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TWAIL, TRANSFORMATION, THE NATIONAL JUDGE, ACADEMIC AND MUNICIPAL LAWYER

*Judge Joel M. Ngugi**

First, an apology. The word "keynote" connotes something serious or substantial or at least some important content to convey. To avoid an anti-climax, let me confirm that there is nothing key about my presentation. Further, I have no substantial paper or notes to give you – so keynote is a misnomer. Keynote is what Prof. Antony Anghie gave us at the first TWAIL Conference in 1997[1] when I was a first year LLM Student and Prof. Gathii's junior (who was in his final year of doctoral studies) and whose other name was "Radical Deconstructivist." Prof. Celestine Nyamu (also a doctoral student), was there too. She sat quietly on the front row every so often eye-brows raised in enlightened absorption of erudition. I remember that this 1997 conference, she turned back to shush me as I whispered to my classmate (Dr.) Zachary Lomo that we really must rethink the term "liberal." Before asking if she would be permitted to make an intervention, she truly looked like Thoth – the Egyptian God of knowledge and wisdom. I can only disclose this now: in part because I have an armed guard!

The second apology I should probably make is that when I got the invitation to speak, I did not ask Prof. Gathii whether I am expected to give a "doctrinal" paper – you know the kind that defines TWAIL and re-traces its history with 240 footnotes[2] for the twentieth time to people who already know it! I did not ask the question because, frankly, I did not want to do that arduous work. So, if you expected that, you will be sorely disappointed.

I understood my task (or rather, I persuaded myself) that my task was to simply offer some thoughts about TWAIL in a Third World Municipal setting.

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* Judge of the Court of Appeal in Kenya. Judge Ngugi holds his LLB degree (1996) from the University of Nairobi and his LLM (1999) and SJD (2002) from Harvard Law School. Judge Ngugi identifies as a Card-Carrying TWAILer. These remarks were delivered on the occasion of the inaugural TWAIL Convocation for Kenyan Students and Law Teachers at Strathmore Law School on 7th September, 2023.

1 Antony Anghie, Remarks at the First TWAIL Conference Held at Harvard Law School (Mar. 1997).

2 *See, e.g.,* James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography,* 3(1) TRADE L. & DEV. 26 (2011).

Just so that we are on the same page, let's make sure we all understand that I am using Third World as an intellectual concept not a geographical or teleological marker. As Prof. Balakrishnan Rajagopal said: *"Third World as a concept is not inflexibly moored to a fixed and unchanging geography."*[3] Or as Karin Michelson reminded us "Third World is a chorus of voices".[4] Upendra Baxi similarly recalls that *"there are geographies of injustice."*[5] Hence, there can be a "South" within the "North," and a "North" within the "South".

Let's also make sure that we all understand that I am using "municipal" to locate our discourse at the national level but in a dialectical or even pragmatic conversation with international legal discourses. Very shortly, you will see why this is important for my conceptualization. I must say that I hesitated to use to use the word "conceptualization" because it heightens the audience's expectations!

Now, let's start with what I believe is not a controversial statement to this audience, although it could probably cause me a lot of problems in the audience of learned judges I just left in Mombasa. *Historically, the Third World has viewed International Law as a hegemonic regime and discourse of domination and subordination and not of resistance and liberation.*

Now, while I have your attention, I might as well say this. *Historically, women and other marginalized peoples, including people from my home county of Kajiado, have viewed national laws and legal discourses as regimes and discourses of domination and subordination not resistance and liberation.* See what I did there?

One of the things I will be urging you to do today is to see the parallels between TWAIL and local emancipatory discourses; and to know that you can practice TWAIL by engaging in those discourses. So, unlike Jesus who scared that guy that the only way to follow him was to sell all his belongings, give his money to the poor and assume Jesus' spartan and peripatetic life,[6] TWAIL, like human rights, can be

3 Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World Social Movements, and the Expansion of International Institutions,* 41 HARV. INT'L L. J. 529 (2000).

4 Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourses,* 16(2) WIS. INT'L L. REV. 353 (1998).

5 Upendra Baxi, *Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law,* 23 IND. J. GLOB. LEGAL STUD. 15 (2016).

6 *Luke* 18:22 (NIV).

practiced everywhere and in any form: in the small places and in the big cities; by big guns like Prof. Gathii; and by determined starters like Miracle Mudeyi, the 4th Year Law Student at the University of Nairobi, and now a recent graduate.

Just for doctrinal purposes, let us recall the basic objectives of TWAIL so laconically and beautifully given by Makau wa Mutua in 2000[7]:

> *The First objective of TWAIL is to understand, deconstruct, and unpack the use of International Law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.*
>
> *The Second objective is to construct and present an alternative normative legal edifice for international governance.*
>
> *The Third objective is, through scholarship, policy, politics, and even maandamano, [protests], to eradicate the conditions of underdevelopment in the Third World.*
>
> *The Fourth: to relentlessly question and undermine conceptual meta-narratives of international law for the reasons that TWAIL finds them to be products of hegemonic discourses. I added this one.*

Now, I must say this even though I know Prof. Gathii might not fully agree: TWAIL was, to a very large extent, influenced by and benefitted from NAIL (New Approaches to International Law).[8] The intellectual method is what unites TWAIL and NAIL. What separates us are the first three functional objectives I have stated above. NAIL, as a project, could be undertaken by an astute intellectual who did not have or care for any political project. Just like algebra or calculus, if you are bright, you can do it – but it does not define your politics or ethics. TWAIL rejected this idea – and we would use some impolite words after the sixth glass of wine to describe what this pursuit of deconstruction for intellectual aesthetics seemed to us. Of course, NAIL also, in spite of itself, sought to offer a conceptual metanarrative of being critical. And, as I said before, TWAIL is definitionally suspicious of conceptual meta-narratives.

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7 Makau W. Mutua, *What Is TWAIL?,* 94 PROC. OF THE ASIL ANN. MEETING 31 (2000).

8 *See* Gathii, *supra* note 2, at 28.

Talking of the first objective as I have stated it, I must confess that I have been strident in my statement of it. That stridency reflects my particular approach to TWAIL. It is important to acknowledge that there is much internal diversity and rich variegation within TWAIL – and so, it is not a monolith.[9]

This is a result of where different TWAILers place their emphasis and focus: Some are socialists; some emphasize opposition more than others; some stress reconstruction more than others; some stress feminism more than others; some emphasis praxis more than others. So, it is, as Prof. Obi Okafor says, *a fragmented unity!*[10]

But, as Prof. Gathii (and his newly minted PhD Student, formerly of Strathmore Law School before he got radicalized, Dr. Harrison Mbori) have pugnaciously insisted, all these flavours of TWAIL can be divided into two: Contributionism (or Moderate) Strand and the Critical (or Radical) Strand.[11]

The Contributionist strand emphasizes the Global South's contributions to international law, on the one hand, and Critical Theorists examine the Global South's subordination in its international relations as a legacy that is traceable to international law, on the other.[12]

The Contributionist strand tends to be more moderate, perhaps, benign. On history and origins of international law, for example, Contributionists insist that international law is the product of a number of civilizations – including Africa - rather than the sole product of European civilization. Contributionism emphasizes, for example, that Africa is "an innovator and generator" of norms of international law.[13] Think of the late Judge T. O. Elias here.

9 *See* Karin Mickelson, *Taking Stock of TWAIL Histories,* 10(4) INT'L CMTY. L. REV. 355 (2008) (referring specifically to the TWAIL Vision Statement).

10 Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?,* 10 INT'L CMTY. L. REV. 371, 375 (2008).

11 *See, e.g.,* James Thuo Gathii, *Africa and the History of International Law* (Alb. L. Sch. Legal Stud. Rsch. Paper, No. 48, 2011-2012), https://ssrn.com/abstract=2029019; *see also* Harrison Otieno Mbori & James Thuo Gathii, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue,* 24 J. WORLD INV. & TRADE 535, 553 (2023); see also Olabisi D. Akinkugbe, *Africanization and the Development of International Investment Law,* 53 CASE W. RES. J. INT'L L. 7 (2021).

12 *See generally* Gathii, *supra* note 11; Akinkugbe, *supra* note 11.

13 Gathii, *supra* note 11, at 1; *see generally* TASLIM OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW (Manchester University Press, 1st ed. 1956).

On the other hand, the Critical Theorists (or radical Strand) focus on the manner in which modern international law continues the legacy of colonial disempowerment while providing spaces for resistance and reform. For critical theorists, a central question for them is how to "defang international law of its imperialist and exploitative biases against the Global South" in general.[14] Think of Prof. Gathii; Prof. Makau wa Mutua; Prof. Anghie; Prof. Obiora Okafor here.

So, we now know something about TWAIL. And we know it is complex. And variegated. Critiques of TWAIL identify this is the first major flaw of TWAIL: that it has no unifying conceptual theory.[15] We say that this is TWAIL's first major strength: that it resists hegemonic metanarrative.

But we also know that one of the insights of the Critical Strand of TWAIL is that international law was produced during the encounter between the Western world with the Colonial "Other"; and that colonialism is a central not peripheral concern of international law.[16] These historical insights yield the further contemporary insight that the colonial pedigree of international law persists in contemporary discourses of international law and its enduring project of governing and transforming non-European Peoples. Given these insights, and given the enduring colonial legacy in the production of contemporary norms and doctrines, then, can a TWAILer be a judge or a lawyer in a State Court in the "Third World" without betraying her TWAIL colours and values? If so, are there any intrinsic insights, values, or approaches to the law and the cases she handling that she brings from TWAIL? If the answer is in the affirmative, should the law teachers in universities in Kenya, then, not take TWAIL a lot more seriously – especially those whose vision is to "be the region's hub of change agents"[17]?

As I pointed out above TWAIL is, above all, an approach to law that is committed to seeing the oft-unseen violence, oppression and social injustice that is occasioned on certain groups of people in the "Third World" through the operation of the law. Much of this law -- which oppresses rather than emancipates; whose doctrines hurt rather than heal; and whose rules dispossess rather than empower – has its origins in the

14 *See* Gathii, *supra* note 11, at 2.

15 *See* Naz Khatoon Modirzadeh, *"Let's All Agree to Die a Little": TWAIL's Unfulfilled Promise,* 65(1) HARV. INT'L L. J. 80 (2023).

16 ANTONY ANGHIE, *Finding the Peripheries: Colonialism in Nineteenth Century International Law, in* IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 32 (2005).

17 Strathmore University Law School, *Vision,* https://law.strathmore.edu/about-us/ (last visited Dec. 10, 2024).

imperial DNA of international law and its mode of diffusion globally. A TWAILer Judge or lawyer armed with this acute awareness and committed to uncovering the colonial origins of the various doctrines of law as well as the theory of the adjudicatory process is better able to see the systemic ways in which the law operates to disadvantage certain groups while masking its violence and oppression through neutral-seeming rules, doctrines and practices. Most of these rules, doctrines and practices are sanitized and given legitimacy through judicial imprimatur. It takes an aware judge and lawyer to see the unseen operation of law; hear the unheard, the unsaid or even the un-utterable perspective; and re-conceptualize the case she is handling in a way which simultaneously does substantive justice to the parties while remaining rooted in a theory of thorough-going change aimed at uprooting the colonial origins of international (and national) law.

Now, I hope to spend the rest of my time demonstrating that this ambitious project is possible. It is possible through commitment to the four things that, I believe, TWAIL teaches us about law and lawyering:

> ***First,*** through a commitment to a historical analysis of law;
>
> ***Second,*** through a commitment to uncovering the material interests of groups in the society;
>
> ***Third,*** through a commitment to pluralism in the law – the complex pathways to justice – and eschewing the colonial efforts to bring everything within the gaze of state-sponsored norms and legal system: in other words, prioritizing, where the first two commitments permit, people-centred justice systems; and
>
> ***Four:*** through a commitment to the idea that law exists to lead to societal transformation not to preserve existing patterns of subordination; oppression and equality. Law must, by definition, be transformative because law cannot be, by definition, neutral. We can spend the whole day on this one, so I will just leave it there for a future conference. In my view, this means that a TWAILer must be engaged in an explicit political project: political in the sense of improving the material conditions of the subordinated; the oppressed; the voiceless; the un-seen; the unheard. To restate, a TWAILer cannot be agnostic about the plight of the oppressed and subordinated peoples!

These are the four commitments of a TWAIL lawyer, academic or judge!

These four commitments are my reading of the various political and scholarly projects of TWAILers. In my view, they completely annihilate the second major critique of TWAIL: that it exists to critique for the sake of it.[18] Recall I said that that is, in fact, the major point of departure between NAIL and TWAIL: TWAIL is committed to particular scholarly and political projects both at the international and national levels. I must admit that some TWAILers might find this problematic. But we are a big tent. In my view, though, the lived realities of too many peoples in the Global South do not permit us to engage in critique for mere theoretical stimulation or academic aesthetics: that would be a betrayal of their voices; their needs; their blood; their sweat; their language. I firmly believe that if one claims to speak for a people or with a people, she must care about their lived realities and material conditions: one cannot be agnostic about it.

Now, I already stated that one of the central tenets and insights of TWAIL is that *the Third World is unavoidably constitutive of international law. International Law is made at the frontiers of the encounter between the Third World (the Other) and the Empire.*

Let me add another often-ignored insight – verbalized at least since 1904 by Prof. Robert Lee Hale but never taught to students at Strathmore Law School: *The State is unavoidably constitutive of the market.*[19]

The parallel should be obvious: As International Law is unavoidably constituted and remade in its encounter with the Third World; the market is constituted and remade by the State.

It is important to say that this is neither a conservative nor a progressive statement. It is just a statement of fact. This means that it can be deployed for oppressive and conservative purposes or for emancipatory purposes.

TWAIL is about disarming the oppressive dominance of neoliberal legal and social thought at both the national and international spaces/discourses. Dominant international law naturalizes and preserves power imbalances in the international order and masks the dominance by allowing critiques at the margins as a safety valve to prevent radical transformation in its doctrines and discourses.

18 *See generally* Naz, *supra* note 15.

19 Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38(3) POL. SCI. Q. 470 (1923).

I would like to suggest three ways in which TWAIL can play the emancipatory role in today's world of *ius gentium* – where international law in some form permeates the regulatory and governance affairs of the very mundane and quotidian affairs of a nation and thereby help in "defanging international law of its imperialist and exploitative biases against the Global South."

First, there is the everyday production of what I call "Global Law" – a seemingly "universal" logic on governance, regulations and the appropriate relationship between the public and private law: there is now a serious contest on the way for the social conception of the trinity of property; torts; and contracts. TWAIL can become the regulatory technology or discourse for defanging the malevolent neoliberalism and illiberalism that can be born either of excessive sovereign nativity syndrome or excessive and unsuspicious borrowing of the "Global Law". Think for example of Private Public Partnerships frameworks or the current regimes of sovereign debt.

Second, TWAIL can also become the tool for deracinating the emerging standards of common decency in human rights by infusing critical thought in decolonizing Human Rights. For example, African jurisprudence has been pivotal in redefining the human rights contours of the death penalty as well as sexual and reproductive rights at a time when the US is rolling back gains in both.[20] Basically, TWAIL is improving, updating and even radicalizing the content of human rights – thoroughly decolonizing it and humanizing it in the process.

Third, TWAIL can become the conceptual technology upon which we can build grassroots' coalitions which can then be used to rebuild more legitimate and people-centred states in the Global South – which might ultimately lead to a coalition of Global South States. When that happens, the end of globally-entrenched inequality, oppression and subordination would be at its end. This is, by the way, the response to the third major critique of TWAIL: that it is ambivalent towards the State in the Global South. Yes, TWAIL is, in the main, ambivalent towards the State in the Global South *as presently constituted.*[21] This is because the State as presently constituted is largely illegitimate due to its complicity in continuing its participation in the international order of subordination. However, TWAIL does imagine re-constitution

20 *Compare, e.g.,* PAK v. Attorney General, 262 K.L.R. 1 (H.C.K.) (Kenya) (finding that the Kenyan Constitution has guarantees for abortion in certain circumstances) *and* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (overturning Roe v. Wade finding the right to abortion was not implicitly protected by the United States Constitution). Both decisions were issued in 2022.

of both the State and its citizens in an organic, thorough-going way which would re-create individual states in the image of true equality, freedom and non-subordination. I say more on this at the end.

In all these three instances, TWAIL can be used as a technology to remake international law at the frontier of national law and then re-export a better version of it through the mechanism of Global and Human Rights Law, and, in the last instance, coalition-building.

In these broad projects the two parallel insights: that international law was historically constituted in its unavoidable encounter with the Third World and that the state is unavoidably constitutive of the market – become important starting points for framing legal concepts that aim to challenge the law's tendency to naturalize inequality, suppression and subordination of some people as their accepted lived realities.

Here are specific examples where this is already happening:

- South-South Judicial Dialogues and borrowings which are producing a distinct new School of Constitutional Thought which we can call Transformative Constitutional Thought.[22]
- The discourse and litigation on sovereign odious debt and financial governance litigation.
- Climate change litigation and activism.
- Transnational employment law.
- The expression of sovereignty through public and citizen participation as a juristic thought applied in specific contexts to resist hegemonic state actions.

Ladies and Gentlemen, as I end, you would recall that I talked about the four commitments of a TWAILer? I wish to relate to them here by telling you what it means to be a TWAILer. It means at least three things:

> ***First:*** one must have political commitment to end all forms of oppression in our individual spaces; capacities; scholarship; intellectual thought and professional

21 *See generally* OBIORA CHINEDU OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA (The Hague: Martinus Nijhoff Publishers, 1st ed. 2000).

22 *See* Willy Mutunga, *Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?,* 8(2) TRANSNAT'L HUM. RTS. REV. 30 (2021).

work. It is not enough to be critical; it is even worse to be just academic or erudite. If you do know the answer to the question: what is your ultimate theory of change, you are NOT a TWAILer. And neither are you Christian. Or Muslim. Or Hindu. Or a real Lawyer. I am sorry: but even Jesus whipped some fellows in the temple.[23]

Second: one must be pathologically optimistic that law has emancipatory potential to transform. Now, people who tend towards TWAIL tend to look at "black-letter law" contemptuously. So, let me be clear that law must be conceived at four levels:

- The Doctrinal (the black letter or the rules);
- The Pragmatic (the practical or the application of the rules to the facts);
- The Theoretical (the philosophy that coheres or questions the doctrinal and the pragmatic: a theory is a set of general statements that aim at justifying or falsifying some discrete legal phenomena);
- The Meta-theoretical (the theory- concerned with an analysis of theory itself: where the context and meanings are produced).

Third: one must be courageous and bold. The work of liberty, freedom and Social Transformation is not for the faint-hearted because none of these things will be willingly given by those benefiting from our unequal society.

How can you be all these three things? Simple. By sustaining the four commitments I talked about earlier:

First, a commitment to a historical analysis of law;

Second, a commitment to uncovering the material interests of groups in the society; and

Third, a commitment to pluralism in the law and people-centered justice.

Fourth: a commitment to using law as a political project to address substantive justice questions of an oppressed or subordinated group.

23 *John* 2:15–17 (NIV).

So: what kind of practical TWAIL Projects can one be involved in in Kenya? I think the TWAIL repertoire can be used to:

- Expose the remnants of Colonial law and its continued application to Kenya:
  - Anti-poverty laws
  - Anti-dissident laws
  - Anti-customary law doctrines
  - Anti-liberty laws e.g. sodomy laws
- Clarify how the state is unavoidably constitutive of the market and how the myth of state neutrality in the market serves foreign powers and their local compradors. It is important to distinguish between limited government and limited state. Our Transformative Constitution, for example, has no conception of limited state. Instead, it permits the state to do all in its power to transform the society. But it limits how the government can do it. Differently put, our Constitution limits the government but not the state.
- Expose how state capture happens and the role of transnational law in the capture.
- Start teaching TWAIL in your Law School AS the MAIN Public International Law Course NOT as the "alternative perspective." While at it, infuse TWAIL thinking in all the courses you teach.
- Build a grassroots coalition to protect Kenya's Transformative Constitution.

Let me end with this: Why is grassroots' coalition-building important? Because that is part of rebuilding a substantively legitimate state in Kenya which will, ultimately, have the capacity to be a TWAIL-state. A TWAIL-state is one which organically subsumes the four TWAIL commitments I spoke about because its institutions are peopled by TWAILers. That means a TWAIL state will be committed to ending all subordination; inequality; state-induced poverty; corruption; and oppression. Imagine if all states in the Global South became TWAIL-states? Then all states in the Global South would use law transformatively: to resist hegemonic international discourses that harm their people; to remove markers of subordination and oppression among their own people; to build truly free, people-centered societies and institutions. Ladies and Gentlemen: Is that not the definition of heaven found in the Bible? TWAIL can ultimately deliver that. That is my meta-theory of change. Come, we TWAIL together!

Thank you for your kind attention. Apologies for taking too much of your time. And for annoying some of you.

International Economic Law in an Era of Multiple Crises:

Opportunities and Challenges for Africa

Titilayo Adebola, Regis Y Simo, Suzzie Onyeka Oyakhire, Tsotang Tsietsi, Harrison Mbori, Ashimizo Afadameh-Adeyemi*

Abstract

This Special Issue on 'International Economic Law in an Era of Multiple Crises: Opportunities and Challenges for Africa' is based on selected papers presented at the Sixth Biennial Conference of the African International Economic Law Network ("AfIELN") hosted by the Ghana Institute of Management and Public Administration's ("GIMPA") Faculty of Law in Accra, Ghana, in June 2023. In this introduction, we set the background for the contemporary issues discussed in the conference. The issue comprises the Keynote Address, two reflections on the Keynote Address and six full-length articles.

1. Introduction

The Sixth Biennial Conference of the African International Economic Law Network ("AfIELN"), hosted by the Ghana Institute of Management and Public Administration's ("GIMPA") Faculty of Law in June 2023, materially contributes to the discourse on international economic law ("IEL") through the lens of Africa. This special issue of the *African Journal of International Economic Law* features selected papers from the conference, each offering a critical examination of IEL. The introduction highlights three contemporary subject matters through which Africa can capitalise on opportunities and confront the challenges it faces: the African Continental Free Trade Area ("AfCFTA"), sovereign debt, and climate governance.

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These opportunities and challenges are examined in the context of Africa's aspirations under the African Union's Agenda 2063, a master plan for transforming the continent into a global powerhouse of sustainable and inclusive development.[1]

The AfCFTA is arguably one of Africa's most transformative trade initiatives; it aims to break new ground by creating a single continental market for goods and services across the continent. Its primary promise lies in enhancing intra-African trade, which currently stands at about 16 percent, by reducing tariff and non-tariff barriers to trade in goods, liberalising trade in services, and harmonising fragmented regulatory frameworks. This is expected to foster economic diversification, promote regional value chains, and increase foreign direct investment ("FDI").[4]

The AfCFTA offers a platform for regional industrialisation, as it aims to reduce Africa's reliance on the export of raw materials and support value-added production instead. However, despite its ambitious scope, the AfCFTA faces significant challenges.[5] These challenges include infrastructure limitations, such as transportation and digital connectivity, which hamper the efficient movement of people, goods, and services across borders. Additionally, incomplete continental legal frameworks and uncertainties around dispute settlement,[6] including the investor-state dispute settlement system, further complicate the implementation of the AfCFTA Protocols.[7] For the AfCFTA to achieve its full potential (beyond the political will, finances, institutional capacity, and continental cooperation required), African countries must invest in infrastructural developments to ensure smoother trade flows. Sovereign debt remains a thorn for

1 African Union Commission, *Agenda 2063 Framework Document—The Africa We Want* (2015), https://au.int/en/agenda2063/overview.

2 Agreement Establishing the African Continental Free Trade Area art. 3, May 30, 2019, 58 I.L.M. 1028, 1032 (hereinafter AfCFTA Agreement); African Continental Free Trade Area (AfCFTA), *About the AfCFTA*, https://au-afcfta.org/about/ (last visited Nov. 10, 2024).

3 AfCFTA Agreement, *supra* note 2, arts. 3, 4; *see also* James Gathii, *Agreement Establishing the African Continental Free Trade Area*, 58 Int'l Legal Materials 1028 (2019).

4 Chidebe M. Nwankwo & Collins C. Ajibo, *Liberalizing Regional Trade Regimes Through AfCFTA: Challenges and Opportunities*, 64 J. Afr. L. 297, 312 (2020).

5 Olabisi Akinkugbe, *Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment*, 28 Afr. J. Int'l & Comparative L. 138 (2020); Regis Y. Simo, *Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility*, 23 J. Int'l Econ. L. 65 (2020).

6 *See e.g.,* Regis Y Simo, *Non-Exclusivity and an Ocean of Possibilities: The AfCFTA Jurisdictional Lex Specialis*, 2 Transnational Disp. Mgmt. 1 (2023).

7 The AfCFTA Protocols include the following: Protocol on Trade in Goods, Protocol on Trade in Services, Protocol on Dispute Settlement Mechanism, Protocol on Intellectual Property Rights, Protocol on Investment, Protocol on Competition Policy, Protocol on Women and Youth in Trade, Protocol on Digital Trade.

many African countries as they grapple with unsustainable debt burdens, exacerbated by the continent's reliance on external financing and vulnerability to global economic shocks.[8]

This underscores the need for a reformed international debt and financial architecture that is more equitable and adaptable to Africa's economic realities.[9] While Africa, with its 55 countries and 1.3 billion people, represents an important and growing constituency in the global economy, its voice has been underrepresented in debt negotiations, often leaving the continent sidelined in discussions that shape international financial frameworks and determine the terms of debt restructuring. Accordingly, Africa must push for more equitable debt restructuring mechanisms that prioritise its long-term development goals and reduce the burden of debt servicing. Innovative financing solutions also present opportunities to align Africa's financing needs with its development goals.[10] In *Transforming Climate Finance in an Era of Sovereign Debt Distress,* James Gathii, Adebayo Majekolagbe, and Nona Tamale argue that "unless climate finance is fundamentally transformed, its growing number of instruments and initiatives will entrench the sovereign debt crisis while failing to resolve the ecological crisis that many countries are already experiencing."[11]

Relatedly, climate governance is another pivotal subject for Africa, as the continent faces some of the most severe impacts of climate change, despite contributing less than 4 percent of global greenhouse gas emissions.[12] Africa is experiencing severe environmental challenges, including biodiversity loss, pest infestations, desertification, rising sea levels, and increasingly frequent droughts.[13] These impacts threaten core

8 *See* African Sovereign Debt Justice Network, Afronomicslaw https://www.afronomicslaw.org/category/afsdjn (last visited Nov. 10, 2024) (for comprehensive analysis and news updates of the African Sovereign Debt Justice Network); *see also*, Danny Bradlow, *Africa's debt crisis needs a bold new approach. Here's what countries can do*, World Econ. Forum (Feb. 28, 2024) https://www.weforum.org/stories/2024/02/africa-debt-crisis-new-approach/.

9 James T. Gathii, *How to Reform the Global Debt and Financial Architecture* (2023).

10 James T. Gathii, Adebayo Majekolagbe, et al., *Transforming Climate Finance in an Era of Sovereign Debt Distress* (2023).

11 *Ibid.*

12 United Nations, *Africa is Particularly Vulnerable to the Expected Impacts of Global Warming*, U.N. Climate Change Conference (2006), https://unfccc.int/files/press/backgrounders/application/pdf/factsheet_africa.pdf.

13 Gebremedhin Gebremeskel Haile, Quihong Tang, et al., *Projected Impacts of Climate Change on Drought Patterns Over East Africa*, 8 Earth's Future 1 (2020); Abubakr A M Salih, Marta Baraibar, et al., *Climate Change and Locust Outbreak in East Africa*, 10 Nature Climate Change 584 (2020); Titilayo Adebola & Chika Charles Aniekwe, *The Lake Chad Basin Region: Conflicts, Crises and Contemporary Developments*, Univ. Aberdeen Sch. L. Blog (Aug. 26, 2022), https://www.abdn.ac.uk/law/blog/the-lake-chad-basin-region-conflicts-crises-and-contemporary-developments/.

sectors, such as food and agriculture, which are vital to the livelihoods of millions of Africans. Through continental collaboration and concerted approaches, Africa can place itself at the forefront of global conversations on climate justice, including by actively advocating for transparency in sovereign debt instruments and the scaling up of finance for climate adaptation and mitigation.[14] The continent's rich renewable energy resources, particularly solar, wind, and hydroelectric power, offer significant potential for a sustainable energy transition that could drive socio-economic growth and development.[15]

Beyond these tripartite opportunities and challenges, Africa's engagement with international economic governance institutions, such as the World Bank and the World Trade Organisation ("WTO"), continues to be marked by systemic inequalities. Despite some progress in representation, Africa remains marginalised in decision-making processes, with limited power to influence outcomes that directly affect its economies. This lack of meaningful representation in key global institutions often results in trade and investment agreements that disproportionately benefit the Global North, thus undermining Africa's development priorities. As Africa continues to confront the challenges of economic vulnerability, including commodity price fluctuations and the ongoing impacts of geopolitical tensions, the need for reforming IEL to promote inclusive growth and sustainability has never been more urgent. Strengthening economic resilience requires reforming IEL frameworks to ensure they prioritise Africa's long-term development goals, address its structural vulnerabilities, and foster greater integration into the global economy.

14 Lukoye Atwoli, Gregory E. Erhabor, et al., *COP27 Climate Change Conference: urgent action needed for Africa and the world*, 23 The Lancet Oncology 19 (2022); Lukoye Atwoli, Gregory E. Erhabor, et al., *COP27 Climate Change Conference: urgent action needed for Africa and the world: Wealthy nations must step up support for Africa and vulnerable countries in addressing past, present and future impacts of climate change*, 30 Int'l J. Pharmacy Prac. 492 (2022); Festus Fatai Adedoyin, Festus Victor Bekun, et al., *Glasgow Climate Change Conference (COP26) and Its Implications in sub-Saharan Africa Economies*, 206 Renewable Energy 214 (2023); African Sovereign Debt Justice Network, *Statement of the African Sovereign Debt Justice Network (AfSDJN) on the Occasion of the 28th Meeting of the Conference of Parties to the United Nations Framework Convention on Climate Change (COP28)*, Afronomicslaw (Nov. 20, 2023), https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/statement-african-sovereign-debt-justice; James Thuo Gathii, *Afronomicslaw Press Release: Wanjiru Gikonyo and Afronomicslaw File East Africa Court of Justice Case Against Kenya Seeking Transparency on Debt Swaps*, Afronomicslaw (July 2, 2024), https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/afronomicslaw-press-release-wanjiru-gikonyo.

15 I.D. Ibrahim, Y. Haman, et al., *A review on Africa energy supply through renewable energy production: Nigeria, Cameroon, Ghana and South Africa as a case study*, 38 Energy Strategy R. 1 (2021).

2. Conference Special Issue Papers

This special issue consists of six articles. The first article in the special issue is written by Kathleen Mpofu. This paper focuses on the ongoing reforms of international investment law and addresses the viability of investor liability provisions as a missing threat in the current talks.[16] Mpofu argues that the reforms undertaken by UNCITRAL Working Group III fall short of the required expectations. Indeed, by focusing on procedural aspects of the investor-state dispute settlement system ("ISDS"), Mpofu argues that it legitimises the current system that prioritises the protection of foreign investors to the exclusion of other stakeholders. According to Mpofu, there is a danger of perpetuating the inequality and unfairness inherent to the existing system if the potential negative impacts of investments that affect local and Indigenous communities and how to address those are not tackled. Mpofu offers solutions on how these reforms can be better inclusive in holding investors accountable for adverse conduct, including to what extent such an approach should be incorporated in the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area ("AfCFTA").

The second article by Atupele Masanjala tackles the topic of cotton trade reform negotiations as a controversial issue at the World Trade Organisation ("WTO"), notably the associated export subsidies that are provided by developed countries.[17] The paper discusses the role played by the so-called "Cotton-4" countries ("C-4") (Benin, Burkina Faso, Chad and Mali) in initiating and driving that reform and the potential benefits for other African countries engaging in the international cotton trade, notably Malawi. Masanjala begins her paper by tracing the evolution of the cotton issue in the WTO before embarking on the Malawian case study, where she evaluates the extent to which the cotton industry has used the campaign against export subsidies.

The next article by Chido Muza focuses on emerging technologies in trade, notably blockchain technology. The paper explores the potential of this technology for secured payments in international commercial transactions.[18] She focuses on the unique characteristics of blockchain, such as transparency, immutability, and decentralisation and argues that the existing problems of trust, security, and efficiency associated with traditional global payment systems (such as letters of credit) have found a solution

16 Kathleen Mpofu, *Assessing the Viability of Investor Liability Provisions in the Reform Agenda of International Investment Law* (6th Biennial Conf. Afr. Int'l Econ. L. Network, 2023).

17 Atupele Masanjala, *Malawi's Cotton Trade: Riding the Coattails of the Cotton-4* (6th Biennial Conf. Afr. Int'l Econ. L. Network, 2023).

18 Chido Teclar Mitchel Muza, *Unlocking the Potential of Blockchain Technology for Secured Payments in International Commercial Transactions* (6th Biennial Conf. Afr. Int'l Econ. L. Network, 2023).

with this tool. However, she also points out some drawbacks that the adoption of this technology may also pose, including its relative immaturity, the problems of jurisdiction when disputes arise, and the data protection challenges.

In the following paper, Mbakiso Magwape tackles the fiscal challenges associated with revenue losses resulting from tariff liberalisation under the AfCFTA.[19] He argues that while domestic revenue mobilisation is a priority to attain AU Agenda 2063 and to improve the standard of living and quality of life for Africans, domestic taxes are one of the most sustainable financing methods African countries leverage for development. Since taxes run parallel with trade and economic rules and play a critical part in integration, particularly on issues such as investor rights and revenue mobilisation for the government, Magwape argues that the AfCFTA project can play a significant role in facilitating harmonisation that addresses base erosion and profit shifting, and common approaches that increase domestic tax collection and revenue.

Focusing on the decolonisation of international economic law pedagogy, Suzzie Onyeka Oyakhire and Ohiocheoya Omiunu reflect on their experiences as Global South teachers of IEL while situated on the opposite sides of the North-South divide.[20] They seek to fill the gap in the decolonisation of international economic law pedagogy scholarship by exploring the comparative perspectives and experiences of Global South scholars who teach IEL at Nigerian and UK universities. From these personal reflective teaching experiences, Oyakhire and Omiunu highlight the benefits of networks such as the African International Law Network (AfIELN), Afronomicslaw, TWAIL, and the IEL Collective as instrumental in their critical approaches to teaching IEL in a context characterised by eurocentrism.

Completing the decolonisation topic and concluding the special issue is a paper by John Nyanje on using Swahili to decolonise the East African Court of Justice ("EACJ").[21] Nyanje underscores the importance of language as a means of communication in regional courts and argues in favour of making Swahili not only an official and working language of the EACJ, but also its dominant language. Nyanje argues that the citizens of the East African Community live in a colonial continuity that makes Swahili appear

19 Mbakiso Magwape, *AfCFTA and Revenue: Navigating Outstanding Fiscal Issues and Legal Framework to attain Agenda 2063* (6th Biennial Conf. Afr. Int'l Econ. L. Network, 2023).

20 Suzzie Onyeka Oyakhire & Ohiocheoya Omiunu, *Decolonising the Teaching of International Economic Law (IEL): A Critical Reflection of Two Global South Scholars Situated on Either Side of The North-South Divide* (6th Biennial Conf. Afr. Int'l Econ. L. Network, 2023).

21 John S. Nyanje, *Swahilinisation' of the East African Court of Justice: Decolonising Through Language* (6th Biennial Conf. Afr. Int'l Econ. L. Network, 2023).

unsuitable for use in the Court. The reform Nyanje proposes will liberate them from the shackles of colonialism that continue to oppress them and ultimately strengthen access to justice in East Africa.

3. CONCLUSION. BEYOND CHALLENGES: CHARTING OPPORTUNITIES FOR IEL FROM AFRICAN PERSPECTIVES

As the continent works to realise the aspirations of Agenda 2063, a proactive and collaborative approach to IEL would be essential for achieving sustainable development and ensuring Africa's equitable participation in the global economy. While the AfCFTA provides an ambitious step in the right direction, its eight Regional Economic Communities ("RECs"): the Arab Maghreb Union, Common Market for Eastern and Southern Africa, Community of Sahel-Saharan States, East African Community, Economic Community of Central African States, Economic Community of West African States, Intergovernmental Authority on Development and the Southern African Development Community must also play their vital roles in advancing Africa's socio-economic goals. This Special Issue underscores the importance of amplifying African voices in global economic governance and fostering scholarship that bridges theory and practice. The insights offered by these papers are a testament to Africa's capacity to turn challenges into transformative opportunities for the benefit of its people and the global economic order.

Moving forward, twin interconnected avenues for building proactive and collaborative approaches to IEL are suggested. First, translating IEL research into law, policy and practice. While African academics have produced extensive research on the continent's engagement with IEL, much of this knowledge remains confined to academic discourse, limiting its impact on law/policy making.[22] For instance, AfIELN has markedly contributed to promoting IEL scholarship from African perspectives, having already hosted six conferences and published articles on all core IEL subjects. However, real gaps exist between the robust existing body of research and its practical application in law, policy and practice. For Africa to maximise its opportunities, a structured approach must be adopted to translate research into law/policy-making and practice. By fostering stronger linkages, academics can work with law/policymakers to translate academic insights into laws, policies and programs.

22 *See e.g.*, African Sovereign Debt Justice Network, Afronomicslaw, https://www.afronomicslaw.org/category/afsdjn (last visited Nov. 10, 2024) (for publications on Afronomicslaw.org and the African Journal of International Economic Law).

Second, multi-stakeholder collaboration can constructively promote opportunities and address challenges in IEL in Africa. Key multilateral institutions, such as the African Development Bank ("AfDB"), African Export-Import Bank (Afreximbank), and the United Nations Development Programme ("UNDP"), for example, play central roles in facilitating the implementation of the AfCFTA Protocols and other Agenda 2063 programmes through financial support, technical assistance, and capacity building initiatives. Simultaneously, the private sector - from multinational corporations to small and medium enterprises - can drive investment and accelerate socio-economic growth. At the same time, civil society organisations can advocate for fair, equitable, and inclusive IEL frameworks, ensuring that marginalised voices and positions are integrated into law/policy-making and practice. Engaging with academics can provide crucial avenues for generating evidence-based and informed recommendations to anchor the activities of these actors. AfIELN remains committed to providing a platform for informed and impactful research that matters to Africa.

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International Economic Law in an Era of Multiple Crises:

Opportunities and Challenges for Africa

Keynote Address:
African International Economic Law Network 2023 Conference

Professor Richard Frimpong Oppong[*]

Introduction

I am deeply grateful to the organisers of the African International Economic Law Network's 6th Biennial Conference for inviting me to deliver this keynote address. The coming three days promise to be academically stimulating and enriching. From the programme schedule, it is evident that your presentations, questions, and contributions will traverse many diverse fields. At the same time, they demonstrate the interconnectedness of the various sub-fields of international economic law.

In this regard, the leadership of the African International Economic Law Network deserves our praise and commendation for managing this vibrant academic network, as well as for organising this Conference here in Accra. It is refreshing to see the growth and maturity of the organisation from its humble beginnings as the African branch of the Society of International Economic Law. It is also very heartening to see that scholars with an interest in African international economic law have found a natural and befitting home.

For me, personally, reconnecting with mentors, senior colleagues, and scholars from Africa and beyond has been very rewarding. This began on my flight from Amsterdam to Accra when, after many years, I met my brothers Professor Olabisi Akinkugbe and our indefatigable Conference Chairperson, Dr. Regis Simo.

I likewise acknowledge the presence of the doyen of African international economic law, Professor James T. Gathii. His invaluable advice and guidance made my transition from the Canadian to the American legal academy both smooth and less stressful. Thank you, James. I also take this opportunity to acknowledge my senior brothers,

Professors Emmanuel Laryea and Kofi Oteng Kufour. Professor Kufour's pioneering work on the institutional aspects of ECOWAS inspired my research as a doctoral student. Thank you, Prof.

Moreover, Ghana's capital, Accra, is an auspicious place to host this Conference. The Agreement establishing the African Continental Free Trade Area (AfCFTA), as the continent's flagship free trade agreement, entered into force in 2019 after Ghana became the 22nd country to ratify it. Ghana is also the location of the AfCFTA Secretariat. I hope that over the next few days, you will find time to explore this city, with its wide array of interesting sights, foods, and cultures.

Colleagues, delivering an opening keynote address to a distinguished academic audience, such as we have here, is challenging. The expectation is that the speaker will set the right tone for the Conference. This is no mean expectation, given the broad range of topics that will be discussed over the coming three days. However, the beauty of our academic lives is that we enjoy academic freedom – it is the bedrock on which our teaching and research thrive. In Ghana, academic freedom is a fundamental human right enshrined in Article 21(1)(b) of the Constitution. Indeed, I crave your indulgence to invoke the spirit of academic freedom in this address, allowing me to focus mainly, albeit not exclusively, on the AfCFTA.

My address is organised as follows: first, I will discuss two fundamental shifts in the global economy and suggest that notwithstanding these shifts, all is not doom and gloom in Africa. Second, against the background of our enthusiasm over the AfCFTA, I will invite us to use part of our scholarship to question the idealised premise of African integration and to contest the legal principles on which the current international economic order is based. Finally, I will examine a number of specific issues, including public participation, implementation, reforming the trade environment through comprehensive legal reforms, and avoiding the perpetuation of inequalities.

Fundamental Shifts, But Not All Doom and Gloom

The international economy is undergoing fundamental shifts, with countries all over the world facing momentous challenges. The countries of the African continent, including our host Ghana, have not been excluded from this economic morass. Many of you may have read that the IMF approved a US$3 billion bailout package for Ghana about a month before the start of this Conference, with the IMF noting that:

> Large external shocks in recent years have exacerbated Ghana's pre-existing fiscal and debt vulnerabilities, resulting in a loss of international market access, increasingly constrained domestic financing, and reliance on monetary financing of the government. Decreasing international reserves, Cedi depreciation, rising inflation and plummeting domestic investor confidence, eventually triggered an acute crisis.[1]

A similar story prevails elsewhere in Africa, where it is reported that currently, just over half of Africa's countries have or are negotiating a programme with the IMF. Most of the active programmes were agreed upon in 2021-22, and the IMF has currently committed approximately US$16 billion to African countries, with more to come. Egypt, Tunisia, Malawi, and Zambia have all turned to the IMF to shore up their finances.

Of course, the two large external shocks that have unravelled national economies in recent years are the Covid-19 pandemic and the Russia-Ukraine War. The effects of these two seismic events are too well-documented to be rehashed here. That said, they have exposed significant vulnerabilities in Africa, including our dependence on foreign food supplies. Some have also argued for or justified the need to prioritise Africa's regional integration project. Before the Russia-Ukraine War, the average person on the street was unlikely to be aware of the extent of their country's dependence on wheat from Russia and/or Ukraine. For example, it is reported that Benin imported all its wheat from Russia as of March 2022. Moreover, Somalia is fully reliant on wheat imports from Russia and Ukraine, with Ukrainian supplies accounting for nearly 69% of total imports of that commodity.

However, the gloom and doom wrought by these external shocks should not blind us to the remarkable initiatives and opportunities that have arisen in Africa within the same period. Notable among these are the AfCFTA and the Pan-African Payment and Settlement System (PAPSS).

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1 IMF, "Trade Integration in Africa: Unleashing the Continent's Potential in a Changing World" (IMF 2023).

As you are aware, trade under AfCFTA rules started in January 2021, with commercially meaningful trade beginning in October 2022, when seven pilot countries — Cameroon, Egypt, Ghana, Kenya, Mauritius, Rwanda, and Tunisia — started trading a set of duty-free goods under the AfCFTA 'Guided Trade Initiative'. The operationalisation of AfCFTA comes at a time when a changing global environment creates both opportunities and challenges for Africa. It has been suggested that greater trade integration could help the continent take advantage of the opportunities provided by technological change and demographic trends. Trade integration could also enhance Africa's resilience to climate change and geopolitical fragmentation in trade relations. Meanwhile, the PAPSS is a platform that facilitates instant cross-border payments in local currencies between countries. It is being promoted by the African Export-Import Bank (Afreximbank) to facilitate instant payments between African countries. Historically, the processing of cross-border payments across Africa has involved the use of SWIFT – a global network for processing international payments. However, in addition to transaction charges, SWIFT requires that transactions between two persons in different African countries be processed by conversion to US dollars. The PAPSS addresses this inefficiency by allowing a buyer in one African country to pay in their national currency, while the recipient in another African country can receive the payment automatically in the corresponding local currency.[2] It is expected to save US$5 billion yearly in cross-border payment charges and boost intra-African trade. So far, it has been piloted successfully in six countries, namely, Nigeria, the Gambia, Sierra Leone, Liberia, Ghana, and Guinea.

Equally significant is that in February 2023, the AU Assembly of Heads of State and Government adopted three new protocols to the AfCFTA: the protocols on investment, intellectual property rights, and competition policy. While none of these protocols is in force, their adoption represents the extraordinary ambitions of African governments, and that is commendable.

2 Isa Alade and others, *Disruptive Innovations or Enhancing Financial Inclusion: What Does Fintech Mean for Africa?* (2022) VANDERBILT JOURNAL OF TRANSNATIONAL LAW VOLUME 53, ISSUE. 4, 673-745

Questioning the Idealised Premise of African Integration in Legal Scholarship

Most legal scholarship on the AfCFTA and, more generally, on regional economic integration in Africa, has taken as its unchallenged premise the notion that regional economic integration is essential to Africa's future economic development. In fact, an unarticulated premise for the idealism of regional integration lies at the foundation of most of the legal scholarship on the AfCFTA. It is what one scholar has referred to as "the promise of the AfCFTA".[3] African integration and African development are seen as mutually reinforcing. Ajibo's surmise that "most contiguous countries are resorting to economic integration to reduce costs, foster efficiency, diversify consumer preferences, facilitate the expansion of businesses and stimulate industrial competitiveness; Africa cannot be an exception"[4] reflects this line of thinking.

Whether characterised as flexible legal regimes, supranational regimes, or something in between, the prior question of whether such regimes are essential to the economic growth and development of *each* African country or of Africa as a collective remains free from critical interrogation in the legal scholarship. Another prior question is whether some African countries should be excluded from economic integration initiatives, notwithstanding accommodating principles such as variable geometry, or whether these initiatives should constitute a continental project.

As noted above, the premise that African integration and African development are mutually reinforcing has generally been accepted in the legal scholarship. This has been so despite the failure of most regional economic integration agreements to live up to the lofty economic development ideals enshrined within them, and despite the efforts to embrace all African countries. It is a well-known fact that since the 1960s, several initiatives have been undertaken to enhance intra-African trade. However, substantial tariff and non-tariff barriers remain in place. Africa trades with other regions more than it does with itself. Indeed, a disturbing paradox and enigma of economic integration in Africa, on which much ink has been spent, is that regardless of having the highest concentration of regional economic communities in the world, Africa continues to be the least integrated continent.

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3 Olabisi D Akinkugbe, *A Critical Appraisal of the African Continental Free Trade Area Agreement* IN KHOLOFELO KUGLER AND FRANZISKA SUCKER, EDS, INTERNATIONAL ECONOMIC LAW FROM A (SOUTH) AFRICAN PERSPECTIVE" (SOUTH AFRICA: JUTA LAW 2021) 283, at 295.

4 Collins C Ajibo, *African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects* (2019) JOURNAL OF WORLD TRADE 871, at 894.

The AfCFTA therefore represents a renewed push for regional economic integration in Africa. Professor Akinkugbe notes:

> The AfCFTA is the latest layer of agreement in Africa's over half a century experimentation with regional economic cooperation. Historically, the AfCFTA builds on the aspirations of pan-Africanists and their visions for an economically independent Africa.[5]

Conversely, Fredrik Söderbaum has observed that:

> One weakness of previous scholarship (especially that rooted in liberal thought) is that too often regions are considered desirable and 'good'. That regionalism can solve a variety of collective action dilemmas is indisputable, but it is equally clear that it may sometimes be exploitative, reinforce asymmetric power relations or lead to a range of detrimental outcomes.[6]

In this light, I argue that the time has come for students and practitioners of African international economic law to vigorously interrogate the idealised premises of regional economic integration in Africa. Should we be more open to accepting that the pan-Africanist vision propelling the AfCFTA is neither settled nor monolithic, and that there are different understandings of this vision, as Professor Rita Abrahamsen[7] has recently demonstrated? Should we be more open to accepting that our desire to be all-embracing and accommodating of Africa's countries drags the integration project and undermines its integrity?

CONTESTING THE LEGAL PRINCIPLES ON WHICH THE CURRENT INTERNATIONAL ECONOMIC ORDER IS BASED

We should continue to be concerned about the sometimes-Eurocentric bent of our scholarship, including in our critique of and recommendations for economic integration in Africa. We can agree on the virtues of regional integration while simultaneously positing that economic integration is, or should be, tailor-made to suit Africa's specific national and regional realities and contexts. That said, the quest to 'Africanise' regional integration should not be an excuse to condone or rationalise lacklustre performance, inefficient and ineffective institutions, or the non-implementation of regional commitments.

5 Akinkugbe, *supra* note 3.

6 FREDRIK SÖDERBAUM, RETHINKING REGIONALISM (PALGRAVE MACMILLAN 2015), at p2.

7 Rita Abrahamsen, *Internationalists, Sovereigntists, Nativists: Contending Visions of World Order in Pan-Africanism* (2020) 46 REVIEW OF INTERNATIONAL STUDIES 56.

However, these concerns over the sometimes-Eurocentric bent of our scholarship should not be understood as a critique of comparativism. Indeed, there are many benefits of comparativism, especially if the right comparators are used. In this regard, I call for greater study of other South-South economic integration arrangements, such as the ASEAN FTA, the Caribbean Economic Community, and the lessons that Africa can learn from them.[8] In addition, we should explore potential linkages between the AfCFTA and other communities in the global South. For example, studies reveal minimal trade between Africa and the Caribbean, despite our shared historical ties. Only 4.4% of the Caribbean's total exports are to Africa. Accordingly, as His Excellency Wamkele Mene, Secretary-General of the AfCFTA Secretariat, recently noted, "the potential for win-win relations between the Caribbean and Africa is tremendous"[9].

Even as the AfCFTA advances the goal of continental free trade to overcome the lingering effects of colonialism and neo-colonialism, we should not forget the continuing need to interrogate and contest the legal principles on which the current international economic order is based. Regrettably, we continue to operate within a set of often inimical rules, designed at a time when most African countries were under colonial domination, although we still expect different results. There is consequently an urgent need to rewrite the rules of the international economic order.

In this regard, it is necessary to re-examine the outsized role of the US dollar in global markets and trade. The decision of delegates from 44 allied countries at the Bretton Woods Conference in 1944 – namely, that the world's currencies would no longer be linked to gold but rather pegged to the US dollar, with President Nixon's subsequent de-linking of the dollar from gold, ushering in the floating exchange rate regimes – continue to haunt many countries and affect their economic fortunes. It means that instead of gold reserves, countries now accumulate reserves that are mostly made up of US dollars, thereby giving the US an outsized influence on foreign economies. How would the economic fortunes of major African gold producers like Ghana, Mali, Burkina Faso, and Sudan have changed if world currencies or the dollar were linked to gold?

8 Clayton Hazvinei Vhumbunu and others, *Consolidating African Regional Integration through the African Continental Free Trade Area: Lessons from the ASEAN Free Trade Area* (2022) 11 JOURNAL OF AFRICAN UNION STUDIES 77.

9 His Excellency Wamkele Mene, *Keynote Address on Occasion of the Caribbean Investment Forum* (2022).

Increasingly, it is reported that central banks are no longer holding the US dollar in their reserves to the extent that they once did. For example, the IMF has reported that 59% of all foreign bank reserves are denominated in US dollars, representing a drop from the high of around 70%. There have even been calls for the dollar to be abandoned.

The PAPSS offers African countries and traders a mechanism to reduce their dependency on the US dollar. In particular, Kenya's President William Ruto recently called on African leaders to take the first steps towards ditching the US dollar as the world's reserve currency by adopting a pan-African payments system to facilitate trade within Africa.[10] Students of African international economic law should pay some attention to these developments and their implications for Africa's future.

The AfCFTA and Public Participation

A continuing concern over Africa's economic integration processes, including the AfCFTA, is the lack of public participation and active engagement from civil society groups. Bringing the AfCFTA home to the people should be a principal concern for scholars of African international economic law. Some of our national constitutions are imbued with the values of public participation in decision-making, and a rich jurisprudence on public participation is emerging from countries such as Kenya and South Africa. The same cannot be said for regional integration, and this should not be allowed to be the case for the AfCFTA. Civil society groups may have weak capacity and resources compared to state and formal market actors such as corporations. However, they can significantly shape and influence the path taken by the AfCFTA.

Market and civil society actors can either be powerful facilitators or inhibitors of economic integration. By way of illustration, concerning the AfCFTA, we will all recall how the advocacy of the Manufacturers Association of Nigeria (MAN) delayed Nigeria from ratifying the AfCFTA, even though Nigeria was at the forefront of its negotiations. Equally noteworthy is that several scholars have lamented how Africa's regional economic integration initiatives remain state-centred and state-driven, as opposed to emphasising market mechanisms.

10 https://northafricapost.com/68180-kenya-calls-on-africa-to-use-papss-to-ditch-us-dollar-in-trade-deals.html

Söderbaum's call for "theoretically informed and comparative studies about the agency of state, market and civil society actors and how these actors come together to construct and de-construct regions"[11] is apposite.

THE CHALLENGE OF IMPLEMENTATION

The perennial issue of implementing the AfCFTA at a domestic level should not be ignored. While 54 countries have ratified the AfCFTA agreement, I am unaware of any country, especially not a dualist common law tradition country, that has given the Agreement (or part thereof) domestic force of law. Vhumbunu and others have captured the significance of this implementation challenge, noting:

> For a successful AfCFTA, there may be a need for a paradigm shift from a regional integration culture and political attitudes characterised by ambitious summit pronouncements, declarations and communiqués that are hardly implemented, to a more result-oriented approach that accentuates and underscores the prominence and urgency of policy execution and robust follow-up mechanisms on the implementation of regional commitments by member states. Thus, while political institutions and political pronouncements are indispensable and salient in the regional integration puzzle as vision-setting authorities, these should be complemented by less politicised technical structures, systems and mechanisms that facilitate the translation of broad visions and policy outlines into concrete and practically actionable deliverables to ensure the successful implementation of the AfCFTA agenda.[12]

Thus, the ultimate benefits of the AfCFTA will depend on how its commitments play out in reality. Giving the Agreement domestic force of law is only one of many implementing measures that must be taken. Establishing and resourcing AfCFTA National Implementation Committees, building the capacity of the private sector, and organising this sector, so that it can participate in the implementation processes, are all significant.[13]

11 Fredrik Söderbaum, *Rethinking Regions and Regionalism* (2013) 14 GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS 9, at 14.

12 Vhumbunu et al, *Supra* Note 8, at 88.

13 P Sebahizi and others, *From Negotiations to Implementation: Building Effective AfCFTA National Implementation Committees* (ODI POLICY BRIEF, LONDON: ODI 2023).

Furthermore, although the AfCFTA addresses numerous significant trade issues that affect the continent, there are a host of others, often characterised as non-trade issues. These include human rights abuses, violations of labour and environmental rights, bad governance, the absence of the rule of law, and, increasingly, climate change. However, the AfCFTA does not significantly address these issues beyond general provisions on sustainable development. Hence, the extent to which the AfCFTA could or should be used as a launchpad to address these issues or integrate them into its trade regime should form an essential part of our future inquiry.

IMPROVING THE TRADE ENVIRONMENT THROUGH COMPREHENSIVE LEGAL REFORMS

Most of the available studies suggest that the AfCFTA can boost intra-African trade and incomes. However, to ensure that this occurs, a comprehensive and holistic reform agenda is required. This agenda should include the improvement of the trade environment, such as transport and telecommunications infrastructure, access to finance and credit, domestic security, enhanced rule of law, and better governance.

From our perspective, as students and practitioners of international economic law, I think the capacity of the existing legal infrastructure to support intra-African trade merits attention, both in terms of public and private laws. In this regard, one area that demands immediate scrutiny is the regulation of digital trade or online transactions. A recent study identified significant diversity across the legal regimes of African countries, relating to issues such as e-signatures and online consumer protection, cross-border data flows, data localisation and personal data protection, the mandatory disclosure of source code, and intermediary liability.[14]

The international harmonisation of private law is an important instrument for improving the trade environment. A strong commercial law infrastructure is likewise necessary for effective intra-African trade. The diversity of national commercial laws is therefore a significant obstacle to cross-border trade. In the words of Asif Efrat:

14 R Tavengerwei and others, *What to Consider Ahead of the AfCFTA Phase II Negotiations: Focus on Digital Trade Policy Issues in Four Sub-Saharan African Countries* (OXFORD PAPER SERIES, NO 16; OXFORD, UNITED KINGDOM: DIGITAL PATHWAYS 2022).

> In a world of national legal systems, where each country has its own corpus of commercial law – most important, its own law of contracts – actors transacting across borders face a significant legal diversity that might hinder trade. Unfamiliar with the foreign legal system, a business faces considerable uncertainty about the consequences of the transaction; this uncertainty, in turn, increases the costs of information finding and negotiations and might result in commercial disputes.[15]

The harmonisation of commercial laws simplifies the legal foundation of trade. It allows contracting parties to save resources. It also helps avoid controversy over the choice of law that may be applied to transactions. In short, it is easier to access, understand, and comply with harmonised law. Accordingly, it reduces transaction costs and risk, thereby reinforcing legal certainty.

Nevertheless, despite the notable diversity of laws within Africa, regional integration initiatives have failed to pay systematic attention to significant areas of commercial law that impact cross-border trading. The only exception is the OHADA initiative. Significantly, not one country that adheres to the common law tradition is a member of the OHADA initiative.

The failure to prioritise the harmonisation of commercial law as an important part of the necessary infrastructure for enhancing intra-African trade is equally manifest at the continental level. In 2004, the African Union established the AU Commission on International Law. One of the Commission's objectives is to codify and progressively develop international law in Africa. However, there is no similar AU commission on private law. The AfCFTA fares no better. Unlike African regional economic integration treaties, the Agreement has no provision for the harmonisation of commercial laws.

How do we explain this failure to prioritise the harmonisation of commercial law in efforts to enhance intra-African trade? I offer the following reasons:

- First, trade agreements promise a reduction in tariff and non-tariff barriers to trade. Hence, they have an immediate effect on prices. However, the impact of legal harmonisation on the price of goods and services is not immediate, especially for consumers.

15 Asif Efrat, *Promoting Trade Through Private Law: Explaining International Legal Harmonization* (2016) 11 REVIEW OF INTERNATIONAL ORGANIZATIONS 311, at 312.

- Second, trade agreements do not have an immediate or widespread impact on legal practice and adjudication. However, the harmonisation of commercial laws entails the displacement of existing domestic laws. Accordingly, it demands significant new learning for both lawyers and judges. In professions that are known to be impervious to change, such a prospect is hardly attractive.
- Third, firms and traders may have no incentive to push for the harmonisation of laws. This is because they can use the contractual device of a choice of law clause to choose a national law that will suit their needs, including foreign laws. Indeed, it is well-known that some traders choose English law as the governing law of their contracts, even though they are trading in Africa!
- Finally, as with many other significant issues that affect Africa, we appear to have 'farmed out' the task of addressing the harmonisation of laws to institutions outside the continent. These include the United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law – two institutions that are dedicated to the harmonisation and unification of laws.

As scholars, we are good at identifying problems, but we often omit to articulate the role that we can play in addressing the problems we identify. As students of African international economic law, we should show greater interest in and commitment to legal harmonisation, as a means of advancing intra-African trade.

I note that, comparatively, scholarly initiatives have played a key role in harmonising private laws elsewhere in the world. For instance, in Asia, a private initiative by scholars and academics aims to create a model law, called the Principles of Asian Contract Law. Similarly, the Principles of European Contract Law were drafted in 1998 by the Commission on European Contract Law (hereinafter, the Lando Commission). Meanwhile, there is the Organisation for the Harmonisation of Business Law in the Caribbean (OHADAC). Since its formation in 2010, OHADAC has already produced a model law for commercial companies, and there are projects for the harmonisation of private international law and the law on international commercial contracts.

Similarly, there is a need to reform domestic laws and dispute settlement systems, so that they can address the cross-border legal problems generated by international commercial intercourse. A great deal has been written about dispute settlement under the AfCFTA. Some have demonstrated how it is modelled after the WTO's dispute settlement system. As such, it represents a regression from the innovations and achievements of regional economic communities, including the individual standing to bring claims.

Ultimately, however, the mechanisms for resolving disputes between private traders engaging in intra-African trade are more significant for the AfCFTA's success. There is a need to set up and provide resources for the commercial divisions within our respective national High Courts, in order to expeditiously handle commercial cases and strengthen the legal and physical infrastructure for alternative dispute resolution, especially arbitration. Is there a case for an African Commercial Court, as Professor Onyema and others have proposed? A recent study by the School of Oriental and African Studies shows strong support for this proposition.

AVOIDING THE PERPETUATION OF INEQUALITIES

While we explore ways through which the AfCFTA can be brought to the people, we should equally be concerned about whether free trade under the Agreement will generate benefits for all through 'trickle-down' growth. It is trite to mention that there are winners and losers in free trade – it is not always an all-win endeavour. In free trade agreements, the participating countries might not benefit equally from the gains of trade.

Obeng-Odom has observed that "inequality is Africa's worst problem, but the official AfCFTA Agreement largely ignores it and promotes economic growth instead"[16]. The benefits of the AfCFTA should not be captured by the few and powerful on the continent. As Tayo has observed: "In most African countries, economic power is closely linked to political power. Economic elites can co-opt production policies in their favour and perpetuate their dominance."[17]

I therefore reiterate, the benefits of AfCFTA should not be unevenly distributed, as has been the case with many resource allocation issues on the continent. However, free trade under the AfCFTA could accentuate existing inequalities in Africa unless appropriate measures and interventions exist.[18]

One such measure or intervention is investment in human capital – governments that invest in their people (the country's most important natural resource) are likely to benefit most from free trade under the AfCFTA.19 By human capital, I refer to

16 Franklin Obeng-Odom, *The African Continental Free Trade Area* (2020) 79(1) AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 167, at 185.

17 https://blogs.lse.ac.uk/africaatlse/2021/06/18/will-african-continental-free-trade-area-afcfta-increase-inequalities-issues/

18 Obeng-Odom, *Supra* Note 16, at 181.

the knowledge, skills, competencies, and attributes that are embodied in individuals to facilitate the creation of personal, social, and economic well-being. Human capital is critical for development; it enhances productivity and global competitiveness. It is essential to the effective functioning of a country's economic, social, and political institutions.

The positive correlative relationship between investment in human capital and economic growth is too strong to merit serious debate. Regrettably, the extant data suggests that the level of human capital is very low across much of Africa. Consequently, deliberate and adequate investment in human capital is necessary for African countries to be able to reap the benefits of free trade under the AfCFTA. In particular, Aziegbe-Esho and Verhoef have noted that investments in human capital by both governments and the private sector:

> Should be directed towards developing capacity in the identified areas of competitive advantage, in developing the knowledge and skills required to enhance productivity in the area of country-specific comparative advantage. …Targets should be set to educate and train citizens in specialist areas relating to the area of comparative advantage in the required post-secondary educational and vocational institutions.

Nevertheless, the prospect that the AfCFTA could accentuate existing inequalities in Africa should not be viewed from the perspective of individuals alone. Significant inequalities also exist between whole countries in Africa, with some being more advanced, developed, and resource-endowed than others. There is a clear 'development divide', just as in other parts of the world. For example, it is estimated that Nigeria, South Africa, and Egypt account for around 50% of Africa's GDP. Accordingly, the AfCFTA brings together unequal economies with varying production capacities.

However, this is not necessarily a bad thing: the more advanced, developed and resource-endowed could be champions and anchors of intra-African trade, much like Germany and France champion and sometimes bankroll European integration efforts. At the same time, there should be measures to address the needs of the less advanced, less developed, and least resource-rich countries to ensure that free trade does not worsen their positions.

19 Ebes Aziegbe-Esho and Grietjie Verhoef, *Reaping the Benefits of African Continental Free Trade Agreement (AfCFTA) - The Role of Human Capital Development* (2023) 15 AFRICA REVIEW 1.

Conclusion

In conclusion, let me once again express my appreciation to the Conference organisers for inviting me to deliver this keynote address. I look forward to the coming days of engaging academic exchanges, discussions, and debate. We are living in challenging times. However, in challenges, one can sometimes find opportunities and learn important lessons. I venture that there are indeed opportunities for Africa in these times.

As scholars of African international economic law, we are uniquely placed to draw attention to important lessons, expose opportunities, and in concrete ways, articulate for our leaders, legislators, and policy-makers how best to take advantage of these opportunities. This Conference provides a unique context for us to do so.
Welcome to Accra.

African States' Priorities for International Economic Law and Socio-Economic Prosperity on the Continent in this Era of Multiple Crises:

Reflections on Some of the Themes in Prof. Richard Oppong's Keynote Address

*Obiora Chinedu Okafor**

Prof. Oppong's keynote[1] is well-conceptualized, articulated and relevant to Africa's current international economic law challenges. To my mind, his paper makes eight key points, as follows:

- Fundamental shifts are occurring in the global economy that have already had, and will continue to have, serious consequences for the health of the economies and societies of almost all African countries;
- Yet, it is "not all doom and gloom" for the continent – for example, the African Continental Free Trade Agreement (AfCFTA) and the new Pan-African Payment and Settlement System (PAPSS) are key innovations that have shown significant promise in recent years;
- There is, however, a need to be more wary of overestimating the promise of regional integration in Africa;
- Scholars of African international economic law must contest the legal and other principles and bases that undergird and propel the current international economic order;
- It is imperative that regional integration projects and institutions in Africa be brought much closer to African people by ensuring much more grassroot participation [I would reframe this as "participaction"];

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1 Richard Frimpong Oppong, *International Economic Law in an Era of Multiple Crises: Opportunities and Challenges for Africa,* (2025) 5 African International Economic Law Journal.

- There is also a need to facilitate more effective implementation of the AfCFTA and other regional integration schemes in Africa by ensuring that the treaties that create them are enacted into domestic law in all their various states parties;
- If the AfCFTA is to reach its full potential to contribute to Africa's socio-economic renaissance, it will be important as well to significantly improve the trade environment on the continent (including its transport and telecommunications infrastructure); and
- Much greater effort must be made to ensure that the implementation of the AfCFTA and other regional integration schemes do not perpetuate [and I would add exacerbate] the wide inequalities that all-too-often exist within the various states and societies on the continent.

There is very little, if anything, to disagree with in this set of arguments. However, the rest of my commentary on the paper will focus on only some of the themes engaged by these points.

As a preliminary point, since many countries on the African continent face serious economic shocks (a kind of crisis), and as we are (mostly) a gathering of international lawyers we should recall that there are at least two senses in which both international law has tended to be a "discipline of crisis." This is true in at least two senses: First, in the sense of its substance and orientation being historically shaped to an extent by "crises" (e.g. World Wars 1 and 2; 9/11; underdevelopment; colonialism, etc). And second, in the sense that as its students and practitioners, we (quite understandably) love to focus on "crises".[2]

I should, of course, also note that what the dominant section of society characterizes as a crisis, and how important we think a crisis is, tends to be the product of certain biases, shaped as they almost always are by the circulation and operation of a mix of material and ideational power. Overall, the point is that we have a long tradition in our discipline of thinking about, and through, crises. And we have also honed the skills to do so well.

It is, however, important to note that although we are indeed in an era of multiple global crisis, I am hard put to think of an earlier era that was not as beset by multiple crises. Indeed, very little in history has ever been totally new, or has presented as

2 *See,* Hilary Charlesworth, *International Law: A Discipline of Crisis*, (2002) 65 Modern Law Review 377, arguing that "International lawyers revel in a good crisis. A crisis provides a focus for the development of the discipline, and it also allows international lawyers the sense that their work is of immediate, intense relevance."

a sudden volcanic eruption. History hardly ever ruptures (or sharply divides) into two, and the "new" is almost always just "seemingly new".[3] Continuity is often more present than discontinuity.[4] And so we must endeavor to treat the current set of crises as deeply embedded in a longstanding and much broader context; as closely connected to the historically tragic continuities of everyday life in almost all of the world (e.g. great power jostling for advantage and accumulation, the subordination of "the rest", mass poverty, malnourishment, lack of sanitation, lack of adequate healthcare, unfair terms of trade, huge infrastructural deficits in Africa, inability to move around the world freely, etc). If we treat the crises that afflict the continent in this way, what we will generally see are heightened, renewed or exacerbated, rather than mostly new, challenges.

It is against this background that we must view some of the multiple crises that African states now confront and will likely face into the future. These include the negative economic impacts of the COVID-19 pandemic; gross/mass poverty; under-development; Russia's invasion of Ukraine; the emergent USA/China "cold peace"; the stranglehold that one or a handful of states have over certain critical gridworks of the global economy; global governance; and a crisis of state legitimacy in Africa [and there are many others]

Concomitantly, in my view, some African states' priorities for international economic law and socio-economic prosperity in this era, and regarding each of these crises, must certainly include how to effectively tackle the negative economic impacts of the Russia-Ukraine war, the COVID-19 pandemic and the next pandemic. Some suggestions are to pool together to significantly advance our vaccine-making capacities; and ramp-up pressure at the WTO to sustain the gains made re TRIPs flexibilities to produce generic vaccines and produce cheaper treatments. Other African priorities ought to be how to ramp up efforts to eliminate intra-African trade barriers; increase pressure at the IMF/World Bank for more debt relief; and levy even more pressure from civil society on our governments for more responsible debt accumulation practices.

As importantly, regarding the imperative of much more effectively addressing the challenge of gross and mass poverty on the continent, I would argue that: despite the Global North's strong resistance, African states must push even harder than they have in the past for the required deeper structural reforms of the global economy.

3 *See*, Joanne Meyerowitz, *Introduction* in Joanne Meyerowitz, ed., History and September 11th (Philadelphia: temple University Press, 2003), at 1.

4 O.C. Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, (2005) 43 Osgoode Hall Law Journal 171, at 180-182

This is in addition to taking certain local measures that will also be important in this respect. More specifically, a more favorable re-orientation of some other aspects of the global trade regime would also be significantly helpful to the vast majority of African countries. For example, the internationalization, streamlining and simplification of global non-tariff barrier regimes in the area of textiles, would be a step in the right direction. Another focus of such renewed African efforts could be toward the full elimination of the Global North agricultural subsidies that significantly hamper wealth generation among African agriculturists. So, despite the 1995 WTO Agreement on Agriculture, and a subsequent 2015 Agreement to end the export subsidies that are mainly used by rich countries, important barriers to fair trade do remain in this area. These challenges are very well known. And so the point here is not to simply rehash them here, but to argue that they are areas in which African countries must intensify their efforts to get better results if their economies and societies are to fare better in the near to medium term.

The massive infrastructure deficits that afflict almost all African states and also hinder inter-African commerce and interaction also needs urgent attention in our time. For example, for inter-African trade to become optimal, a massive amount of critical transportation infrastructure must be rapidly built both within and between African countries. Significant Chinese inroads and accomplishments in this area have now prompted the USA to create its own parallel scheme (with some G7 support). Japan also runs an infrastructure fund and has ramped up its funding capacity (though the program is still mostly Asia-focused). Access to funding and other support from the New Development Bank (the so-called BRICS Bank) is also important if African states are to close their huge infrastructural deficits.

With regard to the implications for Africans of Russia's invasion of Ukraine, it is obvious that African states and peoples are more or less now caught in the middle of great power contestation over values and geo-political advantage. This conflict has exposed the over-dependence of all-to-many African countries on the import of grains from sources outside the continent and our deep and embarrassing vulnerability in the agricultural field. An integrating Africa should therefore highly prioritize agricultural production to a much greater extent than is currently the case.

There is also no doubt that the emergent USA/China "superpower cold peace" has posed, and will for some time continue to pose, a serious challenge to African statecraft and international economic policy/law-making and implementation. It should be noted that the expression "superpower cold peace (a spin on "cold war") is taken from

Ming Wan's creative thought in this area.[5] Thus, as Prof. Oppong suggests, a changing world is upon us, for sure! What to do? Is Africa to simply recycle its cold war strategies and experience? What lessons have Africans learnt from its international economic law praxis from the previous superpower cold war/peace? To what extent precisely is this new kind of cold war really new? What continuities meet the eye as between the defunct cold war and the seemingly new cold peace? And are there any marked discontinuities between the two?

More specifically on the question of African and other Global South peoples being "caught in the middle" of this emergent cold peace, what is the exact character of this predicament? What, if any lessons, can Africans learn from the relevant historical record – especially their own cold war histories? Could what I have referred to elsewhere as "the Bandung ethic" come to the rescue, constituted as it is by the imperative, and ways and means, of solidarity?[6] Thus far, what has this long-touted ethic of solidarity been good for, and not good for? Under what conditions can we optimize its promise and benefits? It is remarkable that non-alignment and the Non-Aligned Movement (NAM) are still alive today even decades after the Soviet-USA cold war and the fall of the Berlin wall. As Africans tackle their current international economic law challenges, are there any lessons for them from this persistence?

Similarly, the persistence to this day of the "G77 + China" formation, despite China's great rise, may also be instructive to Africans – but what precisely are the lessons to be learnt therefrom. What lessons can African states and peoples also learn from their earlier struggles for a new international economic order (NIEO); the adoption of the Charter of Economic Rights and Duties of States; the creation of UNCTAD; the influence that the principles of common but differentiated responsibilities and the common heritage of humankind have exerted at the United Nations; and the survival of the right to development in global praxis? What is living and dead in each of these patterns of consciousness and institutions?

5 *See*, Ming Wan, *Japan-China Relations: Politics of Great Powers and Great Power Politics* in R.J. Pekkanen and S.M. Pekkanen, eds., The Oxford Handbook of Japanese Politics (Oxford: Oxford University Press, 2021) at 843.

6 See O.C. Okafor, *The Bandung Ethic and International Human Rights Praxis: Yesterday, Today and Tomorrow* in V. Nesiah, et al, eds., Bandung, Global History, and International Law: Critical Pasts and Pending Futures (Cambridge: Cambridge University Press, 2017).

These are numerous and weighty issues and questions that cannot but occupy the minds of African leaders and peoples over the next several years and perhaps even decades. There is no easy solution in sight, no ready liturgy to dictate a common direction toward the greatest possible success. Yet, one thing that can be said with a high degree of confidence, even now, is that regarding all of these challenges, heightened levels of inter- and intra-African solidarity remain key for the success of the struggle to achieve sustainable socio-economic progress on the continent.

Cascading Crises Call for a Concerted and Inclusive Gontinental Response:

Reflections on Prof. Richard Oppong's Keynote

*Caroline B. Ncube**

Professor Oppong's Keynote, delivered on 21 June 2023 at the African International Economic Law Network's 6th Biennial Conference, was both timely and well-placed.[1] It was both an honour and a privilege to be invited to participate in the Roundtable Discussion following the keynote speech. This brief note reprises comments I made on that occasion. In the first response, Professor Okafor aptly reflected on how International Economic Law debate and scholarship tends to coalesce around crises-prompted reforms.[2] I followed, true to the mold, by recounting the contemporary crises which the keynote address and many of the conference thematic tracks discussed.

The last three years (2020 – 2023) have seen the world confronted by a staggering health crisis (COVID-19), continuing political strife accompanied by war, inexorably rising levels of poverty and inequality amidst a climate change crisis. These crises cascade into each other, thereby amplifying their negative impact. Therefore, Professor Oppong spoke to the moment and the timeliness of his remarks cannot be overstated. The conference was held in Accra, the locale of the African Continental Free Trade Area (AfCFTA) Secretariat and the site of many pan-African initiatives, which was abuzz (as usual) with innumerable conferences and meetings. This allowed all at the conference to experience the vibrancy and hope that the continent shares and provided fertile soil for Professor Oppong's remarks.

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1 Richard Frimpong Oppong, *International Economic Law in an Era of Multiple Crises: Opportunities and Challenges for Africa,* (2025) 5 AFRICAN INTERNATIONAL ECONOMIC LAW JOURNAL.

2 Obiora C. Okafor, *African States' Priorities for International Economic Law and Socio-Economic Prosperity on the Continent in this Era of Multiple Crises: Reflections on Some of the Themes in Prof. Richard Oppong's Keynote Address,* (2025) 5 AFRICAN INTERNATIONAL ECONOMIC LAW JOURNAL.

The keynote address was both comprehensive and inspiring, covering fundamental shifts in the global economy and the promise of the AfCFTA, whilst soberly interrogating the applicable legal framework.[3] Specifically, Prof Oppong considered public participation, implementation, the contribution of scholarship on how to best undertake legal reforms to ensure that the AfCFTA enable African States to uproot, or at least contain, inequalities. My comments focussed on the latter two aspects.

The COVID-19 pandemic, the first of the cascading crises I listed above, bequeathed important lessons to the African continent and its vision for the AfCFTA. The first of these is that the AfCFTA which carries significant hopes for post-pandemic recovery, being a project wholly within the control of African States. Global solidarity to counter the pandemic was very quickly knocked off its fragile pedestal by vaccine nationalism. Global South led efforts to secure concessionary reforms at the WTO through their proposal for a waiver under the Agreement on Trade-related aspects of Intellectual Property Rights (TRIPS) were thwarted and delayed meaning that the eventual solution was both too late and woefully inadequate. That's the first lesson: seek timely solutions locally and do not rely on global solutions.[4] Since TRIPS reform was inadequate and delayed, the AfCFTA Agreement offers a platform to drive reform and introduce the needed norms on health emergencies. Admittedly, it is one thing to have norms in place and quite another to implement them, but the implementation journey must start with norms. This is the second lesson then: establish norms and implement them.

The Russia-Ukraine war, an instance of the second type of crisis, has taught that strife and war on another continent, even though appearing distant, inevitably have an impact on Africa. In this case, one of these effects was to further jeopardise food security, which partially prompted the peace-brokering efforts of some African Presidents. Perhaps the lesson here is that continental adjustments will be required to adjust to 'global shocks', to borrow Professor Oppong's words. For the AfCFTA, this teaches that prioritising food-security related value chains are critical. Further, it goes without saying that strife and war on the continent will hinder trade as it impedes productivity and secure passage which are core elements of trade.

3 For an update on AfCFTA progress, *see generally,* African Union, *Powering Trade through AfCFTA: A People-Driven Wholesome Development Agenda,* 15 February 2023, Online: https://au.int/en/pressreleases/20230215/powering-trade-through-afcfta-people-driven-wholesome-development-agenda#:~:text=The%20strategy%20focuses%20on%20four,production%20capabilities%20on%20the%20continent

4 For discussion, see dos Santos, F., Ncube, C. B., & Ouma, M. *Intellectual property framework responses to health emergencies – options for Africa,* (2022) SOUTH AFRICAN JOURNAL OF SCIENCE, 118(5/6).

The AfCFTA presents an opportunity to meet these challenges through legal reforms on the continent. Professor Oppong rightly highlighted Digital Trade and Dispute Resolution as core areas which are worthy of scholarly attention. The AfCFTA Digital Trade Protocol forms part of the current (second) phase of negotiations and several papers were lined-up on the conference programme on this topic. Professor Oppong further challenged us to stop conjuring up the same old rules/norms cast in the perspective of days past but rather to consider current contexts and propose norms that are suitable. I argued that what would distinguish these African-grown norms from previous ones is to centre (1) Human Rights and (2) development through alignment with the Sustainable Development Goals and Agenda 2063. These perspectives should galvanize a framework that is inclusive and adequate to meet the prevailing challenges.

As Professor Oppong said, 'it is not all doom and gloom'. The early successes of the AfCFTA hold out significant promise for much-needed change. For instance, the speed of ratification of the AfCFTA Agreement indicates the commitment of African States to its vision. The start of trade and its growth, with the support of the Guided Trade Initiative, is also a noteworthy milestone. However, the spectre of inequality is never far behind, and as these successes emerge it is important to build–in mechanisms to cure existing disadvantages. It is well known and accepted that the informal sector, women and youth face significant disadvantages in trade that would be exacerbated in cross-border contexts hence the attention being given to these constituencies is well-placed. From a norm-setting perspective, protocols addressing these issues are welcome, but more than legal frameworks are required so State-State co-operation as well as finance and other resource support is essential. I argued that the litmus test for the success of the AfCFTA will be how inclusive it is. How its promotion, facilitation and support of trade will cater for all players instead of focusing on formal, large and already successful enterprises and entrepreneurs.

In unearthing the key issues at the opening session, Professor Oppong set the pace and tone of the discussions over the following few days. A major theme of Professor Oppong's remarks was that scholarship should not only critique and identify problems in the existing legal regime but also offer solutions. The conference rallied to this call as its sessions aimed to do precisely that.

Assessing the Viability of Investor Liability Provisions in the Reform Agenda of International Investment Law

*Kathleen Mpofu**

Abstract:

To address the shortcomings that have been identified with the international investment law system, treaty reforms have been proposed that attempt to make provision for the liability of investors for their conduct which has negative impacts on the host state. These include the use of home state courts and the use of counterclaims in investor state arbitration. The question is whether these provisions provide adequate protection to the citizens of host states who face the brunt of negative investor conduct. The paper finds that these measures are not sufficient to provide adequate redress. The paper recommends the incorporation of national courts in the resolution of investment disputes, the increased enforceability of national court decisions across borders as well as providing affected communities access to an adequate and equivalent remedy at the international level. This will give local communities the means through which their rights can be adequately vindicated in the context of international investment law disputes.

Introduction

FDI plays a major role in the development of national economies.[1] The nature of cross border investment is such that there are several interested parties involved in making, regulating, and sustaining investment. The investor, whose primary objective is to receive returns on their investments and protect their property interests while operating in a foreign land; the host state whose interests entail job creation, human and environmental protection, and sustainable development; the home state that seeks to ensure that its nationals are adequately protected abroad and the local communities and citizens of host state where investment activity takes place who want to enjoy the benefits of investment activity and be protected from negative investment

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1 GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 411 (3rd ed. 2012).

activity. In some cases, the interests of these parties may conflict with each other resulting in disputes arising between them.[2]

Despite the existence of all these stakeholders, the international investment law system only makes provision to govern the relationship between the foreign investor and the host state. The international investment law system makes use of a myriad of bilateral investment treaties (BITs) that contain substantive protections for investors and provide for a unique dispute settlement mechanism known as investor-state arbitration. Through investor state arbitration, foreign investors are given special authority to initiate claims against host states, seeking to challenge state regulatory conduct that they allege has infringed on their investments and their rights as contained in BITs.

One of the concerns that has been levelled against the international investment law system is its one-sided nature, in that BITs were intended purely for the protection of investors.[3] BITs have been criticised as creating justice bubbles for foreign investors by creating a system of special rights and special dispute settlement mechanisms that are not accessible by other stakeholders in the international investment law system.[4] To this end, most BITs tend to make provision for investor protections with no corresponding obligations for the investor and host state obligations with no corresponding rights for the host state. In addition to this, most BITs are silent on the rights and interests of stakeholders outside of foreign investors and host states, such as local communities. Local communities as used in this article refers to the term in its broadest sense as a group of people connected to a particular locality who do not exercise governmental authority. It includes indigenous peoples and local residents by geographic proximity. As a result of these concerns,[5] the international investment law system has been facing significant backlash from stakeholders which has led to a 'legitimacy crisis' and in turn led to calls and actions for the reform of international investment law.[6]

2 Jose E. Alvarez & Karl P. Sauvant, *The Evolving International Investment Regime: Expectations, Realities, Options* (2011)

3 Howard Mann, Reconceptualizing International Investment Law: Its Role in Sustainable Development, 17 LEWIS & CLARK L. REV. 521, 522–3 (2013).

4 Anil Yilmaz Vastardis, *Justice bubbles for the privileged: a critique of the investor-state dispute settlement proposals for the EU's investment agreements',* 6 LONDON REV. INT'L L. 279 (2018); Surya Deva & Tara Van Ho, Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism, 24 J. WORLD INV. & TRADE 398 (2023).

5 These concerns have been focused on by UNCITRAL Working Group III and relate to the procedural issues of correctness, consistency and coherence of decisions, independence and impartiality of arbitrators and reducing time and costs of proceedings.

6 Susan D. Franck, T*he Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

Discussions on the reform of international investment law are taking place at various fora. UNCITRAL Working Group III has been mandated to identify concerns regarding the investor state dispute settlement system (ISDS) and develop potential solutions for reform. Working Group III is focused on reforming the procedural aspects of international investment law. It has identified a number of procedural concerns including lack of consistency, coherence, predictability, and correctness of arbitral decisions by tribunals; the perceived or alleged lack of guarantees for independence and impartiality amongst arbitrators and the lack of diversity in the appointment of arbitrators and the increasing costs and duration of arbitral proceedings.[7] In seeking to resolve these concerns, Working Group III is focusing mainly on exploring proposals on reforming the current system of investor state arbitration or introducing a permanent multilateral investment court with or without an appellate mechanism.[8]

This narrow focus on procedural aspects has been criticised as seeking to entrench and legitimize the current system that prioritises the protection of foreign investors to the exclusion of other, equally important parties.[9] Gathii and Mbori note that the focus of Working Group III is aimed at improving ISDS, and will result in the carrying forward of some of the unequal, unfair and unjust rules of international investment law thereby entrenching some of the fundamental challenges that are facing the system that have received little to no attention.[10] The reform effort undertaken by Working Group III has put into the backseat important issues that arise from the potential negative impacts of investments that affect local and indigenous communities.[11] Van Harten et al note that the concerns identified and focused on by Working Group III while also important, are far from the diligent catalogue of necessary reforms that have been proposed by various stakeholders.[12] They further note that the reforms that are presently under discussion would not alleviate the most serious challenges facing the international investment law system and underscore the need for reforms that go beyond just the procedural aspects identified by Working Group III.[13] Sachs et al note

7 *See generally* U.N. COMMISSION ON INTERNATIONAL TRADE LAW: WORKING GROUP III: INVESTOR STATE DISPUTE SETTLEMENT REFORM, https://uncitral.un.org/en/working_groups/3/investor-state.

8 *Id.* (Under the auspices of UNCITRAL Working Group III).

9 James T. Gathii & Harrison O. Mbori, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue,* 24 J. WORLD INV. & TRADE 535, 536 (2023).

10 *Id.*

11 *Caroline Lichuma, International Investment Law Reforms and the Draft Business and Human Rights Treaty: The More Things Change, the More They Remain the Same?*, 24 J. WORLD INV. & TRADE 718 (2023).

12 Gus Van Harten, Jane Kelsey, et al., *Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter* 1-15 (Osgoode Legal Stud. Rsch., 2019).

13 *Id.* at 14.

that the approach undertaken for reform undermines the legitimacy, support for and uptake of Working Group IIIs reform process.[14] They further find that,

> [D]espite the stakes, which continue to mount, the work plan casts serious doubt that Working Group III after all its time, effort and expense, will produce serious or impactful outcomes. The work plan reveals an unwillingness to seriously and fully deal with concerns about how ISDS may negatively impact domestic law and institutions, chill or unduly raise or shift the cost of a public interest regulation or undermine the rights of non-parties. It is, at best, a missed opportunity and at worst, a process that is all but set to lock in a system of dispute settlement that is fundamentally at odds with inclusive sustainable development. A number of stakeholders and states have consequently been disengaging from the process.[15]

The approach to reform by Working Group III to a larger extent remains silent on how other stakeholders that are affected by foreign investment can effectively participate in and make use of the system. Foreign investment disputes particularly in the natural resource extraction sector show that local communities have a lot at stake but have remained almost invisible in the international investment law system with the limited ability to participate in the dispute settlement procedures.[16] In this regard, Cotula notes that 'international law – is not only the story of judges and diplomats and lawyers in tailored suits handling complex litigation. It is also the story of women and men who feel the impacts of rules and proceedings in their lives yet are often excluded from decision making...'[17]

The exclusion of local communities from the international investment law system and their inability to access justice has left many local communities that have been affected by investment activity with no means to vindicate their rights.[18] In these situations local communities (often unsuccessfully) resort to alternative mechanisms in attempts to have their rights vindicated. For example, in *Kiobel v. Royal Dutch Petroleum Co,* a group of Nigerians, after failing to obtain redress in their national courts for harm

14 Lisa Sachs, et al., *The UNCITRAL Working Group III Work Plan: Locking in a Broken System?,* COLUM. CTR. SUSTAINABLE INV. (May 4, 2021), https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system.

15 *Id.*

16 Nicolás M. Perrone, *The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, And The International Investment Regime,* 113 AJIL UNBOUND 16 (2019).

17 Lorenzo Cotula, *Investment disputes from below: whose rights matter?*, INT'L INST. FOR ENV'T & DEV. (July 23, 2020) https://www.iied.org/investment-disputes-below-whose-rights-matter.

18 Emmanuel T. Laryea, *Making Investment Arbitration Work for All: Addressing the Deficits in Access to Remedy for Wronged Host State Citizens Through Investment Arbitration,* 59 B.C. L. REV. 2845 (2018).

caused by the conduct of Shell in Nigeria, unsuccessfully attempted to sue Shell in the courts of the United States under the Alien Tort Statute.[19] The court held that there was a presumption within the Alien Tort Statute against the extra-territorial application of the statute and that in the absence of evidence of a sufficiently strong link between the matter and the territory of the United States, the Alien Tort Statute would be inapplicable to the matter.[20] Since the statute was presumed to be inapplicable the court did not proceed to deal with the merits of the matter. This illustrates that insufficient provision has been made for the participation of and the protection of the rights of local communities who are affected by foreign investment activity.

This is not to say that foreign investment only has negative impacts on local communities. When harnessed properly foreign investment can have several benefits for local communities. However, the inability of the existing domestic and international legal frameworks to appropriately balance the threats and opportunities that come with foreign investment has left local communities more susceptible to suffering the threats.[21]

It is therefore necessary to achieve the reform of the substantive and procedural aspects of the international investment law in a manner that takes into account the needs of other stakeholders, such as local communities, in a manner that focuses on the protection of human, labour and environmental rights and promotes the achievement of sustainable development.

Outside of the auspices of Working Group III, states, interest groups and academics have focused on the need to address this imbalance.[22] Of particular importance to the re-balancing exercise are local communities who often bear the brunt of negative investor conduct, with no equivalent means at the international level to seek redress.[23] The rebalancing of the international investment law system is necessary to ensure that the reform efforts do not merely entrench the existing system but can lead to more positive and fundamental reform that addresses a broad range of issues and accommodates a wide range of stakeholders.[24]

19 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

20 *Id*. at 117–25.

21 George K. Foster, *Foreign Investment and Indigenous Peoples: Options For Promoting Equilibrium Between Economic Development And Indigenous Rights,* 33 MICH. J. INT'L L. 627, 632 (2012).

22 Caroline Lichuma, *International Investment Law Reforms and the Draft Business and Human Rights Treaty: The More Things Change, the More They Remain the Same?*, 24 J. WORLD INV. & TRADE 718 (2023).

23 Ibironke T. Odumosu-Ayanu, *Local Communities, Indigenous Peoples, and Reform/Redefinition of International Investment Law*, 24 J. WORLD INV. & TRADE 792 (2023); Nicolás M. Perrone *Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities*, 24 J. WORLD INV. & TRADE 436 (2023); *see* Perrone, *supra* note 16.

There have been steps taken by academics, think tanks, states and regional economic communities to rebalance the international investment law system, and make provision for local communities and states to have a mechanism through which investors can be held liable for their negative conduct that may cause harm to host states and local communities.[25] The attempts at various levels to incorporate mechanisms by which investors can be held liable in the context of international investment law are what this paper refers to as investor liability provisions.

This paper seeks to undertake an assessment of investor liability provisions that have been proposed in the reform of international investment law, in particular the use of home state laws and home state courts and counterclaims for holding investors liable for their conduct that amounts to a breach of the applicable BIT. These provisions have been incorporated into IIAs such as the African Continental Free Trade Agreement (AfCFTA) Investment Protocol and have been proposed as a viable means through which meaningful reform can be achieved.[26] This paper will explore the effectiveness and practicality of these provisions and ascertain whether these provisions can be used to achieve the desired result of investor liability. The paper will further go on to explore other methods of ensuring investor liability that can be adopted by states at both treaty and national level which could possibly provide more effective redress to the affected parties, including incorporating the exhaustion of local remedies rule and providing access to affected third parties to a remedy at the international level.

This paper seeks to make recommendations on how provisions for holding investors liable for their negative conduct can be strengthened and incorporated into international investment agreements (IIAs) to give greater effect to the re-balancing exercise and ensure that the investors are held to account for their negative conduct. To achieve this, section I will provide an overview of the investor liability provisions under discussion using the Protocol to the Agreement Establishing the African Continental Free Trade Area On Investment (AfCFTA Investment Protocol) as an example and provide an assessment of the effectiveness and practicality of these provisions. Section II will proceed to explore alternative methods of holding investors liable for violations of their investment treaty obligations and section III will conclude.

24 Gathii & Mbori, *supra* note 9.

25 *See* for example the work of the International Institute for Sustainable Development and Open-ended Intergovernmental Working Group (OEIGWG) on transnational corporations and other business entities.

26 Investor liability provisions have been contained in a number of reformed IIAs, however, this paper will draw examples from the AfCFTA Investment Protocol.

I. Overview And Assessment Of Investor Liability Provisions

In the traditional investment law regime, investors enjoyed a wide range of rights and investment protections,[27] which led to a boom in investment arbitration cases, in which investors claimed large sums of money arising out of state regulatory conduct which allegedly violated investors rights and enjoyment of their investment as contained in IIAs. While providing investors a myriad of rights, most IIAs were silent as to the corresponding obligations owed by the investor to the host state and its citizens. As such, even where the investor engaged in conduct that was harmful to the host state, its citizens or its environment, there has been no equal remedy under international investment law through which investors could be held accountable.[28] Further, where states took measures for the protection of human rights, they ran the risk of being held liable for the same, even where these measures were necessary for the protection of human rights.[29] For example, *Aguas del Tunari v Bolivia* where a coalition of farmers, factory workers, environmentalists, labour groups, and others vocally resisted the terms of a water concession granted to an investor leading to the government cancelling the concession.[30] In response, the investor initiated investment arbitration proceedings.

As a result of this, states, although at varying levels have begun to re-assess their investment treaties to bring about more accountability for foreign investors. African states seem to be at the forefront of this re-assessment exercise, by incorporating investor obligations in the investment agreements. For example, the Nigeria Morocco BIT, in article 18(2) provides that '[i]nvestors and investments shall uphold human rights in the host state.[31] Articles 18(3) and 18(4) further make provision for the obligation of investors to act in accordance with core labour standards, and the obligation not to circumvent international environmental, labour and human rights obligations of the host and home state.[32] The AfCFTA Investment Protocol[33] provides for express

27 For example, fair and equitable treatment, full protection and security, most favoured nation, national treatment, transfer of funds, and compensation for expropriation.

28 *See* Emmanuel T. Laryea, *supra* note 18 (An exposition of instances where local communities were unable to or found difficulty in getting redress for harm occasion to them by investment activity).

29 *See* Odumosu-Ayanu, supra note 23, at 820 (For an overview of cases).

30 Aguas del Tunari, SA v The Republic of Bolivia, ICSID Case No. ARB/02/03, Decision on Respondent's Objections to Jurisdiction (21 October 2005).

31 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and The Government of the Federal Republic of Nigeria, Morocco – Nigeria, Dec. 3, 2016, https://edit.wti.org/wti-filesystem/20220107/01520fd8-42b6-4e80-9566-bc9b64f4ec5f/download%20(1).pdf [hereinafter Morocco-Nigeria BIT]

protection of the states right to regulate and the incorporation of investor obligations with a focus on human rights, labour, the environment, indigenous peoples and local communities and socio-political rights.[34] Other organisations have also contributed to the calls for reform of international investment law, with the International Institute for Sustainable Development (IISD) coming up with a model investment agreement, the IISD Model International Agreement on Investment for Sustainable Development, that incorporates investor obligations.[35]

In order to give effect to these substantive protections provided to local communities, there has also been the incorporation of measures that can be used to hold investors liable. These will be discussed below.

A. Home State Courts

A common provision that has arisen in the above -mentioned initiatives is the use of home state courts as a means to hold investors liable. For example, Article 47 of the AfCFTA Investment Protocol provides as follows:

1. Investors and their investments shall, where applicable and in accordance with domestic laws and regulations be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Host State in relation to the investment where such acts, decisions or omissions lead to damage, personal injuries or loss of life in the Host State.

2. State parties shall develop rules and procedures that allow for or do not prevent or unduly restrict, the bringing of court actions relating to the civil liability of investors in the territory of their Home States, taking into account rules governing conflict of laws and the recognition and enforcement of foreign judgements.

The import of these provisions is to provide an avenue through which investors can be held liable in the host state for their negative conduct that can cause harm and damage to a host state and its citizens. Despite the evident purpose of these provisions, there are some issues that affect their practicality and their effectiveness in providing the

32 *Id*. at art. 18(3), 18(4).

33 Protocol To the Agreement Establishing the African Continental Free Trade Area on Investment, Jan. 21, 2023, https://edit.wti.org/document/show/e5d51824-c467-4e24-922b-3fb376d89550 [hereinafter AfCFTA Investment Protocol].

34 *See id*. at Chapters 4–5.

35 The IISD model is formulated to 'promote foreign investment in pursuit of sustainable development, in particular in developing and least-developed countries,' and refers to international human rights obligations.

protection that they desire. In the first instance, it is usually the local communities where the investment takes place that usually suffer the negative impacts of investor conduct, ranging from environmental degradation to violations of labour, cultural and other human rights.[36] As such, it is these local communities that would often seek redress for the damage they have suffered arising from investor conduct. The pertinent question therefore is whether, local communities would be able to effectively make use of home state courts to seek redress. It is the viewpoint of the author that there are several obstacles that would stand in the way of local communities making use of home state courts.

The main obstacle that would be experienced is that of accessibility. One of the fundamental principles of the rule of law is the right of access to justice. The right of access to justice encompasses the provision of an effective remedy that is capable of providing redress. In the context of the use of home state courts, even where there is the removal of impediments such as forum non conveniens, the use of home state courts still falls short of the requirements for an effective dispute settlement process and ensuring access to justice. A practical example of this is where a local community in a rural developing country with limited access to resources would seek to hold a foreign investor, usually a large multi-national company liable in the courts of the foreign investor. Similar difficulties arise even in the context of regional agreements, for example a local community in rural Zimbabwe, seeking to hold a Nigerian investor liable in the Nigerian courts. These examples illustrate that there are several difficulties that can be involved including costs that are associated with litigating in another country the most significant being costs of travel to the court of the home state. In addition to this the difficulty and costs associated in finding legal representation in the home state country, differences in procedure and legal background and language barriers all act as prohibiting factors that bar access to the home state court. As such, while clauses allowing the use of home state courts are set to achieve a noble purpose and assist in holding investors liable, their effectiveness is, to a larger extent limited by practical considerations regarding access to the court. There is therefore a need for additional mechanisms to be put in place to ensure the effectiveness of investor liability provisions.

36 Akinwumi Oguranti, *Access to Justice for Local Communities in Investor-State Arbitration*, AFRONOMICSLAW (Nov. 6, 2019), https://www.afronomicslaw.org/2019/12/06/access-to-justice-for-local-communities-in-investor-state-arbitration

B. Counter claims

Where investor obligations are contained in an IIA, it has been noted that it is important for the host state to have a mechanism that can be used to enforce invest obligations where there has been non-compliance and gain redress for the same. In the present international investment arbitration framework, host states are not able to bring direct claims against the investor for their conduct which may have negatively impacted the citizens of the host state.[37] This because the agreement to arbitrate is made perfecta by the investor initiating arbitral proceedings, however, where the investor has not expressly consented to the arbitration, the host state would not be able to initiate arbitral proceedings. To address these concerns, some arbitration rules allow host states to bring counterclaims against investors.[38] Despite the rules of most arbitral institutions making provision for the use of counterclaims, there are two key obstacles that have been identified by arbitral tribunals in accepting counterclaims made by host states.[39] These two obstacles are whether or not the agreement to arbitrate provides the tribunal with jurisdiction over the determination of counterclaims and the question as to what obligations are owed by the investor to the host state.[40]

In the case of *AMTO v Ukraine*[41], Ukraine sought to bring a counterclaim in accordance with the arbitral rules of the Stockholm Chamber of Commerce. The applicable IIA was the Energy Charter Treaty and its dispute resolution clause provided for the resolution of disputes which alleged a breach of an obligation of the host state. The tribunal held that its jurisdiction to hear a counterclaim was dependent on the contents of the dispute resolution clause in the applicable treaty. In this instance, the dispute resolution clause only extended jurisdiction to the tribunal to determine matters arising from an alleged breach of an obligation of the host state and as such, the tribunal found that it was limited by the subject matter jurisdiction defined in the dispute resolution clause and could not determine the counterclaim raised by the host state.[42] The same reasoning was also applied in the case of *Roussalis v Romania*[43] where the tribunal found that the applicable dispute resolution clause limited the jurisdiction of the tribunal to determining claims brought by the investor alleging a breach of the host states obligations

37 Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 AM. J. INT'L L. 33, 35 (2019).

38 *See, e.g.,* ICSID Arbitration Rules, Rule 48 (2022).

39 Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration,* 21 MINN. J. INT'L L. 216, 216 (2012).

40 *Id.*

41 *Limited Liability Company AMTO v. Ukraine,* SCC Case No. 080/2005, Final Award (Mar. 26, 2008).

42 *Id*. at 118.

43 *Spyridon Roussaliss v. Romania,* ICSID Case No. Arb/06/1, Award (Dec. 7, 2011).

In order to address this, the relevant dispute resolution clause in the applicable IIA would be determinative as to the question of whether the arbitral tribunal will have the jurisdiction to determine a counterclaim by the host state. For the tribunal to have jurisdiction to hear counterclaims by the host state, the dispute resolution provisions in the relevant IIA will have to specifically provide for this. As opposed to granting the tribunal jurisdiction to decide disputes arising from the host state's breach of its obligations,[44] the dispute resolution provision will have to grant the tribunal the general jurisdiction to hear disputes arising out of a violation of any of the obligations that are contained in the treaty. As such, the parties will have provided consent for the adjudication of disputes arising out of the host states violation of its obligations as well as the investor's violation of its obligations. An example of how this has been effectively incorporated is evident in s9 and 10 of the AfCFTA Investment Protocol Zero Draft that provide as follows:

9. Consent to Arbitration

Consent to arbitration shall be provided as follows:

a. each State Party consents to the submission of a claim to arbitration under this Article in accordance with this Annex; and
b. by submitting a claim to arbitration, the investor also consents to counterclaims by the Host State for an alleged breach of the Protocol.

10. Counterclaims

a. Host State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Protocol for damages or other relief resulting from an alleged breach of the Protocol.

However, this provision did not make it into the final draft of the AfCFTA Investment Protocol and it remains to be seen whether a similar provision will be provided in the Dispute Settlement Annex that is to be negotiated in accordance with article 46(3) of the AfCFTA Investment Protocol which is still under negotiation.

By making it possible for the host state to institute counterclaims, the host state may be able to represent the interests of its citizens who may be negatively affected by investment activity. This would give local communities an opportunity to heard and ensure that they have an effective remedy against the negative impacts of investment activities. This obligation on the state to raise counterclaims for the protection of its citizens where investors have violated their obligations in terms of the applicable IIA, is in line with the state's duty to protect. The duty to protect requires that the state take

44 As is the case with most dispute resolution clauses in existing IIAs.

active measures to protect its citizens from human rights abuses perpetrated by third parties through the implementation of regulations and policies and providing effective remedies when violations occur.[45] This duty on the state to take active measures has been recognized in the jurisprudence of other international courts and tribunals. In the case of *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,*[46] the African Commission on Human and People's Rights held that the government of Nigeria had a duty to protect its citizens from the negative impacts caused by foreign oil mining companies. The Inter-American Court on Human Rights in the case of *Velásquez-Rodríguez v. Honduras* held that '[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.'[47] The European Court of Human Rights has further affirmed the position that the state has a positive duty to protect its citizens from human rights violations committed by third parties and to take all reasonable measures to ensure the protection of its citizens.[48]

Within the context presently under discussion, the state's duty to protect its citizens from the negative conduct of foreign investors will have been fulfilled by ensuring provision for investor obligations and by providing an effective remedy through which the host state can seek redress in instances where the investor violates any of its obligations.

In addition to making provision for the host state to bring counterclaims, the state must also make sure that they are able to receive timely information regarding investor non-compliance with their obligations. As the reformed IIAs envisage obligations for investors in relation to the developmental needs of local communities, the activities that are related to the achievement of those obligations can be determined and undergone in conjunction with the investors and the local authorities. Local authorities are in the best position to monitor the actions of investors in relation to the fulfilment or non-fulfilment of their binding obligations and issue progress reports to the national level for the implementation of any remedies that might be available or in assisting the local

45 Juan Pablo Bohoslavsky, Líber Martín & Juan Justo, *The State Duty to Protect from Business-Related Human Rights Violations in Water and Sanitation Services: Regulatory and Bits Implications),* 26 INT'L L.: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 63, 72 (2015) (Colom.); Markus Krajewski, *The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities,* 23 DEAKIN L. REV. 13, 19 (2018).

46 *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria,* Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Oct. 27, 2001), https://achpr.au.int/en/decisions-communications/social-and-economic-rights-action-center-serac-and-center-economic-15596.

communities to access remedies as will be provided for in the IIA. The oversight of the local authority is of particular importance when it comes to preserving cultural and indigenous aspects of the community as they are well versed in this respect. The state has to ensure that local authorities are well equipped to monitor the conduct of foreign investors and that there exist mechanisms for which grievances can be brought to the national level for the purposes of seeking redress.

While counterclaims appear to be a useful tool in attempting to effectively rebalance investment agreements, they are not, on their own, able to fully provide for effective investor liability. This is because, due to their nature, counterclaims can only be instituted after an investor has already initiated a claim. As such, where an investor does not initiate a claim, host states would not be able to make use of the counterclaim mechanism, and this would render the counterclaim provisions less effective for ensuring investor liability. Further, while the state has the duty to protect its citizens, as a party to investment disputes, it should not be taken for granted that the host states will always have the same interests as their citizens. As such, there are some instances where the interests of the host state would be contrary to the interests of the local investors thereby limiting the likelihood of the host state providing adequate representation on behalf of its citizens.[49] In any event, the use of counterclaims does not provide direct redress and remedies to the local communities. They would still be unable to participate in the proceedings, make meaningful representations and have access to information and hearings. This undermines the protection that the re-balancing exercise seeks to achieve.

From the above discussion, despite the efforts to reform the system in order to achieve adequate protection of affected stakeholders, the reform methods adopted are inadequate to meet this goal. According to Sornarajah many reform efforts address the peripheries of the system in the hopes that by fixing them, the challenges of the system will be muted.[50] As such there is a need for additional mechanisms to be put in place to ensure investor liability.

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47 *Velásquez-Rodríguez v. Honduras,* Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).

48 *See generally* Daniel Augenstein, *State Responsibilities to Regulate and Adjudicate Corporate Activities Under the European Convention on Human Rights*, Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (April 2011) https://media.business-humanrights.org/media/documents/9b7d88557de08aa2aad4d2b2428d4abcd0f1b35c.pdf.

49 George K. Foster, *Foreign Investment and Indigenous Peoples: Options For Promoting Equilibrium Between Economic Development And Indigenous Rights,* 33 MICH. J. INT'L L. 627 (2012).

50 Muthucumaraswamy Sornarajah, *Disintegration and Change in the International Law on Foreign Investment,* 23 J. INT'L ECON. L. 413, 418 (2020).

II. Measures To Be Incorporated Into International Investment Treaties To Achieve Effective Investor Liability.

A. National Courts Of The Host State

The UN Guiding Principles on Business and Human (UN Guiding Principles) have not yet culminated into a binding international treaty on human rights but they are widely used and accepted as the standard for business and human rights.[51] According to De Schutter, the UN Guiding Principles are regarded as 'the most authoritative statement of the human rights duties or responsibilities of states and corporations adopted at the UN level.'[52] On this basis they can be used to assist in ensuring investor liability within international investment law.

According to the UN Guiding Principles, the state has an active role to play in ensuring effective redress for victims of violations of rights that are occasioned by business in the course and scope of their business activity. To this end, Guiding Principle 25 provides as follows:

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

The Guiding Principles further provide that the steps can be in the form of state judicial mechanisms i.e., national courts,[53] non-judicial mechanisms,[54] and non-state-based mechanisms.[55] From this we see that the state has the primary duty to

51 René Wolfsteller & Yingru Li, *Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness*, 23 HUMAN RIGHTS REV. 1, 2 (2022).

52 Olivier De Schutter, *Foreword: Beyond the Guiding Principles, in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? (Suryva Deva & David Bilchitz, eds., 2013).

53 *See* U.N. Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* 28, U.N. Doc. HR/PUB/11/04 (2011) (Principle 26 provides that '[s]tates should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.').

54 *See id*. at 30 (Principle 27 provides that, '[s]tates should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.').

55 *See id*. at 31 (Principle 28 provides that, 'States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms.').

ensure that its citizens are able to receive adequate redress arising from human rights violations occasioned by investors. Ensuring strong judicial mechanisms is beneficial in that, where these mechanisms are in the host state, they are more accessible to the victims of rights violations, they ensure ease of participation of all affected parties in the dispute, are much cheaper than cross border or international litigation and there is the possibility of appeal where any party may not be satisfied with the outcome of the decision.

To give effect to these principles, the UN Human Rights Council adopted a draft resolution to establish an open-ended intergovernmental working group to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. The Working group has released a third revised draft text for a binding treaty on business and human rights. The text of the treaty deals with inter alia provisions for ensuring investor liability. These provisions illustrate how the domestic courts of the host state can be an effective forum for ensuring liability of investors and set out the steps that states ought to take in giving effect to the same. For example, article 7 makes provision for access to a remedy and sets out the steps that states ought to take to ensure that victims are able to receive effective redress. These steps include ensuring that there are effective, adequate and timely remedies that overcome the specific obstacles that women, vulnerable and marginalised people face,[56] facilitating access to information,[57] providing adequate legal assistance,[58] removing barriers and obstacles to access to courts such as high costs of filing cases[59] and ensuring enforcement of judgements rendered.[60]

In addition to this, Article 8 provides for the legal liability of business entities and enjoins states to ensure that their domestic laws make provision for domestic liability for business entities carrying our operations within the state for human rights abuses.[61] To this end, these are concrete steps that can be taken by states and incorporated into their investment agreements to ensure that investors can be held liable within the courts of the host state that are closest and most accessible to the victims.

56 Human Rights Council, U.N. Doc. A/HRC/49/65/Add.1, at 25 (Feb. 28, 2002).
57 *Id.*
58 *Id.*
59 *Id.* at 26.
60 *Id.*
61 *Id.* at 27.

Within the international investment law regime, there is no general rule for the exhaustion of local remedies. As such, encouraging local communities to hold investors liable through domestic courts while foreign investors can directly approach international tribunals may increase the likelihood of parallel proceedings and perpetuate the creation of a separate system of justice for investors.

In order to address this, it is proposed that the exhaustion of local remedies rule be incorporated into international investment law as a pre-requisite for the initiation of proceedings before the international mechanism. The exhaustion of the local remedies rule has been considered one of the longest-standing and most basic principles in international law.[62] The CIL rule of exhaustion of local remedies aims at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system before pursuing international remedies. This principle was confirmed in the *ICJ Interhandel* case, where the court held that the exhaustion of local remedies rule is a well-established principle of CIL that gives the State where the violation occurred an opportunity to redress the violation by its own means within the framework of its domestic legal system.[63] The exhaustion of local remedies rule acknowledges that recourse to international dispute settlement mechanisms should complement national mechanisms and should only be pursued where national mechanisms fail to provide effective protection.[64] Where the exhaustion of local remedies rule applies, the claim before the international tribunal will not be admissible until local remedies have been pursued, save for where the remedies are not available or are ineffective.

By incorporating the exhaustion of local remedies rule into the international investment law regime, we not only address the question of parallel proceedings. Mandating the use of the exhaustion of local remedies rule could provide impetus for host states to improve their national legislation, build the capacity of their national courts and strengthen their judicial systems.[65] This is because foreign investors would not be bound by the exhaustion of local remedies rule where the remedies are ineffective or unavailable, and this would act as a means by which states are encouraged to improve

62 Douglas Wong, *From Redundancy to Resurgency: Revisiting the Local Remedies Rule in International Investment Arbitration*, 35 SING. L. REV. 114, 114 (2017).

63 Interhandel (Switzerland v. United States of America), Judgment, 1959 I.C.J. Reports 6 (Mar. 21).

64 Amos O. Enabulele, *Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice*, 56 J. AFR. L. 268, 269 (2012).

65 Richard C. Chen, *Bilateral Investment Treaties And Domestic Institutional Reform,* 55 COLUM. J. TRANSNATIONAL L. 547, 586 (2017).

66 George K. Foster, *Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNATIONAL L. 201, 249 (2010).

the state of their domestic courts where these are found to fall short of providing an adequate remedy. This would not only be beneficial for investors (both foreign and domestic) but improve overall access to justice and strengthen local judicial systems.

The inclusion of exhaustion of local remedies rule also allows for the settlement of disputes through domestic courts that are created in line with national constitutions that are subject to control mechanisms and are therefore viewed as being more determinate, more accountable and more legitimate[66] in comparison to tribunals that are created on an ad hoc basis with no oversight authority. As opposed to trying to create an entirely new legitimate system at the international level, it would be much easier to make use of the already existing domestic court system, whose existence, structure and use are already accepted as having perceived legitimacy.[67] It would address the concern that investor-state dispute settlement (ISDS) functions as a form of international judicial review without the backing of any constitutional system.[68] By grounding ISDS within the framework of the national court system, it will be seen as a part of the national system for the settlement of disputes and can, by extension, be conferred with legitimacy and acceptance that is already enjoyed by national courts. The national courts and international mechanisms will not be seen as competitors working against each other but as one whole unit aimed at ensuring the effective resolution of investment disputes.

National courts also serve as 'sites for endogenous' change in that they can redefine participating actors and shape critical norms.[69] This would be beneficial for international investment law as there have been calls for greater participation of other stakeholders in the investment dispute settlement process and most domestic courts allow for the participation of all interested parties in a matter. Further, its ability to shape norms within the constitutional framework of the state would provide a basis for more acceptable interpretations of the protections that can be offered to investors.[70]

The use of domestic remedies would also inadvertently address other procedural concerns that have arisen in international investment law such as that of multiple proceedings. This is because a majority of national laws already have mechanisms in

67 Filiz Kahraman, Nikhil Kalyanpur, & Abraham L. Newman, *Domestic courts, transnational law, and international order,* 26 EUROPEAN J. INT'L RELATIONS 184, 189 (2020).

68 Daniel Kaldermis, *Back To The Future: Contemplating A Return To The Exhaustion Rule, in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 310, 334 (Jean E. Kalicki & Anna Joubin-Bret ed., 2015).

69 Kahraman, Kalyanpur, et al., *supra* note 67, at 185.

70 This would be in response to criticisms regarding the interpretation of treaty provisions by arbitral tribunals who are far removed from the local realities of the host state and its citizens.

place to address and prevent the occurrence of multiple proceedings. Many systems of domestic law generally apply a no reflective loss principle to shareholder claims. In domestic law systems, shareholders can only claim for the direct injury to their rights as shareholders but cannot claim for any injury that has bene occasioned on the company. In the English Supreme Court in the case of *Prudential Assurance v Newman Industries*[72] the court stated that:

> [W]hat [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a three per cent shareholding.[73]

The court in *Sevilleja Garcia v Marex Financial Ltd,* upheld the rule of no reflective loss claims and stated that the basis of this rule was to prevent double recovery, that there was no causation between the actions of the wrongdoer and the harm to shareholder, noting that the shareholders harm would have been caused by the failure of the company to seek redress, to avoid conflict of interest and preserve company autonomy.[74]

In South Africa, the Supreme Court in *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) held that the underlying principles that find application with regard to the rule preventing reflective loss are, first, that a company has a distinct legal personality, secondly, that holding shares in a company merely gives shareholders the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company and, in the light thereof, a personal claim by a shareholder against a wrongdoer who caused loss to the company is misconceived.[75]

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71 David Gaukrodger, *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice* 8 (Org. Econ. Coop. Dev., Working Paper No. 2014/03, 2014); Julia Richter, *The two problem pillars of multiple proceedings in investment arbitration: why the abuse of process doctrine is a necessary remedy and requires focus in UNCITRAL'S ISDS reform,* 14 J. INT'L DISP. SETTLEMENT 407, 410 (2023).

72 Prudential Assurance Co. Ltd. V. Newman Industries Ltd. (No. 2), [1982] 1 Ch 204 (Eng.).

73 *Id.*

74 Sevilleja Garcia v. Marex Financial Ltd. [2018] EWCA Civ 1468 (U.K.).

75 Itzikowitz v. Absa Bank Ltd. (20729/2014) [2016] ZASCA 43, ¶ 9 (S. Afr.).

This viewpoint was also followed in the matter of *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* held that,

> Where a wrong is done to a company, only the company may sue for damage caused to it. This does not mean that the shareholders of a company do not consequently suffer any loss, for any negative impact the wrongdoing may have on the company is likely also to affect its net asset value and thus the value of its shares. The shareholders, however, do not have a direct cause of action against the wrongdoer. The company alone has a right of action.[76]

Further, the principles of *res judicata and lis pendens* have a clear and direct application in a large number of jurisdictions and can effectively be used to dispose of or deal with multiple proceedings. These rules, while forming part of international law, have been difficult to apply in the context of investment arbitrations and have not provided sufficient redress regarding multiple proceedings.[77]

From the above we see that the domestic courts have already developed rules and mechanisms that can effectively deal with the procedural concerns that have arisen against ISDS. As such, placing the responsibility for the liability of investors within the national court system and incorporating the exhaustion of local remedies would provide an effective means of redress that also considers the needs of local communities and vulnerable and marginalised communities, without fully depriving investors of international remedies.

B. Enforcement Of Judgements Of The National Level

As local communities will largely make use of domestic courts to hold foreign investors liable for any harm that has been occasioned by their operations, there needs to be a mechanism to ensure the enforceability of the judgements rendered by the courts of the host state in the home state, where the foreign investor would have its main operation should the need arise. This is where the home state would have a large role to play in ensuring that investors can be held liable for their conduct. IIAs would have to incorporate provisions that allow the home state to recognise and enforce the judgements of the host state to the extent that they provide for liability of their investors for human rights abuses in the host state. To this end, the home state can be

76 Hlumisa Investment Holdings (RF) Ltd. and Another v. Kirkinis and Others (1423/2018) [2020] ZASCA 83, ¶ 21 (S. Afr.).

77 Jose Magnaye & August Reinisch, *Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration,* 15 L. & PRAC. INT'L CTS. & TRIBUNALS 264 (2016); Aman Prasad, *Res Judicata- A Boon or A Bane for International Investment Tribunals?* (Apr. 26, 2020) (unpublished manuscript) (Uppsala University).

enjoined to remove barriers and difficulties that may be associated with the recognition and enforcement of foreign judgements.[78]

While provisions in IIAs would only apply on a bilateral basis to the extent agreed on by the parties, the Convention on the Recognition and Enforcement of Foreign Judgements (the Foreign Judgements Convention) would be of importance in ensuring large scale recognition of foreign judgements,[79] thereby facilitating the cross border enforcement of host state judgements where they have held foreign investors liable for human rights abuses. Although the Foreign Judgements Convention has not yet come into force and has only been signed by 28 states, the increased use of domestic courts in the resolution of investment disputes may provide the impetus required to see it being utilised to its full potential.

C. Access to an international remedy

While the incorporation of the exhaustion of local remedies rule will rebalance the system by requiring all parties to make use of the same dispute settlement process and ensure that local communities are able to effectively participate, there is still a need to rebalance the circumstances at the international level of governance. As investors are able to have a remedy at the international level, it is equally important that local communities and other affected stakeholders have the same remedy within the confines of the international investment law system. This is necessary because while there are a significant number of benefits to the incorporation of exhaustion of local remedies, this does not answer all the issues that have arisen and may arise in the context of international investment. As noted by Laryea, there may be instances where local remedies are inadequate requiring recourse to international mechanisms.[80] This is inherently noted in the design of the exhaustion of local remedies rule which takes into account that sometimes-local remedies may not be available or effective, however, this does not detract from the implementation of the rule discussed above.

In this regard it is therefore necessary to ensure that local communities are also able to access the international mechanism in designing the reformed international dispute settlement system.

78 This removal of barriers will be based on reciprocal and mutual recognition of judgements between the host state and the home state.

79 Like the New York Convention has done with arbitral awards.

80 Laryea, *supra* note 18, at 2852.

Due to the nature of consent required in arbitration, the retention of arbitration would not be a viable option for the mode of settlement of international investment disputes where the effective participation of third parties needs to be considered. In order for an arbitral tribunal to have jurisdiction to hear a matter, there ought to be a valid agreement between the arbitrating parties. In international investment law the host state agrees to arbitration in advance in the dispute resolution clause of the applicable IIA and the foreign investor consents to the use of arbitration through the initiation of an arbitral claim. As a result, there can only be two parties to an arbitration, the host state and the foreign investor, and only one party, the foreign investor, can initiate arbitration proceedings. As a result of this, there can be no meaningful participation of third parties in the dispute resolution process based on arbitration save for in the limited context of amicus curiae submissions. This means that third parties, usually local communities and vulnerable or marginalised groups will not be able to have their rights and interests adequately protected in the course of an arbitral dispute.

Further, this means that the investor obligations that are being incorporated into newer generation IIAs are ineffective as there would be no equivalent mechanism within the international investment law framework that can be used by third parties to directly enforce the obligations of the foreign investor and seek protection from negative investor conduct. Vastardis notes that, 'a permanent court of investment arbitration is a short-sighted solution to deficiencies in local access to justice which is likely to undermine domestic legal developments.'[81]

In response to this, a permanent judicial mechanism i.e., a multilateral investment court that is modelled on domestic judicial systems for the settlement of disputes arising in the context of international investment law can be utilised.

As noted above, states are beginning to incorporate investor obligations into their treaties, thereby creating obligations for the foreign investor to ensure that their investment activities do not cause harm to the local communities, the host state or the environment. In this regard the rights holders are no longer just foreign investors but also the host states and the local communities. All these actors therefore ought to be given an opportunity to enforce their rights through an equal and accessible dispute settlement process. When a dispute or the outcome of a dispute impacts the rights and

81 Anil Yilmaz Vastardis, *Investment Treaty Arbitration: A justice bubble for the privileged', in* THE OXFORD HANDBOOK OF ARBITRATION (Thomas Schultz & Federico Ortino eds., 2020).

82 Frank J. Garcia & Brooke S. Guven, *Designing a Multilateral Investment Court for Procedural Justice,* 24 J. WORLD INV. & TRADE 461, 471 (2023).

interests of others, procedures must be in place to determine those interests and how the process can accommodate and adjudicate them.[82] The general rule, especially in most domestic legal systems, is that the law should require meaningful participation in the dispute resolution process for any person that has been affected by that process.[83] This viewpoint has also been adopted in international courts and tribunals. For example, the WTO allows for states to intervene in a dispute where they can demonstrate a substantial interest in the matter and the interests of the intervening party can be fully considered when rendering a decision.[84]

To ensure effective participation of all affected parties, the rules of procedure will have to provide for a more court-like mode of dispute settlement that can be accessed by a wider range of parties. The rules of procedure should allow for various parties to have standing before the court and offer flexibility to state parties to opt in and opt out of various mechanisms thereby widening its scope of application and increasing its chances of acceptance.

As signatories to the instrument establishing the MIC as well as signatories to IIAs, state parties should be able to make use of the MIC through the incorporation of state-to-state dispute settlement. Therefore, where states such as Brazil, seek to retain the use of state-to-state mechanisms, they will not have to approach another forum but can also make use of the MIC.[85]

Secondly, the rules of procedure should make provision for individuals- both natural and juristic persons, to have access to the court. This will not only allow foreign investors to be able to approach the court as in traditional investor state dispute settlement but also provide a mechanism through which local communities and other affected stakeholders can directly approach the court and have access to an international mechanism for the settlement of disputes. By extending the right of access to local communities and other affected stakeholders, the MIC ensures that the dispute settlement mechanism works for a wide range of stakeholders. To give effect to this, the court would have jurisdiction to hear all matters arising from a violation of any of the obligations in the BIT. As the jurisdiction of an international court is conditioned on state consent, the consent by states to the jurisdiction of the MIC would, much like in the International Criminal Court, provide the state with jurisdiction over individuals as well.

83 *Id.*

84 Dispute Settlement Understanding, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1867 U.N.T.S. 425.

85 The use of state-to-state mechanisms has not produced many difficulties in practice and so will not be elaborated on further herein.

By ensuring equal access to the court, there is a shift from international investment law being a system which protects the rights of a select group of people to realising that many stakeholders can be affected by investment activity and providing all affected parties with equal remedies before the law.

III. Conclusion

Access to justice is one of the sustainable development goals and has been identified as the third pillar of the UN Guiding Principles on Business and Human Rights which enshrine the duty of the state to ensure access to a remedy for the adjudication and enforcement of business and human rights claims. Access to justice has also been recognised by the former Special Rapporteur on Extreme Poverty and Human Rights who has urged states to include the elimination of inequality in access to justice viewing this as a vital feature of human centred social and economic development. Access to justice entails the right to an effective remedy. Target 16.3 of the SDGs refers to the promotion of the rule of law at the national and international level and ensuring equal access to justice for all.

By incorporating domestic remedies and providing access to local communities to dispute settlement provisions at the international level, not only do we address the concerns that have arisen in the context of international investment law, but we also create a that the international investment law system plays its part in contributing to the achievement of sustainable development. Ensuring liability for foreign investors is an important aspect of the reform of international investment law and will go a long way in rebalancing investment treaties to benefit all stakeholders.

In the premises, we see that the tools and resources for ensuring investor liability are already existent within national and international law. What is required is to bring these out and utilise them in a manner that is compatible with the goals of the international investment law reform agenda.

86 Magdalena Sepulveda (Special Rapporteur on extreme poverty and human rights), *Equality and access to justice in the post 2015 development agenda,* https://www.ohchr.org/sites/default/files/Documents/Issues/Poverty/LivingPoverty/AccessJusticePost2015.pdf.

MALAWI'S COTTON TRADE

Riding The Coattails Of The Cotton-4

*Atupele Masanjala**

Abstract

Cotton has proven to be quite a divisive issue in the World Trade Organisation ("WTO") following the launch of Benin, Burkina Faso, Mali and Chad's campaign in 2003. The four countries, later dubbed 'the Cotton-4,' sought to bring the WTO's attention to the dire effects that the subsidies being provided by developed countries to their cotton industries were having on the African nations' economies. What initially started as a campaign solely by the Cotton-4 has now evolved to include the plight of all least developed countries ("LDCs") whose economies rely, to a certain extent, on cotton.

Cotton is Malawi's fourth largest export behind tobacco, tea and sugar. It was identified in Malawi's Growth and Development Strategy and Malawi's National Export Policy as a priority crop that could lead to an increase in Malawi's overall exports. However, despite these facts, Malawi's cotton production and export levels have been dropping steadily. Thus, an assumption can be made that Malawi should have benefitted from any changes in the WTO that positively affect the cotton industries of the Cotton-4 and other LDCs. The paper is an examination of that assumption and shall ask the main question 'How, if at all, has Malawi's cotton industry benefitted from the Cotton-4's campaign?' It considers the different cotton initiatives that the WTO has embarked on and determines whether there has been a positive spill-over effect into Malawi's cotton industry.

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I. Introduction

There is a Burkinabe proverb that goes, 'The ants said to themselves: Let us unite, we will succeed in moving the elephant.' In 2003, Burkina Faso, Benin, Mali and Chad embodied the proverb and came together and launched a campaign in the World Trade Organisation ("WTO") to bring attention to the dire effects of the 'cotton situation' on their economies in the hope of bringing about change for the better. With cotton being a highly relied on source of export earnings and foreign exchange for all four countries, any ripples in the global cotton market result in waves in their economies. Now, two decades since these countries, later dubbed 'the Cotton-4,' ("C4") launched their campaign, there is need to ascertain if the situation has changed, not only for them but for other cotton producing developing countries like Malawi. Further, if things have changed, have they done so for the better?

This paper seeks to examine the WTO's response to the C4's campaign launched in 2003 and any ripple effects that it has had on Malawi's cotton industry. It advances one main argument- that the numerous interventions undertaken at WTO level have had little to no effect on Malawi's cotton trade because other external factors have either negated them completely or had a bigger impact. In doing so, the paper shall first provide a background of the 'cotton situation' highlighting the progress made by the C4 in their campaign and major events that have taken place in the WTO with regard to the crop. Thereafter, the paper shall dive into the history of cotton in Malawi before finally assessing the benefits that have accrued to both the C4 and Malawi.

II. Evolution Of The Cotton Initiative In The Wto And C4's Progress

This part of the paper shall be a summary, in chronological order, of the events that have taken place in the WTO since the C4 launched their campaign and the progress that they have achieved.

The President of Burkina Faso's 10th June 2003 speech is often lauded as the beginning of the C4's campaign when in actuality, it had begun a few months earlier when they presented the 'Sectoral Initiative in Favour of Cotton'[1] to the Committee on Agriculture in Special Session. In the initiative, the C4 reminded the WTO members of the commitments they made to abide by market-based price determination of

1 Special Session for the Committee on Agriculture, *Joint Proposal by Benin, Burkina Faso, Chad and Mali: Poverty Reduction: Sectoral Initiative in Favour of Cotton,* WTO Doc. TN/AG/GEN/4 (May 16, 2003).

all goods and in doing so, eliminate price distorting subsidies and practices. They lamented at the fact they had gone ahead and eliminated the subsidies in their agricultural sector but, much to their dismay, most developed countries did not do the same. While the impact of the continued subsidies affected their whole agricultural sector, the effects on cotton specifically were amplified given the importance of the crop to the economies of the C4. Thus, they called for two main things: firstly, that a decision be adopted that would provide for the substantial and accelerated reduction of the subsidies offered by the developed countries in relation to cotton. That decision would have to be reached soon and it was proposed that it be included in the agenda of the next Ministerial Conference which was set to be held in September of that same year in Cancun, Mexico. Secondly, until the cotton support measures were fully eliminated, they called for the cotton producing developed countries to compensate the C4 to off-set the income they were losing due to the cotton support measures in place. The compensation was to be reduced annually in proportion to the reductions being made on the cotton support measures. These two proposed actions, though rephrased and paraphrased over the years, are the core request of the C4's campaign.

Regardless of how the campaign would progress and of whatever other players existed in the background, four least developing countries ("LDCs") raising an issue at such a level in the WTO was, in of itself, an impressive feat. The C4 were strategic by, not only forming a coalition, but also realising that the negotiation route would be better suited for this campaign than the dispute settlement system ("DSS"). Interestingly enough, though the DSS inherently poses financial and technical obstacles for many LDCs, the plethora of international partners at the C4's disposal meant that this would not have posed an issue in this specific instance.[2] Further, the C4 risked losing the dispute altogether and, if they had won, risked dealing with a losing party who failed to implement the Panel's recommendations. Ultimately it was the risk of political and diplomatic ramifications of a dispute with the United States ("US") that steered them away from the DSS. However, it has also been suggested that another reason that the C4's campaign was not dead-on arrival was due to them framing themselves as 'competitive victims.'[3] The 'victim' aspect derives from their highlighting the effect of the developed countries' subsidies on the C4's economies and development. However, what differentiated the campaign from other campaigns launched by the global south was the repeated focus on the competitiveness of the C4's cotton on the world stage

2 Manfred Elsig & Philipp Stucki, *Low-Income Developing Countries and WTO Litigation: Why Wake up the Sleeping Dog?,* 19 REV. INT'L POL. ECON. 292, 302-303 (2012).

3 Matthew D. Eagleton-Pierce, *The Competing Kings of Cotton: (Re)framing the WTO African Cotton Initiative,* 17 NEW POL. ECON. 313, 319 (2012).

due to its high quality and low production costs.[4] This was in contrast with American's artificial competitiveness derived from the immense government support and made the campaign very hard to ignore.[5]

The Cancun Ministerial conference was held a few months after the June 2003 speech and the C4 also addressed the other members and asked for the cotton issue to be included on the agenda. At the end, no decision was reached at Cancun on the matter with the members failing to agree on how compensation should be paid and on whether the issue was to be handled as a specific question or under the three pillars of agriculture.[6]

The year 2004, however, saw the C4 make some progress. In August 2004, the WTO adopted the 'August 2004 Framework: Export Subsidies and Competition' and under it, established the Cotton Sub-Committee which was a body specifically meant to deal with cotton in the agriculture talks. While, the Cotton Sub-Committee has been instrumental in keeping the cotton issue on the WTO's agenda and, for the first few years after its establishment applied pressure on to the USA, years went by without it carrying out any significant work leading some to conclude that 'it has largely remained a defunct vehicle.'[7] The next year, at the Hong Kong Ministerial Conference in December 2005, a decision was adopted proclaiming that 'all forms of export subsidies for cotton will be eliminated by developed countries in 2006.'[8] The 2006 deadline was missed and what followed can only be described as a lull in the campaign that lasted years in which no significant steps were taken for a number of years.

By 2013, the world of cotton subsidies had changed from what it was in 2003. The US and the European Union ("EU"), the biggest subsidisers in 2003, had reduced their subsidies with the US' payments to its farmers declining and the EU eliminating its worst sort of subsidies.[9] Self-declared developing countries like China and India, however, had now emerged as the biggest subsidisers. This meant that while the C4's had initially primarily targeted the US and the EU, their campaign had to

4 *Id.* at 321.

5 Karen Halverson Cross, *King Cotton, Developing Countries and the 'Peace Clause': The WTO's US Cotton Subsidies Decision,* 9 J. INT'L ECON. L. 149, 159 (2006).

6 The three pillars of agriculture include market access, export subsidies and domestic support.

7 Eagleton-Pierce, *supra* note 4, at 330.

8 World Trade Organization, Ministerial Declaration of 22 December 2005, WTO Doc. WT/MIN(05)/DEC (2005).

9 Kristen Hopewell, *Global Power Shifts and the Cotton Subsidy Problem: How Emerging Powers Became the New Kings of Cotton Subsidies,* 4 GLOB. STUD. Q. 1, 2 (2024).

expand to the 'emerging powers' who now played a huge role in setting the global price of cotton. The emerging powers' insistence on being considered developing countries under the WTO, a tactic used to escape the same level of scrutiny and strict compliance that the developed countries were subject to, made the C4's work that much harder. Worse still, these new players were less than forthcoming in providing details of their subsidies to the WTO. Thus, the C4 called for increased transparency and accountability on their parts. 2013 also brought with it the Bali Ministerial Conference Decision ("the Bali Decision") in which the WTO members agreed to hold bi-annual dedicated discussions under the Committee on Agriculture in Special Session to address any trade related developments across the three agricultural pillars in relation to cotton. These bi-annual dedicated discussions were dubbed 'cotton days' and from them emanated the 'Evolving Table on Cotton Development Assistance.' This was regarded as a sure victory on the C4's part as the document serves as the WTO's main document for tracking developments and exchanging information on development assistance provided to developing countries in regard to cotton thus streamlining the discussion further. However, due to a deadlock in the WTO over India's refusal to sign a multilateral trade facilitation agreement for fear of how it would affect its right to provide certain subsidies and stockpile food, it was almost a full year before the Bali Decision was fully put into action by the members. In the face of this and falling cotton prices, the C4 made a plea for members to take negotiations seriously and expedite them.

Then came the 2015 Nairobi Ministerial Conference ('Nairobi Decision') on Cotton which started by acknowledging the lack of progress made by the WTO on the cotton front.[10] The decision provides for the cotton issue to be addressed in two components, the trade component and the development component. The trade component is then split into three parts mimicking the three pillars of agriculture. Under market access, the decision stated that those countries 'declaring themselves able to' should grant duty free and quota free access to cotton and approved cotton related products from cotton LDCs from 1st January, 2016[11] and those that cannot should 'consider possibilities for increased import opportunities for LDCs from 1st January 2016.'[12] Under export competition, the decision makes reference and adopts a parallel decision reached at the same ministerial conference on export subsidies.[13] The other decision,

10 World Trade Organization, Ministerial Declaration of 19 December 2015, WTO doc. WT/MIN(15)/46 (2015).

11 *Id*. at ¶1.1.2, 1.1.4.

12 I*d.* at ¶1.3.

13 World Trade Organisation, Ministerial Declaration of 19 December 2015, WTO Doc. (WT/MIN(15)/45/WT/L/980 (2015).

dealing with export subsidies generally, made specific mention of cotton and stated that all export subsidies with regard to cotton were to be eliminated immediately by the developed countries immediately upon adoption of the decision and no later than the end of 2017 by developing countries.[14] Though some progress has been made in implementing the Nairobi Decision, it still has not been fully implemented to this day. Members have had disagreements about how to implement certain aspects of the decision with others questioning whether such a decision can be regarded as legally binding anyway.[15] Consequently, members have still failed to address and resolve the issue of trade distorting support given by members to their cotton industries.[16]

In December 2017, pursuant to another commitment made in the Nairobi Decision to identify and examine market access barriers including tariff and non-tariff barriers for cotton, the WTO, in collaboration with the International Trade Centre launched the Cotton Portal. It 'provides a single entry point for all the cotton-specific information available in WTO and ITC databases on market access, trade statistics, country-specific business contacts and development-assistance related information, as well as links to relevant documents and webpages.'[17] Two years later in 2019 the WTO, at the initiative of the C4, launched World Cotton Day on 7th October with one of the objectives being the engagement of donors and beneficiaries and the strengthening of development assistance for cotton.

In 2020, Covid-19 devastated the cotton industry and the C4 urged that an information session be held to understand the socio-economic impact of Covid-19 on the cotton value chains. The C4 stated that seventy percent of their cotton produced in 2020 was stuck in their 'factories, transit hubs or ports, and weather conditions were severely affecting the quality of the fibre too.'[18] The C4 succeeded in having the Covid-19 and cotton included as a permanent agenda item for the Committee on Agriculture in Special Session. In 2022 the WTO and the Fédération Internationale de Football Association ("FIFA") entered into a memorandum of understanding under which the WTO and FIFA would work together to develop and enhance the participation of the C4 and cotton producing LDCs in global football apparel value chains.

14 *Id.* at ¶12 (whereas export subsidies on other products were supposed to be eliminated by the end of 2018 by developing countries)

15 Dennis Muhambe, *The Paradox of the Nairobi Ministerial Decision on Export Competition: Lessons for the Future,* 13 GLOB. TRADE & CUSTOMS J. 49, 53-55 (2018).

16 U.N. Director-General, *Implementation Of The Trade-Related Components Of Cotton,* WTO Doc. WT/MIN(24)/10 (Feb. 16, 2024).

17 Cotton Portal, *https://www.cottonportal.org/cotton/* (last visited June 30, 2023).

18 Special Session of the Committee on Agriculture, *Report on Information Session on Covid-19 and Cotton: From Facts to Solutions,* TN/AG/SCC/W/34 - WT/CFMC/W/82 (Oct. 19, 2020).

However, the C4's campaign rages on. Despite calls for the lowering of domestic support in the cotton sector, a fully-fledged reform of the industry has not occurred. As it stands, members are being urged to work together to ensure that the 13th Ministerial Conference (M13) can result in concrete results on the cotton issue.

III. Malawi And Cotton

a) History of Malawi's Cotton Industry

Malawi's economy is heavily dependent on agriculture and agricultural exports. Agriculture accounts for thirty-one per cent of the country's Gross Domestic Product (GDP) and yet, it employs seventy-six per cent of the workforce.[19] Throughout Malawi's history, changes in government policies and regimes have disproportionately affected the agriculture sector in Malawi.

Malawi was under single party rule from 1964 to 1994. This period was characterised by state owned or controlled enterprises being the major player in all industries. This went hand in hand with the provision of significant government support to its citizens in an effort to ensure that Malawians had access to food, clothing and shelter. Accordingly, the government provided input subsidies for both cash crops like cotton and food crops such as maize to assist smallholder farmers with the purchase of farm inputs such as seeds and fertiliser. In 1963, the legislature enacted the Special Crops Act.[20] Under this statute, crops designated as 'special crops' would be subject to government intervention in their cultivation and marketing. Only persons with licenses authorising them to do so could take part in the growing, buying, selling or bartering of special crops.[21] Cotton and other cash crops such as tobacco, tea, coffee and sugar were amongst some of the crops designated as special crops. The buying and selling of cotton and cotton inputs was done mostly by one parastatal institution, Agricultural Development and Marketing Corporation ("ADMARC"), which would not only supply the inputs to cotton farmers but also act as their main buyer to ensure that there was always a market for them.

However, in the 1980s and 1990s, pursuant to the structural adjustment programs foisted upon it by the World Bank and the International Monetary Fund ("IMF"), Malawi embarked upon a market liberalisation scheme. The scheme sought to entice

19 U.N. Conference on Trade and Development, *Feasibility study on the development of cotton by-products in Malawi,* UNCTAD/TCS/DITC/INF/2022/5 (2022) (hereinafter 'UNCTAD').

20 Special Crops Act, Cap. 65:01, L.R.O. 1/2018, (1963) (Malawi).

21 *Id.* at § 6(1).

private entities to partake in industries such as agriculture and to lower state funding of parastatals.[22]These moves were a shift away from the African ideal of *umunthu* and were an 'adoption of neo-liberal ideology and individualistic developmental approaches'[23] as the government was essentially moving away from its paternalistic role that had come to define the single-party era. The structural adjustments brought in by the World Bank and IMF were not well received by most Malawians as they were seen as exacerbating the poor people's poverty and enriching the rich.[24] Their fears were warranted because by the 1990s, the cotton market largely consisted of smallholder farmers but was run by larger private entities which formed a quasi-cartel that manipulated pricing to suit them and this, in turn, affected the farm gate prices.[25] ADMARC was essentially stripped of its mandate and ceased to provide support in the form of input subsidies to cotton and other cash crops.

b) Malawi's Cotton Industry Now

In 2013, the Cotton Act[26] was passed into law and commenced the following year. The statute establishes the Cotton Council of Malawi ("the Council") which has the power to, inter alia, advise the government on matters of policy to do with cotton and monitor different cotton stakeholders such as growers, buyers and ginners.[27] Further, the Council also has the power to grant licenses to ginners, buyer, sellers and exporters of cotton seeds, seed cotton and cotton lint.[28] The Cotton Act also puts restrictions on the cotton seed varieties that can be sold or grown in Malawi by stipulating that only seed varieties authorised by the Minister of Agriculture shall be allowed.[29] Despite commencing in 2014, aspects of the statute especially in regard to the Council's mandate are still not fully operational to this day due to the lack of human resource and capacity.[30] What you essentially have in practice then is an industry that is only regulated on paper while it is being held hostage by the larger and richer ginners which do not represent the majority interests.

22 Andrew Comstock, Todd Benson, et al., *A Critical Review of Malawi's Special Crops Act and Agriculture (General Purposes) Act,* INT'L FOOD POL'Y RSCH. INST. DISCUSSION PAPER 01792 (2019).

23 Chance Chagunda, *Development Aid, Democracy and Sustainable Development in Malawi – 1964 to Date,* 41 CADERNOS DE ESTUDOS AFRICANOS 153, 156 (2021) (Port.).

24 Julius O. Ihonvbere, *From Despotism to Democracy: The Rise Of Multiparty Politics In Malawi,* 18 THIRD WORLD Q. 225, 227 (1997).

25 Gift Wasambo Kayira & Paul Chiudza Banda, *The Cotton Industry and the Struggle to Arrest Poverty in Malawi: A Historical Stocktaking,* 22 MALAWI J. SOC. SCI. 29, 42-43 (2023).

26 Cotton Act, Cap. 65:04, L.R.O. 1/2018 (2014) (Malawi).

27 *Id.* at §11.

28 *Id.* at §12.

29 *Id.* at §20.

30 UNCTAD, *supra* note 20, at 14.

Malawi also has a Cotton Development Strategy 2019/20-2023/24 ("MCDS") which is a medium-term strategic framework for the cotton sector meant to be implemented within a five-year period. The current MCDS is a follow up to the previous strategy which was in effect from 2011 to 2016. MCDS has five main pillars, one of them being, 'Trade Competitiveness and Market Development.'[31] Under this pillar, the goal is to increase the volume and value of cotton and cotton products for domestic and international markets by forty percent by 2024.[32] Cotton was also identified in Malawi's 2020 Growth and Development Strategy and Malawi's National Export Strategy as a priority crop that could lead to an increase in Malawi's overall exports.

At present, cotton is Malawi's fourth largest export behind tobacco, tea and sugar. However, despite such a seemingly robust framework, cotton production continues to decline steadily. At the time of the launch of MCDS in 2019, the number of smallholder cotton farmers had declined to 100,000 from the historic average of around 250,000 and yields have stayed at the very low average of 200 to 300 kilograms per hectare.[33] According to the Malawi government, the cotton industry faces several challenges including low public and private investment in the sector, weak cotton farmer organisation, lack of structured markets and climate change.[34] Despite the fact that it is aware of the lack of support the industry received, the government has done very little support to the cotton sector to facilitate both production and exportation of cotton. This is indicative of the value placed on cotton by not only the Malawian Government but the Malawian people as well. As Malawi's economy worsens, focus has been placed on food crops for the poor with cash crops being regarded as the domain of the wealthy. There have been two notable exceptions to this, however.

Firstly, the government tried to support smallholder cotton farmers through the provision of vouchers that granted them input subsidies to enable them to buy inputs such as seeds and fertiliser at a cheaper cost through the Farm Input Subsidy Programme ("FISP") in the 2006/7 and 2011/12 growing seasons.[35] However, the initiative was short-lived due to scarcity of cotton seed and the general disinterest in cotton by many

31 The other pillars include Production and Productivity, Research, Technology Generation and Dissemination, Policy and Regulatory Environment and Institutional Development and Capacity Building. *Malawi Cotton Development Strategy 2019 to 2023,* Ministry of Agriculture Irrigation and Water Development (2019) (Malawi).

32 *Id.*

33 *Id.* at 5.

34 *Id.* at 14.

35 Ephraim Chirwa & Andrew Dorward, *Agricultural Input Subsidies: The Recent Malawi Experience* 93 (Oxford University Press 2013).

smallholder farmers. When one considers the lack of strong government regulation in the sector due to the Council's weakness, the cartel like behaviours of the ginners and the fluctuating prices of cotton, it is no wonder many farmers refused to be involved in the cotton industry. Consequently, though FISP is still operational in Malawi today, it no longer applies to cash crops such as cotton and is solely focused on food crops such as maize and legumes which still hold the farmers' interest. Another attempt at boosting the sector was through the Cotton Production Up-scaling Model (2011-2014). Through it, government injected the equivalent of ten million dollars in the cotton sector in 2011 and 2012 to assist smallholder farmers which resulted in a tremendous rise in cotton production in the initial years of the model.[36] However, there has not been any significant government support to the cotton sector since then.

IV. Success Of The Cotton-4's Campaign

In order to evaluate whether or not Malawi has benefitted from joining the campaign, one needs to first ascertain whether the pioneers of the campaign have even benefitted. Thus, this part of the paper addresses the question, 'Have the C4 succeeded in their campaign?' On the outset, it must be noted that answering the question is not that simple. Indeed, the mere posing of the question in such simplistic terms is an oversimplification of a very complex situation with many factors at play. However, in attempting to answer the question, this article goes to the heart of the C4's campaign and considers the two main things that the C4 has been asking for since they launched the campaign twenty years ago. These are for the developed countries to reduce, with the goal to totally eliminate, export subsidies in their cotton sector and for the developed countries to compensate the affected LDCs in the meantime. This section is, therefore, divided into two parts with each part addressing each request.

a) Elimination of Export Subsidies by Developed Countries
   i) The United States and the European Union

36 *Id.* at 95.

37 John Baffes, The "Cotton Problem", 20 WORLD BANK RSCH. OBSERVER 109, 119 (2005).

38 Kevin Watkins & Jung-ui Sul, Cultivating Poverty: The Impact of US Cotton Subsidies on Africa, OXFAM (Sep. 5, 2002) https://oxfamilibrary.openrepository.com/bitstream/handle/10546/114111/bp30-cultivating-poverty-050902-en.pdf;jsessionid=45E541541BB9E66F687B42837DDBF8F5?sequence=1.

39 Appellate Body Report, United States – Subsidies on Upland Cotton, WTO Doc. WT/DS267/AB/R, (adopted Mar. 21, 2005).

The European Union (EU) began providing support to cotton farmers in 1981 after Greece joined the EU while the US had begun subsidising cotton in 1995.[37] The subsidies have taken various forms such as direct payments to farmers or producers, ad-hoc emergency payments, export credit guarantees and crop insurance.[38]

When the C4 began their campaign, the US was the largest provider of subsidies to their cotton industry. However, in 2002 Brazil brought a complaint before the WTO against the US.[39] The case, also discussed briefly later on in this paper, did not initially result in an overwhelming reform of the cotton industry as was hoped for due to the US' delaying tactics through its refusal to implement both the Panel and Appellant Body's recommendations. This meant that it continued to subsidise its industries for years after the commencement of the case. Further, the case resulted in the entry into a Memorandum of Understanding (MOU), by the US and Brazil which primarily only benefits Brazil in terms of payments. However, under the same MOU, the US agreed to eliminate certain controversial subsidies such as the "Step 2 Payments"[40] and export guarantees[41] from their cotton subsidy system either through legislation such as the 2014 Farm Bill or voting by in the House of Representatives. Unfortunately, both the 2014 and the 2018 Farm Bill (currently in force) still provided for federal insurance schemes to protect cotton producers from price drops or payments to carry out the same function such as the Agriculture Risk Coverage Payments and Price Loss Coverage ("PLC"). More concerning, however, is that the American cotton industry is set to push for more government support under the 2023 Farm Bill to be passed in December, 2023 which could undo much of the ground gained through the case.

In the EU, on the other hand, only two countries produce cotton on a significant level thus, EU's market share is very small compared to the other developed countries that are major cotton producers and yet they are a leading voice in terms of the global cotton price. Since 1981, the EU cotton subsidy regime has only been reformed once, in 2006. In its reform the EU shifted sixty-five percent of the support it gives to decoupled payments meaning that instead of tying payments to production level or market conditions, the EU would make income transfers at a fixed rate.[42] At present, cotton farmers receive decoupled income support (known as cross compliance) for respecting strict standards of environmental protection, animal welfare and food

40 *Id.* (Payments/certificates to eligible producers when certain market conditions existed that exceeded the US benchmark).

41 *Id.* (Credit provided by the US government to either importers or exporters of cotton to facilitate trade).

42 *Agriculture and Rural Development (Cotton),* European Union. https://agriculture.ec.europa.eu/farming/crop-productions-and-plant-based-products/cotton_en.

safety.[43] They also receive cotton-specific support on the condition that the cotton is farmed only on authorised land, authorised seed varieties are used and the harvested cotton is of the approved quality.[44] It should be noted that the EU denies the fact that these domestic support measures qualify as export subsidies. This argument relies on the fact that the EU does not use exportation or production as basis for the support. However, regardless of their motivation, it has been shown that the immense support given by the EU cushions their farmers and allows them to keep their prices low and in turn, contributes to keeping the global cotton price low.[45]

ii) Other Cotton Producers (the Emerging Powers)

The other main cotton exporters are China, India and Brazil though when considering their market share, still calling them emerging is a misnomer.

For the last decade China has held an average of twenty-five percent of the market share when it comes to cotton exports and it has overtaken the US as the main subsidiser of cotton.[46] Despite a WTO Panel finding that China was providing subsidies above its prescribed *de minimis* level of eight point five percent on products such as rice and wheat,[47] China consistently provided support to cotton between eleven and eighteen percent between the years 2011 and 2020.[48] One of the main reasons that China has been reluctant to lower its subsidies is due to the fact that, under the WTO system, it identifies as a developing country and, according to it, should not be forced to eliminate subsidies the same way that developed countries have.[49] India's position is similar and it has been able to use this ground as a way of avoiding penalty for its public stockpiling programmes which would have otherwise been deemed trade distortive. However, in 2018, the US submitted counter-notifications to the WTO Committee on Agriculture in relation to India.[50] The US claimed that India was underreporting the support given to its cotton farmers and that, in actuality, India's support exceeded the ten percent *de minimis* level prescribed for developing countries. The matter went

43 *Id.*

44 *Id.*

45 Baffes, *supra* note 38, at 119-122.

46 Xinyao Wang, Dan Li, et al., Current Situation and Optimization Countermeasures of Cotton Subsidy in China Based on WTO Rules, 12 AGRIC. 1245, 1248-1250 (2022) (hereinafter "Countermeasures").

47 Panel Report, China – Domestic Support For Agricultural Producers, WTO Doc. WT/DS511/19 (adopted Apr. 26, 2019).

48 Countermeasures, *supra* note 47.

49 Kristen Hopewell, Heroes of the developing world? Emerging powers in WTO agriculture negotiations and dispute settlement, 49 J. PEASANT STUD. 561, 564 (2022)

50 Special Session for the Committee on Agriculture, Communication from the United States: Certain Measures of India Providing Market Price Support to Cotton, WTO Doc. G/AG/W/188 (Nov. 9, 2018).

on to be heard by the Panel. India argued that due to its developing country status, it should be able to rely on the special and differential treatment under Article 27 of the Agreement on Subsidies and Countervailing Measures which would have allowed it to continue providing the subsidies even if they were found to be prohibited.[51] However, the Panel found that India had graduated from that bracket and could no longer rely on it. The implications would have proven to be very important in the long run as it is likely they could have been easily applied to the other emerging powers who also declare themselves as developing countries. However, the Panel's decision was never adopted as the US and India reached a mutually agreed resolution instead.[52]

Brazil is one of the very few developing countries that have been able to navigate the WTO system to its immense advantage and the best example of this lies in the aforementioned US-Upland Cotton matter. In 2010, Brazil entered into a preliminary MOU and Framework with the US under which the US was supposed to pay a total of $147.3 million to an annual fund to a newly created 'Brazilian Cotton Institute' to provide technical assistance and capacity building for Brazil's cotton sector.[53] By the conclusion of the dispute in 2014, the US had paid '$450 million over three years under the interim agreement and an additional $300 million to conclude the dispute.[54]

b) Compensation

As mentioned above, the cotton issue is split into two components and the issue of compensation has been put into the development component. This component is dealt with under the Director General's Consultative Mechanism On Cotton (DGCFMC) under which the WTO and its members work with other development partners such as the World Bank (WB), International Trade Centre (ITC) and Food and Agriculture Organisation (FAO) to provide development assistance to the cotton sector in developing countries. The assistance falls into two broad categories, namely, cotton specific development assistance and, secondly, general agriculture and infrastructure development assistance under which cotton might be included. While the actual form that the assistance takes is varied, most takes the form of capacity building support for cotton farmers, technical support to the governments and support for purchase of inputs (e.g. microfinance facilities).

51 Panel Report, *India — Export Related Measures,* WTO Doc. WT/DS541/7 (Oct. 31, 2019).

52 Notification of A Mutually Agreed Solution, *India — Export Related Measures,* WTO Doc. WT/DS541/8 G/SCM/D119/1/Add.1 (July 18, 2023).

53 Framework for a Mutually Agreed Solution to the Cotton Dispute, *United States – Subsidies on Upland Cotton,* WTO Doc. WT/DS267 (Aug. 25, 2010).

54 Hopewell, *supra* note 50.

The C4 have been significant beneficiaries under both categories of assistance. Under the cotton specific development assistance, the C4 have benefitted from programmes such as the FAO's *Cotton Farmer's Capacity Building on Integrated Production and Pest Management* and the EU's *West Africa Competitiveness Support Program*.[55] They have also received assistance from individual WTO country members such as under Brazil's *Programme for the Development of the Cotton Sector in Africa* and the Netherlands' *Cotton Value Chain Development Programme*.[56] In terms of general agriculture and infrastructure development assistance, the C4 have benefitted under inter alia, the WB's *Agricultural Productivity and Diversification Programme* and Germany's *Global programme Soil Protection and Rehabilitation for Food Security*.[57]

c) So, Have They Succeeded?

As mentioned at the beginning of this section, the question of whether or not the C4 have succeeded is a complex one. On the one hand, the campaign has had some success. The US and the EU, the original targets of the C4's campaign, have significantly reduced their cotton subsidies or gotten rid of the especially trade distortive ones. All C4 countries have also received major development support towards their cotton industries. On the other hand, some of their efforts have proven futile. The US and EU have been replaced by emerging powers such as China and India who take advantage of their status as developing countries by not only refusing to eliminate certain subsidies but also benefit from development assistance themselves. For instance, China, India and Brazil are all beneficiaries of Switzerland's 'Better Cotton Initiative.'[58]

Further, the structure and procedures of the WTO make the C4's campaign difficult. The trade component of their campaign is primarily reliant on negotiations with other WTO members or groups formed by members. It can take years to achieve desired results through negotiation. Even where negotiation yields favourable agreements, the lack of implementation and accountability on the part of the members renders the decisions moot. In any case, the wording of the decisions themselves makes it hard to hold WTO members accountable. For instance, in the Nairobi Decision, there is a provision for countries to implement aspects of the decision only where 'they declare themselves able to' and to simply 'consider possibilities' and this provides a loophole for many countries to simply choose not to implement it. This undoubtedly speaks to

55 Sub-Committee on Cotton, *Director-General's Consultative Framework Mechanism on Cotton,* WTO Doc. WT/CFMC/6/Rev.34 (5 May 2023) (hereinafter "Consultative Framework").

56 *Id.*

57 *Id.*

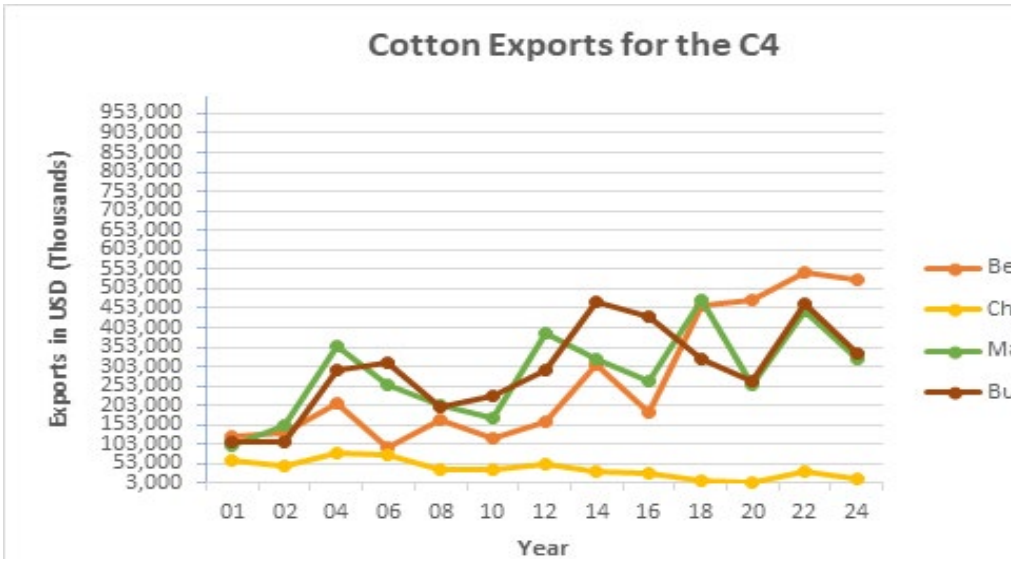
58 *Id.*

a wider problem with the WTO as a whole and not just in regard to cotton. Freedom being one of the most cherished cornerstones of the WTO has resulted in a system which not only fails to quell impunity but actually fosters it and in doing so, only further perpetuates the existing inequalities.

At the end of the day, however, to the C4 and other countries, whatever success is achieved in the WTO sphere only truly matters if it is reflected in the trade numbers. Table 1 below provides for the cotton exports of the C4 since 2001 all the way through to 2022. From these figures it is clear that Benin, Mali and Burkina Faso have experienced unstable cotton exports during the period with their curves dipping and rising drastically and erratically on the other hand. However, despite these erratic movements, the graphs for these three countries have been on an upward slope since 2001 indicating overall and general growth in their exports. For instance, Benin went from exporting roughly $121million in cotton in 2001 to about $525 million in 2024. The remaining country, Chad, has remained consistent in the worst way. Its graph shows little to no movement and any movement has resulted in the graph being on a steady downward slope. The lack of movement in Chad's graph is an indication of the lack of growth in its cotton sector. Chad's exports from 2001 to 2024 went down by $50million in comparison to that of Benin and Mali which went up by over $403million and over $224 million respectively. In contrast to the other C4, Chad has always suffered from relatively low cotton production and export levels to due factors such as low technical knowledge of soil and seeds and access to capital, its ailing cotton industry has also been attributed to the discovery of oil in the country and a shift of priority from cotton to oil.[59]

59 Jean Claude-Nachenga, *Chad: Lessons from the Oil Years, in* OIL WEALTH IN CENTRAL AFRICA (Sharmini Coorey & Bernadid Akitoby eds., 2012)

Table 1: Cotton Exports for the C4 from 2001 to 2024[60]



60 Trade Map, Benin Cotton Exports Statistics, INT'L TRADE CENTRE (August. 2025) https://www.trademap.org/Country_SelProductCountry_TS.aspx?nvpm=1%7c204%7c%7c%7c%7c52%7c%7c%7c2%7c1%7c1%7c2%7c2%7c1%7c2%7c1%7c1%7c1;
Trade Map, Chad Cotton Exports Statistics, INT'L TRADE CENTRE (August. 2025) https://www.trademap.org/Country_SelProductCountry_TS.aspx?nvpm=1%7c148%7c%7c%7c%7c52%7c%7c%7c2%7c1%7c2%7c2%7c2%7c1%7c2%7c1%7c1%7c1;
Trade Map, Mali Cotton Exports Statistics, INT'L TRADE CENTRE (August. 2025) https://www.trademap.org/Country_SelProductCountry_TS.aspx?nvpm=1%7c466%7c%7c%7c%7c52%7c%7c%7c2%7c1%7c1%7c2%7c2%7c1%7c2%7c1%7c1%7c1;
Trade Map, Burkina Faso Cotton Exports Statistics, INT'L TRADE CENTRE (August. 2025) https://www.trademap.org/Country_SelProductCountry_TS.aspx?nvpm=1%7c854%7c%7c%7c%7c52%7c%7c%7c2%7c1%7c1%7c2%7c2%7c1%7c2%7c1%7c1%7c1

V. Malawi's Benefit From The C4'S Campaign

This part of the paper addresses whether Malawi's cotton industry has experienced any spill over benefits from joining the C4's campaign. The issue shall be considered under the same two heads that the C4's success was measured.

a) Trade Component

Malawi has been a WTO member since 1995 and is a part of several negotiation groups such as the Africa Group, LDCs Group and Landlocked Developing Countries Group. It joined the C4's campaign as part of the Africa Group pretty early on and has been part of negotiations and meetings, where able to, since then. It goes without saying that the reduction of subsidies by countries like the US and EU discussed under Part IV of this paper which count as a success to the C4's campaign, also work in Malawi's favour in the same way that the rise of the emerging powers hurts Malawi. However, the true mark of any successful WTO negotiation is the creation of a bi/multilateral trade agreement. Malawi, through its negotiation groups has been able to enter into several preferential trade arrangements with countries such as the US, the UK and a plethora of other mostly European nations. Most of these agreements, however, are in respect of trade in general and not specifically cotton.[61] When it comes to specifically cotton, aside from the United Arab Emirates and China, the main importers of Malawi's cotton are African countries like Zambia, Tanzania and Mozambique.[62]

The significance of this is that whatever preferential treatment Malawi receives in relation to such cotton trade, is borne out of trade agreements from the regional communities that Malawi is a member of like Common Market of East and Southern Africa (COMESA) and Southern African Development Community (SADC) and not necessarily the WTO. So, while on the face of it, it would appear that the WTO negotiations have yielded fruitful partnerships, most of the ones that actually translate to exports for Malawi have been achieved outside of the WTO sphere.

61 Preferential Trade Arrangements, *List of Malawi's Preferential Trade Agreements*, WORLD TRADE ORGANIZATION (2024) http://ptadb.wto.org/Country.aspx?code=454.

62 Trade Map, *Malawi Cotton Exports Statistics,* INT'L TRADE CENTRE (August. 2025) https://www.trademap.org/Country_SelProductCountry_TS.aspx?nvpm=1%7c454%7c%7c%7c%7c52%7c%7c%7c2%7c1%7c1%7c2%7c2%7c1%7c2%7c1%7c1%7c1.

b) Development Component

Much like the C4, Malawi has received significant development assistance both in term of cotton specific assistance and general agriculture and infrastructure development assistance. Under the cotton specific assistance, Malawi has received various assistance from the ITC working together with other WTO members such as China, Bangladesh and India going towards capacity building in Malawi's cotton industry.[63] Under the agriculture and infrastructure development assistance, Malawi has received assistance from Canada towards the establishment of Farm Radio in Malawi, from Japan for the expansion of small-scale irrigation and the World Bank through its Community Based Rural Land Development Project.[64]

c) Malawi's Cotton Exports Since 2001

Whether all of the trade agreements and development assistance received by Malawi as a result of the C4's campaign have also resulted in an increase in Malawi's cotton export is also a matter that needs consideration. Table 2 shows Malawi's cotton exports since 2002 while Table 3 provides a comparison of Malawi's graph with the C4's.

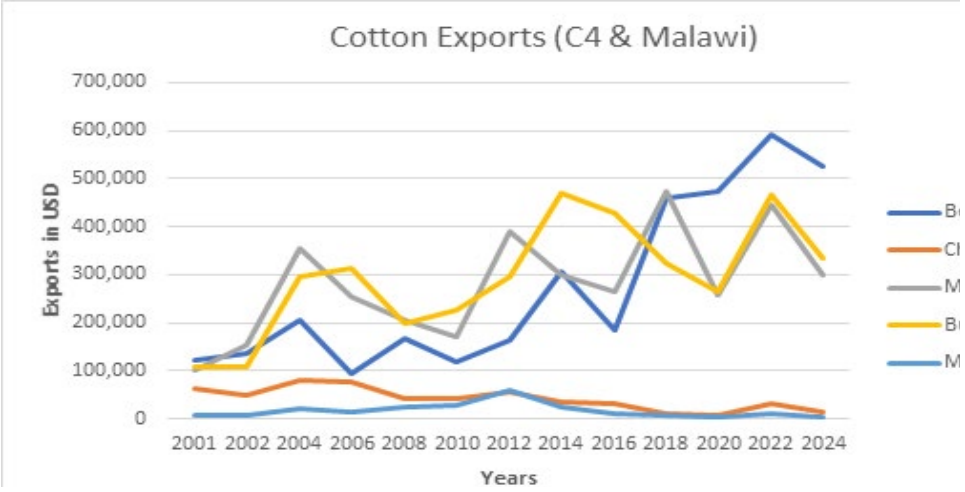
Malawi's cotton exports have been erratic at best with a sharp spike occurring in the 2011/2012 growing season and then a rapid decline thereafter. This sharp rise coincides with a rise in the domestic support provided by the Malawi government in that growing season through Farm Input Subsidy Programme and through the Cotton Production Up-scaling Model (2011-2014). At the time, Malawi also received cotton specific assistance from other WTO members like Brazil and India under projects that were meant to run from 2012 to 2023 and 2011 to 2018.[65] Had the international development assistance had any significant effect on Malawi's cotton export, then the upward trend would have continued during the subsistence of the development assistance programmes. However, when the Malawi government stopped pumping money into the sector after 2012, Malawi's cotton exports took a sharp nosedive and have been on a sharp decline ever since. Considering the fact that the Malawian government has not provided any support after 2012, one can reasonably assume that it was the two programmes implemented by the government that had the biggest effect on the 2011/2012 spike in exports and not any interventions undertaken at WTO level.

63 Consultative Framework, *supra* note 56.
64 *Id.*
65 *Id.*

Further, it is clear that Malawi's cotton exports have not grown over the years that it has been party to the C4's campaign. For instance, Malawi's cotton exports at 2022 are only $9.3million more than what they were in 2024, an almost negligible amount. When compared to the trends shown by the C4, one can see that the trend of Malawi's graph is similar to that of Chad's in that the different interventions made in the sector have had little effect on the long term.

Table 2: Malawi's Cotton Exports from 2001 to 2024

Table 3: Cotton 4 and Malawi's Cotton Exports from 2001 to 2024



d) Confounding Factors in This Research

While it is tempting to look at the figures of Malawi's exports as shown in Table 2 and conclude that the C4's campaign has had little to no benefits in Malawi, it would be improper to do so without acknowledging the confounding factors that exist in this research. Confounding factors can be defined as independent variables which are not the focus of one's research but can have an effect on the phenomena being studied.[66] While the concept is widely used in areas such as medicine and statistics, the principles apply to any research in which a causal link to trying to be established between two variables. Thus, even though we are not able to calculate the actual effect of the confounding factors in this research had on Malawi's cotton exports, it is still important to take note of the other factors that may have affected the exports outside of the C4 campaign.

The first of these confounding factors has already been discussed above and that is the provision of domestic support by the Malawian government. However, another factor that cannot be understated is the effect of Malawi's climate on not only cotton but Malawi's agriculture sector as a whole by resulting in extremely low yields. Malawi has suffered a cocktail of floods and cyclones since 2003 with the most notable being the floods of 2015, Tropical Storm Idai in 2018, Tropical Storm Ana in 2021 and worst of all them, Tropical Storm Freddy in 2023.[67] More often than not, smallholder farmers are not equipped both financially and technically to handle the effects of extreme weather conditions especially when one considers that most of their cotton is rain-fed and not reliant on irrigation.[68]

Another confounding factor that had a global effect on cotton trade and which was raised by the C4 in the WTO is the Covid-19 Pandemic. While Malawi never went on full lockdown, many of its main trade partners like China and the UAE did and accordingly, lowered the level of trade that they carried out in all sectors.

The last confounding factor in this research is what has been dubbed as 'Bankgate' in Malawi. In 2017 the massive defrauding of up to USD 24 million from various commercial banks in Malawi by one of the biggest cotton ginner corporations, Cotton

66 Kantahyanee W. Murray & Anne Duggan, *Understanding Confounding in Research,* 31 PEDIATRICS REV. 124, 124 (2010).
67 *Statement by CDMA on Tropical Storm ANA response operations,* Department of Management Affairs (2022) (Malawi).
68 Vivek Voora, et al., *Global Market Report: Cotton prices and sustainability,* INT'L INST. SUSTAINABLE DEV. (2023).

Ginners Africa Limited came to light.[69] Litigation in respect of this issue was and still is occurring at both criminal and civil level. The local cotton market was shaken as investors became wary of the industry as a whole.

VI. CONCLUSION

The C4 have been the epitome of tenacity and resilience over the course of their campaign however, the system has not provided them with the kind of results that they desire forcing them to keep up their appeals twenty years on from the time they started. Malawi, on the other hand, can be seen to have simply joined the bandwagon that was the C4's campaign. Though arguments can be made about the failures of the WTO in regard to this issue, for instance, by allowing China and India to continue its subsidies, it is clear that Malawi's situation is not merely black and white. When one considers the question that this paper set out to answer, it must be acknowledged at work that it is an intricate system that cannot simply be boiled down into a neatly packaged 'yes or no' answer. However, it can be said with a certain degree of certainty and in consideration of the confounding factors discussed above and the Malawi's government's inability to support the cotton industry, that many interventions that occur at the WTO level are unlikely to trickle down to Malawi's cotton industry. So, while the C4 have generally and rightfully been able to reap the benefits of their campaign, the same cannot be the same for Malawi at the moment.

69 Frank Namangale, *Creditors win 'Bankgate' case,* NATION ONLINE (28 Feb. 2018) https://mwnation.com/creditors-win-bankgate-case/.

UNLOCKING THE POTENTIAL OF BLOCKCHAIN TECHNOLOGY FOR SECURED PAYMENTS IN INTERNATIONAL COMMERCIAL TRANSACTIONS

*Chido Teclar Mitchel Muza**

Abstract:

The globalisation of commerce has highlighted the need for more efficient and secure payment systems in international trade. Traditional payment mechanisms such as letters of credit often face challenges related to trust, inefficiency, and security. Blockchain technology, as a form of distributed ledger technology (DLT), seemingly offers a groundbreaking alternative with its core features of decentralisation, transparency, and immutability. This paper investigates the potential of blockchain technology to revolutionise secured payments in international commercial transactions. By analysing its distinctive attributes and legal implications, the study highlights how blockchain can address the limitations of conventional payment methods. While the integration of blockchain into international trade finance presents certain challenges, including jurisdictional and technological constraints, its transformative potential is undeniable. The research concludes by emphasising the need for appropriate safeguards and infrastructural support to harness the full benefits of blockchain for global commerce.

1. INTRODUCTION

International trade has generally increased in recent years, with a trend towards growth that is mostly attributed to globalisation.[1] A shift like this necessitates a search for methods to improve the effectiveness of operations within the global trade

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1 Marius-Răzvan Surugiu & Camelia Surugiu, *International Trade, Globalization and Economic Interdependence between European Countries: Implications for Businesses and Marketing Framework*, 32 Procedia Econ. & Fin. 131, 131 (2015).

2 Georgis Dimitropoulos, *The Law of Blockchain*, 95 Wash. L. Rev. 1117, 1119 (2020).

community. As traditional payment systems struggle to meet the evolving demands of a global marketplace, 'Distributed Ledger Technology' (DLT) or 'blockchain' has seemingly emerged as a disruptive technology with the potential to revolutionise the way financial transactions are conducted.[2] This research paper delves into the untapped potential of blockchain technology and its implications for ensuring secured payments in international commercial transactions.

The advantages of blockchain technology extend far beyond its most well-known application: cryptocurrency. While a variety of configurations exist, blockchain technology generally manifests as a decentralised and immutable ledger that records and verifies transactions, without the need for intermediaries, in a transparent and secure manner. As a class of technology, its inherent features – such as transparency, immutability, and decentralisation – may address the challenges of trust, security, and efficiency that often plague international commercial payments.

With a particular focus on its legal significance for secured payments in international contracts of sale, this paper explores the advantages of blockchain technology as a disruptive force in the global financial landscape. By examining its unique characteristics, this research reveals how blockchain technology can enhance the security, reliability, and efficiency of payment processes in international commercial transactions.[6]

1.1 Status Quo

The emergence of blockchain technology within the legal domain has the potential to cause significant disruptions, particularly in the realm of international trade finance and letters of credit. This disruptive potential stem from the technology's capability to transform conventional processes involving secured payments for international commercial sale transactions. Currently, the prevalent method for conducting such payments involves the utilisation of documentary letters of credit, which entails multiple steps, paperwork, and actors that often result in delays and complications.[4] Moreover, international sales contracts commonly adhere to traditional contracting methods that may no longer align with the ongoing technological revolution. To adapt to this changing landscape, the integration of blockchain technology can play a pivotal role in modernizing payment systems within international sales contracts.[5] Consequently,

3 Dakota A. Larson, *Mitigating Risky Business: Modernizing Letters of Credit with Blockchain, Smart Contracts and the Internet of Things*, 4 Mich. St. L. Rev. 929, 964 (2018).
4 Matthieu Crozet et al., *International Trade and Letters of Credit: A Double-Edged Sword in Times of Crises*, 70 IMF Econ. Rev. 185, 189 (2022).
5 *See* Larson, *supra* note 3, at 958.
6 *See* Larson, *supra* note 3, at 959.

blockchain technology holds a key to revitalizing and augmenting the effectiveness of letters of credit and other aspects of international commercial transactions.[6]

2. GENERAL ADVANTAGES OF BLOCKCHAIN

2.1. Immutability

Blockchain technology is well suited to international commercial transactions due to its immutable nature.[7] Here, the notion of immutability is that once a transaction has been successfully confirmed and added to the blockchain, it becomes difficult to change or remove. This is said to be a core feature of blockchain technology.[8] It should be noted that true 'immutability' may be unachievable, as there have been isolated instances where blockchain entries have been effectively reversed.[9] However, these instances often leave behind signs of tampering. Therefore, rather than being referred to as immutable or tamper-resistant, blockchains are more accurately described as 'tamper-evident' structures.[10] Blocks of data may involve 'proof of work' consensus algorithms that help to mitigate tampering with the information in the blocks on the chain.[11] For example, a work of proof mechanism combined with the creative use of hashing, can provide blockchain technology with its security.

Additionally, and interrelated, blockchain's security can be attributed to its decentralised nature, as it is not managed by a single entity.[12] It would be nearly impossible to successfully alter a blockchain without altering every block in the chain, performing a new proof of work for every block, and seizing control of most of the peer-to-peer network.

7 Carla L. Reyes, *Conceptualizing Cryptolaw*, 96 Neb. L. Rev. 384, 390 (2017).
8 Eugenia Politou et al., *Blockchain Mutability: Challenges and Proposed Solutions*, 9 IEE Transactions on Emerging Topics in Computing 1, 5 (2019).
9 In a Distributed Automated Organisation ("DAO") hack in 2016, a hacker gained access to 3.6 million dollars of Ethereum ("ETH") cryptocurrency, which at the time was the equivalent of 50 million United States dollars, by taking advantage of a flaw in the coding of the Ethereum-based application, not Ethereum itself.
10 Politou, supra note 8, at 5.
11 Kevin Werbach, *Trustless Trust*, SSRN Elec. J. 1, 26 (2016); *see also* Nicolas Houy, *It Will Cost You Nothing to "Kill" a Proof-of-Stake Crypto-Currency*, 34(2) SSRN Elect. J. 1038, 1040 (2014).
12 Sheikh M. Idrees et al., *Security Aspects of Blockchain Technology Intended for Industrial Applications*, 10 Elect. 1, 26 (2021).
13 Umesh Bodkhe et al., *Blockchain for Industry 4.0: A Comprehensive Review*, 99 IEEE Access 1, 2 (2020).

Furthermore, in contrast to the central registry concept, there isn't a single point of failure or vulnerability.[13] As a result, distributed ledger data is impervious to manipulation. The security and integrity of data are improved by resistance to censorship and manipulation. The approach also reduces costs that would be incurred in creating and maintaining backup databases under the central registry model.[14]

2.2. Storage/Documentary Management

It is well known that international commercial transactions involve significant documentation due to the nature of international commercial trade. With numerous forms of documentation comes multiple phases of correspondence amongst parties involved in the transaction. The use of blockchain technology provides an advantage as it offers an efficient way to organise and store immutable copies of documents.[15]

2.3. Trustless Technology

The use of blockchain technology may be helpful in international commercial transactions as it is a trustless technology. The term 'trustless' in this context refers to the notion that, conceivably for the first time, value exchanges across a network system can be monitored, enforced, and validated without the involvement of a central authority figure or trusted third party, like financing institutions in cases of letters of credit.[16] Owing to the programmable character of blockchain technology, smart contracts can be enabled and these can also operate without centralised institutions. For these reasons, minimal trust is required.[17] Traders in international commercial transactions generally do not have mutual trust, especially regarding payment issues. Therefore, the use of financial technology such as blockchain and smart contracts aid in ensuring transparency throughout commercial transactions.[18]

2.4 Cost Effective

Blockchain is a technology that is not bound by borders, and it can offer a quicker, less expensive infrastructure for transferring units of value.[19] It is argued that as a

14 Koji Takahashi, *Blockchain Technology for Letters of Credit and Escrow Arrangements*, 135 Banking L. J. 89, 89–90 (2021).
15 *Id.* at 94.
16 Primavera De Filippi et al., *Blockchain as a confidence machine: The problem of trust and challenges of governance*, 62 Tech. in Soc. 1, 6 (2020).
17 Trevor I. Kiviat, *Beyond Bitcoin: Issues in Regulating Blockchain Transactions*, 65 Duke L. Rev. 569, 570 (2015).
18 *See* Larson, *supra* note 3, at 956.
19 *See* Kiviat, *supra* note 17, at 569–70.
20 Kiviat, *supra* note 17, at 574.

substitute for the frequently expensive and delayed money transfers, there are math-based "cryptocurrencies" like bitcoin, which are based on blockchain technology that can be used.[20]

Blockchain technology is considered disruptive as it helps to eliminate costs associated with 'middlemen'. Traditionally, intermediaries can be involved to build confidence and lower risk between the parties involved in a cross-border transaction.[21] Conventional payment methods are broadly secure for international transactions, but they are expensive and cumbersome. Due to the system's extensive network of intermediaries, there are commissions and transaction fees to be paid that significantly increase costs.

Expanding on this point, the current payment system used in international commercial transactions imposes the use of mediators and intermediaries. To make a payment, a participant must go through several authorisations and intermediaries, including the payment gateway, exchange mode, and issuer, among others. Despite being in charge of upholding the legitimacy of payments, intermediaries present certain shortcomings, like charging for their services and lengthening the duration of transactions.[22]

Using a blockchain-based system, international trading parties can conduct business at a distance, without having to pay third parties to enforce their agreements with decentralised smart contracts. This way, assets and transactional data can be securely maintained and tracked using blockchain technology, minimising the reliance on traditional intermediaries.[23]

For instance, banks like Westpac teamed up with Ripple in blockchain projects. Westpac is considered as one of the "big four" banks in Australia.[24] To facilitate speedy and secure cross-border payments, several banks and businesses intend to use blockchain payment systems. It could be advantageous for the international trade and commerce law community to not be left behind with such an evolving technology.

21 Brooks B. Basaran & Mahmood Bagheri, *The Relevance of "Trust and Confidence" in Financial Markets to the Information Production Role of Banks*, 11 Eur. J. of Risk Regul. 650, 651 (2020).
22 Nikhil Patel, *International Trade Finance and the Cost Channel of Monetary Policy in Open Economics*, 70 ICJB 117, 119–20 (2021).
23 Like financing institutions in letters of credit, *see* Discussion § 3.5.
24 Staff Writer at Westpac Group, *Towards a 'blockchain' future*, Westpac Group (Dec. 15, 2016, 12:35PM), https://www.westpac.com.au/news/in-depth/2016/12/towards-a-blockchain-future/.
25 Westpac Group, Westpac 2022 Annual Report (2022), available at https://www.westpac.com.au/

2.5 International Contract of Sale

An international contract of sale is an agreement between a seller and a buyer for the sale of goods.[25] The United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980), ("CISG") is the widely used convention for international contracts of sale. From article 1(1) of the Convention, it can be drawn that an international contract of sale is one in which goods are sold "between parties whose places of business are in different States",[26] "when the States are Contracting States"[27] or "when the rules of private international law lead to the application of the law of a Contracting State."[28] An international contract of sale outlines the parties' respective rights, responsibilities, obligations, and remedies for breach.[29] The parties can either be an importer/buyer or an exporter/seller. Lastly, it is of utmost importance that the contract includes conditions of payment so as to avoid foreseeable disputes. Thus, parties may elect to use blockchain payment system to effect payment.

2.6 Blockchain-based Payment System

Effecting payment in international contracts of sale via use of blockchain technology is a relatively less complicated process. Use of the Stellar Blockchain payment system demonstrates how a transaction could take place. Stellar, operating since 2015,[30] is a blockchain-based payment network that links individuals and financial institutions, enabling quick and inexpensive cross-border payments.[31] The network links the businesses in international commercial transactions to financing institutions more quickly and less expensive.[32] As an open-source network that can enable cross-border payments, Stellar makes use of Lumens ("XLM") as its native cryptocurrency to facilitate payment transfers.

content/dam/public/wbc/documents/pdf/aw/ic/WBC_2022_Annual_Report.pdf.

26 United Nations Convention on Contracts for the International Sale of Goods ("CISG"), Art. 1(1).

27 CISG, Art. 1(1)(a).

28 CISG, Art. 1(1)(b).

29 CISG, Art. 4.

30 Marta Lokhava et al., *Fast and secure global payments with Stellar*, SOSP '19 Proceedings of the 27th ACM Symposium on Operating Systems Principles 80, 88 (2019).

31 Nida Khan et al., *Feasibility of Stellar as a Blockchain-based Micropayment System*, Conference: The 2nd International Conference on Smart BlockChain, SmartBlock 2019 at 1 (2019).

32 *Id.* at 2.

33 *See* Khan et al., *supra* note 31, at 4.

Example:

ABC is company that is domiciled, resident and carries out its business in Mombasa, Kenya. Company DEF is domiciled, resident and carries out its business in Johannesburg. ABC is the seller and DEF is the buyer.

ABC and DEF enter into an international contract of sale for liquor. DEF has to make payment of KES 8000000 to ABC before delivery can be affected. Thus, performance of the contract is subject to ABC receiving payment of the goods. DEF will send a payment of KES 8000000 from their bank in Johannesburg to ABC's bank in Mombasa. The seller's bank in Mombasa will then receive a transaction request of KES 8000000, and this will be approved after confirmation with ABC.

After the bank in Mombasa has approved the request, the buyer's bank in Johannesburg will receive the transaction's approval, and KES 8000000 will be deducted from DEF's account. The amount deducted will then be converted to Stellar Lumens (XLM) and it will pass to the Stellar network. It should be noted that when the money is deducted from the buyer's account, it will be in the South African Rand (ZAR). The Stellar network offers a distributed currency exchange that offers the best exchange rate for a particular fiat currency.[33] The XLM will then be converted from the South African Rand to the Kenyan Shilling (KES) at the best exchange rate (assumed to be better than traditional rates offered by the banks). The money, now in Kenya Shilling, will then be credited to ABC's bank account.

The Mombasa and Johannesburg banks act as anchors in this Stellar network. Anchors are essential for converting fiat currency into cryptocurrencies and acting as a link between the parties involved in the international commercial transaction and the Stellar network.[34] Generally financial institutions and banks like the example given above act as anchors as they are trustworthy. Ultimately, this example lucidly demonstrates how the use of blockchain technology can simplify the payment process. On top of simplifying secured payments, blockchain technology also offers a number of advantages specifically in the area of international commercial transactions.

34 Laura Grassi et al., *Do we still need financial intermediation? The case of decentralized finance – DeFi*, 19 Qualitative Rsch. in Acct. & Mgmt. 1, 7 (2022).

35 Mizuho Financial Group, *Conclusion of trade transaction using blockchain and distributed ledger*

3. Legal Significance Of Blockchain Technology

The legal significance of blockchain technology refers to the potential impact and implications that blockchain technology has on the legal landscape, particularly in international commercial transactions.

3.1 Mizuho Case Study

On 6 July 2017, Japanese banking group, Mizuho and Sompo Japan Nipponkoa Insurance Incorporated completed a cross-border commercial transaction between Japan and Australia making use of distributed ledger technology, a blockchain-based network.[35] In contrast to traditional commercial deals, which take many days to complete, a contract involving the Japanese giant Marubeni Corporation and Sompo Japan Nipponkoa Insurance was concluded in under two hours.[36] The buyer from Japan and seller from Australia were entities of Marubeni. A blockchain-based digital model was used to coordinate the entire trade-related procedure, including issuing the letter of credit to distributing trade paperwork.

The platform used to conduct the transaction was IBM's Hyperledger Fabric platform: an open enterprise-grade distributed ledger platform that has privacy controls that enable only the data to be shared to be distributed amongst the participants.[37] A contract of sale was entered into between Marubeni Japan (seller/exporter) and Marubeni Australia (buyer/importer). The buyer requested for a letter of credit issuance from their bank, Mizuho Australia. The buyer's bank issued the letter of credit to the seller's bank, Mizuho Japan. The seller's bank then advised Marubeni Japan of the letter of credit; upon this advice, the goods were then shipped to the buyer. The seller went on to register trade documents, and then received a receipt of payment. The exporter had to digitalize the export and shipping documents, and then uploaded them to the blockchain platform, thus sharing them with the financial institution and other parties involved.[38]

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technology –Collaborative effort with general trading and insurance companies (July 7, 2017), https://www.mizuhogroup.com/news/2017/07/conclusion-of-trade-transaction.html.

36 *Id.*

37 Mizuho Financial Group, *Mizuho Embarks on Project with IBM Japan to Conduct Actual Trade Transactions Using Blockchain* (Apr. 26, 2017), https://www.mizuhogroup.com/news/2017/04/fintech-mizuho-embarks-on-project-with-ibm-japan-to-conduct-actual-trade-transactions-using-blockchain.html.

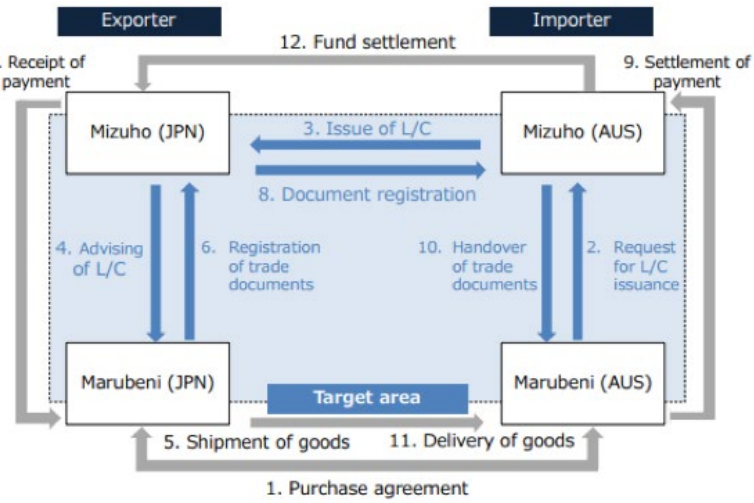
38 Antony Peyton, *Mizuho trials Australia-Japan trade transaction on blockchain*, Fintech Futures (July 17, 2017), https://www.fintechfutures.com/2017/07/mizuho-trials-australia-japan-trade-transaction-on-blockchain/.

39 *See* Mizuho Financial Group, *supra* note 37.

The seller's bank went on to register the documents with the buyer's bank. Marubeni Australia settled payment with their bank, and the trade documents were handed over to them. After the trade documents were handed over, the goods were delivered to the buyer. Lastly, the buyer's bank settled the funds with the seller's bank.[39] This saw the conclusion of the international contract of sale of goods transaction between Marubeni Japan and Marubeni Australia over a blockchain-enabled digital platform.

Below is the diagram of transactions from the Mizuho blockchain project.[40]

Diagram of Transaction



The project revealed a number of benefits. The first benefit was the shorter delivery time for trade documents.[41] This process would typically take a number of days and was reduced to two hours. Secondly, there was a reduction of labour and other costs as well as time spent on document creation and transmission through document digitalisation. [42] Lastly, there was increased transparency by disclosure of transaction information to all parties.[43] For this purpose, as previously mentioned, some blockchain tools allow for the generation of smart contracts, which can be used to facilitate, verify, and enforce transactions.[44]

40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 Lennart Ante, *Smart contracts on the blockchain – A bibliometric analysis and review*, 57 Telematics & Informatics 1, 3 (2021).
45 Justin Evans, *Curb Your Enthusiasm: The Real Implications of Blockchain in the Legal Industry*, 11 J. Bus.

3.2 Blockchain Technology and Smart Contracts

It is argued that the most promising aspect of blockchain technology is smart contracts.[45] A smart contract is a self-executing digital contract that is written in code and shared among blockchain community members,[46] and may be a solution to issues associated with paper contracts. Smart contracts enable automated computer procedures that are programmed to accept input from parties on the blockchain and to authenticate or enforce the negotiation or execution of the contract in accordance with established instructions.[47]

The decentralised, immutable nature of blockchain that serves as the foundation for smart contracts makes it impossible for them to be altered.[48] Due to the blockchain need that every transaction be verified by every node in the network, efforts to hack a single point of entry will be unsuccessful.[49]

3.3 How a Smart Contract Will Work in an International Commercial Transaction

Suppose parties ABC (seller, resident and domiciled in Mombasa) and DEF (buyer, resident and domiciled in Johannesburg) enter into a contract of sale of liquor. A blockchain-enabled smart contract is used by the parties to negotiate even on new terms and this is done automatically as parties would have listed their requirements. Once the terms have been agreed on, DEF is required to make the payment, which is affected via a blockchain network. If payment is received, then delivery of the liquor takes place, ensuring that payment is guaranteed when terms are agreed upon.

The smart contract can go as far as including processed of official government controls and trade operations. For example, this smart contract will have a condition stating that once relevant documents like sanitary and phytosanitary certificates, insurance documents and invoices are complied with and verified, the liquor can be cleared by customs.

Entrepreneurship & L. 273, 274 (2018).

46 *See* Larson, *supra* note 3, at 963.

47 *See* Evans, supra note 45, at 276.

48 *Id.* at 280.

49 *Id.* at 281.

50 Gregory Klass, *Introduction to Philosophical Foundations of Contract Law in Philosophical Foundations of*

Adding on, international commercial transactions do not always have the same courier transporting the goods from buyer to seller. In this instance, the liquor will be shipped by a Mombasa courier X from the Port of Mombasa, Kenya to the Port of Durban, South Africa. The liquor will be handed over to a South African courier once all customs are cleared. The condition on the smart contract will thus state that, if goods have arrived at port and customs officials have cleared them, then courier Y from Durban is to take goods and deliver them to their final destination in Johannesburg. Parties involved in the transaction will have real-time access to the whole process as they would have representative nodes on the blockchain. Thus, processes from negotiating the contract of sale to delivery at the final destination can be done using a blockchain-based smart contract.

3.3.1 The Contractual Agreement

Traditional Position

A contract of sale has its foundation in the notion of obligations.[50] The seller is obligated to make the goods available, and the buyer is obligated to pay the seller. Other parties such as the courier, government and financing institutions are also required to fulfil obligations. The fulfilment of these obligations is dependent on performance. For example, if the seller does not make the goods available to the courier for shipment, the courier will not be able to perform, thus no payment from the purchaser. Such an instance may trigger a dispute amongst the parties involved in the international commercial transaction, necessitating dispute resolution.

Use of Smart Contract

As seen above, the traditional contract of sale is quite similar to the way in which computer code functions. If the seller provides the goods, then the buyer effects payment. Computer code can follow a "if-then" logic.[51] In this way, international contracts of sale drafted in paper form can be complemented or even replaced by computable approaches in form of blockchain-enabled smart contracts that automatically carry out the conditions agreed in the contract of sale.

Contract Law, *in* Philosophical Foundation of Contract Law 1, 2 (Gregory Klass et al. ed., 2014).

51 Fabio Bassan & Maddalena Rabitti, *From smart legal contracts to contracts on blockchain: An empirical investigation*, 55 Computer Law & Security Review 1, 3 (2024).

52 *See* Evans, *supra* note 45, at 277.

53 *Id.*.

In the event of dispute, traditional contracts usually depend on judges to interpret the contract and clarify each party's obligations.[52] It is argued that contracts of sale without the enforcement of the court are "not worth the paper on which they are printed".[53] Obtaining enforcement of an obligation via the court system may be challenging especially when contracts are of an international nature. However, if parties make use of a smart contract, instructions can be pre-programmed, thus guaranteeing performance from parties to the transaction without using court services.[54] Additionally, due to the code-based nature of smart contracts, they are thus accurate, and potential misinterpretation is done away with, hence litigation can be minimised.[55]

As noted, although disputes are inevitable when it comes to international commercial transactions, the use of smart contracts may offer a cheaper method of dispute resolution. Smart contracts allow for parties to the international commercial transaction to include automatic remedies for non-performance when drafting the contract. For example, if delivery is not affected by the set date, an automated remedy kicks in and reduces the likelihood of legal exposure to international trading businesses.

However, the downside of this is that it is not always clear-cut when it comes to such relations. There might be many reasonable reasons for the failure of delivery.

Adding to this point, when litigating with international contracting parties, there is often a dispute over jurisdiction. The use of smart contracts could be advantageous, as it allows for dispute resolution over an automated web-based platform.[56] When resolving disputes with local and foreign courts, the elimination of centralized governing authorities allows for the least amount of delays and bureaucratic inefficiencies.[57] Decentralisation of dispute resolution provides for better access to justice, equality, and fair resolutions.[58] It is common knowledge that parties within a transaction who have access to better resources often get favourable outcomes when it comes to disputes surrounding the contract, putting smaller institutional entities are at a disadvantage.[59]

54 *Id*.
55 *See* Evans, *supra* note 45, at 276.
56 *See* Evans, *supra* note 45, at 277.
57 Karolina Mania, *Online dispute resolution: The future of justice*, 1(1) Int'l Compar. Juris. 76, 76–77 (2015).
58 *Id*; *see also* Evans, *supra* note 45, at 278.
59 *See* Mania, *supra* note 57, at 78; *see also* Evans, *supra* note 45, at 278.
60 Gregory Benson Jr., *Implications of Adopting Blockchain Technology on International Sales Transactions*,

Courts are often clogged with backlog and small businesses cannot afford to have disputes prolonged. The use of smart contract dispute resolution allows transacting parties to solve an issue within weeks or months as opposed to the court procedures that may take years.[60] Dispute resolution via smart contract saves on costs associated with litigation such as expert fees, attorney fees, and court fees, amongst others.[61] Avoiding dealing with court systems leads to efficiency and levelling of playing fields in cross-border transactions.[62]

Moreover, contracting parties to international commercial transactions will be able to maintain their business connection by using the dispute resolution mechanism, which enables parties to work together to address conflicts rather than using an aggressive and hostile legal approach.[63] However, it should be noted that the dispute resolution offered by the blockchains' smart contract is not intended to replace the court system, but rather to assist in lessening the load on courts, especially with trial courts and small claims.[64]

3.4 Are Smart Contracts, Contracts?

A major problem posed by smart contracts is that they are arguably not truly 'contracts'. A contract of sale generally requires elements of offer, acceptance, and consideration/ consensus for it to be legally binding to parties to the contract. Smart contracts lack elements of offer, acceptance, and the intention of being bound by the terms of the smart contract. *Prima facie,* smart contracts seemingly do not meet the characteristics of a binding contractual agreement. thus, an issue of enforceability of smart contracts arises looking through the lens of the conventional definition of a contract.[68]

39(3) N. Ill. Univ. L. Rev. 486, 507 (2019).

61 *World's First Smart Contract Based Arbitration Proceedings Conducted*, Trustnodes (Jul. 17, 2017), https://www.trustnodes.com/2017/07/17/worlds-first-smart-contract-based-arbitration-proceedings-conducted.

62 *See* Evans, *supra* note 45, at 278.

63 *Id.* at 279.

64 *Id.*

65 *Id.* at 282.

66 Jonathan Herpy, *Smart Contracts And The Law: What You Need To Know*, Forbes (Mar. 17, 2022, 09:45AM), https://www.forbes.com/councils/forbesbusinesscouncil/2022/03/17/smart-contracts-and-the-law-what-you-need-to-know/; *see also* Evans, *supra* note 45, at 282.

67 *See* Evans, *supra* note 45, at 282.

68 Daniel P. O'Gorman, *Redefining Offer in Contract Law*, 82(6) Miss. L. J. 1049, 1055 (2013).

69 *See* Benson, *supra* note 60, at 501.

Furthermore, lawyers have a duty of due diligence when it comes to traditional contracts, and this is seemingly absent with smart contracts. Prior formation of a traditional contract, lawyers ought to perform due diligence with regard to the structuring of the transaction.[69] Traditional due diligence methods must be modified since the open-source blockchain model's offers must be comprehended by lawyers to confirm that the products correspond to what the blockchain claims they are.[70]

Yet, in a decentralised ledger system, it is difficult for international commercial lawyers to ascertain ownership of data. Commercial lawyers are also unable to determine who owns intellectual property at any given stage of the blockchain process.[71] These problems have made it more difficult for businesses involved in international contracts of sale to acquire blockchain start-ups and integrate with other businesses that have already done so.[72]

3.4.1 Immutability

A question thus arises as to whether smart contracts can qualify as valid agreements. As noted earlier, smart contracts are unchangeable, immutable and rely heavily on the programmer or one responsible for developing the contract. Thus, developers of the smart contract platform apparently have more power than the legal practitioners.

A drawback of smart contracts' immutability is that it may not accurately reflect the parties' intentions in an international commercial contract of sale transaction. Therefore, the contract would be rendered voidable as true intention of parties will not be reflected.[73]

The immutability of smart contracts means the lack of flexibility of the contract. business entities need flexibility when partaking in cross-border sale transactions. Due to the concrete nature of smart contracts, they do not take into account business ties which are very important when conducting business.[74] Companies must have the flexibility to alter agreements with suppliers and independent contractors in

70 John McKinlay et al., *Blockchain: background, challenges, and legal issues*, DLA Piper (Feb. 2, 2018), https://www.dlapiper.com/en/insights/publications/2017/06/blockchain-background-challenges-legal-issues.
71 Benson *supra* note 60, at 502.
72 *Id.*
73 *See* Evans, *supra* note 45, at 282.
74 Andrew Glidden, *Should Smart Contracts be Legally-Enforceable?*, Medium (Feb. 27, 2018), https://medium.com/blockchain-at-berkeley/should-smart-contracts-be-legally-enforceable-599b69f73aea.
75 *See* Evans, *supra* note 45, at 282.

response to changes in the market.[75] Relationships in the business world would be ruined if companies were obligated to submit contracts created by smart contracts.[76] This then calls for technology experts and lawyers to work together to come up with means to develop and integrate solutions to facilitate the cancellation and reversal of payments. Despite these challenges, the benefits of blockchain-based smart contracts clearly outweigh their drawbacks, making their adoption in international commerce desirable.

3.5 Blockchain and Letters of Credit

When dealing with an international sale of goods transaction, three main separate documents are involved in this transaction and these are; the sales contract, the bill of lading, and the letter of credit.[77] A bill of lading is a document that specifies the party bearing risk for the goods while they are in transit and at which times during the shipping procedure.[78]

A letter of credit commits an issuing bank to pay the agreed-upon sum to the seller on behalf of the buyer, upon receipt of the supporting documentation specified in the letter of credit.[79] The International Chamber of Commerce Uniform Customs and Practice for Documentary Credits oversees letters of credit used in international transactions. The current functioning of letters of credit is not so much favourable. For instance, the seller has to wait for a considerable amount of time before receiving payment because the bank cannot release funds without proper documentation. This documentation often takes time to be delivered, and it could contain errors, thus increasing delays in finalising the international sale. The bank is contractually obliged to pay for the entire or remaining balance of the transaction if the buyer is unable to make a payment on it.[80] Due to obstacles like distance, different state regulations, and the challenge of getting to know each party personally, letters of credit are a crucial part of international trade. This is because banks often act as the financing institutions, and they are trusted.

76 *Id.*
77 *See* Benson, *supra* note 60, at 488.
78 *Id.* at 489.
79 Lowell J. Mooney & Mark S. Blodgett, *Letters of credit in the global economy: Implications for international trade*, 4(2) J. of Int'l Acct., Auditing & Tax'n 175, 176 (1995).
80 *Id.*
81 *See* Larson, *supra* note 3, at 930.

International traders traditionally make use of letters of credit to facilitate international commercial transactions.[81] Letters of credit are an essential trade finance instrument especially for parties that do not trust one another.[82] For example, a seller might not be willing to ship goods without the security that the purchaser will pay. Likewise, a purchaser might not want to make payment without confirmation that the seller has shipped the correct/proper goods.[83] A letter of credit thus enters the transaction acting as an intermediary between the purchaser and seller. Thus, mitigating the risk in the international sale transaction as the bank assumes the responsibility of paying the exporter.

The purchaser is required to provide proof showing that the goods have been shipped and that they meet the standards highlighted in the letter of credit, to effect payment from the bank.[84]

A letter of credit has been seen to be equally favourable for all parties within the transaction.[85] Although payment may be specified against a time draft, in most cases, the purchaser is often a risk as the seller is generally paid before goods reach the purchaser.[86] Therefore, adopting blockchain technology in dealing with letters of credit may seemingly solve this problem.

3.6. How Letters of Credit Work

Letters of credit transaction consist of three parties. The first party is the buyer, also known as the applicant, as they apply to the bank for the letter of credit. The second party is the seller, also known as the beneficiary, as they benefit from the credit arrangement with the financing institution. The third party is the bank which is the financial institution issuing the letter of credit.[87] To be able to assess whether blockchain technology is useful in the letters of credit transactions context, there must be a breakdown of the steps in this transaction.

82 *See* Larson, *supra* note 3, at 931, 955.
83 *See* Larson, *supra* note 3, at 931.
84 John F. Dolan, *Insolvency in Letter of Credit Transactions–Part I*, 132 Banking L. J. 195, 195-196 (2015).
85 See Larson, *supra* note 3, at 932.
86 *Id.*
87 *See* Benson, *supra* note 60, at 493.

3.6.1 Stage 1 - Issuance

A letter of credit starts off with an application to the issuer by the applicant (buyer). The applicant makes a formal application to the financial institution, including the applicant and beneficiary's desired terms.[88] Basic details like the amount of the letter of credit and the paperwork the beneficiary must submit in order to initiate payment against the letter of credit must be provided during this stage.[89] There are several documents often required for the letter of credit, some of which are; a bill of lading, insurance certificate, certificate of inspection certificate of origin and a commercial invoice, amongst others.[90] It is lucid that this initial application requires a number of details, hence accuracy is of utmost importance to prevent future disputes.[91]

After receiving the application for the letter of credit, the issuer has the task of drafting the letter of credit. Nowadays, the dematerialisation of this stage of the letter of credit is a common practice.[92]

Advantages of Using Blockchain During Stage 1

The current electronic method used in this stage often takes several days to arrive at the exporter from the issue of a letter of credit until the information. However, it is argued that by sharing information across a blockchain platform parties involved in the sales transaction would be able to immediately browse the information.[93]

Takahashi is sceptical of the above advantage assertion. Takahashi is of the view that other forms of electronic communication can also be as instant as blockchain technology. Thus, the assertion of swift notification through blockchain is not as real as it is presented to be.

88 *See* Larson, *supra* note 3, at 941.
89 *Id.* at 942.
90 *See* Larson, *supra* note 3, at 942.
91 Michael Sandler & Barbara Di Ferrante, *Primer on Trade Finance: Export Drafts, Letters of Credit, and Banker's Acceptances*, 11 N.C. J. Int'l L. 613, 619, 624 (1986) (stating that to be effective, a modification to an irrevocable letter of credit requires the consent of all parties).
92 *See* Takahashi, *supra* note 14, at 92.
93 See above discussion on the Mizuho case study under 3.1, this was one of the benefits drawn from the project.
94 *See* Larson, *supra* note 3, at 942.

3.6.2. STAGE 2 - DOCUMENTARY COMPLIANCE PRESENTATION

Traditional Practice

The issuer must receive all the trade documentation as provided for in the letter of credit from the "presenter", which is frequently the beneficiary, at the same time and before the letter of credit expires.[94] The issuer assesses whether the document is prima facie in accordance with the letter of credit's provisions. The Uniform Commercial Code ("UCC") refers to this as the "strict compliance" principle.[95] The issuer has a finite, "reasonable" period, which is not to exceed seven business days under the UCC,[96] or up to five business days under the UCP, after obtaining the necessary documentation from the beneficiary to assess compliance or noncompliance and notify the presenter.[97]

The amount of documentation the issuer must review is one of several factors that determine what is reasonable.[98] If any differences exist between the documents presented and the letter of credit requirements, the issuer either "honours" the presentation of compliant documents or notifies the presenter.[99]

Unlike the first stage, de-materialisation is not widely accepted in the topical practice of this stage.[100] Although electronic presentations take place every now and then, generally, paper presentations are still prevalent.[101]

Advantages of Using Blockchain Technology

The distributed ledger technology feature of blockchain appears to be advantageous in the arena of the presentation of documents.[102] Article 17(a) of the UCP 600 provides that, "at least one original of each document stipulated in the credit must be presented", the ledgers' tamper resistance nature will aid to satisfy this condition. To fulfil the condition in Article 17(a) of the UCP, one has to simply present a single electronic record as provided by the eUCP,[103] which seemingly adds nothing. Koji proposes that a better interpretation of the requirement in Art 17(a) would be that the condition is considered to be met where there is a trustworthy guarantee of the integrity of the data contained.[104]

95 *Id.* at 942–43.
96 Uniform Commercial Code ("UCC"), §-108(b).
97 Uniform Customs and Practices for Documentary Credits ("UCP 600"), Art. 14(b).
98 *See* Larson, *supra* note 3, at 945.
99 *Id.* at 946.
100 *See* Takahashi, *supra* note 14, at 93.
101 *Id.*
102 *Id.* at 94.
103 The eUCP is a supplement and digital companion to the UCP 600 in purely digital form. *See* eUPC, Art. e8.
104 United Nations Convention on the Use of Electronic Communications in International Contracts, Art. 9(4)(a) (2005).

However, in as much as blockchain technology provides the advantage of a distributed ledger, it appears to be still lacking as false information can still be fed into the ledger.[105] It should be stressed that issuing falsified documents,[106] as opposed to manipulating documents after they have been issued, constitutes the most severe type of fraud in letters of credit.[107]

3.6.3. STAGE 4 - PAYMENT

Traditional Practice

Whether a letter of credit allows for a sight draft,[108] a time draft,[109] or a deferred payment obligation,[110] will impact when the beneficiary is paid.[111] The majority of letters of credit allow for sight drafts, probably due to the fact that the beneficiary prefers early payment.[112] Payment to the beneficiary is often delayed by time drafts and deferred payment obligations.[113] Payment under a letter of credit is typically made via an electronic transfer if, as is generally the situation nowadays, the parties to a sales contract pick a fiat currency as the mode of payment for their contract.[114]

Advantages of Using Blockchain Technology

Adopting blockchain technology at the payment stage will be of no value if payment is done using a fiat currency as this is often affected by the use of an electric transfer. However, blockchain technology may be useful in this stage if parties to an international contract of sale select a cryptocurrency to be used as the method of payment.[115] When parties choose to utilize a letter of credit in the sales transaction, a bank acts as an intermediary since the buyer cannot directly pay the seller. It raises the question of whether blockchain implementation could make letter of credit transactions trustless.

105 *See* Takahashi, *supra* note 14, at 94.
106 *See* Sztejn v. Schroder Banking Corp., 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941). In this scenario, the seller transported cow hair and other trash but submitted a bill of lading and invoices detailing the bristles as specified in the letter of credit.
107 *See* Takahashi, *supra* note 14, at 94.
108 A sight letter of credit is a document that attests to the payment for goods or services and is only valid when it is presented with the required documentation.
109 A time draft gives a specific deadline by which payment must be made after the purchaser has accepted it and goods have been received.
110 A deferred payment is when the financing institution undertakes to effect payment at maturity.
111 *See* Larson, *supra* note 3, at 945.
112 *Id*; *see also* John F. Dolan, *Strict Compliance with Letters of Credit: Striking a Fair Balance*, 102 Banking L. J. 18 (1985).
113 *See* Larson, *supra* note 3, 945.
114 *See* Takahashi, *supra* note 14, at 95.
115 *Id.*

While it's improbable that letter of credit transactions could become entirely trustless, automating the document examination stage could change this perception. Utilising a smart contract or computer code on a blockchain could automate this stage, triggering payment without manual authorisation by the bank. Thus, it's essential to explore the possibility of automating the document examination stage.[116]

3.6.4 Stage 3 - Document Examination

Traditional Practice

Examination of documents is done with the objective of determining whether they conform with the terms of the letter of credit. Examination of documents might require a value judgment. Thus, automation may pose a challenge. Unless and until there are significant developments in artificial intelligence, it would be close to impossible to automate inspection without foreseeing for every conceivable description of every conceivable good. Hence a conclusion can be drawn that this stage of document examination cannot practically be automated, yet.

The use of blockchain may aid in modernising payments in international sales contracts.[117] Thus, blockchain can be essential in modernising letters of credit.[118] Blockchain provides a simple way to store, organise, and verify documents because international transactions typically require the use of a lot of paper and maybe multiple stages of correspondence as seen with the stages of a letter of credit. Additionally, blockchain can be combined with smart contracts to enhance automation in international commercial transactions.[119] However, blockchain technology does come with disadvantages, some of which include issues around safety and data protection, liability concerns, jurisdictional challenges and also the relative immaturity of the technology.

116 *See* Takahashi, *supra* note 14, at 95.
117 *See* Larson, *supra* note 3, at 958.
118 *Id.* at 959.
119 Reggie O' Shields, *Smart Contracts: Legal Agreements for the Blockchain*, 21 N.C. Banking Inst. 177, 181–82 (2017).

4. Complementary Infrastructural Approaches to Blockchain

4.1 Data With Direct Specification

To effectively implement blockchain technology in international commercial transactions, complementary infrastructural approaches are essential.[120] In this context, complementary infrastructural approaches to blockchain technology and smart contracts refers to using different supportive systems, technologies, or methodologies alongside blockchain and smart contracts to enhance their functionality, efficiency, or capabilities. There are several infrastructural approaches that can be used to enable the smooth flow of blockchain technology in global trade processes. One of these approaches is the implementation of Data With Direction Specification ("DWDS").

While blockchain technology offers a significant transparency advantage in international payment systems, a key challenge lies in ensuring consistent data interpretation across participants.[121] Although all authorised participants have access to the transaction details recorded on the distributed ledger (data visibility), differences in data interpretation (data clarity) can lead to misunderstandings and delays. For instance, the same data points on an invoice, such as product descriptions or quantities, could be interpreted differently by sellers, buyers, and financial institutions, potentially causing friction in the payment process.

DWDS, also known as the "Internet of Rules," offers a compelling solution to bridge this data clarity gap. DWDS establishes a framework for attaching standardised rules and instructions directly to data.[122] This enables everyone interacting with the data to interpret it consistently. In the context of blockchain-based international payments, DWDS can be leveraged to define standardised formats for trade documents commonly used in international commerce, such as letters of credit and bills of lading. By ensuring a common understanding of the structure and meaning of this data, DWDS significantly reduces the risk of misinterpretations.

120 Mehdi Shiva et al., *Exploring Blockchain Technologies for Collaboration and Partnerships*, Government Outcomes Lab (June 2023), https://golab.bsg.ox.ac.uk/documents/exploring-blockchain-technologies-for-collaboration-and-partnerships.pdf.

121 Gousia Habib et al., *Blockchain Technology: Benefits, Challenges, Applications, and Integration of Blockchain Technology with Cloud Computing*, 14(11) Future Internet 341, 349 (2022).

122 Joseph Potvin, *Data With Direction: Design Research Leading to a System Specification for 'An Internet of Rules'* (Jan. 1, 2023) (Ph.D. dissertation, Université du Québec, Canada) at 170.

Furthermore, DWDS goes beyond simply standardising data formats. It allows for embedding decision-making logic directly within the data itself. This embedded logic can guide smart contracts on how to interpret and process the data.[123] For example, consider an invoice submitted on the blockchain platform. DWDS could be used to embed a rule within the invoice data that instructs the associated smart contract to release payment only after the buyer confirms receipt of the goods. This eliminates ambiguity in the payment process and fosters greater trust and efficiency between trading partners.

The integration of DWDS with blockchain technology presents a powerful combination. The transparency and immutability of blockchain data are significantly enhanced by the clear and consistent interpretation facilitated by DWDS. This approach has the potential to streamline international commerce by minimising errors and delays caused by data misinterpretations. Consequently, a more robust and efficient ecosystem for secure international payments can be established.

CONCLUSION

The emergence of blockchain technology presents a transformative opportunity for secured payments in international commercial transactions. By leveraging its unique features of transparency, immutability, and decentralization, blockchain has the potential to address existing challenges associated with trust, security, and efficiency in global payment systems.

Throughout this research paper, general advantages of blockchain technology and its specific legal significance in the context of secured payments for international contracts of sale have been explored. The research highlights how blockchain technology can modernise and supplement traditional methods, such as documentary letters of credit, which often suffer from delays and complications. By integrating blockchain technology into international trade finance, the cumbersome processes can be streamlined, leading to faster, more secure, and cost-effective transactions.

123 *Id.* at 172, 191.

There are acknowledged limitations associated with the adoption of blockchain technology that have not been explored in this paper. For instance, the relative immaturity of the technology, jurisdictional and liability concerns amongst others. Despite these drawbacks, blockchain has the potential to modernize and streamline international trade finance processes, particularly when integrated with complementary infrastructural approaches like DWDS. Such an approach can ensure consistent data interpretation, thereby minimizing errors and delays potentially caused by misinterpretations.

Encountering challenges and uncertainties when transitioning from one technological advancement to another is not uncommon. Considering the relative novelty of blockchain technology in payment systems, experiencing a few issues is to be expected. Yet, by implementing appropriate measures and safeguards, it is possible to overcome these difficulties and capitalize on the numerous advantages offered by this class of technology.

AfCFTA and Revenue: Navigating Outstanding Fiscal Issues and Legal Framework to attain Agenda 2063

Mbakiso Magwape[1*]

Abstract

The African Continental Free Trade Area ("AfCFTA") Agreement will adversely affect revenue collected by African States in its early stages of adoption. The legal effect of tariff liberalisation among Member States will result in the decline of much needed developmental income. Revenue mobilisation is a priority to attain Agenda 2063 and to improve the standard of living and quality of life for "all Citizens". Domestic taxes are one of the most sustainable financing methods African countries leverage for development. Tariff rates and trade-facilitation measures are the primary focus of the continental project. The AfCFTA Agreement and draft Investment Protocol, however, include agenda items on fiscal policy related issues. Taxes run parallel with trade and economic rules and play a critical part of integration particularly on issues such as incentives, investor rights and most importantly revenue mobilisation for the government. The continental project could potentially play a significant role in facilitating harmonisation that addresses base erosion and profit shifting, and common approaches that increase domestic tax collection and revenue. It is therefore necessary to examine interlinks between trade and taxes under the AfCFTA. This paper examines tax related issues in the continent, and the role the AfCFTA could play in integrating them into the continental project. The salient issues that will be analyzed relate to; a) the movement of capital, b) VAT harmonisation in the continent which is key to ensure efficient and fair intra-African trading, c) tax incentives which create tax competition, d) transfer pricing and comparables; and e) exchange of information regarding domestic taxes. The paper further goes beyond substantive issues and also examines the legal infrastructure of the AfCFTA and regional institutions such as African Tax Administration Forum ("ATAF"), and Regional Economic Community ("REC"), interventions in administering fiscal issues, in order to attain AfCFTA's objective of creating a single common market, and attain Agenda 2063.

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1. Introduction

The Agreement Establishing the African Continental Free Trade Area ("AfCFTA Agreement") fundamentally seeks to attain economic integration through liberalised goods and services.[2] This requires commitments and common approaches from African States to effectively achieve its objective. The continental project is in a critical operational phase, with 47 out of 54 Member States depositing instruments of ratification and submitting schedules of tariff concession which set out how far Countries are able to liberalise customs duties reducing barriers to trade.[3] Most efforts up to this point have been focused on trade and services related issues.[4] Domestic taxation has largely been absent from negotiations and the AfCFTAs legal instruments, despite tax playing a key role in regional integration in redressing disparities caused by integration through harmonisation, and improving domestic revenue performance.[5].

The AfCFTA Agreement acknowledges the importance of non-trade related issues, specifically integrating key aspects into the legal framework through specific protocols, specifically; intellectual property rights, investment, and competition policy. These protocols were concluded in Phase 2 of the implementation plan.[6] The instruments ensure minimum standards in order to create conducive environments for traders. There are a number of similarities that tax and trade policy share at a regional and national level. First, trade policy [specifically] national strategy on tariff duties, VAT and customs-control, and tax policy form part of wider fiscal and investment policy. Second, the Revenue from VAT and tariff-duties contributes to national fiscus. Despite the above, tax policy issues have not been fully incorporated into the AfCFTA legal framework – with tax only appearing in best-practice and coordinative provisions under the draft Investment Protocol specifically Article 40, as will be examined in section 3 of this paper. Tax, furthermore, was excluded from primary operational provisions.

2 The Agreement Establishing the African Continental Free Trade Area (hereinafter, "AfCFTA Agreement") African Union (May 30, 2019). Article 4(1) and (2) of the Agreement seeks to progressively eliminate tariffs and non-tariff barriers ("NTBs"), and progressively liberalise trade in services.

3 The operational phase of the AfCFTA was launched during the 12th Extraordinary Session of the Assembly of the Union on the AfCFTA in Niamey, Niger on 7 July 2019. For ratification, *see* Tralac, *Status of AfCFTA Ratification*, AGOA.info (Aug. 13, 2024), https://www.tralac.org/resources/infographics/13795-status-of-afcfta-ratification.html.

4 Phase 1 protocols required tariff reduction commitments. Current rules of Origin negotiations are ongoing with and almost concluded.

5 Rodney Ludema & Iam Wooton, *Economic geography and the fiscal effects of regional integration*, 52(2) J. of Int'l Econ. 331, 357 (2000).

6 AfCFTA Agreement, Article 4(c) recognises cooperation on investment, competition and intellectual property as an objective of attaining integration.

The ultimate aim of the AfCFTA is to liberalise goods and services in order to increase continental trade volume. This has varied revenue implications on revenue generated from tariff duties and other types of income (such as indirect taxes), which diverges from Country-to-Country.[7] The short-term picture, however, is bleak. The AfCFTA will result in a decline of much needed developmental revenue, as States reduce their tariff-rates. African countries are estimated to lose US$ 4.1 billion in tariff revenue.[8] This comes at a time where revenue is required following a period where African States are recovering from the socio-economic impact of the Covid-19 pandemic,[9] with increased sovereign-debt distress and actual restructuring (Chad, Ethiopia and Zambia),[10] slowing of infrastructural projects, and increased inflation. The AfCFTA instrument provides no solution to Member States to redress revenue mobilisation, which will affect development and trade flows. Africa requires revenue for infrastructure to actualise trade benefits and synergies from the AfCFTA.

The UN Sustainable Development Goals ("SDGs") recognise the need to mobilise additional finance to existing public budgets, in particular domestic resources, to fund public goods and services. The AfCFTA objective of creating a single market for goods and liberalise both goods and service,[11] to contribute towards continental inclusive growth and sustainable development in order to have a higher standard of living and quality of life for All Citizens,[12] in accordance with Agenda 2063 requires revenue mobilisation. Revenue mobilisation has been incorporated in Sustainable Development Goal 17 and Target 17.1, which recognises that *"the ability of a State to mobilize its own resources and collect taxes to pay for essential services (education, health, social protection, security, and the like) is at the very heart of a properly functioning government."* African countries have historically collected lower taxes than other counterparts, with the tax to GDP ratio a less than half of OECD Countries in 2021.[13] In this breath, it is imperative to examine revenue related tax implications that will

7 Lawrence Edwards et al., *Quantifying Tariff Revenue Losses From the African Continental Free Trade Area* (PRISM Working Paper Series 2023-5, 2023).

8 Mesut Sayigili et al., *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions* 12 (UNCTAD Research Paper No. 15, UNCTAD/SER.RP/2017/15, 2017).

9 Dean Karlan & Christopher Udry, *Measuring COVID's Devastating Impact on Low and Middle-Income Countries*, KelloggInsight (July 1, 2021), https://insight.kellogg.northwestern.edu/article/covids-impact-on-low-and-middle-incomecountries [https://perma.cc/KD7C-T5LU].

10 United Nations Department of Economic and Social Affairs, Report of the Inter-agency Task Force on Financing for Development 202 (2022). Around sixty percent of LDCs and other low-income countries are now assessed at a high risk of debt distress or in debt distress. Many Middle-Income Countries ("MICs") and Small Island Developing States ("SIDS") also saw significant increases in public debt.

11 AfCFTA Agreement, Article 3(a).

12 African Union, Goals & Priority Areas of Agenda 2063, https://au.int/en/agenda2063/goals (last visited July 4, 2024).

13 *See* OECD & African Union, Revenue Statistics in Africa 2023, https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-tax-revenues/brochure-revenue-statistics-africa.pdf (last visited July 4, 2024).

arise from implementing the AfCFTA, and fiscal options and measures Member States can exercise to meet developmental and SDG objectives.

The paper further examines areas of international taxation that the AfCFTA has not addressed, however that has significant trade and economic implications on States, such as tax competition and incentives, which may drive multinationals ("MNEs") to utilise tax treaty networks, low-tax African jurisdictions, or Special Economic Zones ("SEZs") to obtain tax advantages.[14] It examines possible common approaches and international tax framework that African states may implement to raise increased revenue particularly that address three critical revenue areas of intervention, namely increasing domestic revenue mobilisation, improving tax compliance, and addressing base-erosion and profit shifting which partially also falls under illicit financial flows.[15]

The current landscape present a unique opportunity for the AfCFTA and regional institutions such as the African Tax Administration Forum ("ATAF"), and Regional Economic Communities ("RECs") to address challenges, and possibly utilise the legal architecture of the AfCFTA to reach consensus on critical fiscal issues. Fiscal coordination is critical in improving in order to attain Agenda 2063 and to improve the standard of living and quality of life for all citizens. The aforementioned Agenda 2063 is Africa's blueprint for achieving inclusive and sustainable socioeconomic development.[16] The blueprint is a precursor to the AfCFTA, prioritizing continental and regional integration, calling for the fast-tracking of the AfCFTA.[17] Agenda 2063 further sets out the first-10-year implementation plan for flagship projects, which require every [AU] member state to develop policies and strategies adapted to their circumstances *in relation* to (i) the establishment of an African Continental Free Trade Area ("AfCFTA"); and (ii) the establishment of an African passport and free movement

14 For a preliminary take on Special Economic Zones ("SEZs") in the context of the AfCFTA, *see* Regis Y. Simo, *Special Economic Zones in an Era of Multilateralism Decadence and Struggles for Post-Pandemic Economic Recovery: Perspectives from the Global South*, 24(1) German L. J. 199–226 (2023).

15 United Nations Office on Drugs and Crime ("UNODC") and Organization for Economic Co-Operation and Development ("OECD"), *Coherent Policies for Combatting Illicit Financial Flows*, July 2016. IFFs are defined broadly as all cross-border financial transfers, which contravene national or international laws. This wide category encompasses *inter-alia* several proceeds of crime (for example tax evasion, money laundering, fraud and corruption), and transfers that seek to evade anti-money laundering/counter-terrorist financing measures or other legal requirements (such as transparency or capital controls).

16 Agenda 2063, Adopted at the 24th Summit of the African Union (January 23–31, 2015), Addis Ababa, Ethiopia, https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf.

17 *Id.* at 133.

of people and capital.[18] Both the AfCFTA and Agenda 2063 reaffirm that Africa has turned to regionalism as a means of economic and political growth.[19]

Section one of the paper provides an introduction and overview of the article. Section 2 examines the role movement of capital plays in regional integration, and critically examines taxation in comparable Free Trade Areas (FTAs). Section 3 identifies and examines specific tax related issues that the AfCFTA has incorporated, and revenue opportunities that may be available within the legal framework of the continental project. These include;

a) VAT harmonisation which is critical for ultimately forming a single market, and preventing abuse which results in loss of income for African States;
b) developing minimum standards on tax incentives.
a) alignment of Customs administration with transfer-pricing legislation; and
b) exchange of information legal framework in Africa for domestic tax and customs administration;

Section 4 provides a summary of critical findings and advances recommendations which fall under the AfCFTA framework.

2. The AfCFTA and the Movement of Capital

The text of the AfCFTA Agreement essentially serves as a regulatory and facilitatory function for liberalisation of tariffs and services, and cooperation in customs and trade facilitation.[20] Integration, however, also requires a coordinated legal framework on capital, particularly the freedom of capital. Capital was included within the framework of Agenda 2063, which calls to accelerate progress towards economic integration-at regional and continental level "to meet the needs for sustained growth, trade and exchanges of services, capital and free movement of people.[21] It therefore falls within the long- aspirations of the AU's plans for Continental integration, despite largely being excluded from the AfCFTA, as will be examined below.

18 *Id.* at 17.
19 Joseph Kwabena Manboah-Rockson, *Launch of the African Continental Free Trade Area (AfCFTA) within Agenda 2063: an assessment of the "Actorness" of the African Union (AU) in International Relations (IR)*, 5(1) Int'l J. of Rsch. & Innovation in Soc. Sc. 278 (Jan. 2021). Available at https://rsisinternational.org/journals/ijriss/Digital-Library/volume-5-issue-1/278-286.pdf.
20 AfCFTA Agreement, Article 3(a).
21 Agenda 2063, *supra* note 16, at 133.

Capital plays a significant role in the AfCFTA - it is key to financing African corporation to scale operations and projects in order to successfully increase trade within the continent, attain export diversification, and to further finance key infrastructure projects to facilitate trade. The AfCFTA agreement itself seeks to contribute to the movement of capital, in recognition of its role in economic integration,[22] however has little regulatory rules on capital itself.

The draft Protocol to the AfCFTA Protocol on Investment (Investment Protocol) operates as the primary instrument which prescribes for protection of capital.[23] The instrument protects investors and parties against arbitrary, illegal or discriminatory restrictions and interventions of the transfer of capital by State Bodies through Article 22(1).[24] The provision mandates that "…all transfers relating to an investment to be made freely and without delay…". The text provides limited exceptions to the rule, which is a positive step to ensuring decisions by governments do not interfere with the movement of capital. Exceptions include serious balance-of-payments deficits that threaten to cause serious economic or financial difficulties in the State Party concerned under paragraph 2 – this safeguard is congruent with Article 28 on Balance of Payments under the AfCFTA Protocol on Goods. State safeguard measures have to be notified to the AfCFTA Secretariat, should avoid unnecessary damage to economic and financial investors, be undertaken in a proportional manner with circumstances, and phased out.[25]

The protocol also establishes much needed rules on the management and settlement of disputes to ensure investors and other interested parties have access to remedies. It does so by;

a) prescribing resolution through various dispute forums, specifically consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State, under Article 46(1); and

b) enabling the investor to seek remedy through Article 46(3) of the Investment Protocol, the which directs investors to the [annexed] Protocol on Rules and Procedures of the Settlement of Disputes, - which provides for the establishment

22 AfCFTA Agreement, Article 3(a).
23 Draft released during the Seventh Extraordinary Session of the Specialized Technical Committee on Justice and Legal Affairs (Experts Meeting) (Jan. 16 –21, 2023) in Accra, Ghana. Available at https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf (last visited May 4, 2023).
24 *Id.*
25 AfCFTA Draft Investment Protocol, Article 22(4).

of Dispute Settlement Body, and with authority to establish panels to receive and determine interstate trade disputes.

While the protection of capital through restrictions on movement of transfers, and a dispute settlement mechanism is an important provision in upholding and securing investor rights, the AfCFTA legal framework does not comprehensively address critical issues relating to domestic taxation and freedom of capital. Article 3(4)(e) of the Investment Protocol outrightly prescribes that the Protocol *shall not* apply to "… taxation measures taken in accordance with the applicable laws and regulations of a State Party." The effect of this provision, is that any tax related provisions, measures or restrictions by a state relating to investments under the Protocol fall outside of the scope of protection of the instrument. This particularly means that regulatory measures (tax laws) and tax authority decisions targeting non-resident investors and individuals which are of a discriminatory nature (relative to treatment of residents) are not protected under the investment protocol.

This is also apparent from Article 22(1) which prescribes that "…all transfers relating to an investment to be made freely and without delay in and out of the territory after payment of the respective taxes and duties,". Domestic taxation therefore falls out of the scope of the investment protocol and has no legal remedy under dispute settlement architecture. This is not to be confused with other taxes imposed on goods at the time of entry – as Article 7(1)(3) of the Protocol on Goods widens the scope of liberalisation to apply to other taxes at time of import. The primary issue is that domestic taxation (income tax rules) are excluded from protection under the Investment Protocol. This may mean that Revenue Authorities in host countries may legislate or keep discriminatory measures which prescribe for higher withholding fees on income for non-residents, special recovery measures applicable to foreign corporations, and apply domestic laws at a higher standard to non-residents than residents. All of these which do not constitute a violation of movement of capital.

The European Union takes a divergent approach to the protection of capital. The FTA protects movement of capital from a wide range of forms of discrimination, which include from domestic tax measures. Article 63 of the founding instrument,[26] prohibits all restrictions on movement of capital, without excluding domestic tax measures from the scope of application of the rules. This is also apparent from case-law. Critically, a number of high-profile cases have emerged from this, which include

26 Treaty on the Functioning of the European Union ("TFEU"), European Union, Dec. 1, 2009, OJ C115/13.

the Danish Interest Case which examined anti-abuse law by Danish tax authority,[27] and the *FFI Glo (II)* case where the court held foreign-sourced dividends are not subject to a higher rate that nationally-sourced dividends when examining double-taxation relief and consistency of measures with community rules.[28]

Protection of movement of capital in the EU provides a useful and comparative lesson of the importance of domestic taxes in regionalism and common capital approaches and minimum standards. Free movement cases involving direct taxation systems have more cases than all the non-tax cases combined.[29] Free movement cases in this regard, have been adjudicated to determine whether national measures which restrict payments, and therefore constitute discrimination.[30] Cases address issues of interest taxation, capital gains, wealth and inheritance taxes and charitable donations and there are many more pending.

Should domestic taxes be included in the scope of freedom of movement of capital, Article 3(4)(e) which excludes domestic taxation from the Investment Protocol would have to be amended or deleted. Furthermore, on implementation, African States, specifically revenue administrations and relevant ministries [of finance] would have to adjust restrictive or discriminatory measures which are applied to non-resident taxpayers who are members of the AfCFTA. This would require 43 African Countries signatory to the Agreement to adjust to the requirements. Protection from discrimination could possibly also be extended to third-party investors who are not signatory to the AfCFTA through an amended provision in the Investment Protocol.[31]

The drawback of incorporating domestic tax into the scope of freedom of capital is that it raises complexities in interpretation, and competent bodies to resolve issues. The EU cases are significantly complex, ranging on issues of compatibility of tax treaties (exemption and imputation) as was mentioned above in the *FFI Glo (II)* 0063 case, and reviewing domestic measures, which have also led to inconsistent application of law,

27 Skatteministeriet v. T Danmark (C-116/16); Y Denmark Aps (C-117/16), Feb. 26, 2019.

28 Franked Investment Income Group Litigation (Respondents) v. Commissioners for Her Majesty's Revenue and Customs, FII GLO II (C-35/11), Nov. 13, 2012.

29 *See* Martha O'Brien, *Free movement of capital, taxation and third countries: The European Court of Justice and cross-border dividends* 10, European Union Studies Association ("EUSA") Biennial Conference (May 17–19, 2007), available at http://aei.pitt.edu/7987/.

30 *Id.*

31 The French Administrative Supreme Court ruling, Conseil d'Etat, decision n° 421524, *Sté AVM International Holding,* on 14 October 2020 (holding that the non-resident French capital gains tax generally creates discrimination inconsistent with EU principles when imposed in circumstances where a French tax resident transferor would have been subject to a lower level of tax in similar circumstances).

controversial topics, and complex cases.[32] The AfCFTA would require a robust, and well-versed judiciary, competent in commercial, trade, and tax law. This is necessary in order to preserve investor and taxpayer rights under rules on protection of freedom of capital.

It is imperative to note that the Abuja treaty already prescribed for the elimination of restrictions on the transfer of funds between States.[33] Article 45 established a general obligation for Member States to ensure the free movement of capital within the Community through the elimination of restrictions on the transfer of capital funds between Member States in accordance with a timetable to be determined by the Council.[34] The AfCFTA established slightly more detailed modalities of the extent to which the movement of capital is to be safeguarded, however only so far as it relates to actionable goods and services covered by the Agreement.

The exclusion from protection against discrimination by state actors on investors means that the AfCFTA runs the risk of not establishing comprehensive capital freedoms within the continent. Fiscal Sovereignty with domestic taxes excluded from the scope is prioritised over complete market access and equal treatment principles. The above-notwithstanding, non-tax related mobility of capital rules for traders, and dispute resolution legal mechanism to enforce rights are however positive steps in ensuring capital restriction does not circumvent objectives of integration.

3. Fiscal Issues and Revenue in Africa

This section examines trade-related and non-trade related fiscal issues which have not been addressed in the AfCFTA framework, however, which are related to Agenda 2063 and prospects of attaining the desired objectives.

3.1 VAT: Harmonisation of Systems, Fraud and Mispricing

VAT has largely been excluded from the scope of the AfCFTA Agreement and protocols. While it is covered in relation to general national treatment rules which apply to all taxes on goods at entry, such as the aforementioned Article 7(1)(3) of the Protocol on Goods, there are no explicit dedicated VAT rules. Agenda 2063 Technical and academic

32 Ana Paula Dourado, *The EU Free Movement of Capital and Third Countries: Recent Developments*, 45(3) Intertax 192, 193 (2017).
33 Treaty Establishing the African Economic Community, African Union, adopted in Abuja, Nigeria (June 3, 1991).
34 *Id.*

legal discussions on the AfCFTA have been focused on traditional trade-related aspects of the continental project. This reflects and underlines the primary objectives of the Agreement, which ultimately serve a regulatory and facilitatory function focused on pursuing economic integration of the continent to create a single market for goods and services.[35] A single market cannot exist without VAT harmonisation, in systems and in addressing prevailing common challenges in the continent.

One of the trade-offs or revenue foregone through reduced customs duties on account of tariff liberalisation, is increased long-term broad-based consumption tax in the form of value-added tax and an expanded tax base emanating from trade creation.[36] It is therefore necessary to adopt fiscal measures, at a domestic and potentially continental level, to address revenue shortfalls. A number of proposed theories have been advanced to address foregone customs tariff revenue, one specific to LDCs is to offset tariff cuts through a point-for-point increase in consumption taxes, so long as the tariff reforms increased production efficiency.[37] The two primary challenges this raises is the final burden of tax being passed on to the consumer (potentially low-income earners), and the second, that most domestic industries in LDCs have low production efficiencies.[38]

VAT, like other national domestic taxes, is shaped by national country fiscal policy with revenue mobilisation, trade and commerce, and investment objectives considered in developing its design. States set various VAT tiers to meet national needs, firstly zero-rated essential items, secondly providing exemptions, and lastly setting other single standard rates. VAT rates and thresholds ,therefore, vary and fluctuate in the African continent. The average standard VAT rate in 2020 in countries examined in ATAF's African Tax Outlook report was 16%, slightly lower than the OECD average of 21.8%, with the highest rates emanating from Morocco and Madagascar at 20% and the lowest in Nigeria (7.5%).[39] Thresholds also vary, with the highest threshold being USD 510,690.33 in Morocco, and the lowest in Malawi at USD 33,465.07.[40]

Harmonisation of rates and thresholds may not be feasible, as sovereign states need to

35 AfCFTA Agreement, Preamble.

36 African Tax Administration Forum, *Africa Integration: Does Taxation Matter? An ATAF Policy Research Blog* (July 7, 2020), available at https://www.ataftax.org/africa-integration-day.

37 Michael Keen et al., *Coordinating Tariff Reduction and Domestic Tax Reform*, 56(2) J. of Int'l Econ. 489–507 (2002).

38 Dennis Ndonga et al., *Assessing the Potential Impact of the African Continental Free Trade Area on Least Developed Countries: A Case Study of Malawi*, 46 J. of S. Afr. Stud. 773–92 (2020).

39 African Tax Administration Forum, *African Tax Outlook* (2021), available at https://www.ataftax.org/african-tax-outlook.

40 *Id.*

adjust and design their VAT regimes to support various industries and sectors and various economic demographic groups. Harmonisation of VAT systems through simplified compliance regimes, often administered by the same Revenue Administrations which administer tariff-related cross-border supply of goods and services under the AfCFTA, may reduce cost-of-business and ease multiplicity of requirements in the continent. Coordinating processes and rules, and standardised approaches also reduce administrative burden through digital technology, specifically in information sharing, record keeping and auditing.

Challenges to cross-border e-commerce cut across custom duties and custom procedures, and VAT. They include; i) imports of low-value goods, ii) VAT fraud, which has often been broadly incorporated into the definition of "illicit financial flows"; ii) high compliance costs of administration; and iv) untaxed or under-taxed digital services and goods purchased on digital platforms.[41] VAT harmonisation provides a critical intervention to the aforesaid challenges, with prominent continental proposals advanced include establishing a common simplified registration and collection regime. is critical in addressing the particular issues which have emerged as a challenge in the African context.

The first proposition, therefore, in addressing a number of trade-related issues above, is to implement a simplified compliance regime for supplies of services and intangibles by non-resident suppliers across the continent.[42] The AfCFTA is strategically placed to facilitate and develop coordinated approaches alongside tariff-related objectives. Under the AfCFTA, the authors proposal advanced [based on ATAFs VAT digital toolkit] is to coordinate multiple jurisdictions to operate similar administrative and operational infrastructure to extend its application to supplies of low-value imported goods by non-resident suppliers. Harmonising administration and operations in this way may produce significant cost savings for tax authorities. The proposed approach would allow non-resident suppliers and digital platforms to submit consolidated VAT returns and make consolidated payments covering all supplies that are subject to a VAT obligation under the simplified compliance regime,[43] making it simple for traders, easier for tax administrations, and simultaneously address mis-invoicing in digital transactions.

The suggested approach the author proposes to develop a top-down common

41 OECD/WBG/ATAF (2023), *VAT Digital Toolkit for Africa*, OECD, Paris, https://web-archive.oecd.org/2023-06-27/651045-vat-digital-toolkit-for-africa.pdf (last visited July 11, 2024).
42 *Id.*
43 *Id.* at 127.

approach and prescribe minimum VAT standards on harmonisation of tax regimes, utilising the AfCFTAs legal framework –through an annex on VAT in the Protocol on trade in Goods. This approach was also vaguely advanced by Banga et.al, stating that "…the AfCFTA could provide a guiding framework for applying indirect tax to digitally traded goods."[44] The authors, however, did not specify the modalities of such a framework. The most effective method of advancing for common approaches is through rule-based directive approach, as has been adopted in the EU.[45] This is secondary law that arises from treaties that binds Member States, and which become law through transposition with each state responsible for implementing the laws domestically.

An alternative approach is to widen the scope under the AfCFTA and incorporate VAT into the investment protocol, specifically under Article 40 which generically addresses taxation. The recommendation proposed by the author of this paper, is for the inclusion of an explicit provision which prescribes for common approaches and harmonisation of VAT systems, Specific references to information sharing and digitalisation should be inserted to address common challenges as identified earlier in this sub-section, with modalities developed between Member States within a specified period of time.

Reconciling the two proposals - VAT harmonisation does not entirely fall within the scope of the investment protocol, however Article 40 it is well suited to address tax related issues. Whereas incorporating VAT harmonisation into the AfCFTA is critical in ensuring tariff-reduction and trade facilitation components of the agenda coincide with VAT, which is closely related to import of goods. A similar approach has been adopted at a regional Customs Unions level within the continent, such as SACU, which have legislated measures for adopting common approaches for simplification and harmonisation of trade documents,[46] and is a critical component of forming a single market which agenda 2063 envisions. Furthermore, fragmented rules have currently been developed to address VAT and the digital economy through expansion

44 *See* Karishma Banga et al., *Digital trade provisions in the AfCFTA: What can we learn from South–South trade agreements?* (Apr. 2021), available at https://set.odi.org/wp-content/uploads/2021/04/Digital-trade-provisions-in-the-AfCFTA.pdf (last visited June 8, 2023).

45 Treaty of the Functioning of the European Union ("TEFU"), Article 288.

46 Southern African Customs Union Agreement ("SACU"), 1969. Article 18 of the Agreement prescribes for customs duty-free movement of domestic goods and previously taxed goods between signatory states, specifically between Botswana, Lesotho, Namibia, South Africa and Eswatini. Article 23 prescribes for members to undertake measures ". . . as are necessary to facilitate the simplification and harmonization of trade documentation and procedures.".

of nexus rules and registration requirements in multiple jurisdictions, presenting increased complexity for service-providers and traders in the continent. The author therefore advances that the first proposal is the most comprehensive and well-suited option.

Lastly, VAT fraud remain a priority in Africa, under the general umbrella of Illicit Financial Flows (IFF). A significantly high number of IFFs are accompanied by trade misinvoicing, which affects VAT component of goods. There are multiple types of VAT evasion which include mis-classification and failure to register, however VAT fraud is the most challenging in the African context, which comprises of bogus traders setting up Companies may be set up solely to generate invoices that allow recovery of VAT, and through taxes collected and not remitted through false accounting, by engineering bankruptcy before tax is paid, but crucially also, through missing trader fraud.[47] African countries are extremely dependent on revenue arising from indirect tax,[48] consequently the number of legal or administrative measures, directed towards combating VAT fraud, have significantly increased in various African countries.[49] Domestic measures include introducing electronic invoicing requirements which record business transactions, automatically apply the correct taxes, issues accurate and traceable invoices, and reports sales data to the revenue authority, in real time. Success stories have emerged in Ethiopia and Rwanda.[50]

Exchange of information in cross-border transactions is a critical feature to address VAT fraud. The exponential growth of the digital economy, B2B and B2C platforms has increased the risks of under-reporting, as it is difficult for tax administrations to know when and where a sale has been made.[51] While regional indirect tax efforts have been adopted under RECs, if continental exchange of goods and services is to increase under the auspices of the AfCFTA information sharing through automatic exchange of information is critical to addressing issues of fraud. The AfCFTA is well situated to incorporate top-down VAT mechanisms, namely spontaneous exchange, exchange on request, and automatic exchange of information.

47 Rita De La Feria et al., *Addressing VAT Fraud in Developing Countries: The Tax Policy-Administration Symbiosis*, 47(11) Intertax 950–67 (2019).

48 James Alm et al., *'Sizing' the Problem of the Hard-to-Tax*, 268 Contributions to Econ. Analysis 11–75 (2004).

49 *See* De La Feria, *supra* note 47.

50 Andrew Zeitlin & Nada Eissa, *Evaluation of electronic billing machines: Effectiveness of tax administration* (2016)**,** available at https://www.theigc.org/sites/default/files/2016/02/Zeitlin-Eissa-2015-Project-memo.pdf**;** *see also* Merima Ali et al., *Building Fiscal Capacity in Developing Countries: Evidence on the Role of Information Technology*, 74(3) Nat'l Tax J. 1 (2021).

51 International Monetary Fund ("IMF"), Current Challenges in Revenue Mobilization: Improving Tax Compliance 9 (Jan. 29, 2015).

The AfCFTA Agreement already prescribes customs coordination under Annex 3of the Protocol on Trade in Goods, under Customs Co-operation and Mutual Administrative Assistance. Article 7 prescribes for advance exchange of information on goods and comprehensive exchange under Article 9 with detailed rules on requests.[52] The author therefore further proposed that the scope of the agreement be extended to cover VAT Exchange of Information (EoI) request to address cross-border fraud through verification and information requests, which would run parallel with the AfCFTAs customs EOI regime in relation to goods. This option could compliment both aforementioned proposals above.

3.2 Minimum Standards on Tax Incentives

As the AfCFTA enters into operation it is anticipated that fiscal and investment measures will be utilised by Member States to attract investment and maximise intra-African exports. The most variable factors which states employ to attract investment are sectoral liberalisation and tax incentives. The invariable factors are population, market-size, and natural resources. African countries have notoriously utilised tax incentives to attract mobile capital, or relocation of multinationals or subsidiaries, particularly using special economic zones which exist in 47 out of 54 African countries.[53] Incentives and SEZ are utilised with the objectives of;

a) attracting investment (FDI);
b) promoting industrialisation for job creation and value addition;
c) promoting exports to generate foreign exchange; and
d) fostering private-sector development (which includes micro-small and medium sized enterprises).[54]

There are trade-related incentives which fall under AfCFTAs scope are rebates, reduced excise and customs duties, expedites customs processes, such as Authorised Economic Operator regimes, which also fall under the ambit of WCO, regional bodies such as SACU.[55] Domestic tax measures include *inter-alia* tax holidays, preferential tax

52 African Union, AfCFTA Compiled Annexes to the Establishment of the AfCFTA, at Annex 3, https://au.int/sites/default/files/documents/37121-doc-Compiled-Annexes_AfCFTA_Agreement_English.pdf.

53 *See* African Free Zones Organisation, *African Economic Zones Outlook*, available at africaeconomiczones.com/wp-content/uploads/2020/03/African-Economic-Zones-Outlook-1.pdf.

54 United Nations Economic Commission for Africa, *Harnessing the Potential of Special Economic Zones for Private Sector Development and Inclusive Industrialization in Southern Africa* (2022), available at https://repository.uneca.org/handle/10855/47557.

55 AfCFTA Agreement, Part II (on non-discrimination applies to the trade measures), Article 4 (on MFN), and Article 5 (on National Treatment). *See also* Southern African Customs Union ("SACU"), *Joint Media Release SACU Members Sign Mutual Recognition Arrangement* (May 31, 2023), available at https://www.sacu.int/docs/pr/2023/SACU-AEO-Media-Release.pdf.

rates, accelerated depreciation allowances, VAT exemptions and zero-rated VAT. The incentives are tax expenditure,[56] with trade-incentives and domestic tax incentives potentially resulting in foregone revenue, at a time where AfCFTA Member States may lose up to 5% of GDP due to the anticipated tariff reduction or elimination.[57] There has already been an exponential rise in SEZ and tax holidays in Sub-saharan Africa,[58] an indicator of the high level of tax competition in the region with new investment incentives in *inter-alia* Angola, Botswana and Mauritius.[59] The corporate income tax incentives have a significant potential risk to the revenue base of African Countries.

Africa has not been transparent about tax expenditure, only eleven out of 54 African countries publish figures on tax expenditures, the most under-reported continent.[60] As economies adjust fiscal policies and incentives to maximise on AfCFTA, it is essential to address tax competition, in order to attain UN Sustainable Development Goals (SDGs), which recognise the need to mobilise additional finance, and agenda 2063, which requires revenue mobilisation.

The AfCFTA is already a monumental feat garnering political and technical commitments to liberalise trade for continental economic prosperity. The AfCFTAs draft Investment Protocol, which already prescribes for tax related cooperation and reporting on use of incentives,[61] is well placed to develop a framework or committee coordinating common approach on tax incentives, with the ultimate objective of developing a minimum effective tax rate for Africa. This may incorporate "developmental carve-out" which may enable lower-income countries to utilise incentives in specific-agreed under-developed industries and markets, particularly those relating to developmental areas

56 Tax expenditure is defined as ". . . departures from the normal tax structure, designed to favor a particular industry, activity, or class of persons. They take many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax, or special rates.". *See* Stanley Surrey, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20(2) Boston Coll. L. Rev. 225–369 (1979).

57 On average, the revenue loss would amount to about 0.5–0.8 percent of GDP, depending on the assumed elasticities. However, in a few countries, revenue losses may be as large as 3–5 percent of GDP. *See* IMF, The Regional Economic Outlook: Sub-Saharan Africa 52 (Apr. 2019).

58 Michael Keen et al., *Revenue Mobilization in Sub-Saharan Africa: Challenges from Globalisation II—Corporate Taxation*, 28 Dev. Pol'y Rev. 573–96 (2010); *see also* IMF, Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment (2015).

59 UNCTAD, World Investment Report 2022: International Tax Reforms and Sustainable Investment 61, available at unctad.org/system/files/official-document/wir2022_en.pdf.

60 Agustin Redonda et al., *Tax Expenditure and the Treatment of Tax Incentives for Investment*, 13 Economics: The Open-Access, Open-Assessment E-Journal 1–11 (2019).

61 AfCFTAs Draft Investment Protocol, Articles 2(e) and 7(f) set out cooperation modalities; Article 9(2)(b) of the AfCFTA Agreement prescribes rules on reporting on use of incentives.

such as food-safety, health, energy and environment. This is in line with Article 6 of the AfCFTA agreement on S&DT, which recognises capacity and needs of respective countries, a principle well founded on equity.

Global Minimum Tax rules (GloBE), also referred to as "Pillar 2" of the OECD/G20 Inclusive Framework currently reduces policy options of developing countries that use low-tax rates. The rules ensure the total amount of taxes paid on a MNEs excess profit in a jurisdiction is up to at least 15% by allowing foreign jurisdictions to tax the difference between the low-tax-rate and 15%.[62] While this external solution to addressing low tax rates could pressurize developing countries to change, an African solution, or "inside-out" continental position on tax-competition may be more effective and comprehensive in addressing tax incentives and reduce tax expenditure, as opposed to measures under Pillar 2. The proposal is to set an agreed Continental or regional minimum tax rate under RECs and enable Countries the ability to set tax rates aligned with continental rates may also follow a similar Annex 1 Schedule of Tariff Concessions, where parties deposit an instrument committing to the rates. Rates lower than the continental or regional rates would follow notification procedures under existing S&DT rules. The objective of the policy is to restrict use of [inefficient] incentives, to reduce tax expenditure and to ensure much needed corporate tax revenue at a time of increased trade volumes and economic activity.

3.3 Transfer Pricing: Simplified and approaches, and Comparables

Transfer pricing has emerged as one of the primary areas of prioritisation in Africa. Transfer pricing is the prices at which an enterprise sells its intangible goods or assets or renders services to associated enterprises.[63] It is a legal fiction applied to determine the arms-length standard, the true taxable income of a controlled taxpayer.[64] Transfer pricing is one of the most important tax and customs-related policy issues of importance on the continent in the past decade, specifically in the international and domestic tax arena.[65]

62 This is through the Income Inclusion Rule, Article 2.1 of the Pillar 2 Model Rules. *See* OECD (2021), *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, OECD Publishing, Paris, available at https://doi.org/10.1787/782bac33-en.

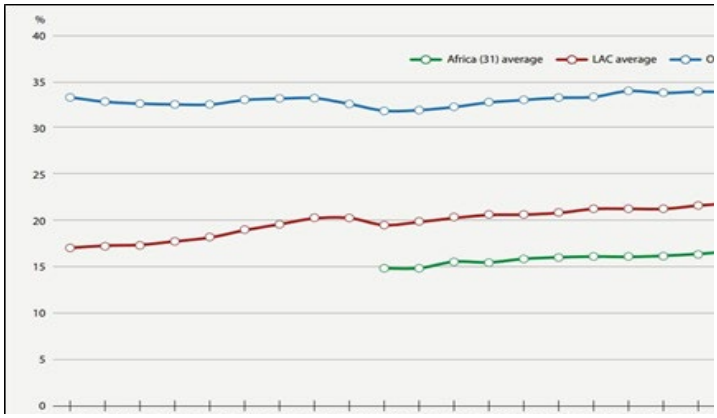
63 OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (1995).

64 United States Internal Revenue Service, Treasury §1.482(1)(b)(1), 26 CFR § 1.482-1(b)(1) (describing how to determine the true taxable income of a controlled taxpayer).

65 Anett Oguttu, *OECD's Action Plan on Tax Base Erosion and Profit Shifting: Part 1 – What Should Be Africa's Response?*, 69 Bull. Int'l Tax'n 11 (2015).

Transfer pricing has the ability to significantly address Illicit Financial Flows ("IFF") specifically relating to multinational organisations. There are varying definitions of IFF, however, it can ultimately be defined as '"…all cross-border financial transfers which contravene national or international laws.".[66] African countries are concerned that their tax bases are being eroded by IFF due to MNEs artificially shifting profits to jurisdictions where the profits are subject to minimal or no tax.[67] Incidents of IFF continue to prevail in many countries around the world, however 'the social and economic impact on developing countries is more severe given their smaller resource base and markets'.[68]

The primary reason that this remains a particular concern and challenge in Africa is that they deprive developing countries of resources that could be used to finance much-needed public services such as education, healthcare, and the infrastructure. Transfer pricing has emerged as potentially transformative solution to increasing revenue from the existing MNE tax-base. Africa has the highest Corporate Income Tax ("CIT") to tax GDP rate in the world, relative to other continents, which means it is potentially more reliant on income from multinationals to finance development.[69] Africa has had the lowest tax to GDP ratio for decades,[70] ultimately, the objective is for Africa to self-finance development through fiscal measures and improved revenue administration.



66 United Nations, Coherent Policies for Combatting Illicit Financial Flows 3 (2016)

67 African Tax Administrative Forum ("ATAF"), Inclusive Framework Proposals to Address the Tax Challenges from the Digitalisation of the Economy, ATAF 3rd Technical Note CBT/TN/03/2019 (2019).

68 OECD, Illicit Financial Flows from Developing Countries: Measuring OECD Responses 15 (2014).

69 In 2018, corporate tax revenues were a larger share of total tax revenues on average in Africa (19.2% in the 30 jurisdictions) and LAC (15.6% in the 27 jurisdictions), than the OECD (10.0%). *See* OECD, Corporate Tax Statistics (2023), available at https://www.oecd.org/en/publications/2023/11/corporate-tax-statistics-2023_068828ca.html.

70 *See* OECD, Revenue Statistics in Africa (Nov. 14, 2022), available at https://www.oecd.org/en/publications/2022/11/revenue-statistics-in-africa-2022_fdf56bd7.html.

The text of the AfCFTA draft Investment Protocol prescribes for three main binding obligations that investors are to subscribe to in relation to transfer pricing. The Article firstly obligates investors to subscribe to minimum standard, specifically to;

a) "…ensure that all transactions with related or affiliated companies are arm's length transactions … in accordance with the domestic regulations of the Host State… and relevant international best practices";
b) "conduct their operations in a manner that fully complies with all applicable tax laws and international standards relating to ensuring that tax benefits are not reduced through base erosion and profit shifting practices; and
c) provide the financial information required by the Host State to ensure compliance with the applicable laws relating to taxation."

The second obligation the draft-protocol prescribes for, is on cooperation, specifically with regards to detection and prevention of transfer pricing manipulation by investors, exchange of information, and Joint Audits within the framework of mutual administrative assistance in tax matters, under Article 40(2).

While the above is critical in ensuring base-erosion and profit-shifting do not occur, the obligations established in the protocol merely buttress national rules and binds them to investors, which is redundant. Cooperative rules under Article 40(2) positively address exchange of information and joint audits, which is critical in ensuring joint approaches which is critical in transfer-pricing where multinationals establish regional networks, and profit-shift based on national tax rates. The above-notwithstanding, the AfCFTA does not address the two primary TP related challenges in the continent, specifically;

a) administrative complexity of transfer pricing rules; and
b) lack or low number of comparable in the Continent, which are needed to appropriately undertake benchmarking and enforce Transfer Pricing rules.

Both issues have extensively been raised as issues in the African context. On the first issue, African tax administrations often report that the complexities in the application of the arm's length principle make it extremely challenging to stop artificial profit shifting by abusive transfer pricing practices.[71] The OECD itself at the inception of developing the rules acknowledged complexities in use of transactional pricing

71 AFAF, *ATAF's opinion on the Inclusive Framework Pillar One (including the Unified Approach) and Pillar Two proposals to address the tax challenges arising from the digitalisation of the economy*, available at https://events.ataftax.org/includes/preview.php?file_id=44&language=en_US (last visited June 5, 2023).

methods, and even impracticable in certain cases due to the complexities of real life business situations.[72] TP regimes in Africa have been not been implemented effectively since adaptation of [largely] OECD rules, in the metric of number of investigations undertaken, cases concluded by dispute-settlement bodies (which include settlements), or re-assessment or adjustments based on TP investigations. This is due to numerous factors, which include lack of capacity in set up specialised units with sufficient skill to tackle audits due to the complex nature of TP.[73] A significant number of African States introduced the "arms-length" principle in domestic tax law, however OECD international standards which are the most technically detailed and structures approach, have largely been introduced following the BEPS 2.0, and the movement to join the OECD/G20 inclusive framework. BEPS deliberations, there were concerns among participants that the transfer pricing guidelines have become uncertain and obscure: making the transfer pricing process 'far more complex'.[74]

Africa's challenge of comparable within a geographical region emanates from a lack or low financial information at the firm level. Availability of local comparables is especially low in developing and emerging economies.[75] Africa hardly has any benchmarking databases.[76] This is highlighted by the statistic that the coverage of all active companies based in non-OECD countries in publicly available financial reporting databases is only 26.6% of all covered firms, and the proportion of active companies based in Far Eastern, Middle Eastern, Central Asian, and African countries is even far lower and reaches only 0.4%. Advanced African economy.[77]

72 OECD, Transfer Pricing and Multinational Enterprises Report of the OECD Committee on Fiscal Affairs 12 (OECD Publishing, 1979).

73 Annet W. Oguttu, *The Challenges of Applying the Comparability Analysis in Curtailing Transfer Pricing: Evaluating the Suitability of Some Alternative Approaches in Africa*, 48(1) Intertax 84 (2020).

74 Richard Collier & Joseph L. Andrus, Transfer Pricing and the Arm's Length Principle After BEPS Ch. 6 (Oxford University Press, 2017); *see also* BEPS Monitoring Group, *Submission to the UN Subcommittee on Article 9 (Associated Enterprises) on the Revision of the UN Practical Manual on Transfer Pricing for Developing Countries* 3 (Sept. 2018), available at https://static1.squarespace.com/static/5a64c4f39f8dceb7a9159745/t/5bac9e071905f4689fd51b02/1538039306826/BMG+Submission+to+UNTC+article+9+final.pdf.

75 Samuel Pinto Ribeiro et al., *The OECD ORBIS Database: Responding to the need for firm-level micro-data in the OECD*, 2010/01 OECD Statistics Working Papers 1–33 (2010), available at https://www.oecd.org/en/publications/the-oecd-orbis-database_5kmhds8mzj8w-en.html. *See also* EuropeAid - Implementing the tax and development policy agenda, *Transfer pricing and developing countries (Final Report)*, available at https://aei.pitt.edu/38951/1/transfer_pricing_dev_countries.pdf.

76 UN, Practical Manual on Transfer Pricing for Developing Countries (2017), at ¶ B.1.10.6.

77 Bart Steens et al., *Transfer Pricing Comparables: Preferring a close neighbour over a far-away peer?*, 47 J. of Int'l Acct., Auditing and Tax'n 2–18 (June 2022, 100471)

One of Africa's leading economies, South Africa, acknowledged challenges in finding local comparable information available and provided specific guidance on the use of foreign comparable.[78] Regulatory groups such as the South African Institute of Chartered Accountants have noted the key variance in the lack of comparable data applicable to South Africa (unlike most OECD countries) and requested for further guidance on the use of foreign comparable data specifically in determining (transactional profit methods).[79]

To this end, it is imperative that AfCFTA's approach, support, or influence regarding transfer pricing should be geared towards common and simplified approaches to transfer pricing within the continent. Furthermore, AfCFTA in carrying out its coordinative function, should focus on a common approach in addressing comparables through developing linkages between investors, traders and financial service providers, and utilise national customs data and tax information to develop geographically reliable data.

On the first issue, alternative simplified approaches have been raised in international tax literature which could be considered. Simpler rules should enable African tax administrations to protect the tax base from artificial profit shifting and provide greater tax certainty for both governments and taxpayers.[80] Recent proposals that have been advanced which are noteworthy, and worth considering, are that of adopting a unified approach to introduce rules that go beyond the arm's length principle with more simplified approaches to profit allocation to market jurisdictions.[81] This approach was advanced by ATAF, in relation to proposals on taxation of the digital economy under OECD/G20 Inclusive Framework (Pillar 1 proposals), however is very much relevant to a common-approach in the continental TP landscape. This could be through formulary apportionment, which is the allocation of an MNE's global consolidated profits based on "a predetermined and mechanistic formula."[82] Two major obstacles appear though; the OECD transfer pricing guidelines rejects this approach, which have largely been adopted by African States, and secondly, it requires global coordination.

78 South African Revenue Service ("SARS") (1999), Practice Note 7 at § 12.

79 South African Institute of Chartered Accountants ("SAICA"), *Comments on a Suggested Draft Interpretation Note on Transfer Pricing to Replace Practice Note 7* (July 13, 2022), available at https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_submission_on_TP_IN_to_replace_PN7.pdf.

80 ATAF, *Media Statement on the Outcomes of the Inclusive Framework Meeting 29 to 30 January 2020*, (Jan. 31, 2020), https://www.ataftax.org/media-brief-inclusive-framework-jan-2020.

81 *Id.*

82 Sol Picciotto & Jeffrey M. Kadet, *The Transition to Unitary Taxation*, 108(4) Tax Notes Int'l 460 (2022).

The first alternative proposal advanced, therefore, is that of a unitary proposal, in the form of a common formulaic African approach to calculating taxable base and allocation of profits between African Member States. Prospects may reduce administrative complexities TP presents. This approach is similar to the EU proposal for a common consolidated corporate tax base (CCCTB) opted to aggregate the national level accounts, which has progressed to "Business in Europe: Framework for Income Taxation" (BEFIT) in accordance with which the Commission aims to propose a directive by the third quarter of 2023.[83] Regional apportioned formula's in revenue already exist in Africa, however in the Customs domain, specifically SACU's revenue sharing agreement operating, which is not based on actual import numbers, but also considers development components.[84] Domestic tax presents far more complexities and variables, however a common approach may provide a solution that would no longer require firms to allocate income or expenses across countries for tax purposes. This would address continental-wide TP related issues, however would leave international TP issues unresolved, in a continent where most investment is made from outside the continent. This approach, therefore would partially assist with simplifying inter-continental TP multinational issues, which could run parallel to domestic TP rules where inapplicable.

Other alternative simplified TP approaches which are highly notable, and worth considering developing continental-wide common approaches for are on safe harbour rules, particularly those that relate to Low-risk distribution, manufacturing, contract research and development functions.[85]

Countries could also begin to apply a formulary approach more widely by building on the profit-split method accepted in the OECD transfer pricing guidelines.[86] Simplified Method for Low Value Adding Intra-Group Services, and advanced pricing arrangements are also common and useful approaches, however, they are approaches that address components of transactions or apply to specific circumstances, and do not simplify TP system wholistically. Ultimately, the objective is to harmonise approaches to reduce administrative processes, to ensure investors and traders compliance burden

83 Legislative Train Schedule European Parliament, *Common corporate tax base (CCTB)*, available at https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-common-corporate-tax-base-(cctb) (last visited June 15, 2023).

84 Southern African Customs Union, *Factsheet: Understanding the SACU Revenue Sharing Arrangement*, available at https://www.sacu.int/uploads/documents/4974d29d897474a901e5fe22b6c420d2cd2991c8.pdf.

85 *See* Oguttu, *supra* note 73, at 84.

86 *See generally* Picciotto, *supra* note 82.

is reduced throughout the continent through common rules, and simplified systems, while enabling African states to apply specific and special domestic rules (which include anti-avoidance rules) such as as the sixth method,[87] which was effectively utilised in the *Zambian Mopani Copper Mines PLC v. Zambia Revenue Authority TP* case.[88]

3.4 Exchange of Information

It was examined in section 3.1 that comprehensive modalities for the exchange of information have been set-out in the AfCFTA Agreement and Annex 3 of the Protocol on Trade in Goods, namely the Customs Co-operation and Mutual Administrative Assistance Annex. The primary scope of EoI under the AfCFTA is in relation to cooperation regarding customs investigations relating to offences relating to goods under Article 8 of the aforementioned Annex, and requests in relation to declarations [of goods].

The AfCFTA does, however, provide a gateway for the exchange of information and joint-audits relating to domestic taxes, through cooperative rules set out under Article 40(2) of the draft Investment Protocol. The clause specifically calls for:

> *"…detection and prevention of transfer pricing manipulation by investors, including in the provision of information necessary to identify and prevent such practices and providing opportunities for Joint Audits within the framework of mutual administrative assistance in tax matters.*

The provision's reference to the "mutual administrative assistance in tax matters" is non-specific and could apply to ATAFs Agreement on Mutual Assistance in Tax Matters,[89] or OECD Convention on Mutual assistance, both critical instrument in the African context enabling signatories to assist each other in the exchange of information, carrying out of tax examinations abroad, carrying out of simultaneous tax examinations and in the collection of taxes. No additional instrument or framework is required under the AfCFTA, with the agreement adequately referencing the most comprehensive continental instrument through a competent continental authority.

87 The sixth method uses a relatively objective point of reference for pricing commodities since they are traded on public exchanges. *See* Section 97A(13) of Zambia's Income Tax Act refer to, the use of a 'reference price' for pricing transactions involving the sale of base or precious metals directly or indirectly between related or associated parties using *inter-alia* monthly average London Metal Exchange cash price.

88 Mopani Copper Mines PLC v. Zambia Revenue Authority, Appeal No. 24/2017. The Court found that the price of copper sold to related party Glencore International AG had been significantly lower than the price of copper sold to third parties.

89 South African Revenue Service, *African Tax Administrative Forum Agreement on Mutual Assistance in Tax Matters*, Article 2 (2022), available at https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/Legal-IntA-EIA-2022-01-Notice-2523-GG-46959-ATAF-Agreement-on-Mutual-Assistance-in-Tax-Matters-23-September-2022.pdf.

The AfCFTA, however, should create linkages between customs and tax related cooperation, given the fact that AfCFTA addresses both domestic taxes and customs mutual assistance provisions.

EOI in the cross-border tax context is critical to investigations of addressing high-net-worth-individuals and multinational operations (particularly in transfer pricing). A number of success stories have emerged with nine African countries collecting EUR 233 million between 2014 and 2021,[90] and Uganda experiencing successful recovery of revenue following the establishment of dedicated EOI units.[91] Customs mis-pricing, VAT fraud and transfer pricing all require cross-border information sharing. Significance of transfer pricing and custom valuation is ever-increasing since multinational enterprises possess more shares in the volume of world trade with the effect of globalization, for instance 80% of trade takes place in 'value chains' linked to transnational corporations.[92]

The AfCFTA prescribes the general framework for cooperation, however does not explicitly set-out cooperation in investigations and audits which cut across various taxes and customs. As intra-African trade increases, which places lower-income-African economies likely to experience of market-entry of African transnational corporations, it is essential to empower joint operations to address base erosion and profit-shifting through architecture of the AfCFTA rules through a multidisciplinary EoI framework. EoI linkages between domestic tax and customs-administration should be considered in the AfCFTA legal framework as the project gathers steam.

4. Conclusion

The AfCFTA incorporates limited tax rules in its scope of coverage, which is understandable, given the trade-oriented nature of the continental project. Most instruments are geared towards the primary objective of tariff liberalisation. The above-notwithstanding, free movement of services and capital forms part of the objectives

90 OECD & ATAF, *Tax Transparency in Africa 2022 Africa Initiative Progress Report* (June 14, 2022), available at https://web-archive.oecd.org/temp/2023-05-12/632173-tax-transparency-in-africa-2022.htm. The Countries are Ghana, Kenya, Mauritius, Morocco, Nigeria, Seychelles, South Africa and Uganda.

91 OECD, Tax Transparency Report on Progress (2016). Uganda established an independent EOI office, obtaining information through her treaty network which was used to raise assessments and tracking the value chain arising from the information obtained. Between 2014 to 2016, Uganda obtained information from her treaty partners under the EOI framework that gave rise to nine million dollars (USD $9,000,000) in tax revenues.

92 UNCTAD, *Global Economy Global Value Chains and Development: Investment and Value Added Trade in the Global Economy*, United Nations (2013), available at https://unctad.org/system/files/official-document/diae2013d1_en.pdf.

of the project, with provisions on the latter making their way into the [final] draft investment protocol. The protocol prescribes protection to investors and traders through prohibiting restrictions on capital transfers, and dispute resolution legal mechanisms to enforce rights. Both are progressive steps in economic integration, however do not comprehensively facilitate free movement of capital. A critical intervention, which would require political commitment, would be to extend protection of capital to non-resident investors from domestic tax measures and decision by revenue administrations. This will prevent discrimination undertaken through arbitrary enforcement and laws which may impede non-resident investor rights, in order to enhance movement of capital and attain the objective of becoming a single common market.

VAT has been excluded from the scope of the AfCFTA notwithstanding its importance and contribution to the African fiscus, and the fact that goods are subject to both tariff duties and VAT at the time of import. Cooperation on digital services tax under VAT is recommended, to prevent fragmentation of rules and ease of trade under the legal architecture of AfCFTA where the ultimate aim of a single market of goods. Addressing VAT fraud remain a priority in Africa, under the general umbrella of Illicit Financial Flows (IFF), with priorities on the continent being digitalisation and low valued goods and harmonisation of systems. Annex 3 of the AfCFTA Protocol on Trade in Goods which prescribes for Customs Co-operation and Mutual Administrative Assistance under Article 7 be well situated to extend to cover VAT EoI which addresses the above. It is therefore recommended that a top-down common approach that prescribes minimum VAT standards on harmonisation of tax regimes be set out by developing an annex on VAT in the Protocol on trade in Goods. Furthermore, it is therefore recommended that the scope of Article 7 be extended to address VAT. The same recommendation is advanced regarding EoI under domestic taxes, which should be able to build from the umbrella economic framework that the AfCFTA provides, particularly considering the fact that most competent parties exchanging information are revenue authorities.

Transfer pricing was included in the draft Investment Protocol under Article 40, with focus on coordination of rules. The priority and focus of such coordination should be common simplified to enable African tax administrations to protect the tax base from artificial profit shifting and provide greater tax certainty for both governments and taxpayers. The measures above will ensure preservation of investor rights and enhanced revenue administration to ensure revenue mobilisation and secure a "…High Standard of Living, Quality of Life and Well Being for All Citizens," in line with Agenda 2063.

Decolonising the Teaching of International Economic Law (IEL): A Critical Reflection of Two Global South Scholars Situated on Either Side of The North-South Divide

Suzzie Onyeka Oyakhire[1] & Ohiocheoya Omiunu[2]

Abstract

This paper offers a critical reflection of the authors' experiences as Global South teachers of International Economic Law (IEL) while situated on opposite sides of the North-South divide, engaging with the practicalities of decolonising the teaching of IEL within our respective universities. Although some attention has been given to the decolonisation of the pedagogy of international law broadly defined and IEL as a sub-speciality of international law, limited studies have explored the comparative perspectives and experiences of Global South scholars who teach IEL in universities on opposite sides of the Global North-South divide. Adopting an autoethnographic methodology, we explore the issue of decolonisation and Eurocentrism of IEL through our personal experiences and reflective practice as decolonisation scholars. Our experiences are discussed around two core themes: knowledge production and curriculum design/ teaching strategy. Specifically, this paper highlights our experiences based on our different journeys, first, as students trained in Eurocentric epistemologies and our subsequent efforts as teachers of IEL, seeking to contribute to the decolonisation of IEL teaching and scholarship in our respective institutions.

> ***'Throughout the world, new questions and issues are being raised about the pedagogy of international law, the teaching materials used, the perspectives that are fostered and taught, and the assumptions that drive these approaches to teaching.[3]***

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3 Antony Anghie, *Introductory Message* to Teaching and Researching International Law in Asia (TRILA) Project 1, 2-3, (National University of Singapore: Centre for International Law 2020) https://cil.nus.edu.sg/publication/teaching-and-researching-international-law-in-asia-trila-project-2020-report/ (hereinafter, "TRILA Report").

1. Introduction

At a time when there is a conscious call across the world to decolonise the international legal education curriculum,[4] there is a need for introspective reflection by those who are leading the charge in the Global South and beyond.[5] Over the years, several authors, mainly but not limited to Third World Approaches to International Law (TWAIL) scholars such as Anghie,[6] Mbengue and Akinkugbe,[7] Moshen al-Attar and Abdelkarim,[8] Shako[9] and Eslava,[10] etc., have drawn attention to the impact of colonialism on the teaching and scholarship of international law.[11] These existing studies 'criticise international law's Eurocentricity in its various guises.'[12] For example, while Mbengue and Akinkugbe, as well as Shako, interrogate the impact of colonialism on knowledge production, Moshen al-Attar and Abdelkarim, and Eslava focus on the impact of colonialism on the international law curriculum content, design, and teaching strategies.

4 The idea of decolonizing the curriculum is part of a larger conversation which questions the continuing dependence on western and Eurocentric university curricular among academics from the Global South. *See* Mohsen al Attar & Shaimaa Abdelkarim, *Decolonising the Curriculum in International Law: Entrapments in Praxis and Critical Thought*, 34 Law & Critique 41 (2023); Savo Heleta, *Decolonisation: academics must change what they teach, and how*, The Conversation (Nov. 20, 2016), https://theconversation.com/decolonisation-academics-must-change-what-they-teach-and-how-68080.

5 The challenges of researching, studying, and teaching IEL, particularly within universities and tertiary institutions in the Global South, have formed the theme of academic discussions and have received specific attention within conferences on international law. *See e.g.*, *IEL Collective Inaugural Conf., 2019* (pre-conference session on the Teaching of IEL). *See also*, Suzzie Onyeka Oyakhire, *Teaching IEL as a Nigerian Teacher in the Era of Decolonization (IEL Collective Symposium II)*, Univ. Bristol L. Sch. Blog (March 27, 2020), https://legalresearch.blogs.bris.ac.uk/2020/03/teaching-iel-as-a-nigerian-teacher-in-the-era-of-decolonisation/.

6 TRILA Report, *supra* note 3.

7 Makane M. Mbengue & Olabisi D. Akinkugbe, *The Criticism of Eurocentrism and International Law: Countering and Pluralizing the Research, Teaching, and Practice of Eurocentric International Law*, *in* The Oxford Handbook of International Law in Europe (Anne Van Aaken, Pierre D'Argent, *et al.,* eds., 2023).

8 Al Attar & Abdelkarim, *supra* note 4.

9 Florence Shako, *Teaching and Researching International Law - A Kenyan Perspective,* Afronomicslaw (Oct. 1, 2020), https://www.afronomicslaw.org/2020/10/01/teaching-and-researching-international-law-a-kenyan-perspective.

10 Luis Eslava, *The teaching of (another) international law: critical realism and the question of agency and structure*, 54 The Law Teacher 368 (2020).

11 Like public international law, IEL has been developed to capture and reflect a set of rules developed by scholars based predominantly but not exclusively in the Global North. This dominance of hegemonic assumptions and scholarly views which promote western perspectives of IEL as universal and immutable is largely attributed to colonialism.

12 Mbengue & Akinkugbe, *supr*a note 7, at 4.

However, few studies focus on scholars' personal reflective teaching experiences as the core emphasis of their methodological engagement with the discussion on the decolonisation of the teaching and scholarship of international law.[13] Shahabuddin's study is an example and provides his personal experience of teaching and researching international law both as a student and academic in the Global South (Bangladesh) and in the Global North (UK).[14] However, Shahabuddin's study only captures the dynamics of a single narrative across two geographies. Accordingly, this paper aims to contribute to the existing scholarship by offering comparative experiences of two Global South decolonisation teachers of International Economic Law (IEL) in universities on either side of the Global North-South divide. It not only re-emphasises the criticisms of the orthodoxy but also highlights our comparative experiences with this culture.

The TRILA report referred to above acted as a catalyst for critical discussions on a symposium on the *Afronomicslaw* blog[15] about the issues within the broader context of the Global South. A significant outcome of this symposium was the realisation that there are similarities in the challenges and shared experiences of Global South scholars teaching international law more broadly across different jurisdictions within the Global South. It was also clear from the symposium that there is a need for teachers and researchers of international law from the Global South to engage with and question our practice as decolonisation scholars critically and more reflectively. When problematised, the overall conclusion from this symposium is that teachers of international law and subsects like IEL from the Global South, including from Africa, are themselves products of systems and curriculums that create and foster Eurocentric norms and hegemonic assumptions about international law.

Motivated by the TRILA report and the subsequent symposium on *Afronomicslaw* blog, we (the authors of this paper) had subsequent long conversations over phone calls and shared our own experiences as teachers of IEL. These conversations opened the space

13 The Teaching and Researching International Law in Asia (TRILA) project, which focused extensively on teaching and researching international law and its sub-specialties within universities in Asia is an illustrative example of the value of such perspectives. TRILA Report, *supra* note 3.

14 *See* Mohammad Shahabuddin, *Teaching and Researching International Law: Some Personal Reflections Via Bangladesh and the UK*, Afronomicslaw (Sept. 25, 2020), https://www.afronomicslaw.org/2020/09/25/teaching-and-researching-international-law-some-personal-reflections-via-bangladesh-and-the-uk/.

15 *See* NUS Centre for International Law & Afronomicslaw, *Symposium Introduction: Teaching and Reserarching International Law – Global Perspectives*, Afronomicslaw (Sept. 2020), https://www.afronomicslaw.org/2020/09/14/symposium-introduction-teaching-and-researching-international-law-global-perspectives/ (*Afronomicslaw* is a blog on all aspects of international economic law as they relate to Africa and the Global South).

for us to reflect on our teaching critically and candidly. In these conversations, we discussed our knowledge of decolonisation and the influence of Eurocentrism on our legal education over the years. Given this premise, this paper reflects on our experiences based on our different journeys, first as students from Africa trained in Eurocentric ideologies and now as teachers seeking to contribute to the decolonisation of IEL. For more context, this paper highlights our experience experimenting with critical legal scholarship at a time when Oyakhire taught at a university in Nigeria compared to Omiunu's experience at a university in the UK. Our experience as teachers is crucial to the knowledge production of IEL, especially since teachers are identified as important agents of change within TWAIL scholarship.[16] Also, this paper seeks to prompt our readers to reflect on their experiences as teachers, students, researchers, or practitioners of IEL in Africa and the Global South, especially at a time when IEL is in an era of multiple crises.

Our analysis is structured around two core themes: knowledge production and curriculum design/teaching strategy. Following this introductory section and a brief overview of the methodology adopted, we begin our discussion by examining the impact of Eurocentrism on our teaching of IEL. We re-emphasise here the dominance of Eurocentric constructs on the research, scholarship, and pedagogy of IEL. In this section also, we establish our positionality as Global South Scholars from Africa whose first experience with IEL was as postgraduate students and later as teachers of IEL and how these characteristics have influenced our perspectives and conclusions reached in this paper. We trace our first experiences with TWAIL scholarship and how this exposed us to critical scholarship which questioned these hegemonic structures on which IEL is grounded. Building on this premise, the next section highlights our experience with curriculum design and our teaching strategy. We engage with the broader discussions of decolonisation and its implications for us as teachers of IEL. Here, we limit the discussion to aspects of the decolonisation debates focused on decolonising the *(IEL)* curriculum. We demonstrate our attempts to join other scholars in questioning legal scholarship and practices foregrounded in Eurocentric ideas. The next section summarises our experiences and indicates areas of convergence and divergence, especially as it relates to how our students respond to our decolonisation efforts. We conclude by reflecting on the varying degrees of differences in our experiences shaped by our respective North/South locations.

16 Mohsen al Attar & Veron Tava, *TWAIL Pedagogy – Legal Education for Emancipation*, 15 Palestine Yearbook Int'l L. 8, 25-26 (2009).

2. A NOTE ON OUR METHODOLOGY

A specific aim of this paper is to critically reflect on our practice as teachers of IEL within the paradigm of the decolonisation of the IEL curriculum. Accordingly, we adopted an autoethnographic methodology for this paper. As described by C.N Poulous, 'autoethnography' involves a researcher writing about a topic of great personal relevance… situating their experiences within the social context.[17] Autoethnography thus requires deep reflection on both one's unique experiences and the universal within oneself.[18] As a methodology, autoethnography involves using the author's personal experiences and connecting the author's insights to self-identity, cultural rules and resources, communication practices, traditions, premises, symbols, rules, shared meanings, emotions, values, and larger social, cultural, and political issues.[19] Autoethnography is thus relevant to this paper since we explore our own individual experiences as teachers of IEL within wider debates of decolonisation and cultures that foster hegemonic assumptions about IEL. Our paper thus defines culture, which is a crucial element in autoethnography, to mean academic culture of learning, researching, and teaching (IEL) in the higher education (HE) sector.

A specific technique adopted within autoethnography methodology is to use self-reflective data whereby authors journal their reflections about their experiences and perceptions related to the topic.[20] Through conversations over phone calls and shared notes, we reflected on our individual experiences with IEL, paying attention to major events that stood out as we interacted with IEL. These events were discussed first regarding our journeys as postgraduate students of IEL and later as teachers teaching IEL in Nigeria and in the UK. We compared notes, highlighting the similar patterns in our experiences and focused on dissimilarities where necessary in relation to the topic. It is important to note that the autoethnographic reflections were not just a static exercise but rather a continuous process of re-evaluating our position, practices, and the broader IEL curriculum.

We also analysed critical scholarship by TWAIL and decolonisation experts, specifically on other reflective research on the experiences of other Global South researchers and teachers of international law, broadly defined. This process enabled us to engage deeply with our personal experiences, providing a reflective and subjective lens on our

17 Christopher N. Poulos, *Essentials of Autoethnography* viii (2021).
18 *Ibid.*
19 *Id.* at 4.
20 Robin Cooper & Bruce V. Lilyea, *I'm Interested in Autoethnography, but How Do I Do It?*, 23 Qualitative Rep. 197, 199 (2022).

roles as Global South scholars teaching IEL. This critical self-examination of how our positionality—being trained in Eurocentric institutions—shaped both our teaching and understanding of decolonisation was crucial in identifying the intellectual risks and barriers we faced in different jurisdictions. By examining our educational journeys, we were able to unpack the ways in which Eurocentric training continues to shape our teaching methods and how this necessitates conscious efforts to unlearn and re-learn critical perspectives such as TWAIL.

3. BEYOND EUROCENTRIC NARRATIVES: DECOLONISING IEL KNOWLEDGE PRODUCTION

In this section we discuss the influence of Eurocentrism on our teaching of IEL. By examining the dominance of Eurocentric materials in our academic journeys, we reflect on how Eurocentric principles shaped our knowledge and understanding of IEL and how this has influenced our pedagogical approaches.

The research, scholarship, and pedagogy of IEL, especially in the post-World War II era, has been framed by Eurocentric epistemological constructs.[21] This Eurocentric framing of IEL was transplanted and subsequently embedded across the Global South via the instrumentality of colonialism and imperialism. As Lebeloane aptly puts it, 'although colonists did not introduce education in Africa, they introduced some new sets, some of which either replaced and or supplemented those which had been there before.'[22] This imperial legacy of colonialism is an important premise for us as authors of this paper because we were both trained within a Nigerian legal system, a post-colonial state influenced by the Eurocentric framing of law and legal pedagogy.

Although there are various dimensions to the issue of Eurocentrism in IEL, like Mbengue and Akinkugbe[23], we limit our discussions on Eurocentrism to the domination of Western and European scholarly works in the IEL syllabi. As Oyakhire notes, the syllabus and materials used in teaching IEL in Nigerian universities present the theories of international trade as prescribed by Western scholars such as David Ricardo

21 Eurocentrism is defined as the sensibility that Europe is historically, economically, culturally, and politically distinctive in ways which significantly determine the overall character of world politics.' *See* Meera Sabaratnam, *Decolonising Intervention International Statebuilding in Mozambique* 20 (2017) (The reach of Eurocentrism is not restricted to IEL or international law more broadly. In fact, the gamut of the legal disciplines such as the Law of Equity and Trust, Law of Inheritance and Succession and Administration of Estates and Wills Law, are also embedded in colonial prescriptions).

22 Lazarus Donald Mokula Lebeloane, *Decolonizing the school curriculum for equity and social justice in South Africa*, 82 KOERS Bulletin Christian Scholarship 1, 5 (2017).

23 Mbengue & Akinkugbe, *supra* note 7.

and Adam Smith. These scholars prescribe the concepts of comparative advantage, trade specialisation, and trade liberalisation as universally accepted economic pillars and foundational theories of international trade.[24] These concepts, which presented a one-size-fits-all approach to trade policies, failed to account for the diverse economic realities and histories of countries outside the Western sphere.[25]

Similarly, teaching about the structure of the international trading system is framed along the lines of liberal/neo-liberal tenets. Accordingly, topics centred on trade sanctions, trade remedies, regional trade agreements, and dispute settlement mechanisms are discussed and presented as a single objective view that must be applied uniformly everywhere. This limits the possibilities for regional contextualisation or questioning its premise.[26] We note here that the emphasis on Western perspectives is a consequence of the way the knowledge of international law and its sub-sects, such as IEL, have been documented and projected over time. This dilemma is described by Mbengue and Akinkugbe, who state that

> teachers of international law in many parts of the Global South remain indoctrinated in the Eurocentric approaches to international law. In the African context, many of these teachers of international law are pedagogically conservative – formalistic and doctrinal – in their approaches to the subject. In many cases, this is not a deliberate choice.[27]

This claim is reinforced by the argument made that 'to teach international law is to augment Eurocentrism within its praxis, and the alternatives are limited and unsatisfactory.'[28] This dominance is not only restricted to academia or knowledge produced within the classrooms of the HE sectors but also in the 'world of the practice of international law.'[29]

24 *See* Oyakhire, *Teaching IEL, supra* note 5.
25 *See generally* D. Ukwandu, *David Ricardo's Theory of Comparative Advantage and Its Implication for Development in Sub-Saharan Africa: A Decolonial View*, 8 Afr. J. Pub. Aff. 17 (2015).
26 Amaya Álvez Marín, Laura Betancur Restrepo, et al., *Rethinking International Law in Latin America*, Afronomicslaw (Sept. 17, 2020), https://www.afronomicslaw.org/2020/09/17/rethinking-international-law-education-in-latin-america (hereinafter Rethinking International Law).
27 Mbengue & Akinkugbe, *supra* note 7, at 14.
28 Al Attar & Abdelkarim, *supra* note 4, at 43.
29 *See also* James Thuo Gathii, Wing-Tat Lee Chair Int'l L. Loy. Univ. Chi. Sch. L., Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law: The Promise of International Law: A Third World View 9 (2020) (hereinafter *The Promise of International Law*).

A recurring criticism of international law is the absence of developing or third world voices in the historical landmarks of the subject of international law.[30] Specifically, there is little or no recognition of the contributions of non-European states to the evolution of modern international law. Gathii highlights this issue, observing that '… there is often too little if anything at all in our casebooks and in our practice about the international law produced in places like Arusha, Tanzania.'[31] He adds that even when such contributions from non-European states are acknowledged, they are frequently marginalised as less significant sources of theoretical innovations in international law compared to their European counterparts.[32]

This limitation is also reflected in IEL in that the research, practice, scholarship and teaching of IEL are biased and skewed towards Eurocentric experiences, which are usually portrayed as universal principles,[33] overshadowing the diverse perspectives of other regions. Shako notes that in Kenyan law schools, for instance, the international law curricula tell a single story of the European experience.[34] Also, the literature and pedagogy adopted in teaching depend heavily on European perspectives, thus silencing, distorting or excluding Indigenous knowledge, scholars and critiques while perpetuating incomplete narratives.[35] Similarly, for the period IEL has been taught at the University of Benin, Nigeria, where both authors did their undergraduate studies, the curriculum has been developed to emphasise and reflect the rules developed predominantly in the Global North.[36]

The studying and teaching of IEL in Nigeria is relatively new.[37] As such, the earliest exposure to IEL for several Nigerian lawyers and scholars occurs during their postgraduate studies overseas (for example, in European or North American Universities).[38] This was certainly the case for both authors, who were first exposed to IEL at the postgraduate level while studying in South Africa and the United Kingdom,

30 Antony Anghie, *The Evolution of International Law: colonial and postcolonial realities*, 27 Third World Q. 740 (2006); *see also The Promise of International Law, supra note* 29, at 3.
31 *The Promise of International Law, supra* note 29, at 3.
32 *Id.* at 5.
33 Babatunde Fagbayibo, *Some Thoughts on Centring Pan-African Epistemic in the Teaching of Public International Law in African Universities*, 21 Int'l Cmty. L. Rev. 170, 171 (2019).
34 Florence Shako, *Decolonizing the Classroom: Towards Dismantling the Legacies of Colonialism & Incorporating TWAIL into the Teaching of International Law in Kenya*, 3 J. Conflict Mgmt. & Sustainable Dev. 16, 17 (2019).
35 *Ibid.*
36 The University of Benin is one of the Federal Universities in Nigeria. IEL was introduced as an optional course in the Faculty of Law in the 2007/2008 academic session way after the authors had completed their undergraduate training in law. *See* Suzzie Onyeka Oyakhire, *Re-Strategising the Position of International Economic Law within the Legal Education Curriculum in Africa*, 17 Manchester J. Int'l Econ. L. 81 (2020).
37 *Id.* at 85.
38 Oyakhire, *supra* note 5.

respectively.[39] Although Oyakhire's postgraduate experience was in South Africa, counter-narratives and critical and alternate perspectives of IEL were not readily available. Undoubtedly our knowledge and appreciation of IEL were influenced by the perspectives of our teachers, usually teaching from, or at least influenced by, a Eurocentric grounding. This is not to say that we did not encounter critical scholars at the postgraduate level who challenged the norms. These scholars, however, constituted the minority and the syllabus's structure and the discipline's nature foreclosed or at the least muted any counter-narratives about the principles of IEL.

As such, a level of scholarly rebellion and intellectual curiosity was necessary for us to explore beyond the strictures of Eurocentric taught master's programmes. Perhaps we were not fortunate to meet teachers who were radical enough to deviate from the status quo, or we probably encountered teachers in the same position we have found ourselves – products of a conditioned environment. We are trying to highlight here that there was limited space for intellectual curiosity beyond the epistemological frame presented to us. More importantly, this paper is a result of our reflections on the impact of our postgraduate experience on our approach to teaching IEL. This is mainly because teachers of IEL, who themselves are products of Western education, may struggle to deviate from conventional epistemological frames.[40] Hence, there is a propensity to recycle the same across generations of students.

Over the years, we, too, as teachers, recognised the need to confront questions about the lack of pluralism in the scholarship and teaching of IEL. Critical scholarship depicted in decolonisation and TWAIL literature provided a basis for us to reflect on and re-evaluate the dominant narratives of IEL scholarship and consider alternative ways of teaching IEL. As Gathii explains, '…TWAIL not only questions international law's presumed universality, but it theorises and views international law from the perspective of the Third World…This perspective also challenges the hierarchical and unequal manner in which rules of international law from some parts of the world become predominant while others are regarded as subordinate or irrelevant.'[41] However, the accessibility and acceptance of these counter-narratives have been an issue, with 'gatekeepers' of the dominant narratives not ceding ground without a push-back. For emphasis, a recent publication with the objective of chronicling the experience of teachers of international law globally invariably excluded the perspectives of scholars and teachers from the Global South.[42] This amplifies the hegemony that teachers of

39 When both authors were undergraduate students at the University of Benin, Nigeria, public international law was only available as an optional module. International Economic Law or International Trade law was not part of the undergraduate syllabus.

40 Heleta, *supra* note 4.

41 *The Promise of International Law, supra* note 29, at 17.

42 A quick look at the table of content confirms that contributors were mostly from the Global North.

international law and its subsets from the Global South continue to stress in their reflections about teaching international law.

As such, students who are not curious enough to go beyond 'paywalls' and other gatekeeping mechanisms found in some Western universities and even in universities in Africa will continue to walk in the oblivion of the counter-narratives about IEL. In one of our phone chats, we realised that we fall into that category of scholars who, as students, walked oblivious of the counter-narratives. We eventually allowed our intellectual curiosity to take us beyond the boundaries of dominant narratives. However, we wonder about the extent to which we are already formed in our ways. Now, being exposed to the body of TWAIL and other critical legal scholarships at the post-doctoral level, we ask ourselves: Do we need to be decolonised, i.e., unlearn, re-learn what we already know or thought we knew about IEL?

Although we acknowledge the role the emergence of TWAIL scholarship and other critical scholarship traditions has played in challenging these hegemonic and Eurocentric assumptions about IEL, we recognise also that TWAIL and other critical perspectives on IEL may not be widely known to teachers of IEL across Africa and beyond. This assumption is made because personally, as postgraduate students of international law about 15 years ago and later as teachers of international law and IEL in the past 9 years, our first knowledge of TWAIL happened only recently. Our ignorance about TWAIL influenced our understanding of the principles and teaching of IEL. Although we had taught IEL by sometimes giving developing country examples to our students, this was done without any critical engagement with international law as advanced by TWAIL scholarship. This means that we taught without reflecting on the criticisms of international law as biased in favour of Eurocentric experiences and portrayed as universal principles. We taught without appreciating the need for alternative voices in disrupting the dominant hegemonic principles.

Similar acknowledgements exist about the limited exposure to and knowledge of international law from a TWAIL perspective in Latin American universities.[43] The lack of exposure to TWAIL scholarships aligns with Oyakhire's argument that in Nigeria and Africa, generally, undergraduate legal education is not preparing law students and, by implication, future teachers of IEL for indigenous knowledge and expertise of IEL.[44] This also reinforces the earlier point made about how knowledge of IEL is acquired from teachers imparting knowledge from the Western perspectives that they are exposed to. Moreso, our own experiences before and after encountering TWAIL underscore the ideological shift that accompanies such knowledge, as described by

43 Rethinking International Law, *supra* note 26.

44 *See* Oyakhire, *supra* note 36, at 86.

Gathii. He notes that 'TWAIL scholars are therefore always self-aware and conscious that their scholarship and practice is trapped within problematic structures of knowledge that represent partial interests and priorities as they struggle to move them beyond those problematic foundations.'[45]

We emphasise here that our seeming unfamiliarity with TWAIL scholarship is that there was little or no consciousness of the alternative perspectives, including decolonisation efforts, when we were studying at undergraduate and postgraduate levels. This is because there was little or no institutional engagement and awareness about the issues of decolonising the curriculum back then in our respective institutions. At best, our knowledge of decolonisation debates was at an individual level of inquiry. We also admit that awareness of the decolonisation discourse, particularly regarding decolonising the curriculum, comes from the *#feesmustfall*[46] and *#Rhodesmustfall*[47] protests in South Africa we experienced between 2017 and 2018.

Subsequent research to understand the reasons behind the protests led to the discovery of more literature about decolonisation within the context of researching and teaching international law, which is relevant to us as teachers of IEL. However, our discovery and engagement with the decolonisation debates were based on our personal inquiries and curiosity, with no support or conducive environment within HE institutions for engaging with the decolonisation debates at this point. This is unsurprising because, despite the initial momentum of the South African protests, there remains little or no institutional engagement with decolonising the law curriculum in many African universities. Adebisi corroborates this point and argues that in African universities, 'decolonisation is stalled'.[48] The same can be said for the UK, with Moghli and Kadiwal pointing out that 'it is only recently that reassessment of curricula in UK HE has been linked to the broader movement to decolonise universities.'[49]

45 *The Promise of International Law, supra* note 29, at 23.

46 *See* Khanyi Mlaba, *South Africa's Students Protests: Everything to Know About a Movement that Goes Back Decades*, Glob. Citizen (Apr. 8, 2021), https://www.globalcitizen.org/en/content/south-africa-student-protests-explained/; *see also* M. Greef, K. Mostert, et al., *The #FeesMustFall Protests in South Africa: Exploring First-Year Students' Experiences at a Per-Urban University Campus*, 35 S. Afr. J. Higher Educ. 78 (2021).

47 Eve Fairbanks, *The birth of Rhodes Must Fall*, The Guardian (Nov. 18, 2015, 1:00 AM) https://www.theguardian.com/news/2015/nov/18/why-south-african-students-have-turned-on-their-parents-generation; *see also* Amit Chaudhuri, *The real meaning of Rhodes Must Fall*, The Guardian (Mar. 16, 2016, 2:00 AM) https://www.theguardian.com/uk-news/2016/mar/16/the-real-meaning-of-rhodes-must-fall.

48 Foluke I. Adebisi, *Decolonisation of Knowledge Production and Knowledge Transmission in the Global South: Stalled, Stagnated or Full Steam Ahead?*, Afronomicslaw (Oct. 21, 2020), https://www.afronomicslaw.org/2020/10/20/decolonisation-of-knowledge-production-and-knowledge-transmission-in-the-global-south-stalled-stagnated-or-full-steam-ahead.

49 Mai Abu Moghli & Laila Kadiwal, *Decolonising the curriculum beyond the surge: Conceptualisation, positionality and conduct*, 19 London Rev. Educ. 1 (2021).

4. Decolonising the IEL Curriculum and Teaching Strategy

As indicated earlier, within the field of IEL, the dominant hegemonic principles that promote Western perspectives of IEL as universal are attributed to colonialism and post-colonial institutions developed post-Bretton Woods.[50] For example, within the context of international trade, a multilateral trading system under the General Agreement on Tariffs and Trade (GATT) was established. This system offered trade liberalisation, market access and elimination of trade barriers as the foundational principles of international trade.[51] The historical antecedents of these norms show that they served or at least served at some point the trade interests of Western powers. On the other hand, these now entrenched economic principles and practices contradict or outrightly exclude pre-colonial practices of international trade which existed within societies in Africa, for example.[52] This marginalisation of African practices is reproduced in the curriculum and, by implication, the teaching of IEL in several African Universities.[53]

The influence of Eurocentrism on our learning of IEL, which we 'inadvertently' transfer to our students through our teaching, illustrates the crucial role that curriculum plays in perpetuating the imperial orthodoxy across generations. To break this cycle, it is imperative that we decolonise the IEL curriculum. However, it remains unclear what it means to decolonise the IEL curriculum. This dilemma is aptly captured in an article in *the Conversation* piece titled: *"What do 'they' mean by decolonisation?"* [54] This is because the different conceptions of decolonisation would influence how a teacher of IEL approaches the topic of decolonising IEL teaching and curriculum. For example, should a teacher in an African University look for case studies and practices that seek to redefine the established principles, or should they merely give local (African) experiences of the interactions with these established international principles? More importantly, is the aim of decolonisation the same for a Global South scholar teaching IEL in Europe?

50 *See* Rachel E. Cononi & Rebecca Hellerstein, *50 years after Bretton Woods: What is the Future of the International Monetary System? An Overview,* New Eng. Econ. Rev. (1994).

51 Oyakhire, *supra* note 5.

52 *Ibid.*; *see also* Aboyade Sunday Ariyo, *Trade Across Frontiers: An Overview of International Trade Before the Advent of Modern Economic System in Nigeria*, 35 Historia Actual Online 53 (2014).

53 Babatunde Fagbayibo, *Fela's music can decolonise international law in African universities*, The Conversation (May 13, 2018, 4:38 AM), https://theconversation.com/felas-music-can-decolonise-international-law-in-african-universities-95816.

54 Heleta, *supra* note 4.

To answer the above question, it was important for us to take a step back to engage with broader questions about decolonisation and the decolonisation movement. This was imperative because decolonisation is not as straightforward as it may sometimes appear. The concept of decolonisation broadly conceived is grounded in critical theory.[55] The foundations of decolonisation have been described to include 'deconstruction and reconstruction, self-determination and social justice, ethics, language, internationalisation of indigenous experiences, history and critique.'[56] However, a specific issue associated with it is the complexity of navigating through debates on the scope and context of the decolonisation concept. Notably, some authors have cautioned that the definition of decolonisation is unsettled and thus means different things at different times.[57]

In acknowledging that there are several definitions of decolonisation, it was important to clarify what decolonisation means to us. Our approach also aligns with Adebisi's view that decolonisation enables [academics] to 'confront the history and effects of imperialism upon academic practices in law.'[58] We do not, for the purpose of this paper, refer to decolonisation in the sense of self-determination and independence of Third World countries from colonial rule in the 1950s-1970s. We limit our reference to decolonisation within the context of decolonising the curriculum within the HE sectors. Decolonisation involves our attempts to join other scholars in questioning legal concepts and practices which foreground Eurocentric ideas and acknowledge the existence and contribution of non-Western philosophies and practices, especially from the Global South to the developments of these concepts or legal histories.

We have specifically found the context of decolonisation within discussions on the teaching of law in both the Global South and Global North HE sectors relevant to our analysis. Within this context, decolonisation in universities across the North-South divide could be construed as 'a move from a hegemonic or Eurocentric conception of law connected to legal cultures historically rooted in colonialism…to more inclusive legal cultures.'[59] It involves the analytical process of questioning European power and

55 'Critical theory aims to demystify and disrupt dominant narratives, interpretations and ways of knowing and understanding legal phenomena.' *See* Clair Gammage, *Critical Perspectives of International Economic Law*, Afronomicslaw (Jan. 15, 2020), https://www.afronomicslaw.org/2020/01/14/critical-perspectives-of-international-economic-law/.

56 Lebeloane, *supra* note 22.

57 *See, e.g.*, Chuma Himonga & Fatimata Diallo, *Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law*, 20 Potchefstroom Elec. L. J. / Potchefstroom Elektroniese Regsblad 1, 4 (2017); Lebeloane, s*upra* note 22.

58 Foluke Adebisi, *Decolonisation and the Law School: Initial Thoughts*, Afr. Skies (July 22, 2019), https://folukeafrica.com/decolonisation-the-law-school-initial-thoughts/.

59 Himonga & Diallo, *supra* note 57, at 5.

aims to confront the mind from coloniality.[60] As Moshen Al Attar and Abdelkarim summarise, 'by applying a decolonial critique, scholars unearth the perversion of Eurocentrism that pervades international law.'[61]

In our conversations about the meaning of decolonisation, we identified that we had different points of emphasis and priorities when thinking about the concept of decolonisation. For Oyakhire, decolonisation means the need to 'reform [the] public international law curriculum so that it could find some cultural [and contextual] grounding in Africa.'[62] For Omiunu, it goes beyond pushing for reforms to the public international law curriculum but also means championing initiatives in the UK HE sector which enables academics and students to 'confront the history and effects of imperialism upon the academic culture related to the teaching and scholarship on IEL.[63] In effect, decolonisation for Oyakhire involves rethinking and reframing the curriculum and bringing Global South experiences to the centre of teaching, learning, and researching IEL.[64] This is also applicable for Omiunu, but it also entails navigating the institutional and cultural barriers that gatekeep the orthodoxy within the UK HE sector.

A point of convergence for us was that, at minimum, decolonisation is a reflective practice that provides alternative ways of thinking about the effects of unequal power structures on how knowledge is produced, transmitted, and exchanged.[65] This entails drawing attention to the dominance of Eurocentric epistemologies within the IEL curriculum while pushing for a recognition of the existence of alternatives to Eurocentric views. We also agreed that decolonisation means bringing to our consciousness and our students the existence of alternative voices which question the very foundations of IEL. We agreed that this can be achieved by incorporating the research of Global South scholars in our reading lists. Although this approach is criticised by Moshen Al Attar and Abdelkarim as minimalist when they suggest that 'what decolonisation offers is a momentary relief in the form of recognition against exclusion for scholars who occupy liminal spaces within academic institutions…'[66] Nonetheless, we share

60 Lebeloane, *supra* note 22, at 2.
61 Al Attar & Abdelkarim, *supra* note 4, at 42-43.
62 Arnold Nciko Wa Nciko, *The Hutians – Decolonising the Teaching of Public International Law in African Law Schools to Address a Real Problem*, Afronomicslaw (Sept. 17, 2020) https://www.afronomicslaw.org/2020/09/17/the-hutians-decolonising-the-teaching-of-public-international-law-in-african-law-schools-to-address-a-real-problem/.
63 Adebisi, s*upra* note 58.
64 Heleta, *supra* note 4.
65 Adebisi, s*upra* note 58.
66 Al Attar & Abdelkarim, *supra* note 4, at 50.

the opinion that attempts at decolonising the curriculum, no matter how minimal, contribute to awareness in terms of questioning the hegemony. This is, in fact, our experience, as our exposure to and engagement with literature on decolonisation led us to the discovery of TWAIL and introduced us to thinking about IEL critically.

However, our journey towards integrating TWAIL scholarship and alternative perspectives in our IEL teaching underscored a broader system challenge in terms of the negligible institutional engagement with decolonising the law curriculum in many African and UK universities. Despite growing awareness and individual efforts, the institutional momentum necessary for meaningful curriculum decolonisation still needs to be improved, calling for a concerted push towards embedding these critical perspectives within legal education frameworks. A specific challenge arising from this status quo is the limitation experienced in critically engaging with the curriculum. Fagbayigbo corroborates this point when he explains that 'lack of exposure to critical scholarship such as Third World Approaches to International Law (TWAIL) prevents African students from understanding how explicit and implicit structural imbalances continue to shape Africa's marginal disciplinary position.'[67]

It is important to reflect on the utility of this statement to teachers in Africa. This happens where the teacher lacks total academic freedom to develop the course syllabus and in instances where the teaching of IEL is co-assigned. Where co-teachers or module leaders are not interested in engaging with critical ideologies or questioning established teaching and knowledge system structures, especially where decolonisation is not institutionalised, there is little freedom to introduce alternative perspectives to the students aimed at pluralising the syllabus. As indicated earlier, the curriculum and teaching syllabus have been developed to reflect dominant hegemonic principles that promote Western perspectives of IEL and are accepted as truth by co-teachers of the course. Therefore, for Oyakhire, the decolonisation of the curriculum and the integration of content representing diverse viewpoints was primarily an individual initiative. While the institutional curriculum structure remained largely unchanged, Oyakhire's teaching approach was characterised by a deliberate effort to incorporate examples of alternative perspectives, challenging the dominant narratives and fostering a more diverse idea of the international trading system.

67 Babatunde Fagbaiybo, *A Critical Approach to International Legal Education in Africa: Some Pivotal Considerations*, Third World Approaches to Int'l L. Rev. (Nov. 28, 2019), https://twailr.com/a-critical-approach-to-international-legal-education-in-africa-some-pivotal-considerations/. Babatunde Fagbaiybo, *A Critical Approach to International Legal Education in Africa: Some Pivotal Considerations*, Third World Approaches to Int'l L. Rev. (Nov. 28, 2019), https://twailr.com/a-critical-approach-to-international-legal-education-in-africa-some-pivotal-considerations/.

5. Convergence and Divergence: Exploring the Interplay in Our Decolonizing Journeys

Since our exposure to decolonisation scholarship, we have become more aware of the need for (re)positioning Global South experiences and alternative perspectives in our teaching. For example, in illustrating the aims of international trade modules taught by both authors in our respective universities, we included materials in our respective syllabi that invited our students to engage with dominant narratives of international trade critically. This approach generally aligns with a significant objective of decolonisation scholarship, which is to ensure that the Global South is centred within IEL scholarship and that IEL recognises and engages with the interests and priorities of Global South countries as it pertains to the production and curation of knowledge.[68] Oyakhire's experience experimenting with critical legal scholarship in an African University compared to Omiunu's experience of experimenting with critical legal scholarship in a European University presents interesting results.

First, although our audiences differed, our aims were similar. Oyakhire engaged with an audience of African students who needed to realise that the IEL world is not flat and that it is okay to challenge the status quo about knowledge. Omiunu engaged with an audience dominated by Western students but also preached the same message. Evidently, with the differences in our audiences, we had mixed reactions. For example, after engaging with the materials and discussions in class, Omiunu had several students voluntarily opt to do a final year dissertation on a topic of IEL, which challenges the dominant narrative. The uptake was not massive, with an average of one student a year opting to do a dissertation on a topic of IEL from a critical perspective. This is evidence that there is a limited appetite for a different take on IEL epistemology. The experience of Oyakhire in this regard was the interest of about 6 IEL students in the same academic session opting to do their final year-long essay on topics critically evaluating the impact of certain WTO principles and practices on developing countries generally and in Africa specifically.

Second, we discovered that our grounding in Eurocentric frames of IEL comes through in the level of risk we are willing to take when experimenting with counter-narratives on IEL. For example, Omiunu observed that he was initially cautious about not upsetting the 'apple cart' when considering what to include in the reading list. He further observes that during his first year of teaching IEL, he stuck to conventional

68 James Thuo Gathii, Wing-Tat Lee Chair Int'l L. Loy. Univ. Chi. Sch. L., Opening Keynote Lecture Delivered at the 5th Society of International Economic Law Biennial Conference: Africa and the Disciplines of International Economic Law: Taking Stock and Moving Forward 1, 19 (July 7, 2016).

topics and reading materials. In the second year of teaching the module, Omiunu felt confident introducing more critical perspectives of IEL. In hindsight, Omiunu recalls feeling more inclined to deviate from the status quo when working with co-module leaders engaged in critical legal research. For Oyakhire, most of the reading list still focused on conventional topics and reading materials. Materials on more critical perspectives of IEL were mentioned with caution or sometimes only by way of inference, knowing that the reality was that other teachers on the module would grade the students on the established perspectives. In hindsight, Oyakhire acknowledges that she should have been bolder in incorporating more TWAIL content in the curriculum and reading list that transcends the mere incorporation of TWAIL in teaching. She recognises that mere mention of TWAIL narratives or alternatives is not sufficient and that a more transformative approach is needed to change the dominant Eurocentric perspective that pervades IEL teaching and scholarship in Nigeria.

In essence, Omiunu initially approached the integration of critical perspectives with caution, reflecting a concern about disrupting established norms. Over time, he became more confident in introducing such perspectives. Oyakhire's experience suggests a more cautious, consistent approach, possibly due to concerns about institutional or collegial support for radical changes. In hindsight, we also recognise that our initial hesitations to integrate critical perspectives into the IEL syllabi within our respective institutions were due to perceived fears that we would face backlash from institutions that we felt were ambivalent towards decolonisation and the need to decolonise the curriculum. These challenges reflect broader issues of perception held by decolonial scholars about the institutional culture and attitude towards decolonisation in the HE sectors. In this context, we found ourselves oscillating between two of De Oliveira Andreotti et al.'s four 'spaces of enunciations' for decolonisation in HEIs - the 'soft-reform' and 'radical-reform' spaces.[69] Operating in the 'soft reform' space as decolonisation activists are tricky, especially for early career researchers who are conscious of the potential backlash that can come from getting on the wrong side of the system. In this soft reform space, the institution may have demonstrated a willingness to engage in debates and discussions about decolonising the curriculum. However, there is a conditioned environment for engaging in changes to the orthodoxy. In the words of Moghli and Kadiwal, when operating in the 'soft space', as a decolonial scholar, 'difference is recognised, but it needs to be tamed within the terms of those 'doing the including', without challenging existing power relations, structural disparities, and subjectivities.'[70]

69 Vanessa de Oliveira Andreotti, Sharon Stein, et al., *Mapping interpretations of decolonization in the context of higher education*, 4 Decolonization: Indigeneity, Educ. & Soc'y 21 (2015).
70 Moghli & Kadiwal, *supra* note 49.

Third, we both agreed that embedding ourselves in networks such as the African International Law Network (AfIELN), Afronomicslaw, TWAIL, and the IEL Collective has been a liberating experience that has given us the confidence to challenge the status quo in our teaching of IEL. We both observed that the proliferation of these networks and the accessible materials they generate have been useful to us as tutors who did not benefit from these insights when we were students. Oyakhire, for example, introduced her students to the AfIELN, Afronomicslaw blogs and the Afronomicslaw Academic Forum, an informal space that brings together undergraduate students interested in IEL as they relate to Africa and the Global South.[71] Oyakhire believes that these networks allowed her students to get more exposure to critical thinking embedded in TWAIL outside of the classroom by interacting with other African students and scholars of IEL on social media spaces.

6. Conclusion

This paper focused on our shared experiences, highlighting the similarities in our encounters with IEL, which reinforced Eurocentric epistemology as students, and how this influenced the way we taught IEL. This comparative perspective offers valuable insights into the challenges and opportunities of decolonising IEL pedagogy in different contexts. We outlined our first experiences with TWAIL scholarship and how this exposed us to critical scholarship, which questioned the hegemonic structures on which IEL is grounded.

This comparative lens also provided rich insights into how geographical and institutional contexts influence the ability to experiment with decolonial approaches. Notably, our comparative reflections showed that despite shared goals, institutional structures, resources, and student reception varied across the North-South divide, shaping the authors' engagement with the decolonisation process. Instructively, while the reflections revealed that autoethnography is valuable for personal insight, it also exposes the limitations imposed by broader institutional structures. Notably, institutional resistance to decolonisation was a recurring challenge in both Nigeria and the UK even though some of the resistance encountered was unconscious. This highlights the need for broader methodological engagements that involve institutional critique and advocacy beyond personal reflections.

71 *See* Academic Forum, Afronomicslaw, https://www.afronomicslaw.org/category/academic-forum (for more information about the AfronomicsLaw Academic Forum).

The question may be asked: why are we, as teachers of IEL, concerned with decolonising the curriculum through our teaching? This question is relevant when considered within the context of our training and experience, as we have highlighted in the preceding sections of this paper. To us, the idea of decolonisation and specifically decolonising the curriculum is particularly relevant, considering that IEL, both as a subject and practice, is in an era of multiple crises. In this context, we recognise that foundational concepts such as multilateralism, free trade and trade liberalisation rooted in Eurocentrism are constantly being challenged in the way states adopt these concepts. The way these concepts are constantly evolving in practice affects the way we teach these concepts.

We have sought answers from publications by TWAIL scholars which show that these seemingly universal concepts were foisted as part of colonisation. Alternative literature shows that states historically embraced the idea of protectionism, self-interest and bilateral rather than multilateral trade. Our attention as teachers and researchers is drawn to the fact that Western states that entrenched these foundational principles which served their interests have begun to move away from these principles. These events have thus forced us to question these practices or get a historical knowledge of how these concepts came to shape IEL practices. Through our encounters with historical literature, mostly from TWAIL scholars, we found that there is no way of teaching IEL without, as a minimum, drawing the attention of our students to pre-colonial trade practices. Even if this is limited to just including such literature as part of the supplementary reading list.

Like the 2020 report by the TRILA project and the Afronomicslaw symposium mentioned in the introductory section, this paper confirms that Global South scholars teaching IEL across different jurisdictions, whether located in the Global South or Global North, share similar experiences. It confirms that teachers of international law who are products of the Eurocentric systems run the risk of perpetuating the culture. We, however, recognise that location is a determinant factor for the level of intellectual experimentation for us as IEL teachers seeking to engage in the decolonising process. Consequently, some differences arise because of the location of our universities in the North-South divide.

For example, in engaging with materials and literature on TWAIL, decolonisation or critical thinking generally, Omiunu, as a teacher in the UK, had more access to these materials. This exposure helped improve his knowledge of the varying debates underlying the topics. On the other hand, Oyakhire, while a lecturer in Nigeria, had limited access to these materials, which sometimes required institutional access to

databases not readily available. The proliferation of open access knowledge sources such as Afronomicslaw.org, TWAILR, and the IEL Collective have undoubtedly democratised the knowledge creation space, which gave Oyakhire some access to much-needed materials.

Also, Omiunu had more opportunities to attend conferences where developments in the decolonisation and TWAIL debates were discussed and analysed. The provision is readily available in universities in the Global North to fund/sponsor his attendance at these conferences when compared to most Global South Universities, especially in Africa. Consequently, Oyakhire, on the other hand, had limited opportunities to attend these conferences in the absence of funding from her university and had to rely on scholarships/bursaries offered by conference organisers to attendees from the Global South in consideration of the cost of attending. These factors generally affected the output of both teachers on their students, generally shaped by the amount of information available to them as they engaged with decolonising their IEL curriculum. Although this paper has highlighted the authors' decolonisation efforts as IEL teachers, we acknowledge that our work can go beyond the classroom. Through our research, we can continue to disrupt dominant narratives and promote decolonisation in IEL by organising workshops and seminars on decolonisation and supporting the development of young IEL scholars and teachers from Africa. The autoethnographic methodology adopted for this study not only facilitated a deep reflection on our positionality as Global South scholars but also revealed the challenges and complexities we encounter in a bid to decolonise IEL. The findings of this study also demonstrate that while autoethnography provides critical personal insights, the broader institutional and structural challenges associated with decolonisation demand a more collective and systemic approach if we are to achieve meaningful changes. It is also important to emphasise that the comparative element of this methodology reinforced the need for contextual sensitivity in decolonisation efforts, while the reflections on subjectivity highlighted the importance of ongoing reflexivity in navigating Eurocentric knowledge systems. We also hope that future research further expands on how methodological approaches, like autoethnography, can be complemented by institutional critique and collaborative efforts in the broader movement to decolonise IEL.

"Swahilinisation" of the East African Court of Justice: Decolonising Through Language

*John S. Nyanje**

Abstract

The importance of language as a means of communication in regional courts is something that does not require much debate. Of course, language is the "natural environment" of the law, in which all legal acts are fulfilled. The language in which we choose to teach, practice and engage actors on regional laws, such as in the East African Community, has political and operational implications; it is not a choice to be made lightly. In this regard, the dominance, if not monopoly, of the English language within the East African Court of Justice ("EACJ"), twenty-two years after its establishment, is something that citizens, lawyers, and scholars within the East African Community ("EAC") should be concerned about.

Through this article, I will first argue why Swahili as a language should be used in the EACJ as the foremost official and working language. This view is not only to make Swahili the dominant language for access to justice, but also to liberate this court from the shackles of colonialism that continue to oppress the citizens of the EAC by making Swahili appear as an unsuitable language to be used in the Court or legal university education. I will then argue that if Swahili is to be introduced as an official working language in the EACJ, this will be an important step in the liberation of colonial court systems and the strengthening of access to justice in the East African region.

The arguments are based on five key pillars. The first pillar is that the EAC missed an opportunity at its inception to make Swahili a working language of the EACJ. Secondly, I argue that no prejudice would be suffered if Swahili is introduced as a working language of the court. Thirdly, I argue that Swahili has earned a globalized space, and therefore it no longer needs justification for being a small language that can't be an integral part of justice dispensation. The fourth pillar argues that culture and tradition form an integral part of the court, and thus, language must become an important tool of the court tradition and the actors at the court. I then conclude by offering a conclusion towards introducing Swahili as a working language of the EACJ.

Introduction

The members of the EAC are largely disintegrated with various colonially inherited languages amongst themselves. Only Swahili can be deemed to be a language with a fair amount of presence either in spoken or official use among all Member States, yet English remains the dominant working language despite the joining of new members who are more Francophone, such as the Democratic Republic of Congo and Burundi, or the new entrant Somalia, whose official languages are Arabic and Somali. For a court whose decisions have been far-reaching to the local communities such as the Serengeti matter on the protection of indigenous lands, it would only be fair if such proceedings and decisions are availed in a language that the local masses are more comfortable with. While I acknowledge that an argument of availability of resources could be raised regarding the high costs of translations, there are two examples noteworthy where the court has been willing to expend resources towards access to justice. The first instance is when the court created the divisions and appellate functions[1] as well as when the court established sub-registries in the member states.[2] Both moves which needed a fair number of resources including hiring very many new judges and senior staff which, for arguendo purposes, is much cheaper than what is needed towards the introduction of a language have been done before.

The conceptual framework of this paper builds on the writings of the renowned Kenyan writer Ngugi wa Thiong'o from almost four decades ago, in which he argues that imperialism continues to control the economy, politics, and cultures of Africa.[3] The same holds true for the legal systems of all African countries and regional groupings. There is still a ceaseless struggle of African judicial system users to try and liberate themselves in all aspects from this capture, which, in my view, is the real "African state's capture" from the Anglo-Saxon traditions and to usher in a new era of truly indigenous African legal systems and jurisprudence. It has been an ever-continuing struggle to remodel our legal systems and history through real control of all the means of a people-centred judicial system. The choice of language and its use in African regional courts is central to this ongoing struggle and pursuit of a better judicial system.

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1 *See* East African Court of Justice ("EACJ") Sub-Registries, available at https://www.eacj.org/?page_id=5064.

2 Treaty for the Establishment of the East African Community, Art. 24 (Nov. 30, 1999), 2144 U.N.T.S. 255. The EAC Establishment Treaty provides that the Court, "shall consist of a First Instance Division and an Appellate Division." *Id.* at Art. 23(2). These amendments were made following a decision of the EACJ that was strongly objected to by the government of Kenya.

3 Ngugi wa Thiong'o, *The Language of African Literature,* 1/150 NEW LEFT REV. (Mar.–Apr. 1985).

As Mazrui's have argued,[4] Trans-ethnic languages in Africa will always be influenced by power dynamics. These power dynamics can be classified either as imperial, hegemonic, or preponderant.[5] An imperial language is one which came with a dominant external power and has yet to develop a large enough number of native speakers from the indigenous population. English and French in many African countries would fall under this category. There is also a very big likelihood that Mandarin could also become a hegemonic language in the future for many African countries.[6] A hegemonic language is a dominant indigenous language in which the speakers and the language itself are powerful forces in society. Amharic in Ethiopia is a good example.[7] On the other hand, a preponderant language is very widespread as a second language but its native speakers are not numerous enough or otherwise powerful enough in society to be politically influential. Kiswahili in East Africa is a good example of this.[8]

Kiswahili, a Bantu language, represents the most widespread macro-continuum of mutually intelligible languages and varieties across East Africa, with a long tradition of documentation from the early 19th century.[9] The language has a deep history of connection in the fight against colonialism across Africa and also as a tool of unity and solidarity across the continent.[10] However, the history and traces of Kiswahili in the region show different variations from one country to another.[11] In Tanzania, upon taking colonial control in 1891, the German government proceeded to make Swahili the national language and great effort was made to disseminate the language

4 Alamin M. Mazrui & Ali A. Mazrui, *Dominant Languages in a Plural Society: English and Kiswahili in Post-Colonial East Africa,* 14(3) INT POL SCI REV. 276 (1993).

5 *Id*.

6 Ifeanyi Eke, *Globalisation will determine the growth of Mandarin in Africa,* LONDON SCHOOL OF ECONOMICS BLOGS (June 21, 2021), https://blogs.lse.ac.uk/africaatlse/2021/06/21/globalisation-will-determine-the-growth-mandarin-chinese-language ("A 2021 World Population Review record shows that four of the seven top countries with the largest Chinese communities and Mandarin speakers are African (South Africa, Nigeria, Mauritius and Madagascar), reinforcing demand for what is considered a growing and therefore lucrative skill."

7 *See* Mazrui & Mazrui, *supra* note 4.

8 *Id.*

9 Nico Nassenstein, *On the Variability of Kiswahili in Bujumbura (Burundi)*, 26 SWAHILI FORUM 205 (2020).

10 Hellen Swingler, *KiSwahili as an agent of liberation, integration,* UNIV. OF CAPE TOWN NEWS (June 1, 2022), https://www.news.uct.ac.za/article/-2022-06-01-swahili-as-an-agent-of-liberation-integration (noting that Professor Aldin Mutembeei of the Julius Nyerere Chair of Kiswahili at Dar es Salaam University points out that, "Kiswahili has evolved with a conscious mind for use in cultural liberation, political gain and educative purposes and to unify people and national consciousness. [KiSwahili] was used to solidify people's togetherness as a weapon against imperialism. It made people see their commonality rather than their differences.").

11 *See* Mazrui & Mazrui, *supra* note 4.

throughout the country.[12] The same seems to have been the case of the Swahili language in Congo where the Belgians influenced its growth, first to curtail the influence of the British from the south, and secondly, to grow a new class of civilisation like in Tanganyika.[13] However, this phase of promotion of Swahili by colonial governments does not negate the phase where Swahili becomes an important tool for the struggle of new independent countries in Africa.[14]

How languages Embrace Colonial Continuities in Courts

Sundya Pahuja in her work on decolonising states, argues that decolonial states were born into law.[15] These foundations passed to the post-colonial state where a single world view and in this case the English or French language have a prejudicial preference, which is born out of a single worldview that these are the advanced languages in which law can be taught, practised or adjudicated thus continuing to hold hostage discourses of procedural law in African regional courts and tribunals. These postmodern colonial anxieties are deeply entrenched in our legal academia and practices sometimes even subconsciously. In essence the drafters of the treaties are subconsciously influenced by the epistemologies of colonisation to accept the continuity of dominance of colonially accepted languages as tools for their courts. By applying a decolonial critique, this paper unearths the perversions of colonially transposed languages that pervade the EACJ.

Ngûgû wa Thiong'o asks a pertinent question on decolonization: from which knowledge system should a postcolonial system - or people for that matter - draw? He argues that if local systems were to thrive, postcolonial societies must look beyond European epistemology.[16] He states that "The choice of language and the use to which language is put is central to a people's definition of themselves in relation to their natural and social environment, indeed in relation to the entire universe." To Ngugi, postcolonial societies struggling to recover from the trauma of Eurocentrism should begin by developing the capacity to self-define "time and space."[17] To him, as a conveyor and incubator of culture and cognition, language is primordial in this struggle.[18]

12 Beverly E. Coleman, *A History of Swahili,* 2(6) BLACK SCHOLAR 13, 22 (1971).

13 JOHANNES FABIAN, LANGUAGE AND COLONIAL POWER: THE APPROPRIATION OF SWAHILI IN THE FORMER BELGIAN CONGO 1880-1938 (University of California Press, 1991).

14 *See* Coleman, *supra* note 12, at 23.

15 SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (Cambridge University Press, 2011).

16 NGÛGÎ WA THIONG'O, DECOLONIZING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE (James Currey Ltd. / Heinemann, 1986).

17 *Id.*

18 Mohsen al Attar & Shaimaa Abdelkarim, *Decolonising the Curriculum in International Law: Entrapments in Praxis and Critical Thought,* LAW & CRITIQUE, FORTHCOMING (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923429.

Ngugi's epistemological position captures the essence of the decolonising African regional courts from the epistemic violence upon which African regional courts are founded. Colonial languages were on many instances imposed in many African countries through brutality. Yet, irrespective of that colonial history, Africans must accept those languages in their pursuit of justice in independent regional courts. How ironic? Why are African regional courts so comfortable disregarding the nefarious origins of the English and French languages? What the EACJ is doing is just allowing the continuity of colonial epistemologies by only having colonially imposed languages as the languages of use before these courts while disregarding indigenous languages like Swahili. Just like Ngugi I prefer the restructure of access to justice and to value local epistemological systems.

As al Attar and Shaimaa[19] have argued, the process of decolonisation is contingent. Decolonisation is mixed up with histories of invasion and settler-colonialism, exclusion and assimilation, and independence and identity. Most of all, the history of decolonisation is the history of resistance and of counter-revolution: colonised peoples sought to shake off the shackles of oppression while colonisers, both internal and external, sought to concretise them. Taking cue from al Attar and Shaimaa, there is no doubt that English is concretised in many African courts to the point where the introduction of indigenous languages is met with disdain. English has been assimilated to this court to a point of wiping out the independence and identity of African languages such as Swahili.

At times it may appear so obvious that law is determined by language.[20] It is true, however, that in whatever way law is perceived, it is primarily a linguistic phenomenon. Wiśniewski elaborates that language can be said to be both a medium for the existence of the law and the form in which it is communicated.[21] Given the primary significance of language for the existence and operation of law, it is no wonder that the relations between language and the law are often the subject of scholarly analysis.

19 *Id.* at 12.

20 Adam Wiśniewski, *Remarks on Language and International Law,* 14 PRZEGLĄD PRAWNICZY UNIWERSYTETU IM. ADAMA MICKIEWICZA 57 (2022), available at http://ppuam.amu.edu.pl/uploads/PPUAM%20vol.%2014/03_Wiśniewski.pdf.

21 *Id.*

In a more thought-provoking manner, Justina Uriburu begins her blogpost[22] on how we should address English centrism in international law by reviewing the works of Benedict Anderson[23] in his many years of working in international law, "more and more scholars in different countries feel that unless they write in American [English], they will not be recognized internationally. At the same time American scholars become lazier about learning any foreign languages except those they have to acquire for the purposes of fieldwork", and fears that, after all, the warnings of political scientist Karl Deutsch may have been right: "Power means not having to listen!"[24].

It is against this backdrop that alternatives to countermand the dominance of the eurocentrism in the EACJ must emerge. Afterall what is African about the EACJ if the singular most significant tool of shaping the court is Eurocentric? Is it that the subjects are to remain African but not tools used to shape their daily lives?[25]

Does Swahili Stand a Chance?

In several columns and after re-reading him carefully over the years,[26] Tanzanian veteran journalist and lawyer, Jenarali Ulimwengu, has argued for and against the use of Swahili in the East African community. I would like to highlight just two of the instances he has done this. In response to the Chief Justice of Tanzania, Hamis Juma, who had lamented that legal practitioners in Tanzania had a problem with understanding and using the English language, both in articulating arguments and drafting pleadings, Jenarali responds by stating that the English language is to the legal profession what a plough is to the farmer, and legs are to a footballer.[27] He further argues that, given the history of the region and the way it has evolved in legal matters, saying that our legal officers do not have enough working knowledge of English is equivalent to admitting that you have too many people doing a job that is not theirs, just like if you went to the soccer ground to find people pretending to play soccer without legs.[28]

22 Justina Uriburu, *Between Elitist Conversations and Local Clusters: How Should we Address English-centrism in International Law?,* OPINIOJURIS (Feb. 11, 2020), http://opiniojuris.org/2020/11/02/between-elitist-conversations-and-local-clusters-how-should-we-address-english-centrism-in-international-law/.

23 BENEDICT ANDERSON, A LIFE BEYOND BOUNDARIES: A MEMOIR (Verso, 2016).

24 *See* Uriburu, *supra* note 22.

25 Babatunde Fagbayibo, *Critical Pedagogy of International Legal Education in Africa: An Exploration of Fela Anikulapo-Kuti's Music, in* THE ART OF HUMAN RIGHTS: COMMINGLING ART, HUMAN RIGHTS AND THE LAW IN AFRICA 314 (Romola Adeola et al. eds, 2019).

26 *See* Collection of Various Articles on Social Issues Published Between 1993 and 1995 in Rai Newspaper under the Same Title as the Monograph in Jenerali Ulimwengu, *Rai Ya Jenerali (E&D Ltd. 2005); see also* The Chanzo Youtube Channel, *Fursa za Lugha ya Kiswahili Afrika na Duniani,* YOUTUBE (Dec. 17, 2023), https://www.youtube.com/watch?v=33w7jDyKFe0 (arguing that "asili ya lugha ni siasa, huwezi kuvitenganisha").

27 *See* Jenerali Ulimwengu, CJ *Fix Integrity of Justice System Before Language of the Courts,* THE EAST AFRICAN (Dec. 23, 2020).

28 *Id.*

Be that as it may, a more polemic question is asked, whether there is a necessity of having the ability to use the linguistic tools remains unimpeachable for anyone who intends to plead, interpret, or adjudicate? Otherwise, how do we hold forth on laws that have been passed down onto us from London, via Delhi, to our shores, all in the language of Chaucer, if we cannot even digest Chinua Achebe?[29]

Conversely, just a year earlier, Jenerali had argued in a separate column, rebuking politicians for not advancing Swahili in the EAC, that the elite in the region treated Swahili as a second-rate lingo to be employed in the marketplace while haggling over the price of beans, or on political platforms while telling the masses lies about "bringing development" to them. Otherwise, to the elite Kiswahili is the tongue of gossip, banter, and light-hearted exchanges.[30] This view is not espoused by Jenerali alone, but several others such as Prof Chacha Nyaigoti-Chacha, the pre-eminent Kenyan educationalist, have often bemoaned the shabby treatment of Kiswahili, whether it be in our public speeches, on radio or television.[31]

Reading Jenerali Ulimwengu over time, for whom I have so much admiration, one could be confused that while on one end he always advocates for the use of Swahili at all levels as a tool for decolonization, he seems to be falling for the same sins of imagining that legal systems such as the ones we have inherited from the common law and civil law cannot be decolonized by the use of Swahili. By insisting that languages form an integral part of these legal systems, Jenerali seems to suggest that justice, a local concept of rights inherent to every human being,[32] cannot be decolonized by using local languages as a tool in these ivory towers referred to as legal systems. Isn't Jenarali then committing the very sin he accuses the elite of the region of? That of treating Swahili as a second-rate lingo to be employed in the marketplace while haggling over the price of beans, as the colonists[33] insisted during their reign in the region?

29 *Id.*

30 *See* Jenerali Ulimwengu, *East Africa: Ulimwengu - SADC boosts Kiswahili - Let the Elite Hang Their Head and 'English' in Shame',* ALLAFRICA (Aug. 26, 2019), https://allafrica.com/stories/201908300333.html.

31 CHACHA NYAIGOTTI-CHACHA, THE POSITION OF KISWAHILI IN KENYA (Uni. of Nairobi, Institute of African Studies, 1981).

32 Grace Mbogo, *Promoting Access to Justice in Africa through Litigation,* RAOUL WALLENBERG INSTITUTE (Apr. 20, 2022), https://rwi.lu.se/news/promoting-access-to-justice-in-africa-through-litigation/ (arguing that, "Access to justice is a basic principle of rule of law that ensures that human rights are protected. One of the ways of promoting and protecting human rights is through legal empowerment which enables individuals to know and use the law to seek justice."); *see also* Martha Wangari Karua v. The Attorney General of the Republic of Kenya, Hon. Anne Mumbi Waiguru, & Hon. Peter Ndambiri (Interveners), EACJ Reference No. 20 of 2019, First Instance Div., ¶ 52.

33 *See* Ulimwengu, *supra* note 30.

It is against this background that I have decided to debunk this narrative and show how the EACJ can use Swahili as a language to decolonise the court from these shackles left in the region by the colonialists and delocalise justice. As the eminent author and writer Ngugi wa Thiong'o has argued in his famous work on decolonising through languages,[34] he believed that writing in Gîkûyû, a Kenyan and African language, is part and parcel of the anti-imperialist struggles of Kenyan and African peoples. He (Ngugi) wanted Kenyans to transcend colonial alienation through this. He correctly argues that we, African, writers are bound by our calling to do for our languages what Spencer, Milton and Shakespeare did for English; what Pushkin and Tolstoy did for Russian; and indeed, what all writers in world history have done for their languages by meeting the challenge of creating a literature in them, a process which later opens the languages for philosophy, science, technology and all other areas of human creative endeavours.[35]

The continued dependence of most African governments on ex-colonial metropolitan languages has led some African scholars to coin the term "linguistic imperialism."[36] Proficiency in the language of the former metropolis has been a keyto élite positions throughout the continent but also access to justice through courts. It is on this premise, just like Ngugi above, that I believe that the EACJ by adopting Swahili as its official and working language would end up achieving the same objectives of decolonizing our systems that people like Ngugi have argued for decades.

The East African Court of Justice (EACJ)

Jurisdiction

The EACJ has a jurisdictional architecture that includes both contentious and advisory jurisdiction.[37] It must, however, be stressed that the primary jurisdiction of the court is to interpret and apply the treaties of the East African Community ("EAC").[38] At

34 *See* wa Thiong'o, *supra* note 16.
35 *Id.*
36 Abdulaziz Y. Lodhi, *The Language Situation in Africa Today,* 2(1) NORDIC J. AFR. STUD. 79, 82 (1993); *see also* George A. Mhina, *Problems Being Faced in the Process of Developing African Languages with Special Reference to Kiswahili,* 42(1) KISWAHILI 43, 57 (1972); *see also* John Indakwa, *A 'lingua Franca' for Africa: A Study of the Need for a Common African Language,* 48 KISWAHILI 57, 73 (1978) (Indakwa discusses cultural imperialism); *see also* L.T. Rubongya, *The Language and Culture of a People,* 94 PRÉSENCE AFRICAINE 13, 30 (1975). There are also some other contributions in the same volume of Présence Africaine dealing with African languages and their role in fostering African cultural identity.
37 Treaty for the Establishment of the East African Community ("EAC Treaty") (1999), Arts. 27– 36.
38 EAC Treaty, Art. 27(1).

the point of establishment, the Court had only one chamber.[39] However, in 2007 amendments to the Treaty for the Establishment of the EAC ("EAC Establishment Treaty") were effected leading to the creation of an Appellate Division making the Court a two-chamber court that came into effect in March 2007.[40]

During the 15th Ordinary Summit of the EAC's heads of state, a decision was made to defer giving the EACJ jurisdiction over human rights and to instead consult with the African Union ("AU") on the matter.[41] The Summit, however, extended the Court's jurisdiction to include trade and investment cases as well as cases arising under the EAC's Monetary Union treaty.[42] The Court also has jurisdiction over disputes between the EAC and its employees;[43] arbitral disputes arising from commercial contracts between private parties; and agreements to which the EAC, any of its institutions, or EAC Member States are parties if an arbitration clause in such a contract or agreement confers such jurisdiction.[44]

For parties with direct access, the jurisdiction of the Court, subject to the limitation of Article 27(1) of the EAC Treaty that provides that the Court shall be granted jurisdiction over human rights at a future date,[45] is compulsory once the relevant state has ratified the EAC Treaty. However, under what Gathii and Mbori term as the *Katabazi* doctrine,[46] the Court assumed jurisdiction over human rights cases based on the premise that in doing so, the Court was simply exercising its jurisdiction to interpret and apply treaty provisions.

39 EAST AFRICAN COURT OF JUSTICE, COURT USERS GUIDE 11 (2013), available at http://eacj.org/wp-content/uploads/2013/11/EACJ-Court-Users-Guide-September-2013.pdf.

40 *See* EAC Treaty, Art. 24. The EAC Treaty provides that the Court, "shall consist of a First Division and an Appellate Division." *Id.* at Art. 23(2). These amendments were made following a decision of the EACJ that was strongly objected to by the government of Kenya.

41 *See* Communiqué of the 15th Ordinary Summit of the EAC Heads Of State, EAC SECRETARIAT (Nov. 2013), https://www.scribd.com/document/188158971/Communique-of-the-15th-Ordinary-Summit-of-The-EAC-Heads-of-State.

42 *See* Communiqué of the 16th Ordinary Summit of the East African Community Heads of State, EAC SECRETARIAT (Feb. 20, 2015), ¶ 9.

43 *See* EAC Treaty, Art. 31.

44 EAC Treaty, Art. 32.

45 EAC Treaty, Art. 27(1).

46 James Thuo Gathii & Harrison Otieno Mbori, *Reference Guide to Africa's International Courts, in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS 314, (James Thuo Gathii ed., Oxford Uni. Press, 2020).

The EACJ has robustly tried to convince the other organs and non-state actors of the court's viability through its jurisprudence which has now largely moved to the realm of human rights.[47] Furthermore, the human rights case law, emanating from the court and notably the Serengeti jurisprudence is sufficient evidence that the EACJ is central to the daily needs of the citizens of the Member States.[48]

The court has, for over a decade now, set up sub-registries in five-member states[49] to allow easy access to the court by the citizens of the member states of the community and has openly strategized and continues to advocate through workshops and sensitization campaigns for the use of the courts by citizens of member states.[50] Even more outrightly, the strategic plan of the Court has insisted on prioritising the sensitization of the court as a key method of achieving its mandate.[51]

It, therefore, makes more sense that if the court has rationalized its central mandate on the use of the court to cater for the everyday needs of the citizens of the member states, especially on questions of human rights, it would thus try to achieve this by use of a local indigenous language as a way of achieving this aim the court should thus employ this strategy to ensure the ultimate reach of the citizens. If the sensitization campaigns are undertaken in local languages and the sub-registries available in the partner states would cater in a local language, it, therefore, beats logic that the very local language cannot be used as a language of the court.[52]

47 James Thuo Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy,* 24 DUKE J. OF COMPAR. & INT'L L. 249 (2013).

48 *Id.* at 259.

49 The Court's sub-registries are located in the capitals of the following Partner States: Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania. See East African Court of Justice, *supra* note 1.

50 East African Court of Justice, *About Registry,* https://www.eacj.org/?page_id=107 ("In order to bring justice closer to the people, the Court established Sub-Registries in the capital cities of the Partner States.").

51 East African Court of Justice, *EACJ to hold sensitization workshop on its role in the EAC integration,* EACJ (Oct. 27, 2011), https://www.eacj.org/?p=404.

52 EAC Treaty, Art. 46 (stipulating that the official language of the Court is English and to that effect all documents to be filed before the Court and the judgement should be in English); *see also* East African Court of Justice, Rules of Procedure (2019), Section 11(1)–(7) on having pleadings in the official language of the court, and Sections 75(1)–(5) on taking of witness evidence in the official language, and Section 98(1) on having appellate procedures in the official language of the court. Also during my field research at the EACJ in April and May of 2022, I interviewed a litigant who was conversant in Kiswahili and French but didn't speak any English. In that regard, he had to provide official translations of all his pleadings from French to English at his own cost and also hire a French translator during his witness evidence. I will not make details of the litigant available in this paper as the case is still before the court.

The Expanding Membership of the East African Community

The East African Community as we know it today is not a new grouping as such. Integration in the EAC started during the colonial era with the British who were in charge of Kenya and Uganda. After World War 1, Tanganyika was brought on board to complete its earlier phase.[53] Post-independence, the leaders of the EAC at the time led by Julius Nyerere, Jomo Kenyatta and Apollo Milton Obote concluded an agreement for East African Cooperation[54] that brought the three nations together in 1967. However, this was to collapse in 1977 after the community experienced turbulence brought about by many factors including personality differences amongst the heads of state and disputes over the sharing of benefits. An agreement[55] was concluded by heads of state to address the issue of the sharing the benefits of the defunct EAC, which agreement implored the states to explore avenues for future cooperation. The processes undertaken by the founder states resulted in the signing of the EAC Treaty on the 30th of November, 1999[56] coming into force in June 2000. By this treaty, the contracting parties established the East African Community[57] with the East African Customs Union and a Common Market as transitional stages to and an integral part of the community.[58]

The Treaty was originally signed by the founding States: Kenya under Daniel Toroitich Arap Moi, Uganda under Yoweri Kaguta Museveni and Tanzania under Benjamin Mkapa. The three nations laid the foundation for the now expanding community. Soon thereafter, the community received interest in joining, from Burundi and Rwanda. After lengthy negotiations and deliberations, Rwanda and Burundi were admitted to the fold on the 30th of November, 2006, by the eighth Summit at Arusha. They later acceded to the EAC Treaty on the 18th of June, 2007, and became full members on the 1st day of July, 2007.[59] They later joined the customs union on the 1st day of July, 2009.[60]

53 Emmanuel Elau, *Membership and Exit from the East African Community* (Oct. 23, 2019), available at https://ssrn.com/abstract=3474286.
54 *See* The Treaty for East African Co-operation, 6 I.L.M. 932 (June 6, 1967).
55 *See* The Agreement For The Division Of Assets And Liabilities Of The Former East African Community (May 14, 1984), available at https://tanzanialaws.com/e/96-east-african-community-mediation-agreement-act.
56 *See* generally EAC Treaty.
57 EAC Treaty, Art. 2(1).
58 EAC Treaty, Art. 2(2).
59 EAST AFRICAN COMMUNITY, *History of the EAC in About EAC,* available at https://www.eac.int/customs/index.php?option=com_content&view=article&id=57:tanzania-rwanda-burundi-in-rail-deal-&catid=1:latest-news&Itemid=163#:~:text=1%20July%202007%3A%20Rwanda%20and.
60 *Id.*

A decade later, South Sudan[61] became a member state of the EAC, but this was not an easy decision to make, owing even it is a huge trading partner for both Uganda and Kenya. In June 2010, Sudan made an application to join the EAC. In November of 2011, that request was rejected.[62] It is believed that Both Uganda and Tanzania raised issues of concern in Sudan, such as their democracy, women rights and religious politics. However, the long-strained relationship between Uganda and Sudan was termed as the biggest source of objection then. Sudan accused Uganda of providing a sanctuary to rebel group from Darfur region, while Uganda disputed Sudan's claims that it had ceased support for the Lord Resistance Army ("LRA"), a rebel group from Northern Uganda.[63] South Sudan made its application months after it attained independence, but the first application was rejected.[64]

In June 2019, the Democratic Republic of Congo ("DRC") submitted an application to join the East African Community ("EAC"). The 21st Ordinary Summit of EAC Heads of State, held on 27th February, 2021, then considered this application and directed the EAC Council of Ministers to expeditiously undertake a Verification Mission in accordance with the EAC Procedures for admission of new Members into the EAC. On 29th March, 2022, Kenyan President Uhuru Kenyatta, the Chair of the Summit of the EAC Heads of States, announced that the DRC has been admitted as the seventh member of the EAC.[65]

On 8 April, 2022, the Treaty of Accession of the DRC to the Treaty for the Establishment of the East African Community was signed by President Kenyatta and by President Félix-Antoine Tshisekedi Tshilombo of the DRC, at State House, Nairobi. Ugandan President Yoweri Museveni and his Rwandan counterpart Paul Kagame were also

61 *See* The Treaty of the Accession of the Republic of South Sudan into the East African Community (April 15, 2016); see also EAST AFRICAN COMMUNITY, *Signing Ceremony of the Treaty of Accession of the Republic of South Sudan in to the East African Community,* available at https://www.eac.int/component/content/article/147-speeches-a-statements/420-media-briefing-on-the-forthcoming-eac-ivestment-conference.html.

62 SUDAN TRIBUNE, *Sudan's bid to join EAC rejected as South Sudan's deferred,* https://sudantribune.com/article40342/ (last visited Apr. 11, 2024).

63 *Id.*

64 SUDAN TRIBUNE, *East African body rejects S. Sudan, Somalia membership bids,* https://sudantribune.com/article43998/ (last visited Apr. 11, 2024).

65 Gerhard Erasmus, *The Democratic Republic of Congo joins the East African Community: What does this signify?,* TRALACBLOG (May 25, 2022), https://www.tralac.org/blog/article/15618-the-democratic-republic-of-congo-joins-the-east-african-community-what-does-this-signify.html.

present at the ceremony.[66] DRC then deposited its instrument of ratification with the Secretary-General of the EAC on 11 July, 2022.[67]

Somalia also made an application to join the federation.[68] On 6 June, 2023, the 21st Extra-Ordinary Summit of the East African Community Heads of State Summit held in Bujumbura, Burundi adopted the Report of the Verification of the Application of the Federal Republic of Somalia to join EAC.[69] The Summit further directed the Council of Ministers and EAC Secretariat to commence the negotiations with the Federal Republic of Somalia with immediate effect and report to the next Ordinary Summit of the EAC Heads of State.[70] The Federal Republic of Somalia was admitted into the EAC bloc by the Summit of EAC Heads of State on 24th November, 2023 and on 15 December, 2023, Somalia signed the EAC Treaty of Accession.[71] On the 4th March 2024 Somalia deposited her instrument of ratification of the EAC treaty of accession with the EAC Secretary-General in Arusha, Tanzania.[72]

The Conundrum of the Expanding Membership

This analysis of the expanding membership is not without purpose; it is aimed at showing a chronologic growth of the members and ever-expanding diversity, which is elaborated below. At the onset, the community was built up by the three founding members who all now acknowledge Swahili as a national language in their states.

66 EAST AFRICAN COMMUNITY, *The Democratic Republic of the Congo formally joins EAC After Signing of the Treaty of Accession to the Community,* EAC (Apr. 8, 2022), https://www.eac.int/press-releases/2411-the-democratic-republic-of-the-congo-formally-joins-eac-after-signing-of-the-treaty-of-accession-to-the-community.

67 EAST AFRICAN COMMUNITY, *The Democratic Republic of the Congo Finally Becomes the 7th EAC Partner State,* EAC (July 11, 2022), https://www.eac.int/press-releases/2526-the-democratic-republic-of-the-congo-finally-becomes-the-7th-eac-partner-state.

68 Joint Communiqué: 18th Ordinary Summit of Heads of State of the East African Community, ¶15 (indicating that the heads of states received a verification report for the admission of the Republic of Somalia into the EAC).

69 EAST AFRICAN COMMUNITY, Summit adopts Verification Report of Somalia to join EAC, EAC (June 6, 2023), https://www.eac.int/press-releases/2817-summit-adopts-verification-report-of-somalia-to-join-eac/.

70 *Id.*

71 EAST AFRICAN COMMUNITY, *Somalia Finally Joins EAC as the Bloc's 8th Partner State,* EAC (Mar. 4, 2024), https://www.eac.int/press-releases/3049-somalia-finally-joins-eac-as-the-bloc-s-8th-partner-state.

72 Luke Anami, *Somalia Gains Full Membership of East African Community,* THE EAST AFRICAN NEWSPAPER (Mar. 4, 2024), https://www.theeastafrican.co.ke/tea/news/east-africa/somalia-gains-full-membership-of-east-african-community-4545276#google_vignette; see also id.

The Founding Members

Tanzania

Tanzania has always led on this front of growing Swahili, as Mwalimu Nyerere, the first president of Tanzania, advanced the idea of having Swahili as a tool to fight for independence during the famous Sabasaba day on July 7th, 1954. This date is now recognized by UNESCO as World Swahili Day.[73] On July 7th 1954, the Tanganyika African National Union ("TANU"), under the leadership of the late Mwalimu Julius Kambarage Nyerere, adopted Kiswahili as a unifying language for the independence struggle.[74]

However, as shown earlier in this paper, the history of Swahili in Tanzania is more complicated.[75] Saida Othman, Issa Shivji, and Ng'wanza Kamata argue in their writings on the biography of Mwalimu Nyerere that Arab trade, long before German colonialism, set the stage for Kiswahili in most of East Africa.[76] In Tanganyika specifically, the Germans also played an important role. They founded the first Kiswahili newspaper called *Kiongozi* in 1904 and encouraged the use of Kiswahili as a medium of instruction in primary school and as a subject in secondary school as part of their language policy (the British after them maintained this policy). Here again, we see that Swahili started as a language encouraged by colonialism to promote its interests, but later, the language took a tangent turn of unity towards the fight against colonialism.

From its inception, Mwalimu Nyerere's political party; the Tanganyika African National Union ("TANU") positioned Kiswahili as a language of the struggle for independence.[77] These efforts were advanced in the 1950s when TANU started adult literacy classes in Swahili.[78] TANU, like the Germans, founded and published a pamphlet called *Sauti ya TANU* to reach to the masses, with most of the articles written by Mwalimu Nyrerere. Ironically. most of his writings were in English.[79] The British were unhappy with this as the language grew in fold to aid the anti-colonial

73 UNITED NATIONS, *World Kiswahili Language Day* - 7 July, UNDGC (July 7, 2023), https://indonesia.un.org/en/237769-world-kiswahili-language-day-7-july.

74 UNIVERSITY OF NAIROBI, *UNESCO declares July 7 World Kiswahili Language Day,* (Nov. 24, 2021), https://www.uonbi.ac.ke/news/un-declares-july-7-world-kiswahili-language-day.

75 *See* Coleman, *supra* note 12.

76 Saida Yahya-Othman, *The Making of a Philosopher Ruler, in* ISSA G. SHIVJI ET AL., DEVELOPMENT AS REBELLION: A BIOGRAPHY OF JULIUS NYERERE 185 (Mkuki wa Nyota ed., 2020).

77 *Id.*

78 *Id.*

79 *Id.*

fight. To curb this influence, they made English the medium of instruction rather than Swahili, as the Germans had done.[80] The language then became the language of struggle and, post-independence. the national language and language of instruction in schools. This was exported to other many African countries during their struggle for independence.

Regarding the dispensation of justice, the law (and practice) permits all Courts/Tribunals in Tanzania to use Swahili and English language since 1985.[81] Primary Courts and Ward Tribunals are required to use Swahili language in oral and written proceedings. Depending on the presiding personnel, District Courts, Resident Magistrates' Court, the High Court, the Court of Appeal and Administrative Tribunals use both Swahili and English languages in oral proceedings. Nonetheless, records and decisions of these Courts/Tribunals must be written in English. Since 1965, Swahili language has been used in debates and the proceedings of the National Assembly.[82]

In 2020, the Parliament of Tanzania passed a law[83] to amend various laws, among others, to declare Kiswahili as the official language of the country's laws and the language to be used in the administration and dispensation of justice. To operationalise this, the Chief Justice of Tanzania, Hon. Prof. Ibrahim Juma, on February. 1, 2022, exercising his powers under Section 84A (5) of The Interpretation of Laws Act [Cap.1 R.E 2019], issued the Rules titled 'The Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions)' Rules G.N 66/2022 (Rules). The rules[84] introduce several areas that will impact the conduct of litigation (court proceedings) in Tanzania.

80 *Id.*

81 FB ATTORNEYS, *Swahili proposed as Language of Tanzanian Law and Courts,* FB Attorneys (Feb. 11, 2021), https://fbattorneys.co.tz/swahili-proposed-as-language-of-tanzanian-law-and-courts/.

82 Id.

83 *See* THE UNITED REPUBLIC OF TANZANIA, Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021 (June 3, 2021).

84 The Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions), Rules G.N 66/2022; *see also* Audax Kameja & Evarist Kameja, *Tanzania: Kiswahili the general rule and English the exception as languages of Tanzanian law and courts,* BOWMANS (Apr. 4, 2022), https://bowmanslaw.com/insights/tanzania-kiswahili-the-general-rule-and-english-the-exception-as-languages-of-tanzanian-law-and-courts/.

Pleadings to be Filed in Kiswahili

The rules[85] clearly provides a mandatory requirement for any person who intends to initiate any proceeding and who, in their opinion, falls under the circumstances where the proceedings and decisions are to be conducted in English, to:

- File their pleadings in English with a corresponding translation in Kiswahili; and
- State the grounds upon which they rely to have the proceedings conducted in English.

The court is given discretionary power, after receiving the filed pleadings, to admit the case and direct that the proceedings and decisions be conducted in English; or reject the case and direct the party to file their pleadings in Kiswahili.

English Language to be Used Where Necessary

Rule 3 and the schedules[86] introduce the circumstances where English may be used in litigation. These include;

- When either of the parties or their representatives are not Kiswahili speakers;
- When the matter is about an international investment dispute related to foreign trade or business;
- Any matter involving finance and monetary affairs, specifically tax and international, regional, or sub regional affairs;
- When matters of science and technology are involved;
- When the law governing the subject matter of the litigation and the practice and procedure involved are not available in Kiswahili; and
- For any other reason the interest of justice demands.

Duty to Interpret

Rule 5[87] provides that if the proceedings are conducted in English and any party to the proceedings or their representative does not understand English; the proceedings should be translated to them in Kiswahili by or under supervision of the presiding officer.

Furthermore, where the proceedings are in English, they and the decisions will be translated into Kiswahili and made available to the parties within 21 days from the date of the conclusion of proceedings.

85 *See* G.N 66/2022, Rule 4.
86 *See generally* G.N 66/2022.
87 *Id.*

It is thus evident from these regulations that the court users in Tanzania have localised Swahili to the point of access to courts.

Kenya

In Kenya, Swahili has been the national language since 1964 and the official language since 2010.[88] As early as 1974, the first President of Kenya, Jomo Kenyatta, in a speech at State House, Mombasa, is reported as saying, *'A nation without culture is dead, and that is why I decreed that Swahili would be the national language'*.[89] This came despite earlier opposition from, among others, the then Attorney General of Kenya, who in 1969 stressed the importance of internationalism and efficiency in the use of legal language, asking, 'If we were to introduce Swahili as an official language, what should I do in drafting legislation?'.[90] The same problem that Jenerali Ulimwengu laments at the start of this work on how Swahili has been left for casual talk as the elite insisted on internationalism has been with us for 60 years now. However, today pieces of legislation in Kenya, including the constitution and debates in Parliament are in Kiswahili without anyone doubting their use of internationalism. Chama cha Kiswahili cha Taifa (CHAKITA) was established in 1998 to research and promote the Kiswahili language in Kenya.[91] Kiswahili is a compulsory subject in all Kenyan primary and secondary schools[92]

The courts in Kenya have stipulated in the Civil Procedure Rules at Section 86[83] that;

> (1) The language of the High Court and of the Court of Appeal shall be English, and the language of subordinate courts shall be English or Swahili.
>
> (3) Written applications to the High Court and to the Court of Appeal shall be in English and to subordinate courts in English or Swahili.

88 The Constitution of Kenya (2010), Art. 7(1)–(2) ("(1) The national language of the Republic is Kiswahili. (2) The official languages of the Republic are Kiswahili and English.").

89 Lyndon Harries, *The Nationalisation of Swahili in Kenya,* 5(2) LANGUAGE IN SOC'Y 153 (1976).

90 LANGUAGE IN KENYA, (W.H. Whiteley ed., 1974); LANGUAGE USE AND SOCIAL CHANGE (W.H. Whiteley ed., 1973).

91 CHAKITA.ORG, *Swahili version on the History of CHAKITA,* https://chakita.org/about/ (last visited Sept. 28, 2023).

92 Kenya Broadcasting Corporation, *CS Matiangi: Kiswahili to Remain Compulsory in New Curriculum,* YOUTUBE (July 25, 2017), https://www.youtube.com/watch?v=FLlWil6zGnU.

93 *See* Civil Procedure Act of 2012, Cap 21 Laws of Kenya (2012).

The Criminal Procedure Code in Kenya stipulates that:

"The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili."[94]

Kenya, like Tanzania, has put up means and ways of having Swahili as a language of access to courts and has further setup institutions towards its development.

Uganda

Unlike in other Eastern African countries, notably Kenya and Tanzania, Kiswahili did not become an official language or lingua franca in Uganda until very recently. The language has a fraught history in Uganda. In 1972, during the presidency of the dictator Idi Amin Dada, Swahili was declared the national language of Uganda and introduced as a compulsory language on radio and television. Government employees were ordered to use Swahili, increasing its use. But the end of the regime also saw the end of the official use of Swahili.[95] Today, scholars like Charles Nuwagaba, a professor of economics at Makerere University, state that Ugandan citizens need to learn Swahili to be on equal footing with EAC states.[96] Angella Kyagaba, a senior curriculum specialist at the Uganda government-run National Curriculum Development Centre, adds that they aim to have every Ugandan schoolchild have a working knowledge of Kiswahili.*97* Even those who were victims of the military regime that abused Swahili, like Ugandans such as Jocelyn Bananuka Ekochu, whose father was killed by Amin's forces in 1972, acknowledge the importance of the language. She says soldiers and police used Kiswahili as a status symbol that made them feel more powerful, which tainted the language in the minds of Ugandans. However, she believes it should be taught in schools to make it easier for Ugandans to communicate with their neighbours.[98]

94 *See* Criminal Procedure Code of Kenya, Cap 75, § 198(4) (2012).
95 Ruth Mukama, *The Linguistic Dimensions of Ethnic Conflict in Uganda, in* CONFLICT RESOLUTION IN UGANDA 181–205 (K. Rupensinghe ed., 1989).
96 Edna Namara, *Why it has taken Uganda so long to embrace Kiswahili,* QUARTZ (May 19, 2022), https://qz.com/africa/2167484/uganda-is-embracing-swahili-in-its-curriculum-after-years-of-resistance.
97 *Id.*
98 Id.

On July 5th, 2022, Uganda's Cabinet approved the adoption of Kiswahili as an official language and directed that it be made a compulsory subject in primary and secondary schools.[99] The government set up the Uganda National Kiswahili Council in 2019 to guide the introduction of Kiswahili as the second national (official) language.[100]

The Cabinet decision was in line with the directive of the 21st EAC Summit held in February 2021, which directed the expedited implementation of Kiswahili, English, and French as official languages within the bloc.

A Missed Opportunity or Fatal Mistake?

This review of the three founding members shows the deep-seated roots of Swahili throughout the societies of the founding member states by the time the EACJ was established. It also demonstrates a deep interest in integrating Swahili into official systems, including the courts. It is evident that the founding members would have supported the adoption of Swahili as an official working language of the EACJ at its inception at the start of the new millennium. In fact, I argue that it was a fatal mistake not to introduce Swahili as a language of the EACJ at its inception, as the conundrum of whether having it as an official language of the Court today would not be existent, and I would not certainly be writing this, as newer members would adapt to it while using the English alternative.

There is a big possibility that if the citizens of these countries, save for a few exceptions in Uganda which had not deeply entrenched the Swahili culture had been given an opportunity to suggest languages of the court at its inception, Swahili would have probably ranked very highly. However, it seems that at inception the court was always seen as a court of incremental reforms. Indeed, this mentality of incremental systems and progress of the court by the creators of the Court has been argued by scholars[101] since the inception and this was most likely the idea as to why Swahili was not initially included as an official working language

99 Hellen Githaiga, *Uganda finally adopts Kiswahili as official language,* THE EAST AFRICAN NEWSPAPER (July 5, 2022), https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-finally-adopts-kiswahili-as-official-language-3869770.

100 *Id.*

101 Tom Ojienda, *Alice's Adventures in Wonderland: Preliminary Reflections on the Jurisdiction of the East African Court of Justice,* 2 E. AFR. J. HUM. RTS. & DEMOCRACY 94, 96 (2004). Ojienda argues that conditioning the "future extension of the jurisdiction" shows the phase-by-phase approach preferred by the Partner States.

102 République du Rwanda, *AXL: Langues et Cultures du Monde,* https://www.axl.cefan.ulaval.ca/afrique/rwanda.htm (last visited Sept. 29, 2023).

Deducing from the phase-by-phase argument by Ojienda, it is not far-fetched to think that while Swahili might have been considered by the founders of the court, they, intended it to be adopted in "future" as an official language. However, I believe this was a fatal mistake as it will be even more problematic to introduce it when the community expands further. It would have been less politically charged to introduce Swahili then than it is today. Given that the founding member states had already established national bodies mandated to promote Swahili, funded by taxpayers, was this not the best opportunity to achieve their objectives? It was therefore not just a missed opportunity but a fatal mistake not to introduce Swahili as one of the official working languages of the court at its inception.

The Widening Conundrum with Newer Members

Rwanda

In April 2017, Rwanda adopted Kiswahili as official language, joining the mother tongue – Kinyarwanda and the existing official languages English and French.[102] Once considered only a dialect, Swahili has gradually entered, officially, into the daily life of the population of Rwanda. The language is currently used in administrative matters and some official documents. Twenty percent of the population is estimated to speak Swahili.[103]

Burundi

Since the school year 2005/2006, both Kiswahili and English have been taught in Burundian primary schools, as a strategy of intensifying political bonds with other countries of the East African Union. Nowadays, Kiswahili is implemented as a widespread but not official language in Burundi, this status only being attributed to French, Kirundi and English (since 2014).[104]

South Sudan

Before independence, the 2005 interim constitution of the Southern Sudan Autonomous Region declared in Part 1, Chapter 1, No. 6 (2) that "English and Arabic shall be the official working languages at the level of the governments of Southern Sudan and the States as well as languages of instruction for higher education."[105]

103 INDIANA UNIVERSITY, *National African Language Resource Center (NALRC) Language & Culture,* https://nalrc.indiana.edu/about/index.html.

104 Nico Nassenstein, *On the variability of Kiswahili in Bujumbura (Burundi),* 26 SWAHILI FORUM 205, 208 (2019).

105 The Interim Constitution of Southern Sudan (2005), Archived 2016-03-03 at the Wayback Machine (PDF; 484 kB), Part One, Pages 3–4, No. 6(1)–(2).

The government of the new independent state later removed Arabic as an official language and chose English as the sole official language. Part One, 6(2) of the transitional constitution of the Republic of South Sudan of 2011 states that "English shall be the official working language in the Republic of South Sudan".[106] Kasinof opines that English was chosen to distance South Sudan from Sudan.[107] South Sudan has expressed interest in adopting Swahili as a second official language in order to deepen ties with the East African Community.[108]

Democratic Republic of Congo

The Democratic Republic of the Congo is a multilingual country where an estimated total of 242 languages are spoken. Ethnologue lists 215 living languages. The official language, inherited from the colonial period, is French. Four other languages, three of them Bantu-based, have the status of national language: Kikongo, Lingala, Swahili, and Tshiluba.[109] Swahili is the most widespread *lingua franca* spoken in Eastern Equatorial Africa. Many variations of Swahili are spoken in the country, but the major one is Kingwana, sometimes called *Copperbelt Swahili,* especially in the Katanga area. Swahili is estimated to be spoken by about forty percent of the population.[110]

Somalia

Somalia faces the same problems that Burundi and DRC faced at the point of joining the EAC. The 2021 Joint Multi-Cluster Needs Assessment ("JMCNA") for Somalia records 11 languages in use. It indicates that Northern Standard Somali is the most widely spoken as a first language (60% of the population), followed by Maay Somali (20%) and Benadiri Somali (18%).[111] The country's official languages are Northern Standard Somali and Arabic, but Arabic is used chiefly in religious practice, and for more than 39% of the population, neither is the main language used at home. Other

106 The Government of South Sudan, The Transitional Constitution of the Republic of South Sudan (2011), (last accessed July 21, 2011).

107 Laura Kasinof, *For South Sudan, It's Not So Easy to Declare Independence From Arabic,* FOREIGN POLICY (Nov. 14, 2018, 8:49AM), https://foreignpolicy.com/2018/11/14/for-south-sudan-declaring-independence-from-arabic-is-not-so-easy-language-politics-juba-khartoum-english/.

108 *See* EYE RADIO, *Kiswahili to be introduced to S. Sudan education curriculum,* EYE RADIO (July 3, 2018), https://www.eyeradio.org/kiswahili-introduced-s-sudan-education-curriculum/.

109 *See* TARGET SARL, *Target Survey: French, the most spoken language in DRC, far ahead of Lingala,* TARGET SARL (July 10, 2021), https://www.target-sarl.cd/up/en/?readstu&enc=utf-8&t=159#.

110 *Id.*

111 *See* CLEAR GLOBAL, *Language data for Somalia* (2021), https://clearglobal.org/language-data-for-somalia/#:~:text=The%202021%20Joint%20Multi%2DCluster,and%20Benadiri%20Somali%20(18%25).

minority languages include two Swahili dialects: Bravanese (also known as Chimwiini or Chimbalazi), spoken along the southern coast, and Bajuni or Kibajuni. Mushunguli (or Mushungulu), spoken by the Bantu minority of southern Somalia, is also spoken in Tanzania, where it is known as Zigula or Zigua. An unknown number of people use Somali Sign Language.

English is widely taught in schools and the language of instruction at many Somali universities; it is also a working language of many Somali NGOs. Italian, previously an official language, is now spoken chiefly by older people and government officials. Somali Minister of Information and Culture Daud Aweis addressed journalists in Arusha, ahead of the 23rd Summit of Heads of State and Government, in Swahili and was commended for a good command of the language. showing its permeation in parts of Somalia, although he faced heavy criticism from some quarters.[112] At present, Somalia faces prejudice and will do so for a long time because neither Arabic nor Somali is likely to ever be considered as a language of the court. However, since government official in Tanzania show enthusiasm towards it, Swahili could be a better option for them.

What is the Fuss About?

A close analysis of the newer members reveals that all the arguments against introducing Swahili as an official working language of the court are not coherent and do not stand up to critical scrutiny. The arguments fall flat at the simplest of analysis as I elucidate below. In Rwanda, the 1996 constitution enthroned English as an official language; in 2007, Rwanda joined the EAC; in 2008, English became the medium of instruction at all school levels. So, even at the moment of joining the EAC, Rwandan citizens had only had English as an official language for a decade, and it was only shortly thereafter that English was made compulsory in schools.[113] Therefore, had Swahili been an official working language of the court, Rwanda would have not suffered any prejudice at its joining time, as they could have opted for English. Additionally, there is no difficulty today as it is already nine years since Swahili was introduced as an official language in Rwanda, which is almost the same period as when English had been made an official language in Rwanda before joining the EAC. If the argument is

112 Abdulkadir Khalif, *Somalia Minister Kicks up a Storm After Addressing a Conference in Swahili,* THE EAST AFRICAN NEWSPAPER (Dec. 2, 2023), https://www.theeastafrican.co.ke/tea/news/east-africa/somalia-faces-swahili-question-as-country-joins-eac-4451830.

113 *See* Indiana University, *supra* note 103.

that entrenchment of English then was more rooted, it still fails because the growth of Swahili in Rwanda has progressed significantly in recent years. The same arguments apply to South Sudan.[114]

Considering Burundi, this is even more straightforward. At the time of joining the EAC, its official languages were French and Kirundi, none of which is an official language of the EACJ. In 2014, Burundi introduced English as an official language; however, while schools teach English, they do not examine it. Therefore, it would have no negative impact on Burundi if they found Swahili at its point of joining the community being one of the official languages of the court as English was not even an official language in Burundi then and only became such seven years later. The same would be true if Swahili is introduced today, as they would have an alternative with English too, and Swahili has grown so much in Burundi that it would most likely become an official language.[115] These arguments apply to the Democratic Republic of Congo, which doesn't even have English as an official language and therefore sits at a more disadvantageous place and would be better off with Swahili.

If this analysis is correct on the language architecture of the member states, I opine that the case of not having Swahili as an official working language of the EACJ stems from postmodern anxieties, clouded by the history of the legal culture of colonialism in the member states, and not any genuine concerns about the language being unable to be used at the EACJ.

Swahili in the East African Community

As the Mazruis have argued,[116] there is a historic dialectic between English as the imperial language and Swahili as the preponderant language of East Africa. Almost by definition, an imperial language begins from above as a language of power.[117] English in East Africa started as the language of the rulers before it could gradually develop into the language of the people. Kiswahili, on the other hand, probably began as a language of the people before it became the language of its rulers.[118]

114 *See* John Hamu Habwe, *Maenezi ya Lugha ya Kiswahili Nchini Sudan Kusini: Mafanikio na Changamoto,* 28 SWAHILI FORUM 68 (2022).
115 *See* Nassenstein, *supra* note 104.
116 *See* generally Mazrui, *supra* note 4.
117 *See* Mazrui, *supra* note 4, at 276.
118 *Id.*

Indeed, when the rulers of Zanzibar were Arabs from the Sultanate of Oman, Swahili triumphed over the conquerors. The language of the colonised assimilated the imperial power, similar to how the Hausa language and culture in Nigeria had substantially assimilated the conquering.[119]

This is also supported by what Ngugi wa Thiong'o, the famed Kenyan writer and critic of the non-use of African languages terms as *Normalised Abnormality*[120] in which the colonised had their language taken from them, and a foreign language imposed. English in the EAC is often associated with the elites and is treated as such, whereas Swahili, cuts across the social ties and social fabric as the language of inclusion, identification, transaction, and socialisation. Developed through informal trade, Swahili continues to be used as the language of transaction and trade in both formal and informal trade across the region and the border posts of EAC Partner States with non-EAC countries. In the continued pursuit to enhance integration, a need to popularize the Swahili language to promote a deep-rooted integration approach is necessary. While our multiplicity of languages and dialects thereof, acts as a constant reminder that we belong to different ethnic and communities, the promotion of Kiswahili in paper and deed will facilitate a more feasible process of integration as an efficient exchange and flow of information. It is the uniformity of language that drives the attainment of harmony in people's perceptions of events in reality.

Swahili is widely spoken by EAC citizens which gives it the status of the region's lingua franca. It is a symbol of the identity of EAC citizens and fosters a sense of shared values, culture, and identity. The Treaty Establishing the EAC acknowledges the position of Swahili in the region and provides that Swahili is adopted[121] and developed as the EAC lingua franca, while English remains the official language.[122]

In furtherance of the spirit of integration, the Community established an institution, the East African Swahili Commission ("EAKC"), which purely deals with the development and research of Swahili.[123]

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119 *Id.*

120 *See* Carey Baraka, *Ngũgĩ wa Thiong'o: three days with a giant of African literature,* THE GUARDIAN (June 13, 2023), https://www.theguardian.com/books/2023/jun/13/ngugi-wa-thiongo-kenyan-novelist-profile-giant-of-africa-literature?CMP=share_btn_fb&fbclid=IwAR3dRwG-JlDf3JOD5_d2AQRLgwV3_dGuqrllAIrZRLsiCGXzlh-9Lht_Dms.

121 *See* EAC Treaty, Art. 119(d) ("The Partner States shall promote close co-operation amongst themselves in culture and sports, with respect to the development and promotion of indigenous languages especially Kiswahili as a lingua franca."); see EAC Treaty, Art. 137(2) ("Kiswahili shall be developed as a lingua franca of the Community.") (1999).

122 *See id.*

123 *See* The Protocol on the Establishment of the East African Kiswahili Commission (Apr. 18, 2007), https://africanlii.org/akn/aa-eac/act/protocol/2007/east-african-kiswahili-commission-eakc/eng@2007-04-18.

On August 25th, 2016, the East African Legislative Assembly resolved to introduce Swahili as one of the official languages of the EAC. The Resolution thus urged the Summit of EAC to amend the Treaty for the establishment of the Community to make Swahili an official language. Former President of the United Republic of Tanzania and the Chairman of the Summit of EAC Heads of State, the late Dr. John Pombe Magufuli, addressed the 17th extraordinary Summit of the EAC in Swahili, a first for the bloc.[124]

In February 2021, during the 21st Summit of EAC Heads of States, a decision was made to adopt Swahili and French as Official Languages of the EAC in addition to the already existing English.[125] In 2022, the East African Community ("EAC") Sectoral Council on Education, Science and Technology, Culture and Sports ("SCESTCS") adopted a roadmap for implementing Swahili and French as official languages of the bloc. This was part of the directive from the 21st summit.

These developments of quickly taking up French in anticipation of the joining by DRC raises questions about the willingness of the decision makers at the EAC to adopt French quickly yet Swahili has been delayed. It is during this research that I learnt that the operational modalities of the introduction of the French language in the EAC would be funded by the French government.[126] In another clear instance of where the community deeply continues to accept colonial languages for a funding of a paltry, forty-three thousand euros,[127] yet Swahili gets to take a back seat for years on end. Truly, this is the Normalised abnormality of a continuity of linguistic colonization.

124 EAST AFRICAN LEGISLATIVE ASSEMBLY, *Kiswahili takes centre stage at the 17th extra-ordinary Summit in - a first for the Community,* EAST AFRICAN LEGISLATIVE ASSEMBLY (Sept. 15, 2016), https://www.eala.org/media/view/kiswahili-takes-centre-stage-at-the-17th-extra-ordinary-summit-in-a-first-f ("I have my speech in both English and Kiswahili – but my colleagues (the Summit Members), have requested me to address you in Kiswahili," the President said, much to the applause of participants.).

125 See EAST AFRICAN COMMUNITY, Communiqué of the 21st Ordinary Summit of the East African Community Heads of State, at ¶ 5 (Feb. 27, 2021), available at https://www.eac.int/communique/1942-communiqu%C3%A9-of-the-21st-ordinary-summit-of-the-east-african-community-heads-of-state.

126 *See* Umar Kashaka, *French to become EAC official language - Kadaga*, New Vision (Dec. 10, 2021), https://www.newvision.co.ug/category/news/french-to-become-eac-official-language---kada-122026.

127 *Id; see also* East African Community, *EAC tables US$103,842,880 Budget Estimates before EALA for the 2023/2024 Financial Year*, EAC (June 13, 2023) (explaining that the 2023/2024 budget that had been allocated to the EACJ was US$4,450,488 which would represent just about 1% of the budget as granted to do the French translations), https://www.eac.int/press-releases/2821-eac-tables-us$103,842,880-budget-estimates-before-eala-for-the-2023-2024-financial-year#:~:text=The%202023%2F2024%20Budget%20has,for%20East%20Africa%20%2D%20US%2412%2C394%2C945.

The above analysis clearly indicates that the systems are in place and acceptance of Swahili in the community has always been a key issue. There is thus no reason not to have Swahili as an official and working language of the East African Court of Justice ("EACJ").

Swahili has Earned Its Place

Nobel Laureate Wole Soyinka, the Nigerian writer, poet and playwright, has since the 1960s repeatedly called for use of Swahili as the transcontinental language for Africa.[128] The African Union ("AU"), the "united states of Africa," nurtured the same sentiment of continental unity in July 2004 and adopted Swahili as its official language.[129] Joaquim Chissano, then the president of Mozambique, put this motion on the table, and addressed the AU in the flawless Swahili he had learned in Tanzania, where he was educated while in exile from the Portuguese colony.[130] Chissano said that he spoke in Swahili in order to urge African nations to promote and use indigenous African languages. The African Union did not adopt Swahili as Africa's international language by happenstance. Swahili has a much longer history of building bridges among peoples across the continent of Africa and into the diaspora.

In celebration of 2019 as the International Year of Indigenous Languages, the Southern Africa Development Community ("SADC"), consisting of a group of sixteen-member states, adopted Swahili as an official language. Swahili was not only recognized as an official language, but also as a mode of communication in business in all sectors.[131] South Africa and Botswana have also made plans to have Swahili taught in their schools.

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128 See M.M. Mulokozi, *Kiswahili as a national and international language*, 66 Kiswahili 66 (2003). Following the independence of several African countries, particularly in Sub-Saharan Africa from the mid-nineteen fifties, debates arose about the possibility of the adoption of Swahili as a common language for Africa since it was the most widely-spoken African language at the time. The most notable propagators of this idea were the late Dr. Kwame Nkrumah, the first President of the Republic of Ghana, Professor Wole Soyinka, the Nobel Prize award-winning African writer, Professor Ayi Kwei Armah, author of the popular novel of the African Writers Series, *The Beautiful Ones Are Not Yet Born*, and Professor Ali Mazrui, a renowned Pan-Africanist.

129 *See* Abdi Latif Dahir, *African languages should be at the centre of educational and cultural achievement*, Quartz (June 2, 2017), https://qz.com/africa/996013/african-languages-should-be-at-the-center-of-educational-and-cultural-achievement.

130 Deji Adeniyi, *Swahili baffles African leaders*, BBC News (July 6, 2004), http://news.bbc.co.uk/2/hi/africa/3871315.stm.

131 *See* Karen Mwandera, *Karibu! SADC Adopts Kiswahili As An Official Language*, Forbes Africa (2019), https://www.forbesafrica.com/current-affairs/2019/08/26/karibu-sadc-adopts-kiswahili-as-an-official-language (last visited Sep. 28, 2023).

Swahili is the first African language recognized by the UN through the adoption of the UNESCO resolution 41 C/61.[132] The 41st session of the General Conference of UNESCO adopted resolution 41 C/61, which recognized the role the Kiswahili language plays in promoting cultural diversity, creating awareness and fostering dialogue among civilizations. It noted the need to promote multilingualism as a core value of the United Nations and an essential factor in harmonious communication between peoples, which promotes unity in diversity and international understanding, tolerance and dialogue. The resolution proclaimed 7 July of each year as World Kiswahili Language Day. This resolution marks July 7 as the World Kiswahili Language Day, in honour of professor Julius Nyerere's *Ujamaa* (brotherhood/unity) philosophy.

At its heads of state meeting in February 2022, the African Union adopted Swahili as an official working language.[133] The action draws inspiration from the need for Africa to steer away from "languages of power," which are often coming from western countries.

Today, Swahili is the African language most widely recognized outside the continent. The global presence of Swahili in radio broadcasting and on the internet has no equal among sub-Saharan African languages.

There is thus no need for further justification as to why the EACJ should not have Swahili as an official and working language of the court. There is a clear, demonstrable need, as Swahili is today highly ranked equal in status to any world top language and thus must be adopted as a working language of the court.

Shaping Courts Through Languages

The EACJ should champion the "others" of international law by having Swahili as a working language. As al Attar theorises[134], there is a Ngugi-Esque (referencing his work)[135] quality to the idea that we should develop knowledge of and in these systems, rather than settling for their colonial constructs. In doing so, we can achieve

132 *See* UNESCO Digital Library, *World Kiswahili Language Day*, UNESCO (Nov. 5, 2021), https://unesdoc.unesco.org/ark:/48223/pf0000379702 (Document code 41 C/61).

133 See Andrew W. Shimanyula, *African Union adopts Swahili as official working language*, Anadolu Ajansi (Oct. 2, 2022), https://www.aa.com.tr/en/africa/african-union-adopts-swahili-as-official-working-language/2498467.

134 Mohsen al Attar, *Must International Legal Pedagogy Remain Eurocentric?*, 11 Asian J. of Int'l L. 176 (2021).

135 Ngugi Wa Thiong'o, Moving the Centre: The Struggle for Cultural Freedoms (James Currey ed., 1993).

decolonization by renouncing the singularity of European epistemology in the adjudication of Supranational courts[136](deduced) and ways of adjudicating permeate other civilizations too. This rationale informs my push for the *"Swahilinization"* of the EACJ.

Moreover, it is important to note that the choice of language in the case of a regional court such as the EACJ cannot be said to be neutral regarding its consequences. This is because it largely determines how the law is interpreted by the court and applied.[137] The legal traditions behind the dominant language exert influence over the interpretation and application of law when the law is drafted in that language. With perhaps some exaggeration, some authors warn that using English in the international sphere threatens to make it into an instrument of political hegemony.[138] Therefore, it is advised that for a regional court such as the EACJ must have at least one other indigenous working language or knowledge of other traditional languages in order to avoid "déformation linguistique."[139]

As Cohen[140] opines on his thesis on the capture of multinational courts by the French language, international judges can be seen as forming "epistemic communities," meaning they are knowledge-based experts who share certain beliefs and values.[141] It would appear that the choice of language by the Court would have a big impact on the legal culture and even inform the common aims and ideas of the court members, particularly considering that appointment and staffing decisions would often turn on the knowledge of chosen language of the court.

A lawyer's command of a language often goes hand in hand with socialisation in a given legal system, especially when that language, such as English, is no longer a major vehicular language used to communicate among the citizens of the member states of the now expansive East African Community. These citizens do not share official languages, and even when they do, the levels of variance of articulation are quite high.[142]

136 *Id.*
137 *See* Justina, *supra* note 22.
138 Christian Tomuschat, *The (Hegemonic?) Role of the English Language*, 86 Nordic J. Int'l L. 196 (2017).
139 Id.
140 Mathilde Cohen, *On the linguistic design of multinational courts: The French capture*, 14 Int'l J. Const. L. 501 (2016).
141 *See also* Anne-Marie Slaughter, *Court to Court*, 92 Am. J. Int'l L. 708 (1998); Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 Int'l Org. 1 (1992).
142 *See* Cohen, *supra* note 140.

If this assumption is true, then courts such as the EACJ fall in the abyss of legitimacy. The EACJ is not a relatively new judicial body, but it must still prove herself to the world. It needs mechanisms to ensure that it preserves the appearance of being for the people of the member states. Indulging in idiosyncratic capture of international courts by use of colonial languages might run contrary to these aims. The *Swahilinization* judicial model is an attractive solution to address this challenge. A regional court culture that privileges superficial unanimity and double talk is particularly not well suited to transnational adjudication.

Conclusion

As Ngugi argues, "The effect of a cultural bomb is to annihilate a people's belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities, and ultimately in themselves."[143] Colonial language domination in the legal systems of the member states has been transposed to the community court, and the erasure of local language and culture continues to this day. Ultimately, whenever the language of court does not belong to the culture of the users, those courts become sites of oppression and erasure, simple yet effective instruments in the colonial project.[144]

It is by pure design that throughout this paper, I have avoided spending a single line arguing for a comparative analysis of the languages used by other multinational courts because I do not want to legitimise the illegitimate. I would have wasted all the efforts put into this work had I engaged in a comparative analysis to justify my thesis from other courts suffering from the very same malaise- courts built on languages founded on a history of subjugation, imposition, and colonial continuities while refusing to adopt their very own. If the EACJ is to adopt Swahili as a working language, it would contribute to a more diverse, equal, and representative justice at the court and a learning point for other regional courts.

Juxtaposing Anghie,[145] a court represents a tradition, whether that tradition is understood in terms of an approach, subject matter, or actors, there is a tradition.

143 Ngũgĩ wa Thiong'o, Decolonising the Mind: The Politics of Language in African Literature 9 (1986).

144 View the Juxtapositions of the Palestinian and Iranian schools advanced in, Hala Espanioly, *Education as a Tool of Empowerment*, *in* Indigenous Minority Education: International Perspectives on Empowerment 42, 45 (Duane Champagne & Ismael Abu-Saad eds., 2005).

145 Antony Anghie, *Welcoming the TWAIL Review*, 1 Third World Approaches to International Law ("TWAIL") Rev. 1, 2 (2020), available at https://twailr.com/wp-content/uploads/2022/04/Anghie-Welcoming-the-TWAIL-Review.pdf.

Courts may present themselves as people-centred, universal, and open to all forms of inquiry, intent only on administering equal justice. But that be as it may, it is through the lens of a particular tradition that any regional court is inevitably assessed and gains its ultimate legitimacy. If the EACJ wants to be rightfully engaged, it must address the very issue of tradition. The tradition is that of making Swahili a working language of the court, a language that most of its users speak and use in their daily lives.