Xinjiang, which has significantly expanded both employment and economic growth.’

– Xinjiang Uyghur Autonomous Region Development and Reform Commission²

a. A contemporary human rights catastrophe

For decades, scholars, activists, and human rights organizations have been steadily detailing the Chinese government’s discriminatory policies towards Uyghurs and other non-Han Indigenous peoples in the Xinjiang Uyghur Autonomous Region (XUAR)³ - a frontier region of Northwest China⁴. However, since 2017, there has been a massive expansion and acceleration in the use of carceral, surveillance, and assimilative technologies targeting non-Han native populations in the region - primarily Uyghurs, who make up roughly 45% of the total and over 77% of the non-Han population in the XUAR⁵.

News surrounding the creation of a vast network of extrajudicial detention centres, a massive counterinsurgency effort to detain and forcibly assimilate Turkic Muslim populations, as well as stories around the brutal impacts of these policies began to trickle out of the region following the appointment of Chen Quanguo in August 2016 as the Communist Party of China (CPC) Secretary of the XUAR. Prior to this appointment, Chen served a five-year term as Party Secretary for the Tibet Autonomous Region (TAR) and became known for his hardline style of governance. Notably, under Chen’s leadership, the TAR regional government introduced a high-tech system of grid policing and ‘convenience police-posts’ that disproportionately targeted Tibetans, a system that he would expand upon in the XUAR⁶.

The massive scale of these efforts has spurred a spike in recruitment to hire as many as 150,000 new police officers in the XUAR through state-run ‘Xinjiang Aid’ offices in different provinces across China,

2 The stable and active development of the economy of the Autonomous Region, XINJIANG UYGHUR AUTONOMOUS REGION DEVELOPMENT AND REFORM COMMISSION (5 December 2018, 6:55 pm), <https://web.archive.org/web/20190520143306/http://www.xjdr.gov.cn/info/9923/23516.htm> (in Simplified Chinese).

3 For instance, see, Secret Violence: Human Rights Violations in Xinjiang, AMNESTY INTERNATIONAL (November 13, 1992), <https://www.amnesty.org/download/Documents/192000/asa170501992en.pdf>.

4 The name Xinjiang and the XUAR are highly contested terms. Xinjiang (which means ‘new frontier’ in Chinese) was first used by the 18th century Qing emperor Qianlong after the (re)occupation of the territory during his reign. Other names include ‘Northwest China’, ‘East Turkestan’, ‘Uyghuria’, ‘Uyghurstan’, ‘Dzungarstan and Altishahr’, and ‘Dzungaria and the Tarim Basin Region’.

5 These demographic figures are drawn from the 2020 Xinjiang census survey. See Main Data of Xinjiang Uygur Autonomous Region from the Seventh National Population Census, OFFICE OF THE LEADING GROUP OF XINJIANG UYGHUR AUTONOMOUS REGION FOR THE SEVENTH NATIONAL POPULATION CENSUS (14 June 2021), <https://www.fmprc.gov.cn/ce/cgtrt/eng/news/t1884310.htm>.

who are then assigned to the region after minimal law enforcement training. The counterinsurgency campaign has seen a litany of abuses, including arbitrary arrest and detention, torture and beatings during interrogation, forced separation of children from parents, mass rape, and forced sterilization and abortion procedures rendered against women while in custody⁸.

But while an impressive amount of information has been made available to the public sphere around systemic violations of human rights committed in this region, coverage has in general been limited in its focus to violations of civil and political rights. This has the unfortunate side effect of obscuring the question of why these policies are being implemented in the first place. Human rights law is structurally predisposed to focusing on victims and perpetrators, allowing those whose interests are advanced by systems of deprivation and privilege to remain comfortably out of sight⁹. As a consequence, we are unable to clearly see the ways in which the remaking of the economy of the XUAR as a key geopolitical hub for China's development – particularly in light of the massive ambitious of its Belt and Road Initiative (BRI) – has created the conditions for racialized discourses and policies to emerge that have facilitated mass abuses and intensive social control against Uyghurs and other non-Han native populations.

b. Racial capitalism's contingency: analysis outside the ambit of white supremacy

This analysis of the crisis in the XUAR actively expands our understanding of international economic law by revealing how political economy, racialization, accumulation, and (mal)distribution structure international law and its impacts beyond the traditional confines of international economic law scholarship. But why should racial capitalism be our theoretical starting point when discussing developments in the XUAR?

Within international law scholarship, racism has often been explored in debates surrounding empire and imperialism. For instance, Third World Approaches to International Law (TWAAIL) scholars have argued that the law on use of force for humanitarian intervention¹⁰, the law of counter-terrorism¹¹, and the recognition

6 China: Alarming New Surveillance, Security in Tibet, HUMAN RIGHTS WATCH, (Mar. 20, 2013, 8:30 am), <https://www.hrw.org/news/2013/03/20/china-alarming-new-surveillance-security-tibet>.

7 Wang Leizhan, UT Witness Statement, UYGHUR TRIBUNAL, (June 7, 2021), <https://uyghurtribunal.com/wp-content/uploads/2021/06/07-1000-JUN-21-UTFW-022-Wang-Leizhan-English.pdf>.

8 Amnesty International, Like We Were Enemies in a War: China's Mass Internment, Torture and Persecution of Muslims in Xinjiang, (2021), https://xinjiang.amnesty.org/wp-content/uploads/2021/06/ASA_17_4137-2021_Full_report_ENG.pdf.

9 Susan Marks, Human Rights and Root Causes, 71 *The Modern L. Rev.* 57, 76 (2011); Mahmood Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)', 32(3) *Ethics* 32 (2002).

10 Makau Wa Mutua, Savages, Victims and Saviors: *The Metaphor of Human Rights*, 42 *Harvard Int'l. L. J.* 201 (2001).

(and non-recognition) of sovereignty¹², are governed by the racializing logic of the “civilizing mission” inherited from international law’s colonial past. These important scholarly interventions however, tend to follow a classical framework of imperialism in which “a dominant, unified imperialist core exploits an oppressed periphery” without paying adequate attention to processes of peripherization within postcolonial states. As a result, TWAIL approaches have been criticized by some as limited in the context of contemporary Indigenous struggles in Asia¹⁵.

As Robert Knox argues, the material structure of imperialism creates intense rivalries that shape the political and economic conditions that generate racial discourses¹⁶. Peripheralization may occur at multiple levels simultaneously: between nation-states, between regions, and between ethnicities through processes of racialization. Knox’s prescription to take account of inter-imperial rivalry in structuring the form in which racialization occurs in any given context allows us to see how and to what ends racial discourses operate in China’s northwest frontier. China’s massive Belt and Road Initiative (BRI) are simultaneously a product of inter-imperial rivalry with the US on a geopolitical level¹⁷ and a primary driver of the securitization of the XUAR on the domestic level. The logics of racial capitalism in the XUAR then can be seen as a strategy of rule constructing a certain part of the working class as racially privileged – attracting a series of economic, political and ideological benefits – and therefore enabling authorities to divide and manage labour most efficiently for capital accumulation¹⁸.

Analyzing the role of racial discourses in structuring the economic and social transformation in the XUAR serves as an important reminder of how the logics of racial capitalism go beyond white supremacy, complexifying the idea of a single global colour line that divides Blackness and Whiteness¹⁹. As Debra Thompson reminds us, “[r]ace was born in the transnational realm and bred to be central to discourses of modernity, empire, and capitalism”, its “impulses are simultaneously local and global, taking on a ‘characteristic specificity in the context of local, national, and state conditions, globally influenced and textured.’”²⁰ Thus, the materialist and global

11 Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 Osgoode Hall L. J. 45 (2005).

12 Antony Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge: Cambridge University Press, 2005).

13 Robert Knox, *Race, Racialisation and Rivalry in the International Legal Order*, in, *RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE*, 175, 176 (Alexander Anievas, Nivi Manchanda & Robbie Shillam, eds., 2015).

14 *Ibid*, at 177-178.

15 Hiroshi Fukurai, *Fourth World Approaches to International Law (FWAIL) and Asia’s Indigenous Struggles and Quests for Recognition under International Law*, 5 Asian J. of L. and Society 221 (2018).

16 Knox, *supra* note 13, at 188.

17 Ho-Fung Hung, *Disintegrating US-China Economic Symbiosis and the New Inter-Imperial Rivalry*, MARXIST SOCIOLOGY BLOG, (Jul. 2, 2020), <https://marxistsociology.org/2020/07/disintegrating-us-china-economic-symbiosis-and-the-new-inter-imperial-rivalry/>.

18 David R Roediger & Elizabeth D Esch, *THE PRODUCTION OF DIFFERENCE: RACE AND THE MANAGEMENT OF LABOR IN US HISTORY* (Oxford: Oxford University Press, 2012).

19 Alexander Anievas, Nivi Manchanda & Robbie Shillam, *Confronting the Global Colour Line: An Introduction*, in *RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE*, *supra* note 13.

orientation of racial capitalism suggests that in order to explore the full potential of the concept, we need to expand our analysis beyond the immediate ambit of white supremacy and carefully examine these dynamics in different contexts.

This orientation aligns with the foundational ideas of racial capitalism. For instance, in *Black Marxism*, Cedric Robinson argues that even in feudal Europe, immigrant Slavs and Irish workers were placed at the bottom of a racial hierarchy under Anglo-Saxon chauvinism.²¹ As he reminds us, ‘the tendency of European civilization through capitalism was thus not to homogenize but to differentiate – to exaggerate regional, subcultural, and dialectical differences into “racial” ones.’²² Race was never just a series of prejudices, but rather an organizing principle on a global scale that was sharpened through colonial encounters and which have also imbricated postcolonial states.

Like in many other postcolonial states, the language of ‘development’ has been used by the state to undermine the interests of native peoples in Xinjiang through the language of economic progress and nationalist unity – a vulnerability that is built into the very attributes of statehood under international law.²³ As China has moved away from the CPC’s initial outward commitment to socialist multiculturalism and economic equality²⁴ towards market liberalization and global integration, it has simultaneously nurtured exploitative economic structures that have to be managed and justified. In the XUAR, various axes of pre-existing social difference (e.g. religious, ethnic, tribal, linguistic, and physical differences) have been produced into race in order to rationalize and justify the inequalities attendant with turning the region into a hub for global trade and resource extraction. The very poverty of ethnicities that have been marginalized and dispossessed within these economic and nationalist structures becomes the proof of their cultural ‘backwardness’, which requires correction by the state to transform these populations in the mould of (Han) Chinese developmental modernity.

In particular, to understand the specific dynamics of contemporary racialization that primarily (but not exclusively) targets Uyghurs and other Turkic Muslims in the XUAR, we must examine how the post 9/11 equation of Islam with terrorism has resulted in what scholars have theorized as “global anti-Muslim racism”.²⁵ Writers such as Nisha Kapoor underscore the “bio-cultural” nature of anti-Muslim racism in that the both the biological and cultural logics of racism are present and entangled within their racial imaginary and subordination.²⁶ Islam is read through the lens of

20 Debra Thompson, *Through, Against, and Beyond the Racial State: The Transnational Stratum of Race*, in RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE, supra note 13.

21 Robin DG Kelley, *Foreword* to BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION, xiii (Chapel Hill: University of North Carolina Press, 3rd ed. 2020) (2000).

22 *Ibid*, at 26.

23 Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law*, 200-240 (Cambridge: Cambridge University Press, 2021).

24 Thomas S Mullaney, *How China went from celebrating ethnic diversity to suppressing it*, THE GUARDIAN, (Jun. 10 2021 3:00pm), <https://www.theguardian.com/commentisfree/2021/jun/10/china-celebrating-diversity-suppressing-xinjiang-communist-party>.

a cultural pathology where the expression of public and political acts of religion and spirituality is deemed to be signs of irrationality and backwardness and acts of political violence of Islamic resistance as senseless, illogical terrorism rather than examining them through the lens of broader decolonial and national liberatory struggles.²⁷ It is in this context that “looking ‘like a Muslim’ is to become hyper-visible and racialized as a type of danger and then subject to forms of disciplinary control – for example, invasive security checks, stop-and-search, police suspicion and imprisonment without charge.”²⁸ In addition, Ghassan Hage underscores how physical or cultural signifiers of Muslimness are fluid, contingent and often linked to colonial connections – through the gaze of being ‘Asian’ in Britain, ‘Turkish’ in Germany, ‘North African’ in France, ‘Arab’ in the United States, or by extension, ‘Uyghur’ in China²⁹.

Thus, a historically-situated ‘racial capitalism with Chinese Characteristics’ lens allows us to combine the social and economic, centering and highlighting the driving forces behind the Chinese government’s increased securitization of the XUAR. These forces include, *inter alia*, the rise of the corporate state, greater integration of the region’s economy into domestic and international energy and trade markets, the long-standing colonial imperative to eradicate Indigenous claims to land and resources; and a racialized security industrial complex that uses anti-Islamic counterinsurgency discourses to justify the expropriation and exploitation of Uyghurs and other non-Han native populations in data and labour-intensive private-public partnerships.

Tracing the history of Chinese political economy in the XUAR and applying a racial capitalist lens shows us that the severe intensification of discriminatory repression is not merely a question of Chinese political authoritarianism, but rather a phenomenon directly linked to forces set in motion by Chinese state capitalism³⁰ and the transnational racialization of Muslims that has emerged under the post 9/11 Global War on Terror framework³¹.

25 Sherene Razack and Zeynep K. Korkman, *TRANSNATIONAL FEMINIST APPROACHES TO ANTI-MUSLIM RACISM* (Durham: Duke University Press, 2022).

26 Nisha Kapoor, *DEPORT, DEPRIVE, EXTRADITE: TWENTY-FIRST-CENTURY STATE EXTREMISM* (London: Verso, 2018).

27 Lucy Mayblin and Joe Turner, *MIGRATION STUDIES AND COLONIALISM*, 158-163 (Cambridge: Polity Press, 2021).

28 *Ibid.*, at 142.

29 Ghassan Hage, *IS RACISM AN ENVIRONMENTAL THREAT?* (Cambridge: Polity Press, 2017).

30 There is extensive scholarly debate on how to classify the economy of contemporary China. This article adopts a working definition of term state capitalism in which the state has outwardly nationalized many key industries, undertakes for-profit economic activity through state-owned enterprises, works parallel to and conjunction with a significant private sector, engages in processes of capital accumulation and wage labour, and where workers have little meaningful control over the means of production. For a brief overview of these theoretical debates, see Li Xing and Timothy M Shaw, *The Political Economy of Chinese State Capitalism*, *Journal of China and International Relations*, 88, 88 (2013).

31 On the specific racialization of Muslims in the XUAR context, see David Brophy, *Good and Bad Muslims in Xinjiang*, *XINJIANG YEAR ZERO*, 52-55 (Darren Byler, Ivan Franceschini, and Nicholas Loubere, eds., 1st ed., 2022); on the emergence of Islam as a socially constructed race, see Cyra Akila Choudhury, *Race and Identity in the Emergence of Islam as a Race*, *FLORIDA INTERNATIONAL UNIVERSITY LEGAL STUDIES RESEARCH PAPER NO. 22-02*.

c. **Thinking infrastructurally about law and the Belt and Road Initiative**

The format of this article heeds infrareg scholars' call to "think infrastructurally" about international law.³² According to Benedict Kingsbury: "[t]hinking infrastructurally typically entails understanding infrastructure not simply as a thing, but as a set of relations, processes, and imaginations." As an analytic, thinking infrastructurally calls on scholars to examine the combination of "the technical (the designed and engineered physical and software elements), the social (the human and non-human actants in their intricate relations), and the organizational (the forms of entity, regulatory arrangements, financing, inspection, governance, etc)." ³³In addition, choices about infrastructure can themselves "operate as regulation—but these regulators [those who make the infrastructural choices] are often themselves only thinly or unevenly regulated. The idea of infrastructure-as-regulation ('infra-reg') is that infrastructure can (and often does) operate in some significant relation to law."³⁴

This approach gives us a helpful blueprint by which to think about the relationship between law, China's Belt and Road Initiative (BRI), and the contemporary human rights crisis that has befallen Uyghurs and other non-Han native populations in Xinjiang. It allows us to consider how the technical infrastructures of the BRI (pipelines, rail, ports, and security/carceral infrastructure) both influence and are influenced by its organizational forms (that eschew detailed treaties for soft law and networks of agreements with China as the hub) that in turn interact with sociopolitical technologies (that racially mark Uyghurs as proto-terrorist dangers who must be controlled and reformed into pliable, patriotic workers) for the globalized purposes of extractive capitalism.

Thus, in Section II, I trace the history of the political economy of Xinjiang, from its relative isolation from the rest of China during the Qing Empire, to the creation of the Xinjiang Production and Construction Corps (XPCC), to the transformations as a result of market reforms in 1990s that domestically integrated the region's economy with the rest of China, to the contemporary global integrations unleashed by access to the WTO and most recently, the Belt and Road Initiative.

In Section III, I analyze the juridical infrastructure of the BRI and assess to what extent the governing logics of the BRI influenced and accelerated the logics of dispossession, exploitation, and surveillance in the region. I argue that the rhetoric of the Global War on Terror and its underlying anti-Muslim animus has, like in many places around the world, allowed state authorities to reframe anti-colonial dissent and struggles for self-determination as risk of terrorism and thus an endemic security risk that threatens global supply chains and oil and gas flows in the region. In this political

32 Benedict Kingsbury, *Infrastructure and InfraReg: On Rousing the International Law 'Wizards of Is'*, 8 Cambridge L.J. 171-186 (2019).

33 *Ibid*, at 10.

34 *Ibid*, at 13.

and economic environment, a particularly vulgar and naked type of racial capitalism has since emerged as the primary governing logic in the XUAR.

In Section IV, I examine some of the ways in which racial capitalism has negatively racialized populations in the XUAR. Drawing heavily on the framework of ‘terror capitalism’ coined by anthropologist Darren Byler, I outline how various sites of carcerality and control within the XUAR contribute to the dual objectives of counter-terrorism and capital accumulation while highlighting some of the beneficiaries of these arrangements. I then discuss the implications of racial capitalism with Chinese characteristics on international labour law by examining the policy responses of both the International Labour Organization (ILO) and the US government through its Uyghur Forced Labour Prevention Act.

Finally, in Section V, I assess the extent to which foreign sanctions for forced labour and human rights abuses may push back against the logics of racial capitalism in the XUAR, as well as the conceptual and political limits of these sanctions for more egalitarian and emancipatory projects.

II. Historical development

a. ‘New Frontier’ governance: the shift to assimilationist policies and the East Turkestan independence movements of the 20th century

The region now known by the Chinese government as Xinjiang is enormous – in US terms, roughly the size of Alaska and four times the size of California. It holds a key strategic location in between Russia, China, Central Asia, and the Indian Subcontinent. Historically, different parts of the region have been contested politically – a key battleground between imperial rivals in the ‘Great Game’.³⁵ The Qing Dynasty (1644 to 1912) named this borderland ‘Xinjiang’ (literally ‘new frontier’) in 1759 after its military conquest of the Dzungar Khanate in the North. Qing forces followed this with the military subjugation of the primarily Turkic Muslim Uyghurs who inhabited the South³⁶.

The Qing enacted policies of ethnic non-integration within the primarily Muslim borderland, with the effect that non-Han populations essentially lived in isolation from the dominant Chinese ethnicity and culture³⁷. This approach favoured a hands-off approach to governance in the borderland

35 Peter Hopkirk, *THE GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA*, (1st ed., 1992).

36 Wang Ke, *THE EAST TURKESTAN INDEPENDENCE MOVEMENT 1930S-1940S*, 2-5 (1st ed., 2018).

37 *Ibid.*, at 9-17. For instance, imperial garrison soldiers were prohibited from interacting or intermarrying with Uyghurs. 18 ‘Han cities’ were ultimately established that were to be separate from the pre-existing ‘Muslim cities’. A permit system which served as a strict set of internal migration controls, particularly for Han Chinese who wished to come into the region for work, trade, or settlement. Provisions were also passed to forbid local residents from learning Chinese language.

regions of Mongolia, Tibet, and Muslim-majority Xinjiang to create a political 'check' on the majority Han population in the interior provinces. In 1884, the Qing drastically changed course and introduced a provincial system of governance, abolishing the pre-existing Uyghur 'beg' system of governance, allowing Han Chinese bureaucrats to serve in the highest-ranking civil and military positions, and promoting an influx of Han settler migration⁴⁰.

When the Qing collapsed in 1911, a series of Han warlords took control of Xinjiang and, despite comprising less than 10% of the population, concentrated political, military, and economic power within Han Chinese hands.⁴¹ Ethnic oppression against non-Han communities intensified at the same time that ideas around pan-Turkism and pan-Islamism were being received through the 'Uyghur Enlightenment'⁴².

By the 1930s, the unified ethnonym of Uyghur entered into common use to reflect the inhabitants of the region along largely religious (Muslim), linguistic (Uyghur), cultural, and ethno-national (Turkic) lines – a consciousness which paved the way for growing nationalist sentiment and two short lived, Soviet-backed East Turkestan Republics (ETRs). The First ETR, based Southwest in Kashgar, existed from 1933 to 1934, while the Second ETR, based in the Northwest in Ghulja (Yining), existed from 1944 to 1949.

While the First ETR only lasted 85 days, the Second ETR was a much more substantial endeavour, mobilizing all Turkic Muslim peoples in the area (including Uyghurs, Kazakhs, Uzbeks, Tatars, and Kyrgyz) and organizing its own military, police, and legal and administrative systems.⁴³ However, the Second ETR was heavily reliant on support of the Soviet Union, and when Stalin later greenlighted Chinese occupation of the region⁴⁴ and nearly all of the Second ETR's leadership was wiped out in a plane crash in Soviet territory on their way to a meeting in Beijing, the People's Liberation Army (PLA) advanced largely unopposed into the region and annexed it by the end of 1949, ending the era of formal East Turkestanian statehood⁴⁵.

38 *Ibid*, at 12-13.

39 *Ibid*, at 5-9. 'Beg' is a turkic word roughly commensurate to 'chief'. The beg system referred to a system of high-ranking officials that were responsible for the civil administration in managing local civil administration, public order, local garrisons, judgments, taxation, agriculture, industry and commerce, education and religious affairs in Uyghur communities. The Qing empire largely continued the beg system and bestowed material benefits and land to local begs who were loyal to the Qing.

40 *Ibid*, at 25, 37.

41 *Ibid*.

42 *Ibid*, at 29-32.

43 *Ibid*, at 266-267.

44 I. Kovalev, *Memorandum of conversation between Stalin and CCP Delegation*, WILSON CENTER, (Jun. 27, 1949), <https://digitalarchive.wilsoncenter.org/document/113380>.

45 Wang, *supra* note 36, at 275.

b. The Xinjiang Production and Construction Corps: settling and securing the frontier through Han migration and development policies

Established in 1954, the Xinjiang Production and Construction Corps (XPCC) is a Han-dominated (86%)⁴⁶ colonial paramilitary organization established for the tripartite purposes of development (of land and commercial activities under its purview), settlement (primarily of Han Chinese settlers to the region), and frontier security (to assist in cracking down on any challenge or threat to Chinese interests).⁴⁷ The unique paramilitary structure of the Corps is a legacy of its establishment by decommissioned soldiers after the CPC's military annexation of the region.

While the XPCC was originally conceived as being self-sufficient and subsisting off an agrarian economy, the late 1990s saw massive reform and "corporatization" of the Corps. This corporatization of the XPCC marked not only a change in form but a wholesale rhetorical and material shift away from its roots in farming to a modernized and urbanized civilian corporate state seeking to attract private investment in a variety of different industries.

The XPCC is enormous in scale, with a population that has ballooned from 175,000 at its founding to 3.25 million in 2019.⁴⁸ It controls 70,000 square km of land, boasting a GDP of 274.707 billion Yuan (\$40.46 billion USD)⁴⁹. Its economy has historically centered around agriculture and the production of cash crops and related products including tomatoes, ketchup, fruit, wheat, red dates, and cotton – producing 30% of China's cotton or 7% of the worldwide total⁵⁰.

The Corps exists as a parallel government (a "state within a state") to the regional XUAR government, having been promoted to equal bureaucratic status as the regional XUAR government in 1999.⁵¹ This administrative structure also at times cause the XPCC and XUAR government to compete. For instance, the XUAR government has frequently blocked attempts by the XPCC to expand beyond agriculture and land development to the lucrative petrochemical and mining enterprises⁵² – a significant source of tension given that the Tarim Basin in Southern Xinjiang represents the largest oil and gas field in China with about 16 billion tons of discovered reserves⁵³.

46 Bao Yajun, *The Xinjiang Production and Construction Corps: An Insider's Perspective*, 3 (Blavatnik School of Gov. working paper No.23, 2018), <https://www.bsg.ox.ac.uk/sites/default/files/2018-05/BSG-WP-2018-023.pdf>. Bao is a prominent expert on the XPCC and was commissioned by the State Council of China as a Research Fellow to study and produce reports on the XPCC and potential reforms.

47 *Ibid*, at 2.

48 Sidney Leng and Cissy Zhou, *China census: Xinjiang's population jumps 18.3 per cent over past decade as sprawling XPCC conglomerate expands operations*, SOUTH CHINA MORNING POST, (May. 12 2021, 8:15 pm), <https://www.scmp.com/economy/global-economy/article/3133228/china-census-xinjiangs-population-jumps-183-cent-over-past>.

49 Lin Xin and Yu Jincui, *Divisions of XPCC contribute to social stability, promote residents' income*, GLOBAL TIMES, (Sep. 23 2020, 10:23pm) <https://www.globaltimes.cn/page/202009/1201866.shtml>.

50 *US bans cotton imports from China producer, citing "slave labour"*, AL JAZEERA, (Dec. 3 2020) <https://www.aljazeera.com/economy/2020/12/3/us-bans-cotton-imports-from-china-producer-citing-slave-labour>.

The XPCC is also an institution that advances Han colonial interests in the region.⁵⁴ The primary avenue in which this is achieved is through XPCC-facilitated Han settler migration, which played a large role in total migration inflows into the XUAR. Han settler colonial migration since the PRC's annexation of the region is clear and unambiguous: between 1949 and 2008, the proportion of Han Chinese in the XUAR rose from 6.7% (220,000) to 40% (8.4 million) of the total population – which is the largest demographic change in the history of any region during the era of the PRC.⁵⁵ XPCC-facilitated migration has also come in waves. Over the decades, this has included large numbers of educated youth from Shanghai, large numbers of peasants from both coastal and interior provinces,⁵⁶ as well as prisoners transferred from other Chinese provinces to primarily XPCC-run prisons.⁵⁷ By 1996, a full 2.3 million of the 6.4 million Han in the XUAR were XPCC members⁵⁸.

As China gradually transitioned to a market economy and later state-guided capitalism, three key reforms made in 1998 'collectively marked the start of a new phase in the way the bingtuan is imagined and deployed'.⁵⁹ These were: (1) significantly diminishing the army's political control over the XPCC, (2) incorporating the XPCC, and (3) affirming XPCC courts and prosecutorial entities as official legal entities⁶⁰.

The incorporation of the XPCC resulted in the creation of 'the world's largest enterprise group'⁶¹; a corporate state that is increasingly merged with the rest of the XUAR (as XPCC operations expanded down from their historical base in the North to the Uyghur-dominated South) and domestic as well as global markets, by transforming the region into a key international source and passageway for energy resources.⁶² XPCC incorporation presaged the 'Open Up the West' (xibu da kaifa) campaign of 2000 and the accession of China to the World Trade Organization (WTO) in December 2001.

Post-incorporation, the XPCC began a series of urbanizing land grabs, establishing a number of settlement cities in the XUAR that totally controlled and inhabited by

51 Thomas Matthew James Cliff, 'Neo Oasis: *The Xinjiang Bingtuan* in the Twenty-first Century', 33 *Asian Studies Rev.* 83,83 (2009).

52 Bao, *supra* note 46, at 10.

53 CNPC makes one billion tonne oil and gas field discovery in Tarim Basin, *HYDROCARBONS TECHNOLOGY*, (21 June 2021), <https://www.hydrocarbons-technology.com/news/cnpc-makes-one-billion-tonne-oil-and-gas-field-discovery-in-tarim-basin/>.

54 Uyghur Human Rights Project, *The Bingtuan: China's Paramilitary Colonizing Force in East Turkestan*, (2018), <https://docs.uhrp.org/pdf/bingtuan.pdf>.

55 Alessandra Cappelletti, *SOCIO-ECONOMIC DEVELOPMENT IN XINJIANG UYGHUR AUTONOMOUS REGION* 92(1st ed., 2020).

56 *Ibid.*, at 130.

57 James D Seymour and Richard Anderson, *NEW GHOSTS, OLD GHOSTS: PRISONS AND LABOR REFORM CAMPS IN CHINA* 115(1st ed., 1998).

58 Barry Sautman, *Is Xinjiang an Internal Colony?*, 2 *Inner Asia* 239,241 (2000).

59 Cliff, *supra* note 51, at 87.

60 *Ibid.*

61 James D Seymour, *Xinjiang's Production and Construction Corps, and the Sinification of Eastern Turkestan*, 2 *Inner Asia* 171, 186 (2000).

62 *Ibid.*

Corps members and their families. Prior to incorporation, the only government approved XPCC settlement city was Shihezi, situated just northwest of the capital city of Urumqi. The XPCC was not authorized to establish another settlement city until 2004, but has since created over half a dozen cities and, according to official government documents, plans to establish around 20 new settlement cities by 2030⁶³.

As the economic reforms of the late 1990s and early 2000s accelerated, the government's focus shifted 'towards the socioeconomic security of the Han population'⁶⁴ given the potential of Han workers to foment unrest if they felt their livelihoods were being threatened by reforms. As a result, the economic, political, and cultural disenfranchisement of Uyghurs and other non-Han communities (e.g. through chronic labour market discrimination and higher poverty rates) was sidelined by the regional government.⁶⁵ This built upon the grievances that these groups had in being disproportionately profiled, targeted, and jailed through the 'Strike Hard' campaign of the 1990s to reign in the threat of "separatism" after the dissolution of the Soviet Union⁶⁶.

As we will see, developmental capitalist reforms in the XUAR beginning in the 1990s have the effect of mobilizing pre-existing social differences (cultural, religious, ethnic) onto a governmental logic which justified the expansion of Han-controlled political and economic commercial and infrastructure projects. These projects not only made significant profits for companies that set up shop in Xinjiang, but also facilitated the integration of the peripheral economy of Xinjiang with the Eastern Chinese core⁶⁷.

c. Opening up the West: one black, one white

During the 1990s and 2000s, Xinjiang was subject of a massive state-driven transformation of the region into 'a center of trade, capitalist infrastructure and agricultural development capable of further serving the needs of the nation'.⁶⁸ The focus on development of the cotton and petrochemicals industries in particular was reflected by the aphorism of *yi hei, yi bai* (one black, one white).⁶⁹ This transformation would radically change ethn racial relations and, as it turns out, plant the seeds for racial capitalism with Chinese characteristics.

63 Bao, *supra* note 46, at 12.

64 *Ibid.*, at 88.

65 David Bachman, *Making Xinjiang safe for the Han? Contradictions and ironies of Chinese government in China's northwest in*, GOVERNING CHINA'S MULTIETHNIC FRONTIERS 155-185 (Morris Rossabi, ed., 2004).

66 Amnesty International, *People's Republic of China: Gross Violations of Human Rights in the Xinjiang Uighur Autonomous Region*, 18-22 (March 31, 1999), <https://www.amnesty.org/en/documents/asa17/018/1999/en/>.

67 Nicolas Becquelin, *Xinjiang in the Nineties*, 44 *The China J.* 65,75 (2000)..

68 *Ibid.*

69 Sautman, *supra* note 58, at 239.

The central government's plan was to 'open up Xinjiang to the world': setting up special economic zones, expanding border trade, accelerating Han settler economic migration, and pouring in state capital for infrastructure investments that would greatly expand agricultural production and the extractive industries. Infrastructure investment surged by 126% as road and rail projects commenced to connect the XUAR economy with the rest of China.⁷⁰ Key projects included the Tarim Basin-crossing Taklamakan Highway, several major oil and gas pipelines to connect Xinjiang as an artery between Eastern China and oil and gas-rich regions of Kazakhstan and Russia⁷¹, and railroad extensions from Korla to Kashgar which opened the 'Uyghur heartland to direct Han migration and Chinese commerce'⁷².

These policy goals were further consolidated in June 1999, when President Jiang Zemin announced the 'Open Up the West' campaign. This campaign connected frontier economic development with nation-building rhetoric: appealing to a civilizing imperative for the region; the rich resources lying untapped that 'wait' for the spiritual impulse of the 'Chinese nation' for their exploitation; and the ambition of the Chinese nation to 'stand up' in the international environment.⁷³ Open Up the West was announced in preparation for China's accession to the World Trade Organization (WTO) in December 2001 – milestone events that would accelerate regional economic integration and pave the way for the emergence of racial capitalism's governmental logic in the XUAR over the next two decades⁷⁴.

In particular, the campaign's rhetoric appealed to the underdevelopment of Western peripheral provinces, where there were higher levels of poverty and a higher concentration of non-Han ethnicities.⁷⁵ Yet campaign policies focused solely on broad development, resource extraction, and investment, assuming broad economic policy would lift all boats rather than directly tackle the thornier question of ethnoracial discrimination and disparity, which studies show had been increasing in the XUAR in the post-1978 era⁷⁶.

The cotton industry was a site of heated particularly dispute. As China became the world's primary manufacturer of clothing and textiles, its economy required a cheap source of domestic cotton. As a result, the state offered large financial incentives

71 Cappelletti, *supra* note 55, at 62.

72 Darren Byler, *Spirit Breaking: Uyghur Dispossession, Culture Work and Terror Capitalism in a Chinese Global City* 38 (PhD Dissertation), <https://xinjiangdocumentation.sites.olt.ubc.ca/files/2020/12/Darren-Byler-Spirit-Breaking-Uyghur-Dispossession-Culture-Work-and-Terror-Capitalism-in-a-Chinese-Global-City.pdf>.

73 Nicolas Becquelin, *Staged Development in Xinjiang*, 178 *The China Quarterly* 358,372 (2004).

74 Cliff, *supra* note 51, at 87.

75 David SG Goodman, *The Campaign to "Open up the West": National, Provincial-Level and Local Perspectives*, 178 *The China Quarterly* 319, 319-323 (2004).

76 Xiaowei Zhang, *Affirmative Action, Economic Reforms, and Han—Uyghur Variation in Job Attainment in the State Sector in Urumchi*, 202 *The China Quarterly* 344 (2010).

77 Becquelin, *supra* note 67, at 81.

for cotton farming, large-scale land reclamation, and the moving of domestic cotton mills to the XUAR. Cotton production skyrocketed as the XUAR quickly became China's leading producer of cotton by 1997.⁷⁷ These incentives also provided a pretext for authorities to reclaim land for irrigated cotton cultivation, attract further Han economic migration to the area, and expand the XPCC's economic and political influence⁷⁸.

However, despite the 'trickle-down' collective prosperity promised, Uyghurs and other non-Han natives remained structurally disenfranchised by these policies. For instance, small-scale farmers (who were disproportionately Uyghur) were required to convert multi-crop farms to meet regionally-imposed quotas for cotton. But because these farmers were forced to sell their cotton at a controlled lower fixed price, the profits were ultimately captured downstream by Han-dominated state-owned enterprises (SOEs), leading to increasing impoverishment for Uyghur farmers in the context of rising prices.⁷⁹ Meanwhile, policies such as the 'responsibility contract' granted reclaimed farmland to prospective Han farmers, putting them in direct (and often unfair) competition with non-Han Indigenous farmers by appropriating the best agricultural land and waiving contract fees for two years⁸⁰.

Similar patterns can be observed in the development of the XUAR's petrochemicals industry. In 1994, China opened the Tarim Basin to foreign investment and exploration, attracting interest from multinational oil conglomerates such as Halliburton.⁸¹ At the same time, several critical oil and gas pipelines were completed between 1993 and 1996⁸², while the opening of the West-East Gas Pipeline in 2005 that connected the Tarim Basin with Shanghai massively expanded the ability of Xinjiang to supply Eastern China with oil and gas.⁸³ By 2002, oil and gas exploitation already represented almost half of Xinjiang's revenues⁸⁴.

Yet the oil and gas boom furthered pre-existing racialized economic disparities and opportunity-hoarding. For instance, 95% of the technical workers in the massive Taklamakan Desert oil exploration project were Han Chinese.⁸⁵ Korla, the second largest city in the XUAR which was previously Uyghur-majority had, as a result of the oil boom become 70% Han Chinese by 2008 as a result of Han economic in-migration. Labour market discrimination was rife – with Han employers often stereotyping Uyghurs as 'terrorists and separatists' and to the extent that they would hire Uyghurs, confining them to low-level jobs in the oilfields⁸⁶.

Left to fester, systemic racialized disparities in the cotton and petrochemical

78 *Ibid*, at 80-82.

79 Byler, *Spirit Breaking*, *supra* note 72, at 39.

80 Becquelin, *supra* note 67, at 76. Responsibility contracts confers land-use rights to households for management of a designated parcel of rural land. Contractees are given technical assistance and supply of production inputs and agree to sell a specific amount of output to state entities, along with the payment of taxes.

81 Steven Mufson and Steve Coll, *China Offers its Oil Riches on Open Market*, THE WASHINGTON POST, (Mar. 20 1994), <https://www.washingtonpost.com/archive/politics/1994/03/20/china-offers-its-oil-riches-on-open-market/6ecc8761-baa2-4139-b170-235a32ee35a4/>.

82 Cappelletti, *supra* note 55, at 62.

83 , *West-East Gas Pipeline Project*, HYDROCARBONS TECHNOLOGY <https://www.hydrocarbons-technology.com/projects/west-east/>, (Last Visited 3 August 2021).

industries during the 90s paved the way for the acceleration of racial hierarchy-making in subsequent decades, particularly as the BRI began taking shape to secure China's central role in global commerce and trade. The BRI's ambitious infrastructure plan has placed Xinjiang in a crucial geopolitical and economic role: both as a through-point for three of its six overland economic corridors and as a crucial hub in securing China's energy interests. A closer examination of the juridical frame of the BRI, its influence on the securitization of the region, and its consolidation of Han colonial interests is thus warranted.

III. Juridical framework of the Belt and Road Initiative

In order to understand contemporary securitization and assimilation campaigns in the XUAR, it is important to understand the juridical framework (a key part of the organizational infrastructure) that enables the BRI and galvanizes the radical reconfiguration of the region's native land and people for Chinese nation-building and economic development. This framework emphasizes soft law (principles, norms, standards, or other statements of expected behaviour) over hard treaties.

Unlike the West, as an examination of the securitization and transformation of the XUAR for global trade and resource extraction reveals, the BRI is pursuing racial capitalism and economic empire in a way that does not necessarily appeal to the rule of law for legitimacy. Although the soft law infrastructure that binds the BRI together is different from Western models, it remains a legal framework which requires a political economy lens to better understand its goals and impacts.

a. BRI's objectives and the focus on soft law

Delineating the scope of the BRI for the purposes of analysis (whether legal or otherwise) can be a challenging exercise. The BRI is massive in scale - involving 70 countries and over two-thirds of the global population – and many relevant projects are not explicitly labeled as being linked to the initiative.⁸⁷ BRI projects exist along with pre-BRI or parallel initiatives to advance regional economic cooperation (e.g. Regional Comprehensive Economic Partners, Asia-Pacific Economic Cooperation, G20, and Preferential Trade and Investment Agreements)⁸⁸.

During Xi Jinping's 10-day tour of the Central Asian Republics in 2013, he announced the five stated objectives of the BRI:

84 Becquelin, *supra* note 73, at 362.

85 Barry Sautman, *Preferential policies for ethnic minorities in China: the case of Xinjiang*, 4 Nationalism & Ethnic Politics 86,86-118 (1998).

86 Jamil Anderlini, *Xinjiang oil boom fuels Uighur Resentment*, FINANCIAL TIMES, (Aug. 28 2008), <https://www.ft.com/content/163dec1c-7518-11dd-ab30-0000779fd18c>.

87 Heng Wang, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 J. of Int'l Economic L. 29, 30-32 (2019).

88 *Ibid.*

- (1) Policy coordination;
- (2) Facilitation of connectivity;
- (3) Unimpeded trade across the Belt and Road;
- (4) Financial integration; and
- (5) Cultivation of people-to-people bonds ⁸⁹.

From a conceptual angle, the BRI is organized as a hub-and-spoke model, with China as the hub reaching out to other BRI states through ‘hardware’ (the infrastructure and specific projects that facilitate economic integration) and ‘software’ (a loosely connected network of bilateral and multilateral agreements and mechanisms)⁹⁰.

In terms of hardware (a key part of the technical infrastructure), the BRI is comprised of several large-scale infrastructure “corridors” often consisting of some combination of highways, ports, railroads, and pipelines. These are divided into the maritime-oriented ‘road’ sea route corridors and the land-oriented economic ‘belt’ corridors. In total, there have been six proposed land-based transnational economic corridors:

- (1) The New Eurasia Land Bridge Economic Corridor;
- (2) The China-Mongolia-Russia Economic Corridor;
- (3) The China-Central Asia-West Asia Economic Corridor;
- (4) The Indochina Peninsula Economic Corridor;
- (5) The Bangladesh-China-India-Myanmar Economic Corridor; and
- (6) The China-Pakistan Economic Corridor (CPEC)⁹¹.

The software component refers to the BRI’s juridical framework: the loose network of agreements, institutions, mechanisms, and dispute resolution bodies that provide a common commercial platform for the BRI’s extensive and varying projects⁹².

Heng Wang argues that through the BRI, China is showing that its approach to international economic law deviates quite significantly from the Western approach of heavy reliance on treaty-based institutional mechanisms.⁹³ Instead, China has embraced a dual-track normative approach that maximizes flexibility by mobilizing soft law rather than legally-binding treaties wherever it can.⁹⁴ While there are no BRI-wide treaty or enforcement mechanisms, the BRI still must take account of pre-existing treaties as well as those formulated outside the BRI. As a result, ‘WTO rules arguably remain the core of the international norms applicable to BRI-related trade.’⁹⁵

89 Anna Hayes, *Interwoven ‘Destinies’: The Significance of Xinjiang to the China Dream, the Belt and Road Initiative, and the Xi Jinping Legacy*, 29 J. of Contemporary China 31, 35-36 (2020).

90 Heng, *supra* note 87 at 35.

91 Lutz-Christian Wolff, *Legal Responses to China’s “Belt and Road” Initiative: Necessary, Possible or Pointless Exercise?*, 29 Transnational L. and Contemporary Problems 249, 253 (2020).

92 Heng, *supra* note 87, at 35.

93 *Ibid.*, at 47-49.

94 *Ibid.*, at 41. As Heng states, these often take the form of co-operation agreements, ‘including joint communiqués, joint statements, agreements, a MOA, MOUs, a letter of intent, initiatives, and consensuses.’

95 *Ibid.*, at 42.

In terms of dispute resolution, China has made efforts to cement its principal role as the overarching 'hub' for the BRI. As part of the BRI infrastructure, the Supreme People's Court launched two international commercial courts – one in Shenzhen and one in Xi'an – under the banner of China International Commercial Court (CICC). The CICC generally hears international commercial cases which have a substantive connection to China, including cases that have a 'nationwide significant impact', while restricting representation to Chinese law-qualified lawyers.⁹⁶ It has since heard dozens of cases, issued operational documents and procedural rules, and expanded to include 'one-stop shop' services including commercial mediation.⁹⁷ As noted by Lance Ang, the CICC plays a strategic role in safeguarding the interests of Chinese firms, particularly its SOEs, and relocating 'the locus of China-related (and Belt & Road) dispute resolution to China.'⁹⁸

Overall, the juridical structure of the BRI is characterized by 'maximum flexibility'. Neither China nor any other BRI state has enacted any hard law with specific BRI relevance.⁹⁹ Rather, the BRI software is a loosely connected network of new or existing bilateral and multilateral mechanisms, 'based on a series of... interconnected bilateral trade pacts and partnerships.'¹⁰⁰ Thus far, labour, human rights, and environmental protections have not been prioritized within this loose network of agreements made between China and other BRI states¹⁰¹.

Like Western-style international economic integration initiatives, free trade and financial integration remain explicit BRI goals. However, the BRI eschews a top-down, hard law approach in favour of a decentralized approach involving soft law, bilateral agreements, and ad hoc institutions, thereby retaining greater institutional flexibility through political relationships. Structurally, the Chinese government ensures that its own domestic political and economic priorities are always protected by reinforcing its geostrategic position as the 'hub' of the BRI and bringing BRI-related dispute resolution 'in-house' through the CICC. This flexible juridical framework helps the Chinese government pursue both the BRI's stated objectives and its own (unstated) geostrategic goals¹⁰², many of which rely on the XUAR as a key fulcrum.

96 Lance Ang, *International Commercial Courts and the Interplay Between Realism and Institutionalism: A Look at China and Singapore*, (14 November 2019), <https://harvardilj.org/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore/>.

97 Liu Tingmei, *The China International Commercial Court (CICC) in 2018*, THE CHINA INTERNATIONAL COMMERCIAL COURT (22 July 2018), <http://cicc.court.gov.cn/html/1/219/208/209/1316.html#>.

98 Ang, *supra* note 96.

99 Wolff, *supra* note 91, at 266.

100 Wade Shepard, *Why The Ambiguity of China's Belt And Road Initiative Is Perhaps Its Biggest Strength*, FORBES (Oct. 19, 2017, 12:06am), <https://www.forbes.com/sites/wadeshepard/2017/10/19/what-chinas-belt-and-road-initiative-is-really-all-about/>.

101 See Aaron Halegua, *Where is the Belt and Road Initiative taking international labour rights? An examination of workers abuse by Chinese firms in Saipan*, in THE BELT AND ROAD INITIATIVE AND GLOBAL GOVERNANCE, 1225 (Maria A Carrai, Jean-Christophe Defraigne, and Jan Wouters, eds., 2020).

102 These include, *inter alia*, outmaneuvering the US 'Pivot to Asia', energy security, regional security, advancing its economic power and military footprint, and eliminating 'separatism, extremism, and terrorism'. See Ume Farwa, *Belt and Road Initiative and China's Strategic Culture*, 38 Strategic Studies 40 (2018).

b. The role of the XUAR and securitization of BRI investments

Xinjiang has outsized geopolitical importance for China within the BRI due to its central location and abundance of raw materials. At least three of the six overland economic corridors pass through the XUAR: the New Eurasia Land Bridge Economic Corridor (including railroads through Urumqi on the way to Europe), the China-Central Asia-West Asia Economic Corridor (attaching to the same railroad before splitting Southwest towards the Caspian Sea and Turkey), and CPEC (which includes highways, rail, and an oil pipeline to the port of Gwadar in Pakistan)¹⁰³.

As a result, the XUAR has seen a massive economic transformation to align itself to the BRI's specific objectives and to connect the Chinese economy to new markets in Russia; Central, West, and South Asia; and Europe. Within this new international trade infrastructure network, the XUAR is the gateway for materials and goods transported overland. Further, the existing pipeline infrastructure that connects Eastern China with oil and gas in Xinjiang can be further extended to oil rich fields in Kazakhstan and Russia, as well as through CPEC to the Indian Ocean to receive oil imports from the Gulf¹⁰⁴.

The push to economically integrate Xinjiang as a key global trade and energy hub for the BRI while simultaneously subjugating native resistance to the development agenda required the creation of a massive security industrial complex – the hallmark of Chen Quanguo's administration. This security industrial complex and its corresponding physical and digital investments must also be seen as an indivisible part of the BRI's technical infrastructure which demand analysis.

Yet it would be inaccurate to see the BRI's influence in the XUAR as a rupture as opposed to a continuation and acceleration of economic liberalization policies and subsequent racialized displacement which pre-dated the BRI. For instance, after Kashgar was made a Special Economic Zone (SEZ) in 2010, the Old City of Kashgar was largely destroyed to make way for economic modernization. This project was executed under the pretenses of the government's "Kashgar Dangerous House Reform Program" in order to ensure residences were "earthquake-proof".¹⁰⁵ The program resulted in the forced relocation of some 220,000 Uyghur residents of the central districts to apartments built on the outskirts of the city. As key cities such as Urumqi¹⁰⁶ and Kashgar¹⁰⁷ are transformed into trade and investment hubs by

103 Ben Derudder, Xingjian Liu, Charles Kunaka, *Connectivity Along Overland Corridors of the Belt and Road Initiative* (October 2018), 6 MTI Global Practice Discussion Paper 10-11. <https://documents1.worldbank.org/curated/pt/264651538637972468/pdf/Connectivity-Along-Overland-Corridors-of-the-Belt-and-Road-Initiative.pdf>,

104 Rebecca Warren, *Xinjiang and the Belt and Road Initiative*, THE STRATEGY BRIDGE, (Jun. 17, 2019), <https://thestrategybridge.org/the-bridge/2019/6/17/xinjiang-and-the-belt-and-road-initiative>.

105 Michael Clarke, *Beijing's March West: Opportunities and Challenges for China's Eurasian Pivot*, 60 *Orbis* 296, 305 (2016).

106 Fernando Burgés, Annie Simm, Isabelle Cooper, *A Tale of Three Ports: The Impact of the Belt and Road Initiative on Unrepresented Peoples in Pakistan and China*, UNPO (December 2019), 15-20 <https://unpo.org/downloads/2593.pdf>.

107 Hayes, *supra* note 89, at 39.

the Chinese government, these changes are conducted in a top-down manner that exacerbates pre-existing ethnoracial inequality between Han and non-Han. The post-2016 system of racialized policing, mass incarceration and “surplus labour” programs thus builds upon prior policy directions in prior decades by eliminating the Indigenous threat while maximizing profits for both private business and the Chinese state.

These large-scale transformative policies in Xinjiang could not have been implemented smoothly without the consolidation and deployment of the social infrastructure of global anti-Muslim racism. In the post-9/11 era ‘the tying of the global sphere into Xinjiang has made it more convenient for the security services to reduce the Uyghurs identity as one prone to religious radicalisation and terrorism’¹⁰⁸. Indeed, the rhetoric of the ‘Global War on Terror’ has been deployed by local authorities to frame anti-colonial struggles as terrorism and thus an endemic security risk that threatens global supply chains and oil and gas flows in the region. After the 2009 Urumqi Riots and 2014 Kunming knife attacks¹⁰⁹, Xi Jinping pledged to implement a ‘strike hard’ strategy through a ‘People’s War on Terror’ in Xinjiang. Notably, the policy goal of eliminating terrorism was explicitly tied to eliminating separatism and extremism under the framework of the ‘Three Evils’.¹¹⁰ Understanding China’s combined policy interests in combating terrorism, separatism, and extremism allows us to better understand the form in which the state socially constructs the ‘Other’: as a racialized Muslim that is a threat because of their radical religious piety, resistance to assimilation, and Indigenous claims to the land that poses a direct threat to Chinese territorial claims and sovereignty.

Within this political and economic environment, a dynamic racialized security industrial complex has emerged in the XUAR to stamp out the Three Evils and secure BRI investments. This has benefited a slew of corporate interests partnering with the state – from AI giants to private security contractors, tourism companies¹¹¹ to manufacturing firms exploiting carceral labour. Anthropologist Darren Byler calls this ‘terror capitalism’ – a particular branch of counterinsurgency-informed racial capitalism – which helps us understand the processes of exploitation and dispossession in which ethnoracial difference is produced and exaggerated to frame certain groups as terrorists and pre-criminals.¹¹² Terror capitalism provides the ideological basis and material incentives by which populations flagged at risk for ‘terror’ and ‘extremism’

108 Burgés, et al, *supra* note 106, at 17.

109 *US says Kunming attack is “act of terrorism”*, BBC NEWS, (Mar. 4, 2014), <https://www.bbc.com/news/world-asia-china-26414018>.

110 Joanna Smith Finley, Security, *Insecurity and Conflict in Contemporary Xinjiang: has PRC Counter-terrorism evolved into State Terror?*, 38 *Central Asian Survey* 1, 2 (2019).

111 For example, in a China National Tourism Administration bulletin, the authorities stress the necessity of tourism for the realization of the BRI, as well as the political task of making Xinjiang ‘safe’ for Han tourists as part of a program called ‘Tourism as Xinjiang Aid’. Guldana Salimjan, ‘Camp Land: Settler Ecotourism and Kazakh Removal in Contemporary Xinjiang’ in *Xinjiang Year Zero*, *supra* note 31, at 152.

112 Darren Byler, TERROR CAPITALISM: UYGHUR DISPOSSESSION AND MASCULINITY IN A CHINESE CITY (1st ed., 2022).

113 Byler, Spirit Breaking, *supra* note 72, at 27.

to become sites of investment where targeted populations can be 'subjected to experiments in policing, mass internment and indoctrination processes' in a constant state of exception where even the most basic of rights do not apply¹¹³.

IV. Terror capitalism: control and exploitation of Muslims under counter-terrorism

a. The transnational counter-terrorism order and racialized Muslims in the XUAR

Though the BRI may have been the immediate impetus for its rapid dissemination in the XUAR, the technologies of terror capitalism have flourished in no small part due to the turn of international law towards the Global War on Terror, which allows for warfare to be waged indefinitely against rogue populations who are considered 'unlawful combatants' for whom both the law of war and international human rights do not effectively apply.¹¹⁴ Since 9/11, a vast institutional, legal, and normative architecture of counter-terrorism has been proliferated at the international level. This hegemonic order can be traced back to the 2001 passing of UN Security Council (UNSC) Resolution 1373, which affirmed terrorism as a threat to international peace and security (therefore vesting the UNSC with Chapter VII powers to effectively legislate for all UN members) and created the Counter-Terrorism Committee (CTC) to monitor and enforce compliance with the Resolution¹¹⁵.

For the Uyghurs, ironically, their 'terrorist' branding in international law was secured by the US within the UN counter-terrorism sanctions infrastructure. On September 11, 2002, as quid pro quo for tacit Chinese support for the invasion of Iraq, the US jointly with Kyrgyzstan, Afghanistan, and China asked the UN to impose sanctions on a nebulous group known as the East Turkestan Islamic Movement (ETIM) as a 'terrorist organization' under UNSC Resolutions 1276 and 1390 – a guilt-by-association that continues to plague Uyghur people 'as the PRC claims its mass internment of Uyghurs is an appropriate response to a serious terrorist threat'.¹¹⁶ Relatedly, UNSC Resolution 1373 also obliged all states to promulgate domestic criminal legislation relating to terrorist activities and drew attention to the important role of deradicalization within carceral settings.¹¹⁷ China translated this into passing a new Counter-terrorism Law and associated Religious Affairs Regulations in 2015, codifying many of the anti-Islamic and assimilationist policies already being implemented in the XUAR¹¹⁸.

114 Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 Case Western L. J. of Int'l. L. 349 (2004).

115 United Nations Security Council (UNSC) Resolution 1373, 28 September 2001, UN Doc S/RES/1373.

116 Sean Roberts, *THE WAR ON THE UYGHURS: CHINA'S INTERNAL CAMPAIGN AGAINST A MUSLIM MINORITY*, 79-80(1st ed., 2020).

117 Fiona De Londras, *THE PRACTICE AND PROBLEMS OF TRANSNATIONAL COUNTER-TERRORISM*, 69(1st ed., 2022).

In light of these international legal norms, the Chinese government has responded with indignation and incredulity to external criticisms of its People's War on Terror, maintaining that they are only following international norms of counterextremism and de-radicalization¹¹⁹. Indeed, some Chinese experts have argued that China's approach is not only justified, but a more thorough and effective version of Countering Violent Extremism (CVE) programs through installing pre-emptive measures that identify, isolate, and rehabilitate potential terrorists.¹²⁰ This points to the need for a more robust critique of these policies that extend beyond proportionality exercises; instead targeting the very underpinnings of counterterrorism logics, the transnational racialization of Muslims, and their manifestations within global capitalist relations. The rest of this section takes a deeper dive into aspects of the emergent racialized security industrial complex in the XUAR.

b. Three sites of discriminatory carceral control and surveillance

Three interrelated sites of carcerality are enabled by terror capitalism which serve as high-risk laboratories by which venture capital policing and surveillance technologies can be tested and improved upon in the XUAR: (1) an open-air predictive grid policing system, (2) a system of extrajudicial detention camps (euphemistically referred to by the government as 're-education' or 'vocational' centres), and (3) an expanding formal prison system. These physical and digital infrastructures work together to secure BRI investments, develop and improve AI surveillance tech, produce and manage a hyper-exploitable labour force, and advance Chinese ethnonationalist assimilatory policy.

First, the XUAR model of open-air predictive policing for racialized communities uses past data through specific indicia to assess risk and whether police intervention and detention for re-education is warranted. In some locales, assessments are made through a system of pre-criminal categories of risk, including growing beards, whether the subject has travelled to a list of 26 'sensitive' countries with majority Muslim populations¹²¹, or whether the subject has quit smoking and drinking¹²².

In terms of spatial geography, the XUAR government has implemented a 'grid management' system of predictive policing building upon the system that Chen Quanguo administered during his time as CPC Party Secretary of Tibet.¹²³ In urban areas, a multi-layered dragnet is installed with housing organized within the jurisdiction

118 Roberts, *supra* note 116, at 178.

119 Brophy, *supra* note 31, at 51.

120 *Ibid.*

121 Maya Wang, *Break Their Lineage, Break Their Roots*, HUMAN RIGHTS WATCH (Apr. 19, 2021), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting>.

122 Yael Grauer, *Revealed: Massive Chinese Police Database: Millions of Leaked Police Files Detail Suffocating Surveillance of China's Uyghur Minority*, THE INTERCEPT (Jan. 29, 2021 2:00 am), <https://theintercept.com/2021/01/29/china-uyghur-muslim-surveillance-police/>.

123 Human Rights Watch, *supra* note 6.

of a grid region that is managed by the combined jurisdiction of a ‘neighbourhood committee’ and a local police station.¹²⁴ These localized administrative hubs manage face-to-face assessments, helps organize party cadre surveillance in the homes of Turkic¹²⁵ Muslims, processes city resident permits, and sends recommendations for detention up the chain of command¹²⁶.

People’s Convenience Police Stations stationed at regular intersections form another key part of the policing dragnet and act as strategic hubs for facial recognition cameras designed to notify authorities as soon as suspects tagged as ‘persons of interest’ (mostly Uyghur men) stray more than 300 meters from their homes.¹²⁷ Convenience Police Stations can coordinate with neighbourhood committees and move quickly against suspects identified as high-risk.

The impact of this dragnet and its systemic inculcation of racial profiling is a sort of stop and frisk practice on steroids. As Grose and Byler write: ‘officers monitor their station’s cameras and conduct spot checks of IDs and smartphones of young Uyghurs. They stop pedestrians and cars, looking for people who do not have a legal right to be in the city or are violating religious regulations. They look for people registered in rural villages and who lack work-authorization documents. They also look for signs of Islamic piety in both the appearance of the young Uyghurs and on their phones¹²⁸.’

Second, for those flagged as high-risk by the predictive policing system, they can be brought to an expansive system of extrajudicial ‘vocational/re-education’ detention camps. The camps share key features: they are separate from the formal criminal justice process, they have a forced assimilation/political indoctrination component, and they form a camp-to-factory pipeline that produces easily exploitable racialized surplus labour.

In order to build this system, the XUAR government embarked on a massive carceral construction campaign starting in 2018 with 268 verified newly constructed detention facilities.¹²⁹ Several of these facilities are large enough to accommodate at least 10,000 prisoners each. The majority of the newly built detention camps resemble permanent, high-security prisons, with watchtowers, internal fencing, and thick perimeter walls¹³⁰.

124 Sarah Tynen, *I was in China doing research when I saw my Uighur friends disappear*, THE CONVERSATION <https://theconversation.com/i-was-in-china-doing-research-when-i-saw-my-uighur-friends-disappear-127166> (last visited Mar. 9, 2020).

125 *China: Visiting Officials Occupy Homes in Muslim Region*, HUMAN RIGHTS WATCH (May 13, 2018 8:00pm), <https://www.hrw.org/news/2018/05/13/china-visiting-officials-occupy-homes-muslim-region>.

126 Tynen, *supra* note 124.

127 Timothy Grose and Darren Byler, *China’s Surveillance Laboratory*, DISSENT MAGAZINE (31 October 2018), https://www.dissentmagazine.org/online_articles/chinas-surveillance-laboratory.

128 *Ibid.*

129 A collaborative satellite imagery project between BuzzFeed News, Open Technology Fund, Pulitzer Center, and the Eyebeam Center for the Future Journalism verified a total of 268 newly built detention compounds scattered around across the region: 92 of which were verified by government procurement documents and other research and 176 verified by satellite imagery. Megha Rajagopalan, Alison Killing, Christo Buschek, *China Secretly Built A Vast New Infrastructure To Imprison Muslims*, BUZZFEED NEWS, (Aug. 27, 2020), <https://www.buzzfeednews.com/article/meghara/china-new-internment-camps-xinjiang-uighurs-muslims>.

130 *Ibid.*

The ‘re-educational’ component of the camps reveal the underlying settler colonial logics of forced assimilation, family separation, and coercive reproductive control. At its core,¹³¹ Indigenous knowledge, religion, culture, and lifeways in the XUAR are linked to claims of political self-determination which directly threaten the Han settler colonial project. Re-education camps therefore function to forcibly assimilate primarily Turkic Muslim subjects and eradicate ‘ideological viruses’¹³². While in re-education, detainees are required to learn Mandarin Chinese, receive classes in ‘manner education’, sing the national anthem and other CPC songs, and are prohibited and punished for practicing Islam or otherwise demonstrating pious behaviour¹³³.

Since 2018, Chinese government authorities have pivoted from denying the existence of the extrajudicial detention camps to justifying and rationalizing them. For instance, the Chinese Consulate in New York stated that the detention facilities were necessary to combat ‘violent terrorism and separatism’, emphasizing the need to ‘root out extreme thoughts, enhance the rule of law awareness through education, improve vocational skills and create employment opportunities’. Revealingly, Chinese officials also explicitly linked these policies to Countering Violent Extremism (CVE) programs in the US and the UK¹³⁴.

Third, terror capitalism has reinvigorated and greatly expanded the formal prison system in the XUAR which runs in parallel with the extrajudicial re-education detention system. Government statistics between 2016 and 2017 show that arrests in the XUAR surged by 731% while serious criminal sentences of 5 years imprisonment or more similarly increased by 965%.¹³⁵ As international pressure and journalistic scrutiny mounted against the extrajudicial re-education camps, concerted efforts were made by state authorities to consolidate the camp system into the legalized system of formal criminal justice and mass incarceration, with re-education camp detainees given lengthy criminal sentences and siphoned into the prison system or ‘released’ to residential surveillance and coerced job placements¹³⁶.

This trend towards lengthy criminal formalization is supported by analyses of testimonies from Uyghur and Kazakh relatives of detainees, which showed a shift

131 Dale Kang, *Drop in Xinjiang birthrate largest in recent history: report*, ASSOCIATED PRESS (May 12, 2021), <https://apnews.com/article/beijing-china-race-and-ethnicity-health-religion-5aab6b4b99263b535ff1d0e9ae890b8f>.

132 “Eradicating Ideological Viruses”: *China’s Campaign of Repression Against Xinjiang’s Muslims*, HUMAN RIGHTS WATCH, (Sept. 9, 2018), <https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs>.

133 *Ibid.*

134 *Ibid.*

135 Dale Kang, *Room for 10,000: Inside China’s largest detention center*, ASSOCIATED PRESS, (Jul. 22, 2021), Associated Press, <https://apnews.com/article/business-religion-china-only-on-ap-f89c20645e69208a416c64d229c072de>.

136 Gene A Bunin, *From camps to prisons: Xinjiang’s next great human rights catastrophe*, ART OF LIFE IN CENTRAL ASIA (Oct. 5 2019), <https://livingotherwise.com/2019/10/05/from-camps-to-prisons-xinjiangs-next-great-human-rights-catastrophe-by-gene-a-bunin/>.

137 Gene A Bunin, *The Elephant in the XUAR: I. Entire families sentenced*, THE ART OF LIFE IN CENTRAL ASIA, (Dec. 9 2020), <https://livingotherwise.com/2020/12/09/the-elephant-in-the-xuar-i-entire-families-sentenced/>.

towards arbitrary and disproportionately lengthy criminal sentences after 2019.¹³⁷ Direct testimonials of ex-detainees have shown that in certain cases, re-education camp detainees are assigned prison sentences in ‘open-court sessions’ inside the extrajudicial camps.¹³⁸ Some re-education camps have been smoothly converted to formal detention facilities. This includes the XUAR’s largest facility, the Urumqi No. 3 Detention Center in Dabancheng, which has appeared to simply change its name from the Urumqi Vocational Skills Education and Training Center in 2019. The Urumqi No. 3 Detention Center currently functions as an enormous remand facility for pre-trial detention for over 10,000 inmates¹³⁹.

Unsurprisingly, within the formal criminal justice system, racially disproportionate charging and sentencing of Turkic Muslim populations in the XUAR is systemic and is mobilized by a commonly espoused racial imaginary¹⁴⁰ of a devoutly religious Muslim male separatist. An analysis of criminal sentences for Kazakhs in the XUAR show that over 90% were men and 75% were charges on religious grounds.¹⁴¹ Behaviours such as praying, attending religious gatherings not approved by the state, studying religion, and expounding scripture have attracted criminal charges¹⁴² and harsh sentences averaging well over 10 years in prison.¹⁴³ In May 2022, a data leak of more than 10,000 Uyghur prisoner names from Konasheher (Shufu) county in Southwest Xinjiang revealed that nearly 1 in 25 people from the country were sentenced to terrorism-related charges – a figure that would rank among the highest imprisonment rates in the world. The average imprisonment term of those named was nine years in jail. Notably, the list does not include convictions for more typically criminal offenses such as theft, drug crimes, or assault, meaning that the total incarceration rate is certainly much higher.¹⁴⁴ However, the turn towards a legalized nature of abuses in the criminal legal system, mass incarceration, and convict labour seems to have somewhat muted international attention/concern, particularly from Western nations like the United States, which employ its own massive carceral regime and Islamophobic and carceral counter-terrorism strategies¹⁴⁵.

138 Bunin, *supra* note 136.

139 Kang, *supra* note 135.

140 For a detailed account of the racial imaginary, see Kendall Thomas, *Envisioning Abolition: Sex, Citizenship, and the Racial Imaginary of the Killing State* in SENSIBLE POLITICS: THE VISUAL CULTURAL OF NONGOVERNMENTAL ACTIVISM 272 (Meg McLagan and Yates McKee, eds., 2012).

141 Bunin, *supra* note 136.

142 Gene A Bunin, *The Elephant in the XUAR: III. “In accordance with the law”*, THE ART OF LIFE IN CENTRAL ASIA, (Apr. 19, 2021), <https://livingotherwise.com/2021/04/19/the-elephant-in-the-xuar-iii-in-accordance-with-the-law/>.

143 Bunin, *supra* note 137.

144 Huizhong Wu and Dake Kang, *Uyghur county in China has highest prison rate in the world*, ASSOCIATED PRESS (May 16, 2022), <https://apnews.com/article/china-terrorism-c90fcc319775278d91da70e8bbe7c226>.

145 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (1st ed., 2012).

c. Production of data capital and a racialized surplus labour force

Two specific types of capital are produced by the security industrial complex inherent to terror capitalism: data and racialized surplus labour.

First, within the high-tech, intensely carceral space of Xinjiang, data is converted into capital through several interrelated processes. An infrastructure of policing, surveillance, and carceral technologies must first be installed within a particular area. To achieve this, the XUAR government has issued lucrative contracts to private companies to develop and implement these technologies, including dozens of procurement bids to construct new detention facilities that were tendered beginning in March 2017.¹⁴⁶ Some of the most prominent private military and security contractors in the world have made investments in this carceral infrastructure. For instance, Frontier Services Group, chaired by former Blackwater founder Erik Prince, announced in 2018 that it was providing construction services and building related ‘training facilities’ and ‘security equipment’ in the XUAR¹⁴⁷, which include private anti-terrorism training schools such as the school built and operated in Kashgar Caohu industrial Park¹⁴⁸.

After this hard infrastructure is built, a venture capitalist approach is taken to data-collection programs that use digital forensics, image and face recognition, biodata collection (facilitated by official policies such as ‘Physicals for All’¹⁴⁹), and language recognition to create a highly detailed base dataset from the millions of Turkic Muslims in the area.¹⁵⁰ This ever-growing base dataset is then used by private companies to improve digital surveillance and AI-enabled tech, allowing them to sell retail and turnkey versions of their products.¹⁵¹ By successfully situating entire Turkic Muslim populations as proto-terrorist populations, basic privacy rights can be collectively stripped away; a significant competitive advantage for Chinese AI companies whose products rely so heavily on intimately detailed datasets.

AI giants such as Hikvision, Dahua Technology, IFLYTEK, Sense Time, and Megvii all have made significant investments in the digital surveillance and control

146 Adrian Zenz, “Thoroughly reforming them towards a healthy heart attitude”: China’s political re-education campaign in Xinjiang, 38 *Central Asian Survey* 102, 102-128 (2019).

147 Seth Hettena, *Erik Prince’s Private Wars*, ROLLING STONE, (Oct. 25, 2020), <https://www.rollingstone.com/politics/politics-features/erik-prince-libya-blackwater-roger-stone-trump-2020-election-1077089/>.

148 Agence France-Presse, *Blackwater founder’s Hong Kong firm signs Xinjiang training camp deal*, THE GUARDIAN, (Feb. 1, 2019), 9:20 pm <https://www.theguardian.com/world/2019/feb/01/blackwater-founder-erik-prince-to-build-training-camp-in-chinas-xinjiang>.

149 *China: Minority Region Collects DNA from Millions*, HUMAN RIGHTS WATCH, (Dec. 13, 2017), <https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions>.

150 Darren Byler, *From Xinjiang to Mississippi: Terror Capitalism, Labour and Surveillance*, TRANSNATIONAL INSTITUTE: STATE OF POWER (May 2021), <https://longreads.tni.org/stateofpower/from-xinjiang-to-mississippi-terror-capitalism-labour-and-surveillance>.

151 Ross Andersen, *The Panopticon is already here*, THE ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/china-ai-surveillance/614197/>.

152 Catherine Shu, *Eight Chinese tech firms placed on US Entity List for their role in human rights violations against Muslim minority groups*, TED CRUNCH, (Oct. 8, 2019 1:37 am), <https://techcrunch.com/2019/10/07/eight-chinese-tech-firms-placed-on-u-s-entity-list-for-their-role-in-human-rights-violations-against-muslim-minority-groups/>.

technologies for law enforcement in the XUAR¹⁵² including developing algorithms that can differentiate and target subjects explicitly by race. Hikvision for instance, marketed video recognition technology that allows for the analysis of the subject's ethnicity (e.g. Uyghur or Han) and skin colour (e.g. white, yellow, black) with an accuracy rate of no less than 90%.¹⁵³ Another company, Cloudwalk, marketed a facial recognition product that could 'recognize Uighurs, Tibetan, or other sensitive peoples,' boasting that 'if one Uighur lives in a neighborhood, and within 20 days six Uighurs appear, it immediately sends alarms so that law enforcement personnel can respond'¹⁵⁴.

Many of these AI-enabled digital surveillance technologies that use the XUAR and its populations as a testing and development lab are now being exported to many governments around the world, particularly in the Global South. These include CloudWalk's contract with the Zimbabwean government to install a large-scale facial recognition program to support policing throughout the country, and which Cloudwalk hopes will improve the accuracy of their technologies by gaining access to a large Black population.¹⁵⁵ The Kampala police in Uganda have also procured CCTV AI and facial recognition technologies from Huawei, raising local concerns about unjustified surveillance, overreaching police powers, and lack of accountability¹⁵⁶.

Second, terror capitalism allows for the production of a racialized surplus labour force that can be hyper-exploited without a corresponding threat of integration and solidarity with mainstream labour grievances. Byler argues that one of the key features of the People's War on Terror was 'a broader process of state-mandated proletarianization of Uyghurs across the region'.¹⁵⁷ The re-education camps themselves have been described by the Xinjiang Reform and Development Commission as the 'carrier' of 'economic growth'¹⁵⁸, which has manifested in a camp-to-factory pipeline built into the very carceral architecture itself. For instance, a 2020 investigative report found that at least 135 newly built detention compounds in the XUAR also contained factories¹⁵⁹.

As with the open-air predictive policing and surveillance infrastructure, these factories also feature systems that use ID checkpoints and smart camera systems to track workers, thereby exacerbating the level of control that employers hold. As

153 Charles Rollet, *Hikvision Markets Uyghur Ethnicity Analytics, Now Covers Up*, IPVM, (Nov. 11, 2019, 9:15am), <https://ipvm.com/reports/hikvision-uyghur>.

154 Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, NEW YORK TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html>.

155 Lynsey Chutel, *China is exporting facial recognition software to Africa, expanding its vast database*, QUARTZ AFRICA (May 25, 2018), <https://qz.com/africa/1287675/china-is-exporting-facial-recognition-to-africa-ensuring-ai-dominance-through-diversity/>.

156 Bulelani Jili, *The Rise of Chinese Surveillance Technology in Africa*, ELECTRONIC PRIVACY INFORMATION CENTER (May 31, 2022), <https://epic.org/the-rise-of-chinese-surveillance-technology-in-africa/>.

157 Byler, *supra* note 150.

158 *Xinjiang Uyghur Autonomous Region Development and Reform Commission*, *supra* note 2.

159 Alison Killing and Megha Rajagopalan, *We Found the Factories Inside China's Mass Internment Camps*, BUZZFEED NEWS, (Dec. 28, 2020) https://www.buzzfeednews.com/article/alison_killing/xinjiang-camps-china-factories-forced-labor.

Byler summarizes: '[t]he information infrastructure system – smartphone tracking, checkpoints, face scans and so on – along with the fear of arbitrary detention, a form of state terror – held Uyghurs and Kazakhs in place, ensuring a docile workforce, and creating endemic conditions of unfreedom.'¹⁶⁰ Speaking on these unfree carceral labour policies, XUAR Chairman Shohrat boasted that re-education camp 'graduates' who completed their re-education terms would be placed in jobs with 'settled enterprises'¹⁶¹.

In addition to the direct camp-to-factory pipeline, the government has enacted massive racialized surplus labour transfer programs, with 2.6 million 'surplus rural workers' placed through state-sponsored relocation programs in 2019; 1.65 million of whom resided in Southern Xinjiang.¹⁶² Local governments are directed to assess each non-Han person identified as a surplus labourer within a quantitative point system, while categorizing them either as in need of training or ready to be sent directly to work. Non-cooperation with the labour placement scheme results in a deduction of points and risk of detention, while cooperation could be used to improve family member scores and hasten detained relatives' release¹⁶³.

Companies in various sectors are incentivized to move to Xinjiang and participate in these schemes through a variety of state subsidies.¹⁶⁴ Under the 'Industrial Xinjiang Aid' scheme, companies can participate either by opening up factories within the XUAR or hiring Uyghur and other Turkic Muslim workers in factories out-of-province through labour transfer schemes.¹⁶⁵ Global supply chains for a large variety of products are implicated under these scheme including solar panels, garments, textiles, electronics, auto parts, appliances, medical and health products, foods, construction materials, and semiconductors – an economic ordering of unfree labour directly facilitated by free trade agreements under the BRI.¹⁶⁶ The ultimate benefactors of this structurally produced unfree labour are large multinational corporations – many situated in the West such as Apple, BMW, Gap, Nike, and Volkswagen. Although outside the direct scope of this paper, the urgency to undertake a more detailed racial capitalism analysis within specific sectors and supply chains is evident.

160 Byler, *supra* note 150.

161 Laura T Murphy and Nyrola Elima, *In Broad Daylight: Uyghur Forced Labour and Global Solar Supply Chains*, (2021), at 10, <https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:d360ffab-40cc-4d83-8b8b-a8bd503286a3>

162 *Ibid.*

163 *Ibid.*, at 10-11.

164 *Ibid.*, at 16.

165 Vicky Xiuzhong, *Uyghurs for sale: "Re-education", forced labour and surveillance beyond Xinjiang*, 2020, Australian Strategic Policy Institute International Cyber Policy Centre, at 12-13, <https://www.aspi.org.au/report/uyghurs-sale>

166 *Ibid.*, at Appendix.

167 International Labour Organization, *Application of International Labour Standards 2022: Report of the Committee of Experts on the Application of Conventions and Recommendations*, 514-521 [ILO Report 2022], https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_836653.pdf

168 *Ibid.*, at 515.

169 *Ibid.*

d. Implications of Chinese racial capitalism on the international law of forced labour

Terror capitalism's production of a massive racialized, cheap, and disposable labour pool in the XUAR has attracted questions as to potential serious violations of international labour law. In the 2022 International Labour Organization (ILO)'s Committee of Experts' Report on the Application of Conventions and Recommendations, the Committee prepared a robust analysis on China's compliance with the ILO Discrimination (Employment and Occupation) Convention (No. 111)¹⁶⁷.

In the report, the Committee notes observations from the International Trade Union Confederation (ITUC) around "the extensive use of forced labour of the Uyghur and other Turkic and/or Muslim minorities for agriculture and industrial activities throughout the [XUAR]."¹⁶⁸ It also notes with concern the presence of direct prison labour (particularly in cotton, textiles, apparel, and footwear), the integration of assimilation and work discipline programs within re-education camps, and the broader Xinjiang Aid labour transfer schemes to factories in Eastern and Central China.¹⁶⁹ The Report also outlines the government's justifications for their vocational camp and labour transfer policies: economic development, poverty alleviation, increasing "language ability", enhancing "employability", opposing "extremism", and actively guiding "religions to adapt to the socialist society so that religious believers may love their country and compatriots."¹⁷⁰

Notably, the Committee of Experts' comments did not shy away from a meaningful analysis of race in the context of labour discrimination in the XUAR. It emphasized that the Convention definition of "race" included "any discrimination against linguistic communities or minority groups whose identity is based on religious or cultural characteristics or national or ethnic origin".¹⁷¹ This definition of race is functional and echoes Stuart Hall's analysis of the shifting and blended dynamics of the 'biological' and 'cultural' logics of race¹⁷², which is particularly crucial to understanding the modalities of anti-Muslim racism in context. Aside from direct extrajudicial detention and forced ideological conversion facilitated by the government, the Committee called on the government to repeal provisions imposing similar 'de-radicalization' duties upon both enterprises and trade unions – extending the reach of racial discrimination in employment and labour¹⁷³.

Finally, the Committee's comments called attention to the mutually reinforcing relationship between a zealous counter-terrorism legal regime (as reflected in China's 2015 Counter-terrorism Law and associated Religious Affairs Regulations as well as the 2016 XUAR Implement Measures of the Counter-Terrorism Law) and racialization:

170 *Ibid*, at 516-518.

171 *Ibid*, at 518.

172 Stuart Hall and D Morley, Stuart Hall: SELECTED WRITINGS: ESSENTIAL ESSAYS, VOLUME 2: IDENTITY AND DIASPORA 112- 113(2019).

173 ILO Report 2022, *supra* note 167, at 520.

“terrorist profiling practices based on a person’s ethnicity, national origin or religion in as much as they generate a climate of intolerance...is conducive to discrimination in employment and occupation and forced labour practices such as those alleged in the observations of the ITUC.”¹⁷⁴

The ILO Committee of Experts taking China to task on racial discrimination in labour and employment as imposed through its racialized security industrial complex recalls Adelle Blackett and Alice Duquesnoy’s observation that “transnational labor law is deeply historicized, rooted in the persisting presence of a racial capitalism that is too easily relegated to a distant past.”¹⁷⁵ It also demonstrated the potential for ILO jurisprudence to be a site in which the afterlives of slavery through racial capitalism and penal/carceral labour are taken seriously across global value and care chains.

Blackett and Duquesnoy’s critical work on the understudied dynamics of the ILO-US dialogue on racial disparities in forced penal labour centre around the US 1991 ratification of the ILO Abolition of Forced Labour Convention (No. 105). In this dialogue, the Committee of Experts turned its attention to racialization and mass incarceration through an analysis of Article 1(e) of Convention No. 105, which sets out that states parties undertake not to make use of any form of forced or compulsory labour “as a means of racial, social, national or religious discrimination”¹⁷⁷.

Despite the US attempting to advancing a textual argument that US prison labour was not necessarily the means of racial discrimination, the Committee’s 2007 General Survey of Convention No. 105 clarified that Article 1(e) required “the abolition of any discriminatory distinctions made on racial and other grounds “in exacting labour” for the purpose of production or service, and that situations in “which punishment involving compulsory labour” is meted out more severely to certain groups defined in racial and other terms, fall within the scope of the Convention.”¹⁷⁸ Notably, widespread international scrutiny and advocacy in regards to forced labour within the XUAR resulted in an April 2022 decision by the National People’s Congress to ratify two ILO conventions on forced labour – including the aforementioned Convention No. 105.¹⁷⁹ Thus, an important transnational legal mechanism has emerged for addressing racial capitalism in the XUAR through an evolving transnational labour jurisprudence on racialized carceral labour.

The ILO Committee of Experts’ approach in deliberately highlighting the racial power dynamics involved in China’s economic and counter-terrorism policies in the XUAR contrasts significantly with the US Uyghur Forced Labor Prevention Act¹⁸⁰,

174 *Ibid*, at 520.

175 Adelle Blackett and Alice Duquesnoy, *Slavery is not a Metaphor*, 67 UCLA L. Rev. 1504, 1507 (2021).

176 *Ibid*, at 1535.

177 *Ibid*, at 1523.

178 ILO, International Labour Conference: Eradication of Forced Labour, Report III (Part 1B), General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), at 81.

179 *ILO welcomes China’s move towards the ratification of two forced labour Conventions*, ILO, (Apr. 20, 2022), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_842739/lang-en/index.htm.

180 Uyghur Forced Labor Prevention Act, Pub L No 117-78, 135 Stat 1525 (2021).

signed into law on December 23, 2021. The Act sets about identifying a list of entities in the XUAR (or in collaboration with the XUAR government) in using forced labour or extracting labour from “persecuted groups” through “the threat of penalty”.¹⁸¹ It also creates a rebuttable presumption that goods mined, produced, or manufactured in the XUAR be subject to important prohibitions due to forced labour concerns¹⁸² and imposes Magnitsky-type sanctions on individuals that the US government determines are responsible for human rights abuses related to forced labour in the XUAR¹⁸³.

Notably, the Act makes no reference to race or racial discrimination, Islamophobia or anti-Muslim animus, nor do they given any indication that the discriminatory imposition of coerced and penal labor was imposed by a set of counterterrorism and deradicalization policies. Rather, the Act uses the de-racialized language of “persecution” and states upfront that its goals are to allow the US to “lead the international community in ending forced labor practices wherever such practices occur”¹⁸⁴ while working to “prevent, publicly denounce, and end human trafficking... a modern form of slavery”¹⁸⁵.

These discursive choices are very deliberate and are used to create a rhetorical (and ultimately legal) differentiation between the practices of racial capitalism domestically and abroad so that it does not inadvertently condemn its own practices in the process of condemning those of the Chinese government. As detailed by Blackett and Duquesnoy, the US has, at least since 2001, attempted to use the discourse of trafficking to turn the focus of transnational labour law compliance away from racial discrimination.¹⁸⁶ In so doing, the US would attempt to position itself as “a moral leader in the eradication of a problem that it perceived mostly to be prevalent elsewhere but certainly also a role in which the state was less the problem than part of the solution.”¹⁸⁷ Blackett and Duquesnoy’s analysis of the US’ strategic use of “modern” forms of slavery also helps us see how the Act attempts to (1) disentangle forced labour from America’s own legacy of transatlantic slavery and relegate it safely to the past, (2) weaponize the rhetorical strength of “modern slavery” to be comparably reprehensible, and (3) assert the US’ claim to leadership of the free world in combatting slavery.¹⁸⁸ A racial capitalism analytic thus helps us not only surface patterns of discriminatory exploitation and accumulation in the XUAR, but also sheds light on the structuring of different policy responses toward the problem.

181 *Ibid.*, at § 2(d)(2)(a)

182 *Ibid.*, at § 3.

183 *Ibid.*, at § 5.

184 *Ibid.*, at § 1(2).

185 *Ibid.*, at § 1(4)

186 Blackett and Duquesnoy, *supra* note 175, at 1525-1533.

187 *Ibid.*, at 1526.

188 *Ibid.*, at 1519.

V. Conclusions

The contemporary human rights catastrophe that faces Uyghurs and other non-Han Indigenous peoples in the XUAR is made possible through a latticework of overlapping legal, political, and economic imperatives: settler colonial policies, global economic integration (including the BRI), insufficient international environment and labour protections, the global war on terror, and private-public carceral investments.

That these transformations began in earnest during the reform era of the 1990s, the Open Up the West campaign, and the perceived need for securitization which accelerated with the integration of the XUAR as a global hub of trade, manufacturing, and natural resource flows under the BRI should be cause for serious reflection among scholars of international economic law. Indeed, it is insufficient to treat political economy issues such as class, race, colonialism, and gender and other important vectors of power and privilege as incidental to law and economics or even worse, mere market 'distortions' or 'externalities'.¹⁸⁹In other words, a racial capitalist analysis, with its focus on political economy, racialization, exploitation, capital accumulation, and (mal)distribution is part and parcel of rigorous international economic law scholarship.

Concerted efforts to exert international pressure on the Chinese government to address extrajudicial detention and enforced disappearances in the XUAR¹⁹⁰ have seen a certain degree of success. Starting in late 2018, the government began releasing select detainees from the re-education camps to house arrest.¹⁹¹In 2019, XUAR officials including Shohrat Zakir made statements indicating that the government's counter-terrorism and deradicalization strategy had succeeded, most detainees had 'graduated' from the re-education camps, and thus the camps were being shut down.¹⁹²However, subsequent investigations have found that between 2019 and 2020, many detention facilities (whether officially earmarked as re-education centres, remand facilities, or prisons) were either newly built or significantly expanded¹⁹³.

While reports corroborate that some camp detainees had indeed finished their terms and had been released, others have been issued lengthy sentences and jailed in prisons, put in house arrest, or released to unfree labour placements managed by Xinjiang Aid¹⁹⁴. International pressure has been partially successful in winding down

189 Angela Harris, *Tracking Extraction*, LAW AND POLITICAL ECONOMY PROJECT, (Feb. 24, 2020), <https://lpeproject.org/blog/tracking-extraction/>.

190 Zachary Basu, *More countries join condemnation of China over Xinjiang abuses*, AXIOS, (Oct. 8, 2020), <https://www.axios.com/un-statement-china-uighurs-xinjiang-6b29dbf5-b93c-4c70-bd4c-333e1c23471f.html>.

191 Gene A Bunin, *Detainees Are Trickling Out of Xinjiang's Camps*, FOREIGN POLICY, (Jan. 18, 2019, 1:10 pm) <https://foreignpolicy.com/2019/01/18/detainees-are-trickling-out-of-xinjiangs-camps/>.

192 Mu Xuequan, *China Focus: Xinjiang determined in counter-terrorism, deradicalization, maintaining development*, XINHUA, (Dec. 9 2019, 9:12 am) https://web.archive.org/web/20210103082702/http://www.xinhuanet.com/english/2019-12/10/c_138618363.htm.

193 Nathan Ruser, *Documenting Xinjiang's detention system*, AUSTRALIAN STRATEGIC POLICY INITIATIVE, (Sep. 2020), <https://cdn.xjdp.aspi.org.au/wp-content/uploads/2020/09/25125443/documenting-xinjiangs-detention-system.cleaned.pdf>.

194 Bunin, *supra* note 142.

extrajudicial camps, but this has in turn instigated conversion of camp infrastructure to a more formalized system of mass incarceration and prison-to-labour pipelines. This should serve to remind us that, while the specific forms may change, so long as the prevailing logics of racial capitalism are not directly challenged, the exploitation of data and labour, forced assimilation, and surveillance and control of racialized communities within the XUAR will continue, if under slightly different modes and processes.

Further, the modes in which international advocacy and pressure have been operating (that is, primarily through the foreign affairs branches of Western governments) has also had troubling effects in terms of campism¹⁹⁵ and opportunistic diplomatic co-optation by American politicians, inflaming a 'New Cold War' rhetoric through the escalating geopolitical rivalry between the US and China.¹⁹⁶ As surfaced by the earlier discussion of the discourse undergirding the Uyghur Forced Labour Prevention Act, the US government has made significant rhetorical efforts to downplay the connections between the racialized exploitation of labour through carceral approaches domestically and abroad. These fractures hint at the conceptual limits of liberal human rights discourse when discussing the current campaign of repression and exploitation in the XUAR.

Indeed, the entire scholarship of racial capitalism would suggest that US officials (and officials from many other Western countries) loudly condemning China on its policies of mass incarceration, racialized policing and surveillance, and settler capitalist exploitation would be a quintessential example of 'the pot calling the kettle black'. Yet given current distributions of geopolitical power, the perilous nature of domestic resistance during the Xi Jinping administration, and the ineffectiveness of the international community to push back against a member of the Permanent Five of the UN Security Council, there seems to be little alternative for relief.

These contradictions leave Uyghurs and other non-Han Indigenous populations in Xinjiang between a rock and a hard place. As Azeezah Kanji and David Palumbo-Liu note: '[t]rapped between China's abusive assimilationism, American political opportunism, and left-wing denialism, it is the Uighurs who are suffering. Abandoning them is not anti-imperialism, but the imperial politics of disposability by another name.'¹⁹⁷

Extending the analytic of racial capitalism and the generative scholarship that it has produced to China's Northwest Frontier helps us better understand how such logics operate and evolve within an interventionist state capitalist government outside

195 Catherine Putz, 2020 *Edition: Which Countries Are For or Against China's Xinjiang Policies?*, THE DIPLOMAT (Oct. 9, 2020), <https://thediplomat.com/2020/10/2020-edition-which-countries-are-for-or-against-chinas-xinjiang-policies/>.

196 Vijay Prashad and Jie Xiong, *Why Xinjiang is central to US cold war on China*, ASIA TIMES (Apr. 17, 2021), <https://asiatimes.com/2021/04/why-xinjiang-is-central-to-us-cold-war-on-china/>.

197 Azeezah Kanji and David Palumbo-Liu, *The faux anti-imperialism of denying anti-Uighur atrocities*, AL JAZEERA (May 14, 2021) <https://www.aljazeera.com/opinions/2021/5/14/the-faux-anti-imperialism-of-denying-anti-uighur>.

the direct ambit of white supremacy. It also helps us expose the racial, colonial, and economic underpinnings behind the global war on terror, particularly for marginalized and dehumanized Muslim populations from Palestine to Kashmir, from Myanmar to China. Indeed, it is the hope that the travel and cross-pollination of the racial capitalism analytic in an era of global capitalist hegemony will generate new insights not only for scholarship but also for new emancipatory possibilities and sites of solidarity.

THE LEGAL EFFICACY OF INVESTMENT TREATY REFORMS IN AFRICA

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Abstract

The assumption underlying ongoing reforms of international investment agreements (IIAs) is that the flexibilities and exceptions constituting the reforms offer effective protections to host states' duty to regulate. This assumption has neither been tested ex-ante or ex post facto the making of new IIAs nor coherently explored in the literature. I explore the question whether the reforms of IIAs offer effective protections to the duty to regulate, using IIAs with African countries as a case study. Do IIA reforms in Africa guarantee that the objective of preserving the duty to regulate can be achieved in practice? Africa's reforms of IIAs are comprehensive, encompassing features aimed at preserving the duty to regulate. I argue that many aspects of the reforms compromise their efficacy. The soft law and precatory nature of, and the provisos embedded in key regulatory safeguards constituting the reforms intended to secure states with regulatory autonomy place contentious limitations on how the new provisions may operate in practice.

Keywords: Africa, investment treaties, investor-state arbitration, reform, duty to regulate.

I. Introduction

The concept of the duty to regulate is about the authority of states to make laws and policies and to implement them to protect the public interest and the rights of their citizens and maintain public order. It is about a state's entitlement or freedom to act as it considers appropriate in pursuit of its national interest, public welfare or to advance other purposes. This duty is sourced from state sovereignty, domestic law and international law.¹

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¹ Useful readings on the concept of the duty or right to regulate include: Charalampos Giannakopoulos, *The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach*, in PERMUTATIONS OF RESPONSIBILITY IN INTERNATIONAL LAW 148 (Photini Pazartzis & Panos Merkouris eds., 2019); YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN THEIR

The reform of international investment agreements (IIAs) and domestic investment policies and legislative frameworks to accommodate the duty of states to regulate in the public interest is a top-most issue in recent international investment rule making globally.² This is due to the use of investor-state dispute settlement (ISDS) mechanism and absolute substantive terms of investment treaties by foreign investors to challenge regulatory measures adopted in the public interest in exercise of the sovereign duty to regulate.³ As stated by Federica Cristani:⁴

The concept of the right to regulate has become a critical element in the development of international investment law and policy. The growing body of cases where public welfare legislation has been challenged under international investment agreements i.e. the arbitration case law arising out of the grave financial and economic crisis of Argentina in 2001; ... arbitration cases brought by Philipp Morris against Uruguay in 2010 and against Australia in 2011 following the introduction of innovative tobacco packaging regulations to reduce smoking and prevent noncommunicable diseases in those countries and, in the EU area, the *Vattenfall* case involving Germany and dealing with host State's environmental restrictions on a coal fired power plant in Hamburg raises the question on where to find the right balance between the need to protect foreign investments and the need to preserve the host State's right to regulate. Moreover, the fear that international investment regulation could constrain[t] the host State's right to regulate has been (one of the elements) at the heart of decision of Bolivia, Ecuador, Venezuela to withdraw from the International Centre for [the] Settlement of Investment Disputes (ICSID) Convention, as well as of the denunciation of bilateral investment treaties by Ecuador and South Africa.

Moreover, the standing given to investors to challenge regulatory measures has the potential to give rise to what has been termed in the literature as "regulatory chill", which arises when states, in the words of Robert Brew, "refrain from regulating

PUBLIC INTEREST AND THE RIGHT OF INVESTORS TO RECEIVE FAIR AND EQUITABLE TREATMENT: THE SEARCH FOR A BALANCE IN TREATIES AND CASES ON INTERNATIONAL INVESTMENT LAW (2018); LONE WANDAH MUOYAL, INTERNATIONAL INVESTMENT LAW AND THE RIGHT TO REGULATE: A HUMAN RIGHTS PERSPECTIVE (2016); AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014).

- 2 U.N. Conference on Trade and Development, *World Investment Report 2012: Towards a New Generation of Investment Policies*, UNCTAD/WIR/2012 (2012) [hereinafter UNCTAD, World Investment Report 2012].
- 3 Dominic N. Dagbanja, *The Limitations Environmental Protection Duty Places on Investment Treaty Making and Interpretation: Perspectives from Ghana*, 21 AFR. Y.B. OF INT'L L. 110 (2016); Jorge E. Vinuales, *Access to Water in Foreign Investment Disputes*, 21 GEO. INT'L ENV'T L. REV. 733 (2009); Audrey Gaughran, *Business and Human Rights and the Right to Water*, 106 PROC. ANN. MEETING AM. SOC'Y INT'L L. 52 (2012); and JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (2012).
- 4 Federica Cristani, Book Review, 6 EUR. J. RISK REGUL. 329 (2015) (reviewing AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014).

adequately to achieve policy objectives in fear of otherwise being sued by investors.”⁵ Thus, Eric de Brabandere was right when he stated that the duty to regulate “is without doubt a hotly debated issue in contemporary investment law. It lies at the heart of the ‘legitimacy crisis’ or ‘backlash’ against investment arbitration which has kept, amongst others, scholarship busy the past years.”⁶ This backlash has led to various efforts to reform the investment treaty regime to accommodate states’ duty to regulate principally because when these agreements were initiated and concluded in the 1960s through to the 1990s and even early 2000s, their predominant focus was on investment protection. Policy space and the duty to regulate were not known under the old generation of investment treaties as these treaties sought to secure absolute standards of investment protection for investors. Today, “new IIAs converge in their efforts to formulate provisions that are more refined and more specific and take into consideration the right of host States to regulate investment for public policy objectives.”⁷

The United Nations Conference on Trade and Development’s (UNCTAD) *World Investment Report 2019: Special Economic Zones* documents the nature of investment treaty, ISDS and investment policy reforms.⁸ According to UNCTAD:⁹

Twenty-seven of the 29 IIAs concluded in 2018 contain at least six reform features and 20 of the 29 contain at least nine reform features ... Highlights of modern treaty making include a sustainable development orientation, preservation of regulatory space, and improvements to or omissions of investment dispute settlement. The most broadly pursued area of reform is preservation of regulatory space.

Globally, the elements of the new treaties, which cover both the substantive terms of IIAs and ISDS, that aim to preserve regulatory space include clauses that: (1) make general exceptions; (2) limit the scope of investment treaties; (3) limit or clarify obligations (e.g. by omitting indirect expropriation); and (4) make exceptions to the right to transfer funds.¹⁰ Sustainable development objectives have also been accommodated in

5 Robert Brew, *Exception Clauses in International Investment Agreements as a Tool for Appropriately Balancing the Right to Regulate with Investment Protection*, 25 CANTERBURY L. REV. 205, 211 (2019).

6 Eric De Brabandere, Book Review, 52 COMMON MKT. L. REV. 1152 (2015) (reviewing AIKATERINI TITI, *THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW* (2014)).

7 Hamed El-Kady & Mustaqeem De Gama, *The Reform of the International Investment Regime: An African Perspective*, 34 ICSID REV. – FOREIGN INV. L.J. 482, 486 (2019). The authors noted that “[d]espite a global environment that is conducive to BIT reform, only a handful of African countries have effectively tackled their existing stock of outdated BITs through renegotiations, amendments or terminations.” Id.

8 U.N. Conference on Trade and Development, *World Investment Report 2019: Special Economic Zones*, 84-115, UNCTAD/WIR/2019 (2019) [hereinafter UNCTAD, *World Investment Report 2019*].

9 Id. at 105.

10 Id.

recent investment treaties that make general exceptions for the protection of human rights and the environment (e.g. no relaxation of health, safety and environmental standards in order to attract or maintain investment).¹¹ Investment treaties concluded in 2018 reveal four approaches to the reform of ISDS mechanism: (1) no provision for ISDS at all or the right to ISDS is subject to the state's right to give or withhold consent; (2) replacement of the system of *ad hoc* arbitration and party appointment of arbitrators with a court-like, standing ISDS tribunal; (3) removing direct access to ISDS or conditioning access to ISDS on the exhaustion of local remedies; and (4) improving ISDS procedures, for example by increasing the control of the state over arbitral proceedings.¹² However, this Article is limited to an analysis of the reform of the substantive terms of investment treaties. The state of the reform of ISDS would have to be considered in a separate piece.

The reforms of investment treaties have been pursued for some time now.¹³ Yet, the efficacy of these reforms have received very limited research, none in particular in relation to Africa. Louis-Marie Chauvel has grouped the existing scholarship into two groups:¹⁴ scholars who have treated the general exceptions as interpretative statements serving more as a guide to the meaning of investment treaty provisions without much having effect on the scope and legal effect of treaty core standards¹⁵ and those who consider the exceptions as restrictive and operative exceptions that have effect on the interpretation of standards of investment protection.¹⁶ As revealed in this Article, the former perspective is more reflective of IIA reforms than the latter perspective.

This Article is concerned, then, with the legal efficacy of investment treaty reforms in Africa. Efficacy in jurisprudence or legal philosophy has been defined as “a condition on the existence of law.”¹⁷ The efficacy is assessed in this Article in terms of whether the

11 *Id.*

12 *Id.* at 106.

13 UNCTAD, **World Investment Report 2012**, *supra* note 2.

14 Louis-Marie Chauvel, *The Influence of General Exceptions on the Interpretation of National Treatment in International Investment Law*, 14 BRAZILIAN J. INT'L L. 140, 144 (2017).

15 Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, INT'L INST. FOR SUSTAINABLE DEV.: INV. TREATY NEWS (May 21, 2015), <https://www.iisd.org/itm/en/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice> (last accessed Apr. 4, 2023).

16 Céline Lévesque, *Influences of the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond*, 44 CANADIAN Y.B. INT'L L. 249 (2007); Céline Lévesque, *The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 363 (Roberto Ehandi & Pierre Sauvé eds., 2013).

17 Thomas Adams, *The Efficacy Condition*, 25 LEGAL THEORY 225, 227 (2019); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (2nd ed. 2009); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1999); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., 1995); and EUGENIO BULYGIN, *ESSAYS IN LEGAL PHILOSOPHY* (Carlos Bernal et al. eds., 2015).

new features constituting the reforms remove or limit the scope of investors' duty to initiate claims against states, and whether ultimately the reforms are capable of securing states' right to regulate by precluding regulatory measures from constituting breaches of IIAs. Legal norms are efficacious if they can be enforced and if they practically operate to protect and preserve the rights and interests the protect of which they were designed to secure. If a provision of a law cannot be enforced or its enforcement fails to secure protection of the rights and interests, it was designed to protect then the law is inefficient or inefficacious.¹⁸

As stated by Julie Kim, the absence of carve-outs for states' duty to regulate became obvious when investor-state arbitrations were initiated against both developing states and developed states.¹⁹ According to UNCTAD, there were up to 1,104 known cases with 124 countries as respondents to one or more ISDS claims as of 01 January 2021.²⁰ About 60 per cent of investment arbitrations in 2018 were brought under BITs signed in the 1990s or earlier while the remaining cases were based on investment treaties signed between 2000 and 2011.²¹ In 2018, about 70 per cent of arbitral decisions on jurisdiction and merit were made in favour of investors.²² Investment treaty and ISDS reforms seek to remedy this mischief to ensure that administrative and regulatory measures are not subject to challenge in investor-state arbitration or that if they are challenged states can legally defend or justify their actions based on the new features constituting the reforms.

As a large number of African states' bilateral investment treaties (BITs) concluded from 1960s to mid-2000s remains in force²³ with absolute investment protection terms and provision for investor-state arbitration as shown in Section II below,²⁴ measures

18 See HARRY W. JONES., *THE EFFICACY OF THE LAW* (1969).

19 Julie Kim, *Balancing Regulatory Interests Through an Exceptions Framework Under the Right to Regulate Provision in International Investment Agreements*, 50 *GEO. WASH. INT'L L. REV.* 289, 290 (2018).

20 U.N. Conference on Trade and Development, *World Investment Report 2021: Investing in Sustainable Recovery*, 129, UNCTAD/WIR/2021 (2021). See also U.N. Conference on Trade and Development, *IIA Issues Note: Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, 1 (July 2020).

21 UNCTAD, *World Investment Report 2019*, *supra* note 8, at 103.

22 *Id.* at 102.

23 Dominic Npoanlari Dagbanja, *Africa*, in *RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT* 336, 341 (Markus Krajewski & Rhea Tamara Hoffmann eds., 2019).

24 See Convention Concerning the Reciprocal Promotion and Protection of Investments, Belgo-Lux.-Cameroon, arts. 2-6, Mar. 27, 1980, 1284 U.N.T.S. 139 (entered into force Nov. 1, 1981) (hereinafter Cameroon-Belgo-Luxembourg Economic Union BIT); Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Eth., art. 3, Jan. 19, 2004, 2771 U.N.T.S. 215 (entered into force May 4, 2006); Agreement on the Promotion and Protection of Investments, Austl.-Egypt, arts. 3-4, May 3, 2001, 2208 U.N.T.S. 347 (entered into force Sept. 5, 2002); and Agreement for the Promotion and Protection of Investments, U.K.-Ghana, arts. 3-5 and 8, Mar. 22, 1989 (entered into force Oct. 25, 1991) [hereinafter Ghana-United Kingdom BIT].

adopted by African states that may have adverse effects on covered investments stand being challenged in investor-state arbitration. Available data shows that between 1993 and 2017, 100 arbitral cases have been brought against African states as respondents. Meanwhile, African states have been home countries to only sixteen investors that have brought investor-state claims against their host states between 2000 and 2017. Except Canada, most of these host states against which investors based in Africa have brought claims are developing countries with a significant number of them being African host countries.²⁵

In response to these claims and the global backlash against investment treaties based on the limitations they place on the duty to regulate in the public interest, African countries have begun to make investment treaties to preserve public interest regulatory autonomy.²⁶ Indeed, as observed by Makane Mbengue, a “multi-layered system of initiatives is burgeoning on the continent to revamp the architecture of international investment law field according to African states’ policy and development priorities.”²⁷ This is reflected in some of the recent BITs African states have entered into which have far-reaching provisions on the duty to regulate and corporate legal and social responsibilities in an effort to balance investment promotion and protection with the need for domestic policy space and corporate accountability. An example is the Benin-Canada BIT of 2014.²⁸ In the preamble to the BIT, the parties recognise that the promotion and protection of investments “are conducive to the stimulation of mutually beneficial economic activity, the development of economic cooperation between both countries and the promotion of sustainable development.” The BIT not only provides for the usual standards of investment protection but actually qualifies them (except in the case of the concept of investment, which is very broadly defined²⁹) in order to accommodate domestic regulation as may be appropriate.³⁰ How legally efficacious are the new IIAs in terms of the space they create for the duty to regulate in Africa?

25 El-Kady & De Gama, *supra* note 7, at 493-95.

26 THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010).

27 Makane Moïse Mbengue, *Africa’s Voice in the Formation, Shaping and Redesign of International Investment Law*, 34 ICSID REV. –FOREIGN INV. L.J. 455 (2019).

28 Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Benin, Jan. 9, 2013, (entered into force May 12, 2014) [hereinafter Benin-Canada BIT].

29 *Id.* at art. 1.

30 *Id.* at arts. 7, 10 and 12.

There is extensive research on Africa, the development and the reform of investment treaties and investor-state arbitration.³¹ It is significant for purposes of establishing the originality and contribution of this article to state that the existing literature on Africa and the reform of international investment law focuses on Africa's contribution to the reforms (with authors such as Olabisi Akinkugbe describing African states as "reverse contributors")³², rather than the operative effect and efficacy of the reforms. Some of the extant literature seems more favourable of the reforms simply by focusing on the newness and unique nature of the reforms rather than engaging with how the reforms operate in practice to achieve the desired objective of preserving the duty to regulate.³³ In fact, Mbengue has observed that existing literature does "not pretend to deal with all the issues regarding investment law in Africa."³⁴ The legal efficacy of these reforms in Africa is one of such unexplored issues. This Article fills this lacuna by analysing the issue of whether the textual terms the reforms are legally efficacious, that is can lead to the attainment of the desired goal of preserving the duty to regulate supposedly underlying the reforms. The reforms of IIAs seem essentially to be aimed precluding regulatory measures from being treated as amounting to a breach of states' obligations under investment treaties. To what do extent do core exceptions and flexibilities constituting the reforms ensure that such policy measures do not constitute a breach of the terms of investment treaties in which the reforms are contained?

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- 31 Mbengue, *supra* note 27; Antonio R. Parra, *The Participation of African States in the Making of the ICSID Convention*, 34 ICSID REV. – FOREIGN INV. L.J. 270 (2019); Won Kidane, *The Culture of Investment Arbitration: An African Perspective*, 34 ICSID REV. – FOREIGN INV. L.J. 411 (2019); Meg Kinnear & Paul Jean Le Cannu, *Concluding Remarks: ICSID and African States Leading International Investment Law Reform*, 34 ICSID REV. – FOREIGN INV. L.J. 542 (2019); Makane Moïse Mbengue, *Special Issue: Africa and the Reform of the International Investment Regime*, 18 J. WORLD INV. & TRADE 371 (2017); Okechukwu Ejims, *The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?*, 34 ICSID REV. – FOREIGN INV. L.J. 62 (2019); Olabisi D. Akinkugbe, *Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law*, 34 ICSID REV. – FOREIGN INV. L.J. 434 (2019); Makane Moïse Mbengue & Stefanie Schacherer, *The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime*, 18 J. WORLD INV. & TRADE 414 (2017); J. Anthony VanDuzer, *Canadian Investment Treaties with African Countries: What Do They Tell Us About Investment Treaty Making in Africa?*, 18 J. WORLD INV. & TRADE 556 (2017); Eric De Brabandere, *Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity*, 18 J. WORLD INV. & TRADE 530 (2017); Erik Denter & Tarcisio Gazzini, *The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment*, 18 J. WORLD INV. & TRADE 449 (2017); and Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 GEO. WASH. INT'L L. REV. 523 (2018).
- 32 Reverse contributors according to Akinkugbe, "denote the fact that while these states may not have been the claimants, their role as respondents who were actively involved in the cases, and in particular, the arguments they advanced and the reports of the tribunal in affirming or rejecting them, have advanced our understanding of international investment law rules and concepts." Akinkugbe, *supra* note 31, at 440.
- 33 Stefanie Schacherer, *The Investment Court System Proposed by the European Union: What Does It Mean for Africa*, in AFRICAN PERSPECTIVES IN INTERNATIONAL INVESTMENT LAW 226, 259-61 (Yenkong Ngangjoh Hodu & Makane Moïse Mbengue eds., 2020).
- 34 Mbengue, *Special Issue: Africa and the Reform of the International Investment Regime*, *supra* note 31, at 378.

This Article argues, in the main, that the broad and soft law nature of core IIA reform elements (in the sense of not being binding obligations³⁵) and the qualifications or provisos to some of these elements and general exceptions stand to defeat or undermine the operative effect and the attainment of the objective of preserving the duty to regulate which underlies the new features or terms in the IIAs. This is because the elements are less likely to preclude regulatory measures from constituting a breach of the terms of IIAs. The conditions, qualifications, exceptions or provisos in these regulatory safeguards allow foreign investors to continue to initiate claims against states for adopting measures the reforms were supposedly meant to protect. The successful pursuit of such claims depends on the formulation of the exceptions and the interpretive approach adopted by the tribunal because there is no unitary jurisprudence in investment treaty arbitration. The qualifications, provisos and exceptions also significantly weaken the defensive or justificatory role of the new reform features. Even if these new IIAs were legally efficacious in preserving African states' duty to regulate, the gains to be derived from them would be eroded by the older BITs given the absolute protections they secure for investment protection as shown in Section II. Therefore, not only must the terms of the new IIAs be effective in preserving the duty to regulate, this must also be accompanied by the reform of existing IIAs.

The duty to regulate cannot be secured or reclaimed in situations where foreign investors retain the right in all cases to institute an investor-state claim challenging the taking of every measure, the public purpose and legal justification for which are not disputable. If the duty to regulate must be preserved, then investors must let go or must not have certain claims or must have effectively qualified claims against states; otherwise, a 'balance' cannot be maintained in the protection of investors' rights and states' duty to regulate.

Krzysztof Pelc in his seminal book, *Making and Bending Rules: The Design of Exceptions and Escape Clauses in Trade Law*, stated that "one of the constants running through all types of agreements is the inclusion of formal clauses that specify just how signatories will be allowed to break the very rules they have agreed on."³⁶ Flexibilities in international agreements allow for the contracting states to be able to temporarily suspend compliance with their obligations without incurring

35 *Hard law/soft law*, EUR. CTR. FOR CONST. & HUM. RTS., <https://www.ecchr.eu/en/glossary/hard-law-soft-law/#:-:text=Soft%20law%20instruments%20are%20predominantly,legally%20enforced%20before%20a%20court> (last accessed Apr. 4, 2023).

36 Krzysztof J. Pelc, *MAKING AND BENDING INTERNATIONAL RULES: THE DESIGN OF EXCEPTIONS AND ESCAPE CLAUSES IN TRADE LAW 1* (2016).

international legal responsibility and liability. If the use of exceptions and flexibilities is limited to their intended purposes only, they can work to achieve the objects underlying them. However, flexibilities can be abused. As stated by Pelc, “[i]f flexibility is over-provided, it can water down the agreement, diminishing the gains ... it would otherwise produce ... More subtly, the mere existence of flexibility, quite independently from its use, can inject considerable uncertainty.”³⁷ An analysis of the flexibilities constituting the reform of the international investment regime shows that the flexibilities are not overworked or over-provided. On the contrary, the flexibilities are rather too loose, precatory and uncertain/indefinite to achieve the objective of securing the duty to regulate underlying the reforms. In the context of flexibilities in international trade law, Pelc has found that “the wide availability of unconstrained flexibility has not led to the regime’s collapse, even in the midst of the Great Recession. Even those countries that could significantly raise their tariff rates overnight without falling foul of their obligations have in most cases turned to contingent flexibility mechanisms instead.”³⁸ This allows the suggestion to be made that concrete and operative flexibilities and exceptions genuinely and effectively securing the duty to regulate may not necessarily lead to a watering down of the international investment regime’s protections to foreign investors and that there is the need for ongoing reforms of IIAs to be more responsive to the preservation of the duty to regulate through more concrete and enforceable exceptions in IIAs.

The investment treaties analysed have been selected based on their relevance for establishing the point about Africa’s participation in the making of investment treaties from their inception. Others have been selected because they constitute some of the most recent treaties that incorporate terms seeking to preserve the duty to regulate in the public interest. The exceptions are the primary subjects of review and analysis in this Article.

The rest of the Article is organised as follows. Section II addresses the subject of the making of investment treaties in Africa. It establishes that the first generation of investment treaties focused predominantly on investment protection and that the terms of those treaties and investor-state arbitration claims against states founded on them necessitated ongoing reforms of international investment law in Africa and beyond.

37 *Id.* at 206.

38 *Id.* at 16.

Section III analysis the reforms of the substantive terms of investment treaties in Africa at the bilateral, regional and continental levels. The analysis shows that the fact that exceptions have been made for the duty to regulate and the adoption of regulatory measures by one provision in an investment treaty does not really secure a state the free, unencumbered or unrestricted exercise of regulatory autonomy or the duty to regulate. The supposedly preserved duty to regulate could be taken away by another provision of the same investment treaty guaranteeing protections to investments and investors or by a qualification or proviso in the very provision seeking to preserve the duty to regulate.

Section IV concludes the Article. It makes the point that the weaknesses and limitations of investment promotion and protection by treaty require alternatives to this regime to be considered rather than sticking to the regime or proposing reforms that entrench the questionable view that investments can be effectively promoted and protected solely by investment treaties and investor-state arbitration. This Article thus provides a legal and normative basis for reflecting and rethinking the efficacy of the reform of IIAs both within and outside the African continent since most IIAs are between African countries and non-African countries.

II. Africa and Investment Treaty Law and Arbitration

The making of investment treaties with African countries has a post-colonial backdrop and started about the same time that the first BIT was signed in November 1959 by Pakistan and Germany and entered into force in April 1962.³⁹ No single colonial power had to conclude a BIT with its colony in Africa while it still exercised colonial power and dominion over that colony. Thus, as noted by Muthucumaraswamy Sornarajah, it was only after decolonization and the dissolution of colonial empires that the need for BITs in the manner known today came to be felt by the former colonial and Western powers, which now became the ‘exporters’ of capital to Africa and the developing world.⁴⁰ Also, Laura Páez has argued that the “[f]irst generation BITs primarily sought to protect and lock in investment interests of developed country partners already present in the region, in particular in sectors that showed typical features of enclave economies, such as minerals, fuel and other commodities, in order to guarantee and sustain the export of primary inputs for the industry of the source country after independence.”⁴¹

39 Treaty for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 6575 U.N.T.S. 24.

40 M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 21 (3rd ed. 2010).

41 Laura Páez, *Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?*, 18 J.WORLD INV. & TRADE 379, 382 (2017).

African countries began to gain political independence from the late 1950s. For example, Ghana and Nigeria gained independence from Great Britain in 1957 and 1960 respectively. The acquisition of independence and sovereignty by the new states changed the nature of the legal regime for foreign direct investment protection in the former colonies, including in Africa. Colonial foreign companies now had to be regulated by the municipal law of the newly independent states which asserted control over their natural resources.⁴² European countries then started 'negotiations' and conclusion of 'reciprocal' BITs with some of their former colonies and other African countries.

Specifically, African countries began to enter into BITs in the 1960s.⁴³ The first BIT to be *signed* in Africa is the Togo-Germany BIT.⁴⁴ It was signed on 16 May 1961 but it did not enter into force until 21 December 1964. The now terminated Morocco-Germany BIT was the second BIT to be signed in Africa, having been signed on 31 August 1961 and entered into force on 21 January 1968.⁴⁵ Thus, the first and second African BITs were signed less than two years after the 1959 Germany-Pakistan BIT was signed and about a year before the Germany-Pakistan BIT entered into force in 1962. The first BIT in Africa to have legal effect is Niger-Switzerland BIT that was signed on 28 March 1962 and entered into force on 17 November 1962,⁴⁶ two years after Niger gained independence. The Côte d'Ivoire-Switzerland BIT, which was signed on 26 June 1962, entered into force on 18 November 1962,⁴⁷ two years after Côte d'Ivoire's independence. It is the second BIT to enter into force in Africa. African BITs thus took legal effect in the same year as the first ever BIT between Germany and Pakistan which came into force eight months earlier than the Niger-Switzerland BIT and Côte d'Ivoire-Switzerland BIT. The Guinea-Switzerland BIT, which was signed on 26 April 1962, came into force on 29 July 1963. Therefore, the Guinea-Switzerland BIT⁴⁸ was the third

42 ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 224 (James Crawford et al. eds., 2005).

43 Mbengue, *supra* note 27, at 456-58; Páez, *supra* note 41, at 382-84.

44 Traité entre la République fédérale d'Allemagne et la République Togolaise relatif à l'encouragement des investissements de capitaux [Treaty on the encouragement of capital investment], Ger.-Togo, May 16, 1961 (entered into force Dec. 21, 1964).

45 Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Marokko über die Förderung von Kapitalanlagen [Treaty on the demand for capital investment], Ger.-Morocco, Aug. 31, 1961.

46 *Accord de commerce, d'investissements et de coopération technique entre la Confédération Suisse et la République du Niger* [Agreement on trade, investment, and technical cooperation], Switz.-Niger, Mar. 28, 1962.

47 *Accord de commerce, de protection des investissements et de coopération technique entre la Confédération Suisse et la République de Côte d'Ivoire* [Agreement on trade, investment protection, and technical cooperation], Switz.-Côte d'Ivoire, June 26, 1962.

48 Abkommen über den Handel, die Investitionen und die technische Zusammenarbeit zwischen der Schweizerischen Eidgenossenschaft und der Republik Guinea [Agreement on trade, investment, and technical cooperation], Switz.-Guinea, Apr. 26, 1962.

BIT to enter into force in Africa. Cameroon signed its first BIT with Germany on 29 June 1962, which entered into force on 21 November 1963.⁴⁹ Between that year and 1989, eight other BITs entered into force between Cameroon and: Switzerland, 1964;⁵⁰ The Netherlands, 1966;⁵¹ Belgium-Luxembourg Economic Union, 1981;⁵² Romania, 1981;⁵³ United Kingdom, 1985;⁵⁴ and United States, 1989.⁵⁵

The making of BITs has continued in Africa since then to the present day. Since 1962, African countries have signed around 900 IIAs, which represent about 26% of the over 3000 IIAs in existence at the end of 2019.⁵⁶ Most of Africa's earlier BITs concluded from the 1960s to 1990s are in still force. The terms of these earlier BITs represent the most classical standards of treatment of investments because the early treaties "dealt exclusively with foreign investment."⁵⁷

A number of the first-generation BITs concluded in Africa between 1960s and 1990s had very broad scope in terms of the subject matter of coverage, although some of them had reasonable qualifications to the scope of application of the terms. The Cameroon-Belgo-Luxembourg Economic Union BIT states in Article 3(1),(2) and (3) as follows:⁵⁸

All investments, present and future, direct or indirect, made by individuals or corporations of one Contracting Party shall be accorded fair and equitable treatment in the territory of the other Contracting Party.

49 Traite entre la Republique federale d'Allemagne et la Republique federale du Cameroun relatif a l'encouragement des investissements de capitaux [Treaty relating to the encouragement of capital investment], Ger.-Cameroon, June 29, 1962.

50 Accord de commerce, de protection des investissements et de coopération technique entre la Confédération Suisse et la République fédérale du Cameroun [Agreement on trade, investment protection, and technical cooperation], Switz.-Cameroon, Jan. 29, 1963.

51 Accord de coopération économique et technique entre le Gouvernement du Royaume des Pays-Bas et le Gouvernement de la République Fédérale du Cameroun [Agreement on economic and technical cooperation], Neth.-Cameroon, July 6, 1965.

52 Cameroon-Belgo-Luxembourg Economic Union BIT, *supra* note 24.

53 Accord entre la gouvernement de la Republique unie du Cameroun et la gouvernement de la Republique socialiste de Roumanie sur la garantie reciproque des investissements [Agreement on the Reciprocal Guarantee of Investments], Rom.-Cameroon, Aug. 30, 1980.

54 Agreement for the Promotion and Protection of Investments, U.K.-Cameroon, June 4, 1982, 1442 U.N.T.S. 260.

55 Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Cameroon, Feb. 26, 1986 [hereinafter U.S.-Cameroon BIT].

56 Dagbanja, *supra* note 23, at 345.

57 JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 94 (1st ed. 2010).

58 Cameroon-Belgo-Luxembourg Economic Union BIT, *supra* note 24, at art. 3 (emphasis added).

Such investments shall be safeguarded and protected *at all times* and shall not be subject to any unreasonable or discriminatory measure that might, *de jure* or *de facto*, impede their management, maintenance, use, enjoyment or liquidation, with the exception of measures necessary for the maintenance of public policy.

The treatment and protection guaranteed in paragraphs 1 and 2 above shall be no less favourable than those enjoyed by individuals or corporations of a third State and in no case less favourable than those recognized by international law.

According to Article 8 of the Ghana-United Kingdom BIT:⁵⁹

Each Contracting Party shall, in respect of investments, guarantee to nationals or companies of the other Contracting Party the *unrestricted* transfer to the country where they reside of their investments and returns. Transfers of currency shall be effected without undue delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

The friendship and commerce treaty between Liberia and Swiss Confederation (FCT)⁶⁰ was intended, to cover both trade and investments and the protection of private property rights, and to promote peace and amity between the parties.⁶¹ Article 2 of the FCT entitles the nationals of the contracting parties the right to enter, travel, reside, to acquire, possess and dispose of movable and immovable property, and to engage in trade and industry. Article 2 of the FCT also entitles the nationals of the contracting parties the right to “enjoy, in matters of procedure, the same treatment as is accorded to the nationals of the Other, with respect to the protection and security of their person and property and with regard to all judicial, administrative and other legal proceedings.” With respect to investments, Article 6 of the FCT provides for national treatment, most-favoured nation treatment (MFN), the duty to repatriate investment and returns and the right against nationalization or expropriation “except when such measures are taken in the

59 Ghana-United Kingdom BIT, *supra* note 24, at art. 8 (emphasis added).

60 Treaty of Friendship and of Commerce, Switz.-Liber., July 23, 1963 (entered into force Sept. 22, 1964).

61 *Id.* arts. 1 and 3.

public interest and unless it is done against payment of an effective and adequate indemnity, in conformity with international law.” The FCT is completely silent on the question of investment dispute resolution. Presumably disputes would be resolved diplomatically or in the domestic courts of the respective parties. This is probably the reason the FCT provides for national treatment with respect to judicial, administrative and other legal proceedings.

The Liberia-Switzerland FCT contrasts with the Liberia-Germany BIT⁶² which deals solely with the promotion and protection of investments, providing for: (1) a wide definition of investment⁶³; (2) full protection and security (FPS) subject to ‘the law in the territory of the other contracting party’⁶⁴; (3) prohibition against non-public purpose and uncompensated expropriation⁶⁵; (4) national treatment and MFN in respect of restitution, indemnification and compensation for loss of investments owing to war or hostilities⁶⁶; (5) MFN generally⁶⁷; (6) the right of repatriation of investment and returns;⁶⁸ (7) subrogation;⁶⁹ and (8) umbrella clause.⁷⁰ The unique aspect of this BIT is that it limits the scope of FPS to such protection as may be available under the laws of the contracting parties and fair and equitable treatment (FET) arises only in respect of governmental determination of the exchange rate when transfers are to be made.⁷¹ The Liberia-Germany BIT is also silent on investor-state dispute resolution but it does provide that disputes between the contracting parties concerning the application or interpretation of the BIT are to be resolved amicably or by arbitration if an amicable settlement fails.⁷² The BIT also secures absolute protection for investment, stating that covered investments shall be governed by international law in the event of conflict between the contracting parties and that measures permitted by such law shall continue to operate only over the period of the conflict.⁷³

62 Treaty for the Promotion and Reciprocal Protection of Investments, Ger.-Liber., Dec. 12, 1961 (entered into force Oct. 22, 1967).

63 *Id.* at art. 8.

64 *Id.* at art. 3(1).

65 *Id.* at art. 3(2).

66 *Id.* at art. 3(3).

67 *Id.* at art. 3(5).

68 *Id.* at art. 4.

69 *Id.* at art. 5.

70 *Id.* at art. 7.

71 *Id.* at art. 6(3).

72 *Id.* at art. 11.

73 *Id.* at art. 12.

Foreign investors have used investor-state arbitration claims against states mostly under these old generation BITs concluded between the 1960s and early 2000s because these BITs made less room for the duty to regulate. According to El-Kady and De Gama:⁷⁴

between 1980 and 2012 (and negotiated on the basis of developed countries models) still exist today, with outdated, broad and all-encompassing standards that clearly limit the right of host African States to regulate investment in their territories, and that expose them more openly to investor–State disputes. Outdated BITs continue to exist despite growing international consensus on the need to reform and to modernize past approaches to investment protection policies.

Foreign investors’ reliance on these absolute standards of investment protection to challenge states’ adoption of domestic regulatory measures in the public interest under municipal law before private arbitrators have influenced ongoing reforms of investment treaties in Africa.⁷⁵

III. The Duty to Regulate and Investment Treaty Reforms in Africa

Efforts aimed at reforming the investment treaty framework to accommodate states’ duty to regulate are taking place globally.⁷⁶ At the United Nations level, the UNCTAD is leading the way by developing frameworks to guide investment treaty reforms and this is reflected, for example, in its *Investment Policy Framework for Sustainable Development*.⁷⁷

Africa is awake on this matter.⁷⁸ Upon reviewing a number of recent investment treaties, El-Kady and De Gama concluded that African countries were now “taking

74 El-Kady & De Gama, *supra* note 7, at 485.

75 See also *Waste Mgmt., Inc. v. United Mex. States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004); *Philip Morris Asia Ltd. v. Commonwealth of Austl.*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); *Yukos Universal Ltd. (Isle of Man) v. Russ. Federation*, PCA Case No. AA 227, Final Award (Jul. 18, 2014); *Cont’l Cas. Co. v. Arg. Republic*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).

76 UNCTAD, *World Investment Report 2019*, *supra* note 8, at 99-115.

77 U.N. Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, UNCTAD/DIAE/PCB/2015/5 (2015).

78 For a discussion of the reforms in Africa see, e.g., Mbengue, *supra* note 27; Mbengue & Schacherer, ‘*Africanization of International Investment Law*, *supra* note 31; El-Kady & De Gama, *supra* note 7; Páez, *supra* note 41; Kinnear & Cannu, *supra* note 31; Parra, *supra* note 31; De Brabandere, *supra* note 31; Kidane, *Contemporary International Investment Law*, *supra* note 31.

a more active approach in the formulation of their international investment commitments at the national, bilateral and regional levels. Africa is becoming a laboratory for innovative and sustainable development-oriented investment policy-making.”⁷⁹

This Section examines the efficacy of the new features of recent investment treaties and Model BITs in Africa. In summary, the reforms of the substantive terms of investment treaties in Africa have taken the form of:

- regionalisation and harmonisation of investment protection.
- developing model BITs.
- general exceptions for the duty to regulate.
- qualifying the scope of the usual terms of investment protection such as national treatment, expropriation and repatriation of investments and returns.
- provision for corporate accountability and requiring investors to comply with domestic law.
- giving standing to public institutions and citizens to institute civil actions against foreign investors for non-compliance with their obligations.
- defining investment to include contribution to development.
- encouraging contracting parties to create jobs through the other contracting party’s investors’ investments in the territory of the contracting party.
- imposing pre-establishment obligations on investors to conduct social impact assessment of the potential investment.
- abandoning the usual standards of investment protection such as fair and equitable treatment and full protection and security.
- exempting social welfare and social services from the coverage of national treatment, most-favoured-nation treatment and performance requirement obligations.
- requiring investors to strive through their policies and practices to contribute to the development of the host state.

⁷⁹ El-Kady & De Gama, *supra* note 7, at 382.

The scope of these reforms demonstrates that Africa fully appreciates the nature of investment treaties and their effects on regulatory space and the need to reform IIAs to preserve that duty to regulate.

i. Bilateral Investment Treaty Reforms in Africa

At the bilateral level, African countries have negotiated new BITs that contain innovative and flexible provisions to accommodate development policy space and the states' duty to regulate in the public interest.⁸⁰ For example, South Africa-Nigeria BIT makes exception to the scope of application of national treatment and MFN stating they are not applicable to laws and other measures aimed at achieving equality and protecting persons or categories of persons who have been disadvantaged by unfair discrimination.⁸¹

The Cameroon-Canada BIT provides that the parties "shall encourage the creation of jobs in Canada through Cameroonian investments and the creation of jobs in the Republic of Cameroon through Canadian investments."⁸² The BIT's provisions on performance requirements, expropriation and transfer of funds do not guarantee absolute right to foreign investors and provision is made to accommodate some flexibility in the area of taxation.⁸³ The national treatment, MFN and performance requirement obligations do not apply to: (1) social services (such as public law enforcement, social and income security or insurance; social welfare; public education; public training; health and child care); (2) the rights or preferences provided to aboriginal peoples; and (3) the rights or preferences provided to socially or economically disadvantaged minorities.⁸⁴ Similar general exemptions can be found in the Kenya-Japan BIT⁸⁵ and Egypt-Mauritius BIT⁸⁶ in respect of national treatment and MFN.

These qualifications help shape the scope of national treatment and MFN. However, the legal efficacy of these new exceptions as safeguards for the duty to

80 *Id.*

81 Agreement for the Reciprocal Promotion and Protection of Investments, S. Afr.-Nigeria, art. 4, Apr. 29, 2000.

82 Agreement for the Promotion and Protection of Investments, Can.-Cameroon, art. 3(2), Mar. 3, 2014 [hereinafter Canada-Cameroon BIT]; see also VanDuzer, *supra* note 31 for analysis on investment treaties between Africa and Canada.

83 Canada-Cameroon, *supra* note 82, at arts. 9-11, 14 and 16.

84 *Id.* at art. 16 and Schedule II.

85 Agreement for the Promotion and Protection of Investment, Japan-Kenya, arts. 3-5, Aug. 28, 2016.

86 Agreement on the Reciprocal Promotion and Protection of Investments, Mauritius-Egypt, art. 5(4), June 25, 2014.

regulate is yet to be fully tested in investor-state arbitration. The qualifications or conditions to the texts of some of these general exceptions might defeat their purposes concerning preserving the duty to regulate. For example, Article 3(2) of the Kenya-Japan BIT provides that the obligation of national treatment “shall not be construed so as to prevent” contracting parties “from adopting or maintaining a measure that prescribes special formalities in connection with investment activities of foreign investors in its Area in accordance with its laws and regulations, *provided that such special formalities do not impair the substance of the rights of investors*” (emphasis added). By this qualification or proviso, measures that prescribe special formalities in connection with investment activities of foreign investors may not be adopted if the measures will impair the substance of investors’ rights, even though they may not be aimed directly at impairing the investments. Such measures may be adopted at the risk of an investor-state suit for indirect expropriation, for example. Therefore, the scope left for this provision seeking to preserve the duty to regulate to be exercised in practice could be very narrow depending on the nature of the effect of the measure on the rights of foreign investors.

Some BITs, for example some of those concluded in the 1960s provided for absolute prohibition against performance requirements⁸⁷ and absolute duty to transfer funds.⁸⁸ Recent investment treaties have softened these positions by providing for exceptions to prohibition against performance requirements and transfer of funds. However, the qualifications to these exceptions weaken their efficacy. The Benin-Canada BIT, for example, prohibits performance requirements, providing that a contracting party may not “impose requirement on an investor to “transfer technology, a production process or other proprietary knowledge to a person in its territory.”⁸⁹ This prohibition is not absolute. Thus, a measure requiring “an investment to use a technology to meet generally applicable health, safety or environmental requirements is not inconsistent with” this performance requirement prohibition.⁹⁰ This particular prohibition “does not apply if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of domestic competition law.”⁹¹ These are innovative exceptions that make room for the duty to regulate on matters of public health and safety and for administrative tribunal or judicial decisions to be respected and enforced under domestic law.

87 U.S.-Cameroon BIT, *supra* note 55, at art. II(6).

88 Treaty Concerning the Promotion and Reciprocal Protection of Capital Investment, Ger.-Benin, art. 6, June 29, 1978, 1459 U.N.T.S. 284; Agreement for the Promotion and Protection of Investments, U.K.-Benin, Nov. 27, 1987, 1556 U.N.T.S. 184.

89 Benin-Canada BIT, *supra* note 28, at art. 10(1)(f).

90 *Id.* at art. 10(2).

91 *Id.* at art. 10(4)(b).

However, the same BIT that gives also more or less takes away the same duty to regulate. Article 12(1) of the Benin-Canada BIT requires the contracting parties to “permit all transfers relating to a covered investment to be made freely, and without delay, into and out of its territory.” The BIT significantly qualifies this right to transfer investment and returns. It provides that a party may prevent a transfer in accordance with its law relating to: (1) bankruptcy, insolvency or the protection of the rights of a creditor; (2) issuing, trading and dealing in securities; (3) a criminal or penal offence; and (4) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities or ensuring compliance with an order or judgment rendered in judicial or administrative proceedings.⁹² A state may also prevent or limit transfers by a financial institution through a measure relating ‘to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions’.⁹³

A contracting party may only prevent such a transfer through the “equitable, non-discriminatory and good faith application of its domestic law.”⁹⁴ A state might restrict a transfer believing that it is acting equitably, non-discriminatorily and in good faith. Ultimately, it is for an investment tribunal to decide if a state applied its domestic law equitably, non-discriminatorily and in good faith. This may end up defeating the object of the exemption of this type of limiting transfer available to the contracting parties. Arbitral tribunals have expressed the view that a “party invoking the allegedly self-judging nature of ... [an] exemption can thereby remove the issue, and hence the claim of a treaty breach by the investor against the host state, from arbitral review. This would conflict in principle with the agreement of the parties to have disputes ... settled compulsorily by arbitration.”⁹⁵ This means the state adopting the measures in question is not “the sole arbiter of the scope and application” of the exemption relied on.⁹⁶ It is for a tribunal to evaluate whether impugned measures fall within the exemption⁹⁷ and this means it is for the tribunal itself to determine whether the state acted equitably, non-discriminatorily and in good faith in applying its law to limit a transfer of funds. In analysing similar language to the effect that non-discriminatory measures designed and applied to protect legitimate public welfare objectives including public health and safety do not constitute expropriation, Brew noted the “low nexus threshold” of such a

92 *Id.* at art. 12(3).

93 *Id.* at art. 12(6).

94 *Id.* at art. 12(3) and (6).

95 *Cont'l Cas. Co. v. Arg. Republic*, ICSID Case No. ARB/03/9, Award, ¶ 187 (Sept. 5, 2008).

96 *CMS Gas Transmission Co. v. Arg.*, ICSID Case No. ARB/01/8, Award, ¶ 366 (May 12, 2005).

97 *Id.* ¶ 189.

clause and the condition that the measures be non-discriminatory”⁹⁸.

The object of the requirement for equity, non-discrimination and good faith in exercising the right to restrict transfer of investment funds might be to prevent the abuse of this power of the contracting states to restrict the transfer of investment capital and returns. However, by making the authority to restrict transfer subject to good faith, equity and non-discrimination, the investor's right to transfer is thereby made absolute in the event that any one of these conditions is not met. The prudence of having a qualification to the right to restrict transfer is questionable. If the legitimacy of seeking to restrict the transfer is not disputed, it is less clear why a state should not have absolute right to restrict the transfer. Again, if the legitimacy of the restriction on transfer is not disputed, it is less clear why a state should not be entitled to discriminate between investors to secure the object of restricting transfer, if the state is otherwise acting in accordance with law and due process.

ii. Regional Investment Treaty Reforms in Africa

Regional investment treaties have also undergone some reform in Africa. Many of them are development policy space friendly, but some are templates or model investment treaties and the extent of their influence in the making of investment treaties entered into has not been researched yet. James Gathii has fully treated the subject of regional trade and investment law in Africa in his book, *African Regional Trade Agreements as Legal Regimes* although the book was published before the most recent investment treaty reform.⁹⁹

The Southern African Development Community Protocol on Finance and Investment (SADC PFI) is one such regional investment agreement. It was adopted by SADC member states on 18 August 2006 and entered into force on 16 April 2010. The SADC PFI is aimed at harmonising investment policies among member states of the SADC to promote the region's economic integration objective. Twelve members of SADC signed the Agreement Amending Annex 1 (Cooperation on Investment) of the Protocol on Finance and Investment on 31 August 2016¹⁰⁰ (Agreement Amending SADC PFI).

98 Brew, *supra* note 5, at 237; see also Chauvel, *supra* note 14, at 153 (drawing a similar conclusion in relation to general exceptions and national treatment standard).

99 JAMES THUO GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* (2011).

100 Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, Aug. 31, 2016, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5527/download>.

The Agreement Amending SADC PFI prohibits nationalisation or expropriation of investment.¹⁰¹ However, measures of general application do not constitute expropriation of a debt security or loan even if they impose costs on the debtor and cause the debtor to default on its debt.¹⁰² Also, measures of general application by a state party “designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation.”¹⁰³ To limit the factors that must be taken into consideration when determining whether foreign investors and domestic investors are in like circumstances for purposes of the national treatment standard, the Agreement Amending SADC PFI provides that such a determination shall be done on a case-by-case basis based on specified factors.¹⁰⁴ Furthermore, notwithstanding the national treatment standard, a state party may in accordance with “domestic legislation grant preferential treatment to domestic investments and investors in order to achieve national development objectives.”¹⁰⁵ Above all, investors and their investments “shall abide by the laws, regulations, administrative guidelines and policies of the Host State for the full life cycle of those investments.”¹⁰⁶ In the absence of these exceptions, preferential treatment of domestic investors for the same development objectives could constitute breach of the applicable IIA.

The 2012 SADC Model BIT specifically addresses the issue of the right of states to pursue development goals. Article 21 of the Model BIT provides that “[n]otwithstanding any other provision”¹⁰⁷ of the agreement, a state party may grant preferential treatment based on domestic legislation “in order to achieve national or sub-national regional development goals.”¹⁰⁸ State parties may also take measures that:¹⁰⁹ (1) support the development of local entrepreneurs; (2) increase employment; (3) increase human resource capacity and training; or (4) are necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures.

101 *Id.* at art. 5(1).

102 *Id.* at art. 5(6).

103 *Id.* at art. 5(7).

104 *Id.* at art. 6(2).

105 *Id.* at art. 6(3).

106 *Id.* at art. 8.

107 S. AFR. DEV. CMTY., SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY art. 21.1 (July 2012), <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

108 *Id.* at art. 21.1

109 *Id.* at arts. 21.2-21.3.

These are all important safeguards for the duty to regulate in Africa if adopted in BITs. However, some features of SADC Model BIT entrench the limiting effect of investment treaties on the duty to regulate through such terms as expropriation (direct and indirect). As Sornorajah has stated, indirect expropriation “takes place within a wide variety of circumstances ... It cannot be identified through a single principle.”¹¹⁰ Yet, the SADC Model BIT seeks to provide for investors’ right against indirect expropriation, stating in Article 6 that a state “shall not directly or indirectly nationalize or expropriate investments in its territory except: (a) in the public interest; (b) in accordance with due process of law; and (c) on payment of fair and adequate compensation within a reasonable period of time.” Jeswald Salacuse has defined indirect expropriation as arising “in situations in which the host states invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors’ legal title to their assets or diminishing their control over them.”¹¹¹

According to Salacuse, “all host countries have a legitimate duty to regulate investors and investments in their territory, but the precise boundary between legitimate regulation and acts that violate a Treaty’s expropriation provisions is often difficult to determine.”¹¹² This is the more reason *indirect* expropriation provisions should not be encouraged in investment treaties. If regulation adversely affects domestic investors and foreign investors in like circumstances and domestic investors go without compensation, it is less clear why foreign investors should be singled out for privileged treatment, especially when they assert a right to national treatment. Moreover, it is extremely unlikely that governments would be in a position to know and therefore assess the adverse impact that a measure constituting indirect expropriation might have on an investment before the measure is taken. In the absence of such prior knowledge, governments would likewise not be in a position to determine the compensation to pay an investor before the measure is taken. Thus, by making explicit provision for indirect expropriation for foreign investors, the duty to regulate that could be reclaimed under some of the features of the Model BIT preserving that right could unreasonably be taken away. If Model BITs prove ineffective, they will perpetuate the problems they were meant to cure in IIAs.

110 M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 437 (4th ed. 2017).

111 JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 525 (2nd ed. 2015).

112 *Id.* at 326.

The Economic Community of West African States (ECOWAS) has Community Rules on Investment (CRI), which have been in force since 2009.¹¹³ The objective of the CRI “is to promote investment that supports sustainable development” in the ECOWAS region.¹¹⁴ Like the Agreement Amending SADC PFI, the CRI provides that a measure of general application does not constitute expropriation of a debt security or loan even if it imposes costs on the debtor thereby leading to the debtor defaulting on its debt.¹¹⁵ The duty to transfer funds is not absolute as it may be limited in specified circumstances.¹¹⁶ Investors and their covered investments “are subject to the laws and regulations”¹¹⁷ of the host state and “shall strive through their management policies and practices, to contribute to the development objectives of the host States and the local levels of government where the investment is located.”¹¹⁸ The CRI imposes pre-establishment obligations on investors and investments to conduct social impact assessment of the potential investment and comply with minimum standards on socio-cultural impact of the assessment.¹¹⁹ In addition, investors “shall be subject to civil actions for liability in the judicial process of their host State for acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State.”¹²⁰ The ECOWAS Common Investment Code of July 2018, a soft instrument, contains similar provisions like ECOWAS CRI.¹²¹ The ECOWAS Common Investment Code imposes substantive obligations on foreign investors, including Article 27 which states significantly that:

27(1) Investors doing business in the ECOWAS territory shall comply with the following environmental obligations under this Code to: (a) carry out their business activities in strict conformity with the applicable national environmental laws, regulations, and administrative practices of the Member States and other multilateral agreements applicable to their investments; (b)

113 Supplementary Act Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, A/SA.03/12/08, Dec. 19, 2008, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download> [hereinafter Community Rules on Investment].

114 *Id.* at art. 2.

115 *Id.* at art. 8(7).

116 *Id.* at art. 10.

117 *Id.* at art. 11(1).

118 *Id.* at art. 11(3).

119 *Id.* at art. 12(1).

120 *Id.* at art. 17.

121 ECOWAS Common Investment Code (ECOWIC) arts. 31-32 (July 2018), <https://ecotis.projects.ecowas.int/wp-content/uploads/2020/06/ECOWIC-JULY-2018-FINAL-ENG2.pdf>.

undertake pre-investment environmental and social impact assessments of their proposed business activities and investments with respect to the natural environment and the local population in the relevant jurisdiction; (c) apply the precautionary principle to their environmental and social impact assessments and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to such investment; (d) make the investor environmental and social impact assessments available to the general public and accessible to the affected local communities and to any other affected interests in the Member State of the proposed investment; (e) perform the restoration, using appropriate technologies, for any damage caused to the natural environment and to pay adequate compensation to all affected interested persons

These are novel features that seek to secure states the duty to regulate and at the same time bring about corporate legal accountability.¹²² However, they are effective only among countries which are members of ECOWAS and do not affect the rights available to foreign investors under BITs concluded by member states of ECOWAS with other non-ECOWAS countries. Moreover, the same CRI that seeks to preserve the duty to regulate also require member states to accord investors “treatment in accordance with customary international law, including fair and equitable treatment and reasonable protection and security under the domestic law”¹²³ of a member state. This obligation “prescribes the customary usage of international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to investments.”¹²⁴ The content of the international minimum standard of treatment of aliens is difficult to identify.¹²⁵ More fundamentally, the existence of the standard itself has been a matter of division among states for a very long time to date.¹²⁶ The inclusion of terms in investment treaties that lack precise boundaries creates the risk of the duty to regulate which could have been preserved by the more qualified protections to investors under the CRI never being preserved.

122 See also Revised Investment Agreement for the COMESA Common Investment Area (CCIA), <https://www.comesa.int/wp-content/uploads/2020/10/English-Revised-Investment-agreement-for-the-CCIA-28.09.17-FINAL-after-Adoption-for-signing.pdf>.

123 Community Rules on Investment, *supra* note 113, at art. 7(1).

124 *Id.* at art. 7(2).

125 SORNARAJAH, *supra* note 110, at 155-57 and 405.

126 *Id.* at 150-54 and 405-11.

iii. Continental Investment Treaty Reforms in Africa

At the continental level, an important soft law instrument the African Union (AU) has put in place in furtherance of the objectives of the AU primary treaty, especially on economic integration, is the 2016 Draft Pan-African Investment Code (PAfIC).¹²⁷ The PAfIC seeks “to promote, facilitate and protect investments that foster the sustainable development of each Member State.”¹²⁸ It provides for various qualifications to the usual standards of investment protection to limit the scope of their application¹²⁹ and abandons standard investment treaty terms such as full protection and security and fair and equity treatment.

The PAfIC provides, quite uniquely, that in order to qualify as an investment, the business undertaking must, among other factors, make “a significant contribution to the host State’s economic development.”¹³⁰ The addition of contribution to the development of the host state as an element of investment in the PAfIC should help settle the issue whether or not an investment is entitled to protection under an IIA if it does not make a contribution to the development of the host state.¹³¹ Arbitral tribunals are divided on the subject into those that support contribution to development as an element of investment¹³² and those that do not.¹³³ The position adopted by the AU is in accord with the very conventional wisdom underlying the making of BITs and other IIAs, namely that they are necessary to attract investment for development. The PAfIC also has provisions specifically on the obligations of investors.¹³⁴

127 Afr. Union Comm’n, Draft Pan-African Investment Code (Dec. 2016) [hereinafter PIAC].

128 *Id.* at art. 1.

129 *Id.* at arts. 7-12 and 15-17.

130 *Id.* at art. 4(4)(vi).

131 Dominic Npoanlari Dagbanja, *The Development Objective as an Imperative in Interpretation of International Investment Agreements*, 44 U.W. AUSTL. L. REV. 144 (2018).

132 *Salini Costruttori S.P.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001); *Fedax N.V. v. Republic of Venez.*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objection to Jurisdiction (July 11, 1997); *Patrick Mitchell v. Dem. Rep. Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (Nov. 1, 2006); *Malaysian Historical Salvors Sdn, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007); *Alex Genin v. Est.*, ICSID Case No. ARB/99/2, Award (June 25, 2001); *Pantechniki S.A. Contractors & Eng’rs (Greece) v. Alb.*, ICSID Case No. ARB/07/21, Award (July 30, 2009); *Amco Asia Corp. v. Indon.*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010).

133 *Société Générale v. Dom. Rep.*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (Sept. 19, 2008); *Consorzio Groupement L.E.S.I.-DIPENTA v. Alg.*, ICSID Case No. ARB/03/08, Award (Jan. 10, 2005); *Electrabel S.A. v. Hung.*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012).

134 PIAC, *supra* note 127, at arts. 19–24.

Thus, the PAfIC was designed to assure investment promotion and protection within the context of member states' duty to regulate in the public interest and to ensure that investment ultimately contributes to the development of the host state. The terms of the PAfIC give effect to its drafters' recognition in the preamble that the AU member states have the right "to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promote sustainable development objectives."¹³⁵ The PAfIC now provides a framework for ongoing negotiation of the Investment Protocol to the Agreement Establishing African Continental Free Trade Area.¹³⁶

These reform efforts point to Africa giving primary consideration to sustainable development as an overarching objective of investment treaties, defining investment in terms of its contribution to the development of host states, abandoning or qualifying the usual standards of investment protection and providing for binding obligations on investors.¹³⁷ However, as Meg Kinnear and Paul Cannu pointed out, the "effectiveness of these new treaty obligations, including new obligations weighing on investors, will depend in large part on the tools used for their enforcement."¹³⁸ The broad nature of most standards of investment protection such as fair and equitable treatment and full protection and security remains unaffected by the general exceptions for the duty to regulate because the exceptions are not directly related to these standards.¹³⁹

These reforms may not be directly aligned with the requirements of national constitutions from which the duty to regulate derives. These reforms in Africa are general and based on the challenge posed by absolute standards of investment protection and investor-state arbitration. It does not seem the reform efforts have been informed by the specific dictates of national constitutions in Africa, except in the case of South Africa.¹⁴⁰ Investment treaty reforms to accommodate development policy space and the duty to regulate in Africa must be informed by the nature of the constitutional duty to regulate. Unless ongoing reforms are

135 Dagbanja, *supra* note 23, at 354-55.

136 Mbengue, *supra* note 27, at 473.

137 Kinnear & Cannu, *supra* note 31, at 544.

138 *Id.* at 545.

139 Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections - Is a General Exceptions Clause a Forced Perspective?*, 39 AM. J.L. & MED. 332, 356-59 (2013).

140 Protection of Investment Act 22 of 2015, Preamble, § 3-4, 6, 10 and 12 (S. Afr.); S. AFR. DEP'T OF TRADE & INDUS., BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 24, 32-33 and 41 (June 2009).

done in the context of specific constitutional rights and obligations, the terms agreed to and flexibilities incorporated into investment treaties may not lead to compatibility between the duty to regulate under national constitutions and obligations under those investment treaties. Thus, the extent of constitutional public interest obligations must determine treaty negotiation and conclusion as along as national constitutions retain supremacy in the hierarchy of legal norms and dictate international economic relations at the national level.

IV. Conclusion

Almost every country or region of the world that is party to or has IIAs is now taking some steps to reform its IIA regime to accommodate the duty to regulate.¹⁴¹ Outside of the African continent, various proposals have been made for the reform of investment treaties and investor-state arbitration. The UNCTAD has not only developed rules on transparency¹⁴² but has also proposed various ways in which investor-state arbitration could be reformed.¹⁴³ The European Union and its partners' inclusion of investment dispute provisions in the Comprehensive Economic and Trade Agreement¹⁴⁴ and the Transatlantic Trade and Investment Partnership Agreement¹⁴⁵ received significant public opposition. This forced the European Union to propose changes to investment dispute settlement procedures and the creation of an Investment Court System (ICS).¹⁴⁶

These European reforms seem to be a replica of what has long been advocated for by Africa and the developing world generally. Africa and the developing world have long stood for their sovereign duty to regulate the activities of multinational businesses entities within their jurisdiction and to control the exploration, development and disposition of their natural resources and wealth under domestic law.¹⁴⁷ This is reflected in the *Declaration on the Establishment of a New International Economic*

141 UNCTAD, World Investment Report 2019, *supra* note 8, at 99-115

142 U.N. Commission on International Trade Law, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).

143 U.N. Conference on Trade and Development, IIA Issues Note: Reform of Investor-State Dispute Settlement: in Search of a Roadmap, UNCTAD/WIR/2013 (2013).

144 Comprehensive Economic and Trade Agreement (CETA), Can.-E.U., Oct. 30, 2016.

145 The Transatlantic Trade and Investment Partnership negotiations were launched in 2013. Negotiations ended without definite agreement at the end of 2016. See Council Decision (EU) 6052/19 of Apr. 9, 2019, Authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods, <https://www.consilium.europa.eu/media/39180/st06052-en19.pdf>.

146 Lisa Diependaele et al., *Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System*, 24 NEW POL. ECON. 37 (2019).

147 Mbengue, *supra* note 27, at 459-560.

*Order*¹⁴⁸; the *Charter of Economic Rights and Duties of States*,¹⁴⁹ and *Permanent Sovereignty over Natural Resources*.¹⁵⁰ The values embodying these norms include respect for sovereignty over natural wealth and resources,¹⁵¹ the need to respect domestic law and exhaust local remedies¹⁵² and the sovereign duty to regulate and exercise authority over foreign investment and the activities of investors and other multinational business entities.¹⁵³ These are the values and principles that underlie current global reforms of investment treaties pursued by developed countries that initially promoted IIAs and their ill-defined terms as the preferred international rules for investment protection.

The current reform of investment treaties in Africa as analyzed above are consistent with these earlier efforts for the sovereign right of developing countries to regulate the activities of multinational business entities operating in their territories. Current investment treaty reforms in Africa make general exceptions for the duty to regulate. These reforms certainly make a huge difference from the absolute standards of investment protection contained in the investment treaties concluded in the 1960s to the early 2000s. It is not certain, however, the scope of policy pace that in practice can be assured African states under these reforms given the qualifications characteristic of the reforms that seek to preserve African states' duty to regulate.

The limitations inherent in investment promotion and protection by treaty and arbitration which have necessitated ongoing global reforms of the IIA regime, even by regions of the world that originally championed these as the best mechanisms, impel African countries to rethink the utility and necessity of this regime in the first place. The powers of governments in Africa must be exercised first to promote the welfare of the people by and for whom these governments are constituted. This imperative must govern investment treaty reforms in Africa. International investment promotion and protection treaties and policies must align with fundamental human rights such as the duty to development and a clean and safe environment and corresponding duties of African states. This is

148 G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974) [hereinafter New International Economic Order].

149 G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974) [hereinafter Charter of Economic Rights and Duties of States].

150 G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962).

151 *Id.*

152 *Id.*

153 *Id.*; Charter of Economic Rights and Duties of States, *supra* note 149, at art. 2(1)(a); New International Economic Order, *supra* note 148.

because the advancement of the welfare of the people is or should be the reason African countries enter into investment treaties in the first place. Since states, within and outside Africa, are now willing to limit the protections available to investors and their covered investments under investment treaties, the question arises as to what remains under those treaties for investors that cannot be achieved for them under municipal investment laws and policies. Therefore, the debate in Africa about reforming investment laws and policies must consider the potential role of regulating foreign investment under municipal law. The limitations of investment treaty law make a case for serious reforms or alternatives to this regime to be considered rather than sticking to the existing regime or proposing reforms that entrench the wrong notion that without investment treaties foreign investors cannot be assured of effective protection.

Tackling The Conundrum; Climate Change And Stabilization Under Fair And Equitable Treatment

Ian Mwiti Mathenge

Abstract: *Climate change is a lethal, global, and imminent problem with a capacity to disrupt the orthodox areas of international law including international investment law. This project examines the conflict between the standard of a stable legal environment under fair and equitable treatment (FET) in international investment law and climate change action. It argues that FET is a broad standard, asymmetrically applied to provide stability to foreign investments, which will clash with climate change policies. The paper calls for viewing climate change as an emergency which has the implication of elevating its international law obligations above the ordinary ones. It explores FET's standard of legitimate expectation and argues for its reorientation to context-sensitivity. The piece proposes "the malleable thesis" as an alternative project on how tribunals should approach legitimate expectations. To solve the conflict, the project makes a normative case for erga omnes climate change obligations based on treaties language and nature of climate change. Through a novel argument on the effect of erga omnes, the piece argues that international investment law should "cede way" to climate change in case of a conflict. The paper asks a bonus question of who should decide investment disputes related to climate change, and it concludes that there are severe concerns about tribunals deciding these cases. However, tribunals may decide climate change cases if they have a "Damascus moment" characterized by a radical shift from investor exclusive adjudication to deference to public interest.*

1 Introduction

Climate change is the greatest catastrophe of our century, often described in eschatological terms. It is what “war” was for the 20th century, characterized by maiming and killing masses at the gruesome hands of armed conflict. The 20th century has acquired names such as bloody century, ¹genocide century, ²age of genocide, ³most violent century ⁴and others calling it the 20th-century DEMOCIDE, ⁵which is a combination of genocide and mass murder. War claimed 187 million people in the 20th century to earn the first place as the doomed century for humankind. ⁶Climate change promises a devastating 21st century, with reports showing that it will claim 83 million people by 2100 and cause enormous damage. ⁷According to a study called the mortality cost of carbon, the number of deaths that will occur is wholly dependent on the effort to reduce greenhouse gases (GHG). ⁸Each year more than 5 million people die because of climate change, with these numbers expected to rise. ⁹The effects of climate change are horrifying, and they include sky rocketing sea levels, which poses a danger to small island states. Wildfires, hurricanes, flooding, drought, and extreme heat are other effects of climate change. The 2022 Intergovernmental Panel on Climate Change (IPCC) report paints an atrocious picture by concluding that “if global warming exceeds 1.5 degree Celsius ... many human and natural systems will face additional severe risks”. ¹⁰To avert or mitigate this crisis, states must act aggressively to cut GHG emissions. Yet, international investment law is working against the goal of reducing GHG.

Armed with over 3,000 bilateral investment treaties (BITs) and other numerous international investment agreements (IIAs), foreign investors have launched a scathing attack on climate change action. ¹¹In 2021 RWE and Uniper, two German companies,

¹ Mark Levene, *Why Is the Twentieth Century the Century of Genocide*, 11 J World Hist 305, 305(2000).

² *Id.*

³ Roger Smith, *Human Destructiveness and Politics: The Twentieth Century as an Age of Genocide*, In Isidor Wallimann and Genocide and The Modern Age: Etiology and Case Studies of Mass Death 21, 21 (Michael N. Dobkowski, Eds, 1987).

⁴ Richard Harwood, *Death In The 20th Century* Washington Post (April 27, 1995) <https://www.washingtonpost.com/archive/opinions/1995/04/27/death-in-the-20th-century/D3f6e534-Fd22-4156-863d-490e143a2e3b/>.

⁵ Rummel Rudolph, *20th-Century Democide*, Publicado En Internet (April 10th 2022) <http://Hawaii.Edu/Powerkills/DBG.CHAP1.HTM>.

⁶ Levene, Mark Supra1, 305.

⁷ Bressler Daniel, *The Mortality Cost of Carbon* 12 Nat. Commun 1, 5 (2021).

⁸ *Id.*

⁹ Zhao, Qi, Et Al Global, Regional, And National Burden of Mortality Associated with Non-Optimal Ambient Temperatures from 2000 To 2019: A Three-Stage Modeling Study 5.7 The Lancet Planetary Health 415, 425 (2021).

¹⁰ The Intergovernmental Panel On Climate Change Climate Change 2022 Impacts, Adaptation and Vulnerability Working Group II Contribution to The Sixth Assessment Report of the Intergovernmental Panel On Climate Change 1, 3-96(2022).

¹¹ Stuart Braun, *Multi-Billion Euro Lawsuits Derail Climate Action*, DW (April 19 2022) <https://www.dw.com/en/energy-charter-treaty-ect-coal-fossil-fuels-climate-environment-uniper-rwe/a-57221166> 19.04.2021 DW.

challenged the Dutch government's plans to phase out coal by 2030 in line with the global push to reduce GHG.

¹²Rockhopper which is a UK company has challenged Italy's ban on drilling within 12 miles of the coast. Westmoreland and Lone Pine companies are suing Canada disputing the ban on hydrocarbon exploration. TransCanada, a Canadian company, has sued US for failure to grant permits for the Keystone XL pipeline project. Ascent Resources has instituted a case against Slovenia challenging the Environmental Impact Assessment (EIA) requirement for fracking activities. These fossil fuel companies are using international investment law to claim over \$ 18 billion for climate change related policy changes.

International investment law has adopted nebulous standards such as fair and equitable treatment (FET) to advance investor interests. ¹³FET has been the single most relied upon standard as a path to unrestricted incorporation of investors' rights. ¹⁴Investors relish FET's principles of legitimate expectation and provision of a stable legal environment because they impose stability akin to stabilization clauses. They limit the power of the state to regulate in public interest by imposing a legal freeze. These standards have led to an aggressive elevation of investor rights creating an inward-looking area of international law. Through lopsided guarantees, this regime has consolidated power in favor of investors. Even the most altruistic of states' policies have been challenged successfully. ¹⁵This insular preferment for investor rights has slowed down climate change action for fear of international investment cases.

This project interrogates the tension between the standard of a stable legal environment under FET and climate change policy. It proceeds on the premise that based on how international investment law has evolved primarily through tribunal decisions, this regime will conflict with climate action. ¹⁶Investor-state tribunals such as in *Eco Oro v Colombia* ¹⁷have found a violation even where the state acted to protect the environment. This finding is bolstered by numerous cases establishing a stable legal environment, such as *Occidental v Ecuador*. ¹⁸These tribunals have ignored the

¹² Di Salvatore Nathalie & Lukas Schaugg, *Despite Consensus On The ECT's Incompatibility With The Global Climate Agenda, Claims That It Is Well-Suited For The Clean Energy Transition Persist*, (April 14 2022) <https://www.itsd.org/itm/en/2021/10/08/malgre-le-consensus-quant-a-lincompatibilite-du-tce-avec-lagenda-climatique-mondial-les-arguments-selon-lesquels-il-est-appropri-e-pour-la-transition-vers-une-energie-propre-persiste-lea-di-salvatore-n/>.

¹³ United Nations Conference On Trade And Development, *Fair And Equitable Treatment UNCTAD Series On Issues In International Investment Agreements II*, 1,1 (2012) https://unctad.org/System/Files/Official-Documents/Unctad/iaeia2011d5_en.pdf.

¹⁴ Cliffe Dekker, *Substantive Rights: Fair and Equitable Treatment Standard Under International Investment Agreements*, Lexology 1[2018].

¹⁵ Bronfman Marcela Klein, *Fair and Equitable Treatment: An Evolving Standard*, 10 Max Planck Yearbook of United Nations Law 609, 617 (2006).

¹⁶ Wilensky Meredith, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership* 45 *Envt. L. Rep. News & Analysis* 10683, 1085 (2015).

¹⁷ *Eco Oro Minerals Corp. V. The Republic of Colombia*, ICSID Case No. ARB/16/4.1

¹⁸ *Occidental Exploration & Production Co. V. The Republic of Ecuador*, UNCITRAL, LCIA Case UN 3467, Final Award, 91 (July 1, 2004).

purpose of legal change by insisting that the investor must be compensated no matter the reason for changing the law. For example, in *Eco Oro and Santa Elena, S.A. v. Republic of Costa Rica*¹⁹ the tribunals were explicit that the noblest reasons such as protection of environment do not excuse the state from compensating the investor. The imposition of a stable legal environment and obligation to compensate investors will create a chilling effect. Yet, climate change action requires significant and urgent policy changes to phase out coal and other sources of GHG. This research explores how we should think about this problem, what is the solution, and who can find the solution. Based on current tribunal practices, international investments law has failed to navigate through states right to regulate causing a huge backlash.

It is not ingenious to claim that international investment law faces considerable backlash.²⁰ While there has been debate on how to respond to the backlash, its existence is axiomatic. Several proposals have been advanced on curbing the backlash.²¹ Depending on what one perceives as the problem, some have argued for reforms, others for renegotiation of IIAs, and others have called for abolishing the system. While this research situates itself in the reform agenda, it concentrates on transforming doctrine and adjudication. This project turns to general international law to construct a comprehensive analysis and solutions to essential doctrinal questions affecting international investment law. Unlike other proposals which concentrate on binary questions,²² this research constructs a nuanced doctrinal view.

This piece is grounded on general international law and legal theory. Although international law has not offered a perfect forum for engagement with major global emergencies, the language of emergency has galvanizing effect. Emergency offers a solution to the problem of conflicting obligations by giving a basis for elevation of some commitments. The project rejects the nihilist response to investor-state dispute resolution, which permeates most critiques of this regime. Instead, it is a practical inquiry into solutions of the structural problems facing international investment law. While the paper takes note of recent debates on climate change and *erga omnes*, it disagrees with International Law Commission (ILC) conservatism on the connection between climate change and *erga omnes*. By viewing international law as a value landed system, the piece uses the language of international obligations to create a hierarchy which will assist in resolving questions of conflicting obligations. The research examines recent development in international law such as CoP27, ILC report on preemptory norms and Germany withdrawal from Energy Charter Treaty to cement its case for the pervasive climate change disillusionment in international law.

¹⁹ *Compañía Del Desarrollo De Santa Elena, S.A. V. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, 212/387 Final Award (February 17, 2000) Para 17.

²⁰ Thomas Dietz, Marius Dotzauer & Edward S. Cohen, *The Legitimacy Crisis of Investor-State Arbitration and The New EU Investment Court System*, 26:4 Rev. Int. Political Econ 749, 750 (2019).

²¹ Brauch Martin, *Should The European Union Fix, Leave or Kill the Energy Charter Treaty*, 1, 3 (2021).

²² Olabisi Akinkugbe, *Africanization and The Reform of International Investment Law*, 53:1 Case W Res J Intl L 7, 12(2021).

Part, one offers an overview of the paper by situating the research problem within the current debate on climate change and international investment law. It also discusses why based on ongoing investment cases this problem is topical. In part two, the piece argues that FET is formulated in broad terms, applied in a one-sided way, which makes the standard a perfect vehicle to impose a stable legal environment. The paper contends that constraining FET in the new generation treaties has been ineffective because they operate in an environment with an embedded view of FET. It also posits that although tribunals have recognized FET as a standard, they have applied it as a categorical rule that operates without an exception. The third part discusses international law climate change obligations through the lenses of emergency. This part is supposed to map some of the climate change obligations that will conflict with FET and offer a basis for the framework of emergency which is a common theme in the paper. The basic idea here is that emergency offers a basis for elevation of climate change obligations.

In part four, the piece highlights the conflict between FET's standards of legitimate expectation and stabilization with climate change. It considers the fractures in international law as manifested by climate change and international investment law. The project discusses fossil fuels cases against climate change and concludes international investment law will offer a perfect avenue for this industry to challenge climate change. It reviews FET's main guarantee of legitimate expectation through "malleable thesis" which is exemplified by qualifications embodied in legitimate assurances. It argues for adoption of context-specific approach to interpreting stability and legitimate expectation. Part five makes a case for climate change *erga omnes* obligations based on language of climate change treaties and its nature. The paper addresses unexplored question of the effect of *erga omnes* obligations on treaty. It makes a novel argument that for an ordinary treaty to "cede way" for *erga omnes* if they conflict. Through what it calls treaty "obligation excuse" the tribunals have a basis to absolve state non-compliance with ordinary treaty obligation. Although the piece concedes that it is only *jus cogens* norms which have capacity of invalidating treaty obligations, *erga omnes* obligations offer a way out without invalidation. In part six, the piece argues that there are serious concerns on tribunals deciding climate change cases unless they drastically transform through what the paper calls "Damascus moment". The "Damascus Moment" entails centralizing and elevating public interest in cases involving the state right to regulate.

2 Fair And Equitable Treatment As An Ambiguous, And Asymmetrical Gateway To Stability

FET has received considerable attention because of the pivotal place it occupies in international investment law. It has emerged as one of the forefront standards in investor-state arbitration to be the most relied upon.²³ Nearly all IIAs contain FET as one of the core guarantees to foreign investors.²⁴ Despite the sacred place that FET occupies in international investment law, it is fiercely contested to a point of significantly contributing to the backlash of the entire regime. This contest raises the question of why this standard is this controversial.

This part argues that FET is often formulated in broad terms with ambiguous phraseology that are subject to undisciplined interpretation by tribunals. Although initially, well-intentioned FET has offered a gateway for tribunals to interpret it incorporating their sense of fairness beyond what states negotiated.²⁵ This standard has mutated to be an absolute and lopsided guarantee to foreign investors. Indeed, FET has become a pathway to stability akin to stabilization clauses, notwithstanding states did not agree to such clauses.

Although the critique of FET is not new, the contribution of this piece is a holistic examination of FET assessing the contribution of modern BITs. The other major contribution of this project is that it provides a coherent critical review of the underpinnings of FET. This wholesome discussion of FET reveals that it suffers from three major problems that make the standard antithetical to climate change. First, FET is an ambiguous standard. Second, FET has been interpreted to offer a stable legal environment that will impede climate action. Third, although tribunals have not classified FET expressly, as a rule, they have applied it as an absolute rule.

The importance of this comprehensive review is that FET is the primary standard that investors are likely to deploy in attacking climate change policy. This standard offers a perfect cover for imposition of the investor centered interpretation of international investment law. No matter how states strive to limit the scope of FET, tribunals treat it as a rule that does not allow for balancing of competing interest.²⁶ This part engages with works of prolific legal philosophers on the debate between a rule and a standard to establish that although tribunals have not characterized FET as a rule, they have approached it as such. This section offers a background for the discussions on how FET will limit climate change action.

²³ Cliffe Dekker Supra 14.

²⁴ Tarald Laudal Berge, *Dispute by Design? Legalization, Backlash, And The Drafting of Investment Agreements*, 64.4 Int Stud Q, 919, 924(2020).

²⁵ Boone Barrera Enrique, *The Case for Removing the Fair and Equitable Treatment Standard from NAFTA*, 128 CIGI Paper 1, 3-6(2017).

²⁶ Boone Barrera, Enrique Supra 25, 3.

2.1 General Overview and the Relevance of Fair and Equitable Treatment

FET has been touted as a core standard to protect foreign investors.²⁷ Since 2000 when FET was activated, it has become a favorite guarantee for investors and tribunals. Yet, this standard is a stumbling block to states right to regulate in public interest. The basic FET's formulation in most treaties is that "each contracting party shall accord the investor of the other party a fair and equitable treatment." This part gives examples of how tribunals have applied FET to contextualize and offer justification for discussing this standard.

FET is an unsettled standard that is used to challenge states power to regulate for varied reasons. The unequivocal nature of FET demonstrates that it is crucial to examine how it has been deployed to stop states from regulating in public interest. For example, in *Bilcon*²⁸ the tribunal was asked to examine whether FET was violated where Canada had included destruction of "community core values" as part of Environmental Impact Assessment. The project was going to adversely affect the community's environment and way of life. The reasoning of Canada was that the mining quarries were not compatible with community core values. The tribunal found that Canada had violated FET by including community values which it thought was an arbitrary consideration.

FET establishes a low threshold for its violation making it an easy standard for foreign investors to meet. What states need to do is act inconsistently or make a slight mistake and they will have violated FET. In *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*²⁹ it was held that the approval of the investment by the Foreign Investment Commission alone sufficed to give an investor legitimate expectation. This is even though the relevant ministry had refused to change the zone of the land based on existing urban policy. The government advised the investor to build the estate in other areas in Chile. In rejecting the State's position, the tribunal held that the government of Chile had violated FET because government agencies had contradicted themselves. Although Chile raised the defense of due diligence arguing the investor ought to have known about the country's urban laws and policy. The tribunals did not address the negligence of the investor.

In *Metalclad Corporation v. The United Mexican States*,³⁰ the tribunal held that the government of Mexico violated FET when the municipality refused to grant permit for the landfill for hazardous waste materials.

²⁷ Swisslion DOO Skopje V. Former Yugoslav Republic of Maced., ICSID Case No. ARB/09/16 award, Para 273 (July 6, 2012).

²⁸ William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. V. Government of Canada, PCA Case No. 2009-04- 17 March 2015 Award On Liability.

²⁹ MTD Equity Sdn. Bhd. And MTD Chile S.A. V. Chile, ICSID Case No. ARB/01/07.

³⁰ Metalclad Corporation V. The United Mexican States, ICSID Case No. ARB(AF)/97/1.

The local authority had acted to protect the local water and environment from contamination. However, the tribunal held that the purpose of the decree was irrelevant when examining how the investor has been treated.

FET is one of the vital substantives guarantees in international investment law. Most investment cases use this standard to challenge state power to regulate because of low threshold of establishing a violation and ambiguous formulation. It has several principles which are equally broad which make it “the go to standard” for many investors. The basic assumption of this part is that there is a huge problem with FET which will make it run counter climate change like it has impeded environmental and other social policies.

2.2 The Meaning of Fair and Equitable Treatment

There is no single agreed definition of FET. Where tribunals have been confronted with discerning the meaning of FET, they have resulted to the dictionary by disjointedly defining fair and equitable.³¹ In some cases, tribunals have attempted to define fair and equitable by using their synonyms.³² However, the challenge is that what is fair has the same meaning as equitable in the ordinary language, giving the impression that the phrase fair and equitable is redundant. Dolzer argues that the word fair and the word equitable have overlapping meanings.³³ The tribunal in *Saluka v Czech Republic*³⁴ acknowledge the difficult task of defining FET using ordinary language by stating that “[t]he ordinary meaning of the fair and equitable treatment standard can only be defined by terms of almost equal vagueness.” Additionally, the words fair and equitable taken separately on their dictionary meaning are broad, which is unhelpful in understanding FET.³⁵

The exact scope and meaning of FET are shaped by how, the concept is entrenched in treaties. There are two approaches to enshrining FET, first, providing FET as part of the minimum standard of treatment (MST) or as an autonomous treaty standard.³⁶ FET as an independent standard usually goes beyond FET as MST standard. The MST is the floor and entitles the investor to the protection as allowed by customary international law. Although it is essential to point out that this standard has evolved beyond the traditional *Neer case* standard,³⁷ it remains lower than the autonomous treaty guarantee³⁸.

³¹ *Eco Oro V Colombia* Para 759 Oxford and Black’s Law Dictionary.

³² *Suez, Sociedad General De Aguas De Barcelona SA, And Vivendi Universal SA V. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision On Liability (30 July 2010) Paras. 212-213.

³³ Dolzer Rudolf, Fair and Equitable Treatment: A Key Standard in Investment Treaties, 39 Int’l Law. 87, 91 (2005).

³⁴ *Saluka Investments BV V Czech Republic, Partial Award*, ICGJ 368 (PCA 2006), 17th March 2006 Para 297.

³⁵ Boone Barrera, Enrique *Supra* 25.

³⁶ United Nations Conference on Trade and Development *Supra* 13, 44.

³⁷ Schwebel Stephen, Is Neer Far from Fair and Equitable? 27.4 *Arbitr. Int.* 555, 555 (2011).

³⁸ *L. F. H. Neer V. United Mexican States Award*, IV RIAA 60 (October 15, 1926).

In practice, the distinction between MST and autonomous FET is blurred because tribunals have resulted in interpreting FET based on broad dictionary words.³⁹ For example, the Tribunal in *Eco Oro* used the dictionary meaning of FET after establishing that the Canada-Colombia IIAs provided for FET as part of MST under customary international law. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) is usually the justification that tribunals provide for interpreting treaties based on their ordinary meaning. What tribunals forget is that the ordinary meaning is to be interpreted in its context. In the case of FET as part of MST, the context is defined by the MST standard, which limits the broad FET. To unleash expansive words in interpreting FET under MST leaves no serious distinction between FET as autonomous standard and MST.⁴⁰

Some tribunals have been quick to characterize FET as a rule of customary international law without evidence. For instance, Prof Philippe Sands dissent in *Eco Oro v Colombia* captures the difference between FET as MST and as a customary international law standard which requires evidence of *opinion juris* and state practice.⁴¹ To fundamentally shift from MST standard in *Neer* case would be recreating a new standard away from what the treaty envisioned. As correctly expressed in *Glamis Gold, Ltd v United States of America*,⁴² the MST standard under *Neer* has not changed fundamentally to acquire the ordinary FET meaning. This is because MST standard prohibits conduct that is considered as the most deplorable in international law as demonstrated by phrases such as “egregious and shocking or offends judicial propriety.”⁴³

In *Waste Management II*⁴⁴ the tribunal described FET from the negative by listing what might be deemed as violating it. It started by stating that the conduct must be attributable to the state and harm the claimant. The tribunal went on to list conduct such as “arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome, which offends judicial propriety.”⁴⁵ This standard guards against discrimination and arbitrary interference with foreign investments. FET gives several broad duties to states that can be termed as catch-all obligations ranging from reasonableness, consistency, transparency, and due process.⁴⁶ The Tribunal in

³⁹ Pope & Talbot V. The Government of Canada, Interim Award, 22 (NAFTA Arbitration Panel) (June 26, 2000) Par 118.

⁴⁰ MTD V. Chile MTD Equity Sdn. Bhd. And MTD Chile S.A. V. Chile (ICSID Case No. ARB/01/7) Award Dated 25 May 2004 Para. 113.

⁴¹ *Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41 Philip Sands Dissent Para 7

⁴² *Glamis Gold, Ltd V United States of America*, UNCITRAL, Award (8 June 2009) (Exhibit CL-59), Para 21

⁴³ *Id* 616 and 627.

⁴⁴ *Waste Management, Inc. V. The United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award (April 30, 2004).

⁴⁵ *Id* at 98.

⁴⁶ *Saluka Investments B.V. V. The Czech Republic*, Partial Award. 17 Mar 2006 Para 288.

Loewen Group Inc. and Raymond L. Loewen v. the United States of America held that FET could be violated by states acting in bad faith.⁴⁷

The difficulty in defining FET is not a justification for tribunals to take the easy way out of interpreting FET to mean all guarantees for the investor. Enrique has described the problem as “FET principle itself has no fixed meaning and was developed by arbitral tribunals.”⁴⁸ Tribunals have developed FET as unchecked standard which operates as a free ride for investors. Despite this malleability when incorporating investor entitlements, tribunals have been rigid when asked to balance FET with state right to regulate in public interest. This asymmetrical interpretation of FET has defined international investment law as investor-centered regime.

The most prominent FET standards are legitimate expectation and provision of a stable legal environment.⁴⁹ These obligations are the mainstay of stability under FET. Under legitimate expectation the investor is guaranteed that states will honor their commitments. The state must have given a specific and reasonable representation expressly or impliedly, which the investor relies upon. An investor expects the state will provide a stable business legal environment that is predictable. Like FET, the contours of legitimate expectation and stability are not clearly delineated.

2.3 Fair and Equitable Treatment as an Ambiguous Standard

Different treaties stipulate FET distinctly depending on the generation of the Treaty. The old generation treaties enumerate states’ obligations to provide for a fair and equitable treatment to investors. As concerns arose on the exact scope and meaning of such an ambiguous statement, states have sought to offer some guidance. However, FET under the modern treaties has not deviated significantly from the old treaties.⁵⁰ Additionally, the new formulations are being applied in an environment that has an engrained view on what is the scope of FET.⁵¹ The Tribunal in *Eco Oro v Colombia* is quintessential example of the old mentality on FET being applied in the new generation treaties. Indeed, this underscores how the new generation treaties operate in an environment that has an entrenched worldview about FET as an open-ended standard that can be used to import whatever guarantees that tribunals finds appropriate. The implication of this is that even the modern treaties, which this piece considers as worded relatively ambiguous, ends up as grossly ambiguous.

⁴⁷ The Loewen Group Inc. And Raymond L. Loewen V. The United States of America, ICSID Case No. ARB (AF)98/3, Award (June 26, 2003) Para 132.

⁴⁸ Boone Barrera, Enrique Supra 25, 10.

⁴⁹ Eiser Infrastructure Limited and Energía Solar Luxembourg S.À R.L. V. Kingdom of Spain, ICSID, Case No. ARB/13/36, Final Award, 4 May 2017, Para 382.

⁵⁰ Enrique Boone Barrera Supra 25, 8.

⁵¹ *Id.*

The old regime of investment treaties provides for FET in the most generous terms.⁵² This regime includes all investment agreements covering 1959 to early 2000s, which usually did not contain concerns such as the environment. These treaties use a simple phrase asking states to offer fair and equitable treatment to the investments. The questions then arise of what is fair and what is equitable? Similarly, what threshold of violations amounts to a breach of FET? What acts can be termed as violating FET? Is fairness a relative standard, or is it an absolute standard entitled to an investor only? Fair to who? This ambiguity is compounded by the inherent wide scope of the words fair and equitable, which are subject to contested interpretation.

The Energy Charter Treaty is a good example of the old generation treaties that provides that state parties are required to guarantee fair and equitable treatment. Article 10(1) of the Charter decrees that there is a “commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.”⁵³ The Nigeria and United Kingdom BIT⁵⁴ provides that “[i]nvestments of nationals or companies of each Contracting Party shall at all times accorded fair and equitable treatment.”⁵⁵ Similarly, Article 9 of Netherland Model BIT provides that “[e]ach Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party.”⁵⁶ These examples demonstrate that old treaties provide for fair and equitable treatment in generic terms.

When concerns started to arise on FET impeding the right of states to regulate in public interest nations such as United States incorporated these concerns in their new generation treaties. United States has entered into 20 Free Trade Agreements (FTAs) detailing FET.⁵⁷ These agreements are with Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore.⁵⁸ Article 11.5 of the FTAs provides for “customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.”⁵⁹ The FTAs limit FET to what is enumerated in treaties. These treaties go along to list what FET includes, with a focus on due process in accessing justice.

⁵² Echeverri Javier, *Some Philosophical Questions to Understand the Role of Arbitrators Through the Notion of Fair and Equitable Treatment*, 24.1 *Estud. Socio-Jurid* 13, 15 (2022).

⁵³ Energy Charter Treaty 2080 UNTS 100.

⁵⁴ Agreement Between The Government Of The Federal Republic Of Nigeria And The Government Of The United Kingdom Of Great Britain And Northern Ireland For The Promotion And Protection Of Investments Em 1661 Abuja, 11 December 1990 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2110/download>.

⁵⁵ *Id.*

⁵⁶ Netherlands Model Investment Agreement 22 March 2019.

⁵⁷ Office of The United States, Trade Representative *Free Trade Agreements* (April 10 2022) <https://ustr.gov/trade-agreements/free-trade-agreements>.

⁵⁸ *Id.*

⁵⁹ United States Model Free Trade Agreements.

However, despite the enumeration of what FET means, FTAs' use of the word "includes" demonstrates that the list is not exhaustive.⁶⁰ This word undermines the intention of limiting the scope of FET. However, it is important to also acknowledge that an exhaustive list has a downside of having under-inclusive treaty.⁶¹ Second, this standard which is found in some of the modern treaties operates in an environment that has an entrenched view of FET as a catchall standard. This was experienced in the above case of *Eco Oro*, where despite the Canada and Colombia FTA providing that FET should not be applied beyond the customary international law MST standard, the tribunal disregarded the qualification.⁶²

The ambiguity of FET gives tribunals an opportunity to lower international investment law standards. This impedes state action because states do not know beforehand what behavior will amount to a breach of FET. The consequence of this is what Schill describes as "the standard acts as a malleable tool of ex post facto control of host states' measures based on the arbitrators' personal conviction and understanding about what is fair and equitable."⁶³ This was seen in the case of *CMS v Argentina* where the tribunal used the preamble to incorporate stability in FET. This was notwithstanding the lack of a guarantee of stability in the US—Argentina BIT (1991), which provided that "[i]nvestments shall at all times be accorded fair and equitable treatment...". The tribunal stated that even good-faith noble measures could violate FET since the purpose of the change of legal regime is not a consideration in assessing what is fair and equitable.⁶⁴

2.4 Fair and Equitable Treatment as a Gateway to a Stable Legal Environment

Stability has been a cornerstone of international investment law's guarantees to an investment.⁶⁵ Based on stability, the host state promises not to alter the business or legal environment significantly to the detriment of the foreign investor. While this guarantee looks conventional, it has been a source of enormous conflict. This conflict has been manifested through the tension between the change of legal regime for public interest and the provision of a constant business environment. Stability finds its way into international investment law in two ways.⁶⁶ The first is the adoption of stabilization clauses either in concessional agreements or national legislation. It is worth pointing out that stabilization clauses are on the decline. The second, which is more controversial, is importing the concept of stabilization under FET. This piece will examine in detail stabilization under FET.

⁶⁰ *Bharat Cooperative Bank (Mumbai) Ltd. V. Employees Union* (2007) 4 SCC 685.

⁶¹ *Id.*

⁶² *Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41 Para 755.

⁶³ Schill, *Stephan International Investment Law and Comparative Public Law* 157 (2010).

⁶⁴ *Id.* 280.

⁶⁵ Ortino Federico, *The Obligation of Regulatory Stability in The Fair and Equitable Treatment Standard: How Far Have We Come?* 21.4 *J. Int. Econ. Law* 845, 846-848 (2018).

⁶⁶ *Id.*

The second, which is more controversial, is importing the concept of stabilization under FET. This piece will examine in detail stabilization under FET.

While it is not clear from the formulation of FET that stabilization is part of its guarantee, in practice, it has been interpreted as a source of stability.⁶⁷ Many tribunals and scholars acknowledge that FET is linked to stabilization. For instance, Kopar states that “[i]t is true that there is an ever-growing arbitral practice that strengthens the link between the FET standard and the stability guarantee, insofar as some scholars view the FET standard as a new form of stability guarantee based on a treaty.”⁶⁸ The question then is what the contours of FET stabilization in the absence of a stabilization clause is. For a clear understanding of stabilization, it is important to distinguish stabilization clauses and general stability under FET.

Stabilization clauses are stipulations found in investments agreements and legislation limiting the host states’ power to change the legal regime during the life of a project or for a specified time.⁶⁹ These clauses can be classified as either freezing, economic equilibrium, or hybrid clauses.⁷⁰ Freezing stabilization clauses suspend the change of legal regime that has the potential of affecting the investment. The aim of these clauses is to ensure that the legal regime that operated at the time of the establishment of the business remains in place. The economic equilibrium guarantees the investors the right to compensation for the costs of complying with the changes in the law. The hybrid clauses combine characteristics of freezing clauses and the economic equilibrium.⁷¹ This operates through the guarantee that in cases of changes in the legal regime, the investor will be restored to the same position as before the changes of the law.

FET guarantees stabilization through two standards of legitimate expectation and a stable business and legal environment.⁷² Unlike stabilization clauses, stabilization under FET is expansive and lacks the delineation of its meaning. Most stabilization clauses have a specified period in which they operate, but FET’s stabilization applies as a perpetual standard. To some, the idea of stability reinforces the object of international investments law as a guarantor of the rule of law and fairness.⁷³ This piece will examine in detail the idea of stabilization when dealing with climate change and see how tribunals have interpreted these standards.

The common finding in cases dealing with stabilization has been that the purpose of change of the law is immaterial in determining the liability of the state.

⁶⁷ *Id.*

⁶⁸ Kopar Rahm, *Stability in International Energy Investments*. In *Stability and Legitimate Expectations in International Energy Investments*, 51–92 (2021).

⁶⁹ Frank Sotonye, *Stabilization Clauses and Sustainable Development in Developing Countries 10-26(2014)* (Ph.D. dissertation University of Nottingham).

⁷⁰ *Id.*

⁷¹ *Id.* at 26.

⁷² Henckels, *Caroline Proportionality and The Standard of Review in Fair and Equitable Treatment Claims: Balancing Stability and Consistency with The Public Interest 3 Society of International Economic Law (SIEL) Biennial Global Conference 3(2012)*.

⁷³ *Id.*

The Tribunal in *Enron V Argentina*⁷⁴ found that the state had violated FET by changing its law. This finding was made despite the grounds for changing the law being legitimate because of the economic crisis. The tribunal expressed itself as follows: -

It is clear that the 'stable legal framework' that induced the investment is no longer in place Even assuming that the Respondent was guided by the best of intentions, which the tribunal has no reason to doubt, there is here an objective breach of the fair and equitable treatment due under the Treaty⁷⁵.

Based on tribunals practice, FET can be described as the new stabilization clauses.⁷⁶ This ubiquitous standard has become a pathway to import stabilization of legal regime where states did not agree to a stabilization clause⁷⁷.

2.5 The Problem of Interpreting Fair and Equitable Treatment as a Strict Rule as Opposed to a Standard

Tribunals have applied FET as a rigid rule that operates without any exceptions or context. While most tribunals have not expressly categorized FET as a rule, they have applied it that way.⁷⁸ It is not enough for tribunals to call FET a standard or a principle because what matters in cases is the application and not labeling. This part argues that applying FET as an invariable rule undermines the ability of this standard to balance competing interests. The implication of a lack of balance is that tribunals end up deciding cases absent legitimate states' considerations. This conceptualization undermines the climate change agenda because of the need to balance the issue of stabilization and policy change to curb global warming.

The skewed application of FET as a rule that operates without exceptions has undermined the state's power to regulate in public interest.⁷⁹ Tribunals have disregarded whether the state acted in good faith to pursue a legitimate national goal.⁸⁰ For instance, in *Azurix v. Argentina*,⁸¹ the tribunal found a violation of FET where the state lowered water prices to ensure affordability and access. This change in water prices arose after serious concerns from the members of the public on how the water prices were hindering enjoyment of their right to water. The tribunal faulted the state for changing the water policy. It refused to recognize the importance of water for the public and balance between the rights of the investor and the obligations of the state to the public.

⁷⁴Enron Corporation and Ponderosa Assets, L.P. V. Argentine Republic, ICSID Case No. ARB/01/3

⁷⁵In 267 And 268.

⁷⁶Merrill & Ring Forestry L.P. V. Canada, Award, 31 March 2010, UNCITRAL Para. 232.

⁷⁷*Id.*

⁷⁸Windstream Energy Llc V Canada, Award, 27 September 2016, UNCITRAL, Para 380.

⁷⁹Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara J. Int'l L. 7, 27 (2014)

⁸⁰*Id.*

⁸¹Azurix Corp. V. The Argentine Republic, ICSID Case No. ARB/01/12.

While responding to Hart, Dworkin argued that Hart's view of law as a union of primary and secondary rules missed a fundamental part of the legal system.⁸² According to Dworkin, the distinction between rules and principles is logical. This distinction signifies convergence in obligation and difference in the character of duties. Dworkin then stated that "rules are applicable in an all-or-nothing fashion. If the facts are given, and the rule is valid, the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."⁸³ If accepted as valid, a rule must apply in a particular situation in a binding manner. They control the decision in a definite way by decreeing what must follow if the basic premise is established. This piece highlights the case for FET as a principle instead of a rule.

The meaning of FET has broad terms and concepts which are non-categorical.⁸⁴ For example, FET has been described as placing an obligation of reasonableness, non-arbitrariness, justness, and non-discriminatory.⁸⁵ These standards are malleable, and they invite some relativity in their examination. They are not categorical rules but are flexible standards that should be examined by looking at the case in totality.⁸⁶ For instance, reasonableness cannot be assessed without looking at the context of the dispute. It follows FET is not meant to apply in an all or nothing fashion.

FET offers an overarching standard that has sub-standards ingrained in it.⁸⁷ It represents what this research refers to as "the meta-principle" since it contains main guiding obligations. This principle acts as the broader principle which operates as the benchmark for examining other minor principles. For instance, under FET, one will find the obligation to adhere to legitimate expectations and provide a stable business environment. These principles are independent of each other, but they indicate how the investor should be treated. Therefore, FET represents an overall goal of various principles which should be realized to guarantee the overarching investor's rights.

The advantage of looking at FET as a principle instead of a rule is that tribunals will have leeway to balance this broad standard with other competing interests.⁸⁸ Duncan Kennedy argues in his seminal work that a rule is limited since it does not address substantive justice.⁸⁹ This is because the law tends to be indeterminate, and it is difficult to maintain a highly formal legal system.

⁸² Williams Michael, Assessment of The Dworkin-Hart Debate 13 (2005) (Masters Dissertation).

⁸³ Dworkin Ronald, The Model of Rule, 35 U Chi L. Rev, 14,25 (1967).

⁸⁴ Global Telecom Holding SAE V. Canada, ICSID Case No. A.R.B./16/16, Award (27 March 2020), Para. 561.

⁸⁵ MTD. Equity Sdn. Bhd. And MTD. Chile SA V. The Republic of Chile, ICSID Case No. A.R.B./01/7, Award (May 25, 2004) Par 11.

⁸⁶ Gold Reserve Inc. V. Bolivarian Republic of Venezuela, ICSID Case No. A.R.B. (AF)/09/1, Award (22 September 2014) Para. 566.

⁸⁷ Electrabel SA V. The Republic of Hungary, ICSID Case No. A.R.B./07/19, Decision On Jurisdiction, Applicable Law and Liability, November 30, 2012 Para. 7.74.

⁸⁸ Islam Rumana, *Proportionality as A Tool for Balancing Competing Interests in Investment Disputes: Fair and Equitable Treatment (FET) Standard in Context*, 1 Jahangirnagar Univ. J.L. 119, 121 (2013).

⁸⁹ Kennedy Duncan, A Critique of Adjudication 1700 (2009).

Even in a situation where we might think that the rule is settled, a situation that requires balancing might arise. Duncan Kennedy in referencing standards like good faith; he argues they represent the open texture of the law.⁹⁰The implication of this argument is that FET should be viewed as a standard guaranteeing justice.

FET as a rule would require perfect states conduct by imposing obligations such as acting consistently and coherently.⁹¹However, standards allow for margin of error by examining what offends the general principles instead of trivial details. Tribunals can look at the goals of the state action and whether it amounts to gross violation of investor rights.⁹²The other advantage is that tribunals avoid absurd decisions that categorical rules can present.⁹³Lastly, if they view FET as a principle, they will seek justice in the case, which is not one-sided.⁹⁴

In sum, FET has become one of the most invoked standards in investor-state arbitration. Despite the importance of this standard, it portends several challenges which undermine its effectiveness in balancing competing interests. This part has demonstrated that FET is an ambiguous standard that has been used by arbitrators to import their sense of fairness which is one-sided. Although the modern treaties have attempted to clarify FET, this has been clipped by the deep-rooted culture of viewing FET as a broad standard that permeates the entire investment regime. This is compounded using non-exhaustive words such as “includes” in enumerating the meaning of FET giving arbitrators leeway in importing the traditional view of FET. The ambiguity has given arbitrators a path to import stability into investments, even absent stabilization clauses.

3 International Law Obligations Relating To Climate Change In The Context Of Emergency

The world is in the midst of unparalleled climate change crisis. The crisis is lethal, worldwide, and irreversible. Climate change has already struck hard causing extreme weather, droughts, rising sea levels, flooding, 955 million deaths per year 96 and estimated 83 Million deaths by 2100. 97Consequently, Intergovernmental Panel on Climate Change(IPCC) has proclaimed that “limiting global warming to 1.5o C would require rapid far-reaching and unprecedented changes in all aspects of the society.”

⁹⁰ *Id.*

⁹¹ Arato Julian, *The Private Law Critique of International Investment Law*, 113.1 *Am. J. Int. Law* 1, 14-19 (2019).

⁹² *Id.* 21.

⁹³ *Id.* 20.

⁹⁴ *Id.* 25.

⁹⁵ Melissa Denchak, *Flooding and Climate Change: Everything You Need to Know*, NRDC (April 10, 2019)

⁹⁶ Laura Millan, *Climate Change Linked to 5 Million Deaths a Year, New Study Show*, Bloomberg (July 7, 2021, 6:30 PM EDT).

⁹⁷ Disha Shetty, *Climate Change Would Cause 83 Million Excess Deaths By 2100* (April 1 2022) <https://www.Forbes.com/Sites/Dishashetty/2021/07/30/Climate-Change-Would-Cause-83-Million-Excess-Deaths-By-2100/?Sh=45c7cf4845c4>.

⁹⁸The race to net zero has been bumpy but with concrete policy change and implementation this goal is achievable. States have created alliances committing to phasing out fossil fuel and other sources of GHG. In the just concluded COP26, 74 states have committed to net zero by midcentury.⁹⁹

States have adopted the language of international law to curb global warming.¹⁰⁰ Yet, international law is such an amorphous subject with contradictory obligations arising from its fragmentation. International investment law has embraced protection of foreign investments as its primary objective. This protection has been pursued without a sense of the wider context of international law. Conversely, climate change has adopted the reduction of GHG and the match to net zero as its primary objective. At the same time, climate change action has taken a global outlook through the prism of international law. To coordinate internationally, states have entered treaties such as the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement on Climate Change 2015. Indeed, climate change is one of the areas that is so reliant to international law and politics because of the global nature of global warming. GHG knows no boundaries nor does climate system.

The recent concluded UN Climate Summit in Egypt dubbed CoP27 demonstrates the weakness of relying on international law and politics to tackle a serious problem like climate change. While some have decried that the world is in the “highway to hell”,¹⁰¹ opinion on CoP27 remains divided, some say that “the 1.5C climate goal died at CoP27”,¹⁰² other have argued that CoP27 has achieved “Historical Win”,¹⁰³ and others concluding it is “flawed though still consequential”.¹⁰⁴ Whatever way one view CoP27, what emerged from the summit is that countries are pushing back expressly or by conduct against reduction of GHG. For example, Saudi Arabia is reported to have laid its case by stating that “we should not target sources of energy; we should focus on emissions. We should not mention fossil fuels.”

⁹⁸ The Intergovernmental Panel On Climate Change, *Summary for Policymakers of IPCC Special Report On Global Warming of 1.5°C Approved by Governments* (8 October 2018) https://www.ipcc.ch/site/assets/uploads/2018/11/pr_181008_p48_spm_en.pdf.

⁹⁹ Clea Schumer, *How National Net-Zero Targets Stack Up After The COP26 Climate Summit* (November 18, 2021) <https://www.wri.org/insights/how-countries-net-zero-targets-stack-up-cop26>.

¹⁰⁰ Ruppel Oliver, Christian Roschmann, and Katharina Ruppel, *Climate Change: International Law and Global Governance* 9,10-13 (Baden: Nomos 2013).

¹⁰¹ Sharon Kimathi, *Sustainable Switch: COP27 warned ‘We are on a highway to climate hell’* (November 17, 2022) <https://www.reuters.com/business/cop/sustainable-switch-cop27-warned-we-are-highway-climate-hell-2022-11-07/>

¹⁰² Damian Carrington, *the 1.5C climate goal died at Cop27 – but hope must not* (November 20, 2022) <https://www.theguardian.com/environment/2022/nov/20/cop27-summit-climate-crisis-global-heating-fossil-fuel-industry>

¹⁰³ Zack Colman, Karl Mathiesen, *COP27 Summit Yields ‘Historic Win’ for Climate Reparations but Falls Short on Emissions Reductions* (November 21, 2022) <https://www.scientificamerican.com/article/cop27-summit-yields-historic-win-for-climate-reparations-but-falls-short-on-emissions-reductions/>

¹⁰⁴ Covington Alert *COP27: A Flawed Though Still Consequential Climate Summit* (November 23, 2022,) <https://www.cov.com/en/news-and-insights/insights/2022/11/cop27-a-flawed-though-still-consequential-climate-summit>

¹⁰⁵Senegal's president has retorted on exploitation of fossil fuels" Why not? Why should Africa not do this?" ¹⁰⁶In addition to some states being spokespersons to the fossil industries, over 636 fossil fuel lobbyists were in Cop27. ¹⁰⁷The contested space of international law and politics demonstrate that although international law offers an important avenue for discourse it is limited because of varying interests of different states.

The framework of international law is inescapable for climate change action. This framework has numerous benefits including the availability of developed doctrines such as due diligence and no harm principle to supplement climate regime. ¹⁰⁸At the same time, climate change has an inherent emergency which calls for its relooking in the prism of crisis. Amid the catastrophe of the century, international law must adopt emergency as the structure of approaching climate change. This part argues that international law response to climate change needs to adopt an emergency framework. The emergency framework will influence how international law relating to climate change including investment law will be interpreted and implemented. It also shapes how states respond to climate change by elevating it to a priority.

3.1 International Law Norms Relating to Global Climate Change Emergency

States' climate change obligations are broad and often not expressed in precise terms. While there is no doubt that states have obligations toward climate, pinning down the scope of these responsibilities into actionable duties remains an uphill task. These obligations are spread throughout the numerous international instruments dealing with climate change. Climate change has international environmental law grounding that reinforces its ubiquitous obligations. Yet, international environmental law is not designed for an emergency. In this part, I look at how basic international environmental law obligations can be reoriented to deal with climate change as an emergency.

¹⁰⁵ Fiona Harvey et alia Cop27 first week roundup: powerful dispatches, muted protest, little cash (November 12, 2022)<https://www.theguardian.com/environment/2022/nov/12/cop27-first-week-roundup-powerful-dispatches-muted-protest-little-cash>

¹⁰⁶ Ruth Michaelson Cop27 first week roundup: powerful dispatches, muted protest, little cash+ (10 November 2022) <https://www.theguardian.com/environment/2022/nov/12/cop27-first-week-roundup-powerful-dispatches-muted-protest-little-cash>

¹⁰⁷ Ruth Michaelson 'Explosion' in number of fossil fuel lobbyists at Cop27 climate summit (November 10, 2022) <https://www.theguardian.com/environment/2022/nov/10/big-rise-in-number-of-fossil-fuel-lobbyists-at-cop27-climate-summit>

¹⁰⁸ Mayer Benoit, The Relevance of the No-Harm Principle to Climate Change Law and Politic, 19 Asia Pac. J. Environ. Law 79, 93 (2016).

3.1.1 The Obligation to Prevent and Not to Cause Excessive Emission of GHG Under the No-Harm and Precautionary Principle

States sovereignty is not a *carte blanche* to act unabated without considering how its actions or omissions might injure neighboring countries.¹⁰⁹ To ensure the responsible use of states' territorial areas, the no harm principles require states not to cause transboundary harm. The articulation of the no harm rules was made in the early case of Trail Smelter Arbitration. The tribunal stated that the state has no "right to use or permit the use of its territory in such a manner as to cause injury fumes in or to the territory of another."¹¹⁰ Yet, the traditional no-harm principle can prove unhelpful for a large-scale problem and an emergency like climate change.

Climate change is complicated and interconnected, which means that the actions of one state are likely to have a transboundary effect.¹¹¹ Indeed, the atmosphere does contain territorial boundaries. This means that the no-harm principle must be viewed in the context of climate change. One character that defines climate change is emergency due to its disruptive nature. Although the no-harm principle requires hard evidence and severity of transboundary injury, the emergency framework calls for tailoring of this principle in favor of climate change. This obligation calls for the presumption of transboundary harm regarding climate change if a state does not take reasonable measures to reduce its GHG. Admittedly, the question of causation has been a contested issue in climate change discourse. However, recent studies show that there is a link between GHG emissions and climate change¹¹².

States' obligations under no harm principles require both obligations of not injuring and preventing the harm.¹¹³ The no-harm rule imposes both a negative and positive duty.¹¹⁴ The negative obligation is for the state not to injure the neighboring country. The positive is for the state to exercise due diligence, which means adopting measures to prevent the harm. The conception of climate change as an emergency requires heightened due diligence. An emergency requires concerted effort to eliminate it. The state is then required to enact laws and policies to ensure that third parties within their territory do not cause injury to neighboring countries.

¹⁰⁹ Arya Neil, *Do No Harm: Towards A Hippocratic Standard for International Civilization*, Acad. 1,1 (2016)

¹¹⁰ Trail Smelter (U.S. V Canada), 3 R.I.A.A. 1907, 1965 (1938, 1941).

¹¹¹ Mayer, Benoit *Supra* 101, 27.

¹¹² Stips, Macias Coughlan. Et Al, *On the Causal Structure Between CO2 and Global Temperature* 6 Sci Rep 1,1 (2016). <https://doi.org/10.1038/Srep21691>.

¹¹³ Jervan Marte *the Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to The Development of the No-Harm Rule*, 1,55 (14-17 Pluricourts Research Paper 2014).

¹¹⁴ *Id* 49.

Additionally, due diligence obligations can complement usual climate change obligations by grounding state responsibility to enforce and monitor emission of GHG.¹¹⁵ For instance, a due diligence obligation entails the duty to conduct an Environmental Impact Assessment (EIA). By now countries should have adopted the climate change impact assessment, which includes assessing the GHG effect of defined projects.

The advantage of the adoption of the no-harm principle in the climate change context is that compared to usual climate change obligations, this principle has acquired the status of customary international law rule.¹¹⁶ The signaling of the no-harm principle as a rule of customary international law was made by the ICJ in the *Corfu Channel case*.¹¹⁷ Although the ICJ did not state that it was dealing directly with the no-harm principle, the import of its findings and articulation led to the conclusion that the court was dealing with this principle. The court stated that states are “under an obligation not to allow its territory knowingly to be used for acts contrary to the rights of other States.”¹¹⁸ The ICJ in *Corfu Channel* referred to the obligation not to harm the neighbor in general terms and without characterizing it as customary. In *Pulp Mills Case*, the ICJ, while quoting the *Corfu Channel case*, expressly acknowledged that the no-harm principle is a customary international law rule.¹¹⁹ It is essential to note that the court did not use the word no harm but the principle of prevention. However, the essence of the court’s formulation remains the same as the no-harm principle.

The invocation of the no-harm principle will present some difficulty because of the complexity of climate change. One complexity is being experienced in the standard of proof, and the causation threshold.¹²⁰ Even more importantly, the attribution of the harm to the state will be a challenge due to causation and delayed effect problems.¹²¹ The proposed threshold is significant harm caused by the lack of reasonable measures to prevent climate change.¹²² Nevertheless establishing violation of the obligation of states not to harm other states will be difficult. The only solution to these hurdles is the adoption of broad presumptions based on international acceptable levels of GHG. To the minimum, states should adopt measures to reduce the emission of GHG gases and have a system of monitoring the implementation of these measures.

¹¹⁵ *Id* 56.

¹¹⁶ Mayer, Benoit *Supra* 101, 93.

¹¹⁷ *Corfu Channel, United Kingdom V Albania, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949), 9th April 1949, United Nations [UN]; International Court of Justice [ICJ].*

¹¹⁸ *The Corfu Channel Case, The United Kingdom V. Albania, ICJ Rep. (1949) P 22.*

¹¹⁹ *The Case Concerning Pulp Mills On the River Uruguay, Argentina V. Uruguay, ICJ Rep. (2010).*

¹²⁰ Mayer, Benoit *Supra* 101, 92.

¹²¹ *Id.*

¹²² Mayer, Benoit *Supra* 101, 81.

3.1.2 International Law Obligations in the Context of Climate Global Emergency

Global climate change regime is operating in the shaky ground of international law. Climate change has infiltrated international law in unrivaled way significantly altering states slow-paced approach to international affairs. Yet, international law is highly contested subject with politics and interests taking center stage. Climate change is therefore facing the double problems of the weaknesses of international law and the contestation of climate change obligations. Despite these complexities and challenges, climate change has turned to international law for an answer. Can international law match the occasion of coordinating interests and providing a platform for global response in times of this emergency? How should international law obligations be viewed? What is the importance of shift in the conceptualization of international law obligation? This part seeks to engage with these puzzling questions to offer a solution on the cooperation's of international law in the age of the unprecedented crisis.

The recent IPCC report has described climate change in almost eschatological terms.¹²³ This picture of end of reality has been painted in the entire globe and across regions. The report has concluded that climate change has caused “widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability.”¹²⁴ The damage has been brutal on human life, the ocean life and entire ecosystem. It has had an impact on the physical health, livelihood, and precipitated humanitarian catastrophe. The bottom line is that it is not business as usual. How then should international law obligations be viewed in this era of climate change.

Climate change is global, destabilizing, and imminent threat to human life which requires decisive response from international law. With the rise of the sea level, the mass deaths of human being and threat to life in the entire ecosystem, climate change is an emergency.¹²⁵ The language of emergency is not strange in international law. The Human Rights Committee in its General Comment on article 4 of International Covenant on Political and Civil Rights places two conditions for public emergency.¹²⁶ First an emergency must threaten the life of a nation and second is official proclamation. Although meant for a different regime, the threat to the life of a nation emerges as the core element of public emergency. The impact of climate change reveal that it fits the threat to the entire humanity not only a single nation.

¹²³ The Intergovernmental Panel, On *Climate Change Climate Change 2022 Impacts, Adaptation and Vulnerability Working Group II Contribution to The Sixth Assessment Report of the Intergovernmental Panel On Climate Change* 1, 3-96(2022).

¹²⁴ *Id* 7.

¹²⁵ *Id* 42.

¹²⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

The conceptualization of climate change as an emergency will affect the interpretation and implementation of its obligations. These climate change obligations will have two impacts. The first is to reorient other international law obligations to align them with the climate change emergency. Emergency destabilizes the status quo by demanding its elevation and acute attention.¹²⁷ Second, emergency demands more than the ordinary conduct to alleviate its conditions. Almost all situations of emergency cause suffering which require a swift and imminent response. Rhetorically emergency has a way of galvanizing people around a course.

When dealing with climate change in the age of its emergency, it is important to resist inertia or indifference. The sources of the inertia are likely to manifest themselves in two ways. First, the parochial view of fragmented areas of international law.¹²⁸ The danger of this parochialism is that it blinds the emergency by adopting the view that it is the responsibility of another international law regime to deal with climate change. For instance, tribunals might argue that it is the responsibility of states to deal with climate change through the international climate change law. Second, the proclivity to think of climate change from one's own experience only. This view is what might be called as the lack of empathy while dealing with climate change related disputes. Although climate change affects the universe it has different direct impact to different places. It is tempting to treat climate change based on our own surrounding which is dictated by our locality. The effect of climate change might vary due to different resilient levels and adaptation mechanism.

This part has argued for the reorientation of conceptualization of climate change in the age of its emergency. It has argued that climate change must be viewed as an emergency which has implications on how states respond and how its obligations are mediated with other international obligations. Climate change has all elements of an international emergency such as it is posing an imminent threat to humanity as a whole, it has destabilizing effect to international order and lastly it has a global effect.

4 The Conflict Between Climate Change And Stabilization Under Fair And Equitable Treatment

The core question in this project is mapping the potential conflict between climate change and international investments law standards, particularly stabilization under FET. Before delving into addressing the conflict, it is vital to ask whether a conflict exists, or it is imaginary. States' obligations towards climate change demand alignment of previous international commitments.

¹²⁷ Julian Izzo, *Human Rights And Security In Public Emergencies* 1,1 (April , 5 2022) <https://www.E-Ir.Info/Pdf/94411>.

¹²⁸ Van Asselt, Harro, Francesco Sindico, And Michael A. Mehling, *Global Climate Change and The Fragmentation of International Law*, 30.4 *Law. & Pol'y*, 423, 434 (2008).

This alignment involves changes in law and policy to advance a climate change agenda. Understandably, global climate change action has gained traction recently.¹²⁹As a corollary, one expects a corresponding change in the legal regime to reflect the shift in international commitments. These changes are a source of potential conflict between states' interventions to realize climate change obligations and investors' rights.

There are two approaches to answering whether a conflict exists between climate change and investors' guarantees. The first approach posits that there is no conflict between international investment law and climate change.¹³⁰This approach relies heavily on the text of both regimes to argue that international texts on climate change do not require a change of law. International climate change treaties provide for broad mandate without specifying how to realize it. This means that states have alternatives ways of achieving the climate change targets. This approach was adopted in the progressive decision of *Suez and Vivendi Universal S.A. v The Argentine Republic*¹³¹ where the tribunal stated that "Argentina is subject to both international obligations, i.e. human rights and [investment] treaty obligations and must respect both of them equally. Argentina's human rights obligations and its investment treaties obligations are not inconsistent, contradictory, or mutually exclusive." Thus, the purported conflict is imaginary and, in some cases, self-created. Under this approach, the underlying philosophy is that the state is a rational actor with choices to realize international obligations without altering previous ones.

The second approach which this research adopts is that the conflict exists out of the implementation, and interpretation of international obligations.¹³²The conflict manifests itself through legislation targeting specific sectors with the highest carbon footprint, such as the fossil fuel industry. The other way is through general legislation that embraces broad policy change to implement climate change. This way, the foreign investor is caught up in the non-discriminatory regulation. Despite the non-discriminatory nature of the rule, the investors' guarantees are adversely affected.¹³³To buttress that the conflict between the two regimes exists, fossil fuel companies are challenging climate change action of several states claiming the violation of international investment law. This part engages with over \$ 18 billion worth cases that have been instituted against governments challenging climate change policies. It argues that the fossil fuel industry is likely to experience unprecedented levels of stranded assets because of climate change policies. It also engages the standards of legitimate expectation and a stable legal environment.

¹²⁹ Rinawati Fitria, Katharina Stein, And André Lindner, *Climate Change Impacts On Biodiversity—The Setting of a Lingering Global Crisis*, 5 Diversity 114, 115-116 (2013).

¹³⁰ Boute Anatole, *Combating Climate Change Through Investment Arbitration*, 35 Fordham. Int'l. LJ. 613, 653 (2011).

¹³¹ Suez, Sociedad General De Aguas De Barcelona, S.A. And Vivendi Universal, S.A. V. Argentine Republic, (ICSID Case No. ARB/03/19 Decision On Liability - 30 July 2010).

¹³² Condon Bradly, *Climate Change and International Investment Agreements*, 14.2 Chin. J. Int. Law 305,308 (2015).

¹³³ *Id*

Through what this research calls the “malleable thesis” this paper argues that legitimate expectation contains qualifications which reveal that it is a context sensitive guarantee.

4.1 Signs of a Fractured International Law Regime; Climate Change and International Investment Law

The implications of the match to net-zero will have serious casualties in the fossil fuel industry. Consequently, the fossil fuel industry has launched a serious attack on climate change action with a surge of investor-state cases being experienced. France bans on exploration of oil was thwarted by a threat from Vermilion, a Canadian company.¹³⁴Cases have been instituted at ICSID challenging climate change action against US, Netherlands, Italy, and Slovenia for over \$ 18 billion claiming breach of FET and legitimate expectation.¹³⁵Governments are being hampered from implementing ambitious climate change obligations because of the investor-state cases. In fact, the New Zealand minister of Climate Change decried that climate goals “would have run afoul of investor-state settlements.”¹³⁶Yet, these grossly conflicted regimes operate within the auspices of international law. This sub-part goes into details to examine this conflict using ongoing cases.

4.1.1 Climate Change and International Investments in Fossil Fuels; A Potential Tension

The fossil fuels industry poses the most significant challenge to climate change action. Increasingly, it is becoming clear that fossil fuel phase-out is inevitable.¹³⁷Domestically, governments are facing huge pressure from civil society to get rid of fossil fuels. For instance, in USA Center for Biological Diversity has mounted pressure on the US government to phase out fossil fuels exploration in public lands.¹³⁸At the international level, states are building alliances to match toward net-zero.

¹³⁴ ISDS Platform, *Vermilion Vs. France: Blocking Climate Change Laws With ISDS Threats* (April, 20 2022) <https://www.isds.bilaterals.org/?vermilion-vs-france-blocking>

¹³⁵ Matteo Fermeleglia, Catherine Higham, Korey Silverman-Roati And Joana Setzer, *Investor-State Dispute Settlement' As A New Avenue For Climate Change Litigation*, Columbia Climate Law Blog (March 13 2022) <https://blogs.law.columbia.edu/climatechange/2021/06/02/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/> .

¹³⁶ Elizabeth Meager, *Cop26 Targets Pushed Back Under Threat Of Being Sued*, Capital Monitor (March 13 2022) <https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/>.

¹³⁷ UN Climate Change News, *UN Chief Calls For Immediate Global Action To Phase Out Coal* (March 12 2022) <https://unfccc.int/news/un-chief-calls-for-immediate-global-action-to-phase-out-coal>.

¹³⁸ Center for Biological Diversity, *Legal Petition Calls On Biden to Phase Out Federal Oil, Gas by 2035* (March 10 2022) <https://biologicaldiversity.org/W/News/Press-Releases/Legal-Petition-Calls-On-Biden-To-Phase-Out-Federal-Oil-Gas-By-2035-2022-01-19/>.

For example, in the just concluded COP26, Costa Rica and Denmark governments launched the Beyond Oil and Gas Alliance (BOGA), which aims at assisting in the phase-out of oil and gas production.¹³⁹BOGA brings together countries such as France, Denmark, Costa Rica, Sweden, Wales, Greenland as core members and New Zealand, Portugal, and the state of California as its associate members. At the same time, Italy, Finland, and Luxembourg have registered as friends of this alliance. Again, in COP26, 28 states became members of Powering Past Coal Alliance, a 190-member alliance working on getting rid of coal.¹⁴⁰One of the achievements of COP26 was the declaration by 40 states that they commit to phasing out coal.¹⁴¹The efforts to decarbonize means that the states policy on climate change will significantly shift, rendering most fossil fuel investments useless. While the sincerity of these commitments remains to be seen, some countries have started to implement de-carbonization measures painting a gloomy picture for investors. This part discusses the effect of phasing out fossil fuels on international investors.

4.1.2 The Effect of Climate Change Action for The Fossil Fuel Industry

The journey to net-zero is bumpy, but it appears to be gaining traction across the universe. The European Union and 44 other countries, which make up 70 percent of the global emission, have adopted a net-zero target by 2050.¹⁴²This net-zero campaign requires a concerted effort to face-out fossil fuels and other sources of GHG. In COP26, the United States, Canada, and 18 other countries took a decisive stand to stop funding fossils fuel projects overseas using public funds.¹⁴³The implication of these efforts has been captured by Mercure and others in the following terms “[l]arge quantities of fossil fuel reserves and resources are likely to become ‘unburnable’ or stranded if countries around the world implement climate policies effectively.”¹⁴⁴ Even more gross for the fossil fuel industry is the finding that half of the fossil fuel properties will have no value by 2030.¹⁴⁵ The value of the stranded assets has been estimated at \$11 trillion - \$14 trillion.

¹³⁹ Beyond Oil & Gas Alliance, Redefining Climate Leadership (March 13th 2022) <https://Beyondoilandgasalliance.Com/> .

¹⁴⁰ Erika Lennon, Nikki Reisch and Sebastien Duyck, False Solutions Prevail Over Real Ambition at COP26 (March 10th 2022) <https://Cz.Boell.Org/En/2021/12/16/False-Solutions-Prevail-Over-Real-Ambition-Cop26-0>.

¹⁴¹ *Id.*

¹⁴² International Energy Agency, Net-Zero by 2050 A Roadmap for The Global Energy Sector 32 (10 March 2022)

¹⁴³ Kate Abnett and Simon Jessop, U.S Canada Among 20 Countries To Commit To Stop Financing Fossil Fuels Abroad (March 12, 2022) <https://www.Reuters.Com/Business/Cop/19-Countries-Plan-Cop26-Deal-End-Financing-Fossil-Fuels-Abroad-Sources-2021-11-03/> .

¹⁴⁴ Mercure Salas Et Al, Reframing Incentives For Climate Policy Action, 6 Nat. Energy. 1133,1133 (2021).

¹⁴⁵ *Id.*

¹⁴⁶The cost of avoiding catastrophic climate change is going to be extremely high for investors. Approximately 60 to 80 percent of publicly listed fossil fuels reserve should be declared unburnable if devastating climate change consequences are to be avoided.¹⁴⁷For the next 20 years, the estimated costs of this declaration of unburnable fossil fuel are \$ 28 trillion. ¹⁴⁸The implication of climate change action will have dire consequences for investments in fossil fuels industries.

Climate stranded assets occur where the value of fossil fuel assets depreciates or losses value completely due to climate change action. ¹⁴⁹Although stranded assets are not a phenomenon that is found in climate change only, the implementation of climate change mitigation measures is expected to have the highest level of fossil fuel losses. The implication of phasing out of fossil fuel is that most coal, oil, and gas reserves will be rendered valueless. Kyla Tienhaara observes that key assets such as oil reserves predominantly found in Venezuela, Canada, Russia, and the Middle East will lose value. ¹⁵⁰The majority of coal reserves are in U.S., Russia, Turkmenistan, Iran, Qatar, China, Australia, and India. ¹⁵¹The Global Energy Monitor (GEM) tracks around 2793 gas pipelines, with Italy proposing to have Adriatica Pipeline as an additional mode of transportation and Bulgaria proposing the Valchi Dol–Preselka Replacement Pipeline.¹⁵²By 2022 March, the GEM had tracked 108 countries for having new coal plants. ¹⁵³Additionally, GEM tracked 13,412 coal units and 2 107 plant owners. ¹⁵⁴Coal mines are also on the rise, with 67 countries having large reserves, 3,019 coal mines, and 7.1 billion tons of coal extracted per year. ¹⁵⁵The oil and gas industry and production total to around 29,014, plants. ¹⁵⁶More than 5183 sites are either discovered or operating. Foreign investors feature heavily on GEM data as the owners of the oil and gas plants. Yet, going by the international climate commitments these fossil fuels operations will be short-lived.

¹⁴⁶ Jonathan Watts, Ashley Kirk, Niamh Mcintyre, Pablo Gutiérrez And Niko Kommenda, *Half World's Fossil Fuel Assets Could Become Worthless By 2036 In Net Zero Transition*, The Guardian (March 10 2022) <https://www.theguardian.com/Environment/Ng-Interactive/2021/Nov/04/Fossil-Fuel-Assets-Worthless-2036-Net-Zero-Transition>.

¹⁴⁷ Ben Caldecott, Elizabeth Harnett, Theodor Cojoianu, Irem Kok, And Alexander Pfeiffer *Stranded Assets: A Climate Risk Challenge X*(Inter American Bank 2016) .

¹⁴⁸ *Id* 10.

¹⁴⁹ *Id* 5.

¹⁵⁰ Tienhaara, Kyla, And Lorenzo Cotula. *Raising The Cost of Climate Action Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* 9(International Institute for Environment and Development 2020).

¹⁵¹ BP, *Statistical Review of World Energy* 46(70th Edition 2021).

¹⁵² Global Energy Monitor *Global Fossil Infrastructure Tracker* (March 14 2021)<https://Globalenergymonitor.Org/Projects/Global-Fossil-Infrastructure-Tracker/>.

¹⁵³ Global Energy Monitor *Global Coal Plants Tracker* (March 14 2021) <https://Globalenergymonitor.Org/Projects/Global-Coal-Plant-Tracker/> .

¹⁵⁴ *Id*.

¹⁵⁵Global Energy Monitor *Global Coal Mine Tracker* (March 14 2021) <https://Globalenergymonitor.Org/Projects/Global-Coal-Mine-Tracker/>

¹⁵⁶ Global Energy Monitor *Global Oil And Gas Extraction Tracker* (March 14 2021) <https://Globalenergymonitor.Org/Projects/Global-Oil-Gas-Extraction-Tracker/>.

Carbon Tracker has warned investors of gloomy days in oil and gas industry based on the International Energy Agency (IEA) report that there should be no new investments to achieve the climate change targets.¹⁵⁷ Additionally, it is expected that the production levels will fall, leading to oil and gas companies to cut their revenues drastically. Of course, the demise of fossil fuel industry is not as easy as this research puts because there are so many complications relating to transition. Nevertheless, it is projected that the production of fossil fuels will drop by 80 percent for shale companies.¹⁵⁸ The strive for net-zero will have an effect beyond the fossil fuel companies to cover the motor vehicle manufacturers and other related companies.¹⁵⁹ This will leave \$ 11 trillion to \$ 14 trillion stranded assets.¹⁶⁰ The fossil fuels reserves will lose approximately 50 percent, which translates to \$ 12.9-17.2 trillion.¹⁶¹ The study shows that 68 percent-77 percent of loss will be in oil only and 90 percent will both oil and gas.¹⁶² The estimates of stranded capital losses is around \$303- 364 billion, which translates to 33 percent- 39 percent of fossil fuel.¹⁶³ It is projected that in one or two years from 2021, the stranded capital will be between \$ 539 to \$ 908 billion.¹⁶⁴

The IEA's finding that investments in fossil fuels must stop poses difficult questions on the relationship between international climate change and investment law.¹⁶⁵ States have no option rather than scrap the exploration and production of fossil fuels which portends a disaster for fossil fuels companies and their investments. The increased effects of climate change have been a pressure point for states to act quickly and decisively. The situation for the fossil fuel industry has also been exacerbated by growing alliances committing to eliminating dirty energy. The daunting issue will be how to navigate these hard questions of investor rights and climate change.

¹⁵⁷ Carbon Tracker, *Adapt To Survive: Why Oil Companies Must Plan For Net-Zero And Avoid Stranded Assets* (March 14 2021) <https://Carbontracker.Org/Reports/Adapt-To-Survive/> .

¹⁵⁸ *Id.*

¹⁵⁹ Jean Eaglesham And Vival Monga, *Trillions In Assets May Be Left Stranded As Companies Address Climate Change* Wall Street Journal(March 14 2021) <https://www.wsj.com/articles/trillions-in-assets-may-be-left-stranded-as-companies-address-climate-change-11637416980> .

¹⁶⁰ Jonathan Watts, Ashley Kirk, Niamh McIntyre, Pablo Gutiérrez And Niko Kommenda *Half The World's Fossil Fuel Assets Could Become Worthless By 2036 In A Net-Zero Transition* (March 14 2021) <https://www.theguardian.com/environment/ng-interactive/2021/nov/04/fossil-fuel-assets-worthless-2036-net-zero-transition> .

¹⁶¹ Tyler Hansen, *Stranded Assets and Reduced Profits: Analyzing The Economic Underpinnings of the Fossil Fuel Industry's Resistance to Climate Stabilization*, 158 *Renew Sust Energ. Rev* ,5(2022).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ International Energy Agency, *Global Energy Review 2021 Assessing The Effects of Economic Recoveries On Global Energy Demand and CO2 Emissions in 2021* 11(2021).

4.1.3 International Investment Law as A Tool for Attacking Climate Change Action

The fossil fuel industry is not just watching as the world takes major steps to achieve net-zero. Treaties such as the ECT are offering an avenue for investors to sue states claiming a breach of the stable legal environment. Several corporations have instituted cases against countries for phasing out coal and other climate related changes. The pressure from fossil fuel companies suing under ECT and other IIAs has stirred a debate on the future of these treaties.¹⁶⁶ This pressure comes in the wake of the studies revealing that a fifth of investor-state cases has been instituted by fossil companies.¹⁶⁷ The most daunting issue has been that even the mere threat of these multi-billion cases is enough to deter states from adopting climate change policy.¹⁶⁸ This part uses ongoing cases to demonstrate how investor-state dispute resolution interacts with climate change.

Ascent Resources, a U.K. company, is suing Slovenia for \$ 118,000,000, challenging an environment assessment requirement.¹⁶⁹ There are several environmental concerns about the effect of fracking in this project.¹⁷⁰ These concerns range from the destruction of ecology to adverse effects on the Mura River, a water resource to emission of GHG. According to the notice of intent to sue, the claim hinges on FET, which claimant describes as “Slovenia’s guarantee that the investments would be accorded fair and equitable treatment Article 2(2) of the BIT and Article 10(1) of the ECT”).¹⁷¹ The other dimension of this case is that the community that bears the burden of environmental pollution and climate change petitioned the authorities against this project. The Slovenia government is showing signs of backtracking against the decision to stop fracking.¹⁷² In January 2022, the government passed a law permitting restricted fracking, which shows the power of investors-state dispute resolution mechanism.¹⁷³

¹⁶⁶ Dietrich Brauch, Should The European Union Fix, Leave or Kill the Energy Charter Treaty? Should The European Union Fix, Leave or Kill the Energy Charter Treaty 3(Columbia Center On Sustainable Investment 2021)?

¹⁶⁷ Lea Di Salvatore, Rising Trend in Investment Arbitrations Threatens to Undermine Critical Climate Measures Iii (IISD Report 2021).

¹⁶⁸ Kyla Tienhaara, Regulatory Chill in A Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement, *Transnatl. Environ. Law.* 229, 232 (2017).

¹⁶⁹ Joe Lo, Fracking Company Sues Slovenia Over ‘Unreasonable’ Environmental Protections, *Climate Hone News* (March 15 2022) <https://www.climatechangenews.com/2020/09/09/fracking-company-sues-slovenia-unreasonable-environmental-protections/>.

¹⁷⁰ Corporate Europe Observatory, How The Energy Charter Treaty Could Facilitate a Toxic Fracking Project in Slovenia (March 15, 2022) <https://corporateeurope.org/en/2021/06/how-energy-charter-treaty-could-facilitate-toxic-fracking-project-slovenia>.

¹⁷¹ Enyo Law, Treaty Claims Against The Republic Of Slovenia By Ascent Resources Plc And Ascent Slovenia Ltd (March 14 2022) <https://www.italaw.com/sites/default/files/case-documents/italaw11654.pdf>.

¹⁷² Business & Human Rights Resource Centre, U.K. Company Ascent Resources Threatens Slovenia With Legal Action Using Energy Charter Treaty (April, 5 2022) <https://www.business-humanrights.org/en/latest-news/uk-company-ascent-resources-threatens-slovenia-with-legal-action-using-energy-charter-treaty/>.

¹⁷³ Total Slovenia News, Govt Amends Mining Act To Allow Low-Volume Fracking In Petišovci (April, 5 2022) <https://www.total-slovenia-news.com/politics/9453-govt-amends-mining-act-to-allow-low-volume-in-petisovci>.

Foreign investors have also challenged the plans by some governments to phase out coal. RWE, a Germany-based company has sued Netherlands for \$ 1,652,000,000, challenging the plan by the Dutch government to phase out coal by 2030.¹⁷⁴ The case of *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*¹⁷⁵ is ongoing, with the latest news being the issuance of a procedural order on objection to jurisdiction. Similarly, Uniper, also a Germany-based company, has instituted a case for \$ 1,062,000,000 challenging the Netherlands' coal phase-out. The tribunal, on March 3, 2022, also issued a procedural order in the case of *Uniper SE, Uniper Benelux Holding B.V., and Uniper Benelux N.V. v. Kingdom of the Netherlands*¹⁷⁶ directing how the case will proceed.¹⁷⁷ These two cases claim that the plan to phase out coal does not consider the plant owners' investments rights.¹⁷⁸ The primary legal argument is FET and legitimate expectation that the legal environment will not drastically change over the course of the investments.

A Canadian company TransCanada is suing the U.S. for \$ 15 billion, claiming that it has suffered a loss due to the denial of a permit for the Keystone XL Pipeline project.¹⁷⁹ The Obama administration refused to grant the company permit claiming that the project undermines the U.S. global leadership on climate change. This project would have heightened the fossil fuel activities by transporting 800,000 barrels of crude oil from Canada to Texas.¹⁸⁰ The Department of States estimates that the project would have contributed to 17 percent more CO2 than another average barrel in different areas.¹⁸¹ When Trump came to power he authorized a 1,200-mile pipeline to proceed under this project.¹⁸² However, the US President Joe Biden has canceled the permit, which has led the investor to institute the case claiming breach of North American Free Trade Agreement (NAFTA). Rockhopper Exploration, a U.K.- based company, has sued Italy for refusal to grant a permit for drilling on the Adriatic coast.

¹⁷⁴ Friends Of The Earth Europe, *Coal Company Sues Netherlands For €1.4 Billion For Coal Phase Out* (April 5 2022) <https://Friendsoftheearth.eu/Press-Release/Coal-Company-Sues-Netherlands-For-1-4-Billion/> .

¹⁷⁵ RWE AG and RWE Eemshaven Holding II BV V. Kingdom of The Netherlands (ICSID Case No. ARB/21/4).

¹⁷⁶ Uniper SE, Uniper Benelux Holding B.V., And Uniper Benelux N.V. V. Kingdom of The Netherlands (ICSID Case No. ARB/21/22).

¹⁷⁷ International Centre for Settlement of Investment Disputes *Uniper SE, Uniper Benelux Holding B.V. And Uniper Benelux N.V. V. Kingdom Of The Netherlands (ICSID Case No. ARB/21/22)* (April, 5 2022) <https://Icsid.Worldbank.Org/Cases/Case-Database/Case-Detail?Caseno=ARB/21/22> .

¹⁷⁸ Stan Putter, *The Netherlands Coal Phase-Out And The Resulting (RWE And Uniper) ICSID Arbitrations* Kluwer Arbitration Blog (April 5 2022) <http://Arbitrationblog.kluwerarbitration.com/2021/08/24/The-Netherlands-Coal-Phase-Out-And-The-Resulting-Rwe-And-Uniper-Icsid-Arbitrations/> .

¹⁷⁹ Ian Austen, *TransCanada Seeks \$15 Billion from U.S. Over Keystone XL Pipeline* New York Times (April, 10 2022) <https://www.nytimes.com/2016/01/07/business/international/transcanada-to-sue-us-for-blocking-keystone-xl-pipeline.html> .

¹⁸⁰ Bobby Magill, *Climate Central On January 7, 2016, U.S. Sued For Killing Keystone XL Pipeline*, Scientific American (April 5 2022) <https://www.scientificamerican.com/article/u-s-sued-for-killing-keystone-xl-pipeline/> .

¹⁸¹ *Id.*

¹⁸² Celine Castronuovo, *Company Behind Keystone XL Seeks \$15B In Damages From US* The Hill (April 5 2022) <https://thehill.com/policy/energy-environment/561535-company-behind-keystone-xl-seeks-15b-in-damages-from-us/> .

¹⁸³The Italian government banned all new oil and gas drilling near the coast amidst protests on environmental concerns. The company is asking for \$ 275 million, yet it had only spent 29 percent of the money. ¹⁸⁴The main claim in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. the Italian Republic* ¹⁸⁵is that Italy has breached the FET standard under ECT. ¹⁸⁶The claimant challenges Italy for failure to accord it a fair and equitable treatment that requires that a foreign investor's legitimate expectation be upheld.

In only five cases, fossil fuel companies are asking for over \$ 18 billion as compensation for government action to realize the climate change agenda. The foreign investors' claims are totaling to the same as the net annual climate funding promised to the developing countries. ¹⁸⁷It is not surprising that fossil fuel companies find the investor-state regime favorable to their interests. Currently, about 231 investor-state cases totaling to approximately 20 percent of all reported cases have been instituted by fossil fuel companies. ¹⁸⁸This trend will intensify as many countries take decisive steps to phase out fossil fuels. These cases raise the question of how the international investment law and climate change regime will interact with each other.

4.2 Tension Between Investor's Legitimate Expectations and Climate Change Obligations

Legitimate expectation has become one of the most preeminent principles in international investment law. Nearly all FET cases invoke legitimate expectations due to its perverse nature. ¹⁸⁹What has, however, brought considerable debate on this doctrine is its use to import stabilization. Providing a stable legal environment is a crucial guarantee for long-term investment. Most of these projects are capital intensive; hence, they require business and legal environment stability. ¹⁹⁰Questions of legitimate expectations are likely to play out in challenges against

¹⁸³ *Rockhopper V. Italy* ICSID Case No. ARB/17/14 [Http://Climatecasechart.Com/Climate-Change-Litigation/Non-Us-Case/Rockhopper-V-Italy/](http://Climatecasechart.Com/Climate-Change-Litigation/Non-Us-Case/Rockhopper-V-Italy/).

¹⁸⁴ Yamina Saheb, *How Shadow Courts Threaten The Climate*, New Internationalist (April 10 2022) [Https://Newint.Org/Features/2021/06/08/Long-Read-Shadow-Courts](https://Newint.Org/Features/2021/06/08/Long-Read-Shadow-Courts) .

¹⁸⁵ (ICSID Case No. ARB/17/14).

¹⁸⁶ Danilo Ruggero, *Rockhopper Vs. Italy: Weighing Legitimate Expectations Up Against Investor's Due Diligence In M&A Deals* Kluger Arbitration Blog (April 10 2022) <http://Arbitrationblog.Kluwerarbitration.Com/2018/01/27/Rockhopper-Vs-Italy-Weighing-Legitimate-Expectations-Investors-Due-Diligence-Ma-Deals/> .

¹⁸⁷ Global Justice Now, *Corporate Courts Vs. The Climate How The Fossil Fuel Industry Is Deterring Climate Action Through Secret Tribunals* (April 10, 2022) [Https://www.Globaljustice.Org.Uk/Wp-Content/Uploads/2021/09/GJN_Corporatecourtsvsclimatebriefing_Sept2021.Pdf](https://www.Globaljustice.Org.Uk/Wp-Content/Uploads/2021/09/GJN_Corporatecourtsvsclimatebriefing_Sept2021.Pdf) .

¹⁸⁸ International Institute For Sustainable Development, *Rising Trend In Investment Arbitrations Threatens To Undermine Critical Climate Measures* (April 10 2022) [Https://www.Iisd.Org/Press/Investment-Arbitrations-Threaten-Climate-Action](https://www.Iisd.Org/Press/Investment-Arbitrations-Threaten-Climate-Action) .

¹⁸⁹ Teerawat Wongkaew, *Protection of Legitimate Expectation in Investment Treaty Arbitration*3(2019).

¹⁹⁰ Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as A Problem of Legitimacy*, 31 Eur. J. Int. Law 289–308 (2020).

climate change regulations. This potential conflict raises questions of the scope of legitimate expectation. This part argues that legitimate expectation is one of the broad principles that will conflict with climate change obligations. However, climate change is inherently an evolving public interest issue; hence an investor should reasonably expect the legal regime will change.¹⁹¹ The onus belongs to the investor to conduct due diligence in line with the evolving investment practices of using climate change as a risk factor. Additionally, legitimate expectation is an indeterminate concept with so many qualifications that allow for considering context.

Traditionally, legitimate expectation was a principle to protect citizens against abuse of discretion.¹⁹² The foundation of this principle was the need for consistency and trust in the government pronouncements.¹⁹³ The government's representation was binding if relied upon by an individual. This is the rule of law foundation of legitimate expectation. The other aspect of legitimate expectation was to protect against unfair treatment of citizens. The government is presumed to be the overbearing party in its interactions with individuals. Legitimate expectation acts as a balancing factor against taking away accrued rights.

Despite the importance of the doctrine of legitimate expectation, it is subject to numerous caveats.¹⁹⁴ These caveats range from using the concept of reasonableness to limit what is legitimate. Other principles that have arisen are the legality of promise and reliance. What these qualifications reveal is that legitimate expectation is a contextual dependent doctrine. Additionally, the qualifications are ambiguous and broad. For instance, the meaning of reasonableness of the expectation is not settled. This has been exacerbated by the tribunal's recognition that implicit representations can give rise to legitimate expectations.¹⁹⁵ The caveats and the allowance of implicit representations have made legitimate expectations nebulous guarantees. This what this research calls the "malleable thesis" of legitimate expectations.

4.2.1 The Sources of Legitimate Expectation

The categorization of legitimate expectations has taken different shapes. There is a classification based on sources touching on treaty-founded legitimate expectation and contract-based. On the other hand, there is legitimate expectations under FET and other specific promises made by the state. This part examines the sources of legitimate expectation to lay a background on this important standard.

¹⁹¹ Bulkeley Harriet and Peter Newell, *Governing Climate Change* 68 (2015).

¹⁹² Ahmed Farrah and Adam Perry, *The Coherence of the Doctrine of Legitimate Expectations*, 73 *Camb. Law J.* 61, 63 (2014).

¹⁹³ *Id.*

¹⁹⁴ Lo, Mao-Wei, *Legitimate Expectations in A Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defenses Under International Investment Agreements*, 13 *Contemp. Asia Arb. J.* 13 249, 254(2020).

¹⁹⁵ *Total, S.A V Argentina*, ICSID Case No ARB/04/1 Para 120.

Tribunals have offered conflicting positions on contract-based legitimate expectations. For instance, the tribunal in *Continental Casualty v Argentina*¹⁹⁶ observed that the obligations arising out of contractual commitments should be taken seriously in establishing a legitimate expectation. This was captured in *Total SA v Argentina*¹⁹⁷ which held that if the state has promised an investor through a contract or stabilization clauses to provide a particular guarantee, the investor has a legitimate expectation. However, in *Parking v Lithuania*¹⁹⁸ the tribunal stated that a contractual promise is not necessarily a legitimate expectation under international law. This was also stated in *Haester v Ghana*¹⁹⁹ where the tribunal stated that a contractual right does give rise to a legitimate obligation under FET.

Despite the differing awards, the contractually backed legitimate expectations offer the most explicit commitments to the investor. In *Texaco v. Libya*²⁰⁰ the tribunal recognized the validity of stabilization clauses as a contractual guarantee for the protection of the investment. Similarly, in *Revere Copper & Brass, Inc. v. OPIC*²⁰¹ the tribunal accepted that stabilization clauses as part of international law supersede domestic law. These cases demonstrate that courts will uphold stability as a contractual guarantee. Lastly, in *Suez (InterAgua) v Argentina*, the tribunal accepted that contractual documents gave rise to legitimate expectations²⁰².

The place of FET's legitimate expectation arising from the contract has been a source of divided opinion.²⁰³ Tribunals have embraced a more balanced view that for a breach of contract to amount to a violation of FET, it must be serious and capricious. For example, the tribunal in *Waste Management, Inc. v Mexico*,²⁰⁴ was emphatic that the breach must be an "outright and unjustified repudiation of the transaction". Based on this finding, the tribunal refused to find a violation of FET for failure to pay the investor by the state.

Legitimate expectations may be founded on the general national or international law applicable at the time of investment. This legitimate expectation is based on the understanding that an investor relies on the general promises found in the law. Some of the promises are in the form of licenses, legislation, constitutional guarantees, treaty guarantees, assurances, and affirmations.²⁰⁵

¹⁹⁶ Continental Casualty Company V. The Argentine Republic, ICSID Case No. ARB/03/9, September 5, 2008, Para. 261.

¹⁹⁷ Total SA V. The Argentine Republic, ICSID Case No. ARB/04/01 Para 101.

¹⁹⁸ Parking-Compagniet AS V. The Republic of Lithuania (ICSID Case No. ARB/05/8) (Award, September 11, 2007, Para 344.

¹⁹⁹ Gustav F W Hamster GmbH & Co KG V. The Republic of Ghana, ICSID Case No. ARB/07/24 Para 337

²⁰⁰ Texaco V. Libya Int'l Arbitral Award, 104 J. Droit Int'l 350 (1977).

²⁰¹ Revere Copper & Brass, Inc. V. OPIC, AAA Award of August 24, 1978, 17 ILM 1321 (1978).

²⁰² Suez, Sociedad General De Aguas De Barcelona SA And Interaguas Servicios Integrales Del Agua SA V The Argentine Republic, Decision On Liability, ICSID Case No ARB/03/17, 30 July 2010, Para 212.

²⁰³ Fulvio Maria, FET and Legitimate Expectations. In: Fair and Equitable Treatment and The Fabric of General Principles 92 (2018).

²⁰⁴ Waste Management, Inc. V. Mexico, ICSID Case No. ARB (AF)/00/3, Award of April 30, 2004, Para 115.

²⁰⁵ Laryea, Emmanuel, Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application 4,10 (Chaisse J., Choukroun L., Jusoh S. Eds Handbook of International Investment Law and Policy 2020).

All these form part of the broad promise, which lures investor to invest in the host state. In *Metalclad Corporation v Mexico*²⁰⁶ the federal government assurances that the municipality will grant permits automatically was held to create a legitimate expectation. The tribunals stated that “metalclad was entitled to rely on the representation of federal officials and to believe that it was entitled to continue its construction of the landfill.”²⁰⁷ This was an interesting finding, especially because the requirement for permit should not be in vain. Construction is a highly sensitive endeavor and permits requirements guarantee safety of the project.

Legitimate expectation may also arise from a guarantee in a legislation. This guarantee may be found in a generation legislation or as part of the broad legislation targeting foreign investors or a sector. For instance, in Article 26.2 of the Model Petroleum Agreement of Ghana, the investor is assured of the stability of the investment, which includes “the fiscal and contractual framework.”²⁰⁸ This provision protects the investor from the changes in the legal regime hence inhibiting the state’s power to regulate in the public interest. However, Ghana has shifted from the freezing to economic equilibrium stabilization clauses.²⁰⁹ Investors in Congo have invoked stabilization clauses to seek insulation from changes in the mining code. For instance, Randgold Resources, a company with headquarters in Jersey, has argued that it is entitled to 10 years of stability after the enactment of the law.²¹⁰ The role of general law was affirmed by the tribunal in *Saluka* in the following terms.

‘[a]n investor’s decision to invest is based on the state of the law and the totality of the business environment at the time of the investment as well as on the investor’s expectation that the conduct of the host State subsequent to the investment will be fair and equitable.’²¹¹

Political statements are one source of legitimate expectation that have caused considerable contestations. The first point of contention has been defining what amounts to a political statement.²¹² Is it statements made by politicians? Or statements made in a political context? What is a political context? This uncertainty has led to some tribunals to reject political statements as a source of legitimate expectations. The tribunal in *El Paso v Argentina* held that political statements²¹³ were not capable of giving rise to legitimate expectations.

²⁰⁶ *Metalclad Corporation V. The United Mexican States*, ICSID Case No. ARB (AF)/97/1 Para 89.

²⁰⁷ *Id.*

²⁰⁸ Abdullah Faruque Typologies, Efficacy and Political Economy of Stabilization Clauses: A Critical Appraisal 4 Oil, Gas & Energy L. J. 34 [2007].

²⁰⁹ Onyi-Ogelle, Obioma Helen, And Paul Musa, *The Effect of Stabilization Clauses in Petroleum Contracts in Developing Countries Like Nigeria* 2.3 International Review of Law and Jurisprudence (IRLJ) 152 [2018].

²¹⁰ David McKay *Miners To Target Stability Clauses Ahead Of Key DRC Code Talks* [April 10 2022] <https://www.Miningmx.Com/News/Markets/32132-Miners-Pitch-Congos-Kinshasa-Targeting-Stability-Clauses/> <https://www.Miningmx.Com/News/Markets/32132-Miners-Pitch-Congos-Kinshasa-Targeting-Stability-Clauses/>.

²¹¹ *Saluka Investments BV V. The Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, Para 301

²¹² *Continental Casualty Company V. The Argentine Republic*, ICSID Case No. ARB/03/9, The Award, September 5, 2008, Para. 261(I).

²¹³ *El Paso Energy International Company V. The Argentine Republic*, ICSID Case No. ARB/03/15 Para. 395.

The tribunal was emphatic that political statements do not provide guarantees even if they might have induced investors to investing.

The more crucial category for this piece is the legitimate expectation that originates from FET generally. Under this conceptualization, the investor expects that the state will act in all its dealings in a reasonable, transparent, consistent, and fair way.²¹⁴ The question then arises what do these broad terms mean in assessing the conduct of the state. In *Charles Lemire v Ukraine* where the tribunal was confronted with whether failure to issue a license to the investor to expand its business amounted to a breach of legitimate expectation. The tribunals stated that “a regulatory system for the broadcasting industry was to be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions.”²¹⁵ This interpretation leaves questions on the scope of legitimate expectation.

4.2.2 Legitimate Expectations’ Conflict with Climate Change Obligations

Legitimate expectation has been the mainstay of protecting the investor’s reliance and providing a stable environment.²¹⁶ This standard has been applied as a catchall for all inequitable conducts. Indeed, FET’s framework is enabled by specific standards of legitimate expectation. Despite the importance of legitimate expectation, its broad nature has been a point of tension with the state power to regulate.²¹⁷ This has been experienced in examining states’ conduct besides legitimate expectation’s ubiquitous entailments. One of these contentious standards is the provision of a stable legal environment and consistent conduct that is free from ambiguity. Together with the demand for states to act fairly, non-discriminatory, and transparently, legitimate expectation is used to incorporate all investors disappointments. This part is divided into two (i) legitimate expectation’s stability and climate change and (ii) relooking at legitimate expectation through the lenses of “malleable thesis”.

4.2.2.1 Legitimate Expectation’s Stability and Climate Change

Legitimate expectation’s stability will impede states’ power to implement climate change policies. While some tribunals have expressly rejected the idea of unchanging legal regulation, others have adopted such a position.

²¹⁴Thunderbird V. Mexico Ad Hoc Arbitration, Arbitral Award, January 26, 2006, Para.147.

²¹⁵Joseph Charles Lemire V. Ukraine, ICSID Case No. ARB/06/18 Para 267.

²¹⁶Zeyl Trevor, Charting The Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law, 49 *Alta. L. Rev* 203, 222 (2011).

²¹⁷*Id* 221.

²¹⁸Tribunals have read legitimate expectation as imposing stability in two ways. First, a stable legal environment as an independent guarantee to all investments. Second, the cumulative effect of the requirement for states to act in a consistent, free from ambiguity, and totally transparent manner establishes stability. This cumulative effect creates what this research refers to as “the romanticized state”.

The obligation to provide a predictable and stable business framework will conflict with the climate change obligations. Signs are emerging of tribunals reading stability to impede states regulatory changes in favor of the environment. For instance, *Eco Oro v Columbia* ²¹⁹despite a clear environmental exception, the tribunal stated that the host state has a responsibility to guarantee a predictable business environment. The tribunal quoted with approval the finding in *Merrill, Award* ²²⁰which stated that the investor is entitled to operate in a normal environment that is not subject to changes and uncertainties.

One of the most pronounce way to impose stability is through the legitimate expectation’s standard of a stable legal and business environment. The tribunal in *Duke V Ecuador* ²²¹stated that “[t]he stability of the legal and business environment is directly linked to the investor’s justified expectations.” ²²²The tribunal then linked legitimate expectation’s stability with FET. Although the tribunal went on to give a caution that the expectations must be reasonable, the ubiquitous nature of reasonableness renders the caution worthless.

Stability can also be introduced by invoking the cumulative effect of requiring states to act in a consistent, non-ambiguous, and transparent manner. This stability relies on the utopian conception of a perfect state that is faultless as it will be argued extensively later in this paper. Through this “romanticized state” which operates in a perfect world free from uncertainties, crisis, and coordination problems, the investors are informed of all laws that will affect them in the future. The tribunal in *Tecmed* ²²³was the first to determine that legitimate expectation places these standards. While the tribunal did not mention the word stability, the effect of these standards is to read in stability. What was even more revealing on the wide scope of the three standards is the interpretation that the tribunal gave to what it envisioned as a consistent conduct of the state. The tribunal stated that the state acts consistently if it does not change any previous decisions which were relied upon by the investor in deciding whether to invest.²²⁴

²¹⁸*Id* 221-225.

²¹⁹*Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41 Para 770.

²²⁰*Merrill and Ring Forestry L.P. V. Canada*, ICSID Case No. UNCT/07/1 (March 31, 2010) Para. 233.

²²¹*Duke Energy Electroquil Partners and Electroquil SA V Ecuador*, ICSID Case No. ARB/04/19,

²²²*The Award*, August 12, 2008, Para. 340.

²²³*Duke Energy Electroquil Partners and Electroquil SA V Ecuador*, ICSID Case No. ARB/04/19 340.

²²⁴*Técnicas Medioambientales Tecmed, S.A. V. The United Mexican States*, ICSID Case No. ARB (AF)/00/2. At Para 153.

²²⁵*Técnicas Medioambientales Tecmed, S.A. V. The United Mexican States*, ICSID Case No. ARB (AF)/00/2. 154.

It would be disingenuous to present the contention of legitimate expectation's stability as having the effect of impending climate change as a one-sided argument. There is a counterargument that some tribunals have accepted that states can regulate for public interest.²²⁵ The argument here is that when confronted with public interest matters, some tribunals have upheld the power of the state to regulate and rejected legitimate expectation's stability. To support this argument, awards such as *Plasma Consortium Limited v Republic of Bulgaria*,²²⁶ *Impregilo SpA v The Republic of Argentina*,²²⁷ and *Parkerings v Lithuania*²²⁸ are cited, where the tribunal stated that “[i]t is each state's absolute right and privilege to exercise its sovereign legislative power. A-State has the right to enact, modify or cancel a law at its discretion.” In response to this argument: - the decisions upholding the power of the state to regulate are sporadic and not binding. Thus, they cannot offer a serious assurance that tribunals will follow them. Second, there is a growing trends showing that tribunals have rejected the power of state to regulate as a justification for policy change. For example, in *Eco Oro v Colombia and Occidental v Ecuador* which has been discussed extensively in the paper.²²⁹ Third, the problem is structural largely touching on one-sided substantive standards and tribunals dispositions to elevate investor rights.

Moreover, the conflict is likely to manifest itself in several ways. The first and the most obvious is the change of the law that bans certain GHG products such as coal.²³⁰ The second is through the imposition of disclosure obligations that the investors argue are burdensome and amount to arbitrary interference with the business environment. This can be seen in the prism of the Environmental, Social, and Governance (ESG) through capital markets regulators.²³¹ The problem will arise from the huge disclosure requirements, which are costly. It can also arise due to punishment arising from false disclosures, such as greenwashing. Here, investors will be challenging the primary mandate to regulate to their detriment- although questions of estoppel might arise to preclude the investors from raising such a defense.

Legitimate expectations' stabilization insulates investors against changes in the regulatory regime of the host states.

²²⁵Giannakopoulos, Charalampos. The Right to Regulate in International Investment Law and The Law of State Responsibility: A Hohfeldian Approach 162(Permutations of Responsibility in International Law 2019).

²²⁶Plasma Consortium Limited V Republic of Bulgaria, Award, ICSID Case No ARB/03/24, August 27, 2008, Para 219.

²²⁷Impregilo Spa V the Republic of Argentina, ICSID Case No ARB/07/17, Award, 21 June 2011, Paras 285, 290–91.

²²⁸Parkerings-Compagniet AS V. Republic of Lithuania, ICSID Case No. ARB/05/8) Para 332.

²²⁹Occidental Petroleum Corporation V Republic of Ecuador ICSID Case No ARB/06/11 Award (October 5, 2012) Para 526.

²³⁰Lobel Nathan and Fermeglia Matteo, *Investment Protection and Unburnable Carbon: Competing Commitments in International Investment and Climate Governance*, 4 Diritto Del Commercio Internazionale 1, 17(2018).

²³¹Alston Bird, How Is ESG Regulation Influencing Investor Behaviour? (April 15 2022) <https://www.jdsupra.com/legalnews/how-is-esg-regulation-influencing-3894739/> .

The argument has been that states can regulate but that they will be subject to prompt, effective, and full compensation to foreign investors.²³² The question becomes should states pay for legislating in the public interest.

4.2.2.2 Relooking at Legitimate Expectations and the “Malleability Thesis”

The norm of legitimate expectations needs reconstruction away from what some tribunals have fashioned it. The vision of this project is to redirect this norm to the correct path of balancing interests and considering context. Through what this project calls “the malleable thesis” I argue that the nature and role of legitimate expectation demonstrates that it is an indeterminate concept meant to protect reasonable assurances considering the entire environment. Legitimate expectation cannot, therefore, be divorced from the context that gives rise to the expectations. One crucial factor in assessing legitimate expectation is the character of the institution of the state and the centrality of public interest in its organization. The character of the state as the protector of public interest is inimical to the interpretation of legitimate expectation to freeze public interest laws.²³³ Given this understanding, this part engages with investor’s expectation and argues that an investor cannot reasonably expect to impede the rights of the state to change its laws. It posits that climate change is a public interest matter that requires eminent state action. Due to the nature of the state as a protector of public interest, the investor cannot expect that the state would legitimately abdicate this central role.

A state cannot fold its hands when an issue that affects public interest arises.²³⁴ Some states may act or not, others may be slow or speedy, but the expectations to discharge state’s mandates exists. Can an investor legitimately expect that the state will remain, mum, especially when staring at a catastrophe such as climate change? The answer to this question is no, and investor rights are expected to give way to the more significant societal concerns.²³⁵ Public interest has occupied a pedestal position in the life of society. Doctrines such as eminent domain, compulsory acquisition and emergency powers exist to allow state to protect the life of the nation. One way that the state reacts is to change its laws to address the eminent national concerns.

²³²Compañía Del Desarrollo De Santa Elena S.A. V. Republic Of Costa Rica, ICSID Case No. ARB/96/1.

²³³Giannakopoulos, Charalampos Supra 218, 162.

²³⁴Guest Alison, *Interpreting Public Interest Provisions in International Investment Treaties*, 18 Chi. J. Int’l L 321, 333 (2017).

²³⁵*Id.*

Some tribunals, such as the tribunal in *Continental Casualty Company v. Argentina*,²³⁶ was of the view that an investor cannot expect the country will not change its laws, especially during a crisis. The tribunal was emphatic that investor expectation must consider the nature of the state as a custodian of the public interest.

Legitimate expectation is a highly qualified principle, and it should be easily displaced if a justified state interest is demonstrated.²³⁷ One of the features of legitimate expectation is that it has several indeterminate concepts embodied in it. The requirement of assurances being legitimate has two implications. First, the expectations must have a foundation in state's action. This action can take the shape of the law, contract, or any of the sources of legitimate expectation previously discussed. Second, the expectations must have been within the realm of what is reasonable to expect from the state. For example, one cannot expect that the state will fulfil an illegal promise such as award of licenses through corruption. Apart from legality, the context of the promise is relevant in reviewing the reasonableness of state assurances. The "malleable thesis" of legitimate expectation provides that this concept has no settled entailment. The norm of legitimate expectation does not have a necessary form that it must follow. It is a malleable standard that balances interests through the lenses of fairness. This norm embodies other standards such as reasonableness which are also malleable. Reasonableness of a decision in the context of competing interests requires a value judgement. One must examine what is sensible and equitable to expect when a nation is threatened to conclude about the validity of assurances. The test that this research suggest is of a rational informed promisor. Of course, deciding what values are upheld more than others is not an easy task but it buttresses the malleable nature of legitimate expectation.

Under customary international law, the state has a right to regulate. While this right to regulate is not absolute, it is crucial in cases of public interest. It emanates from the character of the state as a sovereign entity.²³⁸ The effectiveness of the state as a key player in international law would be highly undermined if this right was curtailed through legitimate expectation. The recognition of the right of state to regulate as overriding the standard of legitimate expectation is likely to face three objections. First, state consent to international investment treaties is an expression of sovereignty. Second, the right to regulate is not absolute, and states have accepted the limitation of this right through treaty obligation providing for lawful expropriation.

²³⁶Continental Casualty Company V. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008, Para. 258.

²³⁷Potestà Michele, Legitimate Expectations in Investment Treaty Law: Understanding The Roots and The Limits of a Controversial Concept, 28 Icsid Review 88, 90 (2013).

²³⁸Mann Howard, The Right of States to Regulate and International Investment Law: In UNCTAD, The Development Dimension of FDI: Policy and Rule-Making Perspectives 211, 214 (2002).

The requirements for lawful expropriation include:²³⁹

- (i) public interest or purpose
- (ii) non-discriminatory
- (iii) due process and compensation that is prompt, adequate, and effective.

Third, the state gave the investor representations through their legal regime, and the state's right to regulate is not impeded provided they compensate the investor.

While states' sovereignty is not a *carte blanche* for eroding investor rights, legitimate expectation is a flexible standard that allows for considering context. First, legitimate expectation is a malleable standard that is subject to qualifications.²⁴⁰ This is what this research has referred to as "malleability thesis". Legitimate expectation is inherently an indeterminate concept. Words such as legitimate allow for examining the broader context. What is legitimate is subject to a holistic analysis of circumstances. This analysis can lead to an entire evaluation of the environment by asking questions such as legitimate to who? Why are expectations legitimate? Is the legitimacy of expectation normative or procedural? These questions reveal that the concept of legitimate expectation is not a settled.

The other counterargument is that the power to regulate is not absolute since states have accepted standards such as lawful expropriation which require compensation. The answer to the expropriation analogy is that legitimate expectation is different from expropriation because of the severity of measures. For expropriation to be successfully invoked, the investment must be severely affected. In *LG & E Energy v Argentina*, the tribunal refused to hold that Argentina had expropriated the claimant's investment because there was no "a permanent, severe deprivation of LG & E rights with regard to its investment, or almost complete deprivation of the value of LG & E investment."²⁴¹ However, the tribunal accepted the breach of stable legal environment under FET.

In response to the third objection on state luring investor through promises, in international law, legitimate expectations' stable business environment is the exception instead of the norm.²⁴² This means that the state must have accepted expressly to curtail its vital right to regulate. Some tribunals have recognized the inherent right of the state to regulate and rejected legitimate expectation. For instance, the tribunal in *Toto v Lebanon*²⁴³ was of the view that without an express stabilization, the state could not be impeded from changing its laws. It

²³⁹United Nations Conference On Trade and Development, Expropriation 27(UNCTAD Series On Issues in International Investment Agreements II 2012.)

²⁴⁰Mann, Howard Supra 231.

²⁴¹LG&E Energy Corp., LG&E Capital Corp., And LG&E International, Inc. V. Argentine Republic, ICSID Case No. ARB/02/1 Para 200.

²⁴²Michele Potestà, *Legitimate Expectations In Investment Treaty Law : Understanding The Roots And The Limits Of A Controversial Concept*, 28 ICSID Review 88, 118(2013).

²⁴³Toto Costruzioni Generali S.P.A. V. The Republic Of Lebanon, ICSID Case No. ARB/07/12.

follows that this inherent right of the state to change its laws, especially at the time of adversity, means that the right to regulate climate change overshadows legitimate expectations. This is in line with global recognition of the need for decisive action with the UN Secretary General decrying that “the world remains way off target in staying within the 1.5-degree limit of the Paris Agreement.”²⁴⁴

The scope of legitimate expectation should be delineated not to cover the public interest legal changes.²⁴⁵ Climate change is one of the biggest global challenges, and an investor cannot reasonably expect that they would have rights that impede this global concern. Indeed, the legitimate expectation is determined by the nature of the promise in place, and the circumstances of each case. An investor cannot expect that their rights will be elevated above the public interest of global nature.²⁴⁶

4.3 Autonomous Stable Legal Environment and Climate Change

It sounds odd to suggest that the right of the state to change its laws is subject to an overriding right of the investor. The investor’s right to a stable legal and business environment exists as an autonomous FET standard. In practice, however, this standard overlaps with legitimate expectation’s promise of stability. The difference is that legitimate expectation is based on reasonable promises that are lied upon by the investor. There is no caveat such as reasonableness in autonomous stable legal and business environment. In theory, this makes legitimate expectation a higher standard to meet.²⁴⁷ Nevertheless, both stabilities have elicited tension with the state power to regulate.

The obligation to provide a stable business and legal environment has been interpreted as a treaty guarantee.²⁴⁸ This obligation stops the state from altering the laws that existed when making the investment. The rationale is that an investor has committed enormous capital based on the legal regime that existed, and it is unfair for the state to change the law. The understanding is that the laws in a state are a big luring factor for investors. A case that is often cited to illustrate stability is the *Occidental*, where the tribunal stated that “there is certainly an obligation not to alter the legal and business environment in which the investment has been made.”²⁴⁹ The rationale of this finding is that the entire regime of international

²⁴⁴UN News, 2021 *A Crucial Year’ For Climate Change, UN Chief Tells Member States* (March 3 2022) <https://News.Un.Org/En/Story/2021/02/1084132> .

²⁴⁵Gülçür Abdulkadir, *The Necessity, Public Interest, And Proportionality in International Investment Law: A Comparative Analysis*, 2 U. Balt. J. Int’l L. 215, 217 (2019).

²⁴⁶*Id* 264.

²⁴⁷Ortino Federico, *The Obligation of Regulatory Stability in The Fair and Equitable Treatment Standard: How Far Have We Come?* 21 J. Int. Econ. Law 845,847(2018).

²⁴⁸*Id* 858.

²⁴⁹*Occidental Exploration and Production Company V Ecuador, Final Award, LCIA Case No UN3467, IIC 202 (2004)*., Para 191.

investment law is designed to protect investments. Thus, the changes in the law can be a threat to the protection accorded to the investment.²⁵⁰

Some tribunals have held that the intentions of the changes in the legal regime are irrelevant in assessing whether the state violated the stability guarantee.²⁵¹ Instead, the obligation to compensate the investor is absolute. The tribunal in *Sempra v Argentina*²⁵² remarked that the purpose of the stability is to realize the treaty's object, which is to protect the investor. It then stated that reasons for the changes in the law are inconsequential even when they are noble. This reasoning is against the noble goals of governments tackling global warming through several policy changes to reduce GHG.²⁵³

Stability limits the sovereign power of the state to change its laws.²⁵⁴ This power should not be limited lightly through inferences. To do so would be to elevate investors on a pedestal which is not the intention of international law. An investor operates in a polycentric environment that involves competing interests and with a possibility of societal disasters. To argue that all these interests should be sacrificed at the altar of the investor is an insular interpretation of the law. The tribunal in *Philip Morris v Uruguay*²⁵⁵ recognized the right of the state to regulate in the public interest. It was emphatic that the stability under FET should not impede the right of the state to change its laws in the public interest. Additionally, the dynamic nature of the state was recognized by the tribunal in *Eiser v Spain*²⁵⁶ where the tribunal observed that the state should not be impeded from changing laws to respond to the evolving nature of the society. This piece does not advocate for unchecked power of the state since that can lead to abuse of power. Although the tribunal in *Parkerings v Lithuania* recognized the right of the state to change its laws as unhindered, it added a caveat. The tribunal stated that it is prohibited for “a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power.”²⁵⁷

²⁵⁰CMS Gas Transmission Company V. The Republic Of Argentina, ICSID Case No. ARB/01/8. Para 274.

²⁵¹Ortino, Federico Supra 240, 850.

²⁵²Sempra Energy International V. Argentine Republic. (ICSID Case No. ARB/02/16), Para. 303-04. See Also Enron, Award, May 22 2007, Para. 268.

²⁵³Dubash Navroz, *Climate Laws Help Reduce Emissions*, 8 Nat. Clim. Change. 709,709 (2020).

²⁵⁴Ortino, Federico Supra 240, 850.

²⁵⁵Philip Morris Brand SARL, Philip Morris Products S.A. And Abal Hermanos S.A. V. Oriental Republic Of Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016 (N 120) Para 422.

²⁵⁶Eiser Infrastructure Limited And Energía Solar Luxembourg S.À R.L. V. Kingdom Of Spain, ICSID Case No. ARB/13/36Award, May 4, 2017 (N 143) Para 362.

²⁵⁷Parkerings-Compagniet AS V. Republic of Lithuania, ICSID Case No. ARB/05/8 Para 332.

4.4 The Effect of the Conflict Between Climate Change and the Standard of Stable Legal Environment

The obligations of legitimate expectation and provision of a stable legal environment are the two most contentious aspects of FET.²⁵⁸ These obligations have been interpreted as imposing an absolute duty to states. Tribunals have been adamant that foreign investors must be compensated if there is interference with FET.²⁵⁹ This raises the question of whether states that seek to implement the Paris Agreement or other international instruments on climate can do so without the requirement of compensation. This blind stability that fails to recognize the reason for the change in the law conflicts with climate change agenda.²⁶⁰ Tribunals will interpret FET as elevating the interest of foreign investors beyond climate change obligations. One of the decisions that adopted this parochial mode is *Occidental v Ecuador*.²⁶¹

States will be required to compensate foreign investors if they change the law to the detriment of investors. This diverts the resources that could be used for climate change adaptation and mitigation to pay investors. Going by the jurisprudence in *Tecmed Medioambientales Tecmed, S.A. v The United Mexican States*²⁶² poor states which are struggling with transition are likely to suffer double tragedy of compensating investors and paying for the cost of cleaner energy. This is buttressed by decisions such as *Metalclad Corporation v. The United Mexican States*,²⁶³ where the tribunal refused to recognize the protection of the environment as an excuse for state action citing that environment was not one of the treaty exceptions.

The international climate change agenda will be slowed by international investment law.²⁶⁴ Without regulating significant emitters such as the burning of fossil fuels, climate change goals will remain a mirage. UNFCCC and Paris Agreement have a strong mandate for the state to implement policies to reduce temperature to below 2 Celsius pre-industrial periods. The climate change agenda will have serious opposition from international investment law going by decisions like *Sempra v Argentina*, which stated that “[w]hat counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby

²⁵⁸Henckels Caroline, *Proportionality and The Standard of Review in Fair and Equitable Treatment Claims: Balancing Stability and Consistency with The Public Interest 2* (In Society of International Economic Law (SIEL), 3rd Biennial Global Conference Working Paper No. 27 2012).

²⁵⁹*Id* 4.

²⁶⁰Ortino, Federico *Supra* 240, 851(2018).

²⁶¹*Occidental V Ecuador I*, Award, July 1, 2004, At 191.

²⁶²*Técnicas Medioambientales Tecmed, S.A. V. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.

²⁶³*Metalclad Corp V The United Mexican States*, CASE No. ARB (AF)/97/1, August 30, 2000.

²⁶⁴Stephan Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?* 24, J. Int. Arbitr., Issue 469, 470(2007).

safeguarding the very object and purpose of the protection sought by the treaty.”²⁶⁵ The requirement for the states to act consistently paints a doom picture for the push to decarbonize.²⁶⁶

The effect of the parochial interpretation of FET on climate change action is that it will have a chilling effect on the state’s interventions.²⁶⁷ This effect will be motivated by two fears, to wit, that of huge compensation and the fear of being “blacklisted” as investor unfriendly. Most developing countries depend on foreign investors to spur their economic growth. Therefore, if investors view them as having decisive climate change action, they are likely not to attract investments. The chilling effect can undermine the climate change agenda by creating inertia on climate change regulations.²⁶⁸ States confronted with the option of facing the wrath of investors’ compensation and protecting climate change might choose to forego climate change for two reasons. First, the failure to implement climate change agenda has no immediate direct harm exclusive to the state. It is because of the interconnectedness of climate change and the lack of penalties in climate change enforcement. Second, compensation has a direct harm which disincentives states to act. This situation will be compounded by the fact that developed countries and upcoming economies are the highest emitters of GHG. Therefore, developing states are likely to cite such facts to demonstrate that they are not responsible for emissions even without climate change policies.

5 In Search Of An International Law Answer; A Case For Climate Change *Erga Omnes* Obligations

The conflict between FET’s stabilization and climate change obligations presents a daunting international law challenge. International law has struggled with the question of harmonization of obligations without success.²⁶⁹ This question has been perennial and perplexing, especially with the proliferation of bilateralism and fragmentation of international law. Most states lack a common and clear position on international law. States have committed themselves internationally on multiple fronts without considering the potential conflict in future obligations. This has been exacerbated by the lack of a clear hierarchy of laws at the global level. Other than *jus cogens*, treaty law arguably has the same force of law across the international regime. The cumulative effect of this nature of international law has

²⁶⁵Sempra Energy International V the Argentine Republic, ICSID Case No ARB/02/16, Award, September 28, 2007, Para 300.

²⁶⁶Stephan Schill Supra 257.

²⁶⁷Kyla Tienhaara Supra 176, 257.

²⁶⁸Carolina Moehlecke, The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty 64 Int Stud Q 1, 2 (2012).

²⁶⁹Ghouri Ahmad, Is Characterization of Treaties a Solution to Treaty Conflicts? 11 Chin. J. Int. Law 247, 251 (2012).

undermined its effectiveness. Yet, there has emerged “super-obligations” ranking above bilateral obligations. Although there are three widely accepted consequences of erga omnes obligation, this piece suggests a fourth effect called “ceding way”. This part argues that erga omnes obligations rank above bilateral and some multilateral obligations. It engages with the value of erga omnes obligations and concludes that these types of obligations will assist in navigating the murky waters of conflicting international responsibilities. This part contends that climate change erga omnes obligations is a source of legitimacy to overshadow investment obligations that run counter the reduction of GHG. It concedes that the exact formulation of what obligations are erga omnes require a much broader research project beyond this piece.

5.1 Reimagining the Hierarchy of Norms; A Case for the Emerging *Erga Omnes* Obligation to Mitigate and Prevent Climate Change

The concept of erga omnes has been one of the most ingenious inventions to fill the gap in the law of state obligations. International law has inherent weaknesses which have been debated for centuries. Some legal philosophers have gone to the extent of denying the validity of international law as a legal system.²⁷⁰ For instance, Austin’s command theory posits that law is a command of the sovereign backed with sanctions, and this sovereign is habitually obeyed.²⁷¹ Based on this conceptualization of law, international law is not law, and Hart contests international law by arguing that it lacks a law-making and a mandatory adjudication body.²⁷² Other scholars have taken a less extreme position by arguing that international law does not impose a binding obligation. For instance, Goldsmith and Posner argue that states need not abide by international law.²⁷³ Despite these contestations, the existence of international law is a settled question. What, however, has been a source of debate is the nature of obligations that international law imposes. Illustrative of this contest is the debate surrounding the special rapporteur on jus cogens report and the push by various special interest groups to declare their domain as *jus cogens*.²⁷⁴ This piece argues that while it is difficult to conclude that climate change has acquired the status of jus cogens, the case for erga omnes obligations can be successfully made.

²⁷⁰Anthony D’Amato, *Is International Law Really Law*, 79 NW. U. L. REV. 1293, 1297 (1984-1985).

²⁷¹Bix Brian, John Austin (April 13 2022) <https://Plato.Stanford.Edu/Entries/Austin-John/>.

²⁷²Paysandú Mehrdad, *The Concept of International Law in The Jurisprudence of HLA Hart* 21 Eur. J. Int. Law 21.4 967,975 (2010).

²⁷³Jack Goldsmith and Eric Posner, *The Limits of International Law* (2005).

²⁷⁴Dire Tladi, *Remarks In A Symposium Called Making Sense Of Higher Law: The ILC’s Special Rapporteur On Jus Cogens* (March 27, 2022) <https://www.youtube.com/watch?v=Nsh5deb1kbq>.

Despite the lack of a clear hierarchy in international law in the fashion of the domestic law, certain obligations such as *erga omnes* have emerged to occupy the first order.²⁷⁵ Often *erga omnes* is confused with *jus cogens*. However, while all *jus cogens* norms attract *erga omnes* obligations, not all *erga omnes* obligations are based on *jus cogens* norms.²⁷⁶ Indeed, the stand of *jus cogens* norms in the international legal order is settled as the highest norms. The puzzle has been whether *erga omnes* obligations occupy the second position. Ulf has captured the debate on these norms and responsibilities in the legal academia.²⁷⁷ Ulf's article summarizes arguments in the debate by quoting leading scholars such as Malcolm Shaw who argues that *erga omnes* is a higher obligation compared to the others, or at worst it is a distinct obligation.²⁷⁸ This does not mean that *erga omnes* is the highest obligation, but Malcolm Shaw recognizes that it is not an ordinary obligation. Ulf captures the position of Erika who posits that *erga omnes* "constitutes a second layer of the international value system, below that of peremptory norms".²⁷⁹ The position that *erga omnes* is just below the *jus cogens* norms is the most plausible international law position. This is because if other norms are of the same status as *jus cogens*, then it loses its character as a peremptory norm. *The Barcelona Traction Case*²⁸⁰ has identified the importance of the subject matter and multilateral obligations as the two elements of *erga omnes*.

Erga omnes obligations are owed to the entire global community.²⁸¹ These obligations differ from the traditional understanding of international law as establishing reciprocal duties of contractual nature. Due to their importance, international law recognizes existence of universal obligations that should be enforced by any state. The ICJ's *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*²⁸² indicates that the state parties to the convention propound a common interest as opposed to parochial one. This way, states came together to achieve an international goal of punishing the crimes that shocks the conscience of humanity. The implication of *erga omnes*

²⁷⁵Craig Eggett and Sarah Thin, Clarification And Conflation: Obligations Erga Omnes In The Chagos Opinion <https://www.Ejiltalk.Org/Clarification-And-Conflation-Obligations-Erga-Omnes-In-The-Chagos-Opinion/> (March 10 2022).

²⁷⁶Id.

²⁷⁷Ulf Linderfalk, International Legal Hierarchy Revisited—The Status of Obligations Erga Omnes, 80 Nord. J. Int. Law 1-23 (2011).

²⁷⁸Malcolm Shaw, International Law, 124 (6th Ed 2008).

²⁷⁹Erika De Wet, The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for The Coherence and Legitimacy of International Decision Making, 2 Potchefstroom Electron. Law J 1, 9(2007).

²⁸⁰Barcelona Traction, Light and Power Company, Limited (Belgium V. Spain) (New Application: 1962), The Second Phase, Judgment of 5 February 1970, ICJ Reports 1970, P. 32, Paras. 33–34.

²⁸¹Bassiouni Cherif, International Crimes: "Jus Cogens" And "Obligatio Erga Omnes" 59 Law Contemp. Probl. 63,72 (1996)

²⁸²Advisory Opinion Concerning Reservations to The Convention On the Prevention and Punishment of the Crime of Genocide, International Court of Justice (ICJ), May 28, 1951.

is that they create an obligation that is above ordinary reciprocal obligation. If there is a conflict between the ordinary treaty obligation and *erga omnes* obligation, the former should “cede way” to the later. This ceding way does not mean that *erga omnes* will invalidate other treaties, but it means that it will overshadow ordinary obligations. The basis of this argument is the effect of *erga omnes* as a superior obligation ranking above ordinary treaties.

The superiority of *erga omnes* obligation is hinged on a normative claim of its value.²⁸³ General international law expresses values of the global community. International investment law expresses the values of the rule of law and protection of the foreign investor.²⁸⁴ In international human rights, the value of human dignity occupies a significant position in the discourse.²⁸⁵ In the areas of climate change, the value of protecting the earth from the existential challenge of global warming is the main concern.²⁸⁶ While the formulation of these values is an intuitive act that is subject to fierce challenge, the existence of some value to be served by the international order is not in doubt—the germane question is what becomes of these values if they compete with each other. One answer that this research will pursue is that the international community, like any other community, cares about certain values more than others.²⁸⁷ For instance, the international community is strongly concerned about its existence.²⁸⁸ Consequently, climate change engages the basic value of the international community, which is its existence and alleviation of huge suffering.

5.1.1 Treaty Language Signaling that Climate Change Obligations are *Erga Omnes*

The international climate change regime has taken a global and multilateral outlook on the issue of global warming.²⁸⁹ This regime is made up of several legal instruments which trace their roots to the Earth Summit. The first major climate change treaty was the UNFCCC passed in 1992 in Rio. This treaty represented a watershed moment in climate change governance. Climate change initiatives are marred with politics, with factionalism being on the increase.²⁹⁰ UNFCCC has continued to be a monumental treaty with 196 member states, meaning that it has a wider coverage across the globe.

²⁸³Ulf Linderfalk *Supra* 286, 6.

²⁸⁴Jeswald Salacuse, *The Treatification of International Investment Law*, 13 *Law & Bus. Rev. Am.* 155, 158 (2007).

²⁸⁵Kate Karklina, *Human Dignity as A Foundational Value of Peremptory Norm*, 9(In International Riga Graduate School of Law RGSL Research Paper No. 22).

²⁸⁶United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 Preamble.

²⁸⁷Bederman David, *The Spirit of International Law* 13 (2002).

²⁸⁸Villalpando Santiago, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law* 21 *Eur. J. Int. Law* 387, 392 (2010).

²⁸⁹Linn Johannes, *Recent Threats To Multilateralism*, 9 *Glob. J. Emerg. Mark. Econ* 86-101 (2017).

²⁹⁰Giddens Anthony, *The Politics of Climate Change*, 43 *Policy Polit* 155, 159 (2015).

Although the effectiveness of UNFCCC in reducing GHG is subject to debate, its centrality in the climate change agenda cannot be contested. The norms of UNFCCC have been reinforced in the Kyoto Protocol, Copenhagen, Paris Agreement, and Cancun Agreement. This part argues that based on the language of these instruments and wide subscription, core climate change obligations are *erga omnes*.

The language of the UNFCCC and Paris Agreement demonstrates core climate change obligations are owed to the global community as a whole.²⁹¹The preamble of UNFCCC encapsulates the nature of climate change obligation by stating that “acknowledging that change in the Earth’s climate and its adverse effects are a *common concern of humankind*.”²⁹²The invocation of common concerns of humankind has significance in assessing the nature of the interests involved.²⁹³Climate change is then viewed from the prism of the global obligations to curb global warming. The Paris Agreement adopts similar language in the preamble but goes on to add that states should look at climate change holistically.²⁹⁴States are required to consider human rights and vulnerable groups while addressing the climate change crisis. The implications of using language such as common concern of humankind are that climate change obligations are not seen as contractual. Instead, they extend beyond states individual interests.

The implications of the use of the language of the common concern of humankind signal that climate change is *erga omnes* obligation.²⁹⁵First, the use of common concerns of humankind engages the collective action of the global community. This is because what is common in the circumstances means widespread and not involving a few states.²⁹⁶In other words, it is shared among several states by virtue of being members of the international community. Second, this delocalizes and multilateralizes the goal of addressing climate change. Thus, climate change is not only a national matter which should be exclusively addressed by states domestically. State has extraterritorial interest in the climate system.²⁹⁷Additionally, this obligation is not contractual between various states, which means there is no reciprocity in narrow sense. A state need not be directly affected for it to participate in this type of intervention.

²⁹¹Moellendorf Darrell, Climate Change and Global Justice, 3 Wiley Interdiscip. Rev. Clim. Change 131, 132 (2012).

²⁹²United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38.

²⁹³Mayer Benoit, A Review of the International Law Commission Guidelines On the Protection of the Atmosphere, 20 MelbJintlaw 453, 472 (2019).

²⁹⁴Paris Agreement to The United Nations Framework Convention On Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Igos Preamble.

²⁹⁵Mayer, Benoit Supra 286, 473.

²⁹⁶*Id.*

²⁹⁷Quirico, Ottavio, Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation 65 Neth. Int. Law Rev 185, 193 (2018).

Lastly, the use of the words humankind means that the uniting factor is the protection of humanity. The selection of word “humankind “as the baseline, points to the transcendental nature of climate change. It is no longer an issue of specific unique national interest such as economic or territorial interest; rather, it is the protection of humans.

UNFCCC and Paris Agreement provides that climate change is a global concern that require a global response. The preamble of UNFCCC enumerates the nature of climate change as “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response.”²⁹⁸The objective of the Paris Agreement is that “it aims to strengthen the global response.”²⁹⁹These two major international climate change instruments provide that the obligations imposed upon states are global. While not all global obligations are *erga omnes*, this is a signal as to the character of climate change. These two instruments are also widely subscribed by states, demonstrating the global consensus on this issue. Of course, one might argue that these treaties contain so many provisions that each provision cannot be viewed as an expression of consensus. However, the wide attention that COPs have attracted illustrates how states view their climate change obligation as taking a global shape.³⁰⁰A close look at these international climate change obligations shows that they are owed to the entire universe.

The principal objection to the argument on the use of the common concern of humankind is found in the report of the International Law Commission (ILC) on draft guidelines on the protection of the atmosphere with commentaries. The ILC commenting on the preamble of these guidelines remarks that

It is understood that the expression identifies a problem that requires cooperation from the entire international community. At the same time that its inclusion does not create, as such, rights and obligations, and, in particular, that it does not entail *erga omnes* obligations in the context of the draft guidelines.³⁰¹

The ILC commentary does not undermine the argument that common concern for humankind manifests *erga omnes* obligations. To prove this, this piece will make three arguments. First, the ILC commentary does not explain why the phrase “common concern” does not signal *erga omnes* obligations.

²⁹⁸United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 Preamble.

²⁹⁹Paris Agreement to The United Nations Framework Convention On Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Igos Article 2.

³⁰⁰Robert Mcsweeney Analysis: How Delegations At COP Climate Summits Have Changed Over Time (April 12 2022) <https://www.carbonbrief.org/analysis-how-delegations-at-cop-climate-summits-have-changed-over-time>.

³⁰¹International Law Commission (ILC) *Report Draft Guidelines On the Protection of the Atmosphere, With Commentaries Thereto* A/CN.4/736, 4 (2021).

Even if the reasons were provided in the debating stage of the report, the ILC arguments were overly weak.³⁰² For instance, the ILC's main concern is that characterizing common concern of humankind as providing for *erga omnes* would lead to the proliferation of litigation against states. This argument by ILC is unpersuasive because being a gatekeeper for the state is not a requirement for an obligation to acquire *erga omnes*. As rightly pointed out by Mayer that "[s]uch reasoning represents an appeal to consequences (argumentum ad consequentiam), a logical fallacy through which the truth-value of a statement is assessed based on a normative judgment of its consequences".³⁰³ This is a subversion of the mandate of the ILC because the ILC is not meant to be states apologist to minimize litigation against states.

The other argument is that the ILC comments on the scope of "common concern for humankind" are restricted to their draft rules. The ILC was not making a sweeping statement on the phrase common concern for humankind. Although the effect of its statement can be used comparatively to show that climate change obligations are not *erga omnes*, such an argument will not be founded on the language of ILC. Lastly, the fact that ILC found it necessary to comment that the phrase common concern of humankind in the guidelines did not amount to *erga omnes* supports the thesis of this part. This implies that the ordinary use of this phrase imposes an *erga omnes* obligations hence it was necessary for ILC to clarify the scope of its draft rules. As Dinah correctly observes that "as an international law term, it is notable, first for what it does not include, which is a reference to states. It is rather a humanity, the multitude of individuals whose concerns are at issue."³⁰⁴ This understanding informs why the ILC found it crucial to clarify the scope of this phrase when dealing with the draft regulations. Additionally, even if the phrase does not lead to the automatic conclusion of *erga omnes* obligation, there is a possibility when looked at cumulatively with other arguments made in this paper it leads to this conclusion.

While this piece concedes that it is difficult to make a watertight case for climate change as a preemptory norm, it argues that the ILC has taken a conservative and overly cautious approach to environmental law issues.³⁰⁵ The ILC has construed its mandate narrowly giving preeminence to the codification of international law, which makes the institution operates as herald.³⁰⁶ Given the current ILC approach towards climate change and environmental law in general, its pronouncement on these subjects shouldn't be given much weight.

³⁰²Sixth Committee of the General Assembly and The Topical Summary of the Debate in The Sixth Committee (A/CN.4/724) And ILC Report, A/70/10, 2015, Chap. V, Paras. 45–54.

³⁰³Mayer, Benoit Supra 293, 469

³⁰⁴Dinah Shelton, *Common Concern of Humanity*, 39 *Envtl. Poly & L.* 83,83 (2009).

³⁰⁵Mayer Benoit Supra 292, 460

³⁰⁶*Id*

The recent 2022 ILC report titled the Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), cements the argument that ILC is not the best authority when it comes to climate change and environmental matters.³⁰⁷ This piece makes three arguments why the ILC could have done more in advancing environmental law and climate change norms in international law, but it failed dethroning it the peerless position to comment on climate change. First, the ILC core mandate of ILC is enshrined in article 13(1) (a) of the UN Charter and article 1 of the Statute of the ILC, which provides that ILC is mandated to assist the General Assembly to, “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification”.³⁰⁸ Although article 14 of the Statute of ILC adopts a restricted view of the phrase progressive development of international law, article 13 (1) (a) of the UN Charter has no express constraints. Progressive development of international law introduces discretion to the ILC to make suggestions on how norms are involving.³⁰⁹ Therefore, ILC can consider the development of international law regarding climate change and environment. Given the importance of climate change and environmental norms such as no harm principles in the current climate change discourse it is a failure for the ILC 2022 report on *jus cogens* to make no recognition on environment or climate change. The report does not recognize the value that the protection of environment and climate protects, which is an underlying test for the elevation of a norm.³¹⁰

Second, despite the stature of the no harm principle as the foundation of the obligation to prevent transboundary harm,³¹¹ the ILC 2022 *jus cogens* report is silent on environment and climate norms. The ILC makes a list of what it calls “a non-exhaustive list of norms”, which have previously been referred to as *jus cogens*.³¹² This restrictive approach was unnecessary given the scope of the report as containing rules of identification and legal consequences of preemptory norms. Third, the no harm principle has the same underpinning as the crime of aggression which the ILC identified as *jus cogens*.³¹³ Although it is not conclusive evidence that since no harm principle and crime of aggression both protect against a violation of territorial integrity under article 2 (4) of the UN Charter, they have same standing in international law, the transboundary effects of climate change should receive same seriousness as crime of aggression.

³⁰⁷International Law Commission (A/77/10) Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries

³⁰⁸U.N. Charter art. 13.

³⁰⁹International Law Commission Statute article 13 (1) (a)

³¹⁰Prosecutor v Anto Furundzija, International Criminal Tribunal for the former Yugoslavia (ICTY) (1998) IT-95-17/1-T para 153

³¹¹Brent, Kerry Anne (2017). The Certain Activities case: what implications for the no-harm rule?. *Asia Pacific Journal of Environmental Law*, 20(1), 28, 51

³¹²International Law Commission supra conclusion 23

³¹³Brent, Kerry Anne supra 51.

The obligation of the states under common concern for humanity transcends national interest.³¹⁴ The focus is humanity as a race of human beings instead of nationals of a particular state. This requires states to cooperate among themselves to realize this higher goal of protecting society. Such a reasoning animates the collective approach to climate change as an issue that is of great value due to its centrality to the existence of the universe.³¹⁵

5.1.2 The Nature and Consequences of Climate Change as Signaling *Erga Omnes*

Many commentators have characterized climate change as pervasive, irreversible, global, and lethal.³¹⁶ Others view climate change as an existential issue posing the greatest threat to humanity. Whatever way one regards climate change, it is the greatest challenge facing humanity in this century. What makes climate change this complex is the interconnectedness of the climate system, meaning that it is not subject to territorial boundaries. The other is that its universal nature implies that emission in one place will affect outlying areas. The consequences of global warming have been devastating. This challenge is intricate, and one community alone cannot effectively respond to climate change. This part then considers whether this nature and consequences of climate change leads to the conclusion that it is an *erga omnes* obligation.

Climate change is interconnected both in its nature and its effects, and this means that the emission of GHG in one place will have an impact beyond its locality.³¹⁷ Climate change occurs as a reaction to the increase of GHG in the atmosphere. The concertation of GHG affects the climate balance leading to global warming. Due to the widespread nature of the atmosphere, the emission of the GHG will lead to the trapping of the Sun's heat in the atmosphere.³¹⁸ Human activities have altered the greenhouse effect, with more heat being retained. The web nature of climate system means that boundaries cannot contain its effect. Although the web nature of climate change is not peculiar to it, it is more pronounced when it comes to climate than other

³¹⁴Jimena Murillo Chávarro, *The Common Concern of Humankind and Its Implications in International Environmental Law* 5 *Mqjlicenvlaw* 133, 138 (2008).

³¹⁵Cottier, Thomas, Philipp Aerni, Baris Karapinar, Sofya Matteotti, Joëlle De Sépibus, And Anirudh Shingal *the Principle of Common Concern and Climate Change* 3 *Archiv Des Völkerrechts* 293, 297 (2014).

³¹⁶Sasmita Mohanty and Bimal Prasanna Mohanty *Global Climate Change: A Cause of Concern* 32 *Natl Acad Sci Lett* 149, 149 (2009).

³¹⁷Cottier, Thomas *Supra* 299, 295.

³¹⁸Mitchell, John, *The "Greenhouse" Effect and Climate Change* 27 *Reviews of Geophysics* 115, 115 (1989).

environmental subjects. Judge Weeramantry addressed the web nature in *Legality of the Threat or Use of Nuclear Weapons* advisory opinion stating that:

“The Global environment constitutes a huge, intricate, delicate interconnected web in which a touch there or a palpitation there sends tremors throughout the whole system. Obligations Erga Omnes, rules jus cogens and international crimes respond to this state of affairs by permitting environmental wrongs to be guarded against by all nations.”³¹⁹

The nature of climate change involving multiple states means that its response cannot be national. From a moral and global justice point of view, states owe the entire universe the obligation to mitigate and prevent climate change because the effect cannot be contained in one nation.³²⁰ One defining character of these obligations is that they arise where there is the likelihood that the actions or inactions of a state will harm others. If the issue being dealt with is global due to the shared atmosphere, it means that the obligation should not be national only. Some authors have commented that climate change poses a massive challenge because it is “planetary in scope and due to its long-term and potentially irreversible consequences intergenerational in impact.”³²¹ The ever-present challenge of mitigating climate change requires global action because these efforts will be ineffective unless coordinated internationally. This rationale informs the UNFCCC and Paris Agreement provisions on international cooperation.

It is undeniable that climate change is an existential risk to humanity.³²² Even if one might contest the existential nature of climate change as hyperbole, it is the most significant threat to human life. These statements have been echoed by the UN Secretary-General who has warned that global warming is an existential threat to life.³²³ The effects of climate change have been dire on human life. Due to climate change, the heat levels, floods, and drought, have increased. The warming has led to the melting of Antarctic ice, Greenland ice and increased heat

³¹⁹Legality of The Threat or Use of Nuclear Weapons [1996] ICJ 2 Dissenting Opinion of Judge Weeramantry, Part 3 Sec 4:1 (B).

³²⁰Quirico Ottavio, *Towards A Peremptory Duty to Curb Greenhouse Gas Emissions?* 44 Fordham Int'l LJ 923, 928 (2020).

³²¹Bodansky Brunne E and Rajamani, *International Climate Change Law 2* (2017).

³²²Smith, Glen. *Clothing The Emperor: Supporting National Climate Change Action in Ireland Through Local Governance Networks* in *Creating Resilient Futures Integrating Disaster Risk Reduction, Sustainable Development Goals and Climate Change Adaptation Agendas* 109, 110 (2021).

³²³United Nations News, *Climate Change: An ‘Existential Threat’ To Humanity, UN Chief Warns Global Summit* (April 12, 2022) <https://News.Un.Org/En/Story/2018/05/1009782> .

retention.³²⁴ Climate change also threatens the existence of marine life because of the acidity in the water.³²⁵ Additionally, climate change threatens human life through depletion of food security, health, and economic challenges. The question is what do these catastrophic effects of climate change mean for the international obligations.

Since climate change threatens human life unprecedentedly, the obligations placed upon states are higher than ordinary ones. Protection of life occupies a core part in the design of international order. Indeed, the importance of climate change is fortified by the type of interests that its actions are meant to safeguard. Climate change obligations create a correlative right to the international community due to the importance of global life. For instance, the ICTY in *Furundzija* stated

“Furthermore, the prohibition of torture imposes on States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then is a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative rights of all members of the international community. It gives rise to a claim for compliance accruing to every member, which then has the right to insist on the fulfillment of the obligation or in any case to call for the breach to be discontinued.”³²⁶

The sixth IPCC report calls for an urgent and drastic shift in the climate change policy to reduce global warming.³²⁷ Climate change is affecting the world dangerously and faster than previously anticipated.³²⁸ One of the significant clarion calls is that extreme weather is causing untold human suffering and that time is running out.³²⁹ The increase in global warming will have a broad irreversible impact on human beings and the environment.³³⁰ Thus, the environment cannot be protected adequately without addressing the climate change concerns.

³²⁴Robert L. Glicksman, *Global Climate Change and The Risks to Coastal Areas from Hurricanes and Rising Sea Levels: The Costs of Doing Nothing* 52 Loy. L. Rev 1127, 1138 (2006).

³²⁵United States Environmental Protection Agency, Climate Change Indicators: Ocean Acidity (April 13 2022) <https://www.epa.gov/climate-indicators/climate-change-indicators-ocean-acidity#:~:Text=Although%20the%20ocean's%20ability%20to,Water%20to%20produce%20carbonic%20acid.>

³²⁶In *Furundzija's Judgment Where Prosecutor V. Anto Furundzija*, Judgement of December 10, 1998, Case No. IT-95-17/1, Para 151-152.

³²⁷The Intergovernmental Panel On *Climate Change, Climate Change 2021 The Physical Science Basis* 36(2021) <https://www.reuters.com/business/cop/un-climate-report-urges-world-adapt-now-or-suffer-later-2022-02-28/> .

³²⁸*Id.*

³²⁹*Id.*

³³⁰Stephen H. Schneider and Kristin Kuntz-Duriseti, Uncertainty and Climate Change Policy. *Climate Change Policy* 77 (2002).

State's obligations to curb global warming should be viewed as occupying a special character in the international legal order. The implication of the special character of climate change is that it supersedes international investment law.

A counterargument against the case for *erga omnes* obligation is that the international climate change regime is overly weak. To support this argument is the voluntary nature of the NDC under Paris Agreement, which lacks enforcement mechanisms. These counters are valid, but they fail for two reasons. First, climate change obligations are contained in different treaties, including the UNFCCC, which is the main convention. This means that the Paris Agreement is an addition to the main treaty. Second, the Paris Agreement provides for clear obligation under Articles 4,5,6,7, and 8 mandating states to reduce GHG. The lack of coercive or mandatory obligations does not mean that the current obligations are ineffective. Thus, the regime of international climate change offers a platform for coordination of international response.

5.1.3 The effect of *erga omnes* obligations and a case for “ceding way” of climate change obligations

The concept of *erga omnes* has received considerable attention in international law academia.³³¹ While important contributions have been made in understanding this vital concept, the scope of these writings have been limited to concept identification and a few consequences.³³² In fact, significant focus has been oscillating between *erga omnes* and *jus cogens*. Although there are several effects of *erga omnes* obligations, this part considers “ceding the way” to *erga omnes* by ordinary treaty obligation.

Beyond the implications of many states having a legal interest in *erga omnes*, there are several effects of this concept.³³³ Yoshifumi identifies three consequences of *erga omnes* as follows; the obligation not to recognize illegal situations, third-party countermeasures, and the locus standi of not directly injured States in response to a breach of obligations *erga omnes*. States have an obligation not to recognize illegal acts which violate *erga omnes*. Although this obligation was articulated in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*³³⁴ it is not clear to what extent this finding was influenced by the fact that the norm under consideration was also *jus cogens*. The consequence of non-recognition is

³³¹Crow Kevin and Lina Lorenzo-Escobar, From Traction to Treaty-Bound: Jus Cogens, Erga Omnes and Corporate Subjectivity in International Investment Arbitration 13 J. Int. Disput. Settl. 121, 138 (2022).

³³²*Id* at 141.

³³³Tanaka Yoshifumi, The Legal Consequences of Obligations Erga Omnes in International Law 68 Neth. Int. Law Rev 1,3(2021).

³³⁴Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004.

different from “ceding way” since the conflicting international investment law obligations cannot be termed as illegal. Illegality of an act must exist first before the consequence of non-recognition can attend. Additionally, the existence of international investment law conflicting *erga omnes* obligations cannot be termed as a breach of international law.

The breach of *erga omnes* obligation allows third party states to take counter measures.³³⁵ This phenomenon of third-party counter measure has become a common way of enforcing compliance of international obligations. For example, third party counter measures have been adopted against Russia for invading Ukraine and breaching an international norm against aggression. The requirement for these measures to be taken is a breach of international law norm. The other effect is that breach of *erga omnes* gives *locus standi* to each member of the international community.³³⁶

This project argues that *erga omnes* obligations have a fourth implication which is to “excuse breaches of ordinary treaty obligation.” Since *erga omnes* has no capacity to invalidate a treaty like *jus cogens*, the implication of its superiority is to overshadow ordinary treaty obligations. All treaties are not equal since some establish an *erga omnes* obligation, which is superior to the others. International law elevates *erga omnes* for two reasons which are related to the elements of this norm. The first is that *erga omnes* expresses an important norm in international law hence such a norm should supersede others. The second is that international law takes a consequential approach which is that an obligation that increases utility for many states should occupy a higher rank.

A conflict between *erga omnes* obligation and international investment law obligations will be resolved by international investment law ceding way for *erga omnes*. The culpability of states for upholding *erga omnes* obligations and breaching international investment law does not attach. The treaty continues to exist without the ability to impede an *erga omnes* obligation. The basis for this theory of ceding way is that superiority of *erga omnes* must have implications. The scope of the implication of *erga omnes* is constrained only by *jus cogens*. Therefore, as a second order norm *erga omnes* cannot have same effect as first order norm of *jus cogens*. At the same time, *erga omnes* cannot have same consequences as ordinary treaties.

³³⁵Tanaka Yoshifumi Supra 317,16.

³³⁶Tanaka Yoshifumi 317,20.

6 The Suitability Of International Investment Arbitration To Decide Climate Change Cases, And A Call For Public Interest Sensitive Adjudication

The backlash against the investor-state arbitration is on the surge.³³⁷ Questions such as whether arbitration is the best mechanism to solve international investment disputes have taken a prominent place in the debate.³³⁸ Intuitively, the idea that an arbitrator, possibly a private practitioner in a leading city, is likely to decide a country's climate change policy sounds obnoxious. To some, the backlash is misplaced because the arbitrator is deciding a narrow dispute on how the investor was treated. Depending on one's worldview, these questions might appear as arising out of a misapprehension of investor-state dispute resolution mechanism or not. While the existence of the backlash cannot be denied, the validity of reasons of its causes is subject to contention. No other area has brought into question the legitimacy of international investment law, like tribunals' decision on cases touching on right to regulate in public interest. To compound this issue, tribunals have been contradicting each other, especially on matters of public policies.³³⁹ Admittedly, most public policy issues are controversial even at the domestic level. To solve the legitimacy deficits, talks of reforming the system have gained traction in the mainstream institutions such as UNCTRAL and ICSID.³⁴⁰ While these bodies have demonstrated responsiveness, their reforms agenda is procedural and tangential leaving the underlying issues unanswered.³⁴¹

Climate change is a pertinent issue that has attracted global attention over the last decade. This attention has been increasing with the adverse climate change effects being felt worldwide. The solution to this looming crisis of this century can only be achieved if states take decisive action at the national level.³⁴² Both private and public sectors have a role in addressing the climate change menace. Indeed, since the private sector is a significant emitter of GHG, their involvement is likely to accelerate reducing global warming.³⁴³ Yet, investors are becoming the stumbling

³³⁷Asha Kaushik, *Revisiting History: How The Past Matters for The Present Backlash Against the Foreign Investment Regime*, 50 Harv. Int'l. LJ. 491, 492 (2009).

³³⁸*Id.* 509.

³³⁹Anders Nilsson & Oscar Angelson, *Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed*, 30 J. Int'l Arb. 56, 588 (2013).

³⁴⁰Frank J. Garcia, Lindita Ciko, Apurv Gaurav and Kirrin Hough *Reforming the International Investment Regime: Lessons from International Trade Law* 18 J. Int. Econ. Law, 861, 885 (2015).

³⁴¹Gathii, James, *Reform and Retrenchment in International Investment* 1,1 (2021) <https://ssrn.com/abstract=3765169> Or <http://dx.doi.org/10.2139/ssrn.3765169>.

³⁴²Voigt, Christina *State Responsibility for Climate Change Damages* 77 Nord. J. Int. Law 1,10(2008).

³⁴³Ganguly, Geetanjali, Joana Setzer, And Veerle Heyvaert *If at First You Don't Succeed: Suing Corporations for Climate Change* Oxf. J. Leg. Stud 841, 847 (2018).

block to the realization of the climate change agenda.³⁴⁴

Investor have aggressively attacked the climate change policies being adopted by states as demonstrated by the cases discussed in part four. Just to highlight a few, *in Vattenfall AB and others v. Federal Republic of Germany*,³⁴⁵ an investor challenged government policy to reduce production of coal in Germany. This was repeated in the cases of *Lone Pine Resources Inc. v. The Government of Canada*,³⁴⁶ where the investor challenged Quebec law to limit oil and gas exploration in a bid to reduce fossil fuels. Additionally, an investor challenged Italy's oil exploration policy in the case of *Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic*.³⁴⁷ The recent exit of Netherlands, France, Germany and announcement of intent to leave by Luxembourg the Energy Charter Treaty signals a regime which is under siege.³⁴⁸ Yet, this does not necessarily mean that it is a win for climate change because of the sunset clauses which allows the treaty to remain in force for 20 years after a state has withdrawn from the treaty.³⁴⁹ Therefore, the proponents of a reformed international investment law should not be quick to celebrate the developments.

The investor state dispute resolution mechanism has been discredited as an illegitimate regime.³⁵⁰ In the biblical Damascus journey, this regime can be likened to "Saul" whose work is destruction of good work by impeding climate change action. A laundry of transgressions can be highlighted, for example, tribunals have been awarding colossal amount of money leading to a chilling effect on public interest regulation. Additionally, state right to regulate in public interest has been heavily impeded to a point where states have directly proclaimed their fear of the investor state arbitration.³⁵¹ There has been an expansive and one-sided interpretation of substantive standard elevating the rights of the investors and importing standards such as stable legal environment in the absence of stabilization clauses.³⁵² The other problem is the perception or existence of bias.³⁵³ Can such a discredited regime decide climate change cases?

³⁴⁴Hannah Thomas-Peter *Fossil Fuel Firms Sue Governments Across The World For £13bn As Climate Policies Threaten* Sky News, UK (10 April, 2022) <https://news.sky.com/story/fossil-fuel-companies-are-suing-governments-across-the-world-for-more-than-18bn-12409573>.

³⁴⁵ICSID Case No. ARB/12/12.

³⁴⁶ICSID Case No. UNCT/15/2.

³⁴⁷ICSID Case No. ARB/17/14.

³⁴⁸Frédéric Simon Another blow for Energy Charter Treaty as Luxembourg announces exit (November 18, 2022) <https://www.euractiv.com/section/energy/news/another-blow-for-energy-charter-treaty-as-luxembourg-announces-exit/>

³⁴⁹Andrei Belyi, *The Energy Charter process in the face of uncertainties*, 14 J. World Energy Law Bus 363, 364.

³⁵⁰Gathii, James Thuo, *Supra* 325.

³⁵¹Elizebeth Meager *Supra* 129.

³⁵²Puig Sergio and Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and The Reform of Investment Law* 112 Am J Int Law 361, 366 (2018).

³⁵³*Id.*

The hallmark of this part is to highlight the seriousness of concerns raised on the suitability of investor-state dispute resolution mechanism. These questions should be explored before a cascade of climate change-related investment disputes erupts. This piece argues that unless arbitral tribunals have a “Damascus moment” by abandoning investor exclusive adjudicative philosophy and adopt public interest-oriented adjudication they are ill-suited to decide climate change cases. The idea of the “Damascus moment” is motivated by the need for tribunals to abandon “a sole master” approach where the investor rights are the only controlling interests.

6.1 Mapping The Debate on the Legitimacy of Investor-State Dispute Resolution: A Multiple Sided Discussion

Like any other debate, the question of legitimacy of international investment law is multiple sides often contesting the existence, substantive standards, procedural and the dispute resolution.³⁵⁴This debate has created camps, one made of practitioners and arbitrators who are committed to the system that they serve for apparent reasons.³⁵⁵Most of them are beneficiaries of the investor-state system as currently practiced. There is some nuance needed in the analysis since it will be imprecise to generalize all practitioners and arbitrators. The other category is made up of academics and civil society, who are fierce critics of this system.³⁵⁶It is essential to highlight that there is a category of academics and think-tank institutions who are also beneficiaries of this system and are committed to defending its legitimacy.³⁵⁷Also, there are certain countries and unions of nations committed to reforming or abandoning the regime. This part seeks to highlight main arguments on both sides of the debate before making the key argument of this paper.

6.1.1 The arguments in favor of deciding all questions using investor-state arbitration

No better summary of the proponents of investor-state mechanism that can be offered than Rob Howse’s summary.³⁵⁸ Howse starts by establishing his legitimacy as an insider in the investor-state dispute mechanism before attacking those who criticize this regime.

³⁵⁴Asha Kaushik Supra 321, 525.

³⁵⁵Ylli Dautaj, Between Backlash and The Re-Emerging “Calvo Doctrine”: *Investor-State Dispute Settlement In An Era of Socialism, Protectionism, And Nationalism*, 41 NW. J. INT’L L. & BUS 273, 310 (2021).

³⁵⁶Tannoy Das, *The Rotten Core Of International Investment Law* (14 March 2022) <https://www.Afronomicslaw.Org/2020/04/15/The-Rotten-Core-Of-International-Investment-Law>.

³⁵⁷Alvarez Maria, and Piotr Willinski, *A Response to The Criticism Against ISDS by EFILA* 33 J. Int. Arbitr. 1-10 (2016).

³⁵⁸Rob Howse, *Courting The Critics of Investor-State Dispute Settlement: The EU Proposal for A Judicial System for Investment Disputes* 6-7 (2015).

He characterizes some detractors by making the following statement “the criticisms of the existing ISDS system are ill-informed and indeed irresponsible.”³⁵⁹ The author lays down the basic premises of the criticism as fundamentally flawed by reducing the commentaries as missing the point. This is because they attack individual cases contesting precise allegations of gross violation of investment standards. However, the author does not address the issue that while these cases are specific disputes, they reveal a perverse disposition in determining cases. For instance, the case in *Eco Oro v Colombia* demonstrates the tribunal’s perception of the place of the environmental protection when weighing it with investor rights.³⁶⁰ Additionally, to look at the issue from the prism of disjointed cases would be missing the structural aspects of a system. The investor-state dispute resolution mechanism does not result from an accident. Like all other systems, they have a purpose and a dominant worldview which the major players continuously shape.

The other argument is that there is no evidence that arbitrators are biased against states, and in fact, states win more cases than investors.³⁶¹ This argument is offered to demonstrate that arbitrators are competent and fair. To answer this argument, states winning or not is reductionist because a fair evaluation of the system is not based on who wins. To do so would be looking at the results only, which do not communicate the entire story. To judge the system fairly, one needs to assess its evolution, design, goals, composition, processes, and outcome. It might be the case that states are winning more cases, but investors who succeed win on flimsy reasons and are awarded colossal amounts. Even so, this type of evaluation leaves a lot unexplored, and it might lead to hasty conclusions.

The most persuasive argument in favor of investor state dispute resolution mechanism is that the regime is meant to establish the rule of law by depoliticizing and delocalizing disputes.³⁶² The investor is guaranteed protection of investments against arbitrary interference by the host states. Although the underlying philosophy of this argument is that host states have weak rule of law that is not capable of protecting the foreign investor, there is some merit in this goal of investor-state dispute mechanism. The example that is often given is Yuko’s expropriation by the Russian government and how the domestic courts could not protect the investor.³⁶³ To reject the value of investor-state dispute resolution mechanisms wholesomely would be mistaken. Generally, being a foreign investor comes with some downside.

³⁵⁹ *Id* 2.

³⁶⁰ *Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41

³⁶¹ Ylli Dautaj *Supra* 337, 309.

³⁶² Brower Charles and Schill Stephan, *Is Arbitration a Threat or A Boon to The Legitimacy of International Investment Law?* 9 *Chic. J. Int. Law* 477-482 (2009).

³⁶³ Henley Kathryn, *Telephone Law and The ‘Rule of Law’: The Russian Case*, 1 *Hague J. Rule Law* 241, 242 (2009).

With some protections, the host state will take its commitments on the treatment of foreign investors seriously.³⁶⁴ While this argument has considerable merit, it is not entirely true especially because of advances that have been made in democratization process.

6.1.2 The Case Against Investor-State Dispute Resolution

The investor-state dispute mechanism is fiercely contested to the extent of shaking its core. With the exponential increase in the number of BITs cases have increased making this area of law one of the most active international law domains. The increase has also drawn considerable attention, which has heightened scrutiny. The scrutiny has raised several questions touching on the contradictory decision, the ability to balance public interest and investors' rights and arbitrators bias among others. One question that has preoccupied the debate is the suitability of international investment arbitration to determine public interest regulatory disputes. This part engages with some arguments against the investor-state dispute resolution mechanism.

The substantive standards are over-broad giving arbitrators unabated discretion.³⁶⁵ The argument has been that tribunals have approached international investment law without a sense of judicial discipline that comes with recognizing exercise of limited power. Often standards such as FET and indirect expropriation have been interpreted to overturn state actions for minute transgressions. Since the world is not perfect, this means that most states mishaps will be brought under the umbrella of broad standards. A corollary to this, is that the text of the treaty does not matter because the arbitrators have wide powers which they use to transplant their sense of justice.³⁶⁶ This means that the state is held to very high and arbitrary standards that ignore governance's realities. The example of these standards was encapsulated in the case of *Metalclad Corp v Mexico*³⁶⁷ which stated that the state violated FET for failing to ensure a transparent, constant, and predictable environment to the investor. Similarly, in *Técnicas Medioambientales Tecmed, S.A. v. the United Mexican States* considering FET, the tribunal faulted the government for not renewing a license for investors hazardous waste landfill by remarking thus:

³⁶⁴Schultz Thomas and Cédric Dupont, Investment Arbitration: Promoting The Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study, 25 Eur. J. Int. Law 1147, 1163 (2014).

³⁶⁵ZhuYing, Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development, 58 Nat. Resour J. 319, 321 (2018).

³⁶⁶García Carlos, All The Other Dirty Little Secrets: Investment Treaties, Latin America, And The Necessary Evil of Investor-State Arbitration, 16 Fla. J. Int'l L. 301, 310 (2004).

³⁶⁷*Metalclad Corp. V. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, The Award, 5 ICSID Rep. 209, Para. 99 (August 30, 2000).

The foreign investor expects the host State to act consistently, free from ambiguity, and totally transparently in its relations with the foreign investor, so that it may know beforehand any rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.³⁶⁸

The investor-state dispute resolution mechanism obstructs the right of the state to regulate in favor of public interest.³⁶⁹ This observation has offered one of the most pronounced attacks against the international investment law regime. The concern is that tribunals ignore the glaring public interest in favor of investor protection. It is one thing for the tribunal to question state's motivation and it is another to ignore public interest. Even the most altruistic reasons have come under sharp attack. For instance, although there was no award, the case of *Foresti v Republic of South Africa*³⁷⁰ demonstrates the extent to which the investors can go in challenging state policy. The investor had contested the Black Empowerment Policy, which sought to give access to black people who have been historically disadvantaged and excluded in the economy under apartheid regime. In another case, the tribunal held that Canada had violated the minimum standard of treatment in the case of *Bilcon v Canada*³⁷¹ concerning the failure by the Canadian authority to approve the mining project for environmental and community considerations. Through the aggressive elevation of the investor, tribunals have shelved the environment, human rights, and public health. Yet, the state's power to regulate as an expression of sovereignty is the bedrock of the modern international law.³⁷² Some tribunals have tried to walk the fine line between state regulation and investor protection.³⁷³

The other challenge is bias which is considered as one of the most egregious crimes against the legitimacy of adjudicatory mechanisms. The investor-state arbitration has come under sharp attack for being biased against states.³⁷⁴ The bias has two dimensions.³⁷⁵ First, the pool of arbitrators is made up of commercial lawyers who appear in some cases as counsels for corporations.³⁷⁶

³⁶⁸Técnicas Medioambientales Tecmed S.A. V. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, Para. 154 (May 29, 2003).

³⁶⁹Stephanie Bijlmakers, Effects of Foreign Direct Investment Arbitration On a State's Regulatory Autonomy Involving the Public Interest, 23 AM. REV. OF INT'L ARB. 245, 249 (2012).

³⁷⁰Foresti V. Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Award (August 4, 2010).

³⁷¹Bilcon of Delaware Et Al V. Government of Canada, PCA Case No. 2009-04.

³⁷²Thompson, Alexander, Tomer Broude and Yoram Haftel, Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, And Change in Treaty Design 73 International Organization 859, 875 (2019).

³⁷³Telenor Mobile Commc'ns A.S. V. Republic of Hung., ICSID Case No. ARB/04 /15, Award, ¶ 64 (Sept. 13, 2006).

³⁷⁴Nolan Michael Challenges to The Credibility of the Investor-State Arbitration System 5 Am. U. Bus. L. Rev. 429, 438 (2015).

³⁷⁵William Park, Arbitrator Bias, 1(Boston University School of Law, Public Law Research Paper No. 15-39 2015).

³⁷⁶Nolan Michael Supra 376, 356.

Sergio and Shaffer have described this phenomenon as follows “[c]ollectively, these individuals[arbitrators] constitute a small club of self-regulated decision-makers that lacks gender and geographic diversity.”³⁷⁷ Second, most arbitrators are from the Global North, judging disputes against stereotyped Global South states.³⁷⁸ The bias of arbitrators affects their ability to balance public interest matters. The world view of these arbitrators is commercial lawyers, which limits their exposure. Additionally, the system is seen as self-perpetuating because of the close pool of arbitrators, which is difficult to penetrate. This skews the systems in favor of the commercial interest, at the expense of public interest.

The other line of attack on the investor-state arbitration is the contradictory awards arising from similar facts.³⁷⁹ Although the lack of harmonious interpretation of investment standards can be attributed to the decentralized dispute resolution mechanism, the rule of law demands certainty in the system. Despite the lack of a precedent system in international investment law, the centrality of consistency in adjudication cannot be underscored. The landmark cases to demonstrate the contradiction is *LG&E*³⁸⁰ and *CMS*³⁸¹ cases. Both cases originated from similar facts on the adjustment of tariffs arising from the Argentinian crisis. The tribunal in *CMS* stated that Argentina had contributed to the crisis. Therefore, it could not invoke necessity as a defense. While the tribunal in *LG&E* accepted the defense of necessity, remarking that the investor had not demonstrated that Argentina contributed to the crisis. The contradiction raises the question whether this regime can be trusted to protect public interest.

6.2 The Suitability of Investor-State Arbitration to Decide Climate Change Disputes

It is risible to claim that international arbitration has no value as a method of resolving international disputes resolution. Despite a few benefits, the regime is fundamentally flawed, which the raises the question of its suitability to decide climate change disputes.³⁸² Unlike other public interest issues, climate change is global, lethal, and imminent which demands that its cases be taken with gravitas they deserve. The race to stabilize the global temperature has become one of the

³⁷⁷Puig Sergio and Gregory, Shaffer Imperfect Alternatives: Institutional Choice and The Reform of Investment Law, 112 Am. J. Int. Law 361,366(2018).

³⁷⁸ *Id.*

³⁷⁹Waibel Michael, Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*, 20 Leiden J. Int. Law 637,641 (2007).

³⁸⁰*LG&E Energy Corp. V. Argentine Republic*, ICSID Case No. ARB/02/1, Decision On Liability (October 3, 2006).

³⁸¹*CMS Gas Transmission Co. V. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005).

³⁸²Julie Maupin, Public and Private in International Investment Law: An Integrated Systems Approach, 54 VA. J. Intl L. 367, 385 (2014).

most urgent and vital policy actions of the 21st century. This part argues that there are severe concerns for the arbitrators deciding climate change-related disputes. These concerns extend beyond individual arbitrators to the entire system of international investment law, which was not designed with pressing public interest in mind. However, the only remedy to cure these flaws is infusion of the system with public interest.

6.2.1 Investor-State Arbitration Is Fundamentally Flawed to Decide Climate Change Cases; “The Saul” Of International Adjudication

Currently, investor-state dispute mechanism has serious issues, making it unsuitable to decide climate change-related disputes.³⁸³ Unless these concerns are addressed, the arbitration cannot navigate the sensitive subject of climate change. As argued above, the substantive standards privileges investors above public interest. This has been seen in cases such as *Santa Elena*³⁸⁴ holding that the reasons for the change in legal regime is inconsequential in determining state’s liability and damages.³⁸⁵ Additionally, the science surrounding climate change is still evolving, and a lot remains uncertain. This is the reason climate change is supported by principles such as precautionary. With the high threshold placed upon the state to act transparently, consistent, and free from ambiguity, it might be difficult for tribunals to decide some of these malleable issues relating to climate change.

When tribunals accede to the arena of climate change, they will influence public policy on such a contentious issue.³⁸⁶ Based on the experience of cases such as *Eco Oro*³⁸⁷ tribunals have not proved to be good in balancing public interests and investors’ rights. This problem is not sporadic acts of a few arbitrators, but it is a structural issue that deals with the distribution of obligations and rights. Under this system, the investor operates without many obligations while the state shoulders numerous duties. Disputes relating to fundamental issues such as climate cannot afford to be subjected to such a skewed dispute settlement mechanism. This is compounded by the lack of doctrinal assurances that require tribunals to consider climate change interests in deciding investor rights.

The other concern is the parameters of the state’s role as the protector of public interest. This role of the state has never been questioned to the extent that international investment law does. Investors have challenged almost all regulations that affect them, even in cases that are thought to be unassailable. There are

³⁸³*Id.*

³⁸⁴*Id.*

³⁸⁵Di Benedetto Saverio, *International Investment Law and The Environment* 33(2013).

³⁸⁶*Id.*

³⁸⁷*Eco Oro Minerals Corp. V. Republic of Colombia*, ICSID Case No. ARB/16/41.

numerous academic writings discussing some of the defenses that states can make against investment cases arising from regulating Covid-19.³⁸⁸ However, the mere contemplation that investors would file several cases based on Covid-19 related laws demonstrates the extent of the challenge that states are likely to face even in the noblest measures.

6.2.2 A Case for the “Damascus Moment” Public Interest Oriented Investor-State Arbitration in Deciding Climate Change Disputes

The debate on the concerns about investor-state arbitration has rotated around binary options of courts or arbitration.³⁸⁹ While the solution of establishing a court has been the kneejerk reaction to the backlash on international investment law, this solution is not the panacea to legitimacy deficit. A court just transfers powers to a permanent body administered almost like ICSID. However, the court’s existence without addressing broader questions such as design of substantive standards will be unhelpful. Further, this does not address the fundamental questions that go to the problem’s root causes. Indeed, courts can be commercially single-minded, as demonstrated by the many commercial divisions in several jurisdictions.³⁹⁰ Efficiency and facilitation of commercial transactions are the underlying philosophies of these court. This demonstrates that courts are not the silver bullet though they might be the first step towards harmonizing the jurisprudence. Courts or arbitration is an issue of the form of the dispute resolution mechanism, which is secondary to addressing structural flaws. This part calls for a *metanoia* of the investor-state arbitration in what it describes as “Damascus moment”. Without this systemic change, international investment law will run a foul with climate change action.

The centrality of public interest as the organizing philosophy for climate change policy cannot be gainsaid. The public interest has been lacking in investor-state arbitration. To regain the legitimacy that is pivotal in deciding climate change disputes, tribunals must be guided by public interest consideration. Of course, this does not mean that the state policy must be upheld. Instead, the tribunal should not look at the dispute from the private law lens, with the major objective of protecting investors. Rather, it should be accustomed considering state policy to advance climate change.³⁹¹

³⁸⁸Dimitrios Katsikis, ‘Necessity’ Due to COVID-19 As A Defence to International Investment Claims, 36 ICSID Rev/ FILJ 46, 48 (2021).

³⁸⁹Howse Rob, *Designing A Multilateral Investment Court: Issues and Options*, 36 Year. Eur. Law 209, 215 (2017).

³⁹⁰Winslow Luke, Alec Baker and Charles Goehring the *Neoliberal Conquest of the Supreme Court*, 3 Commun. Public 205, 205-217 (2018): 205-217.

³⁹¹Alexei Atif, *Preventing The Regulatory Chill of International Investment Law and Arbitration*, 9 International Law 85,85(Research Canadian Center of Science and Education 2020).

“The Damascus moment” requires a complete shift on adjudication of government policy. The tribunal is supposed to acknowledge the right of the state to regulate as a legitimate action of the state. In the area of climate change, the tribunal must acknowledge that climate change is an imminent threat to humanity. Therefore, it is a primary responsibility of states to implement measures to mitigate global warming. Science has established those human activities are responsible for the rise in global average temperature.³⁹² Specifically, GHG arising from burning of fossil fuel makes two-third of all GHG.³⁹³ Government actions to reduce GHG in the atmosphere are inevitable. Therefore, the tribunals cannot decide investments disputes outside the context of the climate change emergency.

The emergency context must be preeminent in interpreting and implementing international investment law. Key facts should guide arbitrators in deciding investment cases. First, ton of billions of GHG is being emitted in the fossil fuel industry.³⁹⁴ Second, two-third of cities are at the verge of destruction by rising sea levels.³⁹⁵ By 2050, 140 million people will be displaced by climate change in Sub-Saharan Africa, Latin America and South Asia.³⁹⁶ International investment law must be guided by the words of scientist who have proclaimed that “[t]he climate crisis has arrived and is accelerating faster than most scientists expected. It is more severe than anticipated, threatening natural ecosystems and the fate of humanity.”³⁹⁷ These issues should be crucial factors in deciding the legality of state action to reduce the GHG and how it affects investors.

When in conflict with the international investment law, climate change obligations should be considered as *erga omnes* obligations ranking above international investment law. International investment law cannot be interpreted as an exclusive discipline. Despite the problem of fragmentation of international law, the international system has states as major subjects of international law. Thus, when the entire system is challenged by catastrophe like climate change the system must respond in a coordinated way. This nature of international system should influence how arbitrators view their roles. In any case, arbitrators have often quoted general international law in interpreting states obligation to demonstrate that tribunals recognize that international investment law does not operate in isolation.

Investor-state tribunals should recognize that there is no perfect government that works seamlessly. When dealing with a rapidly evolving area like climate

³⁹²United States Environmental Protection Agency, Global Greenhouse Gas Emissions Data (April 10 2022) <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> .

³⁹³*Id.*

³⁹⁴United Nations, *The Climate Crisis – A Race We Can Win* (April, 10 2022) <https://www.un.org/en/75/climate-crisis-race-we-can-win> .

³⁹⁵*Id.*

³⁹⁶*Id.*

³⁹⁷William Ripple, Christopher Wolf, Thomas Newsome, Phoebe Barnard, William Moomaw, *World Scientists' Warning of a Climate Emergency*, 70 *Bioscience* 1,9 (2020).

change, states cannot be expected to figure it out and work faultlessly. Most arbitrators have an ideal conception of government and how it should run in an almost magical manner. Yet, the government is a complex entity with several centers of powers, which often work in a dynamic world full of uncertainties. The human rights law has managed to handle this nature of government by developing doctrines such as margin of appreciation.³⁹⁸ For instance, the tribunal viewed state action as discriminatory in *Quiborax v Bolivia* when the government reacted to quell the unrest and environmental degradation. It concluded that “discrimination does not cease to be because it is undertaken to achieve a laudable goal”.³⁹⁹

While human rights doctrines are not automatically transferable to international investment law, it is important that an arbitrator’s world view of government operations is not used to disproportionately impede the public interest.⁴⁰⁰ Additionally, governments work in a polycentric environment involving conflicting interests. To streamline the variant interests’ governments will limit the rights of one party for a cohesive co-existence. Unless the international investment law caters for this inherent character of exercise of state powers, the tribunal’s decisions will be aloof and elitist, which might undermine the global climate change agenda.

International investment law has fundamental flaws that make the regime run counter climate change action. This area is not designed to balance competing interests. Tribunals have approached international investment law myopically without considering other areas of international law. At the end, what has been produced is a one-sided regime. Despite these weaknesses the regime can have a Damascus moment which incorporates public interest in case determination. Tribunals must not only view climate change obligations as *erga omnes* but also must have an emergency worldview.

7 Conclusion

This piece has sought to examine the tension between stabilization under FET and climate change action. It highlighted that FET is formulated broadly and interpreted expansively to incorporate even the slightest transgressions against the investor. This sweeping nature of FET has turned out to be a gateway for incorporating the arbitrators’ sense of justice beyond treaty provisions.

³⁹⁸Hwang, Shu-Peng, *Margin of Appreciation in Pursuit of Pluralism? Critical Remarks On the Judgments of the European Court of Human Rights On The Burqa Bans*, 20 Hum. Rights Law Rev 361, 365 (2020).

³⁹⁹*Quiborax SA and Non Metallic Minerals SA V. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2. Award Para 253.

⁴⁰⁰Beharry Christina and Melinda Kuritzk, *Going Green: Managing The Environment Through International Investment Arbitration*, 30 Am. U. Int’l L. Rev 383, 421 (2015).

Tribunals interpret FET as a one-sided guarantee that acts as a pathway for stabilization akin to stabilization clauses. This situation has been compounded by tribunals interpreting FET using the dictionary meaning of the word fair and the word equitable. The interpretation yields broad terms which have no material content. Although the new generation of investment treaties have a restricted FET, the inclusion of words such as “includes” undermines the effectiveness of this restriction. Additionally, the new generation treaties operate in a culture with an embedded view of FET, which means that tribunals ignore the restrictions and interpret FET expansively. While tribunals label FET as a standard, they apply it as a categorical rule that operates without exception or context. Yet, FET is supposed to be interpreted considering context and incorporating relevant information such as the reason for a violation and the purpose of state action.

The project has interrogated the question of international climate change as the century’s crisis, which has acquired a moral galvanizing effect. It sought to provide a basis for elevating international climate change obligations above FET by viewing the later as an emergency. It discussed how the IPCC has painted a doom picture requiring the most urgent climate response. The universe has one climate system, which means that climate change knows no boundaries. Thus, states have adopted the language of international law and relations in responding to climate change. This research called for rethinking of international law to harmonize ordinary obligations with climate change emergency. International law has benefits such as relatively developed principles such as no-harm and precautionary principles, which can aid in solidifying climate change obligations. The no-harm principle should be interpreted broadly with presumptions to overcome the challenges associated with causation in climate change. This piece suggests adoption of the emergency framework in the wake of these conflicting international law obligations. The climate change catastrophe warrants the adoption of an emergency structure that will lead to climate elevation above other international commitments.

The international law project is imperfect because of the fragmentation and lack of a clear hierarchy of laws. For instance, investors have deployed international investment law to stop climate change actions. The fossil fuel companies have instituted over five cases challenging climate change action for breaching FET and other standards. These companies are suing governments for over \$ 18 billion. The cases have led to some governments expressing their fear of implementing climate change policies because of investor-state dispute resolution.

The core of this research is examining the tension between stabilization under FET and climate change. One of the standards that incorporate stabilization is a legitimate expectation. This piece finds that even in the absence of stabilization clauses or specific promises, tribunals have interpreted the mere existence of a particular legal regime as creating legitimate expectations. Tribunals have rationalized this reading of legitimate expectation, arguing that investors invested

based on laws that existed at the time of investments, which means the law should not change. For instance, in *Duke v Ecuador* the tribunal concluded that “[t]he stability of the legal and business environment is directly linked to the investor’s justified expectations”. Here, the legitimate expectation incorporates a stable legal environment. Legitimate expectation also establishes stability by demanding consistent, non-ambiguous, and transparent state conduct. These standards insulate investors from public interest legal changes such as the adoption of climate change policies. Yet, legitimate expectation is subject to caveats such as reasonable expectations that offer a path for incorporating context in interpreting the law. The paper has offered an extensive discussion of what it calls the reconstruction of legitimate expectation through the lenses of “malleable thesis”. It argues that legitimate expectations have no settled meaning and to determine the core of the concept one must look at the context and make a value judgment. Through a reasonable promisor it reconstructs what amounts to legitimate expectation. It is not proper for an investor to expect the state will not respond to global emergencies like climate change. The other form of stabilization is autonomous stability under FET.

The conflict between climate change obligations and international investment law requires a coherent legal structure and infusion of public interest in investment disputes. *Erga omnes* obligations offer a concrete architecture to solve the question of conflict of international commitments. Claiming that an obligation is *erga omnes* elevates it higher than ordinary treaty obligations. *Erga omnes* obligation expresses a value judgment because only crucial standards meant to protect humanity, or the universe occupy the pedestal place. These obligations embody what society considers more important than others because every society has a ranking of commitments based on the interests they protect. While this research did not explore fully the exact formulation of obligation that amounts to *erga omnes*, it was clear that some aspects of climate change obligations have acquired this standard. This piece relied on treaty language such as “common concern for humankind” to argue that some climate change obligations are *erga omnes*. These treaties also delocalize and multilateralizes climate change commitments. The preamble of UNFCCC buttresses the notion that climate change has global nature which requires a global response. The nature of climate change as a global crisis that knows no boundaries and poses existential danger signals that curbing global warming is an *erga omnes* obligation. Apart from the three widely accepted consequences of *erga omnes*, this research has proposed a fourth consequence of ceding way for *erga omnes* obligations if they conflict with ordinary treaties.

The last question that this project has sought to answer is the correct forum to resolve climate change-related disputes. The investor-state dispute resolution mechanism faces vast backlash based on substantive and procedural reasons. One of the significant sources of the backlash is the view that the regime impedes

states' public interests' regulations. This dispute resolution mechanism has acquired a character like the biblical "Saul" in the Damascus journey. Some of the transgressions of this regime are that the substantive standards privilege an investor more than the right to regulate for public interest. The others are colossal damages, arbitrators' bias, contradictory decisions, and abuse of substantive standards to impose a utopia view of states. This piece argues that the concerns are legitimate, and they raise serious issues about the appropriateness of tribunals to determine climate change-related disputes. These concerns are justified because international investment law did not envision these tribunals deciding public interest cases. In what this research calls "the Damascus moment," the tribunals can make a complete shift from investor-exclusive adjudication to a holistic and public interest approach. This shift is characterized by adopting public interest-oriented adjudication on climate change. It also requires the realization that there are no perfect governments, especially in times of evolving crises like climate change.

THE AfCFTA IP PROTOCOL AND THE COMMERCIALISATION OF TRADITIONAL KNOWLEDGE IN AFRICA

**Dr Patrick Ageh Agejoh*

Abstract

The quest for traditional knowledge from Africa is witnessing increasing illicit commercialisation by multinational pharmaceutical firms and biotech companies. Scientific research and innovations have changed the way traditional knowledge (TK) is used, managed, and governed today. Intellectual property rights protection, such as patent rights, based on TK does not include TK holders' interests. African countries are frustrated with many multilateral arrangements such as the WTO TRIPs Agreement and international trade negotiations under the World Trade Organisation due to the complex and unequal bargaining powers in these negotiations. A kind of one-size-fits-all arrangement. The adoption of the Continental Free Trade Area Agreement (AfCFTA) with its proposed IP Protocol to the Agreement could be a way to balance the inequality and to harness intra-regional trade negotiations relating to the commercialisation of traditional knowledge (TK). This analysis posits that for the AfCFTA Agreement's objectives and the proposed IP Protocol to be achievable, the policies and laws of sub-regional bodies in Africa be harmonized to set minimum standards and effectively tackle the aspects of IP relating to the commercialisation of TK. Existing sub-regional organisations such as ARIPO and OAPI are fragmented along colonial backgrounds without harmonisation allowing for continuous illicit exploitation and commercialisation of TK in Africa.

Keywords: IP Protocol, Commercialisation, Traditional, Knowledge, Africa

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1. Introduction

The migration from the Organisation of African Unity to the launch of the African Union in Durban 2002, was *inter alia* to accelerate the political and socio-economic integration of the continent and defend African common positions on issues of interest for the continent. With this in mind, African Union (AU) Member States in 2013 adopted the AU Agenda 2063 as a shared framework for ‘inclusive growth and sustainable development for Africa’ including ambitious policies in a variety of areas of interest for the continent.¹ Sustainable development presupposes and necessitates the harmonisation of economic-related laws such as intellectual property laws that regulates the works of art, designs, marks and patent inventions.² With these in mind, African Union Member States at the 10th Extraordinary Summit of the AU Assembly of Heads of State and Government held on 21 March 2018, in Kigali, the Republic of Rwanda via the Kigali Declaration, adopted the Continental Free Trade Area which came into force on 30 May 2019. This is to ‘create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the AU Agenda 2063 Pan African Vision of “An integrated, prosperous and peaceful Africa”.’³ The negotiation of this Free Trade Agreement contains intellectual property rights provisions on copyright, geographical indicators, trademark, patent and trade secrets that will serve the standards of the African continent taking into account the protection of traditional knowledge.

Economic and technological expansions triggered in the late 19th century the importance to develop new international trade laws. The development of these laws was with the intent to promote multilateralism and regional trade agreements. While multilateralism is the most salient force in the post-war world economy, the existence of economic regionalism provides regional trade agreements in the form of customs unions and free trade areas.⁴

From May 2019, the Africa Continental Free Trade Area (AfCFTA) Agreement has become the world’s largest continental free trade area, creating a single market for goods and services that apply to 1.2 billion people.⁵ The adoption of the Agreement

1 *Agenda 2063: The Africa We Want*, AFR. UNION (2015), https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf (last visited Apr. 8, 2023).

2 Yeukai Mupangavanhu, *The Protection of Intellectual Property Rights within the Continental Free Trade Area in Africa: Is a Balance between Innovation and Trade Possible?*, 15 INT’L J. BUS., ECON. & L. 14, 14 (2018).

3 Afr. Union, Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (last visited Apr. 8, 2023).

4 KEVIN G. CAI, *Regional Economic Integration in East Asia*, in THE POLITICS OF ECONOMIC REGIONALISM 83 (2010).

5 Titilayo Adebola, *Mapping Africa’s Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol*, 1 AFR. J. INT’L ECON. L. 233, 234 (2020).

includes the adoption of important Protocols to the Agreement to deal with specific areas of trade. Intra-Africa harmonisation of protection and commercialisation of TK requires a deeper regional integration in which political conditions permit faster movement toward free trade, which would then spill over to the world economy.⁶ Regional integration and development in Africa is not only a function of the structural transformation of economies but the advancement of science and innovation capacities.⁷ Africa trade agreements generally demonstrate high levels of ambition with low levels of implementation.⁸ Just like the Paris Convention for the Protection of Industrial Property of 1883, which seeks to harmonise national patent laws, the AfCFTA Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures are high-level protocols to expand intra-African trade through the harmonisation and coordination of trade liberalisation across Africa.⁹

Africa continent is rich with biodiversity, genetic resources and traditional knowledge. The African Regional Intellectual Property Organisation (ARIPO) Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore refers to traditional knowledge as 'knowledge originating from the traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community'.¹⁰ The *Echinops Giganteus* endemic plant of the Kingdom of Magha-Bamumbu is useful to prevent heart and gastric troubles. Traditional use of this plant is for anti-cancer purposes, with several effective cytotoxins. The indigenous communities of the Kingdom of Magha-Bamumbu, Lebialem Division, and South West Region of Cameroon have exploited the plant resource over the years. *Echinops Giganteus* is among other plants used traditionally by this community.¹¹ The trade of Traditional Knowledge (TK) has emerged as a contemporary global issue of importance resulting from the advances in technology and the interest of biotechnology companies in the genetic resources of developing countries. In recent years, the international community has intensified

6 See CAI, *supra* note 4, at 83.

7 Saidi Trust, Knowledge Valorisation for Inclusive Innovation and Integrated African Development, in INNOVATION, REGIONAL INTEGRATION, AND DEVELOPMENT IN AFRICA: RETHINKING THEORIES, INSTITUTIONS, AND POLICIES 97 (Samuel Ojo Oloruntoba & Mammo Muchie eds., 2019).

8 Gabila Nubong, Developmental Regionalism and the Success Prospects of Africa's Continental Free Trade Area (CFTA): Lessons from Africa's Early Integration Experience, 13 AFR. REV. 1, 3 (2021).

9 Afr. Union, Protocol to Trade in Goods and Services to the African Continental Free Trade Area (2018), <https://au-afcfta.org/trade-areas/market-access/> (last visited April 11, 3, 2023).

10 African Reg'l Intell. Prop. Org., Swakopmund Protocol on the Protection of Traditional Knowledge & Expressions of Folklore pt. I, § 2.1, Aug. 9, 2010, <https://www.aripo.org/wp-content/uploads/2019/06/Swakopmund-Protocol-on-the-Protection-of-Traditional-Knowledge-and-Expressions-of-Folklore-2019.pdf> (last visited Apr. 9, 2023).

11 See generally Mathieu Tene et al., Lignans from the roots of *Echinops giganteus*, 65 PHYTOCHEMISTRY 2101 (2004).

its search for effective remedial measures to counter perceived negative effects on indigenous communities arising from the exploitation and commercialisation of traditional knowledge by pharmaceutical and agriculture industries.¹² These advances in technology have led to a shift from subsistence or traditional use of plant resources to the high commercialisation of these species. The Devils Claw plant of the Cassel Community, North, West, South Africa is also one of the medicinal plants considered as gold and diamonds of Cassel Community. It is useful for arthritis relief, weight loss, kidney disease, natural pain relief and other diseases. The useful medicinal plant attracts bio prospectors who through intermediaries have been interested in buying even the 'mother tuber' of the plant at the cost of R400 as against R500 proposed by the traditional healer in which there was still the complaint that selling the 'mother tuber' of the plant was like giving away the power of the community.¹³ The commercial value of these species has led to unsustainable stalking from African communities' traditional knowledge of plant resources. This unsustainability is combined with the expansion of local and international markets which put at risk of extinction not only traditional knowledge but also the economies of the vulnerable communities.¹⁴ The phenomenon of tapping unquantifiable wealth from Africa to the global north can be seen in the ongoing unequal trade between the duos.¹⁵ Trade mispricing, commercial smuggling of TK, and lack of developmental investments are calculated as illegal capital flight from Africa. Trade mispricing may be through collusion between importers and exporters within the same invoice, not based on international principles or treaties by multinational corporations.¹⁶ These prejudices have caused many indigenous communities to oppose the integration of their inherent rights over their knowledge in a commercial system so complex and unequal.¹⁷

The continent is confronted by a fragmented IP architecture, comprising an array of partially overlapping and sometimes conflicting agreements, laws and policies. Africa needs a homegrown IP system that underscores the unique forms of innovation and

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- 12 Paul Kuruk, *Mutual Recognition Agreements and the Protection of Traditional Knowledge*, 38 COMMONWEALTH TRADE HOT TOPICS 1, 12 (2005).
 - 13 Otsile Ntsoane, *Intellectual Property Rights and Natural Resources: A Case Study of Harvesters of Medicinal Plants in the North-West Province, South Africa*, in INDIGENOUS KNOWLEDGE SYSTEMS AND INTELLECTUAL PROPERTY IN THE TWENTY-FIRST CENTURY: PERSPECTIVES FROM SOUTHERN AFRICA 114 (Isaac Mazonde & Thomas Pradip, eds., 2007).
 - 14 Paul-Marie Loundou, *Medicinal Plant Trade and Opportunities for Sustainable Management in the Cape Peninsula, South Africa* (Dec. 2008) (M.Sc. Thesis, University of Stellenbosch) (on file with the University of Stellenbosch Library system), <http://scholar.sun.ac.za/handle/10019.1/2495>.
 - 15 NKWAZI N. MHANGO, HOW AFRICA DEVELOPED EUROPE DECONSTRUCTING THE HIS-STORY OF AFRICA, EXCAVATING UNTOLD TRUTH AND WHAT OUGHT TO BE DONE AND KNOWN 13 (2018).
 - 16 DEV KAR & DEVON CARTWRIGHT-SMITH, GLOB. FIN. INTEGRITY, ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES, 2002-2006 8 (2008).
 - 17 JONATHAN CURCI, THE PROTECTION OF BIODIVERSITY AND TRADITIONAL KNOWLEDGE IN INTERNATIONAL LAW OF INTELLECTUAL PROPERTY 17 (2010).

creativity for the continent to deliver effective development-oriented IP protection of TK.¹⁸ Before analysing in greater detail the importance of the AfCFTA Protocol on intellectual property rights, it is worth highlighting the international dimension relating to the protection and commercialisation of traditional knowledge.

2. International Dimension on the Protection and Commercialisation of TK

The liberalization of the global trade policies and other economic reforms are evolving such that value-added product development and its commercialization has become one of the fastest economic activities in the world.¹⁹ In 1998, the African Department of the World Bank highlighted the need to integrate traditional knowledge into the development process by launching an Indigenous Knowledge for Development Program. Nicolas Gorjestani's World Bank paper on Indigenous Knowledge for Development states that TK has the potential to provide locally managed, sustainable and cost-effective survival strategies. Building on TK can be effective in helping to reach the poor since TK is often the only asset they control and are very familiar with.²⁰ In Malawi, TK of farmers and fishermen has been merged with scientific knowledge to improve the sustainable use of the Lake Malawi Basin resources. Kenya, Ethiopia and Ghana are developing projects from World Bank fundings to promote medicinal plants as an integral part of health-related TK to provide alternative sources of income and to maintain and protect biodiversity.²¹

Given that intellectual creativity require scientific validation for it to be granted exclusive rights within the framework of IPR, TK may require validation prior to the sharing of such knowledge beyond the original context.²² There are concerns that the exploitation of TK of developing countries, which are often used commercially and/or patented in developed countries with little or no benefit shared with the owners of the resources.²³ For many traditional communities in Africa and other developing countries, their TK entails a bundle of relationships and obligations rather

18 Adebola, *supra* note 5, at 234.

19 P. Pushpangadan & K. Narayanan Nair, *Value Addition and Commercialization of Biodiversity and Associated Traditional Knowledge in the Context of the Intellectual Property Regime*, 10 J. INTELL. PROP. RTS. 441 (2005).

20 Nicolas Gorjestani, *Indigenous Knowledge for Development: Opportunities and Challenges*, Presentation at UNCTAD Conference on Traditional Knowledge, at 2 (Nov. 1, 2000), https://web.worldbank.org/archive/website00297C/WEB/IMAGES/IKPAPER_.PDF

21 *Id.*

22 Gorjestani, *supra* note 20, at 18.

23 U.N. Conference on Trade and Development, Sophia Twarog, *Preserving, Protecting and Promoting Traditional Knowledge: National Actions and International Dimensions*, 61, UNCTAD/DITC/TED/10 (Sophia Twarog & Promila Kapoor eds., 2004).

than a bundle of economic rights as under the common law property system.²⁴ The international dimension is based on the western perception of intellectual property protection principles which entail exclusive rights and other legal measures that limit the use of the protected material by third parties. The protection principles also set conditions for their authorized users such as imposing compensation or patenting.²⁵ Article 10(c) of the Convention on Biological Diversity (1992) provides that ‘each Contracting Party shall, as far as possible protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements’.²⁶

Industrialized countries have made efforts to push for the harmonization of legal standards to render IP protection more efficient and more widespread. This has led to the adoption of the WTO TRIPs Agreement to include IP protection of TK. The European Union has influenced its member states to promote the effective protection of intellectual property which include innovations from TK.²⁷ The WTO TRIPs Agreement in its Article 66.1 made it flexible for least developed countries based on different levels of development by granting the LDCs a “grace period” during which they do not have to comply with the whole of the agreement.²⁸ The TRIPs Agreement after its adoption provided for an initial transition period up to 2006 which has been extended severally and will now run until 01 July 2034, or earlier should the LDC become a developing country before that date. A further transition period relates to pharmaceuticals that is in place until 01 January 2033 or earlier should the LDC cease to be an LDC before that date. In terms of this transition period, LDCs are not required to give exclusive marketing rights to pharmaceuticals that are subject of a patent application as is provided for in Article 70.9 of the TRIPs Agreement. LDCs currently have the policy space to make unique IP regimes that are appropriate to their socio-economic development during these extendable transition periods.²⁹

Developing and least developed countries are arguing that knowledge and creativity have been narrowly defined in the context of IP protection ignoring indigenous creativity of traditional knowledge. IP rights are theoretically property rights to products of the mind.³⁰ At the 2001 Doha Conference, developing and LDCs demanded a review

24 CURCL, *supra* note 17, at 92.

25 Julie Yassine, *IP Rights and Indigenous Rights: Between Commercialization and Humanization of Traditional Knowledge*, 20 SAN DIEGO INT’L L. J. 71, 76 (2018).

26 United Nations Convention on Biological Diversity (1992), Art.10(c).

27 *Id.* at 75.

28 The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs - 1995), art.66.1.

29 Caroline B. Ncube, *Intellectual Property and the African Continental Free Trade Area: Lessons and Recommendations for the IP Protocol*, 21 J. INT’L TRADE L. & POLY 1, 6 (2022).

30 VANDANA SHIVA, *THE PLUNDER OF NATURE AND KNOWLEDGE: BIOPIRACY* 9 (U.K. ed. 2011).

of the TRIPS Agreement and outstanding implementation issues before the TRIPS Council to cover the relationship between the TRIPS Agreement and the CBD, as well as the protection of traditional knowledge.³¹

Debates on the commercialisation of TK led to the establishment of the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) whose mandate is to finalise a text-based negotiation agreement on international legal instrument(s), without prejudging the nature of the outcome, relating to the intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).³² The chairperson of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has prepared a draft internationally binding instrument which provides in its Article 3 a clearer understanding of the modalities of international disclosure requirement in which policymakers can make informed decisions regarding the costs, risks and benefits of a disclosure arising from the commercialisation of traditional knowledge.³³ The draft instrument in its Article 3.2 provides that:

Where the claimed invention in a patent application is [materially/directly] based on Associated TK, each Contracting Party shall require applicants to disclose: (a) the indigenous peoples or local community that provided the Associated TK, or, (b) in cases where the information in sub paragraph (a) is not known to the applicant, or where sub paragraph (a) does not apply, the source of the Associated TK.³⁴

In a normal course of action, the acknowledgement of the material source of information is an important sign of good faith. Issues of biopiracy or illegal exploitation and commercialisation of TK usually arise when the user(s) of this knowledge is claiming patent protection of associated traditional knowledge which is not 'new' contrary to

31 U. N. Conference on Trade and Development, *Implications of the African Continental Free Trade Area for Trade and Biodiversity: Policy and Regulatory Recommendations*, 23, UNCTAD/DITC/TED/INF/2021/3 (2021), https://unctad.org/system/files/official-document/ditctedinf2021d3_en.pdf.

32 WORLD INTELL. PROP. ORG., TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY 1 (2015), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf.

33 See generally Ian Goss, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources* (Apr. 30, 2019), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_chair_text.pdf.

34 https://www.wipo.int/tk/en/igc/draft_provisions.html

the requirement of novelty in a patent application. To avoid conflicts and illegality in the commercialisation of TK, the drafters of AfCFTA IP Protocol should adopt this proposition of WIPO IGC chairperson draft instrument and make a mandatory disclosure requirement that supports legal certainty and sanctions in case of a breach of the disclosure requirements for patent application arising from the use of TK in Africa. Proponents of intellectual property rights protection of TK hold the views that IPR provides legal entitlements to TK holders, safeguarding against the illegitimate acquisition of IPR over TK and ensuring the practice of prior informed consent (PIC) and access and benefit-sharing (ABS).³⁵

The standards set under the TRIPs Agreement have raised further debates such as being inconsistent and contrasting the provisions of the CBD Convention for the protection of TK. At the Doha Ministerial Conference negotiations to the TRIPs Agreement in 2001, the Africa Working Group supported by other developing countries protested for the amendment of the TRIPs Agreement. It was suggested at the Doha negotiations that patent applicants are required to disclose the country of origin of genetic resources and traditional knowledge used in their inventions, with evidence that the TK holders received prior informed consent.³⁶ Looking at the complexities in patent protection, alternative regulatory mechanism entails a balance in trade between TK holders and multinational firms.

Article 7 of the Nagoya Protocol to the Convention on Biological Diversity (CBD) requires that access to TK associated with genetic resources held by indigenous or local communities must be based on prior informed consent (PIC) and that a mutually agreed term has been established.³⁷ Asian Pacific Islands under the Pacific Islands Forum on Intellectual Property, Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources on their part held a conference in 2015 in Samoa in which it was stated that when traditional knowledge is lost, this can have an enormous impact on the cultural identity and way of life of indigenous communities.³⁸ Traditional knowledge form part of the rich cultural identity of Africa which must not be eroded through cross-border trade. The disproportionate exploitations and commercialisation of TK by multinational firms through bilateral trade agreements most often than not disregard the socio-economic wellbeing of the local owners of TK. Some scholarly

35 Pushpangadan & Narayanan Nair, *supra* note 19, at 444.

36 Intellectual Property: Geographical Indications and Biodiversity, WORLD TRADE ORG, (Dec. 2008), https://www.wto.org/english/tratop_e/dda_e/status_e/gi_e.htm.

37 U.N. Convention on Biological Diversity, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 7, Oct. 29, 2010, <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

38 Veniana Qalo, Pacific Islands Forum Secretariat, Practical Workshop on Intellectual Property, Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources (Dec. 8, 2015), https://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_apa_15/wipo_iptk_apa_15_remarks_iplcs_day.pdf.

analyses have shown that the protection of TK under the current IP rights regime does not provide an ecosystem for the balance of trade and equal benefits arising from the commercialisation of these resources.³⁹

The World Health Organisation Conference Declaration of Alma-Ata in 1978 in paragraph 3 of the Declaration expressed the need that:

[e]conomic and social development, based on a New International Economic Order, is of basic importance to the fullest attainment of health for all and to the reduction of the gap between the health status of the developing and developed countries. The promotion and protection of the health of the people is essential to sustained economic and social development [of all]⁴⁰

Social development entails equal and fair access of the greater population to their natural heritage and proceeds from trade in these resources. Intellectual property protection rights globally have created social and economic imbalances between the owners of TK and the users. The lack of harmonisation of international laws in the commercialisation of TK is based on the complex reasons that industrialised countries do not want to participate in a clear internationally binding mechanism for the fear that it may open a Pandora's box for intersecting claims over TK.

Meanwhile, the European Community Directive 98/44/EC of the European Parliament and of the Council of 06 July 1998 on the legal protection of biotechnological inventions in its preamble states that 'differences in the legal protection of biotechnological inventions offered by the laws and practices of the different Member States could create trade barriers and hence impede the proper functioning of the internal European market'.⁴¹ The EC have understood that 'uncoordinated development of national laws on the legal protection of biotechnological inventions in the Community could lead to further disincentives to trade, to the detriment of the industrial development of such inventions and the smooth operation of the European market'.⁴² Therefore, the EC Directive should serve as a reference for Africa to understand that for the AfCFTA IP Protocol to protect their TK and smooth operation of activities arising from the commercialisation of TK, a continental framework must be put in place for AU market.

39 U. N. Conference on Trade and Development, *Report of the UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework*, 9 (Feb. 4-6, 2004), https://unctad.org/system/files/official-document/ditcted200518_en.pdf.

40 WHO, Declaration of Alma-Ata, III (1978).

41 Directive 98/44, of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions (1998).

42 *Id.*

There is a contradiction between the CBD and TRIPs Agreement as well as the lack of legislative harmonisation of laws on the commercial use of TK. Article 7 of the TRIPs Agreement provides that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁴³

Technological innovations and the transfer of technology from industrialised countries to developing and LDCs has been highly contested among technology holders and if lackadaisically agreed, the agreement will be through a compulsory licence which is not cheap. Transfer and dissemination of technology within the international IP law system remains a huge and unsolved problem. Unequal trade relationships between industrialised countries and developing countries do not provide a mutual advantage to the holders and users of TK. IP rights standards as provided in article 27(3) of the TRIPs Agreement are complex and do not recognise indigenous creativity in Africa like other LDCs or developing countries. The use of the word 'should' in the provision in article 7 gives the impression that IP protection promotes innovation and economic growth. The WTO TRIPS Agreement in Article 27(3)(b) gives developing countries considerable flexibility concerning how they can choose to protect plants and new plant varieties by excluding plants from patentability although it requires them to protect plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. But the ever-increasing setting up of IP protection standards does not recognise TK innovations in the competitive market economy. There is a lack of a multilateral binding mechanism that safeguards the general interest of humanity. Traditional knowledge importance for developing countries' development and trade may not be overemphasized. This, therefore, needs assistance to build regional capacities and develop institutional and consultative mechanisms for TK protection and TK-based innovation.⁴⁴

In South Africa, the Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 provides strict regulations on the commercial use

43 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017, art.7.

44 U.N. Conference on Trade and Development, Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, 1, U.N. Doc. TD/B/COM.1/EM.13/2 (Aug. 22, 2000), <https://unctad.org/system/files/official-document/c1em13d2.en.pdf>.

of indigenous knowledge. Article 25(1) of the Act states that ‘the National Indigenous Knowledge System Office (NIKSO) may at the request of an indigenous community facilitate the commercial use of indigenous knowledge’.⁴⁵ According to Article 25(2) of the Act:

NIKSO must, in respect of commercial use of indigenous knowledge—
(a) promote partnerships for innovation and product development;
(b) coordinate funding; (c) develop market strategies; and (d) promote commercial use of products, services, processes and the use of technology.

To facilitate the commercial use of indigenous or traditional knowledge, NIKSO must promote a partnership that encourages local innovations and/or the use of local technology. Such use will provide socio-economic benefits to the indigenous communities and the sustainable management and marketing of these resources. In Article 28 of the Act, ‘any third party, who infringes the rights of that indigenous community, is guilty of an offence and on conviction liable to pay a fine as prescribed’.⁴⁶ The South African framework law with provisions of sanction ensures a fair and equitable commercial use of TK as opposed to ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore and other RECs framework laws in Africa.

The adoption of the Africa Continental Free Trade Area as a form of regional integration to serve as the fulcrum of hope in harmonising IP laws in the continent that will foster intra-Africa trade will reduce underdevelopment in the continent. This era of 4th industrial revolution (4IR) provides opportunities for countries and regions to make significant advances and lift huge sections of populations out of poverty, improve incomes and catalyse economic and social transformations.

3. IP Protocol to the AfCFTA and the Protection of Traditional Knowledge

Article 8 (1) of the Agreement Establishing the AfCFTA Agreement provides that ‘the Protocols on Trade in Goods, Trade in Services, Investment, IP Rights, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices shall upon adoption form an integral part of the Agreement’.⁴⁷ The IP Protocol to the AfCFTA may create incentive measures enabling the free circulation of

45 See generally Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 (S. Afr.).

46 Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019, art.28

47 African Union Agreement Establishing the African Continental Free Trade Area (2012), art. 8.1.

goods and free access to information that would induce investment in Africa. A single continental market according to the AfCFTA objective entails the adoption of an IP Protocol that will serve as one-stop access and as an engine for increased innovative activities in the continent. African states should all have the same vision as to the protection of traditional knowledge and intellectual property rights.⁴⁸

IP can be a barrier or a catalyst to trade and investment. IP rights may prevent the importation of goods from one member state to another because of its territoriality principle. This is because IP rights are aimed at protecting the owner from competition arising from infringing copies made by a competitor. In so doing, IP can be an obstacle to the free movement of goods, which could lead to anti-competitive behaviour in the internal market. The harmonisation of IP laws is, therefore, important for the realization of a common market that has no or few barriers in the continent.⁴⁹ From 2000 onward the AU member states have adopted five principal IP instruments to set out African common positions on plant variety protection, geographical indicators, designs, patent and trademark policies and institutional roadmaps.⁵⁰

The principal IP instruments are: the Continental Strategy for Geographical Indications in Africa 2018–2023; the African Union Strategic Guidelines for the Coordinated Implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in Africa (ABS Strategic Guidelines 2015); the Science, Technology and Innovation Strategy for Africa (STISA-2024); the Pan African Intellectual Property Organisation (PAIPO 2016); Statute and the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and the Regulation of Access to Biological Resources (AU Model Law 2000). In line with the realities and priorities on the continent, the IP system is designed into different categories such as copyrights and industrial property (patent, trademark, industrial designs, and geographical indicators) including the rights of plant varieties protection, traditional knowledge, cultural expression and folklore to stimulate socio-economic development in the continent. The IP system is simply designed to ensure compliance with multilateral agreements or conventions. An inclusive and sustainable industrial development should be associated with job creation, sustainable livelihoods, innovation, technology, skills development and/or equitable growth.⁵¹ In drafting the IP Protocol in the AfCFTA Agreement, it must be developed to maximise the benefits of trade liberalisation and

48 Tshimanga Kongolo, *The African Intellectual Property Organizations: The Necessity of Adopting One Uniform System for All Africa*, 3 J. WORLD INTELL. PROP. 265, 282 (2005).

49 Y. Mupangavanhu, *African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization*, 59 J. AFR. L. 1, 6-7 (2015).

50 Adebola, *supra* note 5, at 237.

51 Gabila F. Nubong, *Africa's Industrialisation and Economic Transformation within a Developmental Regionalism Paradigm*, 5 EUR. J. ECON., L. & SOC. SCIS. 616, 618 (2021).

ensure an equitable distribution of these benefits. The continent's IP architecture is disconnected alongside colonial links - shaped by the realities of external influence or pressures through bilateral or multilateral trade arrangements.

The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and the Regulation of Access to Biological Resources states in its preamble that 'it is necessary to protect and encourage cultural diversity, giving due value to the knowledge, technologies, innovations and practices of local communities with respect to the management and use of biological resources'.⁵² The Africa Model Law is construed to take into consideration the community interests of the local communities when there is a need to access TK for commercial use. Any such access would be based on prior informed consent (articles 3, 4 and 5 of the African Model Law). The AU Model law does not have any enforceable mechanism to protect the commercial benefit sharing of TK. The concept of intellectual property rights as expressed in the TRIPS Agreement was seen as alien to the indigenous understanding of property rights, and therefore, a more appropriate consideration to the local context such as community rights, traditional knowledge, technology, innovations, and practices was pursued in the Model Law. As a central principle, the OAU Model Law holds that patents on life forms are immoral and go against basic African values and virtues and should, therefore, be outlawed.⁵³

The AU Model Law speaks to the sui generis protection option as provided in the TRIPs Agreement flexibility to safeguard access and benefit-sharing arising from the commercialisation of TK and farmers' rights.⁵⁴ Nevertheless, for this soft law to have meaning among African communities, there must be a symbiotic integration of trade arising from the use of TK in Africa. It is worth noting that no African country has adopted this Model Law for their plant variety protection (PVP). Contrarily, about twenty African countries have introduced variations of PVP systems that disregard the African Model Law. Alongside the disregard for the African Model Law is the introduction of the International Convention for the Protection of New Varieties of Plants (UPOV) Act of 1991 on the continent although the African Group at the TRIPS Council in Doha 2001 rejected the UPOV Act of 1991 because of its narrow focus on plant breeders' rights.⁵⁵

52 African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, ORG. OF AFRICAN UNITY [OAU] MODEL LAW (2000).

53 DANIEL ROBINSON, CONFRONTING BIOPIRACY: CHALLENGES, CASES AND INTERNATIONAL DEBATES 136 (2010).

54 Adebola, *supra* note 5, at 239.

55 Amaka Vanni, *What Should the AfCFTA's IP Agenda Be?*, AFRONOMICSLAW (Jan. 21, 2019), <https://www.afronomiclaw.org/2019/01/21/what-should-the-afcfas-ip-agenda-be/>.

The adoption of the International Union for the Protection of New Varieties of Plants (UPOV) in 1961, which inspired the introduction of plant variety protection in the WTO TRIPS Agreement, countries in Africa are faced with IP obligations under these multilateral agreements that are not as directly relevant to their context as the established practices of saving, using and exchanging and propagating plant materials to feed their families and communities.

The AU ABS Strategic Guidelines recommend Africa Union Member States to 'cooperate to develop compatible continental and regional procedures for granting prior informed consent including mutually agreed terms and monitoring compliance by users'.⁵⁶ The AU Member States' cooperation should include the 'sharing of relevant information between countries and with indigenous and local communities and all relevant stakeholders at all levels, including through the establishment of databases' for TK in the continent.⁵⁷ These recommendations are coming on the touchstone of the paradigm shift from common heritage for public benefits to economic investments that require IP protection of TK. The development of the AfCFTA IP Protocol may make important provisions to safeguard the haphazard and weak protection of TK in Africa. Christophe Geiger says that intellectual property rights today tend to become increasingly disassociated from 'creators to benefits' by large and unlovable multinational corporations.

TK protection within the framework of AfCFTA IP Protocol includes the development of geographical indications (GIs) strategy for the continent. GIs refer to products with specific characteristics, qualities or a reputation resulting essentially from their geographical origin.⁵⁹ The GIs for TK holders in Africa is fragmented and unorganized mostly from smallholders with less awareness and inadequate access to the market information system. International trade standards require the authorities to be capable to invest in both the protection and promotion of the GI tools such as certification, inspection, control, and accreditation. The current fragmentation of the IP legal framework in Africa which includes geographical indications does not provide enough effective enforcement concerning the protection and certification of TK innovations

56 AFR. UNION COMM'N, AFRICAN UNION STRATEGIC GUIDELINES FOR THE COORDINATED IMPLEMENTATION OF THE NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILISATION 3, 5-7 (2015), http://archive.abs-biotrade.info/fileadmin/media/Knowledge_Center/Pulications/African_Union_Guidelines/AU_Strategic_Guidelines_On_ABS_-_20150215.pdf.

57 Ibid

58 Christophe Geiger, *Intellectual Property and Investment Protection: A Misleading Equation*, in *GESTALTUNG DER INFORMATIONSRECHTSORDNUNG [DESIGN OF THE INFORMATION LAW SYSTEM]* 3 (V. Fischer et al. eds., 2021).

59 AFR. UNION DEPT' OF RURAL ECON. & AGRIC., CONTINENTAL STRATEGY FOR GEOGRAPHICAL INDICATIONS IN AFRICA 2018-2023 (2019), https://au.int/sites/default/files/documents/36127-doc-au_gis_continental_strategy_enng_with-cover-1.pdf.

in the continent.⁶⁰ A Continental Strategy on GIs promote sustainable social and economic development in Africa rich with biodiversity and traditional knowledge.⁶¹

The Science, Technology and Innovation Strategy for Africa (STISA-2024), which is the first phase of a ten-year strategy (2014-2024) that positions science, technology and innovation at the core of the AU Agenda 2063 and posits that the protection of traditional knowledge production requires the strengthening of intellectual property rights and regulatory regimes at all levels.⁶² One of the priority areas for the STISA-2024 flagship programme has been the establishment of a Pan-African Intellectual Property Organisation (PAIPO) to ensure the dissemination of patent information, provide technical and financial support to invention and innovation and promote protection and exploitation of research results.⁶³

The PAIPO was adopted in Addis Ababa on 30 January 2016 and has so far been signed by just six (6) Member States of the AU. This level of engagement falls short of the mandate of PAIPO 'responsible for intellectual property and other issues related to IP in Africa and to promote effective use of intellectual property system as a tool for economic, cultural, social and technological development of the continent as well as set IP standards that reflect the needs of the African Union, its Member States and RECs'.⁶⁴ Will the faith of an AfCFTA IP Protocol be different from that of PAIPO? While hoping that a new IP Protocol will address existing gaps, an integrated continental IP system can propel creativity, innovation and be an effective guide that promotes the acquisition and commercialization of intellectual creativity arising from the use of TK for sustainable growth and development in Africa. Six years after the adoption of the PAIPO, and only 6 countries have signed the treaty out of the 55 Member States of AU, none have ratified or acceded to this treaty. It is not clear whether the AU initiative establishing the PAIPO alongside the AfCFTA IP Protocol would play a significant role in the harmonisation of the IP system and intra-African trade.

One of the core objectives of the AfCFTA Agreement is continental cooperation on intellectual property rights that create a single market that will deepen the economic integration of the African continent. The use of TK from generation to generation have proven to provide important health benefits to the local communities. Africa and

60 *Id.* at 17.

61 Adebola, *supra* note 5, at 245.

62 AFR. UNION, SCIENCE, TECHNOLOGY AND INNOVATION STRATEGY FOR AFRICA 2024 26 (2020), https://au.int/sites/default/files/documents/38756-doc-stisa_science_tech_innovation_strategy.pdf.

63 *Id.* at 36.

64 African Union Statute of the Pan African Intellectual Property Organization (PAIPO) (2016).

other developing countries expressed concerns at the Doha Conference on access to essential medicine in which IPR places a barrier to the affordability of pharmaceutical products to poor LDCs. Although the Doha Declaration sought to clarify this aspect, more needs to be done. The AfCFTA Protocol on IPR may provide an opportunity for the Africa States to speak with one voice and to articulate that voice in a harmonious approach.⁶⁵ The existing IP systems under ARIPO and OAPI, for example, is fragmented, weak and have failed to achieve the socio-economic and technological development of the continent. These subregional organisations are fragmented, weak and have failed in the sense that they are simply trying to comply with international IP standards setup in the TRIPs Agreement not suitable to satisfy Africa's needs. Although least developed countries of Africa are exempted from the implementation of the TRIPs Agreement. It is still difficult to decipher a coherent approach to the AU's IP policy for the continent. A *sui generis* IP system that includes associated indigenous knowledge is necessary to promote an effective IP system that reflects the needs of African populations. This paper advocates a *sui generis* IP system which provides indigenous communities in Africa more power to control and to benefit from uses of knowledge developed and sustained by their members. The Statute of PAIPO is a Pan-African *sui generis* IP system to regulate the commercialisation of TK in Africa. However, it is not yet known whether the AfCFTA IP Protocol will seek to provide some mechanisms on the implementation of the PAIPO provisions which in its article 4(b) says the legislation shall 'facilitate the realisation and harmonisation of regional treaties with continental IP standards'.⁶⁶ An all-inclusive continental IP organization is necessary in order to increase economies of scale and for the development of scientific and technological resources that promote and protect the forms of IP relevant to Africa.⁶⁷

Article 1 of the Statute of PAIPO defines IP rights to include associated traditional knowledge within an IP system that assist the use of "intellectual property rights for the socio-economic development of Africa".⁶⁸ Continent-wide recognition and protection of traditional knowledge would be an important step in the right direction, and it would not be without precedent. Therefore, AU IP policies should adequately protect traditional knowledge for socio-economic benefits.⁶⁹ The PAIPO statute is also intended to harmonize IP standard in Africa that takes into account the human

65 Abrie du Plessis, The Proposed AfCFTA Protocol on Intellectual Property Rights, TRALACBLOG (May 17, 2019), <https://www.tralac.org/blog/article/14066-the-proposed-afcfta-protocol-on-intellectual-property-rights.html>.

66 Afr. Union, Statute of the Pan-African Intellectual Property Organisation (PAIPO), Jan. 31, 2016, <https://au.int/en/node/32549> [hereinafter PAIPO Statute].

67 Mupangavanhu, *supra* note 43, at 4.

68 PAIPO Statute, *supra* note 58.

69 J. Janewa Osei-Tutu, *IP in the African Union: Opportunities for New Discourse?* 1, 6 (Fla. Int'l Univ. Legal Stud. Rsch. Paper Series, Paper No. 21-06, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3795640.

development needs of AU member states.⁷⁰ Unfortunately, PAIPO does not include measures to protect key issues like public health and nutrition as it is found under article 8 of the WTO TRIPs Agreement.⁷¹ We hope that the AfCFTA IP Protocol draft document shall be able to close this gap. Associated traditional knowledge is useful for the economic and health benefits of local and indigenous communities in Africa. Protecting traditional knowledge practices maybe a way to promote local innovation and reduce reliance on foreign innovations or inventions.⁷²

Section 5(2) of the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore states that:

In the interest of transparency, evidence and the preservation of traditional knowledge, relevant national competent authorities of the Contracting States and ARIPO Office may maintain in registers or other records of the knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of the traditional knowledge holders concerned.⁷³

Maintaining records of TK is primordial to protect against illegal trading of this knowledge that does not meet the needs of the knowledge holders. Maintaining a registration or database of TK is necessary via a framework that reflects an explicit commitment to deepen Africa's socio-economic integration and trade cooperation for inclusive growth. Albeit the Swakopmund Protocol is not a continental framework adopted by all 55 Member States of the AU, the development of a continental IP Protocol may take into account existing frameworks like ARIPO and its related protocol, OAPI and RECs on IP rights. Economic cooperation between African countries still has a long way to go in the sense that most African countries prefer co-operating with European and American countries and more recently with China, than fostering the intra-African economic interchanges between them. This is also true of intellectual property protection.⁷⁴

For the AfCFTA IP Protocol to achieve any benefits, it should also be able to institute dispute resolution mechanisms for the settlement of IP disputes. It is critical to have an enforcement mechanism to ensure an effective system to resolve disputes over what

⁷⁰ *Id.* at 14.

⁷¹ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 8, *in* Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299.

⁷² Janewa Osei-Tutu, *supra* note 61, at 11.

⁷³ The Swakopmund Protocol on Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) (2010).

⁷⁴ Mupangavanhu, 'African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization' 59 *J. of African Law* at 20.

the rules provide and whether they have been broken in a specific case. This is essential to promote compliance with the rules and procedures.⁷⁵ This can be referenced from the WTO Dispute Settlement Mechanism which is based on GATT principles. Article XXIII (1) of the General Agreement on Tariffs and Trade (GATT) provides that the dispute settlement process may be invoked when one party claims that a benefit accruing to it under the General Agreement has been:

nullified or impaired [by another party] or that the attainment of any objective of the [General] Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under [the General] Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of [the General] Agreement, or (c) the existence of any other situation.⁷⁶

It is worth noting that an effective tailor-made dispute settlement mechanism is critical to the operation of the Continental Free Trade Area. A system of rule enforcement is necessary to guarantee security and predictability in intra-African trade.⁷⁷ Article 3.2 of WTO Dispute Settlement Understanding states, for example, that “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system”.⁷⁸

African Union Agenda 2063 principle of inclusive growth and sustainable development emphasizes that development is an integral part of its innovation strategy. Therefore, a balanced IP framework that also incorporates the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) flexibilities such as compulsory licensing may facilitate access to medicines and contribute to achieving sustainable development in the continent. Since TRIPS flexibilities allow the production of generic medicines, traditional knowledge creativity must be promoted and protected to close healthcare deficits in the continent. The AfCFTA IP Protocol should resist any temptation or pressure to expand the subject matter, scope, or duration of patent protection but focus on developing a framework that promotes local innovations.⁷⁹

The AU Assembly held its 25th Ordinary Session in South Africa in 2015 and adopted the African Union Strategic Guidelines [the Practical Guidelines] for the Coordinated

75 William J. Davey, *The WTO Dispute Settlement Mechanism* 1,2 (Ill. Pub. L. & Legal Theory Rsch. Papers Series, 2003).

76 General Agreement on Tariffs and Trade art. XXIII.1, Oct. 30, 1947, 55 U.N.T.S. 194.

77 Davey, *supra* note 66, at 9.

78 World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

79 Vanni, *supra* note 49.

Implementation of the Nagoya Protocol in Africa. The AU Strategic Guidelines are to facilitate access and benefit-sharing (ABS) implementation in Africa and to facilitate coordination and cooperation between African countries in the implementation of the Nagoya Protocol to the Convention on Biological Diversity (CBD) relating to access and benefit-sharing arising from the exploitation and commercialisation of TK. The Strategic Guidelines allow the AU Member States to tailor-made the Guidelines in a way that suits its national circumstances, priorities, needs and policies. Unfortunately, the Strategic Guidelines were not intended to provide uniform ABS measures in Africa.

4. Challenges and Opportunities of AfCFTA IP Protocol

The AfCFTA IP Protocol may present an opportunity to redefine the agenda for negotiation of IP issues in Africa that impact the international IP system. This IP Protocol should target a three-level alignment that seeks to protect existing policy spaces from erosion by trade agreements, support national efforts to craft appropriate IP legislative and policy framework to manage regional cooperation. There are general principles on the negotiation of the AfCFTA set out in the AU Statement on the Objectives and Guiding Principles for negotiating the Continental Free Trade Area. These principles also apply to the AfCFTA Protocols.⁸⁰

Public participation is important in the development of the process and substance of the IP Protocol as drawn from the principles developed by international IP experts for WIPO and the WTO facilitated by the Max Planck Institute for Innovation and Competition in Munich – Germany. This public participation includes transparency and consultation in the development of negotiating provisions. The AfCFTA IP Protocol must bear in mind the broader socio-economic development discussions aligning to the UN Sustainable Development Goals (SDGs 1, 3, 10 & 17) and the AU Agenda 2063 on specific issues such as access to medicine, innovations arising from the use of indigenous knowledge and access to copyright-protected works.⁸¹ AfCFTA negotiations must be geared towards ensuring good, fair, balanced and widely supported policy through democratic, open, transparent, inclusive and diligent processes. An example was the period leading to the adoption of the AfCFTA

80 Caroline Ncube et al., A Principled Approach to Intellectual Property Rights and Innovation in the African Continental Free Trade Agreement, in *INCLUSIVE TRADE IN AFRICA: THE AFRICAN CONTINENTAL FREE TRADE AREA IN COMPARATIVE PERSPECTIVE* 183-84 (David Luke & Jamie Macleod eds., 2019).

81 *Id.* at 184.

Agreement and the significance of national consultation in which the Government of Nigeria could not sign the Agreement without the consultation of the business community. The business community in Nigeria argued that its views had not been adequately considered and the country's signature at that stage would not be in the country's best interests.⁸²

It does not suffice to adopt IP protection with a registration office but also one that has a culture of respect and enforcement of IP rights, such respect is impossible to build as long as the substantive provisions of IP law are far removed from the realities of everyday life in Africa. The AfCFTA IP Protocol is expected to provide the requisite details on states co-operation and the significant impact on the regulation of IPRs on the African continent within the context of intra-Africa trade.⁸³ A challenging factor to the AfCFTA IP Protocol is Africa's dependence on donor funds, conflicting bilateral or regional trade and investment agreements, limited legislative capacity and negotiating skills for IP norms and the interfaces between IP and development in Africa.⁸⁴

Caroline Ncube suggests in her paper that the AfCFTA IP Protocol does not have to seek to regulate all aspects of IP but to provide for co-operation in IP as its stated mandate different from regulation in IP. This means that existing national IP laws and the statutes IP institutions at continental and regional levels, such as the PAIPO Statute and the regulatory instruments of RECs, ARIPO and OAPI, will continue to form the bedrock of regulation whilst the IP Protocol will focus on co-operation.⁸⁵ I agree with her point and to posit that the AfCFTA IP Protocol cannot be limited to co-operation but be tailored to harmonise and balance the IP system in Africa in a manner that promotes and protects indigenous or local creativity and equal trade. Article 21(4)(a)(d) of the Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community on cooperation to mean 'the reinforcement of good regulatory and standards setting practices, identifying and assessing instruments for trade facilitation such as the harmonisation'.⁸⁶ Good regulatory frameworks and standards setting practices form the bedrock of sustainable development in Africa. The challenges of colonial allegiance and underdevelopment necessitate the adoption of enforceable frameworks that promote intra-Africa trade and socio-economic growth.

82 *Id.* at 186.

83 Ncube, *supra* note 27, at 2.

84 Adebola, *supra* note 5, at 289.

85 Ncube, *supra* note 27, at 9.

86 Agreement Establishing a Tripartite Free Trade Area among COMESA, EAC and SADC (2008).

Conclusion

It is true that IP protection of TK is already regulated in some AU member states like South Africa and some RECs, informed by their obligations under international treaties, other agreements and bilateral trade agreements. The IP Protocol of AfCFTA must be able to incorporate these regulations that will ensure balance of trade and sustainable development in Africa. My arguments in this article also emphasize that the absence of effective continental policy and legislative measures or the insufficiency of existing mechanisms to ensure adequate protection of traditional knowledge has meant that illegal exploitation and their commercialisation by multinational corporations are allowed to prevail, to the disadvantage of the African peoples who are supposed to enjoy proceeds over these resources. The AfCFTA IP Protocol should lead and contribute to the recognition of the African vision within the international framework.

WTO TRIPs Agreement flexibility provisions and the proposal for a sui generis regime protection of indigenous knowledge have witnessed several changes arising from the exploitation and commercialisation of traditional knowledge in Africa. However, more is required to eliminate trade imbalances and the recognition of indigenous creativity in the market economy.

African governments should ensure that their stakeholders - business (both big and small), trade unions and civil society non-governmental organisations (NGOs) - are included in the AfCFTA IP Protocol national and regional consultation processes and provide their negotiators with clear mandates for negotiations. African countries need to build effective institutions that are inclusive and enable the fullest participation of stakeholders in the negotiating processes. This will improve both the quality and the sustainability of the AfCFTA Agreement and its Protocols.

THE EU AS A MODEL FOR AFRICAN REGIONALISM: DECOLONIZING REGIONAL INTEGRATION IN AFRICA?

Armin Cuyvers* and Patricia Ouma**

Abstract

The EU is the most dominant model used to design and support regional integration in Africa. As such, the EU model can be considered as part of the knowledge infrastructure in Africa: not only does the EU often provide the epistemic starting point for thinking about regional integration, it also contributes, financially and with expertise, to the process of regional integration. This paper critically reflects on the role and usage of the EU model in Africa. It asks which colonial pitfalls an EU-inspired approach may lead to and if and how these pitfalls may be avoided or mitigated. If possible at all, this may help answer the further question if and how EU experiences can be critically questioned and translated for cautious use in the African context, whilst reducing the risk of importing explicit or implicit colonial elements. One key element we focus on in this context is the implications of state-centred regional integration. We also turn this critical approach back on the EU: what can and should the EU learn from the African innovations in regional integration?

1. Introduction: the questions we ask and the answers we give ...

The European Union (EU) is the most developed form of regional integration in the world. It is often viewed as the epitome of regional integration ‘because of its long history, broad scope, further deepening and successive enlargements’¹ as well as its relative success. Consequently, the EU is often used as a model, albeit sometimes an anti-model, for other forms of regional integration in the world.² This most certainly applies to Africa, where the EU is commonly used as a template or benchmark for different regional integration projects. As a result, the EU model often already

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1 Sanoussi Bilal, *Is the EU a Model of Regional Integration?: Risks and challenges*, EUR. CTR. FOR DEV. POLY MGMT. 3 (2007), <https://ecdpm.org/work/is-the-eu-a-model-of-regional-integration-risks-and-challenges>.

2 See, e.g., Philippe de Lombaerde et al., *Problems and Divides in Comparative Regionalism*, in COMPARATIVE REGIONAL INTEGRATION: EUROPE AND BEYOND 21-41 (Finn Laursen ed., 2010); see also Fredrick Söderbaum, *Old, New, and Comparative Regionalism: The History and Scholarly Development of the Field*, in THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM 16-41 (Tanja A. Börzel & Thomas Risse eds., 2016).

provides the epistemic starting point for thinking about regional integration. On a more practical level, moreover, the EU and several of its Member States regularly contribute, financially and with expertise, to the process of regional integration. This only adds to the influence of the EU model on regional integration in Africa, directly and indirectly.³

One can decry *and* welcome the influence of the EU model, both methodologically and normatively. Methodologically, for example, the risks of the N=1 problem are well known and frequently reiterated: how can one project the EU experience, which has been shaped by unique contextual factors, on wholly different contexts?⁴ Normatively, the use of the EU model may be perceived as a form of modern colonialism. Despite these significant risks, the fact remains that the EU simply is the most developed and best studied form of regional integration. Consequently, EU experiences and theories on EU integration are the richest sources on regional integration we have. In addition, no perfect comparisons ever exist in the inherently n=1 reality of political organization where one cannot turn back the clock and organize the same territory with the same history, culture, people and 'events' again except for the one key variable that one wants to isolate and test.⁵

Accordingly, as we cannot observe any multiverses that might be out there either, we will have to make do with the imperfect tool of comparison. Whilst doing so, however, we must try to minimize the distortions caused by manifold relevant differences between regions and maximize our sensitivity to the pitfalls these differences create, including with the help of decolonial comparative law. To this end, this contribution has three aims. First, to identify some of these distortions and pitfalls. Second, to explore if and how some of these findings should impact our research agenda and the type of advice we distil from the EU experience for regional integration in Africa. Third, and certainly not last, how we may use this critical rethinking of EU lessons to challenge perceived wisdom and dogma on EU integration itself. What could and should the EU learn from regional integration projects in the rest of the world, which may find better and more modern solutions to some of the shared challenges?

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- 3 Wanyama Masinde & Christopher Otieno Omolo, *The Road to East African Integration*, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS 1-12 (Emmanuel Ugirashebuja et al. eds., 2017).
 - 4 See Amitav Acharya, *Regionalism Beyond EU-Centrism*, in THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM 190-133 (Tanja A. Börzel & Thomas Risse eds., 2016); see also Finn Laursen, *Regional Integration: Some Introductory Reflections*, in COMPARATIVE REGIONAL INTEGRATION: EUROPE AND BEYOND 1-18 (Finn Laursen ed., 2010).
 - 5 See more generally on the challenge of comparison, for example also between the EU and other (con)federal polities A. Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU* (2013) (Ph.D. Thesis, Leiden University), <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/europees-recht/summary-thesis-a-cuyvers-english.pdf>; and Armin Cuyvers, *The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World*, 19 EUR. L.J. 711 (2013).

The aim, therefore, is not just to ‘decolonialize’ the ideas lifted from the EU experience for African blocs, but also to ‘decolonialize’ the (self-)perception of the EU as the inherent gold standard in regional integration. This second part has become increasingly urgent as, with Brexit and the rest of the ‘pluricrisis’ facing the EU, the EU itself is also in need of fresh ideas and perhaps some rethinking of several initial doctrines and assumptions.⁶ Considering this aim, this paper focuses on the comparison between the EU and the East African Community (EAC). Not only is the EAC strongly modelled on the EU, it is also the regional organization we have collaborated with most, specifically on the challenges of adapting EU law and mechanisms to the East-African context.⁷ In addition, the EAC is currently engaged in an effort to draft a new regional constitution. This project could benefit from further consideration on whether and how to use the EU model.

To structure and delimit this contribution, it focusses on several key comparative elements. Section 2 looks at the concept of a region itself, including the relation between regional and continental perspectives and identities. Section three subsequently looks at the actors assumed to be relevant for regional integration, and the implications such often implicit choices have. Section four considers the underlying objectives of integration, which in turn affect the order and pace of integration addressed in section five. Section six ends with some conclusions and recommendations for future research, agenda setting and collaboration.

In addressing these comparative elements, we strive to contribute to a broader decolonial approach. As pointed out, the EU model influences several regional polities globally, several of which have been colonized by European powers. These legal transplants⁸ have had varied levels of success and failure, determined by a variety of factors. When studying the EAC, it is necessary to evaluate the key factors that have informed its regional integration model as a way of understanding its nature and functioning. A decolonial perspective allows us to interrogate the EAC’s specific context while examining the suitability of the borrowed EU model.

For this purpose, decolonial comparative law is preferred over mainstream comparative law, which has been linked by several authors to the risk of advancing the colonial agenda directly and indirectly.⁹ Mainstream comparative law can be traced to

6 See more generally Armin Cuyvers, *Brexit and the Real Democratic Deficit: Refitting National and EU Democracy for a Global Reality*, in REFLECTIONS ON DEMOCRACY IN THE EUROPEAN UNION (Afshin Ellian & Raisa Blommestijn eds., 2020).

7 See more generally EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS (Emmanuel Ugirashhebuja et al. eds., 2017).

8 Alan Watson, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2nd ed. 1993).

9 Lena Salaymeh & Ralf Michaels, *Decolonial Comparative Law: A Conceptual Beginning* 86 *RABELS J. FOR FOREIGN & INT’L. PRIV. L.* 166, 167-170 (2022).

European legal tradition. For instance, the centrality of legal rules in comparative studies can be seen as a typical feature of European approaches.¹⁰ The added advantage of decolonial comparative law is that it goes beyond analysing the contextual similarities and differences, and also ‘examines relationships of power between legal systems or traditions.’¹¹ In drawing conclusions on the suitability of the EU model for African integration, decolonial comparative law allows a deeper exploration into the impact of coloniality on what may otherwise seem to be a removed new era of regional cooperation, due to the absence of formal political control by former colonial powers.

This provides a fuller analysis of the phenomenon studied by revealing the interconnectedness of events and using that as the basis to offer various descriptive and normative claims.

Decolonial comparative law also addresses the implicit hierarchy typically found in mainstream comparative law that assumes one system (the donor’s) is better than the other (the recipient’s).¹² By going beyond the comparison of legal rules, and instead also highlighting and examining the underlying relationships of power between the regions compared, decolonial comparative law offers more in-depth explanations without implicitly assigning values and embedding the colonial ‘lustre’ even further.

Another reason why a decolonial approach is important for this paper lies in the more general need to continue dispelling the notion of the universality of European knowledge. The problem of coloniality is not the spreading of ideas, but their universalisation, which leads to a systematic classification of populations and their knowledge as inferior.¹³ This false yardstick has led to the suppression of ‘other’ knowledges, a feature termed as ‘epistemicide’ or ‘epistemic racism’ by Milton Santos and Ramon Grosfoguel respectively.¹⁴ Suppression, in turn, has led to the assumption that these knowledges do not exist, giving even more dominance to western world views.¹⁵

Even knowledge that has the aura of universality emerged from a particular locality, after which it became globalised due to hegemonic forces. The EU model is no exception. For although the EU model is indeed the most developed and studied, this, does not exclude the imperial factors that are also at play in the hegemonic expansion of EU knowledge on regional integration. Yet, like all other knowledges,

10 *Id.* at 171.

11 *Id.* at 187.

12 *Id.* at 173.

13 *Id.* at 177.

14 Lynn Mario T. Menezes de Souza, *Glocal Languages, Coloniality and Globalization from Below*, in *GLOCAL LANGUAGES AND CRITICAL INTERCULTURAL AWARENESS: THE SOUTH ANSWERS BACK* (Manuela Guilherma & Lynn Mario Menezes de Souza eds., 2019).

15 Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 *HYPATIA* 236, 236 (2011).

the knowledge on EU integration originated locally. What is more, Europe's imperial quest did not only lead to the imposition, expansion and investment in European thought, but also to the containment of non-European epistemology. Centralising European knowledge and methodology while diminishing others therefore creates the unacceptable risk of ignoring what other ideals are out there, learning how to pursue them, and ensuring that there is room for them to develop structurally from an epistemological standpoint, given the equality of origination.

Conversely, a decolonial comparative approach may also enable EU theory to become more receptive to ideas originating from other spheres of cooperation, seriously considering them as useful and equal. While it is important to decolonise regional integration within African blocs, it is also crucial to decolonise the West. In explaining that decolonial scholarship is not anti-Western scholarship, Salaymeh and Michaels observe that inasmuch as coloniality emerged from the West, it is not essential to it because the West can be decolonized.¹⁶ An injection of innovative approaches and perhaps even an upgrade of dated doctrine could prove beneficial to current crises faced by the EU.

Even as decolonial theory continues to gather ground and gain further articulation, it of course also faces sharp criticism. Some authors argue that the decolonial strategy is a conservative one and bears a likeness to coloniality in the way that it allows the generalisation of the colonial experience, much in the same way coloniality generalises knowledge that is otherwise unique to a certain locality.¹⁷ It therefore tends to work within already established macrostructures such as capitalism along similar trajectories as coloniality, rather than seeking to subvert these systems entirely.¹⁸ Another criticism is that decolonial theory ends up recentring global history around a singular European period by privileging the colonial moment over all others' essentially drawing attention away from the substantive knowledge it seeks to validate.¹⁹

We also note that in founding our claims and justifications on decolonial theory, whilst at the same time using the methodological framework of the very systems that are claimed to be rooted in coloniality, we not only strengthen and reaffirm the integrity of these structures, but also seek validation and admission into them. The

16 Salaymeh & Michaels, *supra* note 9, at 179.

17 Gianmaria Colpani, Jamila M.H. Mascot & Katrine Smiet, *Postcolonial responses to decolonial interventions*, 25 POSTCOLONIAL STUD. 1, 1-16 (2022).

18 *Id.*

19 Where they note,

Since colonialism has violently introduced an inescapable fissure in the (post)colonial world, including by injecting the colonial gaze into the self-perception and imagination of the (post)colonial subject, *translation* between imperial and subaltern languages - across idioms as well as conceptual universes - has become the unsurpassable horizon of post coloniality, which does not allow for the retrieval of untouched and untranslated non-Western epistemologies.

Id. at 10.

audience we seek, whose acknowledgment and more we deem necessary, (consciously or unconsciously), is usually largely with the western world rather than the colonised world, reinforcing the hierarchies that continue to oppress. In this sense, we continue to essentially ask for permission for our ideas to exist through behaviour that suggests a lack of agency. This procedural challenge of decoloniality is not lost on us, but by admitting that this paper does not adhere to calls for a radical exercise in decoloniality, it recognises the limitations that any recommendations given might have in evoking any big shifts. At the same time, we do hope that through our chosen approach, a bridge is built between the more traditional and decolonial comparative approach, on the one hand, which can both constructively connect to the key constructs in traditional regional integration theory on the other. This would in our view contribute to more radical attempts to rethink the very nature and structure of regional integration.

2. The concept of a region and the role of the state

Regional integration requires that there is such a thing as ‘a region’ to integrate.²⁰ In the EU, the region has historically been strongly defined along the lines of nation-states sharing a certain geographical location and proximity.²¹ In part this is due to the initial overriding objective of preventing future conflicts between France and Germany after centuries of warfare escalating into two World wars. This inevitably led to a strong focus on controlling states and their behaviour. In addition, since Westphalia, the nation-state has been a highly dominant factor in European governance in general, welding together identity, legitimacy, money, public administration, the use of force and other key factors. Consequently, the process of European integration largely focused on states and hence defined the concept of the European region along state lines as well.²² Key questions, for example, became how to connect European integration to the democratic and governance structures of the Member States, what the (hierarchical) relationship between the EU and the Member States is or should become, or how EU law relates to the laws propagated by Member States. Membership of the EU is also only open to states, meaning that the borders of the EU follow the borders of its Member States.²³

20 On the contested and complex concept of a region, and the many different ways in which one can conceptualize a ‘region’, see *inter alia* Söderbaum, *supra* note 2; see also Joseph S. Nye, *Comparative Regional Integration: Concept and Measurement*, 22 INT’L ORG. 855 (1968).

21 Note that the concept of a *European* state, which is a requirement to join under Article 49 TEU, has not been legally defined, meaning that the ultimate geographical scope remains open for future political decision-making within any potential boundaries set by the Court of Justice of the EU (CJEU).

22 This is of course not to say that non-state actors did not play an important role. Frank Schimmelfennig, *Europe, in THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM* 178-202 (Tanja A. Börzel & Thomas Risse eds., 2016); see also Armin Cuyvers, *The Road to European Integration, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS* 22-43 (Emmanuel Ugirashebuja et al. eds., 2017).

23 This is complicated by the different status of overseas territories as well as the fact that post-Brexit Northern-Ireland, for now, remains part of the EU Customs Union and largely the EU internal market for goods, but this is not relevant for the point made here.

The broader concept of a 'European region', moreover, was never clearly defined. Although a certain, if blurry, idea of 'Europe' as a continent has been around for a long time, the EU did not start out with a clearly delineated concept of Europe as a region. Rather, initial integration was primarily centred around France and Germany, gradually radiating outwards. In fact, expansion to other European states was only a last-minute addition to the Schuman plan which kicked-off European integration. Monnet initially envisaged a community between France and Germany alone, only adding the option for other states to join the evening before, by hand. As it happened, however, the EU gradually expanded. From the initial core of six Member States, the EU enlarged to 28, now 27 post-Brexit, which increasingly triggered the question where the geographical limits to the 'European region' actually lie.²⁴ Even if it could build on a shared history, culture and perhaps some level of common European identity, the EU therefore did not start out with a clearly defined geographical region in mind. Neither was European integration driven as such by a need or desire to (re) unite a certain preconceived region.

For East-Africa, defining the region in statal, or even geographical, terms might not be the most correct or beneficial approach, at least not exclusively. To begin with, except for Rwanda, the states involved are relatively young and were largely shaped during colonial times. Latching regional integration to the 'contrived state',²⁵ therefore, risks basing regional integration on statal conceptions that may not match the East-African context but might rather entrench certain colonial legacies.²⁶ In addition, a focus on the state may exclude other conceptions of the region, which may also be important, for example along historical, cultural or tribal lines, which do not follow straight lines on a map. An overly statal conception of the region may, therefore, imbue the entire project of regional integration with an unintended bias that may exclude some key dimensions of how East Africa does or wants to define itself as a region.

Different from the EU, moreover, and confirming the limits of the statal approach to defining a region, there is a stronger, if complex, understanding of a pre-existing East African identity. In this sense, East Africa might even be said to have a stronger pre-existing notion as a region than the EU. This leads to the question how this pre-existing conception of a region should be connected to the East African regional project and poses a challenge to decolonial thought to direct some attention to the study of pre-existing concepts around cooperation that were diminished with the rise of coloniality. Should a regional integration project, moreover, serve existing

24 Of course, the 'European' Convention on Human Rights has a far broader membership. See *The Council of Europe in Brief: Our Member States*, COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/our-member-states> (last visited Apr. 5, 2023).

25 Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1134 (1995).

26 See also Christof Hartmann, *Sub-Saharan Africa*, in THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM 178-202 (Tanja A. Börzel & Thomas Risse eds., 2016).

conceptions of the region, or should it help create new regional identities that fit with the political realities and organization of political power, so as to make them viable and effective? Makau Mutua strongly proposes that the only way to address the problems of 'European Africa' is to redraw the map of Africa.²⁷ Would addressing geopolitical wrongs better serve the aims of the region? Are there ways to incorporate non-statal dimensions of being 'a region' into state-based forms of regional organization, as long as these other regions stay within the external boundaries of the region as set by its statal members? Ahmed An-Na'im, for example, asserts that pre-existing nations do not need to overthrow the state to exercise their right to self-determination, and can instead use constitutional devices like autonomy regimes.²⁸ Mutua, on the other hand, believes that the postcolonial state must be dismantled before any precolonial ideals of community, social organisation and democratisation can take place, as the precolonial state is 'a fundamentally undemocratic entity in concept and reality.'²⁹

These are questions that need further debate and action. The centrality of the state in East African integration has inevitably led to a focus on questions around democracy, hierarchies of law, and governance structures. It seems as though by adopting the EU model, the EAC has adopted these incidental questions that are Eurocentric at their core. Though important, these questions risk further embedding colonial legacies attached to the creation of the state, and overlook the seeking and answering of questions falling outside the postcolonial state. Part of this debate should then also revolve around the conception or role of the state itself and whether it should be reconsidered, for example, considering the state more as an administrative unit and less as a political or identity anchor.

Lastly, East-Africa also faces the challenge that the states that have been created now represent certain vested national interests and have also acquired a level of sovereign pride, inter alia linked to post-colonial independence. Regional integration that is primarily defined along statal lines may entrench such nationalistic sentiments as well as the existing elites that control the current states. This connection between the conception of the region itself and the parties that participate in or derive power from regional integration also brings us to the issue of actors in regional integration.

3. Actors in regional integration

The definition of the region, including a focus on the state, also has a strong impact on the actors that are considered relevant for regional integration, both as agents and 'customers' of integration. A statal definition of the region, and of regional integration,

27 Mutua, *supra* note 25, at 1162.

28 Abdullahi Ahmed An-Na'im, *The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-determination*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 105, 109 (Douglas Greenber et al. eds., 1993).

29 Mutua, *supra* note 25, at 1162.

logically leads to a focus on states and statal institutions as the key actors, together with any institutions created at the regional level.

In the EU, the statal focus meant that most key actors have a strong link to Member States, either directly or indirectly. Several institutions and bodies directly represent the Member States, being the Council of Ministers, the European Council, and national ambassadors in COREPER. What is more, much of the preparatory work for EU legislation is done by committees of national civil servants, and most of the members of the European Parliament campaign as part of a national political party, tying their election to a significant extent to the national political process as well. In the search for more democratic legitimacy, moreover, the EU is increasingly looking for ways to incorporate national parliaments into EU decision-making further connecting the EU to the existing state mechanisms of legitimacy. Of course, non-state actors also play an important role in European integration, for example via the Economic and Social Committee, which represents the interests of employers and labour at the EU level. What is more, several societal groups manage to have significant influence on EU integration, for example the round table of industrialists during the formative years of the establishment of the internal market or other lobby groups. The power of these actors, however, does not come close to those of state actors (although of course some societal actors can influence these state actors at the national level as well, and hence influence EU policy indirectly). Attempts by the EU to better include societal actors, for example by introducing a citizens' initiative, seem only to have a very limited impact. By and large, therefore, the EU is still strongly focussed on state actors, and struggling to actively engage with non-state actors.³⁰

For East Africa, a statal focus therefore also implies a certain risk of preselecting state actors as the most relevant and dominant actors as seen in the operations of Summit and the Council of Ministers. Obviously, state actors will always be relevant for any form of far-reaching integration as they have the kind of authority and administrative capacity required for deep integration. The question, however, is how dominant or exclusive state actors should be³¹ given, especially, the contested idea of the state.

To begin with, an overly exclusive focus on state actors again reinforces the role of the state, with all the risks outlined in section 2. It also means that non-state actors and organizations, which can play an important role in African societies, are relatively excluded. This may weaken the legitimacy and inclusiveness of regional integration and rob East African regional collaboration of some of its unique potential. Even

30 Cf. Armin Cuyvers, *The Institutional Framework of the EU*, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS 79-103 (Emmanuel Ugirashebuja et al. eds., 2017).

31 For the current framework, which is very state centred, and especially president-centred, see Wilbert T.K. Kaahwa, *The Institutional Framework of the EAC*, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS 43-79 (Emmanuel Ugirashebuja et al. eds., 2017).

worse, it may even enable state actors to undermine the influence of these non-state actors at the national level. For example, once a law is adopted by state actors at the regional level, national societal organizations will no longer be able to use their national tools to affect the content or adoption of this law. The Anyang' Nyong'o case in the East African Court of Justice is a good illustration.³² Here, the claimants contested the manner in which candidates were chosen in the East African Legislative Assembly (EALA). The EAC Treaty requires that an election be carried out when constituting the membership of EALA.³³ Seats were instead divided according to political parties' strength in the national parliament, and one reason for this, according to the claimants, was to control the domestic legislative agenda.³⁴ Even though the court sided with the claimants, the backlash birthed a successful attempt at undermining the role of non-state actors in East African integration. In order to chip away at the influence of the court, the Kenyan government orchestrated an underhanded amendment process, outrightly excluding civil society and private sector, and any attempts made to undo this failed.³⁵

Regionalism, if done wrong, can therefore be a means to exclude national counterforces. Similarly, a strong role for state actors generally means more power for those in government over those in opposition, as it tends to be those in government that represent states at the regional level and control regional institutions. Especially where the government is controlled by one societal faction, tribe, and/or party, this risks locking other groups out of regional decision-making. An overly exclusive focus on state actors may therefore undermine the position of the opposition in general, and minorities in particular, again eroding the legitimacy and inclusiveness of integration. This is particularly problematic where certain groups or minorities are spread over multiple states, and risk losing their voice at the regional level because they are not effectively represented at the government level in any of the states. The members of the Kenyan opposition in the Anyang' Nyong'o case claimed that the procedure used to essentially appoint EALA members contrary to the requirements of the EAC Treaty was an attempt by the Kenyan government to evade any national power-sharing commitments made with the opposition.³⁶ If this scenario had been allowed to play out, it would have given the relevant state actors the opportunity to strengthen their position at the expense of the opposition using regional apparatus.

32 Peter Anyang' Nyong'o v. Att'y Gen. of Kenya, Reference No. 1 of 2006, E. Afr. Ct. of Just., (Mar. 30, 2007), https://www.eacj.org/wp-content/uploads/2012/11/EACJ_Reference_No_1_2006.pdf.

33 Treaty for the Establishment of the East African Community art 50 (1), Nov. 30, 1999, <https://www.eacj.org/wp-content/uploads/2012/08/EACJ-Treaty.pdf> [hereinafter EAC Treaty].

34 Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 301 (2016).

35 James T. Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMPAR. & INT'L L. 249, 268-71 (2013).

36 Alter et al., *supra* note 34, at 301.

Thirdly, empowering state actors through regional integration also risks empowering those societal groups who have a strong hold on national government already, for example certain business interests. Especially where the aim of regional integration may be to overcome national capture and monopolies, and to enable a free flow of trade to benefit consumers, this is obviously undesirable.

All in all, a focus on state actors, precipitated by a focus on states, may lead to the transference of the problems of the state. An even deeper hole may be dug through the regionalisation of corruption, the regionalisation of the disregard for the rule of law, the regionalisation of discrimination, and ultimately through either mimicking large parts of EU law or replicating inherited Eurocentric state practices, in short, the regionalisation of coloniality.

When designing EAC institutions, especially for the envisioned EAC (con)federal constitution, it is therefore important to design a regional model and institutional system that fits its own context and aims. If insights from the EU are used, moreover, it is vital to decolonize the EU model, with its very strong focus on state entities, or, in any event, to provide checks and balances for the effects such a statal bias might have in East-Africa. For example, one may consider tools to include the national opposition in regional decision-making, as well as representation of other societal groups. Going one step further, one could explore where non-state actors could be given actual, well delineated, powers to act, for example on very concrete and specific terrains such as education, health or social protection.³⁷ Similarly, the construction of and participation in EAC institutions could be based less on state connections, but also on other concepts of representation.

Such an exercise of broadening the range and powers of non-state actors should be of great interest to the EU as well. The EU might also benefit from broadening and diversifying its perspective on relevant actors, for example to better include not just the opposition in Member States but also those parts of society currently not reached or constructively engaged by European integration. As again illustrated by Brexit, there seems to be an increasingly large group that feels 'left out' by European integration and globalization. Instead of ignoring or disqualifying this group, there is a need to incorporate their views and interests more, which requires a rethink on the relevant actors and institutional design for regional integration, also in the EU. European integration might also provide an opportunity for smoother legal and political processes in respect of rising 'independentism' in Europe.³⁸ The last three decades have seen the emergence of several new states on the continent, some of which have joined the EU.³⁹ Moreover, discourse on independence referendums is

37 See also *infra par.* 4 below on the objectives of regional integration.

38 GRAHAM AVERY, EUROPEAN POLICY CENTRE, INDEPENDENTISM AND THE EUROPEAN UNION POLICY BRIEF (2014), https://www.epc.eu/content/PDF/2014/Independentism_and_the_EU.pdf.

39 *Id.*

continuing, with Scotland planning a second one in late 2023,⁴⁰ a looming possibility of one in Belgium as regards Flanders and Wallonia,⁴¹ not forgetting the contentious events in Catalonia in 2017.⁴² Such possible divisions of member states present new challenges for the EU to navigate in terms of membership and decision-making, for example. Observing how the EAC potentially engages with state counterforces could provide valuable lessons for the EU in dealing with independence seeking groups in any transitional processes and potential risks of underrepresentation nationally and regionally.

As indicated, a strong role for state actors will likely always remain, while states remain key organizational units for regional integration. Yet when using the EU model, the very state-centred implications of this model should be recognized and where possible counter balanced. Naturally the relevance and feasibility of involving non-state or non-traditional actors also depends on the concrete objectives being pursued by regional integration, which is the next key dimension to consider when decolonizing the EU model.

4. The objectives of regional integration

Regional integration is not an end in itself. Therefore, it is vital to have a clear idea about the specific objectives of any regional organization project when designing it. The EU model, moreover, tends to reflect the objectives underlying EU integration. Copying the EU model hence usually means implicitly incorporating the objectives behind EU integration, or failing to sufficiently serve those objectives that are not part of the EU objectives. As Arewa puts it, '[t]his mismatch between source and target of borrowing has contributed to a gap between law on the books and law in practice.'⁴³

Since its inception, two main EU objectives have been peace and prosperity through economic integration.⁴⁴ The idea thereby was that economic integration and prosperity were not just ends in themselves but also tools for the objective of peace. By creating prosperity, and making this prosperity dependent on collaboration, future conflict could be avoided. Simply put, it would become economically almost impossible to fight. On a more positive note, the institutional and personal habit of consultation

40 Akash Paun, Jess Sargeant & Duncan Henderson, *Scottish independence*, INST. FOR GOV'T (Oct. 9, 2018), <https://www.instituteforgovernment.org.uk/explainers/scottish-independence>.

41 Chinyere Obasi, *Belgium: The Case of Flanders and Wallonia*, HARV. POL. REV. (July 22, 2021), <https://harvardpolitics.com/flanders-and-wallonia/>.

42 Katy Collin, *Order from Chaos: The referendum in Catalonia, explained*, BROOKINGS (Sept. 29, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/09/29/the-referendum-in-catalonia-explained/>.

43 Olufunmilayo B. Arewa, *DISRUPTING AFRICA: TECHNOLOGY, LAW, AND DEVELOPMENT* 43 (2021).

44 Consolidated Version of the Treaty on European Union, 2012 O.J. (C326/13) art. 2, https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF; Paul Craig & Gráinne de Búrca, *EU LAW: TEXTS, CASES, AND MATERIALS* 1-32 (7th ed. 2020).

and collaboration created by integration would also foster cooperation and reduce the chances of conflict.

The initial focus on peace was largely determined by the history of the German-French conflict. But the fundamental logic of preventing conflict by increasing its economic costs, or even making conflict impossible because production chains for essential goods require inputs from other states, is more generally valid. In Africa as well, economic interdependence might foster a more collaborative approach, even if the nature of this interdependence might differ. Similarly, a habit of consultation and collaboration, across different levels of government, might also benefit stability and cooperation, especially where tensions and the risk of misunderstandings increase.

It is important to understand, however, that even the seemingly general integration objective of peace through prosperity was and is based on specific social objectives and economic realities in the EU. One key fact is that the economies in the EU were diverse enough to benefit from intra-EU trade. In other words, removing barriers to trade leads to more intra-EU trade and wealth. In addition, the assumption was that all economies involved were strong enough to survive open competition. As a result, those that were outcompeted would be able to switch to another economic activity where they would have a relative advantage, improving the overall competitiveness of the EU economy, and contributing to a net increase in overall EU wealth (leaving distributional effects aside).

On top of these two foundational objectives, the EU has of course over time incorporated multiple other objectives, ranging from transport policy and science to the environment and foreign affairs. In fact, there are very few areas left where the EU does not at least have a supporting objective, and almost none where EU law does not affect remaining national competences.⁴⁵ Over time the underlying aim of peace seemed to have lost some of its significance or legitimizing potential, especially for younger generations in Western Europe that no longer seemed to perceive war as a realistic threat. However, in the wake of the ongoing Russian invasion of Ukraine which began on 24 February 2022 Europe can no longer define its reality on a 'post-war' basis.⁴⁶ Despite the addition of new objectives and the fluctuation of the relevant weight of different objectives over the course of European integration, however, the two initial aims of peace and prosperity remain deeply and systematically engrained in the EU model. What is more, many of the other aims are often connected to economic objectives of the EU and build on the EU's competences in external trade

⁴⁵ See famously Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMPAR. L. 205 (1990).

⁴⁶ CORINA STRATULAT, EUROPEAN POLICY CENTRE, WAR HAS RETURNED TO EUROPE: THREE REASONS WHY THE EU DID NOT SEE IT COMING (Apr. 28, 2022), https://www.epc.eu/content/PDF/2022/War_has_returned_to_Europe_DP.pdf.

or the internal market. For that reason, as far as the objectives of the EU model are concerned, this contribution focuses on the implicit incorporation of the peace and economic objectives when other regions use the EU as a model.

For East Africa, the objective of preserving peace and stability of course remains highly relevant, certainly with the accession of South-Sudan, the Democratic Republic of Congo, and the ongoing tensions in these regions. A recent crisis that has seen intervention from the EAC involves the clashes between the rebel movement, M23, and DRC's armed forces in the east of the country. The EAC has been instrumental in leading peace talks between representatives of the rebel groups and the DRC government, and leading military efforts.⁴⁷ EAC leaders, led by a peace envoy, Kenya's former president Uhuru Kenyatta, undertook to deploy a regional force to counter the rebels.⁴⁸ The EAC's capacity in handling peace and security in the region will be tested here, especially because it is the first time that the bloc has sent troops to a partner state.⁴⁹ The opposite is true for its counterpart, the Economic Community of West African States (ECOWAS), which has conducted a number of military operations in West Africa, a notable success story being its intervention in The Gambia in 2017 which ousted long-time ruler Yahya Jammeh.⁵⁰ The strategy of increasing economic interdependence to boost stability therefore also remains relevant. Even small contributions to stability should be appreciated here. One should, furthermore, also not underestimate the practical effect of frequent personal contact enabled by regional integration, both at the leader level and the lower echelons.

The more problematic underlying objective, however, is that of economic integration. At face value, both the EU and the EAC share the same need and desire to boost prosperity and to that end create an effective internal market. Economic conditions, however, differ strongly. For example, many East African states produce similar goods. This can be traced back to colonialism, which, on top of legal imperialism, involved the creation of economies structured to be uncompetitive.⁵¹ After all, the motivations of colonial policies revolved around extraction for external benefit rather than internal improvement of the occupied nations.⁵² The production of similar goods, first of all, means that there is limited scope for intra-regional trade, and hence less benefits

47 Koffi Sawyer, *Can the East African Community stabilise eastern DRC?*, INST. SEC. STUD. (Nov. 1, 2022), <https://issafrica.org/iss-today/can-the-east-african-community-stabilise-eastern-drc>.

48 Nelleke van de Walle, *East Africa's DR Congo Force: The Case for Caution*, INT'L CRISIS GRP. (Aug. 25, 2022), <https://www.crisisgroup.org/africa/great-lakes/democratic-republic-congo/east-africas-dr-congo-force-case-caution>.

49 *Id.*

50 Thomas Lowe, *Bracing Against the Tide: ECOWAS and Recent Military Coups in West Africa*, YALE REV. INT'L STUD. (Mar. 2022), <http://yris.yira.org/comments/africa-comments/5657>.

51 Arewa, *supra* note 43, at 93.

52 *Id.* at 16.

for removing barriers to trade.⁵³ Second, it means that they may see each other as competitors, selling the same goods to third countries. Third, the underlying problem is that they tend to sell basic raw materials and foodstuffs, as a result of which they only gain a small part of the added value in the overall value chain.⁵⁴ Fourth, African undertakings might often not be competitive enough to face open competition with world markets immediately, meaning that opening up can lead to foreign competitors taking over and undermining the long-term growth potential of local businesses.

Even if one wants to include economic objectives in African regional integration, one needs to therefore carefully define which economic objectives suit the need of the region, what form of economic integration is required to achieve these objectives, if any, and subsequently adapt the EU model to these specific economic aims. For example, instead of removing barriers to intra-community trade, one may first want to support more developed and diversified national economies, which could then benefit from intra-community trade in the longer run. In line with this objective, one could focus on stimulating and fostering economic activities that capture a larger share of the added value in the respective Member States. Both of these objectives, however, require almost the opposite of the EU model: to first protect and shelter economic actors instead of exposing them to intra-community or even global competition.⁵⁵ Such sheltering, however, also brings the risk of unwarranted protectionism or protection based on political contacts rather than economic merit. As a result, such forms of 'protective' or 'Green-house' integration may need forms of protection against such negative side effects that were not necessary in the EU and hence not included in the EU model.

The African Continental Free Trade Area (AfCFTA) has taken considerable steps to address some of these challenges through including specific objectives as to the development and promotion of regional and continental value chains, and the enhancement of socio-economic development, diversification and industrialisation across the continent.⁵⁶ Through its 'Special and Differential Treatment' clause, it also provides flexibilities to countries based on their level of economic development to ensure comprehensive and mutually beneficial trade.⁵⁷ The Guided Trade Initiative (GTI), launched in October 2022, is said to be designed to allow intra-African

53 Afr. Union, *Action Plan for Boosting Intra-African Trade*, at 8, https://au.int/web/sites/default/files/newsevents/pressreleases/26498-pr-action_plan_for_boosting_intra-african_trade_f-english.pdf.

54 *Id.*

55 Compare in this regard also the more developmental school of regional integration in the new wave of integration in Latin-America. See, e.g., Andrea C. Bianculli, *Latin America*, in THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM 154-78 (Tanja A. Börzel & Thomas Risse eds., 2016).

56 Agreement Establishing the Africa Continental Free Trade Area: Protocol on Trade in Goods art. 2(e) & (f), Mar. 21, 2018, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

57 *Id.* at art. 6.

trade in a commercially meaningful and sustainable way.⁵⁸ The initiative aims to test the AfCFTA's operational, institutional, legal and trade policy environment.⁵⁹ Even though it may seem at the outset that the framing of the AfCFTA objectives are Eurocentric in their overall approach, it may not necessarily mean that they are not relevant to the African context. It is hoped that these additional measures go far enough to adequately contextualise economic integration in Africa.

Once one starts modifying the objectives of economic integration, moreover, other objectives might gain relevance. For starters, conquering a higher percentage of the added value will require education and investment, and a well-designed system for collaboration and joint ventures with foreign undertakings. Attracting FDI must then also not be seen as an objective in itself, but as a tool to contribute to this more structural improvement of the economy. Similarly, collaboration on basic infrastructure and innovation will become more important, as East Africa will have to select those sectors for development where it can leapfrog ahead. The Cotonou Agreement, for instance, between African, Caribbean and Pacific countries and the EU provides some leeway in selecting priority areas to collaborate on depending on a region's level of development.⁶⁰ In addition, one could use regional integration to fill gaps in training and education in a way that was never necessary, or possible, in the EU.

Again, such modifications to the EU model are also highly relevant for the EU itself. As the euro crisis has shown, the discrepancy in competitiveness between Member States has grown dramatically in the EU, certainly with its gradual expansion South and East. In addition, the EU now also has to consider how to function in a more multi-polar world with, *inter alia*, an ascending China. What is more, partially due to these developments, the EU is increasingly confronted with the need to deal with the distributional effects of economic integration: it is very well to grow European GDP by 5%, but if this leads to net economics benefits of 10% for Western and Northern Member States and a net loss of 5% of GDP for other Member States or certain social groups, the overall social impact may still be negative.⁶¹ Here experiments in other regions to ensure equitable distribution of the benefits of integration may be valuable.

58 Pavithra Rao, *AfCFTA's Guided Trade Initiative takes off, set to ease and boost intra-African trade*, U.N. AFR. RENEWAL (Oct. 12, 2022), <https://www.un.org/africarenewal/magazine/october-2022/afcfta%E2%80%99s-guided-trade-initiative-takes-set-ease-and-boost-intra-african-trade>.

59 *Id.*

60 Cotonou Partnership Agreement of 23 June 2000, art. 35(3), 2000 O.J. (L317) 3, https://eur-lex.europa.eu/resource.html?uri=cellar:eabc0bbc-f137-4565-952d-3e1ce81ee890.0004.04/DOC_2&format=PDF.

61 See on the fundamental challenge this distribution means for globalization more generally JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS REVISITED: ANTI-GLOBALIZATION IN THE ERA OF TRUMP* (2017).

Even on seemingly neutral objectives such as economic growth or trade, therefore, it is important for East-Africa to unpack and deconstruct the underlying objectives and assumptions when using the EU model. For the EU, moreover, it is also essential to reassess some of its explicit and implicit objectives as a now very diverse Union of 27 enters a 21st century in which the economy and geopolitical reality are very different from the post WWII era. Ultimately, moreover, all these factors operate steadfastly within, and are judged against, free-market capitalist structures originating from western philosophies. Perhaps a venture outside this particular box can also contribute to the development of new economic and social systems that can provide tools more relevant to the EAC in a digitalizing 21st century.

5. The order, pace and scope of regional integration

EU integration followed a particular order, at a certain pace, and has by now achieved a very broad scope, partially by design and partially due to ‘events’ such as the fall of the Berlin wall. There are very few reasons why other regions should in principle follow this order, pace and scope of integration. In fact, considering the high context dependency of the EU’s integration trajectory, this might be one domain where different regions can and should make very different choices. As this is a very broad topic, however, covering over six decades of EU integration, we will focus here on the order, pace and scope of economic integration.

The evolution of EU integration is generally captured within Bela Balassa’s theory of integration.⁶² The EU has weaved through the various stages of integration from free trade area, customs union, common market, and economic union through to total integration, with the introduction of a single currency.⁶³ Economic integration is complemented by federal aspects even though the likelihood of full federation has long diminished.⁶⁴ Economic integration was initially characterised by free movement of goods, focussing first on removing tariff barriers, such as customs duties, and then non-tariff barriers (NTBs) such as differing product standards. Subsequently, the EU started to focus more on economically active persons and services, and only more recently on digital services. This sequencing made sense as at the start of European integration goods made up more than 70% of all European trade, and hence the biggest obstacles to trade concerned goods.⁶⁵ At the time, for example, services were even considered a residual category of economic activities.

62 BELLA BALASSA, *THE THEORY OF ECONOMIC INTEGRATION* 2 (2011).

63 EUR. PARLIAMENT, *THE EUROPEAN UNION AND REGIONAL ECONOMIC INTEGRATION: CREATING COLLECTIVE PUBLIC GOODS—PAST, PRESENT AND FUTURE* 2 (2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689369/EPRS_BRI\(2021\)689369_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689369/EPRS_BRI(2021)689369_EN.pdf).

64 *Id.*

65 Stefaan Van den Bogaert et al., *Free movement of services, establishment and capital*, in *THE LAW OF THE EUROPEAN UNION* 539-586 (Pieter Jan Kuijper et al. eds., 5th ed. 2018).

In terms of timing, moreover, much depended on bumpy periods of stagnation followed by leaps. After a period of 'Euro sclerosis' in the '70s and early '80s, for example, during which political decision-making was largely blocked, the internal market programme at the beginning of the '90s revived the internal market leading to a sudden boost in economic integration. Similarly, the fall of the Berlin wall led to a boost in expansion and deeper political integration, including the introduction of the euro as very much a political decision to cement European integration.⁶⁶

As to scope, European economic integration has by now affected almost all sectors of public authority, including social security, health care, criminal justice, and migration, to name some of the more sensitive ones. This is to a large extent due to the legal doctrine of effectiveness, which holds that any national rule that might potentially restrict free movement, and hence economic integration, falls under the scope of EU free movement law, and hence EU law.⁶⁷ As almost any national rule can directly or indirectly affect some aspect of free movement, this means that the scope of European economic integration has become almost universal. Even where there is no EU legislation on a specific field, for example because it concerns a national competence, all national laws in this field still have to comply with EU Treaty rules as soon as they might impact on free movement.

Neither the order, pace nor scope of European integration should necessarily guide the integration project in East Africa. To start with the order, we now live in a very different economic reality than in the 1950s and 1960s. Starting economic integration with goods, therefore, is not necessarily the optimal approach, especially not when one includes the different objectives behind economic integration in East Africa and the structure of East African economies. Instead, it may make much more sense to start, for example, with digital services, financial services, telecom and capital. These are not just economically more important these days, but they may also allow for faster growth, do not require the same institutional, political and real-world infrastructure, and may provide the financial context required to stimulate the production of more complex and valuable goods.

In several of these areas, moreover, the *pace* of integration can also be very different from the EU. First of all, because one can build on existing experiences and models, certain regulatory frameworks can be established much faster and better. Some stages of integration may be done away with altogether, whereas in other areas East Africa can leapfrog ahead. For example, creating a good digital infrastructure and decentralised grids may avoid the need for more costly and old-school investments in

66 LUK VAN MIDDELAAR, *THE PASSAGE TO EUROPE: HOW A CONTINENT BECAME A UNION* (Liz Waters trans., 2013).

67 Armin Cuyvers, *General Principles of EU Law, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS* 217-228 (Emmanuel Ugirashebuja et al. eds., 2017).

infrastructure. At the same time, considering the economic objectives of East-African integration, some other forms of integration might be pursued at a slower pace. An even more gradual approach to the liberalisation in certain goods, for example, could be emphasised to protect particular vulnerable or essential industries, and not just those that serve powerful political interests.⁶⁸ As another example, some of the key benefits of monetary integration might be achieved without a full monetary union, postponing the necessity of such a major, complex and risky leap in East African integration.⁶⁹

An important way in which the EAC already incorporates flexibility is in the form of variable geometry⁷⁰ where integration follows a 'differentiated (instead of uniform) treatment of members of the same region, in terms of time, issue areas and members'.⁷¹ This flexibility is precipitated by political and economic factors; political in that there are divergent and competing sovereign interests present in the Partner States, and economic in relation to the practicalities surrounding the integration process, such as the distribution of responsibilities, resources and benefits.⁷² The EAC has employed flexible integration in several instances throughout its history. For example, subgroups of partner states have pursued policy changes at slower speeds, there has been equitable distribution of regional institutions and organisations to avoid concentration in one partner state, and preferential allocation of industries, and credit and investment from regional banks.⁷³ However, as pointed out, more can be done towards a strategic shift that focuses on the practical aspects of what can be jointly achieved without the delays caused the large political cost of committing to more complex regional relationships.

The order and pace of integration are also closely connected to the scope of integration. As indicated the EU model is a generalist model whereby in principle the entire economy is integrated, and all areas connected to this economic integration are affected by regional law as well. This approach has clear advantages, but also carries huge costs. For example, it requires deep institutionalization, effective national and regional legal systems and stable political collaboration. For the East African context, therefore, one could seriously consider if a more lean, smart approach to integration is possible, for example, zooming in on those areas of economic integration, like digitization and finance, where fast gains at relatively low cost are possible. One could

68 NICOLE KOENIG, JACQUES DELORS INST., A DIFFERENTIATED VIEW OF DIFFERENTIATED INTEGRATION 7 (July 23, 2015), <https://institutdelors.eu/wp-content/uploads/2020/08/differentiatedintegrationjdbjuli2015-3.pdf>.

69 Constantine V. Vaitsos, *Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey*, 6 WORLD DEV. 719, 739 (1978).

70 EAC Treaty, *supra* note 33, at art. 7(1)(e).

71 TIMOTHY MASIKO, FLEXIBLE REGIONAL ECONOMIC INTEGRATION IN AFRICA: LESSONS AND IMPLICATIONS FOR THE MULTILATERAL TRADING SYSTEM 134-37 (2022).

72 *Id.*

73 *Id.* at 66.

also think of new sectors where national regulation is not yet fully comprehensive, for example in intellectual property rights, data protection, fintech or platforms, so that regional integration can fill a gap instead of competing with existing national rules. One possible source of inspiration here is ASEAN, which is exploring the concept of harmonizing particular value chains instead of the entire economy in order to enhance the region's participation in global value chains.⁷⁴ A more focused approach to economic integration, be it in certain sectors, value chains or along other organizational lines, could offer faster benefits at lower integration costs. It could also have the additional benefit of focusing on sectors where national opposition to collaboration, for example because of entrenched interests, is relatively low. This would also reduce the challenge of regional integration to national sovereignty and political elites, while at the same time establishing a practise of integration and collaboration that can slowly spread to other, more contentious sectors.

If the EU model must be used, therefore, East-African integration projects should be careful to assess the assumptions on order, pace and scope of integration that are implied by the EU approach. In its turn, moreover, the EU could greatly benefit from other, modern and more lean attempts at regional integration. As demonstrated by Brexit and gradually rising Euroscepticism in many Member States, an increasing number of EU citizens is asking if European integration could take place in a more efficient way and with a lower cost to national sovereignty. This may not be possible, but it is certainly worth carefully observing if some other regions might find more efficient and effective means of integrating, certainly in modern sectors of the economy, than the EU model. After all, the law of the inhibiting lead may equally apply to regional integration.

6. The questions we ask and the advice we give ...

Based on the above, admittedly short and limited, assessment, it becomes clear that the EU model is based on many assumptions and contextual elements that simply do not apply to other regions, including those in Africa. In addition, adopting a Eurocentric approach unquestioningly amounts to a failure to historicise the violent origin of some of its principles.⁷⁵ This does not mean that we should always ignore the EU example when pondering and planning integration in other regions. It does mean, however, that we should thoroughly chart and assess the nature of each specific region, the objectives of integration in that particular region, and the actors, order, pace, and scope of integration that fit with those objectives.

74 ASEAN-JAPAN CTR., GLOBAL VALUE CHAINS IN ASEAN: A REGIONAL PERSPECTIVE 16 (Jan. 2019), https://www.asean.or.jp/en/wp-content/uploads/sites/3/GVC_A-Regional-Perspective_Paper-1-Revised_2019_full_web.pdf.

75 Bardo Fassbender & Anne Peters, *Towards a Global History of International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds., 2012).

Consequently, when designing East African regional integration, we should make sure that we start with the right questions on the needs and context of the region itself. We should thereby dig deeply into each objective, as superficial overlaps in objectives such as ‘economic integration’ or ‘free trade’ can hide underlying differences that require radically different approaches to regional integration. Only once we have established the specific needs and context can we then ask which tools of EU integration might be usefully tweaked or translated. As is more often the case, therefore, giving good advice starts by asking a lot of good questions. One consequence for research is that we should do a better job of charting and asking these questions per region. There is a logical tendency to start from the research questions that are relevant for the EU experience, such as democratic legitimacy, which may not be relevant (yet) for other regions. Ideally, therefore, we would be able to draw up a joint research agenda with the different regions, treating the formulation of the correct questions as valuable research output in itself. We can also contribute on this point by providing the knowledge infrastructure required to ask and answer these questions. For example, we can do more work to use comparative regional integration to unearth the implicit assumptions underlying the EU project, and combine these findings in textbooks and class materials on the use of comparative examples in regional integration.

Such a critical assessment of the EU through comparisons with other regions, moreover, could also help to improve our understanding of the EU, and perhaps to find some solutions to the increasingly urgent challenges facing the EU itself. What were the choices made, sometimes unconsciously, in the EU, and what were the roads not taken? What might new innovations be and what options for effective regional integration has the EU not incorporated yet, so it may not remain stuck in 4G regional integration where 5G variants may already be available? The mere fact that the EU is considered (by the dominant standard) the most successful and effective form of regional integration in the world so far does of course not mean that it will remain the best possible or most efficient form, or that it may not be in need of a major update. Decolonializing EU law, therefore, does not just mean accepting that the EU model may not be good for other regions. It also means accepting that the EU will not remain the gold standard for ever. Perhaps the equivalent of a floating currency for regional integration may be invented somewhere else in the world, as all nations and peoples face the challenge of how to organize their political coexistence in an increasingly interdependent world.

On an even more fundamental level, moreover, knowledge of the context can thereby help break the habit of accepting as universal whatever the established hegemonic structures of the time considers as truth, fact or objectivity. It also breeds the confidence needed to explore different ways of knowing, while claiming space for good ideas without the need to impose, universalise or gatekeep, on the way to confronting epistemic injustice

As alluded to in the beginning, all knowledge originates locally, and through hegemonic expansion, European knowledge has acquired a global quality. It is also understood that this 'global' or 'universal' knowledge is often recontextualised after interacting with different local elements as it is accommodated into local cultures, knowledges or beliefs.⁷⁶ Unlearning the 'sanctity' of the western yardstick allows an appreciation for relocalised or recontextualised versions of 'global' models. Improving these mixed models through innovative solutions based on the correct questions is a step forward, even though it does not immediately subvert the contested macrostructures. Giving credence to relocalised models is a move towards elevating important elements of non-hegemonic epistemology.

⁷⁶ de Souza, *supra* note 14.

References

- Acharya, A. (2016). Regionalism Beyond EU-Centrism. In T. Börzel, & T. Risse, *The Oxford Handbook of Comparative Regionalism*. Oxford: Oxford University Press.
- Alter, K., Gathii, J., & Helfer, L. (2016). Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences. *European Journal of International Law*, 293-328.
- An-Na'im, A. A. (1993). The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-determination. In D. Greenberg, S. Katz, M. Oliviero, & S. Wheatley, *Constitutionalism and Democracy: Transitions in the Contemporary World* (pp. 105-125). Oxford: Oxford University Press.
- Arewa, O. (2021). *Disrupting Africa: Technology, Law, and Development*. Cambridge : Cambridge University Press.
- ASEAN. (2019, January). *Global Value Chains in ASEAN: A Regional Perspective*. Retrieved from ASEAN Japan Centre: https://www.asean.or.jp/en/wp-content/uploads/sites/3/GVC_A-Regional-Perspective_Paper-1-Revised_2019_full_web.pdf
- Avery, G. (2014, May 7). *Independentism and the European Union: Policy Brief*. Retrieved from European Policy Centre : https://www.epc.eu/content/PDF/2014/Independentism_and_the_EU.pdf
- Balassa, B. (2011). *The Theory of Economic Integration*. Oxon: Routledge Revivals.
- Bianculli, A. C. (2016). Latin America. In T. Börzel, & T. Risse, *The Oxford Handbook of Comparative Regionalism*. Oxford: Oxford University Press.
- Bilal, S. (2007, September). *Is the EU a Model of Regional Integration? Risks and Challenges*. Retrieved from European Centre for Development Policy Management: <https://ecdpm.org/wp-content/uploads/2013/11/EU-Model-Regional-Integration-Risks-Challenges-2007-.pdf>
- Bogaert, S., Cuyvers, A., & Antonaki, I. (2018). Free Movement of Services, Establishment and Capital. In P. Kuijper, F. Amtenbrink, D. Curtin, B. Witte, A. McDonnell, & S. Bogaert, *The Law of the European Union* (pp. 539-586). Deventer: Wolters Kluwer.
- Collin, K. (2017, September 29). *Order from Chaos: The referendum in Catalonia, explained*. Retrieved from Brookings: <https://www.brookings.edu/blog/order-from-chaos/2017/09/29/the-referendum-in-catalonia-explained/>
- Colpani, G., Mascot, J., & Smiet, K. (2022). *Postcolonial responses to decolonial interventions*. *Postcolonial Studies*, 1-16.
- Craig, P., & Búrca, G. (2020). *EU Law: Text, Cases, and Materials*. Oxford: Oxford University Press.

- Cuyvers, A. (2013). The confederal come-back: Rediscovering the confederal form for a transnational world. *European Law Journal*, 711-738.
- Cuyvers, A. (2013). *The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*. LUP.
- Cuyvers, A. (2017). The Road to European Integration. In E. Ugirashebuja, J. Ruhangisa, T. Ottervanger, & A. Cuyvers, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (pp. 22-42). Leiden: Brill Nijhoff.
- Cuyvers, A. (2020). Brexit and the Real Democratic Deficit: Refitting National and EU Democracy for a Global Reality', in: In E. Ellian, & R. Blommestijn, *Reflections on democracy in the European Union*. The Hague: Eleven International Publishing.
- Dotson, K. (2011). Tracking Epistemic Violence, Tracking Practices of Silencing. *Hypatia*, 236-257.
- European Parliament. (2021). *The European Union and regional economic integration*. Retrieved from European Parliament: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689369/EPRS_BRI\(2021\)689369_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689369/EPRS_BRI(2021)689369_EN.pdf)
- Fassbender, B., & Peters, A. (2012). Towards a Global History of International Law. In B. Fassbender, & A. Peters, *The Oxford Handbook of the History of International Law* (pp. 1-24). Oxford: Oxford University Press.
- Gathii, J. (2012). *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*. Chicago, USA: Loyola University Chicago School of Law.
- Hartmann, C. (2016). Sub-Saharan Africa. In T. Börzel, & T. Risse, *The Oxford Handbook of Comparative Regionalism*. Oxford: Oxford University Press.
- Joseph S. Nye. (1968). Comparative Regional Integration: Concept and Measurement. *International Organization*, 855-880.
- Kaahwa, W. T. (2017). The Institutional Framework of the EAC. In E. Ugirashebuja, J. Ruhangisa, T. Ottervanger, & A. Cuyvers, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (pp. 43-78). Leiden: Brill Nijhoff.
- Laursen, F. (2010). Regional Integration: some introductory reflections. In F. Laursen, *Comparative Regional Integration: Some Introductory Reflections*. Aldershot: Ashgate.
- Lenaerts, K. (1990). Constitutionalism and the Many Faces of Federalism. *The American Journal of Comparative Law*, 205-263.

- Lombaerde, P., Langenhove, L., Söderbaum, F., & Baert, F. (2010). Problems and Divides in *Comparative Regionalism*. In F. Laursen, *Comparative Regional Integration. Europe and beyond* (pp. 21-39). Aldershot: Ashgate.
- Lowe, T. (2022, March). *Bracing against the Tide: ECOWAS and Recent Military Coups in West Africa*. Retrieved from The Yale Review of International Studies,: <http://yris.yira.org/comments/africa-comments/5657>
- Makau Mutua. (1995). Why Redraw the Map of Africa: A Moral and Legal Inquiry . *Michigan Journal of International Law*, 1113-1176.
- Masinde, W., & Omolo, C. (2017). The Road to *East African Integration*. In E. Ugirashebuja , J. Ruhangisa, T. Ottervanger, & A. Cuyvers, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (pp. 1-21). Leiden: Brill Nijhoff.
- Middelaar, L. v. (2020). *The Passage to Europe: How a Continent Became a Union*. New Haven: Yale University Press.
- N Koenig. (2015, July 23). A differentiated View of Differentiated Integration . *Policy Paper 140*. Berlin, Germany: Jacques BelorInstitut.
- Obasi, C. (2021, July 22). *Belgium: The Case of Flanders and Wallonia*. Retrieved from Harvard Political Review: <https://harvardpolitics.com/flanders-and-wallonia/>
- Paun,, A., Sargeant, J., & Henderson, D. (2022, October 25). *Scottish independence*. Retrieved from Institute for Government: <https://www.instituteforgovernment.org.uk/explainers/scottish-independence>
- Prof. Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others, Reference No. 1 of 2006 (East African Court of Justice March 30, 2007).
- Söderbaum, F. (2016). Old, New and Comparative Regionalism: The History and the Scholarly Development of the Field. In T. Borzel, & T. Risse, *The Oxford Handbook of Comparative Regionalism*. Oxford: Oxford University Press.
- Salaymeh , L., & Michaels, R. (2022). Decolonial Comparative Law: A Conceptual Beginning. *Rabels Journal for Foreign and International Private Law*, 166-188.
- Sawyer, K. (2022, November 1). *Can the EAC stabilize eastern DRC*. Retrieved from Institute for Security Studies: <https://issafrica.org/iss-today/can-the-east-african-community-stabilise-eastern-drc>
- Schimmelfennig, F. (2016). Europe. In T. Börzel, & T. Risse, *The Oxford Handbook of Comparative Regionalism*. Oxford: Oxford University Press.
- Souza, L. M. (2019). Glocal Languages, Coloniality and Globalization from below . In M. Guilherme, & L. Souza, *Glocal Languages and Critical Intercultural Awareness: The South Answers Back*. New York: Routledge.
- Stiglitz, J. (2017). *Globalization and its Discontents Revisited: Anti-Globalization in the*

Era of Trump (2017, Penguin). . New York: Penguin.

Stratulat, C. (2022, April 28). *War has returned to Europe: Three reasons why the EU did not see it coming*. Retrieved from European Policy Centre: https://www.epc.eu/content/PDF/2022/War_has_returned_to_Europe_DP.pdf

Timothy Masiko. (2022). *Flexible Regional Economic Integration in Africa: Lessons and Implications for the Multilateral Trading system*. Oxford: Hart Publishing.

Ugirashebuja, E., Ruhangisa, J., Ottervanger, T., & Cuyvers, A. (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Leiden: Brill Nijhoff.

United Nations. (2022, October 12). *AfCFTA's Guided Trade Initiative takes off, set to ease and boost intra-African trade*. Retrieved from Africa Renewal: <https://www.un.org/africarenewal/magazine/october-2022/afcfta%E2%80%99s-guided-trade-initiative-takes-set-ease-and-boost-intra-african-trade>

Vaitsos, C. (1978). Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey. *World Development*, 719–769.

Walle, N. v. (2022, August 25). *East Africa's DR Congo Force: The Case for Caution*. Retrieved from International Crisis Group: <https://www.crisisgroup.org/africa/great-lakes/democratic-republic-congo/east-africas-dr-congo-force-case-caution>

AFRICAN PRACTICE IN INTERNATIONAL ECONOMIC LAW 2021-2022

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In 2021-2022, Africa maintained its fight for relevance in the global trade environment that is characterised by a continued/increased protectionism vis a vis the enormously expanded fragmentation of production across borders, the consequences of COVID-19, the Russia/ Ukraine war, the Fourth Industrial Revolution and the rise of East and South Asia as new economic frontiers. Her strategy continues to be to expand the market access of African countries with each other and with other regions of the world.

Introduction

The journal retains this important tradition of analysing the most significant development in the international economic law field as it affects and reflects the practice of African States. Given the increase of protectionist policies of high-income countries that have called into doubt the continuity of trade agreements with preferential access for African exports, the Continent must take its destiny into its hands by developing and maintaining effective regional integration framework structures. Consequently, the most important developments in the quest to start the full implementation of the AfCFTA are examined in the first instance. Next, the article considers the significance of the recently celebrated 20-year anniversary of the African Union (AU). It re-enforces the importance of a sustained scholarly engagement with the burgeoning *sui generis* AU law as one of the most essential ways to avoid issues of horizontal and vertical fragmentation in the development of African international economic law. Recent global developments like the Russian/Ukraine war, the WTO's new agreement on fisheries subsidies, and COP 27 and how they affect the interests of African countries are also examined. The article concludes with a background consideration of the investor dispute settlement cases in the covered period that has had African States as parties

Status of the African Continental Free Trade Agreement (AfCFTA)

Many analysts agree that the AfCFTA is the most important tool for deepening economic integration in Africa, especially in relation to improving regional value chains (RVC).¹ In 2021-2022, the continent made significant headway in implementing the AfCFTA. The most important are highlighted below.

The Establishment of the AfCFTA Guided Trade Initiative (GTI)

Africa made huge progress in implementing the AfCFTA by inaugurating and operationalising the GTI. Given the largely understandable delay in commencing the operational phase of the AfCFTA (which was supposed to start on 1 January 2021),² the AfCFTA Council of Ministers in July 2022 announced the establishment of the GTI; a solutions-based approach to tackle any inertia against the Agreement's journey of progress.

The GTI is a framework that matchmakes African businesses and products for export and import in select African countries. The objectives of the GTI according to the AfCFTA Secretariat are:

- i. 'to allow commercially meaningful trading under the AfCFTA;
- ii. to test the operational, institutional, legal and trade policy environment under the AfCFTA; and
- iii. to send an important positive message to the African economic operators.'³

The GTI signals the formal commencement of trading under the AfCFTA. Eight State Parties – Cameroon, Egypt, Ghana, Kenya, Mauritius, Rwanda, Tanzania and Tunisia (representing the 5 regions of Africa) are now trading under the framework which will cover trade in ceramic tiles, batteries, tea, coffee, processed meat products, corn starch, sugar, pasta, glucose syrup, dried fruits, and sisal fibre. On a positive note, the President of Kenya on 5 October flagged off the first consignment of tea from Kenya to Ghana under the GTI.⁴

1 WORLD BANK GRP, THE AFRICAN CONTINENTAL FREE TRADE AREA ECONOMIC AND DISTRIBUTIONAL EFFECTS (2020), <https://openknowledge.worldbank.org/server/api/core/bitstreams/ef1aa41f-60de-5bd2-a63e-75f2c3ff0f43/content>.

2 The commencement of the AfCFTA was delayed because of the effects of the COVID 19 pandemic.

3 *The AfCFTA Guided Trade Initiative*, AfCFTA (Oct. 7, 2022), <https://au-afcfta.org/2022/09/the-afcfta-guided-trade-initiative/#:~:text=The%20specific%20objectives%20of%20the,to%20the%20African%20economic%20operators>.

4 Shah Rome Khan, *Kenya, Ghana Commence Free Trade under AfCFTA*, DIPLOMATIC INSIGHT (Oct. 5, 2022), https://thediplomaticinsight.com/kenya-ghana-commence-free-trade-under-afcfta/#google_vignette.

Comments on the GTI

Some notable points arise from the establishment of the GTI with respect to describing the distinctive aspects of African States' practice in the area of international economic law. First, the GTI emphasises again the sacred place of flexibility as the most important principle that underpins trade regionalism in Africa. Generally, it is argued in the context of international law, international trade law and international relations, 'flexibility' can only be understood in two distinct ways; first as an institutional choice in contrast with legalisation in relation to how international actors design institutions and how States express their reluctance to limit their sovereignty with more legalised commitments (flexibility as an institutional choice).⁵ Flexibility has also been used to illustrate how various agreements transform or are adaptive to new and unplanned circumstances (contractual flexibility).⁶

With regards contractual flexibility, GTI is an example of variable geometry (a coalition of the willing) which although a prominent feature of African RTAs, remains a standard practice in many other FTAs in the world. In relation to the former, GTI seems to represent an appeal for flexibility/informality rather than legalisation as a more effective approach for pursuing economic integration in Africa. This is of course without prejudice to the fact that its aim is to give effect to the 'very legalised AfCFTA' by testing its operational, institutional, legal, and trade policy environment. Proponents against legalisation in African economic regionalism may therefore refer to it as yet another reason why Africa should eschew legalisation which is 'arguably' Eurocentric and not fitted for African purposes.

By simply matchmaking businesses and products outside the formal structures of an FTA (in a largely effective way), the GTI re-emphasises again that the nature of many African economies means that the justification of economic integration will not conform to the classical (Viner) theories of

5 In IL and IR literature, flexibility is normally used to represent an absence of legalisation in the setup of international institutions. Flexibility in this regard used interchangeably with non-legalisation, less legalisation or lack of formalisation. See generally Kenneth W. Abbott et al., *The Concept of Legalization*, in LEGALIZATION AND WORLD POLITICS 401 (Judith Goldstein et al. eds., 2000); Barbara Koremenos, *Institutionalism and International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991).

6 This flexibility are adaptive or transformative mechanisms in treaty cooperation that allow States to respond to future contingencies and shocks in a way that preserves the existing arrangements previously agreed on. Contractual flexibility also enables international institutions to solve specific cooperation problems by permitting States not to abide by certain commitments so as not to jeopardise the whole agreement. This conception of flexibility was developed by the IR theory on the Rational Design of International Institutions. Examples of contractual flexibility in trade and economic integration agreements include escape clauses, differentiated integration (principle of asymmetry and variable geometry) and constructive ambiguity. Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

integration. Given the economic characteristics of African States, there seems to be a consensus that the focus should be on developing dynamic effects capabilities that support economies of scale and the growth of a strong competitive manufacturing sector.⁷ The argument on whether the best way to do this is through legalised agreements (like the AfCFTA which is largely justified under the classical theories of integration) is plausible and should continue.

Away from the theoretical arguments, the question of how long the GTI will (and should) last remains unclear. There are some indications from the AfCFTA secretariat of plans to continue the interim agreement and expand it to include other countries. Something similar to the initiative is also planned for trade in services. Is it the case that the sooner the GTI gives way and the main deal takes off, the better,⁸ or is the GTI (or some variations of it) at present, the best strategy for progress in light of the very intricate complexities of negotiating a trade deal with 54 countries with different socio-economic realities? The answer probably lies in seeing how the GTI develops in the coming months and if more progress will be made in resolving the challenges that have prevented the full take-off of the AfCFTA.

Conclusion of the AfCFTA Protocol on Investment

In December 2021, African States started the process of negotiating a protocol on investment as part of AfCFTA phase 11 negotiations (which will also include a protocol on competition and intellectual property). The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area draft was concluded in October 2022 and has been adopted at the ministerial level by the AfCFTA Council of Ministers. The final phase which is expected to be 'ceremonial' is the review and adoption of the Protocol text by the AU Assembly of Heads of States at its ordinary session scheduled in February 2023.

Although the final draft adopted by the Council of Ministers has not been made public, it seems it is not expected to differ significantly from the draft shared in November 2021 as part of the negotiation process. The objective of the Protocol it is hoped will remain to build a continental legal structure to facilitate and protect intra-African investment whilst fostering sustainable development and preserving State regulatory autonomy taking into account the need to foster harmonisation by building on the framework of the regimes of African States, the regional economic communities and the Pan-African Investment Code. Following adoption by the AU Assembly, the Protocol

7 In this regard, the GTI is arguably a step in the right direction.

8 Gerhard Erasmus, *The Scope of the AfCFTA is Expanding. What are the Implications?*, TRALAC (Feb. 3, 2023), <https://www.tralac.org/blog/article/15909-the-scope-of-the-afcfta-is-expanding-what-are-the-implications.html#:~:text=Trade%20in%20goods%20and%20in,modern%20trade%20arrangement%20is%20envisaged>.

will enter the stage of ratification in accordance with the constitutional procedure of States. Of course, to access the full benefits of the Protocol, 'aligning domestic law, implementation of all provisions, and targeted complementary action' will be crucial.⁹

Resolving the Remaining Issues with the AfCFTA

On a broad level, the success of the AfCFTA will depend on two factors; resolving long-standing political economy issues as it relates to integration and the choice between more restrictive or more liberal rules of origin (RoO).¹⁰ In relation to the latter, continental-wide harmonisation on RoO has been the major factor that has prevented the full commencement of the Agreement for two years now. Even though tariff revenue is a sensitive issue for many African LDCs, it is hoped that 2023 will be the year all issues regarding RoO are resolved. This remains the main agenda for the AfCFTA Secretariat. However, the World Bank in a recent report has warned that the liberalisation of 90 percent of tariff lines (which was what was initially agreed on) may effectively represent just a small value of trade. Given that intra-African trade is already low, States may need to further subject more of their sensitive products to liberalisation since an 'exclusion of even a small set of tariff lines could effectively exclude a significant share of imports to a country.'¹¹ This may reinforce the position of the AfCFTA pessimists who have argued that the Agreement has been oversold and should by no means be seen as a panacea to Africa's problems.¹² Part of the claim is that the undue focus on improving intra-African trade is counter-productive. Rather, significantly improving the productive capacities of African States should be the priority since the low level of intra-African trade is just a reflection of low productive capacities.¹³ However, the promise that the AfCFTA presents in accelerating these productive capacities is not mutually exclusive with other solutions that may exist outside the framework of the Agreement.

The African Union (AU) at 20

The AU celebrated its 20-year anniversary in 2022. The umbrella continental organisation was established in July 2002 with ambitions to further entrench Pan-Africanism as the overarching principle on which the development of the continent

9 Dirk Willen te Velde, *Promoting Investment for Africa's Industrialisation through Economic Integration*, OVERSEAS DEV. INST. (Nov. 18, 2022), <https://odi.org/en/insights/promoting-investment-for-africas-industrialisation-through-economic-integration/>.

10 AFRICA IN THE NEW TRADE ENVIRONMENT: MARKET ACCESS IN TROUBLED TIMES 276 (Souleymane Coulibaly et al. eds., 2022).

11 Id. at 272.

12 Kasirim Nwuke, *I confess, I am an AfCFTA Sceptic*, AFR. REP. (Feb. 15, 2022), <https://www.theafricareport.com/176253/i-confess-i-am-an-afcfta-sceptic/>.

13 Id.

is pursued. Of course, Pan-Africanism has influenced the integrationist dynamics not just politically but also economically, well before African States' accession to international sovereignty in the 1960s and continues to do so currently. The principle was first institutionalised in Africa by the Organisation of African Unity (OAU), the first region-wide indigenous (organisational) attempt at integration. It was evident from the charter of the OAU that African states saw regionalism as not just a means to foster brotherhood, fight colonialism and promote unity transcending ethnic and national differences but also as a means to create and strengthen common institutions for economic cooperation in for instance the transport and communication sectors.¹⁴ Throughout its years, a common thread in the OAU's Declarations¹⁵ was an acknowledgment of economic integration as a necessary condition for concrete independence and development.

In 2002, the AU became the latest expression of the Pan-Africanist spirit. In forming the organisation, African leaders acknowledged the glaring weakness of the OAU but most importantly, sought to make an audacious statement of their willingness to take the political and economic development of the continent very seriously. Consequently, the AU Constitutive Act includes as its objectives 'achieving greater unity and solidarity between African countries and the peoples of Africa; accelerating the political and socio-economic integration of the continent; promoting sustainable development at the economic, social and cultural levels as well as the integration of African economies' among others.¹⁶

Twenty years provide a good opportunity to reflect on how much the organisation has achieved its goals and to suggest the best ways to deal with its challenges. An important symposium has already been done in this regard with very good submissions.¹⁷ However, it is important to crystalize the most important thoughts on the nature and development of the AU that relate more directly to the study and practice of African States in international economic law and to encourage more research in this area.

Firstly, one of the most significant points that arose from the symposium is the acknowledgment and celebration of the important role the AU has played in norm

14 Org. of African Unity [OAU] Charter art. 2, May 25, 1963, 479 U.N.T.S. 39 (entered into force Sept.13, 1963).

15 Org. of African Unity [OAU], *Monrovia Declaration of Commitment of the Heads of State and Government, of the Organization of African Unity on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order*, Sixteenth Ordinary Session, AHG/ST. 3 (XVI) Rev.1 (July 17-20, 1979), https://au.int/sites/default/files/decisions/9526-assembly_en_17_20_july_1979_assembly_heads_state_government_sixteenth_ordinary_session.pdf.

16 See Constitutive Act of the African Union art. 3, July 11, 2000, 2158 U.N.T.S. (entered into force May 26, 2001) [hereinafter AU Constitutive Act].

17 Babatunde Fagbayibo & Arnold Nciko wa Nciko, *Introduction to Symposium: AU @20: Looking Back and Thinking Forward on the Impact of the African Union on Deepening Continental Integration in Africa*, AFRONOMICSLAW (Aug. 1, 2022), <https://www.afronomicslaw.org/index.php/category/analysis/introduction-symposium-au20-looking-back-and-thinking-forward-impact-african>.

generation and the creation of a *sui generis* African Union Law (AU Law) not based on Eurocentric conceptions. AU Law which is used interchangeably with the 'Public Laws of Africa' importantly 'provides a normative framework for the realisation of the political, social and economic objectives of Pan-Africanism.'¹⁸ In a recent book, Olufemi (et al) argues convincingly that whilst AU Law may be useful in adapting existing international law to the African context, they are also 'quite innovative and original as compared to universal international law norms in that they only exist within the public law of Africa as binding rules or principles'¹⁹ Further, it is also argued that more scholarly engagement with this emergent AU legal order is a veritable tool for weaving together various aspects of the integration agenda (including economic integration); the aim being to increase norm coherence that assists in dealing with key challenges African States face.

One of those challenges relates to the age-long problem of ascertaining what constitutes the right approximation of sovereignty to pursue the objectives of political and economic integration; (ie the arguments for and against supranationalism and intergovernmentalism as a tool for African political and economic integration). In this regard, scholars have consistently noted that the non-conferral of supranational authority on the institutions mandated to enforce African treaties is accountable for the widespread non-compliance with the treaty obligations.²⁰ In the coming years that the AfCFTA becomes fully operational, these perennial issues will certainly re-surface.²¹

Moreover, it is important to note that although economic integration in Africa has been implemented through the various regional economic communities (RECs), the AU still provides a critical institutional framework for improving intra-African trade, especially in the context of the AfCFTA. Unlike in the RECs, nothing in the AfCFTA Agreement indicates that the AfCFTA is an international organisation in its own right but only a specialised arm of the AU.²² It is not given any legal personality

18 The quote is from Judge Abdulqawi Ahmed Yusuf, former president of the International Court of Justice. It is lifted from Femi Amao, *Framing AU Law through the Lenses of International Constitutionalization and Federalism*, in THE EMERGENT AFRICAN UNION LAW: CONCEPTUALIZATION, DELIMITATION, AND APPLICATION (Olufemi Amao et al. eds., 2021). For the original work by Judge Yusuf, see ABDULQAWI A. YUSUF, PAN-AFRICANISM AND INTERNATIONAL LAW 185 (2014).

19 Amao, *supra* note 18, at 46.

20 In addition, Article 3(l) of the AU Constitutive Act mandates it to 'coordinate and harmonize the policies between the existing and future Regional Economic Communities [RTAs] for the gradual attainment of the objectives of the Union'. AU Constitutive Act, *supra* note 18, at art. 3(1).

21 Regis Yann Simo, *The (Domestic) Enforcement of AU International Economic Law Instruments: Exploring the Desirability of Direct Effect*, in THE EMERGENT AFRICAN UNION LAW: CONCEPTUALIZATION, DELIMITATION, AND APPLICATION (Olufemi Amao et al. eds., 2021).

22 On this see generally Gerhard Erasmus, *The AfCFTA Institutions: Could the Secretariat hold the key to Implementation?* (Trade L. Ctr. (Tralac), Working Paper No. US19WP01/2019, 2019), <https://www.tralac.org/documents/publications/working-papers/wp2019/2621-us19wp01-erasmus-afcfta-institutions-06022019-fin/file.html>.

and some of the bodies that the AfCFTA Agreement creates (like the Assembly) are also organisations of the AU.²³ In addition, even though the Secretariat enjoys legal personality, Article 13(3) of the AfCFTA Agreement notes that it ‘shall be a functionally autonomous institutional body within the African Union system.’ As noted by Prof Erasmus, ‘the institutional design of the AfCFTA contains indications of creating a structure within the AU system and a proper trade organisation’²⁴ which could lead to some issues in the future. If the fact that the RECs are to be building blocks of the AfCFTA is added to the equation, there is no doubt that there will be a need to ascertain what would be the ‘right’ legal and institutional relationship between the AU, AfCFTA, the RTAs and the States to avoid issues of both horizontal and vertical fragmentation.²⁵

The Russian-Ukraine Conflict in the midst COVID-19 Recovery

On February 24, 2022, the world witnessed a full-fledged invasion of Ukraine by Russia. The war has had enormous implications for the global economy which has just started to recover from the worst pandemic in almost a century. The unprecedented energy price surges and food disruptions (in view of the comparative advantage of Russia and Ukraine) that the conflict has occasioned have had negative reverberations in every corner of the globe contributing to high inflation, food insecurity, and the tightening in global financing conditions. Within just 3 months, the UNDP reported that 71 million fell into poverty and the number is increasing.²⁶ The problem is exacerbated by the fact that an estimated 97 million become extremely poor as a result of the pandemic and the solutions that developing countries have sought have raised their debt to a 50-year high to more than two and half times their revenue.²⁷ In addition, the conflict continues to have geopolitical consequences for global governance between the US, Russia, China, and the EU.

23 Article 1 of the AfCFTA Agreement states that Assembly as used in the Agreements “means the Assembly of Heads of State and Government of the African Union.” See Agreement Establishing the African Continental Free Trade Area art. 1, Mar. 21, 2018 (entered into force May 30, 2019).

24 Erasmus, *supra* note 22, at 19.

25 While vertical fragmentation is concerned with regime or institutional hierarchy, horizontal fragmentation is concerned with rule complexity of public international law norms. Of course, the relationship between vertical and horizontal fragmentation is that the tensions in the former could cause divergence of rules even in the same subject area. See generally Panagiotis Delimatsis, *The Fragmentation of International Trade Law*, 45 J. WORLD TRADE 87 (2011); Joost Pauwelyn, Fragmentation of International Law, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2006); THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE (Thomas Cottier & Panagiotis Delimatsis eds., 2011).

26 *Global cost-of-living Crisis Catalyzed by War in Ukraine Sending Tens of Millions into Poverty, Warns UN Development Programme*, U.N. DEV. PROGRAMME (July 7, 2022), <https://www.undp.org/press-releases/global-cost-living-crisis-catalyzed-war-ukraine-sending-tens-millions-poverty-warns-un-development-programme>.

27 *Id.*; Carolina Sanchez-Paramo et al., *COVID-19 leaves a Legacy of Rising Poverty and Widening Inequality*, WORLD BANK BLOGS (Oct. 7, 2021), <https://blogs.worldbank.org/developmenttalk/covid-19-leaves-legacy-rising-poverty-and-widening-inequality>.

In the context of the devastating effects of COVID 19, analysts have provided some details of the economic impacts of the Ukraine-Russian conflict on Africa;

- i. The African Development Bank notes the conflict has triggered a shortage of 30 million tons of grains in Africa together with a considerable increase in cost. This is because the continent spends \$75 billion on cereal import annually and in 2020, 15 African countries imported over 50 percent of their wheat from Russia or Ukraine.
- ii. The IMF reports that staple food prices in Africa rose almost 24 percent between 2020-2022, the highest rise since the 2008 global financial crisis.
- iii. Supply disruptions of fertilizer imports from Russia, Ukraine, and Belarus has led to a sharp rise in fertilizer costs which have risen 199 percent since May 2020 with prices more than doubling in Kenya, Uganda, and Tanzania in 2022. It is projected that food production will be massively affected in the continent in 2023 especially because most fertilizer producers are banning exports to protect their own farmers.
- iv. The pressure from fluctuations in exchange rates and high commodities prices occasioned by the conflict and post-pandemic recovery led to double digits inflation in 40 percent of African countries. According to the IMF, seven African countries are in debt distress coming up to 2023 and 14 more are at high risk of debt distress. This makes it further impossible to have social protection systems for millions of Africans.²⁸

The geopolitics of the conflict has turned Africa into a battleground for China, the US/EU, and Russia as they seek to further assert their influence in the continent. The Russian foreign minister embarked on an African tour twice in 2022 and had meetings with the governments of Egypt, Ethiopia, Uganda, Congo, Senegal, Cote d'Ivoire, and Ghana since the 'special operation' in Ukraine began in February 2022. Moscow has sought support from Africa to legitimatise its invasion, to counteract the West's blame for the global food prices as a result of the war, and has also promised bilateral investment opportunities for the continent. By contrast, the Ukrainian president in a closed address to the AU in June 2022 described Africa as a hostage of the Russian military operation in his country in relation to the skyrocketing food prices and its

28 For a comprehensive review, see Bitsat Yohannes-Kassahun, *One Year Later: The impact of the Russian conflict with Ukraine on Africa*, AFRICARENEWAL (Feb. 13, 2023), <https://www.un.org/africarenewal/magazine/february-2023/one-year-later-impact-russian-conflict-ukraine-africa>; see also INT'L MONETARY FUND, LIST OF LIC DSAS FOR PRGT-ELIGIBLE COUNTRIES AS OF FEBRUARY 28, 2023, <https://www.imf.org/external/pubs/ft/dsa/dsalist.pdf>; Cedric Okou et al., *Africa Food Prices Are Soaring Amid High Import Reliance*, IMF BLOG (Sept. 27, 2022), <https://www.imf.org/en/Blogs/Articles/2022/09/26/africa-food-prices-are-soaring-amid-high-import-reliance>.

devastating effect on Africa. Both the US secretary of state and the Chinese foreign minister also visited the continent in 2022 as the proxy war over the legitimacy of the conflict and the overall race for superiority in their new 'scramble for Africa' continues.

African nations have largely stayed away from taking sides in the conflict maintaining their long-preferred non-aligned policy to global geopolitical disputes. In March 2022, South Africa, China, and more than a dozen other African countries abstained from voting in UN resolution EN/11 which sought to condemn Russia for its invasion of Ukraine. However, what is not in doubt is that the continued intense rivalry of political and economic influence over Africa by the US and China/Russia emphasise again the continent's increasingly important role in global politics and economy. How they utilize this for their benefit, particularly in relation to negotiating fairer trade and investment deals that champion African interest and mainstream its unique practice remains to be seen.²⁹

In the short term, the overlapping issues of the Russia/Ukraine war, the pandemic, and the resultant surge in food and fuel prices are painful reminders of African States' lack of preparation to manage unexpected shocks in the global economy that can happen almost instantaneously. Policymakers have proposed a package of solutions that are important to alleviate the suffering of millions.³⁰ Interestingly the kickstarting of the AfCFTA remains crucial in this regard.

WTO Agreement on Fisheries Subsidies

After more than 2 decades of negotiations, WTO members finally concluded the WTO Agreement on Fisheries subsidies in June 2022. Given the general decline of the WTO since Doha and the plunge toward economic nationalism and protectionism, the Agreement 'arguably' shows that the organisation still has some signs of life and thus might still be relevant for the global governance of the multilateral trading system. More so, the Agreement which has environmental sustainability as its main objective is the first WTO agreement that focuses on the environment and this is possibly a good response to the crisis of legitimacy that the organisation has earlier suffered in relation to its response to dealing with important non-trade issues.³¹

29 The growing interest in Africa can be used to further the argument for the recalibration of the UN Security Council and to give Africa two permanent states. Moutiou Adjibi Nourou, *The Russia-Ukraine War highlights Africa's Growing Geopolitical Importance*, ECOFIN AGENCY (Oct. 12, 2022), <https://www.ecofinagency.com/public-management/1210-43948-the-russia-ukraine-war-highlights-africa-s-growing-geopolitical-importance>.

30 This includes 're-allocating the \$100 billion IMF Special Drawing Rights to support African countries and restructuring both private and public debt would give these countries the fiscal space to weather the crisis.' For these other measures, see importantly Yohannes-Kassahun, *supra* note 28.

31 Elizabeth Trujillo, *A Dialogical Approach to Trade and Environment*, 16 J. INT'L ECON. L. 535 (2013); Henrik Andersen, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18 J. INT'L ECON. L. 383 (2015).

Particularly for the purposes of this paper, the Fisheries Subsidies Agreement also meets the Sustainable Development Goal 14.6 mandate for the WTO to negotiate disciplines to eliminate subsidies contributing to illegal, unreported, and unregulated (IUU) fishing and overfishing, taking into account *the needs of developing country members*. Consequently, The Agreement generally prohibits 3 types of subsidies; subsidies granted to vessels and operators engaged in illegal, unreported, and unregulated (IUU) fishing or fishing-related activities in support of IUU fishing; subsidies for fishing or fishing-related activities regarding an overfished stock, and subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant regional fisheries management organisation.³²

Fishing has long been a sticking point in Africa's relationship with the West (especially the EU) for a long time. There are currently about 11 Agreements on Fisheries Partnership Agreements between the EU and Africa; seven for tuna and 4 mixed agreements. Seven of these agreements are with countries in West Africa. Given that fishing provides food security for 200 million Africans, African scholars have for decades expressed concerns that the political economy of Euro-African fisheries agreements do 'not augur well for growth and development in Africa, and it is especially not conducive to the sustainable management of Africa's marine resources'³³ because the value negotiated for the agreements are not commensurate with the amount fish species that the EU removes from the continent.³⁴ In addition, European vessels are considerably involved in the practice of IUU fishing whilst receiving fishing subsidies from their respective governments.

The impact of the Agreement will, directly and indirectly, affect Africa when it becomes fully operational.³⁵ Indirectly, foreign vessels that receive subsidies and hence found it profitable to fish in African waters will reduce. Although African States will eventually have to curtail the subsidies to their own industrial fleet,³⁶ it has been argued that the African fishing industry could become significantly 'more profitable regardless

32 See World Trade Organization, Ministerial Decision of 17 June 2022, WTO Agreement on Fisheries Subsidies arts 3-5, WTO Doc. WT/MIN(22)/33, WT/L/1144 (2022), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/33.pdf&Open=True>.

33 Okechukwu C. Iheduru, *The Political Economy of Euro-African Fishing Agreements*, 30 J. DEVELOPING AREAS 63, 64 (1995).

34 Ifesinachi Okafor-Yarwood, *African Countries Must Protect their Fish Stocks from the European Union- here's how*, THE CONVERSATION (Feb. 15, 2022), <https://theconversation.com/african-countries-must-protect-their-fish-stocks-from-the-european-union-heres-how-177095>.

35 Currently only 3 members (out of the 110 required) have submitted their instrument of acceptance of the Agreement.

36 GIOVANNI OCCHIALI, INT'L CTR. FOR TAX & DEV., FISCAL POLICIES FOR THE FISHERIES SECTOR IN SELECTED AFRICAN COUNTRIES: REPORT IN BRIEF 4, <https://ferdi.fr/dl/df-76QUdi7EouVAtNdr9aR7gb2c/fiscal-policies-for-the-fisheries-sector-in-selected-african-countries.pdf>.

of subsidies level, as many African countries are missing out on potential revenue due to a lack of up-to-date information for their negotiating teams and of regional coordination.³⁷ The AfCFTA arguably can provide such regional coordination. In the interim, four African countries (Angola, Eritrea, Morocco and Nigeria) signed the Food and Agricultural Organisation (FAO) Agreement on Port State Measures (PSMA) in November 2022. The PSMA is the first binding international agreement specifically designed to tackle IUU fishing by preventing port access to foreign vessels that engage or support IUU fishing.³⁸

United Nations Climate Change Conference 2022 (COP 27)

COP 27 (termed the African COP) was held in Sharm el-Sheikh, Egypt from 6-20 November 2022. The conference comes on the heels of the World Meteorological Organisation's (WMO) 2021 State of the Climate in Africa Report (released in September 2022), which shows the rising climate change threats for health, food and water security, and socio-economic development in Africa.³⁹ COP27 has been characterised as a mixed bag featuring 'big wins, and significant losses.'⁴⁰ The key takeaways from the conference include the establishment of a loss & damage fund, a reaffirmation of the commitment to limit global temperature rise to 1.5°C above pre-industrial levels,⁴¹ prioritisation of accountability and transparency in the commitments of business and institutions, commitment to mobilising more financial support to developing countries, and a focus on implementation.⁴²

However, it is considered that the most remarkable achievement of COP27 is the establishment of the loss & damage (L&D) fund.⁴³ The L&D fund is designed to intervene in circumstances of immediate need such as extreme weather events arising from the adverse effects of climate change; and to enable vulnerable developing

37 *Id.* In addition, the full exploitation of all stocks of fish and the limited opportunities for expanding aquaculture in Europe, North America, and East Asia mean that by 2030 only countries in South Asia, the Pacific, and Africa can fill the gap of an additional 60 million tons of fish that the global market will need. See Okiche, *supra* note *.

38 Susan Chacko, *Four African Countries Back Agreement Against Illegal, Unregulated Fishing*, DOWNTOEARTH (Nov. 14, 2022), <https://www.downtoearth.org.in/news/africa/four-african-countries-back-agreement-against-illegal-unregulated-fishing-85952>.

39 WORLD METEOROLOGICAL ORG., STATE OF THE CLIMATE IN AFRICA 2021, WMO-No. 1300 (2022), https://library.wmo.int/doc_num.php?explnum_id=11512.

40 Adebayo Majekolagbe et al., *Roll Out the Drums, or Not: Hits and Misses at COP 27*, AFRONOMICSLAW (Nov. 24, 2022), www.afronomicslaw.org/category/analysis/roll-out-drums-or-not-hits-and-misses-cop-27.

41 To this end, a mitigation work programme was established in COP27, with the objective of expeditiously scaling up mitigation ambitions and implementations.

42 *Five Key Takeaways from COP27*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/conferences/sharm-el-sheikh-climate-change-conference-november-2022/five-key-takeaways-from-cop27> (last visited Apr. 10, 2023).

43 *COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries*, U.N. CLIMATE CHANGE (Nov. 20, 2022), <https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries>.

countries (most of whom are in Africa), to build resilience.⁴⁴ The potential for the L & D fund for Africa if properly constituted and managed could be significant given the particular vulnerability and adverse effects of climate change in the continent. However, the financing mechanisms and frameworks for the L&D fund is unclear at this stage and would remain so until COP28. This is because the responsibility for determining the mechanisms has been assigned to a Transitional Committee who will make recommendations for consideration and adoption by COP28. The first meeting of the Transitional Committee is expected to take place sometime in March 2023.

Some fundamental questions which the Transition Committee would have to tackle include: how the funds will be applied i.e., whether it will be compensatory for destroyed assets⁴⁵ or for reconstruction etc? Who will be the contributors, i.e., whether only developed countries, or whether it will be inclusive of large developing economies with major emission contributions such as China, India etc.⁴⁶ It has been suggested that the Bridgetown Initiatives is the best model to follow if the objective is to increase climate finance.⁴⁷ However, there are concerns as to whether developed countries will honour their pledges and contribute to the fund. Other concerns, includes the issues of transparency and accountability of recipient African States in terms of how they utilise the funds for the most vulnerable.

Trends in International Investment Law

International Investment Agreements

What quickly stands out within investment treaty practice in Africa within the period in focus is the interest in Africa by the United Arab Emirates (UAE). This is reflected in the number of Bilateral Investments Treaties (BITs) that have been executed between the UAE and African countries. They include the Mozambique – UAE BIT,⁴⁸ the Cote d'Ivoire-UAE BIT,⁴⁹ and the Democratic Republic of Congo – UAE BIT.⁵⁰

44 The idea behind the L & D fund is for the provision of immediate financial support in the event of loss and damage occasioned by an extreme weather event caused by climate change. See Ruth Kattumuri et al., *Loss and Damage Fund – Size, Design and Agility are Essential*, COMMONWEALTH BLOG (Dec. 5, 2022), <https://thecommonwealth.org/news/blog-loss-and-damage-fund-size-design-and-agility-are-essential>.

45 According to the US Special Envoy on climate change, the L&D fund does not operate as reparations based on responsibility, rather it results from the necessity for developed countries to act in support of developing countries in dealing with the effects of Climate change. See Majekolagbe et al., *supra* note 42.

46 Olivia Serdeczny et al., *2023 will shape the Loss and Damage fund for years to come – have your say now*, CLIMATE ANALYTICS BLOG (Jan. 9, 2023), <https://climateanalytics.org/blog/2023/2023-will-shape-the-loss-and-damage-fund-for-years-to-come-have-your-say-now/>.

47 Majekolagbe et al., *supra* note 42.

48 Mozam.-U.A.E. BIT, Feb. 7, 2022 (not in force).

49 Côte d'Ivoire-U.A.E. BIT, Nov. 24, 2021 (not in force).

50 Dem. Rep. Congo-U.A.E. BIT, Oct. 12, 2021 (not in force) [hereinafter DRC-U.A.E. BIT].

Among African countries, the Democratic Republic of Congo (DRC) has been the most active in executing BITs during the period under review. The DRC has signed BITs with Turkey⁵¹ and the UAE⁵² and has also signed the only inter-African BIT with Rwanda.⁵³ The latter was signed on 26 June 2021 alongside two other bilateral treaties on double taxation and mining concessions.⁵⁴ The text of the DRC-Rwanda BIT (2021) is in French, however, a rudimentary translation of the text reveals that aside from the usual pro-investor, investment protection provisions of BITs, the text seems to include provisions similar to the Morocco-Nigeria BIT (2016), on corporate social responsibilities,⁵⁵ environmental protection;⁵⁶ and liability of investors etc.⁵⁷

Investor-State Dispute Settlement (ISDS)

Between 2021 and 2022, about 9 investment arbitration claims were instituted by and against African countries before the International Centre for the Settlement of Investment Dispute (ICSID) tribunal and other ad hoc investment tribunals. These claims (most are still pending but others have been discontinued) border on alleged adverse host State measures affecting investments in construction, mining and quarrying etc., and arise predominantly from alleged breaches of substantive treatment standards contained in BITs. Egypt remains the African country with the most claims against it,⁵⁸ with about 4 ISDS, of which two have been settled and discontinued.⁵⁹

Despite its criticisms by African and developing countries,⁶⁰ investment treaty-based ISDS, has also been adopted by investors of African nationalities to resolve grievances

51 Dem. Rep. Congo-Turkey BIT, Sept. 7, 2021 (not in force).

52 DRC-U.A.E. BIT, *supra* note 52.

53 Agreement on Investment Promotion and Protection, Dem. Rep. Congo-Rwanda, June 26, 2021 (not in force) [hereinafter DRC-Rwanda BIT].

54 *Rwanda, DR Congo Sign Three Bilateral Agreements*, RWANDA IN SINGAPORE, <https://www.rwandainsingapore.gov.rw/info/info-details/rwanda-dr-congo-sign-three-bilateral-agreements> (last visited Apr. 10, 2023).

55 DRC-Rwanda BIT, at art. 14.

56 *Id.* at arts. 15-16.

57 *Id.* at art. 19.

58 Tsoatag Tsiesti & Akinyi J. Eurallayah, *African Practice in International Economic Law: 2020-2021*, 2 AFR. J. INT'L ECON. L. 122, 136 (2021). See also Africa, ISDS PLATFORM (Apr. 2020), <https://www.isds.bilaterals.org/?-africa-263->.

59 *Vicat S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/21/35, Discontinued (2021); *KGL Int'l for Ports, Warehousing, & Transp. K.S.C.C. v. Arab Republic of Egypt*, ICSID Case No. ARB/21/21, Discontinued (2021); *HeidelbergCement AG v. Arab Republic of Egypt*, ICSID Case No. ARB/21/50 (2021); *Bahgat v. Arab Republic of Egypt (II)* (2021).

60 The criticisms of ISDS in relation to developing countries include issues of transparency, duration & costs (as well as third party funding) etc. See U.N. Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), 7-13, U.N. Doc. A/CN.9/930/Rev.1 (Dec. 19, 2017); see also Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53 CASE W. RSRV. J. INT'L L. 7 (2021); GABRIELLE KAUFMAN-KOHLER & MICHELE POTESTA, INVESTOR-STATE DISPUTE SETTLEMENT AND NATIONAL COURTS: CURRENT FRAMEWORK AND REFORM OPTIONS (2020).

with other African host States. The first ICSID dispute of 2022 was the intra-African ISDS claim *Suzor and SBEC v Senegal*,⁶¹ which was between Mauritian claimants and Senegal. The nature of the dispute is unclear at the moment and this again reinforces the need to sort out the issue of openness & transparency in investment treaty based ISDS. However, it seems to be in relation to a power plant in the south of Dakar. Furthermore, in *EEPL v Congo*,⁶² another intra-African ISDS case, the claimant (a Mauritian subsidiary of an Australian company), is alleging that the Republic of Congo, undertook unlawful measures against it. The claimant claims that the Republic of Congo expropriated its two iron ore projects, and apparently granted them to a Chinese-linked company operating in the Republic of Congo. This amounted to expropriation and a violation of the FET standard based on the Congo – Mauritius BIT (2010). Given the transparency issues already highlighted, most of the relevant facts are unavailable, however, since Australia has no BIT with the Republic of Congo, this raises the issue of possible treaty shopping through the Congo – Mauritius BIT.⁶³ Finally, another intra-African ISDS dispute instituted within the covered period is *Qalaa & ASEC v Algeria*.⁶⁴ The claimants in this case include an Egyptian private equity fund with a cement focused subsidiary. From the limited available information, their claim seems to have arisen out of alleged unlawful measures carried out by Algeria against the claimant's cement plant projects that resulted in their devaluation and forced sale. Consequently, the claimants contend that Algeria's adverse measures amounted to indirect expropriation and a breach of the FET standard. The claimants are seeking \$900 million in damages for Algeria's alleged breach.⁶⁵

Another ISDS claim against African host States is *Comervi v Morocco*.⁶⁶ Here, the claimant invested in the construction of residential housing in urban developments at the outskirts of Rabat & Tangiers. However, according to the claimant, the investment was truncated owing to Morocco's failure to provide the basic infrastructure for the cities to thrive, and the inability of the claimant to obtain necessary administrative

61 Damien Charlotin, *ICSID Registers Its First 2022 Case, Arising Out of A Power Plant Dispute With Senegal*, INV. ARB. REP. (Jan. 5, 2022), <https://www.iareporter.com/articles/icsid-registers-its-first-2022-case-arising-out-of-a-power-plant-dispute-with-senegal/>. It is instructive to note that this claim was brought a few months after the Paris Court of Appeal affirmed the UNCITRAL award of 243 Million Euros against Senegal in *Aboukhalil v. Senegal* (2015). See Damien Charlotin, *Paris Court of Appeal Upholds Denial of Justice Award Against Senegal, Sees No Bar Against Claims by Dual Nationals in Underlying BIT*, INV. ARB. REP. (Oct. 14, 2021), <https://www.iareporter.com/articles/paris-court-of-appeal-upholds-denial-of-justice-award-against-senegal-sees-no-bar-against-claims-by-dual-nationals-in-underlying-bit/>.

62 *EEPL Holdings v. Congo*, ICSID Case No. ARB/21/53 (2021).

63 Agreement on the Reciprocal Encouragement and Protection of Investments, Congo-Mauritius, Dec. 20, 2010.

64 *Qalaa Holdings v. People's Democratic Republic of Algeria* (2021).

65 Damien Charlotin, *Ad Hoc Treaty-Based Arbitration is Underway Against Algeria, As Egyptian Cement Investors Allege Expropriation*, INV. ARB. REP. (May 18, 2021), <https://www.iareporter.com/articles/ad-hoc-treaty-based-arbitration-is-underway-against-algeria-as-egyptian-cement-investors-allege-expropriation/>.

66 *Comercializadora Mediterránea de Viviendas S.L. v. Kingdom of Morocco*, ICSID Case No. ARB/22/17 (2022).

authorisations because of the internal conflicts between Moroccan officials. Thus, the contention is that the respondent is in breach of FET standards (particularly denial of justice), Full Protection and Security, and Indirect Expropriation. The claimant is claiming damages in the amount of 400 million Euros against Morocco.⁶⁷

In *Bahgat v. Egypt (II)*⁶⁸ the argument by the claimant is that despite the affirmation by the respondents that the investments in the iron and steel projects belonged to the claimant in the final award of *Bahgat v Egypt (I)*,⁶⁹ the respondent has refused to comply with the assurances it provided to the arbitration tribunal therein. Instead, after the final award the respondent (Egypt) asserted that the investments no longer belonged to the claimant and to this end issued licences to 3rd parties to mine the claimant's concession areas. The claimant also contends that Egypt wilfully disregarded its obligations under international law to pay the damages and claimant's legal costs awarded in the final award of *Bahgat v Egypt (I)*. According to the respondent, all of these amounted to direct expropriation, a violation of FET and the Transfer of Funds obligation in the Finland-Egypt BIT (2004).

In addition to investment treaty based ISDS claims, arbitration award enforcement proceedings have been brought against African States. For instance, in January 2022, Zhongshan brought an action before the US District Court for the District of Columbia to enforce the sum of about \$70 million awarded against Nigeria in the UNCITRAL investment arbitration case of *Zhongshan Fucheng v. Nigeria*,⁷⁰ where damages were awarded against Nigeria for violation of Zhongshan rights under the China-Nigeria BIT (2001). In response, Nigeria challenged the jurisdiction of the US Court to entertain the enforcement proceedings, however the motion has been dismissed.⁷¹

In conclusion, it is observable and remains demonstrable that the issue of openness & transparency within ISDS still persists thereby continually shrouding investment arbitration claims with a veneer of mystery regardless of the public interest nature of

67 Lisa Bohmer, *Spanish Construction Company Lodges 400 Million Eur Treaty Claim Against Morocco*, INV. ARB. REP. (June 16, 2022), <https://www.iareporter.com/articles/spanish-construction-company-lodges-400-million-eur-treaty-claim-against-morocco/>. See also *Comervi v. Morocco*, UNCTAD INV. POLY HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1211/comervi-v-morocco>.

68 *Bahgat v. Arab Republic of Egypt (II)*, JUSMUNDI (2021), <https://jsumundi.com/en/document/other/en-mohamed-abdel-raouf-bahgat-v-arab-republic-of-egypt-ii-notice-of-arbitration-friday-13th-august-2021>.

69 *Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award (Dec. 23, 2019).

70 *Zhongshan Fucheng Industrial Investment Co., Ltd. v. Federal Republic of Nigeria*, Final Award (Mar. 26, 2021). For a detailed discussion of this claim, see Jude Thaddeus Uchenna Nnodum, *The Protection of Foreign Investments: The Zhongshan Investment Claim and Lessons for Nigeria*, AFRONOMICSLAW (Sept. 27, 2022), <https://www.afronomiclaw.org/index.php/category/analysis/protection-foreign-investments-zhongshan-investment-claim-and-lessons-nigeria>.

71 *Zhongshan Fucheng Industrial Investment Co., Ltd v Federal Republic of Nigeria*, Case 1:22-cv-00170-BAH (2023).

the issues that are in contention. Interestingly, it is obvious that despite the arguably justifiable criticisms of investment treaty based ISDS, there remains appetite for it within Africa, as can be seen in the recent intra-African ISDS disputes highlighted in this discussion.⁷² Of note is the claim of \$900 million damages against Algeria, by Egyptian investors in *Qalaa & ASEC v Algeria*. Interestingly, Article 10 (1) of the Algeria-Egypt BIT (1997), though in French, loosely translates as a requirement for the parties to settle disputes arising from the interpretation of the BIT, through diplomatic channels. Once again, given the issue of transparency within investment treaty based ISDS, it is unknown if this option was explored. Nevertheless, in the interest of African solidarity it is hoped that the alternative of informal diplomatic exchanges is explored more for the settlement of intra-African disputes, rather than resorting to ISDS.

Conclusion

Building a convergence between African States' interests with each other and with the rest of the world has remained Africa's strategy to expand its market access in the new global trade environment. This strategy won't be going away anytime soon. Regionally, the target next year (and in the short term) will be to commence the full operationalisation of the AfCFTA and to continue to use the enormous potential of the Agreement to engage with the African people and build consensus on how to solve the massive development issues that the continent faces. Globally, Africa must develop a *unified*, clear, and firm strategy for engaging with the global economic powers and should use the massive interest it has received in recent times to re-calibrate some of the economic asymmetries it has suffered and still suffers. Nevertheless, one thing is clear, the theoretical and practical developments in African states' increasingly unique practice in the field of international economic law continue to be exciting and welcoming for the old and new generations of interested African scholars.

⁷² See Mmiselo Freedom Qumba, *Africa and investor-state dispute settlement: Mixed Reactions, Uncertainties and the Way Forward*, 28 S. AFR. J. INT'L AFFS. 1, (2021).

“LET THE NETWORK” ♣: THE ROLE OF AFRICAN SUB-REGIONAL COURTS IN PROTECTING INTERNET ACCESS AND HUMAN RIGHTS IN THE DIGITAL ENVIRONMENT

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Abstract

Regional economic communities (RECs) in Africa are sub-regional intergovernmental organizations of African states established primarily for economic integration. However, in the last two decades, two of these RECs, namely — the Economic Community of West African States (ECOWAS) and the East African Community (EAC), have become active forums for human rights protection. In addition to their core jurisdiction in trade, investment and other economic matters, the Courts of these economic communities have also obtained the jurisdiction to adjudicate human rights claims. In this Article, we highlight how the ECOWAS Court, and the East African Community Court of Justice (EACJ) are protecting Internet access and the enjoyment of human rights in the digital environment on a continent that is gaining notoriety for ‘Internet blackouts.’

♣ This sub-title is taken from the popular social media hashtag called #LetTheNetWork – which is used to fight internet shutdowns the world over.

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I. Introduction

Human rights protection in Africa has traditionally consisted of two layers: the regional human rights system hinged on the African Charter on Human and Peoples Rights 1981 (“the African Charter”) and national human rights mechanisms of individual African states. A third layer has emerged at the sub-regional level through the repurposing of some sub-regional economic community regimes (mainly courts or tribunals) to determine claims of human rights violations.¹ An important area in which these sub-regional human rights systems are making inroads is the protection of access to the internet and the enjoyment of human rights online.

Following the lead of the UN Human Rights Council, the African Commission adopted its Resolution on Freedom of Information and Expression on the Internet 2016.² The Resolution mandates African States to respect and protect freedom of expression on the Internet including by adopting legislative measures. Most recently, the African Commission adopted a ‘normative equivalency’ approach where the same rights people have offline must be protected online in its landmark Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019.³ Despite this, digital authoritarianism through Internet shutdowns, restriction of access to social media during elections, and arbitrary electronic surveillance of journalists, opposition politicians or other persons considered threats to ruling governments are rife.⁴ Sub-regional courts are rising to the challenge by pushing back on these threats to human rights on the Internet in Africa.⁵

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- 1 FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 469-514 (2nd ed. 2012); Solomon T Ebobrah, *Human Rights Developments in Sub-regional Courts in Africa During 2008*, 9 AFR. HUM. RTS. L.J. 312 (2009); THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (James Thuo Gathii ed., 2020).
 - 2 Afr. Comm'n Hum. & Peoples' Rts. [ACHPR] Res. 362 (LIX), Resolution on the Right to Freedom of Information and Expression on the Internet in Africa (Nov. 4, 2016).
 - 3 Afr. Comm'n Hum. & Peoples' Rts. [ACHPR], Declaration of Principles on Freedom of Expression and Access to Information in Africa (Nov. 2019); see also Dafna Dror-Shpoliansky & Yuval Shany, *It's the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology*, 32 EUR. J. INT'L L. 1249 (2021).
 - 4 Admire Mare, *State-Ordered Internet Shutdowns and Digital Authoritarianism in Zimbabwe*, 14 INT'L J. COMMC'N 4244 (2020); Yohannes Eneyew Ayalew, *From Digital Authoritarianism to Platforms' Leviathan Power: Freedom of Expression in the Digital Age Under Siege in Africa*, 15 MIZAN L. REV. 455 (2021); see also EVGENY MOROZOV, THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM (2012).
 - 5 See Amnesty Int'l Togo v. Togolese Republic, JUD No. ECW/CCJ/JUD/09/20, Judgment, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS) (June 25, 2020); In re Registered Trs. of the Socio-Econ. Rts. & Accountability Project (SERAP) v. Fed. Republic of Nigeria, Application No: ECW/CCJ/APP/23; 24;26&29/21 Judgment No: ECW/CCJ/JUD/40/22, Judgment, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS) (July 14, 2022).

In this Article, we highlight how the human rights mechanisms of African sub-regional economic organisations are blazing the trail in protecting internet access and the enjoyment of human rights online. Using the doctrinal and case study approaches, we contextualise the discussions around the ECOWAS Court of Justice ('ECOWAS Court') and East African Court of Justice ('EACJ'). Our choice is informed by two main reasons. First, generally the ECOWAS Court and the EACJ are the leading sub-regional courts as far as human rights protection is concerned. Secondly, and more importantly, they are the courts that have had the opportunity to decide cases and issue publicly available judgments relevant to the topic.

The Article is organised into six parts including this introduction which counts as Part I. In Part II, we examine the nature and development of the human rights jurisdiction of African sub-regional courts, focusing on the ECOWAS Court and the EACJ. Part III then zooms in on the role of the ECOWAS Court in protecting internet access and the exercise of human rights online while Part IV examines the EACJ's jurisprudence relevant to the protection of human rights online. Part V assesses the performance and effectiveness of sub-regional courts particularly the normative contributions of the ECOWAS Court and the EACJ to the protection of human rights online. Part VI concludes the Article.

II. African Regional Economic Communities And Human Rights Protection

A. The Layers of Human Rights Protection in Africa

Africa is one of three regions of the world with a regional human rights system.⁶ The African Charter on Human and Peoples' Rights, the constitutive instrument of the African human rights system, provides for a catalogue of human and peoples' rights as well as duties of the individual. The Charter creates the African Commission as the primary body for the promotion and protection of human rights on the continent.⁷ However, since the establishment of the African Court of Human and Peoples Rights in 2006, the jurisdiction to interpret, apply and enforce provisions of the African Charter in cases alleging human rights violations ('the protective mandate') is now shared between the Commission and the Court.⁸ Nevertheless, because an

6 See THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (Manisuli Ssenyonjo ed., 2011).

7 Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter") art. 45, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

international human rights mechanism is subsidiary and complementary to national jurisdiction, African states still retain the primary mandate to protect human rights. This is evident in their obligation to take all measures (whether legislative, judicial or administrative) to implement the rights in the African Charter; and the requirement for individuals to exhaust local remedies before seizing the Commission or the Court.⁹

A third layer of human rights protection has since emerged at the sub-regional level. Subregional groupings of African states are typically for economic integration purposes. Indeed, under the roadmap for the creation of the African Economic Community (AEC) in the Abuja Treaty 1991, the AEC is to be established in six stages using Regional Economic Communities (RECs) as the building blocks.¹⁰ For this purpose, the African Union has officially recognised eight RECs, namely, the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the Southern African Development Community (SADC), the Intergovernmental Authority on Development (IGAD), the Arab Maghreb Union/Union du Maghreb Arabe (UMA), the Community of Sahel-Saharan States (CEN-SAD), and the East African Community (EAC).¹¹

Given their economic outlook, the human rights dimensions of RECs are not always appreciated. Yet, the ultimate objective of any integration project is to improve the socioeconomic wellbeing of the peoples of the integrating states. Thus, at the very least, an integration project has an implied objective to promote socioeconomic rights like the rights to health, education, work, and an adequate standard of living. Similarly, gross, widespread or systematic violation of human rights in one or more of the integrating states can cause political instability that will destabilise the whole region and by extension the integration agenda. Given this connection between economic integration and human rights protection and their mutually reinforcing roles, RECs typically indicate the recognition, promotion and protection of human rights among their core objectives or principles.¹² Within some of the RECs there are

8 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 2, Jan. 25 2004 [hereinafter Protocol to the African Charter]; Afr. Comm'n Hum. & Peoples' Rts., Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020 Rule 128, Mar. 4, 2020.

9 Protocol to the African Charter, supra note 8, arts. 1 and 56; see also RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMMENTARY 17 (2019).

10 Org. of African Unity [OAU], Treaty Establishing the African Economic Community art. 6, June 3, 1991 [hereinafter Abuja Treaty].

11 *Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs)*, Assembly of the African Union, Seventh Ordinary Session, DOC. EX.CL/278 (IX) (July 1, 2006).

actual mechanisms for the protection of human rights in the form of jurisdiction of Community courts to adjudicate complaints of human rights violations.

However, since these RECs were not originally nor primarily established for human rights protection, they have had to take on that mandate along the way. They have done this by repurposing existing Community institutions (in this case, their Community courts or tribunals) to adjudicate claims of human rights violations.¹³ Following the abolition of the SADC Tribunal's human rights jurisdiction in 2014 after it upheld a challenge to Zimbabwe's land reform program,¹⁴ the ECOWAS Court and the EACJ are currently the only sub-regional courts with active human rights jurisdiction.

B. The Human Rights Mandate of the ECOWAS Court

By the Lagos Treaty of 1975, states in the West African sub-region created the Economic Community of West African States (ECOWAS) to promote economic development and cooperation and raise the standard of living of their peoples.¹⁵ The Lagos Treaty made no mention of human rights. The closest it had to a human rights reference was a carveout permitting the implementation of measures to protect human, animal or plant life¹⁶ that was modelled on a similar clause in the GATT 1947.¹⁷

However, beginning in 1989 a series of political and legal developments culminated in ECOWAS pivoting to human rights protection. First, the outbreak of civil wars in Liberia (1989) and Sierra Leone (1991) which led to serious human rights violations and humanitarian crises compelled ECOWAS to take on a more political role in the

12 See Economic Community of West African States (ECOWAS) Revised Treaty art. 4(g), July 24, 1993 [hereinafter ECOWAS Revised Treaty]; Treaty for the Establishment of the East African Community arts. 6(d) and 72, Nov. 30, 1999 [hereinafter EAC Treaty]; Treaty of the South African Development Community art. 4(c), Aug. 17, 1992; Treaty Establishing the Common Market for Eastern and Southern Africa art. 6(e), 1993; Agreement Establishing the Inter-governmental Authority on Development (IGAD) art. 6A(f), Mar. 21, 1996, IGAD/SUM-96/AGRE-Doc.; Community of Sahel-Saharan States Revised Treaty art. 4(e), Feb. 16, 2013.

13 Obiora C. Okafor & Okechukwu J. Effoduh, *The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces: Sovereign Hurdles, Brain Relays, and "Flipped Strategic Social Constructivism"*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 113 (James Thuo Gathii ed., 2020); Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 158 (James Thuo Gathii ed., 2020).

14 The SADC Tribunal issued a ruling in a landmark case involving a land dispute between the Government of Zimbabwe and 78 white farmers. The Tribunal ruled in favour of the farmers, who had petitioned the court to issue an order barring the Government of Zimbabwe from taking over their farms without compensation. The Tribunal found the measure constituted discrimination based on race and that it was conducted without due process; see *Mike Campbell (Pvt) Ltd. v. Republic of Zimbabwe* 2008 Case No. 2/2007, SADC (T) (S. Afr.).

15 Treaty of the Economic Community of West African States (ECOWAS) art. 2, May 28, 1975, 1010 U.N.T.S. 14843 [hereinafter Lagos Treaty].

16 *Id.* art. 18(3)(c).

17 See General Agreement on Tariffs and Trade art. XX(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

subregion. It deployed peace keeping forces to the conflict areas under the ECOMOG initiative and adopted the *ECOWAS Declaration of Political Principles 1991*. The Declaration was a blueprint for how ECOWAS would promote peace, stability, and democracy based on a culture of political pluralism and human rights.¹⁸ It showed the resolve of ECOWAS to centre human rights in its agenda. ECOWAS members pledged, under the Declaration, to respect and promote the full range of internationally recognised civil and political rights; economic, social and cultural rights, and any other rights inherent in the dignity of the human person.¹⁹ Just about the same time, the Treaty Establishing the African Economic Community ('the Abuja Treaty') had been adopted in June 1991. The AEC was to be established in six stages using (sub)-regional economic communities including ECOWAS as the building blocks. The objectives of the AEC contained in the Abuja Treaty included the recognition, promotion, and protection of human rights consistent with the African Charter.²⁰

To revitalize ECOWAS to better achieve its economic objectives and deal with the socio-political challenges of the sub-region, the ECOWAS Authority commissioned legal reforms that led to the repeal and replacement of the Lagos Treaty with the ECOWAS Revised Treaty 1993. Following the example of the Abuja Treaty and mindful of the situation in the sub-region that had necessitated the *ECOWAS Declaration of Political Principles*, the Revised Treaty made the recognition and respect of human rights one of its pillars. Consequently, under Article 4(g) of the Treaty, member states 'solemnly affirm and declare their adherence' to the 'recognition, promotion and protection of human and people's rights' in accordance with the African Charter.²¹ To give effect to their commitment to respect and protect human rights, member states amended the ECOWAS Court Protocol in 2005 to grant the Court jurisdiction to determine cases of human rights violation that occur in any member state.²² The Court's human rights mandate is additional to its core functions as the Community Court of Justice, the Community Administrative Court and the Community Arbitration Tribunal all of which serve ECOWAS' primary purpose as a REC.

As far as the sources of human rights law are concerned, the Court's jurisdiction is not necessarily tied to one human rights treaty. The Court may apply any human rights instrument ratified by the respondent state that is relevant to the case before it as well as any human rights norms of general international law binding on the state. However, the African Charter is essentially the primary source of human rights law for

18 ECOWAS, *Declaration of Political Principles*, Fourteenth Session, A/DCL.1/7/91 (Jul. 4-6, 1991).

19 *Id.* at ¶¶ 4-5.

20 Abuja Treaty, *supra* note 10, at art. 3(g).

21 ECOWAS Revised Treaty, *supra* note 12, at art. 4(g).

22 ECOWAS, Protocol on the Community Court of Justice art. 9(4), A/PI/7/91 (Jul. 6, 1991).

the ECOWAS Court. This is because all ECOWAS members are parties to the African Charter and have also bound themselves by Article 4(g) of the ECOWAS Revised Treaty to respect, promote and protect human rights within ECOWAS in accordance with the African Charter.

C. The Human Rights Mandate of the East African Community Court of Justice

The re-purposing of the ECOWAS Court for human rights protection differs from how the EACJ attained its human rights mandate.²³ While the ECOWAS Court is specifically granted the jurisdiction for human rights cases under the 2005 Supplementary Protocol, the EACJ took on that role through an expansive interpretation of its jurisdiction under the EAC Treaty.

The East African sub-region has had a long history of integration efforts dating back to colonial times.²⁴ In 1967 Kenya, Uganda and Tanzania, as independent states, created the first East African Community under the Treaty for East African Co-operation 1967. However, this immediate post-colonial attempt at integration failed for reasons including lack of political will, lack of private sector participation and concerns around unequal distribution of the benefits of integration.²⁵ Accordingly, the first EAC was formally dissolved in 1977.²⁶ After experimenting with various cooperation arrangements since the 1977 dissolution,²⁷ the new East African Community (EAC) currently comprising Kenya, Tanzania, Uganda, Burundi, DRC and South Sudan was established in 2000 under the EAC Treaty 1999.²⁸ The overarching objective of the EAC as specified in the EAC Treaty is to develop policies and programs to deepen mutually beneficial cooperation among the Partner States in matters relating to politics, economics, security, culture, legal and judicial affairs.²⁹

23 James Thuo Gathii & Harrison Otieno Mbori, *Reference Guide to Africa's International Courts: An Introduction*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 302 (James Thuo Gathii ed., 2020).

24 See the construction of the Kenya Uganda Railway 1897-1901 and the creation of various regional institutions in subsequent years including the East Africa Customs Collection Centre 1900, the East African Currency Board 1905, the East Africa Postal Union 1905, the Court of Appeal for Eastern Africa 1909, the East Africa Customs Union 1919, the East African Governors Conference 1926, the East African Income Tax Board 1940, and the Joint Economic Council 1940.

25 See Abuja Treaty, *supra* note 10, at Preamble.

26 *Id.*

27 See Wilbert T.K. Kaahwa, East African Community (EAC), in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW 10 (Last updated Jan. 2013).

28 *Id.* (Kenya, Uganda and Tanzania recreated the EAC in 2000 and are therefore the original parties to the EAC Treaty 1999. Burundi and Rwanda acceded to the EAC Treaty on June 18, 2007 and became full partner states from Jul. 1, 2007).

29 EAC Treaty, *supra* note 12, at art. 5(1).

The EAC Treaty creates the Summit of Heads of State, the Council of Ministers, the East African Legislative Assembly and the EAC Secretariat as the key political organs of the Community while establishing the East African Court of Justice, as the principal judicial organ. The Court was originally established as a one-chamber court. However, by a 2007 amendment to the EAC Treaty, an appellate division of the Court was created making it a two-chamber court.³¹ Based in Arusha, Tanzania, the EACJ's mandate is to interpret, apply and enforce the EAC Treaty.³² The Court's jurisdiction may be exercised in contentious matters where the conduct, decision or regulation of a partner state or an organ of the Community is challenged for breaching the EAC Treaty.³³ Access to the Court's contentious jurisdiction is open to partner states, the Secretary General of the EAC and any person resident in any of the partner states.³⁴ Also, on the request of the Summit of Heads of State, the Council of Ministers or a Partner State, the Court may give an advisory opinion on any question of law arising from the Treaty that affects the Community.³⁵

Under Article 27(2) of the EAC Treaty, the Court is intended to have an extended mandate including a human rights jurisdiction to be determined 'at a suitable subsequent date' and operationalized under a Protocol to the Treaty.³⁶ But despite the postponement of the human rights jurisdiction of the Court, the partner states undertake under Articles 6(d) and 7(2) of the EAC Treaty to abide by principles of good governance including the rule of law, democracy, and the recognition, promotion and protection of human rights consistent with the African Charter. Beginning with *Katabazi v Uganda*, the Court has held that it has jurisdiction to determine cases alleging human rights violations despite the postponement of its human rights jurisdiction under Article 27(2) of the EAC Treaty. In that case, Uganda's security agencies frustrated the execution of a bail bond by the applicants by re-arresting and charging them for terrorism before a military court. Applicants were

30 *Id.*, art. 9.

31 *Id.*, art. 23; see also James Thuo Gathii, *International Courts as Coordination Devices for Opposition Parties: The Case of the East African Court of Justice*, in *THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE* 43 (James Thuo Gathii ed., 2020).

32 EAC Treaty, *supra* note 12, at art. 23.

33 *Id.*, arts. 28, 29 and 30.

34 *Id.*

35 *Id.*, art. 36(1); see also Kaahwa, *supra* note 27, para. 30.

36 EAC Treaty, *supra* note 12, art. 27(2). Despite this objective, the partner states excluded human rights jurisdiction from a 2014 Protocol adopted under Article 27(2) of the EAC Treaty. Among the reasons given were the fact that partner states were parties to the African Charter and therefore human rights claims may be submitted to the African Court. See Victor Lando, *The Domestic Impact of the Decisions of the East African Court of Justice*, 18 AFR. HUM. RTS. L. J. 463, 466-67 (2018).

not released despite an order of the Constitutional Court of Uganda declaring their re-arrest unlawful. Before the EACJ, applicants argued that Uganda's actions violated the good governance clause specifically the principle of rule of law. The respondent State argued that the case was a human rights claim over which the Court had no jurisdiction under Article 27(2) of the EAC Treaty. The Court disagreed, reasoning that Article 27(2) does not preclude its jurisdiction to interpret provisions of the EAC Treaty merely because the case implicates human rights.³⁷ It then interpreted the good governance clause, particularly, the rule of law element as requiring partner states to uphold judicial independence and respect court decisions. Based on this, it concluded that Uganda violated the fundamental principle of rule of law under the EAC Treaty by the actions of its security agencies.

Rather than directly determining whether applicants' human rights had been violated, the Court found a way around Article 27(2) by framing the issue as 'whether the state had violated the principle of the rule of law'.³⁸ This approach of indirectly determining human rights claims in light of principles contained in the good governance clauses of the EAC Treaty has become the basis of the EACJ's human rights jurisdiction. It is worth mentioning however, that in cases such as *Independent Medical Legal Unit and Plaxenda Rugumba* the First Instance Division of the Court has taken a more direct approach without necessarily linking the human rights claim to the rule of law or other principles of the good governance clause.³⁹ In the *Plaxenda Rugumba* case, for instance, the First Instance Division held that the Court's existing jurisdiction to interpret and apply the EAC Treaty includes the determination of whether a partner state has promoted and protected human rights in accordance with the African Charter under the good governance clauses of Articles 6(d) and 7(2).⁴⁰ In the Division's view, the purpose of Article 27(2) of the EAC Treaty is to add to the Court's existing jurisdiction, but that existing jurisdiction already includes the power to interpret and apply the human rights clauses of the Treaty.⁴¹ In other words, the First Instance Division was basically saying that to decide human rights claims, it need not link the cause of action to the rule of law or other concepts included in the good governance clause. Nevertheless, the Appellate Division of the Court has declined to go along with the more direct approach of the First Instance Division. In both the *Independent*

37 James Katabazi v. Sec'y Gen. of the E. Afr. Cmty., Ref. No. 1 of 2007, E. Afr. Ct. of J., ¶39, Judgment (Nov. 1, 2007).

38 Mihreteab Tsighe Taye, *The Role of the East African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court*, 27 AFR. J. INT'L & COMPAR. L. 359, 369 (2019).

39 See *Indep. Med. Unit v. Att'y Gen. of Republic of Kenya*, Ref. No. 3 of 2010, Judgment, E. Afr. Ct. of J. (June 29, 2011); *Plaxenda Rugumba v. Sec'y Gen. of the E. Afr. Cmty.*, Ref. No. 8 of 2010, Judgment, E. Afr. Ct. of J. First Instance Div., ¶23 (Dec. 1, 2011).

40 *Rugumba*, Ref. No. 8 of 2010, ¶23.

41 *Id.*

Medical Legal Unit and Rugumba cases, it differed from the First Instance Division by holding that the Court may only deal with a human rights issue if it is part of another legal claim under the EAC Treaty on which the Court can peg its jurisdiction.⁴²

III. The Ecowas Court's Protection of Internet Access and Human Rights on Digital Platforms

As noted above, economic integration and human rights protection are interconnected and mutually reinforcing. Accordingly, protecting human rights is not only a moral or political issue, but also an essential factor in economic development. For instance, the freedom of movement including the right of persons to freely leave and return to their countries is essential for economic integration. Cross-border trade and business will be severely affected without the guarantee and protection of such a right. But in our current globalised world that is so interconnected by information communication technologies, many of the things people needed to physically meet to do can now be done virtually. Teaching and learning, trade in goods and services, social interactions, business meetings, and even political gatherings are now done online without the need for people to travel or meet in a physical location. It is in this broader conception of the indispensability of the Internet to our social, political and economic lives that attempts to frame access to the internet as a human right must be viewed.⁴³ The ECOWAS Court has decided four cases dealing with the human rights implications of access to the internet and services provided over the internet. *These are Amnesty International et al v Togo; Incorporated Trustees of Laws and Rights Awareness Initiatives v. Nigeria; Festus Ogwuche v. Nigeria; and SERAP and Others v Nigeria (Twitter Ban Case).*

Amnesty International et al v. Togo came on the back of popular protests in the country in 2017 that called for constitutional reforms to impose a presidential term limit. The government responded by shutting down access to the Internet and arresting and detaining protesters. Applicants contended that the internet shutdown affected their work (including as journalists) and violated Article 9 of the African Charter and Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR)

42 See Indep. Med. Unit, Ref. No. 3 of 2010, at 10-11; see also Plaxeda Rugumba, Ref. No. 8 of 2010, at ¶24.

43 See Daniel Joyce, Internet Freedom and Human Rights, 26 EUR. J. INT'L L. 493 (2015); Lawrence Mute, Report of the African Commission's Special Rapporteur on Freedom of Expression and Access to Information in Africa 2019 (2019), ¶¶ 34-36 [hereinafter Lawrence Mute Report].

both of which guarantee freedom of expression. The Court held that strictly speaking access to the internet, in and of itself, is not a fundamental human right.⁴⁴ However, since internet access facilitates or enhances freedom of expression by individuals, it should be considered a derivative right that is a component of freedom of expression. Thus, the Court concluded that because internet access is closely linked to freedom of expression and complements the enjoyment of the right, both must be treated as human rights that require legal protection and remedies for their violation.⁴⁵ The Court found that while the national security reasons for which the government decided to shut down the internet would ordinarily be valid grounds for derogating from a human right, such a limitation or derogation must be in accordance with law. But since the internet shutdown was not authorized by law, the government violated Articles 9 and 19 respectively of the African Charter and the ICCPR.

Incorporated Trustees of Laws and Rights Awareness Initiatives v Nigeria concerned a Nigerian law that imposed criminal penalties for offensive online speech. Under section 24 of Nigeria's Cybercrimes Act 2015, a person committed an offence if they knowingly or intentionally published a speech or information through a computer system or network that was grossly offensive, indecent, or pornographic. Section 24 also criminalized false information intentionally or knowingly published via a computer network or system to cause annoyance, inconvenience, insult, enmity, ill-will, or needless anxiety to another person. Penalties ranged from five to ten years imprisonment or fines of 700,000 to 25 million naira or both. Several persons were arrested and detained in Nigeria under the law for allegedly making offensive or annoying social media posts about politicians. Applicants contended that Section 24 of the Cybercrimes Act violated the freedom of speech under the African Charter and the ICCPR, for among others, being overly broad, vague, and disproportionately restrictive of free speech.

The Court concluded that although Section 24 of the Cybercrimes Act may have been enacted for a legitimate objective,⁴⁶ it failed the test of being a necessary, proportionate and least restrictive means of restricting freedom of expression.⁴⁷ The Court noted

44 Amnesty Int'l Togo v. Togolese Republic, JUD No. ECW/CCJ/JUD/09/20, Judgment, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS), ¶ 38 (June 25, 2020). This view is consistent with the earlier debate whether internet access is considered a human right. For example, American Internet pioneer Vinton Cerf, also known as, the 'the father of the Internet' argues that internet access is not a human right. He contends that "technology is an enabler of rights, not a right itself." Vinton G. Cerf, *Internet Access Is Not a Human Right*, N.Y. TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html>.

45 Amnesty Int'l Togo, JUD No. ECW/CCJ/JUD/09/20, at ¶ 45.

46 Inc. Trs. of L. & Rts. Awareness Initiatives v. Fed. Republic of Nigeria, SUIT No ECW/CCJ/APP/53/2018 JUDGEMENT No ECW/CCJ/JUD/16/20, Judgement, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS), ¶¶137- 141 (July 10, 2020).

47 *Id.* at ¶161.

that generally ‘laws that criminally penalize defamation, insult, false news, etc., disproportionately violate the right to freedom of expression’.⁴⁸ But independent of that presumption, the Court found that the penalties under Section 24 were disproportionately high. On that basis, the Court concluded that Nigeria violated Article 9 of the African Charter and Article 19 of the ICCPR.

In *Festus Ogwuche v. Nigeria*, the question was whether the government’s directive requiring prior vetting of political programs before they are broadcast on traditional media or streamed online (in order to prevent divisive, inciteful or hateful speech) violated freedom of expression. The Court held that it was. It reasoned that while freedom of expression may be restricted on grounds including national security, the government failed to prove that there was sufficient threat to national security or public order to justify the overly excessive burden it sought to impose on media freedoms under the directive.

In *SERAP and Others v Nigeria*, applicants challenged the government’s ban of access to Twitter on 4 June 2021 on grounds that Twitter was undermining the corporate existence of Nigeria. Applicants argued that the ban or suspension of Twitter (without basis in a law or order of a court) violated freedom of expression, the right to information and freedom of the media contrary to the African Charter and other human rights treaties binding on Nigeria.⁴⁹ The case produced two judgements, a ruling on a preliminary objection of Nigeria to the Court’s jurisdiction and the judgment on the merits of the case.

Nigeria argued that the Court had no jurisdiction because the Twitter ban did not implicate human rights. However, the Court held, relying on *Amnesty International v Togo*, that because access to the internet facilitates freedom of expression, ‘denial of access to the internet or services provided via the internet... operates as denial of the right to freedom of expression and to receive information.’⁵⁰ The Court therefore concluded that it had jurisdiction to hear the case given the implications of the Twitter ban for people’s ability to freely express themselves.

On the merits of the case, the Court held that freedom of expression under Article 9 of the African Charter and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) include the complementary right to access information.⁵¹

48 *Id.*

49 In re Registered Trs. of the Socio-Econ. Rts. & Accountability Project (SERAP) v. Fed. Republic of Nigeria, Judgement, Application No: ECW/CCJ/APP/23; 24;26&29/21 Judgment No: ECW/CCJ/JUD/40/22, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS), ¶ 30, 37 (July 14, 2022).

50 *Id.* at ¶ 22.

51 *Id.* at ¶ 67.

Since access to social media including Twitter is essential for exercising freedom of expression and its derivative rights to impart and receive information, the Court held that access to Twitter is complementary to freedom of expression.⁵² According to the Court, access to social media like Twitter should be regarded as a component of freedom of expression and the right to receive or impart information with the result that their restriction must have a basis in law or an order of a court.⁵³ Because respondent State failed to show that its ban or suspension of Twitter was based on a law or order of a court, the Court concluded that it violated Articles 9 and 19 respectively of the African Charter and the ICCPR.⁵⁴

It is significant that the ECOWAS Court has recognised access to the Internet as a human rights issue that has implications for the enjoyment of rights such as freedom of expression. While access to the internet in these two cases were litigated and determined within the context of freedom of expression, they are important precedents that may be applied by analogy in future cases to other human rights enjoyed or exercised on the Internet. But on a more conceptual level, one could view the Court's pushback against restrictions of access to the Internet as exemplifying the mutually reinforcing roles of human rights protection and economic integration. Given the crucial importance of Internet access for trade in goods, provision of services, running of businesses and other economic purposes, protecting access to the Internet as a human right will have a multiplier effect that contributes to the economic integration agenda of ECOWAS. Therefore, the Court's role in human rights protection generally, and in the protection of access to the Internet in particular, is not a deviation from ECOWAS' core objective of economic integration. If anything, it is an integral part of it.

IV. The East African Court of Justice and Human Rights in The Digital Environment

Like ECOWAS, the EAC has no human rights protocol or a human rights chapter in its Treaty. The EAC Treaty only refers to human rights in general terms mainly under its 'good governance clause' and 'rule of law clause'⁵⁵ specifically Articles 6(d) and 7(2). Article 6(d) provides:

The fundamental principles that shall govern the achievement of the objectives of the Community by the partner states shall include: ... (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities,

52 *Id.* at ¶ 68.

53 *Id.* at ¶¶ 68-71.

54 *Id.* at ¶¶ 86 - 89.

55 See EAC Treaty, *supra* note 12, arts. 6(d), 3(3)(b), 7(2), 27(2) and 123(3)(c).

gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Similarly, the good governance clause of Article 7(2) of the EAC Treaty requires partner states "to abide by the principles of rule of law, democracy, social justice and the maintenance of universally accepted standards of human rights." As discussed in Part II, the presence of these provisions and the jurisdiction of the EACJ to interpret and apply the EAC Treaty has enabled the Court to creatively assert a limited human rights jurisdiction despite Article 27(2) of the EAC treaty.⁵⁶ As a result, cases involving claims of human rights violations, including violations of (digital) human rights, have often been referred to the Court. Relevant in this regard are *Burundian Journalists' Union v. Attorney General of Burundi*⁵⁷ and *Media Council of Tanzania v. Attorney General of Tanzania*.⁵⁸

The case of *Burundian Journalists' Union v Burundi* involved allegations of online and offline media freedom violations that was decided by the EACJ in 2015.⁵⁹ Applicant challenged Burundi's newly enacted Press Law No.1/11 (2013) on grounds that it imposed undue restrictions on press freedom. Applicants claimed that these restrictions included a requirement for journalists to disseminate only "balanced information"; a prohibition of publications that insult the head of state; a requirement for film makers to obtain prior permission; and other restrictive regulation of content in both the print and online media.⁶⁰ Applicants argued that a free press is a cornerstone of democracy, the rule of law, accountability, transparency, and good governance; therefore, the media should be able to freely disseminate information on public matters including information critical of the government. Applicant argued that by unduly restricting freedom of expression both offline and online,⁶¹ Burundi had violated the good governance values embodied in Articles 6(d) and 7(2) of the EAC Treaty.⁶²

The Court had to determine whether the impugned provisions of the Press Law violated Articles 6(d) and 7(2) of the EAC Treaty. The court observed that democracy must necessarily include adherence to press freedom as provided under Articles 6(d)

56 See James Katabazi v. Sec'y Gen. of the E. Afr. Cmty., Ref. No. 1 of 2007, Judgment, E. Afr. Ct. of J., ¶16 (Nov. 1, 2007); Taye, *supra* note 38.

57 *Burundian Journalists Union v. Att'y Gen. of the Republic of Burundi*, Ref. No. 7 of 2013, Judgment, E. Afr. Ct. of J. First Instance Div., ¶¶ 99-102 (May 15, 2015).

58 *Media Council of Tanz. v. Att'y Gen. of the United Rep. of Tanz.*, Case No. 2 of 2017, Judgement, E. Afr. Ct. of J. First Instance Div., ¶¶ 70-72 (Mar. 28, 2019).

59 *Burundian Journalists Union*, Ref. No. 7 of 2013, ¶¶ 99-102.

60 *Id.* at ¶¶ 10, 17.

61 *Id.* at ¶ 50.

62 *Id.* at ¶ ¶ 9-10.

and 7(2) of the Treaty.⁶³ That, also, a free press goes hand in hand with the principles of accountability and transparency entrenched in Articles 6(d) and 7(2) of EAC Treaty. Citing its previous decision in *Mohochi v Attorney General of Uganda*, the Court emphasised that these principles are binding on Partner States and are not merely aspirational.⁶⁴ For these reasons, the Court found that Article 19 of the Press Law which prohibited journalists from publishing information about stability of the currency, information that may harm the credit of the State and its national economy, and information about diplomatic activities, among others, was inconsistent with the good governance standards of the EAC Treaty.⁶⁵ The Court also concluded that the requirement under Article 20 of the Law for journalists to reveal their sources on matters of public order or national security violated the Treaty. It reasoned that the watchdog role of journalists in a democratic society would be seriously undermined if they are forced to disclose their confidential sources.⁶⁶ Accordingly, the Court held that the requirement to disclose confidential sources did not ‘meet the expectations of democracy’ and hence violated Articles 6(d) and 7(2) of the EAC Treaty.⁶⁷

Generally, the *Burundian Journalists Union* case makes an important contribution to media freedom. However, regrettably, the Court did not seize the opportunity to elaborate on the scope of freedom of expression including its dimension in the digital ecosystem.⁶⁸

In *Media Council of Tanzania and Others v Attorney General of Tanzania*, applicants challenged various provisions of Tanzania’s Media Services Act 2016, particularly section 7(3) of the Act.⁶⁹ That provision required media houses to ensure that they do not publish information that will—

- (a) undermine national security or a lawful investigation by law enforcement;
- (b) impede due process of law or endanger the safety of any person;
- (c) constitute hateful speech;
- (d) disclose cabinet proceedings;
- (e) facilitate the commission of a crime; or
- (f) involve unwarranted invasion of individual privacy.

63 *Id.* at ¶ 82.

64 *Id.* at ¶ 74.

65 *Id.* at ¶¶ 99-102.

66 *Id.* at ¶¶ 108-109.

67 *Id.* at ¶ 111.

68 Nani Jansen Reventlow & Ségnonna Horace Adjolohoun, *Will Konaté Set African Journalists Free? Interrogating the Promises of an Emerging Press Freedom Jurisprudence in African Regional Courts*, 2 AFR. HUM. RTS. Y.B. 427 (2018).

69 *Media Council of Tanz. v. At’y Gen. of the United Rep. of Tanz.*, Case No. 2 of 2017, Judgement, E. Afr. Ct. of J. First Instance Div., ¶2 (Mar. 28, 2019).

The applicants argued that these provisions imposed restrictions on the type or content of news that media houses may publish. Accordingly, they were unjustified restrictions on the freedom of expression and a violation of the principles of democracy, rule of law, accountability, and transparency contained in the good governance clauses of the EAC Treaty.⁷⁰ The respondent counter-argued that freedom of expression is not absolute and that the restrictions imposed by the Act were in the national interest and consistent with the Constitution of Tanzania as well as the EAC Treaty.⁷¹

Applying the conventional tripartite test for limiting human rights, namely, legality, legitimacy, and necessity and proportionality, the Court concluded that the impugned provisions violated international human rights law standards.⁷² Specifically, the Court found terms such as “undermine” and “impede” employed in section 7(3) of the Act to be vague. Also, respondent State failed to demonstrate why the restrictions under the Act were necessary or appropriate means of achieving legitimate state or national interests.⁷³ For these reasons, the Court held that the impugned provisions of Tanzania’s Media Services Act, particularly section 7(3), violated freedom of expression and freedom of the press. By extension, they also violated the fundamental principles contained in the good governance clauses of Articles 6(d) and 7(2) of the EAC Treaty.⁷⁴

While these cases of the EACJ protecting media freedoms were mainly decided within traditional media contexts, they nonetheless provide standards that are applicable to enjoyment of media rights on the Internet. In any event, because journalism is now practised mainly through digital or online mediums, there is a strong basis to extend the Court’s jurisprudence to the digital environment using the ‘normative equivalency approach’ which advances the view that the same rights people have offline must be protected online.⁷⁵ Accordingly, although the EACJ has yet to specifically address the issue of Internet access and its implications for enjoyment of human rights, one can predict based on its current jurisprudence that it will not hesitate to protect Internet access and human rights within the digital ecosystem.

70 *Id.* at ¶¶ 5, 6.

71 *Id.* at ¶ 15.

72 *Id.* at ¶ 66.

73 *Id.* at ¶ 72.

74 *Id.* at ¶¶ 73, 112.

75 See generally Dror-Shpoliansky & Shany, *supra* note 3.

V. The Effectiveness and Normative Contributions of Sub-Regional Courts to Human Rights in The Digital Environment

The performance and effectiveness of international courts (including human rights bodies) are considered to be a function of ‘the compliance rates of their decisions, their usage rates, as well as their overall success or lack thereof’.⁷⁶ For some scholars, the effectiveness or impact of a court is best measured by the rate at which governments comply with its decisions. This approach is quantitative in nature,⁷⁷ and essentially translates to ‘the number of complied-with judgments divided by the total number of judgments.’⁷⁸ By this approach, a court is effective ‘if states comply with its judgments’ and do so at a high rate.⁷⁹ On the other hand, if its decisions are mostly ignored, then the Court is not effective by reason of low compliance with its decisions.⁸⁰ But, this approach has its own flaws. For example, compliance can be hard to observe as states may sometimes ignore a judgment or comply with it after years if not decades.⁸¹

For this reason, there are those who approach the effectiveness of an international court by focusing less on the quantitative indicators, and rather prioritize the normative contributions of court decisions.⁸² A court is considered effective if there are observable and desired changes in the behaviour of states in the normative direction of the court’s judgments.⁸³ This approach acknowledges that international courts exist for different roles and purposes, and thus, a quantitative approach is ill-suited for measuring all of them.⁸⁴ Besides, there may be ambiguity about which goals should be the benchmark

76 THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS, *supra* note 1, at 2.

77 See generally Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

78 *Id.* at 28.

79 *Id.*

80 THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS, *supra* note 1, at 2.

81 Posner & Yoo, *supra* note 77, at 28.

82 THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS, *supra* note 1, at 3; see also Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RESV. J. INT’L L. 387, 393 (2000).

83 Raustiala, *supra* note 82, at 393–94; see also Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464–76 (Cesare P.R. Romano et al. eds., 2013). He identifies at least four methodological approaches to measuring the effectiveness of international courts: (i) case-specific effectiveness (under which a state changes behaviour as a result of a ruling by an international court); (ii) *erga omnes* effectiveness (which measures the effectiveness of international court rulings on a broad range of constituencies); (iii) embeddedness effectiveness (under which international court adjudication is unnecessary because domestic courts are sufficient); and (iv) norm-development effectiveness (under which effectiveness is measured by how an international court helps to build a body of jurisprudence and develop international law). *Id.* at 466.

84 THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS, *supra* note 1, at 3; see also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 917–18 (2005); Daniel Abebe, *Does International Human Rights Law in African Courts Make a Difference?*, 56 VA. J. INT’L L. 527, 537–61 (2016).

for assessing the performance of an international court.⁸⁵ Thus, while strict compliance with judgments may indicate effectiveness, such quantitative indicators alone do not measure how such decisions create 'normative consequences and ripples.'⁸⁶

Assessing the performance and effectiveness of African sub-regional courts under the above approaches produces a mixed bag of results. Under the rate of compliance scorecard, they score quite low. With the ECOWAS Court, for instance, the rate at which state parties have complied with its judgments has been poor. Indeed, the President of the Court has lamented that 'the poor rate of compliance with judgments of the Court, which currently stands at about 30 per cent' is of grave concern.⁸⁷ Article 24 of the ECOWAS Court's Protocol makes provisions for implementing the Court's decisions. Yet, most member states have failed to domesticate the Court's Protocol or its relevant provisions on execution of judgments to enable their domestic courts enforce decisions of the ECOWAS Court.⁸⁸ Also, out of the 15 members, only six have complied with their duty to appoint or designate a competent national authority to process judgments of the Court.⁸⁹ Many of the states 'do not all-too-often respect the decisions of their own domestic courts' and seem to approach the ECOWAS Court with the same attitude.⁹⁰

85 See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 233 (2012); Tom Gerald Daly, *The Alchemists: Courts as Democracy-Builders in Contemporary Thought*, 6 GLOB. CONSTITUTIONALISM 101, 108 (2017). International courts serve various purposes including vindicating rights, constraining arbitrary exercise of state power, and addressing the validity of transitional justice processes. Mere quantitative measurement of the rate of compliance cannot sufficiently measure the effectiveness of the Court on all these indicators.

86 THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS, *supra* note 1, at 4. In its 2021 activity report the African Court highlight its influence and impact in the continent as follows:

The jurisprudence established by the [African] Court from these cases deals with a wide range of human rights issues shaping the socio-economic and political landscape of the continent, including issues of elections, good governance, freedom of expression, rights of indigenous peoples [It] reinforces the widely held principles of indivisibility, interrelatedness and interdependency of human rights, and the view that respect for human rights provides a foundation upon which rests the political structures of human freedoms, the achievement of human freedoms

Activity Report, *infra* note 95, ¶ 34.

87 Ifeanyi Emeka, *Only 6 Countries Respect ECOWAS Court Rulings- Justice Asante*, BLUEPRINT NEWSPAPER (Nov. 22, 2021), <https://www.blueprint.ng/only-6-countries-respect-ecowas-court-rulings-justice-asante/> (quoting Amoako Asante in a speech delivered at the International Conference of the ECOWAS Court of Justice in Lomé, Togo in November 2021).

88 See Richard Frimpong Oppong, *The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment*, 25 AFR. J. INT'L COMPAR. L. 127 (2017).

89 See *9 W/African Countries Disregard ECOWAS Court Rulings-Judge*, VANGUARD (Nov. 22, 2021), <https://www.vanguardngr.com/2021/11/heifer-in-talks-with-diaspora-investors-for-livestock-production/>. These are Guinea, Nigeria, Mali, Burkina Faso, Togo and Ghana. The rest, namely, Benin, Cape Verde, Côte D'ivoire, The Gambia, Guinea Bissau, Liberia, Niger, Senegal and Sierra Leone are yet to do so. *Id.*

90 Okafor & Effoduh, *supra* note 13, at 109.

Turning to the EACJ, the nature of its human rights jurisdiction makes the dynamics of compliance slightly different from what obtains in the ECOWAS Court. The ECOWAS Court is specifically mandated to adjudicate human rights claims and provide relief to victims, making its jurisdiction protective or executory.⁹¹ In other words, it has powers to issue binding and executable orders that require compliance by states. By contrast, the EACJ's indirect and largely interpretative human rights jurisdiction does not allow for direct adjudication of human rights claims and issuance of mandatory orders. Consequently, the rulings of the EACJ are often "declaratory" in nature with no immediate and direct compliance consequences for states.⁹² For example, in *Burundian Journalists Union v. Attorney General of Burundi*, the Court declared sections of Burundi's Press Law as inconsistent with the EAC Treaty but declined to make any consequential orders compelling amendment of the Law.⁹³

Nevertheless, this does not mean that judgments of the EACJ, even if declaratory, are without effect. Consistent with the principle that a state must implement its international obligations in good faith, and in accordance with Article 38(3) of the EAC Treaty, a partner state has the obligation to take necessary measures to implement judgments of the Court without delay. In the case of a declaratory judgement, the measures to be taken would obviously not be directed by the Court. However, the state is not absolved from responsibility merely because of that. It must on its own initiative take appropriate measures to bring its conduct in conformity with the outcome of the judgement. Despite this understanding of their obligation, EAC partner states routinely fail to implement judgments of the EACJ making non-compliance a continuing challenge in the EAC as well.⁹⁴

Expectedly, the trend is no different at the regional level. The compliance rate of African Court on Human and Peoples' Rights remains at a meagre 7% of its total judgements.⁹⁵ According to the 2021 activity report of the African Court, of the over 100 judgements on merits and orders for provisional measures rendered by the court, only two states parties (Burkina Faso and Côte d'Ivoire) have fully complied with the judgments of the court.⁹⁶

91 See Solomon T. Ebobrah & Victor Lando, *Africa's Sub-Regional Courts as Back-Up Custodians of Constitutional Justice: Beyond the Compliance Question*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 192 (James Thuo Gathii ed., 2020).

92 *Id.*

93 *Burundian Journalists Union v. Att'y Gen. of the Republic of Burundi*, Ref. No. 7 of 2013, Judgment, E. Afr. Ct. of J. First Instance Div., ¶ 121 (May 15, 2015).

94 Ebobrah & Lando, *supra* note 91, at 192.

95 *Activity Report of the African Court on Human and Peoples' Rights (AfCHPR): 1 January – 31 December, 2020*, Executive Council, Thirty-Eight Ordinary Session, EX.CL/1258(XXXVIII), ¶ 37 (Feb. 3-4, 2021).

96 *Id.*

That said, beyond the discouraging rates of compliance, the ECOWAS Court and the EACJ are contributing significantly to African human rights jurisprudence. On the human rights implications of Internet access and the enjoyment of human rights within the digital environment, the decisions of the ECOWAS Court and EACJ are setting standards of acceptable conduct for African states and galvanizing activists and ordinary citizens to demand better from their governments.⁹⁷ For instance, regardless of their compliance status, the ECOWAS Court decisions in *Amnesty International v. Togo and SERAP v Nigeria (Twitter Ban Case)* are ground-breaking precedents that set a normative standard that arbitrary deprivation of access to the Internet or services provided over the internet are human rights violations.⁹⁸ These cases and others will provide guidance to other courts (whether national or international) faced with similar questions, inform the content of national regulations on internet services and social media, and provide a reference point for civic engagement by human rights NGOs and other civil society organisations.

Undoubtedly, compliance with court decisions is an important indicator of effectiveness, and every effort should be made to ensure that African states comply with judgments of the Courts they themselves have set up. But at the same time, it is important that we do not fixate on quantitative measurements of effectiveness and lose sight of other indicators such as normative development, vindication of rights and the name-and-shame effects of international court judgments. While these may not have the immediate and visible impact of compliance, they contribute in no small measure towards building a culture of acceptable normative behavior of states.⁹⁹

97 See Natalia Krapiva, ECOWAS Togo Court Decision: Internet Access is a Right That Requires Protection of the Law ACCESSNOW (Jul. 14, 2020), <https://www.accessnow.org/ecowas-togo-court-decision/> (last updated Jan. 13, 2023) (“The ECOWAS Court ruling in the favour of the Togolese people is not only a victory for those affected by the 2017 internet shutdowns, it sets a precedent to all other governments that they will be held accountable for their actions”).

98 In consonance with this view, James Gathii observes that ‘opposition politicians and parties bring strategic litigation to Africa’s international courts as one venue, among others, for mobilising support for the promotion of and defence of political freedom.’ By filing cases in international courts, including African Court, opposition parties, politicians, and litigants articulate their grievances and in so doing preserve oppositional norms and values in countries where political opposition survival faces repressive control by authoritarian states. In so doing, these opposition politicians and political parties seek to build, maintain, and de-fend social and political movements. For example, political dissidents like Ingabire Umuhoza from Rwanda and the Tanzanian politician, the late Christopher Mtikila, used litigation to advance their causes before the African Court. See James Thuo Gathii & Jacqueline Wangui Mwangi, The African Court of Human and Peoples’ Rights as an Opportunity Structure, in THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS SOCIAL CHANGE 212-13 (James Thuo Gathii ed., 2020).

99 Victor Ayeni, Beyond Compliance: Do Decisions of Regional Human Rights Tribunals in Africa Make a Difference?, in COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA: ESSAYS IN HONOUR OF FRANS VILJOEN 55 (Aderomola Adeola ed., 2022).

VI. Conclusion

Sub-regional courts such as the ECOWAS Court and East Africa Court of Justice are assuming crucial roles in protecting human rights on the Internet. Their contributions can be seen in generally expanding the institutional protection of human rights, flagging online human rights violations, fostering digital rights norms and setting the boundaries of acceptable behaviour for states on access to the Internet. While their normative and institutional capability to foster human rights on the Internet cannot be gainsaid, compliance and enforcement of judgments continues to be the Achilles heel of sub-regional courts in Africa.¹⁰⁰ Within ECOWAS for instance, most member states have failed to domesticate the Court's Protocol or its relevant provisions on execution of judgments to enable their domestic courts enforce decisions of the ECOWAS Court.

Given that the rate of compliance with a court's decisions is an important way of measuring its effectiveness, low compliance is always concerning. However, effectiveness may also be assessed by focusing less on the quantitative indicators (i.e., rate of compliance), and rather looking to whether overall, the decisions of a court are effective in setting standards, influencing a change in the behaviour of states and generally aiding in normative development.¹⁰¹ Going by this alternative approach, we argue that despite low compliance rates with their judgments, sub-regional courts like the ECOWAS Court and the EACJ are making effective normative contributions towards curbing the authoritarian behaviour of African states within the digital environment.

100 *Id.*

101 See generally Obiora Chinedu Okafor et al., *On the Modest Impact of West Africa's International Human Rights Court on the Executive Branch of Government in Nigeria*, 35 HARV. HUM. RTS. J. 169 (2022).

*Book Review:***AFRICA IN THE NEW TRADE ENVIRONMENT:
MARKET ACCESS IN TROUBLED TIMES.**

By Souleymane Coulibaly, Woubet Kassa, and Albert G. Zeufack, (Eds.), World Bank Group (2022), pages 327, ISBN (paper): 978-1-4648-1756-4

*Katrin Kuhlmann**

The World Bank has produced a timely and comprehensive assessment of the African continent's trade prospects and challenges with *Africa in the New Trade Environment: Market Access in Troubled Times*. At a time when the African continent is blazing a new trail in global trade policy with the African Continental Trade Area (AfCFTA) and when other countries are evaluating their approach to trade policy vis-à-vis Africa, the book presents an invaluable economic lens through which to consider the possibility these approaches hold and the contradictions they present. The book also raises some very important questions in light of “[k]ey [c]hanges in the [t]rade [e]nvironment”¹, such as rising protectionism, regionalism, the COVID-19 pandemic, and the Fourth Industrial Revolution, which will have significant implications for Africa's trade potential now and in the future.

At the start of the book, Coulibaly, Kassa, and Zeufack discuss Africa's trade and investment patterns (imports and exports are on the rise but still represent a small share of global trade) and raise questions with respect to sectoral and geographic shifts, pushing the reader to reevaluate the role that trade agreements and trade preference programs with traditional partners, namely the EU and US, have played and could continue to play; what increasing trade patterns with Asia means for the continent; and the significance of regional integration and value chains. The “key changes” noted above are interwoven with this assessment, putting the trends in a more contextual and urgent light.

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1 WORLD BANK GRP, AFRICA IN THE NEW TRADE ENVIRONMENT: MARKET ACCESS IN TROUBLED TIMES 5 (Souleymane Coulibaly et al. eds., 2022), <https://openknowledge.worldbank.org/server/api/core/bitstreams/d4c515f5-e1ed-5f8e-8a1b-fde2eb35dd7c/content> [hereinafter AFRICA IN THE NEW TRADE ENVIRONMENT].

Key changes in the trading environment are particularly relevant in the context of trade agreements and preference programs with Europe and the United States. These include the EU's Economic Partnership Agreements (EPAs) and Everything But Arms (EBA) program and the U.S. African Growth and Opportunity Act (AGOA). The book poses the question of whether the objective of using these instruments to foster development will still resonate "in a protectionist world." The authors further question whether leveraging "regional integration to scale up supply capacity, and global integration to scale up demand", as presented in the World Bank's 2009 World Development Report "Reshaping Economic Geography" still holds sway.

Signs of shifts in the foundation of trade instruments have been apparent for some time. Europe long shifted away from trade preferences to reciprocal deals in the form of the EPAs, and, during the last AGOA authorization, members of the U.S. Congress pressed for a shift towards reciprocal programs and away from unilateral trade preferences in order to ensure that U.S. enterprises do not lose in the process. With AGOA's expiration looming in 2025, this question will likely surface again, with trade preferences hanging in the balance.

In Chapter 6, "The Promise and Challenge of the African Continental Free Trade Area," Kassa, Edjigu, and Zeufack discuss the significance of the AfCFTA in the context of both the "key changes" and its potential for structural transformation. Citing a study by Mevel and Karingi², the authors note an anticipated increase in intra-African trade of over 50 percent once the AfCFTA is operationalized, with most gains in the manufacturing sector. Over time, trade will increase even more significantly, particularly if non-tariff measures and trade facilitation are a focus, as another study by Saygili, Peters, and Knebel shows.³ However, the book asserts that Africa is the "most fragmented continent" with "thick borders" made up of a complex web of tariff and non-tariff restrictions impacting trade. In particular, the AfCFTA could reduce market fragmentation and meaningfully address non-tariff measures (NTMs), which will be critical for transformation within Africa's markets and through global value chains (GVCs). NTMs are an issue outside of the African

2 Simon Mevel & Stephen Karingi, *Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union*, Presented at the 7th African Economic Conference 17-19 (Oct. 4, 2012), https://aec.afdb.org/sites/default/files/2019/12/04/deepening_regional_integration_in_africa_a_computable_general_equilibrium_assessment_of_the_establishment_of_a_continental_free_trade_area_followed_by_a_continental_customs_union.pdf.

3 Mesut Saygili et al., U.N. Conference on Trade and Development, *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions*, 5, U.N. Doc. UNCTAD/SER.RP/2017/15/Rev.1 (Rsch. Paper No. 15, Feb. 2018), https://unctad.org/system/files/official-document/ser-rp-2017d15_en.pdf.

continent too, as the book points out; for example, European food standards affect farmers' access to markets and can significantly increase implementation costs.

So how could the AfCFTA drive more transformational change? In both the book's overview and the AfCFTA chapter, the authors discuss impact and the relevance of the classical theoretical framework developed by Viner in 1950, noting that "the classical theory is very restrictive for evaluating the impacts of regional integration initiatives such as the AfCFTA." They argue instead for a framework that evaluates effects on employment, productivity, investment, and structural transformation.

The authors also rightly highlight the importance of legal and regulatory change in capturing gains from trade. Intraregional trade, as exemplified by the AfCFTA, holds the promise of important enhancements in resilience to shocks, diversification, economies of scale, and conflict reduction.⁴ However, the extent of these gains will be subject to improvements in regulatory and logistics performance. As the authors argue, Africa's trade networks, in the form of both physical and soft infrastructure, need to be enhanced and regulatory systems strengthened if the gains of trade are to be realized.

The AfCFTA is designed to address these gaps, although its implementation will not be easy as the book readily acknowledges. For starters, the AfCFTA has the formidable task of bridging rules across Africa's Regional Economic Communities (RECs), which are meant to form the "building blocs" of the AfCFTA, yet the AfCFTA does not provide a roadmap on how to do so. Further, much of the AfCFTA's success will rest upon national law, with domestic policy and regulatory reform acting as a key driver for trade performance. National strategies and policies within the AfCFTA Member States will be of paramount importance, as will meaningful improvements in regional infrastructure and a reduction in non-tariff barriers (NTBs) between the parties.

However, there are two important aspects of transformational change that the book does not explore in depth. First is the connection between Africa's regional integration and the trade agreements and programs maintained by Africa's trading partners. Whether reciprocal or unilateral, trade instruments maintained by Africa's trading partners vis-à-vis the continent are fragmented⁵, presenting a

4 AFRICA IN THE NEW TRADE ENVIRONMENT, *supra* note 1, at 241-43.

5 David Luke et al., *The European Union is Undermining Prospects for a Free Trade Agreement with Africa*, LONDON SCH. ECON. & POL. SCI (Dec. 14, 2021), <https://blogs.lse.ac.uk/africaatlse/2021/12/14/european-union-is-undermining-prospects-for-free-trade-agreement-with-africa-epa-afcfta/>.

significant challenge for structural change and sometimes undercutting rather than supporting regional integration.

The book suggests the need to prepare for a new “era” of reciprocal agreements, rather than preferential arrangements, yet many experts caution against this approach. The U.S.-Kenya Trade Agreement was meant to be a step towards a reciprocal trade model between the United States and African negotiations, but negotiating reciprocal trade agreements has proven to be a slow and politically fraught process. The EU’s reciprocal agreements in the form of EPAs have been heavily criticized as working against Africa’s regional integration, despite their capacity building component. As LSE’s David Luke argues, their asymmetrical nature⁶ poses challenges for Africa’s market development, and they can work against regional integration⁷ due to their structure and design. Further, a recent Brookings Institution article weighing the pros and cons of reciprocal versus preferential arrangements argues (drawing upon World Bank data), argues that trade preference programs are better positioned to offer the possibility of structural change.⁸

The preference programs have notable gaps as well. For example, AGOA has historically been underutilized, and it affords much greater benefits to some countries than others due to its product coverage. Like other trade preference programs, AGOA also does not cover dynamic sectors like digital and financial services⁹, which could be critical to more transformational reform. This is important in terms of impact and growth and because of the current circumstances stemming from another “key change”, the COVID-19 pandemic, and the pandemic-induced recession, which has impacted sub-Saharan Africa the hardest.¹⁰

Market access under AGOA is also subject to a number of conditions, ranging from rules on intellectual property to human rights measures. There is currently a discussion in the context of the U.S. Generalized System of Preferences (GSP) Program, the foundational preference program on which AGOA is built, around

6 *Id.*

7 KATRIN A. KUHLMANN & MWANGI S. KIMENYI, BROOKINGS AFR. GROWTH INITIATIVE, BUILDING REGIONAL MARKETS: AGOA AND THE ECONOMIC PARTNERSHIP AGREEMENTS 19 (2012), https://www.newmarketslab.org/_files/ugd/7cb5a0_1cef8172aa944c659b609f2cc0d7ae06.pdf.

8 Gracelin Baskaran, *US-Africa Trade Relations: Why is AGOA Better Than a Bilateral Free Trade Agreement?*, BROOKINGS (Sept. 24, 2020), <https://www.brookings.edu/blog/future-development/2020/09/24/us-africa-trade-relations-why-is-agoa-better-than-a-bilateral-free-trade-agreement/>.

9 Claire Klobucista, *AGOA: The U.S.-Africa Trade Program*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgroundunder/agoa-us-africa-trade-program> (last updated Mar. 18, 2022, 1:55 PM).

10 *Id.*

expanding conditionality to include new provisions on labor, environment, and even women's economic empowerment that would likely influence the next phase of AGOA as well. While very important to inclusive and sustainable trade and development, a goal of the AfCFTA, how these issues are approached and whether African nations are part of that approach will matter.

Solutions to the fragmentation and asymmetry that exist are not easy to come by. For starters, U.S. and EU programs should be as closely aligned with the AfCFTA as possible, reinforcing the African continent's own plans for market integration and transformation without creating alternative, competing frameworks. The book stops short of such a recommendation, placing much of the responsibility for improved trade performance on the shoulders of the African continent, but Africa's trading partners could play a different role as well. Such alignment would certainly affect both the timing and substance of outside initiatives and could also argue for following Africa's lead on issues that are now part of the next stage of the AfCFTA, including investment, competition, intellectual property, digital regulation, and gender and youth.

As a second and related aspect of this challenge, outside approaches have sometimes brought about policy and regulatory changes that may not be in the continent's best interests in the short- or long-term. While the book is right in pointing out the importance of regional and national legal and regulatory reform within the continent, the potential for transformational change in Africa's markets also depends upon the global system of trade rules and the trade policies of Africa's partners, which have not always been designed with Africa's needs in mind.

It is surprising that the book does not note the shift in global trade governance, as evidenced by the crisis in trade rules and negotiations under World Trade Organization (WTO), as another "key change in the trade environment" that will affect Africa's potential for transformational change. With regionalism on the rise, the void left by the WTO is likely to be taken up by regional trade agreements, highlighting the possibility of the AfCFTA to reshape global trade rules as well.¹¹

While facilitating market development is an important goal, shaping trade rules to ensure gains to local companies and citizens is another. In this light, rules imported from elsewhere may not be adequate, and it may well be time to rethink some of the multilateral approaches as well. Again, following the AfCFTA's lead

11 Katrin Kulhmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development*, 51 GEO. J. INT'L L. 753, 763 (2020).

would be very beneficial, and perhaps the more nuanced approach to assessing trade agreements' impact proposed in the book could be extended to encompass tailored changes in laws and regulations that address local priorities. In this light, the AfCFTA could be an instrument for even more transformational change than the book envisions, and balanced trade rules (and trade agreements) could well be the missing link.

*Book Review***AFRICA'S "NEW" TRADE POLICIES IN AN
INCREASING UNILATERAL WORLD****AFRICA IN THE NEW TRADE ENVIRONMENT:
MARKET ACCESS IN TROUBLED TIMES.**

*By Souleymane Coulibaly, Woubet Kassa, and Albert G. Zeufack, (Eds.), World Bank Group
(2022), pages 327, ISBN (paper): 978-1-4648-1756-4*

*Dr Regis Y. Simo**

1. Africa in a Muddy and Agitated Global Trade Environment**1.1. A Brief Summary**

Souleymane Coulibaly, Woubet Kassa, and Albert G. Zeufack's edited book addresses the challenges currently facing Africa in international trade. As the subtitle indicates, the aim of this publication is to propose a new strategy to boost Africa's market access within the current global environment. This new strategic shift is tackled from three main angles. First, the authors analyse the impact of trade agreements (multilateral, regional, and unilateral) on Africa's position in global trade and suggest ways in which these partnerships could be improved in a way that benefit Africa's economies. Part I focuses on unilateral trade preference schemes devised by developed countries to provide non-reciprocal market access to goods originating in Africa. Two emblematic schemes are tackled here, viz the United States AGOA and the European Union Everything but Arms (EBA) programmes. Secondly, the book proposes going beyond 'traditional' partners and seek to secure access in new frontier markets in Asia where they have a lot

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to learn in terms of insertion in the global value chains (GVCs). In this regard, Part II provides insights on Africa trade relations with (East and South) Asia. As exports to Asia remain highly concentrated in natural resources, one also learns for instance that, contrary to some assumptions, China is not always the primary trading partner of individual African countries. Others players such as India and Pakistan are equally dominant (pp. 187-88). Part II therefore proposes to build on these achievements to strengthen trade ties with Asia. Thirdly, the book takes stock of the small size of African economies and suggests that they would be better off deepening regional integration. In this quest for a stronger and deeper economic integration, the largest middle-income AfCFTA State Parties are exhorted to take the lead.

1.2. The book in a broad context ...

Once portrayed as “hopeless”¹, a couple of years later as “hopeful”² and “rising”³, Africa’s economic potential is characterised by contradictions. While the continent has experienced a relative economic growth thanks to the wave of economic liberalisations of the 1990s, its full economic potential, however, remains untapped even today. Many studies agree that the path to a sustained growth depends largely on a set of structural economic transformations.⁴ One area where African countries continue to struggle is their full participation in the multilateral trading system. While the role of international trade as crucial in the fight against poverty⁵ is largely undisputed, African countries have sometimes faced challenges inherent to their postures as latecomers at the multilateral trade negotiations table.

To these challenges, the WTO has largely remained inefficient: first the WTO has been incapable to efficiently discipline unfair trade practices, some of which affect exports of interest to African countries; in addition, it has been unable to strengthen the special and differential treatment provisions⁶ aimed initially at accommodating their weaker economic positions and ensuring their smooth inclusion into the global trading system. The need to strengthen and accelerate regional economic

2 The Hopeless Continent, *ECONOMIST*, May 13, 2000, <https://www.economist.com/weeklyedition/2000-05-13>.

3 Special Report Emerging Africa: A Hopeful Continent, *ECONOMIST*, Mar. 2, 2013, <https://www.economist.com/special-report/2013-03-02>.

4 Africa Rising, *ECONOMIST* (Dec. 3, 2011), <https://www.economist.com/leaders/2011/12/03/africa-rising>.

5 WORLD BANK GRP. & WORLD TRADE ORG., *THE ROLE OF TRADE IN ENDING POVERTY 7* (2015), <https://documents1.worldbank.org/curated/en/726971467989468997/pdf/97607-REPLACEMENT-The-Role-of-Trade-in-Ending-Poverty.pdf>.

6 Regis Y. Simo, *Developing Countries and Special and Differential Treatment*, in *INTERNATIONAL ECONOMIC LAW – (SOUTHERN) AFRICAN PERSPECTIVES AND PRIORITIES 254-63* (Kholofelo Kugler & Franziska Sucker eds., 2021).

integration on the continent comes to some extent as a reaction to some of these challenges.

Whereas some of these issues, notably the continued relevance of special and differential treatment⁷ in the acceptance and implementation of WTO rules, have revived the tension between developing and developed country Members, thus fragilizing the organisation further, the ongoing war in Ukraine and the revitalisation of “aggressive” unilateralism in foreign policy could be the final nail in the coffin of multilateralism as we know it⁸ and to its post-world war II institutions. Indeed, if the interests of countries have emphatically diverged⁹ at the United Nations where attempts for a resolution¹⁰ to condemn Russia did not gathered the semblance of unanimity, Russia is also contemplating to withdraw from the WTO¹¹ in response to the avalanche of trade and economic sanctions imposed after its invasion of Ukraine.

At a time when the world is thus entrapped in a post-Covid cum Ukraine’s invasion turbulence, coupled with a soaring cost of living¹², Africa is also struggling to finally get trade start under the Agreement establishing the African Continental Free Trade Area (AfCFTA). Concluded in 2018, entered into force in 2019, the start of trading under the AfCFTA Agreement officially commenced on 1 January 2021. This means that trade between State Parties to the Agreement that have deposited their instrument of ratification, i.e. 43 out of the 54 signatories. However, despite this “official” start of trading date, trade is yet to effectively take place because the negotiations of the operational instruments (especially the rules of origin¹³ and

7 *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness*, WTO Doc. 19-1114, WT/GC/W/765/Rev. 1 (Feb. 26, 2019), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=251793#.

8 Adam S. Posen, *The End of Globalization? What Russia’s War in Ukraine Means for the World Economy*, FOREIGN AFFS. (Mar. 17, 2022), <https://www.foreignaffairs.com/articles/world/2022-03-17/end-globalization>.

9 Carlos Mureithi, *How African Countries Voted on Russia’s Invasion of Ukraine*, QUARTZ (Mar. 7, 2022), <https://qz.com/africa/2138584/how-african-countries-voted-on-russias-invasion-of-ukraine>.

10 Permanent Rep. of Ukraine to the U.N., Letter dated Feb. 28, 2014 from the Permanent Rep. of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/136), *Aggression Against Ukraine*, U.N. Doc A/ES-11/L.1 (Mar. 1, 2022), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/272/271/PDF/N2227227.pdf?OpenElement>.

11 Anna Shushkina, Tolstoy: *Foreign Ministry Sent Proposals to the State Duma on the Denunciation of International Agreements*, PUBLN FED. ASSEMBLY RUSS. FED’N (May 17, 2022, 4:16 PM), <https://www.pnp.ru/politics/tolstoy-mid-napravil-v-gosdumu-predlozheniya-o-densnatsii-mezhdunarodnykh-soglasheniy.html>.

12 *World Economic Situation and Prospects as of Mid-2022*, U.N. DEP’T ECON. & SOC. AFFS.: ECON. ANALYSIS (May 18, 2022), <https://www.un.org/development/desa/dpad/publication/world-economic-situation-and-prospects-as-of-mid-2022/>.

13 Dennis Ndonga, *Rules of Origin as a Key to the AfCFTA’s Success: Lessons that can be Drawn from the Regional Experience*, AFRONOMICSLAW (Mar. 15, 2021), <https://www.afronomicslaw.org/category/analysis/rules-of-origin-key-afctas-success-lessons-can-be-drawn-regional-experience>.

tariff concessions for trade in goods, and schedule of specific commitments for trade in services) are still incomplete.

Pending the outcomes of these negotiations, which will certainly station African countries on the train of the most ambitious free trade agreement ever agreed on the continent, AfCFTA State Parties have engaged in the negotiations of a series of trade agreements with third-countries. The objectives of these agreements are as numerous as they can be confusing. They are sometimes aimed at securing (new) market access for African goods especially in markets where access used to be secured through non-reciprocal trade schemes. The conversion of unilateral EU GSP schemes into reciprocal Economic Partnership Agreements with certain erstwhile beneficiaries is a case in point. The United States is also craving to mature its own trade relations¹⁴ with the continent through conclusion of trade agreements. Apart from these “historical” scenario, newcomers such as China¹⁵ and India¹⁶ are also knocking at the door and have already concluded comprehensive free trade agreements on the continent. Yet, the multiplication of these solo adventures also comes with the of risk of fragilizing the process of the AfCFTA and obfuscate the credo of speaking with a unique voice¹⁷ in international trade issues if their foreign trade policies and interests (tend to) diverge. This divergence was strikingly manifest in the use of trade measures to address the Covid-19 health crisis. Unlike the European Union, for instance, where individual countries’ measures were quickly replaced by the EU Commission’s regulations¹⁸, African countries excelled by their solitary approaches, perhaps explained by the lack of a common external trade strategy.

It is this dynamic and disconcerted global trade environment that provided context for this book edited by Souleymane Coulibaly, Woubet Kassa, and Albert G. Zeufack. Although the editors and authors are all economists not only by

14 Regis Simo, *The AGOA as Stepping Stone for USA—Africa Free Trade Agreements*, 17 J. INT’L TRADE L. & POLY 115 (2018).

15 Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Mauritius, China-Mauritius, Oct. 17, 2019, http://fta.mofcom.gov.cn/mauritius/annex/mlqs_xdzw_en.pdf.

16 Comprehensive Economic Cooperation and Partnership Agreement (CEPA) Between the Republic of India and the Republic of Mauritius, India-Mauritius, Feb. 22, 2021, <https://commerce.gov.in/wp-content/uploads/2021/08/India-Mauritius-CECPA-Text-for-Upload.pdf>.

17 Decision on the Draft Agreement Establishing the African Continental Free Trade Area (AfCFTA) & Decision on the African Common Position for Negotiations for a New Cooperation Agreement with the European Union, Executive Council, Eighteenth Extraordinary Session, Ext/EX.CL/Dec.1 & 2 (XVIII) (Mar. 19, 2018), https://au.int/sites/default/files/decisions/34054-ext_ex_cl_dec_1-2xviii_e26_march.pdf.

18 Ignacio Carreno et al., *The Implications of the COVID-19 Pandemic on Trade*, 11 EUR. J. RISK REGUL. 402 (2020).

training but also in their daily practice, their pieces are accessible to a non-specialist audience.

2. The book's theses

The overview chapter of the book sets the scene for what the editors believe should be African countries' preoccupations in this troubled international trade environment. From the outset, they recognise that pre-Covid19 African countries' trade environment was already in a turmoil (p. 1). Indeed, they rightly hinted at the proliferation of regional trade agreements (RTAs) and the resurgence of protectionism that the world began to face with the election of Donald Trump as US President in 2016, epitomised by the trade war¹⁹ waged against China and US allies in America and Europe. Although proliferation of RTAs usually connotes a negative phenomenon²⁰, what is more preoccupying today is the propensity of some of these "new generation" schemes to (re-)write global trade rules outside the WTO forum where developing countries are once again excluded. The spread of WTO-extra²¹ provisions in these agreements and the hopes for their multilateralization²² remind us of these worries. Proliferation is not only prejudicial to the WTO, but poses a risk of marginalisation in the framing of future (global) trade rules.

Regarding the trade feud, Africa, as innocent bystander, certainly suffered from the increase of tariffs on goods originating in countries such as South Africa²³ (notably in the aluminium and steel industry). The amount of WTO requests for consultations²⁴ that some of these tariffs generated is a testimony of their scale. This chapter identifies another channel through which Africa can be indirectly affected by this trade friction is through the integrated production networks between African businesses and Chinese firms present in Africa (p. 7). Yet, a fair account of these protectionist measures cannot disregard the fact that some African countries,

19 CHAD P. BROWN & MELINA KOLB, PETERSON INST. INT'L ECON., TRUMP'S TRADE WAR TIMELINE: AN UP-TO-DATE GUIDE (Apr. 19, 2018), <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf>.

20 Jagdish Bhagwati, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* (2008).

21 Henrik Horn et al., *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33 *WORLD ECON.* 1565 (2010).

22 Bernard Hoekman, *Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization*, 18 *J. INT'L ECON. L.* 609 (2015).

23 Collins C. Ngwakwe & Mokoko P. Sebola, *The US-China Trade War and the Economic Ripple on South Africa*, 15 *GLOB. TRADE & CUSTOMS J.* 543 (2020).

24 *Index of Dispute Issues: Aluminum and Steel Products*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm?id=G232 (last visited Apr. 21, 2023).

the same South Africa's wine sector took advantage of a trade war between China and Australia²⁵ to conquer Chinese customers, even though the context of that war totally different from the US-led trade war identified earlier.

Beside this collateral damage narrative, that Africa was also struggling with its own internal trade wars in several places during the same period, and some still ongoing, is worth mentioning and should not have escaped the attention of the editors in this introductory chapter. In effect, Rwanda unilaterally closed its border with Uganda in February 2019, i.e. before the Covid19 outbreak, and only reopened²⁶ it 3 years later. This closure not only threatened regional economic integration in the East African Community, since it restricted free movement of goods and persons, but it also set a bad precedent for the use of trade instruments to settle political scores between African leaders. The lingering trade war between Uganda and Kenya, that saw a truce last year, is also on the verge of resumption with the recent Kenya's tax on Ugandan eggs.²⁷ These habits do not bode well for the future of the AfCFTA since these same measures may to be invoked by the same countries against the same targets in the operationalisation of the AfCFTA Agreement. The future of the AfCFTA is consequently hanging on the use of these types of trade (defence) instruments sometimes imposed in total disregard of the texts of the treaties. According to Kassa, Edjigu and Zeufack in chapter 6 of this collection on "The Promise and Challenge of the African Continental Free Trade Area", the systematic recourse to unilateral border closures to curb the flow of some goods sensitive to the imposing country is sometimes symptomatic of African countries' culture to trade dispute settlement, thus forms part of the numerous challenges facing the AfCFTA (p. 273).

The rest of the book is divided in two parts. What follow next will only address Part I of the book on nonreciprocal trade arrangements. While the editors have opted for the term "agreements" (p.33), this is a misnomer given that the beneficiaries of unilateral trade preferences do not have to "agree" with the granting state for the schemes to be established. Therefore, it is perhaps more correct to refer to them as arrangements consistent with the WTO taxonomy.²⁸ Terminology aside, three

25 Freshfield Bruckhaus Deringer, *The Australia-China Trade Dispute: What Happened, and What's Next?*, LEXOLOGY (Jan. 17, 2022), <https://www.lexology.com/library/detail.aspx?g=f53a9d6f-053f-4a94-b42b-d919456a0341>.

26 Press Release, E. Afr. Cmty., EAC Applauds the Re-opening of the Gatuna-Katuna Border Post by the Republics of Rwanda and Uganda (Jan. 28, 2022), <https://www.eac.int/press-releases/2354-eac-applauds-the-re-opening-of-the-gatuna-katuna-border-post-by-the-republics-of-rwanda-and-uganda>.

27 Gerald Andae, *Kenya Fresh Tax on Uganda Eggs Sets Stage for Another Trade War*, E. AFR. (June 13, 2022), <https://www.theafrican.co.ke/tea/business/kenya-fresh-tax-on-uganda-eggs-sets-stage-for-trade-war-3846726>.

28 Glossary Term: Preferential Trade Arrangements (PTAs), WORLD TRADE ORG., https://www.wto.org/english/thewto_e/glossary_e/preferential_trade_arrangements_ptas_e.htm#:~:text=This%20is%20the%20term%20used,to%20a%20trade%20partner%20unilaterally (last visited Apr. 21, 2023).

chapters conduct, one after the other, a product-level analysis of exports to the EU and US under the EBA and AGOA. In Chapter 1, the authors find that AGOA has contributed to increased exports in most Sub-Saharan African countries, these gains were essentially concentrated in these countries' primary sectors and less so in manufacturing sectors. In Chapter 2, a product-level analysis suggests that the apparel sector has benefitted of the preferential market access to the US under the AGOA. Chapter 3 engages in a comparative analysis of the AGOA and the EU EBA.

The common thread of these three chapters is the appraisal of African countries' market access through the EU EBA and the US AGOA, notably their impacts on trade creation and their subsequent implications for economic transformation through exports. Their findings suggest a clear heterogeneity in African countries' responses to these trade preferences. Accordingly, the argument is that more success for economic transformation lies with "changes in infrastructure, connectivity, the fundamental institutions of legal frameworks and property rights protection, and smart macroeconomic management with stable and competitive exchange rates and low inflation" (p.33). Although the pertinence of these findings is not put to question, some of these "prescriptions" may raise some eyebrows. They resonate with the so-called Washington Consensus²⁹ packages, especially in their institutional reforms and property rights protection. The institutions where the authors of these pieces are affiliated with may even make their claim suspicious in this regard. Indeed, for the critics of the rule of law rhetoric³⁰ there could be a perception that what was then prescribed as conditions for loan (structural adjustment programmes) now appears as a *sine qua non* for market access under preferential market schemes. This, of course, is already tied to the eligibility criteria as mentioned below.

The comparison between the AGOA and the EBA, and the neglect of the EU GSP, is equally puzzling. To begin with, the logic of this comparison is not readily evident from a legal standpoint. It is worth noting that these schemes differ in several respects. From a legal standpoint, the WTO legal coverage of the AGOA is a waiver of US obligations under Article I and Article XIII of the GATT. Indeed, Article IX:3³¹ of the Marrakesh Agreement Establishing the World Trade Organization

29 John Williamson, *The Strange History of the Washington Consensus*, 27 J. POST KEYNESIAN ECON. 195 (2004).

30 UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

31 Marrakesh Agreement Establishing the World Trade Organization art. IX:3, Apr. 15, 1994, 1867 U.N.T.S. 154.

(WTO Agreement) provides that the WTO Ministerial Conference can waive an obligation imposed on a Member by any WTO covered agreement if warranted by “exceptional circumstances”. The EBA on the other hand relies on the Enabling Clause.³² In particular, Paragraph 2(d) provides, in addition to preferential tariff treatment accorded by developed countries products originating in developing countries, that *special treatment* may be extended to the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

In addition to the legal coverage of these programmes, their beneficiaries and their eligibility criteria differ. While the EU EBA initiative expressly targets LDCs, i.e. the most vulnerable among developing countries, the US AGOA’s beneficiary list attracts a mix of developing countries and LDCs, thus the *raison d’être* to seek a WTO waiver. Whereas the focus on the EBA and the AGOA in this book make economic sense, especially their impacts on the beneficiaries’ exports, the EBA comes with almost no conditions attached, unlike the AGOA. The underutilisation of AGOA is sometimes the result of the enforcement of these conditions. On this front, a better comparator from a legal perspective, would have been the EU GSP scheme, especially the GSP+ mechanism with the associated sustainable development conditionalities. Indeed, what both the AGOA and the GSP+ schemes share in common is the promotion of the granting states’ values. Complying with these set of conditions, such as the elimination of barriers to US trade and investment³³ (by granting national treatment to US trade and investment), entails that these schemes are not genuinely “unilateral”.

Based on these differences, one may explain the logic of this comparison by the authors’ desire to assess the EU and US “special” unilateral tariff preference schemes that operate next to their “default” GSP programmes. Moreover, the fact that many former EU GSP beneficiaries have negotiated reciprocal trade agreements with the EU may have steered the authors to exclude it from their analysis.

3. Conclusion

This edited collection is a great addition to the literature on African trade policy in an era where the discourse is dominated by post-Covid19 recovery,

32 Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries: Decision of 28 November 1979 (L/4903), WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm (last visited Apr. 21, 2023).

33 African Growth and Opportunity Act, 19 U.S.C. § 3703.

and where the world is struggling with a gradual retreat of globalisation. In this context, Africa would need to strengthen its policies to be able to advance its economic transformation. While there are no doubts about political support behind the AfCFTA, the implementation challenges remain enormous but not unsurmountable.

The editors have identified the pertinent themes that would determine the fate of the AfCFTA, notably the issue of non-tariff barriers that prevents active partaking in global and regional trade. On this front, the design of products standards, the reduction of high transportation costs (sometimes linked to inadequate trade infrastructures) associated with other trade facilitation measures (such as red tape and transit issues) will be key in the success of the AfCFTA agenda for the free movement of goods (alongside reduction/elimination of tariffs). The other agenda waiting AfCFTA policy makers is in the sector of services, especially, but not limited to, producer services absent which trade in goods may not happen.