Flexibility and Innovation in International Economic Law: Enhancing Rule of Law, Inclusivity, and Resilience in the Time of COVID-19

By:

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Times of crisis tend to highlight the importance of flexibility and innovation in international economic law (IEL), but this focus has taken on new significance and dimension with the COVID-19 pandemic. Current circumstances warrant an even greater emphasis the intersection between flexibility, regulatory innovation, and economic and social development.

This article will briefly examine this dynamic across three interconnected dimensions: (1) flexibility and innovation in IEL agreement models, with a focus on trade agreements, that better integrate economic and social development goals and allow parties to adapt to new circumstances or phase in

commitments on a more incremental basis; (2) flexibility in implementation of trade disciplines and agreements; and (3) legal and regulatory innovation that can both define and flow from IEL agreements. These three dimensions take into account both treaties themselves and how they relate to changes in law and regulation in practice, drawing a link between international agreements and their operation that is particularly important in times of change or uncertainty. In assessing dimension three, legal and regulatory innovation, which has been a focus of my work over the past decade, I will touch upon design, implementation, and regulatory options, the latter of which will refer to the regulatory possibilities available to countries in line with both economic and social development considerations and international rules and standards. This dimension relates to "policy space" but can be exercised affirmatively and can highlight important variations in domestic law that may enable states to better address crisis and vulnerability while still preserving cooperation and rule of law.

This article is intended to contribute to the broader discussion on flexibility and innovation in trade models and rules that is central to the challenges we face in the global economy today. It is also part of a larger ongoing project focused on linking law and development at the treaty level with a framework for assessing innovation, patterns, and variations in domestic law in an attempt to better understand possible legal and regulatory responses to current challenges and future opportunities.

Flexibility in Trade Agreements and Their Implementation The current pandemic seems to call for both greater certainty through a rules-based system and greater flexibility and innovation in how the rules are developed and applied. While combining a rules-based system with flexibility and innovation may seem contrary to some global trade approaches, it is actually well aligned with other models, including Africa's approach to trade through the Regional Economic Communities (RECs) and African Continental Free Trade Area (AfCFTA).

Responses to the pandemic have highlighted tensions that will need to be addressed. Rather than acting cooperatively, many countries have bent or even broken the rules to act unilaterally (including a number of OECD economies that have been proponents of a rule-based system during better

economic times), "turning inward" and enacting export bans and other measures on medicines, medical equipment, and personal protective equipment (PPE); food; and other manufacturing inputs. Instead of fostering cooperation and transparency, these measures tend to drive up prices and cause hoarding and shortages of essential goods, pitting countries against each other. This trend highlights the need for a new global understanding that combines a rules-based system with heightened cooperation and room for regulatory flexibility, allowing countries to address domestic concerns while still acting collaboratively overall. The flexible models discussed below, when combined with fit-for-purpose regulatory innovation and inclusive design and implementation of the rules, could provide a way forward for both mitigating the effects of the pandemic and ensuring recovery and resilience.

Africa's trade agreements are models for flexible, cooperative engagement that deserve further study and broader support. As James Gathii has highlighted, Africa's agreements exhibit flexible cooperation instead of "rules requiring scrupulous and rigorous adherence," as well as other important facets, including variable geometry; integration of social, economic, and political goals; equity in distribution of trade benefits; and membership in multiple, overlapping trade bodies. These characteristics can be found in many of the RECs, including the Southern African Development Community (SADC), East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), and Economic Community of West Africa States (ECOWAS), among others, which share common elements, even though differences remain. Further, as Arinze Bryan Okiche has argued, flexibility should not be viewed as "accidental" or "incidental" and instead "must be provided for by the treaty" and fall clearly within its legal framework, drawing an important connection between flexibility and legal instruments themselves.

The African Continental Free Trade Area (AfCFTA) is another example of a flexible IEL model. In addition to clearly articulating the importance of alignment with social and economic development goals, it represents a forward-looking, flexible rules-based approach to special and differential treatment and is also a good example of a "progressive" trade agreement that phases in commitments over time based on nations' priorities and capabilities, consistent with the principle of variable geometry. The AfCFTA text also explicitly provides for periodic review and addition of instruments as needed

(Articles 28 and 8, respectively), adding to its flexibility to respond to changing circumstances and needs. While the flexibility to "review and revise" needs to be balanced with the need to create predictable rules and rights, it can be a useful tool, particularly when approached in the context of economic and social development.

Flexibility, often through special and differential treatment, is built into other trade agreements as well. Special and differential treatment provisions appear nearly 200 times in World Trade Organization (WTO) agreements, often in the form of transition periods to implement rules, special safeguards, and other flexibilities. Although the clock has run out on some of these provisions, special and differential treatment remains central to IEL, including in the WTO system and many regional trade agreements (RTAs). Even trade agreements from regions known for following standard RTA approaches, such as the United States and Europe, show some signs of flexibility in design and focus, although the flexibility is often "hidden" and tends to be more piecemeal. For example, the U.S.-Morocco Free Trade Agreement takes a flexible approach to the agricultural sector, given its importance to Morocco's economy, and the United States also entered into an incremental agreement with the EAC focused on trade facilitation, sanitary and phytosanitary measures and technical barriers to trade (EAC-U.S. Cooperation Agreement), which has been referenced in the context of the new U.S.-Kenya Trade Agreement. In addition, a number of trade agreements include transparency provisions and mechanisms for consultation and stakeholder input, which can enhance flexibility and improve inclusivity, particularly if well designed and implemented. While different than the flexibility inherent in Africa's trade agreements, these models may offer a ray of hope for new agreements, including those among countries at different stages of development, like the U.S.-Kenya Trade Agreement (which is touted as a new "model" without detail on what such a model might entail) that would benefit from more flexibility and reference to the broader context of Africa's continental commitments.

With regard to both agreement design and implementation, the WTO Trade Facilitation Agreement (TFA) is a notable example, as it phases in implementation of commitments over time based on needs and resources. Other agreements address implementation through different aspects of special and differential treatment, including trade capacity building assistance.

Overall, however, implementation of trade agreements deserves much greater focus, particularly since the framework established by any trade agreement will require further legal and regulatory change that must take into account a number of actions, trade-offs, benefits, and practices.

Across agreements, balanced flexibility that incorporates the certainty of a treaty, context of variable geometry, and reality of changing markets can be seen in some of these examples. This is particularly true of the African trade agreements that usher in tailored and progressive change, tethered by high-level legal commitments, in disciplines ranging from non-tariff measures to agricultural market regulation to customs and trade facilitation. All of these substantive issues are more important than ever, and the section below will briefly discuss innovations in national law (and links with RTAs) in these areas.

Flexibility and Innovation in Legal and Regulatory Design

Innovation and flexibility in law and regulation themselves will be critical in addressing vulnerability and building resilience. As is true with trade agreement models, flexibility and innovation in the rules themselves can allow for tailored approaches that take into account the needs of different stakeholders and the priorities of states at different levels of development. Based on empirical research, there is already quite a bit of innovation in regulatory approaches, including among African nations, that balances economic and social development considerations. There is also a fair amount of flexibility in how countries can design and implement their rules, particularly under the WTO Agreements and the African RTAs. This section will briefly share some of these innovations in several areas of law central to the pandemic response, namely food security, intellectual property (IP), and digital economy.

Food security is central to economic and social development, and effectively addressing food security often involves a thicket of rules, policies, and regulations. While some legal disciplines have been established in agriculture, most treaty models fall short of fully addressing the range of issues important to addressing food security. A number of legal and regulatory innovations currently exist across Africa, including monitoring mechanisms for non-tariff barriers, flexible regulatory approaches to bridge the informal and formal

agricultural sectors, and innovative practices in regulating agricultural inputs, agricultural finance, and other aspects of agricultural markets. While these innovations are present in African national law and also link with RTAs (sometimes flowing from RTA provisions and, in other cases, influencing their design), a comprehensive regulatory approach to food security is needed nearly everywhere. At the national level, regulatory innovation in agricultural rules can increase productivity, crop diversity, and opportunities for farmers, small- and medium-sized enterprises (SMEs), and larger enterprises alike. At the RTA level, flexible and innovative approaches could balance market access with food security; build upon existing international, regional, and national good practices; and establish more inclusive markets as they develop over time.

Innovation in IP law will also be increasingly important as nations and regions respond to the pandemic, given the direct link between IP and availability and access with respect to medicines, vaccines, and equipment. IP is governed internationally under a number of institutional arrangements and measures, including the WTO, World Intellectual Property Organization (WIPO), African Regional Intellectual Property Organization (ARIPO), African Intellectual Property Organization (OAPI), with a Pan-African Intellectual Property Organization (PAIPO) also under development. While intellectual property rules at the WTO level create a baseline of protections, other instruments, namely those through the African institutions, are more flexible. In IP, as in agriculture, current rules do not fully take into account future needs. Here innovations could include integrating the flexibilities incorporated into the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement on access to medicines and compulsory licensing into national law and expanding upon them to cover the full range of medicines, vaccines, and medical equipment needed to treat COVID-19. The path forward could also include building upon innovations in other aspects of IP lawthrough both national law and international rules, as proposed by South Africa in the latter case, or innovative alternatives to traditional patent protection, such as IP pooling or a prize system for vaccine production and distribution, with implications for national law and broader global cooperation.

Regulatory innovations in IP must also encompass adequate approaches to biodiversity and traditional knowledge, building upon national rules in countries like Ethiopia, Kenya, Tanzania, South Africa, and Zambia as well as examples in

other parts of the world, like India, Peru, Thailand, Malaysia, and Vietnam. Disciplines in international rules establish access and benefit sharing (Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits), open the door for affirmative rights, and call for systems for recording and protecting rights and the communities that hold them, also providing a good framework upon which to build.

As the world increasingly shifts to doing business online, digital regulation will also take on an increasingly significant role in mitigating and recovering from the pandemic. Here, there is not yet established international law, leaving the space open for regulatory innovation from a broader range of countries. Currently, innovations can be found across nations and regions in areas including consumer protection, data privacy and protection, cybersecurity, and electronic transactions. Although multilateral rules do not yet exist in this area, RTAs are increasingly incorporating digital provisions. While the European General Data Protection Regulation (GDPR) is often touted as a model, regulatory approaches vary around the world, and countries have adopted different good regulatory practices tailored to particular circumstances. Kenya, for example, regulates in the digital sphere under separate legal instruments covering electronic transactions, cybercrimes, consumer protection, and data protection and privacy, while other countries, like Rwanda, have put in place umbrella laws that regulate a number of different aspects of the digital economy under one instrument. Regulating through different legal instruments could provide greater flexibility as circumstances and technology change, while regulating through a unified legal instrument could streamline institutional arrangements, rights, and obligations.

In addition, as the ECOWAS data protection rules highlight through their specific reference to human rights and “fundamental liberties” of the data holder, digital rules can be aligned to social and economic goals through their design as well. As a further example of tailoring digital rules to incorporate the needs of the economically vulnerable, the Digital Economy Partnership Agreement (DEPA) recently signed by Chile, New Zealand, and Singapore emphasizes data inclusion for indigenous communities, women, rural populations, and low socio-economic groups, which is a notable innovation.

Concluding Remarks

As the world continues to navigate and eventually recover from the COVID-19 pandemic, new approaches to IEL will become ever more important. Applying flexibility and seeking innovative approaches to treaties and rules, aligned with economic and social development, will allow countries to respond to changing circumstances and move forward collectively. Examples of both flexibility and regulatory innovation exist across agreement models and critical legal issue areas, including agriculture and food security, IP, and digital regulation. Of course, this piece has just scratched the surface, and greater research and understanding is needed across IEL and domestic economic law and regulation. Also needed are better tools for measuring the social and economic impact of changes in the rules and options for applying flexibilities in practice. This needs to be a global dialogue, but the world has a lot to learn from the flexibilities and innovations that are already emerging in Africa and elsewhere.

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