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The African Continental Free Trade Area: Toward A New Legal Model For Trade and Development

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ABSTRACT

International trade law is at a turning point, and the rules as we know them are being broken, rewritten, and reshaped at all levels. At the same time that institutions like the World Trade Organization (WTO) face significant change and a global pandemic challenges the rules of the market, Africa's new mega-regional trade agreement, the African Continental Free Trade Area (AfCFTA), is emerging as a promising framework for redesigning international economic law. As this Article will argue, the AfCFTA presents a new normative approach to trade and development that is positioned to rewrite the rules in a more inclusive and equitable way and, over time, possibly affect global trade well beyond the African continent.

Historically, trade and development have been linked through the framework of Special and Differential Treatment (S&D), which has been a central feature of the WTO and is increasingly shaping regional trade agreements (RTAs) as well. Although the connection between trade and development is more important than ever before, traditional S&D is not positioned to deliver on broader priorities of social and economic development in the current international climate. Fortunately, as this Article will argue, Africa's approach under the new AfCFTA sets the stage for a needed refresh of S&D. While the AfCFTA incorporates traditional aspects of S&D, it also includes elements of a forward-looking, rules-based approach to further economic and social development and advance the Sustainable Development Goals (SDGs). This new dimension of S&D holds great potential for promoting integration through trade, representing the needs of a diverse group of countries in the rulemaking process, and reshaping international economic law more broadly to generate positive development outcomes.

This Article begins with an assessment of the AfCFTA as an alternative model for trade and development law, evaluating the agreement in the historical and evolving context of S&D and examining its role in shaping a new normative approach to S&D. The AfCFTA, we argue, represents a shift from using S&D as a largely defensive trade approach to one that positions S&D as an affirmative tool for achieving sustainable development through the design and implementation of the rules of trade themselves, while still maintaining flexibility for countries that need it. This new approach may finally replace the old trade paradigm of the "haves and have nots" with a system in which trade rules can be designed to benefit all.

Although the AfCFTA is still at an early stage and will have to overcome formidable challenges, this Article provides an initial assessment of the AfCFTA's proactive new model in the context of the substantive areas of law identified as next-stage (Phase II) negotiating priorities: intellectual property rights (IPR), investment, and competition law. The Article's comparative assessment draws upon the laws of African nations, African and international RTAs, and other proposals for international legal reform.

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Finally, the Article looks to the future, positing that the AfCFTA could be the best legal instrument available to break the stalemate in international rulemaking, design new trade law approaches to pressing issues like global health and food security, and close the loop between trade rules and development goals, including the seventeen SDGs. As the AfCFTA is rolled out and implemented, it could have a profound impact on trade and development law, reshaping the rules for Africa and perhaps the world as well.

I. INTRODUCTION

While the new African continent-wide trade agreement signals a significant shift in the international legal order, African continental integration is not a new proposition.[1] The 1991 Abuja Treaty Establishing the African Economic Community (Abuja Treaty) and 2000 Constitutive Act of the African Union established the legal basis for a pan-African trade pact, building upon the Organisation of African Unity (OAU) established under the 1980 Lagos Plan of Action.[2]

In 2012, following up on the 2000 Constitutive Act of the African Union, African nations decided to fast-track a continental free trade agreement. The African Continental Free Trade Area (AfCFTA) has since moved from a shared vision to an executed trade agreement among fifty-four of the fifty-five African Union (AU) nations in record time.[3] The AfCFTA was signed in March 2018 and entered into force in May 2019.[4] As of September 2020, the AfCFTA had been ratified by thirty countries, with more ratifications in process.[5] It establishes the world's largest regional trade agreement (RTA) in terms of geographic size and partner states, connecting 1.2 billion people

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[1] *See* Mwangi S. Kimenyi & Katrin Kuhlmann, *African Union: Challenges and Prospects for Regional Integration in Africa*, 7 WHITEHEAD J. DIPL. & INT'L REL. 7, 7 (2012).

[2] Org. of African Unity [OAU], *Lagos Plan of Action for the Economic Development of Africa 1980-2000*, at 5, https://www.resakss.org/sites/default/files/OAU%201980%20Lagos%20Plan%20of%20Action%20for%20the%20Economic%20Development%20of%20Africa.pdf; Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241, 8, https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf; Constitutive Act of the African Union, July 11, 2000, at 5, https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf.

[3] JONATHAN D. MOYER, ABIGAIL KABANDULA, DAVID K. BOHL, TAYLOR HANNA, IBRAHIM MAYAKI & MARTIN BWALYA, AFRICAN UNION DEVELOPMENT AGENCY (AUDA-NEPAD) & FREDERICK S. PARDEE CENTER FOR INTERNATIONAL FUTURES, CONDITIONS FOR SUCCESS IN THE IMPLEMENTATION OF THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT 5 (2020).

[4] The consolidated AfCFTA text was adopted and signed at the 10th Extraordinary Summit of the AU Assembly in Kigali, Rwanda on March 21, 2018 by forty-four African Heads of State and Government and entered into force on May 30, 2019 following ratification by twenty-four countries. As of publication, thirty countries had ratified.

[5] *See* AFR. UNION COMM'N & U.N. ECON. COMM'N FOR AFR., AFRICAN CONTINENTAL FREE TRADE AREA: UPDATED QUESTIONS AND ANSWERS 1 (Jan. 2020); *see also* TRADE LAW CENTER (TRALAC), "STATUS OF AFCFTA RATIFICATION," https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html.

in a market estimated to total from U.S. $2.5 trillion to upwards of U.S. $4 trillion.[6] Building upon existing African RTAs in the form of African regional economic communities (RECs), the AfCFTA signals political will towards establishing a unified legal institution to advance economic and social development through trade.

The AfCFTA reflects both Africa's new model of what a trade agreement should look like and aspects of the multilateral legal framework of the World Trade Organization (WTO). The AfCFTA has a strong development focus, highlighting economic and social development and legal harmonization among its objectives,[7] and incorporating aspects of the AU's Agenda 2063, which prioritizes inclusive social and economic development and links Africa's growth and integration to the Sustainable Development Goals (SDGs).[8]

The AfCFTA follows a "framework agreement" model, with a core agreement forming a foundation that will be built out through several phases of negotiation. Phase I of the negotiations established the Protocols on Trade in Goods, Trade in Services, and Dispute Settlement, with corresponding schedules of market access concessions and rules of origin (ROO).[9] The agreement's mechanism for dispute settlement, which is modeled largely on the WTO Appellate Body, is contained in the Protocol on Rules and Procedures on the Settlement of Disputes (and accompanying annexes).[10] The Agreement Establishing the AfCFTA also includes annexes on

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[6] *See id.*; *see also* Landry Signé, *Africa's Big New Free Trade Agreement, Explained*, WASH. POST (Mar. 29, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/?utm_term=.7ef4d48b47cc.

[7] Agreement Establishing the African Continental Free Trade Area art. 3, Mar. 21, 2018, 58 I.L.M. 1028 [hereinafter AfCFTA].

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

[9] TRALAC, THE AFRICAN CONTINENTAL FREE TRADE AREA: A TRALAC GUIDE 4 (6th ed. Nov. 2019), https://www.tralac.org/documents/resources/booklets/3028-afcfta-a-tralac-guide-6th-edition-november-2019/file.html.

[10] Consultations shall be sought in the first instance, after which a dispute may be referred to the Dispute Settlement Body (DSB) requesting establishment of a Dispute Settlement Panel. AfCFTA, Protocol on Rules and Procedures on

ROO, non-tariff barriers (NTBs), customs cooperation, trade facilitation, transit, trade remedies, sanitary and phytosanitary measures (SPS), and technical barriers to trade (TBT), which track with African and WTO law.[11] Phase I, which will liberalize trade in goods and services by ninety percent,[12] was meant to become fully operational on July 1, 2020, although the current COVID-19 crisis has delayed this timeline until early 2021.[13] Negotiations on Phase II issues are scheduled to begin once Phase I is operational and will include Protocols on Intellectual Property Rights (IPR), Competition Policy, and Investment.[14] A Phase III to develop a Protocol on E-Commerce has also been formally approved by the AU Assembly.[15]

A. *Unique Nature of the AfCFTA*

Several attributes make the AfCFTA unique and worthy of much closer study as the agreement advances through its different phases. One is the timing of the AfCFTA, which has generated significant political will at the same time that the WTO crisis, Brexit, and the U.S.-China trade agreements are wreaking havoc on international trade law. If the AfCFTA is able to break new ground in advancing a trade model focused on sustainable development, including in

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the Settlement of Disputes, art. 6, Mar. 21, 2018, 58 I.L.M. 1028, 1067. The AfCFTA is not the African first mega-regional body to model dispute settlement on the WTO Dispute Settlement Body; the Tripartite Free Trade Agreement among COMESA, the EAC, and SADC also follows this model. *See* Olabisi D. Akinkugbe, *Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment*, AFR. J. INT'L & COMP. L. (forthcoming 2020).

[11] Compiled Annexes to the Agreement Establishing the African Continental Free Trade Area, TRALAC, https://www.tralac.org/documents/resources/african-union/2163-compiled-annexes-to-the-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html (last visited Aug. 29, 2020).

[12] The remaining ten percent will be divided among sensitive goods (seven percent), with a longer phase-in period, and excluded goods (three percent). LANDRY SIGNE & COLETTE VAN DER VEN, KEYS TO SUCCESS FOR THE AFCFTA NEGOTIATIONS, BROOKINGS INSTITUTION 5 (May 2019), https://www.brookings.edu/wp-content/uploads/2019/05/Keys_to_success_for_AfCFTA.pdf; *Developments in Competition Law in Africa*, LEX AFRICA (Aug. 22, 2008), https://www.lexafrica.com/2018/08/developments-in-competition-law-in-africa/.

[13] Schedules of tariff concessions and commitments on services remain to be finalized (as do aspects of rules of origin), in order to make Phase I operational.

[14] AfCFTA, *supra* note 7, art. 4.

[15] African Union, *Decision on the African Continental Free Trade Area (AfCFTA) Doc. Assembly/AU/4 (XXXIII)*, Assembly/AU/Dec. 751 (XXXIII).

complicated legal areas like IP and traditional knowledge, competition law, and investment, it could propel international law forward at a critical time when avenues for multilateral negotiations have stalled. It could also serve as a unifying force in response to the COVID-19 pandemic, particularly if tariff and non-tariff barriers are dismantled within the continent to strengthen regional trade.[16]

Another unique feature of the AfCFTA is its design. The AfCFTA follows a relatively distinctive model for RTAs, taking the form of a "progressive" or "incremental" trade agreement, with commitments and negotiating rounds staged over time and tailored to the priorities and capabilities of the negotiating parties.[17] It bears some similarity to the WTO Agreement on Trade Facilitation (TFA),[18] which tailors commitments to countries' needs and capacities and allows for incremental implementation, and of course has much in common with existing African RTAs, which incorporate flexibility and variable geometry into their structures.[19] The AfCFTA's structure allows for periodic review of the agreement, currently intended to take place every five years, and the flexibility to negotiate additional instruments, which will then become an integral

[16] *See* Ibrahim Assane Mayaki, *How Africa's Economies Can Hedge Against COVID-19*, PROJECT SYNDICATE (Mar. 27, 2020), https://www.project-syndicate.org/commentary/africa-trade-integration-hedge-against-covid19-by-ibrahim-assane-mayaki-2020-03.

[17] In addition to the WTO TFA, other trade agreements reflect a progressive approach. For example, the U.S.-Morocco FTA adopted a progressive approach for the agricultural sector, due to its significance and growth potential. For a summary of other development-focused aspects of RTAs, see Katrin Kuhlmann, *Post-AGOA Trade and Investment: Policy Recommendations for Deepening the U.S. Trade and Investment Relationship*, Testimony before the U.S. International Trade Commission, Washington, D.C., Jan. 28, 2016; NEW MKTS. LAB & HARVARD LAW & INT'L DEV. SOC'Y, HARVARD LAW SCHOOL TRADE INNOVATION INITIATIVE: SUMMARY OF FINDINGS ON TRADE AND DEVELOPMENT IN FREE TRADE AGREEMENTS (2015), https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/7cb5a0_37610cba6cde4f02afb3d0cfa3ab7fb8.pdf.

[18] Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Feb. 22, 2017, WTO Doc. WT/L/940. The WTO TFA Agreement, which allows countries to prioritize commitments in three categories depending upon needs, capacity, and resources (Categories A, B, and C), "recognizes differences in countries' regulatory systems and capabilities and both phases in reforms and links to aid funding." KATRIN KUHLMANN, CENTER FOR STRATEGIC & INT'L STUDIES, THE HUMAN FACE OF TRADE AND FOOD SECURITY: LESSONS ON THE ENABLING ENVIRONMENT FROM KENYA AND INDIA 37 (2017).

[19] James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT'L L. & COM. REG. 572, 573 (2010).

part of the agreement.[20] This inherent flexibility should allow the AfCFTA to respond to new trade opportunities and challenges as they arise, including the recent COVID-19 pandemic and broader sustainable development considerations.

In its design, the AfCFTA also explicitly references sustainable development, calling to mind language in the Preamble to the WTO.[21] The AfCFTA's objectives include sustainable and inclusive socio-economic, gender equality, and food security,[22] linking the AfCFTA with the SDGs, in line with Agenda 2063.

A third unique feature of the AfCFTA is its scale. While it has features in common with Africa's existing RTAs, the AfCFTA aims to create a larger, unified trade bloc, with the potential to boost both regional rule of law and Africa's market prospects. With respect to the latter, although intra-regional trade in Africa has been low in both absolute and comparative terms, economists predict that the AfCFTA will boost regional trade by over fifty percent (around $34.6 billion).[23] The continental market will only be able to reach its potential, however, if the AfCFTA can succeed in creating clear and reliable rules for the market that are effectively implemented.

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[20] AfCFTA, *supra* note 7, arts. 8 and 28.

[21] The Preamble to the Marrakesh Agreement Establishing the World Trade Organization states, "Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living . . . and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

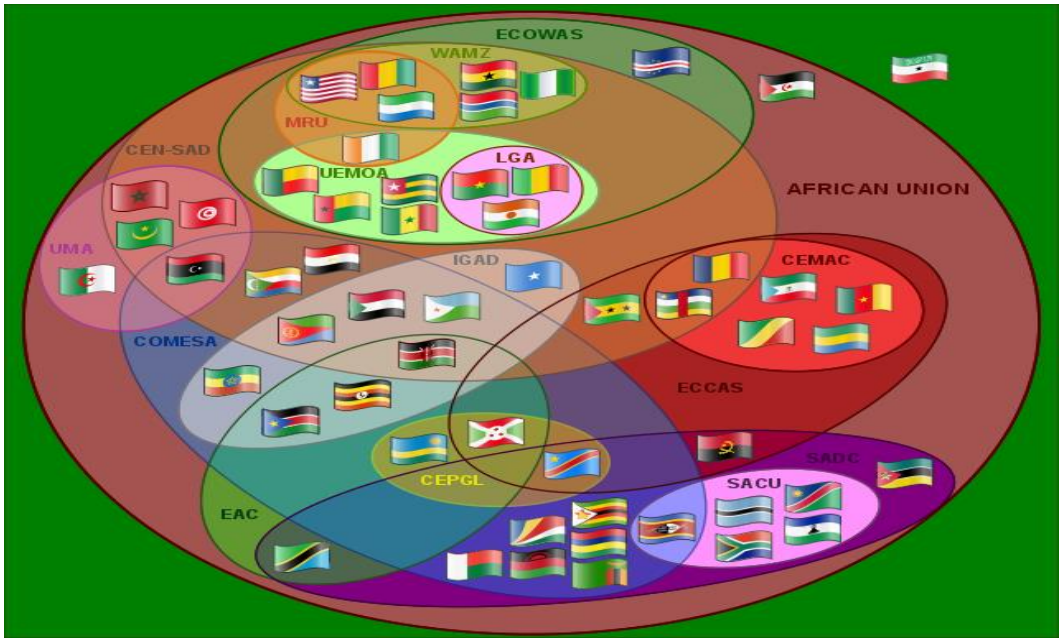
[22] AfCFTA, *supra* note 7, art. 3(e), (g).

[23] Stephen Karingi & Simon Mevel, *Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union* 17 (selected paper for Presentation at the seventh African Economic Conference, Kigali, Rwanda, Oct. 30, 2012– Nov. 2, 2012)), https://aec.afdb.org/sites/default/files/2019/12/04/deepening_regional_integration_in_africa_a_computable_general_equilibrium_assessment_of_the_establishment_of_a_continental_free_trade_area_followed_by_a_continental_customs_union.pdf. These gains will be important, given the number of smaller countries, many of which are landlocked, with limited natural resources. *See also* Osmond Vitez, *The Benefits of Free Trade for African Countries*, HOUS. CHRON. (Feb. 12, 2019), https://smallbusiness.chron.com/benefits-trade-developing-countries-3834.html.

B. *Regional Integration and the AfCFTA*

While innovative, the AfCFTA's model will face some challenges. In contrast to other regional integration movements, African regional integration has taken place through a series of legal instruments that have been developed and implemented in a non-linear and overlapping manner.[24] While the Abuja Treaty provided a framework for the RECs, it did not establish a binding structure, which explains the differences in status and legal structure among the current RECs.[25] The RECs also span differing legal systems (including common law, civil code, and customary legal systems), further adding to the diversity and patchwork of rules.

Figure 1 below depicts the overlapping membership among the eight RECs officially recognized by the AU.[26]



[24] *See* Gathii, *supra* note 19.

[25] GERHARD ERASMUS, TRALAC, DOES THE AFCFTA ENABLE AFRICA TO SPEAK WITH ONE VOICE ON TRADE ISSUES? 5, (March 2020), https://www.tralac.org/publications/article/14456-does-the-afcfta-enable-africa-to-speak-with-one-voice-on-trade-issues.html.

[26] The Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

Figure 1: Overlapping Membership in Existing African Regional Economic Communities[27]

Among these, the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of West African States (ECOWAS), and Southern African Development Community (SADC) are perhaps the most advanced in terms of economic and legal integration.[28] In 2015, the Tripartite Free Trade Area (TFTA), which will feed into broader integration under the AfCFTA, was launched to integrate COMESA, the EAC, and SADC.[29] While this could reinforce the AfCFTA in some respects, it also adds another layer of complexity to continental integration, since the TFTA is itself still being developed. Overlapping membership among the RECs could also complicate the establishment of a common external tariff[30] and might impact regulatory harmonization and implementation efforts to address NTBs.[31] Additionally, the lack of a traditional most-favored nation (MFN) clause could perpetuate a fragmented system of regional rules and complicate integration under the AfCFTA.[32]

The AfCFTA has taken on the formidable task of "resolv[ing] the challenges of multiple and overlapping memberships and expedit[ing] the regional and continental integration processes."[33] It is not clear how this process will unfold, particularly since the RECs have already

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[27] *See* Brian Berkey, *Shifting US-Africa Relations*, WHARTON PUBLIC POLICY INITIATIVE (Aug. 4, 2019), https://publicpolicy.wharton.upenn.edu/live/news/3084-shifting-us-africa-relations.

[28] *See* Kimenyi & Kuhlmann, *supra* note 1, at 7; *see also* KATRIN KUHLMANN, SYNGENTA FOUNDATION FOR SUSTAINABLE AGRICULTURE HARMONIZING REGIONAL SEED REGULATIONS IN SUB-SAHARAN AFRICA: A COMPARATIVE ASSESSMENT (2015).

[29] Andrew Brasington, Prospects of an African Continental Free Trade Area (CTFA) 5 (2017) (unpublished written assignment) (on file with author).

[30] Elina Fergin, Tangled up in a Spaghetti Bowl—Trade Effects of Overlapping Preferential Trade Agreements in Africa 11 (2011) (unpublished Bachelor Thesis in Economics) (on file at the School of Economics and Management, Lund University).

[31] Thabane Nhlengethwa, The COMESA-EAC-SADC Tripartite Free Trade Area Negotiations 12 (Aug. 30, 2016) (on file with the University of the Witwatersrand).

[32] SIGNE & VAN DER VEN, *supra* note 12 ("While consistent with the principle of preserving the *acquis*, the lack of a traditional MFN clause in the AfCFTA also risks the creation of a patchwork of rights and obligations that differ across each of the State Parties.").

[33] AfCFTA, *supra* note 7, art. 3(h).

developed a considerable, and sometimes inconsistent, body of law. However, several of the AfCFTA's articles shed some light on this question. Article 5 of the AfCFTA provides that the Free Trade Areas (FTAs) established under the RECs will be used "as building blocks for the AfCFTA."[34] Article 19 of the AfCFTA further articulates that the AfCFTA shall prevail in the case of a conflict or inconsistency between it and a regional set of rules and enshrines the *acquis* principle that higher levels of integration achieved through the RECs will be maintained.[35] While Article 19 appears to indicate that existing legal structures under the RECs will be integrated into the AfCFTA framework, the reference in the AfCFTA text to the *acquis* principle, which is also noted in Article 5,[36] could highlight that the AfCFTA will not fully take on the task of reconciling overlap (and legal differences) among the RECs.[37]

Implementation of rules has also been a persistent challenge,[38] and, while not unique to the AfCFTA (or Africa for that matter), this challenge will only intensify with the ambitious plans for continental harmonization.[39] As has been the case with the RECs, changes in law that result from

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[34] *Id.* art. 5(b).

[35] *Id.* art. 19.

[36] *Id.* art. 5(f).

[37] Trudi Hartzenberg, *AfCFTA Negotiations After Kigali—Keeping an Eye on the End Game*, TRALAC (June 20, 2018), https://www.tralac.org/blog/article/13119-afcfta-negotiations-after-kigali-keeping-an-eye-on-the-end-game.html ("[Preserving the *acquis*] means that overlapping membership in the RECs will not be addressed in the AfCFTA even though one of the AfCFTA's general objectives is to resolve this challenge." The *acquis* principle "first entered the African regional integration terminology" in the context of the Tripartite Free Trade Agreement (TFTA) discussions.); SIGNE & VAN DER VEN, *supra* note 12.

[38] There is often a considerable divide between the rules as written and the rules as applied. *See, e.g.*, KATRIN KUHLMANN, REFRAMING TRADE AND DEVELOPMENT: BUILDING MARKETS THROUGH LEGAL AND REGULATORY REFORM (2015), http://e15initiative.org/publications/reframing-trade-and-development-building-markets-through-legal-and-regulatory-reform/; s*ee also* Trudi Hartzenberg, *Regional Integration in Africa* (World Trade Org., Econ. Research and Statistics Div., Working Paper No. ERSD-2011-14, 2011).

[39] Legal implementation challenges are not unique to African countries and are a challenge to measure and track. However, legal and implementation challenges can be assessed based on common dimensions. *See Approach to Legal and Regulatory Reform*, NEW MARKETS LAB (2019), https://www.newmarketslab.org/about; KATRIN KUHLMANN, THE AFRICA REGIONAL INTEGRATION INDEX (forthcoming) https://www.integrate-africa.org/ (a forthcoming work which is a helpful tool for understanding infrastructure, trade, and other aspects of implementation).

the AfCFTA will also have to be domesticated into national law in the partner states[40] and implemented through a series of steps, and this process differs depending upon a country's legal structure.[41]

C. *AfCFTA and the Sustainable Development Goals*

Another challenge for the AfCFTA will be establishing a comprehensive approach to sustainable development. While the AfCFTA references sustainable development in its objectives and specifically refers to some areas covered by the SDGs (such as gender equality and food security),[42] full alignment with the seventeen SDGs and their 169 goals and 230 targets will require addressing a number of additional areas of law beyond those slated for Phase II and III negotiations. These include strategies to address food security, health (including rules on medicines and medical equipment, which are increasingly important in light of the COVID-19 pandemic), and environment and climate change, along with binding rules on gender, labor, and other aspects of human rights.[43] While a full assessment of these areas is beyond the scope of this Article, some preliminary observations are included in Section IV.

Through the AfCFTA, the world's largest regional trading bloc could now change the rules from within, returning to the multilateral forum with a much stronger negotiating position. The AfCFTA's approach to its priority "rules" areas—IP, competition, and investment (and possibly other issues at a later stage)—is likely to build upon recent trends and existing legal models within

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[40] *See, e.g.*, Laura Páez, *A Continental Free Trade Area: Imperatives for Realizing a Pan-African Market*, 50 J. WORLD TRADE 533 (2016). It is, however, important to note that domestication practices vary among Common Law and Civil Law jurisdictions, for example.

[41] *See* KUHLMANN, *supra* note 28.

[42] AfCFTA, *supra* note 7, art. 3.

[43] Derived from Katrin Kuhlmann, Chantal Line Carpentier, Tara Francis, & Malou Le Graet, *Trade Policy for a Resilient, Inclusive, and Sustainable Development in A New International Economic Order* (June 2020), https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_4460da2de0e746dd81ad32e003cd0bce.pdf.

the continent (see Section III) and intentionally reshape current international law. In doing so, the AfCFTA could initiate a new, sustainable development approach to rulemaking through RTAs, spurring a "WTO+" driven by the economic and social development considerations of many instead of market dominance by the few, particularly if the less legally and economically advanced nations in Africa have an equal voice in crafting emerging law. Over time, the rules-based approach, and advances in international law, established through the AfCFTA could shape other trade agreements as well as future rounds of multilateral negotiations.

This Article will assess the AfCFTA's legal model through three interconnected lines of analysis. It first evaluates the AfCFTA through the lens of S&D, drawing the conclusion that a new normative approach stems from the AfCFTA's design and scope that incorporates some traditional elements of development-led trade but paves the way for a more progressive rules-based approach to broader economic and social development.[44] The Article then assesses the substantive issue areas slated for Phase II of the AfCFTA (IPR, investment, and competition law), highlighting the new direction in international economic law that could emerge from the AfCFTA. The Article concludes by exploring the possibility that the AfCFTA will evolve into a more comprehensive, and hopefully more inclusive, model for trade and sustainable development over time.

II. Role of Special and Differential Treatment in Trade Agreements

Trade and development scholars have traditionally approached the design of trade agreements, and how rules are applied within these agreements, through S&D.[45] Simply put, S&D affords "special rights" for developing countries,[46] as discussed below, and it has been part of the system

[44] An earlier work by Katrin Kuhlmann called for such an approach to S&D. *See* KUHLMANN, *supra* note 38.
[45] *See* Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When, and How?* (World Trade Org. Economic Research and Statistics Division, Working Paper No. ERSD-2004-03, 2004).
[46] James Bacchus & Inu Manak, *The Development Dimension: What to do About Differential Treatment in Trade*, CATO INSTITUTE (Apr. 13, 2020), https://doi.org/10.36009/PA.887; s*ee also* D.B. Magraw, *Existing Legal Treatment*

of international trade in some form since the middle of the last century. While traditional aspects of S&D appear in the AfCFTA model, a new normative rules-based dimension of S&D appears to arise from the AfCFTA as well. The subsections below examine the historical context of S&D, summarize the criticisms that have been raised against its application, and present the new model for S&D that stems from the AfCFTA's design.

A. *Historical Approaches to S&D*

Historically,[47] S&D has afforded special trade treatment for developing economies and least developed countries (LDCs) in particular,[48] usually in the form of non-reciprocal treatment, special safeguards, longer transition periods to implement legal requirements, preferential trade arrangements with developed markets, and aid for trade.[49]

S&D, as generally accepted, is underpinned by several broad themes and phases, which roughly track with the evolution of the international trade rules. One phase encompasses differential treatment in the form of less than full reciprocity and trade preference programs (this was the main approach to S&D during its early years under the General Agreement on Tariffs and Trade (GATT) phase), which led to non-reciprocal trade arrangements like the trade preference

of Developing Countries: Differential, Contextual and Absolute Norms, 60 COLO. J. OF INT'L ENVTL. L. AND POL'Y 69 (1989).

[47] *See* Keck & Low, *supra* note 45.

[48] There is no definition of "developing country" in the global trading system, and countries have instead self-designated to receive S&D treatment, leading to some of the recent criticism against S&D. LDCs are defined based on a three-part test that assesses per capital Gross National Income (GNI), human assets, and economic vulnerability. *LDC Identification Criteria and Indicators*, UNITED NATIONS, https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-criteria.html.

[49] The WTO Secretariat provides a useful categorization of S&D provisions based on a six-fold typology. WTO Secretariat, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc. WT/COMTD/W/239 (Oct. 12, 2018). ((1) *Provisions Aimed at Increasing Trade Opportunities of Developing Country Members*, including trade preference programs; (2) *Provisions to Safeguard the Interests of Developing Country Members*, including around 100 provisions related to development across disciplines and WTO agreements; (3) *Flexibility of Commitment, of Action, and Use of Policy Instruments*; for example, GATT Article XVIII and flexibilities under the WTO Agreement on Subsidies and Countervailing Measures (4) *Transitional Time Periods*; (5) *Technical Assistance*; and (6) *Provisions Relating to LDCs*, with a note to Paragraph 2(d) of the Enabling Clause); *see also* PAUWELYN, GUZMAN, AND HILLMAN, INTERNATIONAL TRADE LAW 745–49 (3d ed.).

programs that unilaterally opened developed country markets to trade from emerging markets.[50] Another phase, which coincided with the Uruguay Round of trade negotiations and establishment of the WTO, focuses on providing flexibility in implementing trade rules and safeguarding developing country trade interests.[51] This approach resulted in longer transition periods and exemptions from the rules in order to give developing countries some degree of flexibility and even policy autonomy in integrating and implementing new economic rules.[52] The need for flexibility grew in importance as multilateral rules became more comprehensive and negotiations more reciprocal (and as the rules of trade became more complex and increasingly included domestic, "behind the border" regulations across a range of substantive areas).[53] In addition to flexibility in adherence to the rules, capacity building and technical assistance, or aid for trade, became another staple of S&D. However, aid for trade has mainly been pursued on a "best-endeavor" basis[54] (i.e., not as a result of binding law). Further, while S&D is not explicitly

[50] These include the Generalized System of Preferences (GSP) program and duty-free quota-free (DFQF) for LDCs, which must also be "generalized," as well as region-specific programs like the African Growth and Opportunity Act, which fall outside of the standard legal authority (Enabling Clause) for preference programs. *See* Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/AB/R (adopted Apr. 7, 2004), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm. While trade preference programs have played a distinct role in development, they have also been criticized for excluding goods that are essential to developing country economies, thus leaving little room for economic diversification. *See, e.g.*, KUHLMANN, *supra* note 38.

[51] Constantine Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* 20 (World Bank, Policy Research Working Paper No. 2388, 2000).

[52] *Id.* at 18.

[53] These include issues covered by Uruguay Round agreements, including agriculture, TBT, SPS, safeguards, trade-related investment measures (TRIMS), IPR, and subsidies and countervailing measures. *See* Constantine Michalopoulos, *Trade Policy and Market Access Issues for Developing Countries* (World Bank, Policy Research Working Paper No. 2214, 1999); s*ee also* Secretariat of the U.N. Conference on Trade and Development, International Trade Negotiations, Regional Integration and South-South Trade, Especially in Commodities (Background Paper prepared for the Doha High-Level Forum on Trade and Investment, Background Paper No. 2, Dec. 2004), https://www.g77.org/doha/Doha-BP02-International_Trade_Negotiations.pdf.

[54] *See* Lily Sommer & Jamie MacLeod, *How Important is Special and Differential Treatment for an Inclusive AfCFTA?*, *in* INCLUSIVE TRADE IN AFRICA: THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT IN COMPARATIVE PERSPECTIVE 71 (David Luke & Jamie MacLeod eds., Routledge 2019); *see also* Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT'L ECON. L. 405 (2005).

mentioned in the General Agreement on Trade in Services (GATS Agreement), an interesting case has been made that the positive list approach in GATS represents another variation on S&D that provides "built-in flexibility" to allow countries to determine which sectors should be liberalized (or not) while also largely rendering insignificant the distinctions between developing countries and LDCs that have characterized S&D throughout its history.[55] The WTO TFA, which recognizes differences in countries' regulatory systems and capabilities and allows countries to undertake and prioritize commitments based on their specific needs, represented another significant development in S&D (and multilateral rulemaking itself).[56]

The request for policy autonomy has also been central to the S&D debate and involves striking a balance between "core trade policy rules" and "policy space" for developing economies to pursue policy and regulatory approaches that will best suit a country's needs as economic development advances.[57] Not surprisingly, policy autonomy continues to arise in the context of RTAs and has already shaped the AfCFTA's development.[58]

Legally, S&D has also evolved over time. While the discussion on S&D dates back to the middle of the last century, S&D was first legally enshrined in Part IV of the GATT in 1965 (Article XXXVI:8 of Part IV notably contains the principle of non-reciprocity).[59] Unfortunately, Part IV

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[55] COLETTE VAN DER VEN, SPECIAL AND DIFFERENTIAL TREATMENT IN THE CONTEXT OF THE DIGITAL ERA (CUTS International 2018).

[56] The WTO Trade Facilitation Agreement allows countries to stage implementation based on their needs and capabilities. Countries must notify their commitments under three categories: Category A (immediate implementation), Category B (implementation following a transition period), and Category C (implementation following a transition period with capacity building support). Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, *supra* note 18, at 5.

[57] *See* Hoekman, *supra* note 54; s*ee also* Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 VA. J. INT'L L. 551 (2012).

[58] Costantinos Berhutesfa Costantinos, *The African Continental Free Trade Area: Lessons from Other Free Trade Agreements in Other Parts of the World, Navigating the Political and Economic Differences, Poor Infrastructure, Stability, Synchronising AfCFTA with Other Continental Integration Schemes* (AfCFTA interview transcript) at 2.

[59] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. *See also* Bacchus & Manak, *supra* note 46.

of the GATT also consists largely of "best endeavor" language with no real legal force.[60] To address this, elements of S&D were codified through the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause).[61] The Enabling Clause elaborated on S&D, stating that it should "be designed and, if necessary, modified, to respond positively to the development, financial, and trade needs of developing countries."[62] Yet, even though the Enabling Clause made important advances in S&D, codifying non-reciprocity, establishing a permanent waiver for trade preference programs, and establishing different rules for South-South trade agreements, S&D has remained largely non-binding.[63] Other provisions, like Article XVIII of GATT 1994, which provides flexibility for developing countries in addressing balance of payments problems or the promotion of infant industries, were meant to address specific concerns, but they have proven to be challenging to administer.[64] In addition to GATT Part IV, GATT Article XVIII, and the Enabling Clause, various provisions on S&D are scattered throughout WTO Agreements, with 183 references overall.[65]

As new rules also came about in agriculture, trade in services, and IPR, concern with adopting and implementing a growing book of rules mounted, and many countries emphasized that they had not been involved in the creation of the rules to begin with.[66] The Doha Development

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[60] *See* Pallavi Kishore, *Special and Differential Treatment in the Multilateral Trading System*, 13 CHI. J. INT'L L. 363 (2020).

[61] *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, ¶ 5, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.), at 203–05 (1980) [hereinafter Enabling Clause].

[62] *Id.* ¶ 3(c); s*ee also* Keck & Low, *supra* note 45.

[63] *See, e.g.*, Kishore, *supra* note 60.

[64] General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 55 U.N.T.S. 194, 258, *as incorporated and modified by* General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1869 U.N.T.S. 154 [hereinafter GATT 1994].

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

[66] *See* Michalopoulos, *supra* note 51, at 7.

Round, launched in 2001,[67] was meant to address a number of concerns with S&D, some of which are discussed in greater detail below, but the Round broke down in 2008 and has not been successfully revived.[68] Proposals for S&D reform have remained on the table, and the G90 (developing countries and LDCs) recently pressed for reform in connection with the December 2017 Buenos Aires Ministerial.[69] S&D has also arisen in the broader context of WTO reform, particularly with regard to the classification of developing countries,[70] which is discussed below.

B. *Criticisms of S&D*

Despite the evolution in S&D, it has been subject to a range of criticism, with some stressing that S&D has not done enough to promote development through trade and others seeking a more nuanced normative approach.[71] A number of governments and experts are also increasingly pressing for reconsideration of what it means to be a developing country.[72]

Developing economies have argued that S&D flexibilities have not been an effective development tool,[73] resulting in part from the vague and hortatory nature of many S&D provisions

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[67] Paragraph 44 of the Doha Declaration states: "We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries…We therefore agree that *all special and differential treatment provisions* shall be reviewed with a view to strengthening them and making them more precise, effective and operational . . ." World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]; *see* Bacchus & Manak, *supra* note 46.

[68] *See* David Kleinmann & Joe Guinan, *The Doha Round: An Obituary*, GLOBAL GOVERNANCE PROGRAMME, Jun. 2011, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881069. Indeed, the failure to agree on review of and improvements to S&D provisions contributed to the failure of the Doha Round. *See* Bacchus & Manak, *supra* note 46.

[69] General Council for Trade Negotiations Committee, *Draft G90 Ministerial Declaration: Special and Differential Treatment*, WTO Doc. JOB/GC/160 (Nov. 28, 2017).

[70] EUROPEAN UNION, CONCEPT PAPER ON WTO MODERNISATION (2018). For a helpful discussion of these developments and S&D in the context of digital trade, see VAN DER VEN, *supra* note 55.

[71] *See, e.g.*, Keck and Low, *supra* note 45; Hoekman, *supra* note 54; BERNARD HOEKMAN, RE-THINKING ECONOMIC DEVELOPMENT IN THE WTO, (European Univ. Inst., Robert Schuman Ctr. for Advanced Studies Global Governance Programme 2013); KUHLMANN, *supra* note 38.

[72] *See* Bacchus & Manak, *supra* note 46.

[73] *Draft G90 Ministerial Declaration*, *supra* note 69.

and the complexity of using S&D (for example, the procedural requirements of GATT Article XVIII have proven to be difficult to navigate).[74] Others have highlighted that S&D has not performed well because it has lacked strategy, evidence, and economic and welfare justification.[75] Weak institutional and implementation capacity, which tend to remain a challenge even with extended time periods for compliance, have also been flagged as concerns.[76] Political and economic ideology have underpinned application of S&D as well.[77]

Another criticism has been the value of S&D, particularly as tariffs have decreased and preferences margins eroded.[78] Although additional market access for emerging economies can sometimes be negotiated through RTAs under these circumstances,[79] even if desirable, it is important to note that RTAs can present challenges to effective application of S&D. For example, while in some respects the EU's Economic Partnership Agreements (EPAs), which were negotiated to replace unilateral trade preferences, expand market access for developing economies and highlight a more comprehensive approach to S&D, experts and scholars have also raised issues

[74] *See, e.g.*, Keck & Low, *supra* note 45; Sommer & MacLeod, *supra* note 54; VAN DER VEN, *supra* note 55.
[75] S&D is often not based on cost-benefit analysis, which could help to more effectively assess—and ultimately address—development considerations. Hoekman, *supra* note 54, at 2–3; *see also* Keck and Low, *supra* note 45.
[76] Michalopoulos, *supra* note 51, at 16.
[77] *See* Katrin Kuhlmann, Post-AGOA Trade and Investment: Policy Recommendations for Deepening the U.S. Trade and Investment Relationship, Testimony before the U.S. International Trade Commission (Jan. 28, 2016); s*ee also* Bacchus & Manak, *supra* note 46.
[78] Nicolas Imboden, *Special and Differential Treatment: A New Approach May Be Required*, BRIDGES AFR., Nov. 2017, at 21.
[79] Michalopoulos, *supra* note 53, at 1.

with their impact.[80] South-south RTAs and mega-regional deals,[81] such as the AfCFTA, represent a different aspect of this progression.

Another ongoing challenge to S&D and trade and development is the broad categorization of "developing" countries, which raises questions of effectiveness and equity and has implications for the scope of S&D treatment as well.[82] In particular, developing country self-designation has recently received increased attention in the context of WTO reform.[83] Although varying arguments and rationales exist regarding classification of developing countries,[84] differentiation in S&D now appears to be the trend, which could enable S&D to operate based on more tailored development needs rather than broad generalizations.

Finally, the normative basis of S&D also requires reassessment. In order for trade agreements to function as tools for economic and social development, [85] the design of agreements

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[80] The EPA model applies S&D to liberalize trade in 80 percent of goods, while carving out 20 percent of trade as "sensitive." If not approached carefully, this can lock in the status quo and discourage further growth and diversification. Patrick Messerlin, *Economic Partnership Agreements: How to Rebound*, *in* UPDATING ECONOMIC PARTNERSHIP AGREEMENTS TO TODAY'S GLOBAL CHALLENGES 22 (Emily Jones & Darlan F. Marti eds., German Marshall Fund 2009). The EPAs have proven to be a challenging model for S&D and contain elements that discourage, rather than encourage, regional trade and integration. Kimenyi & Kuhlmann, *supra* note 1, at 21.

[81] Imboden, *supra* note 78, at 3.

[82] Joost Pauwelyn, *The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Regimes*, 22 REV. EUR. COMMUNITY & INT'L ENVTL. L. 29, 29 (2013) ("In practice, huge differences between countries have existed and will continue to exist, be it in terms of land mass, population, gross domestic product (GDP), GDP per capita, military capacity, natural resources, industrial production, private or public wealth, environmental conditions, history, culture, etc.").

[83] The United States, in particular, has challenged self-designation of developing country status in the WTO and is also reassessing the parameters for trade preference programs. *See* Communication from the United States, *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance*, WTO Doc. WT/GC/W/757 (Jan. 16, 2019); The White House, Memorandum on Reforming Developing-Country Status in the World Trade Organization (July 26, 2019); Bacchus & Manak, *supra* note 46.

[84] Developed countries have advocated for a differentiated approach based on economic, trade, and institutional dimensions, while developing countries have pressed for a "human-centered" approach, consistent with the work of Amartya Sen. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM (Random House 1999). For an insightful review of the differentiation debate, *see* Bacchus & Manak, *supra* note 46. In the African context, some have also argued that too many distinctions among countries could further splinter S&D. *See* Sommer & MacLeod, *supra* note 54.

[85] For a summary of other development-focused aspects of RTAs, see Katrin Kuhlmann, Post-AGOA Trade and Investment: Policy Recommendations for Deepening the U.S. Trade and Investment Relationship, Testimony before the U.S. International Trade Commission (Jan. 28, 2016). *See also* NEW MKTS. LAB & HARV. L. & INT'L DEV. SOC'Y, *supra* note 17.

and their provisions, effect on domestic law, and implementation of rules will need to be better incorporated into S&D from the outset.[86] To date, with some exceptions, S&D approaches have been more reactive than proactive.[87] However, not only could S&D help encourage buy-in for an agreement's obligations,[88] it could be used to give countries a hand in shaping the rules that they will ultimately have to implement.

C. *S&D in the AfCFTA*

The AfCFTA incorporates S&D in several ways, building upon traditional S&D to create the space for a new, progressive, rules-based approach to S&D. The Principles underpinning the AfCFTA (Article 5) explicitly refer to "flexibility and special and differential treatment,"[89] even though "reciprocity" will be recognized,[90] and S&D is included in a number of the AfCFTA's provisions, as discussed below. While the S&D provisions in the AfCFTA are relatively comprehensive, partner states likely will continue to grapple with challenges inherent in S&D, such as weak administration (provisions are currently not automatic, which may leave out countries with less legal and institutional capacity), lack of clarity, and insufficient tools for monitoring and sharing best practices.[91]

Responding to one challenge with traditional S&D, the AfCFTA clearly represents more of a "differentiated" or "customized" S&D model.[92] It is clear from the way the provisions are

[86] KUHLMANN, *supra* note 38.
[87] *See, e.g.*, Hoekman, *supra* note 54; HOEKMAN, *supra* note 71; KUHLMANN, *supra* note 86; Bacchus & Manak, *supra* note 46.
[88] Sommer & MacLeod, *supra* note 54.
[89] AfCFTA, *supra* note 7, art. 5(d).
[90] *Id.* art. 5(i).
[91] AfCFTA, Protocol on Trade in Goods, Mar. 21, 2018, 58 I.L.M. 1028, 1043 [hereinafter Protocol on Trade in Goods]; s*ee also* Sommer & MacLeod, *supra* note 54, at 81–83.
[92] *See* Keck and Low, *supra* note 45; *see also* Pauwelyn, *supra* note 82.

crafted that they are driven by Africa's particular economic, geographic, and even legal circumstances, with S&D provided based on need. For example, the AfCFTA's Protocol on Trade in Goods recognizes different levels of development among the state parties and the need to provide flexibilities, special and differential treatment, and technical assistance to state parties with special needs.[93] The Preamble to the Protocol on Trade in Services also acknowledges particular needs of "least developed, land locked, island states, and vulnerable economies in view of their special economic situation and their development, trade, and financial needs."[94] Article 6 of the Protocol on Trade in Goods also supports a more nuanced and differentiated approach:

> In conformity with the objective of the AfCFTA in ensuring comprehensive and mutually beneficial trade in goods, State Parties shall, provide flexibilities to other State Parties *at different levels of economic development or that have individual specificities* as recognised by other State Parties. These flexibilities shall include, among others, special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis (*emphasis added*).[95]

Article 7 of the Protocol on Trade in Services further advances this approach to S&D by noting that state parties should take into account challenges faced by other state parties and "grant flexibilities such as transitional periods, *on a case by case basis, to accommodate special economic situations and development, trade and financial needs of the state parties*."[96] These provisions go beyond the usual distinctions, which have been based primarily on economic measurements, and

[93] The Preamble to the Protocol on Trade in Goods, Article 6 of the Protocol on Trade in Goods states: "In conformity with the objective of the AfCFTA in ensuring comprehensive and mutually beneficial trade in goods, State Parties shall, provide flexibilities to other State Parties at different levels of economic development or that have individual specificities as recognised by other State Parties. These flexibilities shall include, among others, special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis," Protocol on Trade in Goods, *supra* note 91, art. 6.

[94] AfCFTA, Protocol on Trade in Services, Mar. 21, 2018, 58 I.L.M. 1028, 1053 [hereinafter Protocol on Trade in Services].

[95] Protocol on Trade in Goods, *supra* note 91, art. 6.

[96] Protocol on Trade in Services, *supra* note 94, art. 7.

allow for "differentiated opportunities" and "targeted supports" based on other factors, such as level of industrialization, size of the agricultural sector, resource endowments, proximity to ports, and conflict status.[97]

Article 7 of the Protocol on Trade in Services also incorporates the need for "special consideration" in (progressive) services liberalization to "promote critical sectors of growth, social and sustainable economic development" as well as "special consideration" for technical assistance and capacity building.[98] The AfCFTA includes other provisions related to S&D, including the provisions in Article 15 that allow the Council of Ministers to waive obligations based on "exceptional circumstances."[99] Additional S&D flexibilities also exist in both the Protocol on Trade in Goods and Protocol on Trade in Services.[100] While the AfCFTA's S&D provisions do not create an absolute legal right to S&D, they do establish the legal basis for a "case-by-case" application of S&D.[101]

The AfCFTA is also based on the principle of "variable geometry" (also referenced in the AfCFTA's Principles),[102] which allows for issues and agreements to be "broken into parts" and

[97] Sommer & MacLeod, *supra* note 54.

[98] Protocol on Trade in Services, *supra* note 94, art. 7.

[99] AfCFTA, *supra* note 7, art. 15.

[100] In the Protocol on Trade in Goods, these include Article 11 (modification of tariff concessions), Article 17 (trade remedies), Article 24 (infant industries), Articles 26 (general exceptions), Article 27 (security exceptions), and Article 28 (balance of payments difficulties), with Article 29 covering technical assistance and capacity building. Protocol on Trade in Goods, *supra* note 91. In the Protocol on Trade in Services, they include Article 14 (balance of payment difficulties), Article 15 (general exceptions), Article 16 (security exceptions), Article 23 (modification of schedules and concessions), and Article 27 (technical assistance and capacity building). Protocol on Trade in Services, *supra* note 94; s*ee also* Sommer & MacLeod, *supra* note 54, at 80.

[101] Sommer & MacLeod, *supra* note 54, at 78. James Bacchus and Inu Manak argue for a case-by-case approach to S&D at the multilateral level. *See* Bacchus & Manak, *supra* note 46.

[102] AfCFTA, *supra* note 7, art. 5(c).

approached in stages,[103] further customizing the agreement's design and impact.[104] Variable geometry is evident in the AfCFTA's approach as an incremental trade agreement, and aspects of variable geometry can be seen in some of the AfCFTA's provisions.

Overall, the AfCFTA's structure, incorporation of variable geometry,[105] more tailored and differentiated approach, and focus on incremental rulemaking based on African law developed through the RECs as building blocks,[106] appear to signal a normative shift in S&D away from a "defensive" approach towards a more "affirmative" approach to S&D[107] that allows for use of substantive law to advance development.[108] This unique formula for S&D and incremental legal change should be leveraged to shape new rules as they are developed and as regional provisions are integrated. Further, because the AfCFTA incorporates sustainable development into the agreement text, as discussed above, this paves the way for a broader development-focused approach to design and implementation of the rules.

Ultimately, however, while this form of development-led rulemaking represents a more proactive, rules-based approach to S&D, it still has its limitations. First, policy space will continue to be an issue. RECs, as is true of WTO rules, allow for flexibility in domestic regulation, within limits. In the AfCFTA, the framework rules should incorporate good practices from across the continent, and countries will need to maintain the flexibility to tailor rules and regulations to

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[103] Hoekman, *supra* note 54; *see also* Katrin Kuhlmann, *Post-AGOA Trade and Investment: Policy Recommendations for Deepening the U.S. Trade and Investment Relationship*, Testimony before the U.S. International Trade Commission, Washington, D.C., January 28, 2016.

[104] This approach to trade agreements can also be referred to as a "building block approach," which can be customized and advanced incrementally. Kuhlmann, *supra* note 103, at 2.

[105] *See* HOEKMAN, *supra* note 71.

[106] AfCFTA, *supra* note 7, art. 5.

[107] Traditional S&D represents a "defensive" approach rather than a "positive or offensive" approach focused on development priorities. HOEKMAN, *supra* note 71, at 3.

[108] For a discussion on reframing S&D to focus on economic law and regulation, see KUHLMANN, *supra* note 38.

particular circumstances at the national (and sometimes even sub-national) levels.[109] As the AfCFTA advances, it will also be important to ensure that rules are developed in a balanced, inclusive way and that nations with less developed legal systems and weaker bargaining power are not left out. Regulatory capacity will also remain a challenge and is not easy to address through trade agreements or S&D approaches,[110] so a better understanding of comparative law, diverse regulatory good practices, and practical solutions will be needed.

Ultimately, generating development through trade could depend upon adopting legal frameworks that will improve countries' ability to diversify trade, compete in export markets, and strengthen domestic economic systems to the benefit of small entrepreneurs and larger investors alike.[111] While the AfCFTA is still in its early stages, it could deliver on some of these goals as it reshapes future law on the continent, and perhaps beyond.[112] Section III will examine the range of rules in priority negotiating areas (IP, investment, and competition law) that could form the basis for a development-focused rules-based approach.

III. COMPARATIVE ASSESSMENT OF THE AFCFTA IN KEY ISSUE AREAS

With the next round of the AfCFTA focused on a set of substantive rules, the new normative model for S&D discussed in the previous section is likely to result in development-focused changes in law in several key areas, namely IPR, investment, competition law, and,

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[109] *See, e.g.*, Hoekman, *supra* note 71.

[110] KUHLMANN, *supra* note 38.

[111] KUHLMANN, *supra* note 38.

[112] It is also possible that African leaders will continue to press for more nuanced approaches at the multilateral level, although this will likely vary by issue and perhaps even economic and geographic differences. Past proposals have focused on changes in the rules on agriculture and other issues, highlighting the differences of countries that are net importers rather than net exporters. *See* World Trade Organization, Declaration of the 2nd Meeting of the African Ministers of Trade (AMOT) of 13 December 2016, WTO Doc. WT/L/1004 (2016). The AfCFTA could become a stepping stone to "deep integration where African countries are prepared to test their ability to participate in multilateral negotiations." Regis Yann Simo, *The African Continental Free Trade Agreement in a Decaying Multilateral Trading System: Questioning the Relevance of the Enabling Clause* 5 (Nov. 30, 2019) (presented at the International Economic Law (IEL) Collective Inaugural Conference, University of Warwick, November 2019).

perhaps on a longer timeframe, other issues. This section will include a brief comparative analysis of African national and regional law, international law, and other relevant practices and approaches within these substantive areas to highlight how the AfCFTA may prompt change in regional and broader international law. This is in line with the comparative approach in the AfCFTA, which highlights the consideration of best practices in the RECs, state parties, and International Conventions binding upon the African Union.[113] Practically, regional integration and some degree of harmonization of existing regional rules will have to be considered, keeping in mind the *acquis* principle, as will implementation gaps and the reality that changes in continental law will ultimately depend upon national law and domestication of harmonized rules. New rules made under the AfCFTA should also balance the agreement's objectives on industrial, economic, and agricultural development with a degree of regulatory autonomy for state parties, allowing for flexibility and differentiated regulatory approaches while establishing a system of rules that can attract investment to a historically fragmented market of fifty-five nations.

In assessing what the rules *could* take into account, it is important to consider what they *should* take into account, given the AfCFTA's focus on sustainable development. The AfCFTA presents both the opportunity—and the challenge—of developing new rules in a way that advances economic and social development and balances the priorities of a diverse (and large) group of countries, incorporating good practices from both small and large economies. This is a departure from many historical approaches, but it would set a refreshing new precedent. The AfCFTA text supports this view, calling for "consensus" in rulemaking and highlighting the importance of building upon "best practices" among RECs, state parties, and international conventions.[114] In

[113] AfCFTA, *supra* note 7, art. 5.
[114] AfCFTA, *supra* note 7, art, 5(k)–(l).

doing so, the AfCFTA should reflect "best practices" of a range of state parties, including nations with more developed legal systems and smaller nations whose systems may not be as developed. Based on additional research, some smaller economies' rules and regulations contain important flexibilities for smaller producers and informal actors that will be important to achieving broader development goals.[115] Priority should be placed on identifying and preserving legal practices that give rights to more vulnerable groups, such as small businesses, informal economic actors, and farming communities, as the AfCFTA evolves.

A. *Intellectual Property Rights*

One of the main issues for AfCFTA Phase II is IPR, which has been frequently highlighted in the context of both S&D and trade and development due to its impact on developing economies and their citizens.[116] There are many aspects of an IP regime that could be included in the AfCFTA, ranging from a tailored continental approach on traditional IP issues (copyright, trademarks, patents) to coverage of issues that have largely fallen outside of trade rules, such as protection for genetic resources and traditional knowledge.[117] The impact of more concentrated efforts on IP rules could be far reaching, contributing to achievement of a number of SDGs, such as SDG 1 (No Poverty), SDG 2 (Zero Hunger), SDG 3 (Good Health and Well-Being), SDG 8 (Decent Work and

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[115] *See* Katrin Kuhlmann & Bhramar Dey, *Using Regulatory Flexibility s to Bridge Market Informality: A Global Study on Building Inclusive Seed Systems*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668668; *see also*, Kuhlmann and Dey, *Regulatory Flexibilities Bridge Gaps Between Seed Systems*, AGRILINKS (June 25, 2020), https://www.agrilinks.org/post/regulatory-flexibilities-bridge-gaps-between-seed-systems.

[116] *See* Daniel Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 FORDHAM L. REV. 505 (2005).

[117] *See* Donald Harris, *TRIPS After Fifteen Years: Success or Failure, as Measured by Compulsory Licensing*, 18 J. INTELL. PROP. L. 367, 371 (2011).

Economic Growth), SDG 9 (Industry, Innovation, and Infrastructure), and SDG 15 (Life on Land), among others.[118]

IP rules vary among African nations and within regional bodies,[119] calling for a nuanced approach to S&D that combines both traditional flexibility in implementing rules once they are set and a proactive approach to designing the rules themselves. Regional IP rules have been developed within the RECs to a degree, with substantive IP discussions slated under the TFTA.[120] Harmonized rules have also been advanced through other institutional bodies including the African Regional Intellectual Property Organization (ARIPO),[121] *Organisation Africaine de la Propriété Intellectuelle* (OAPI),[122] which notably establishes a unitary IP system among Civil Code countries,[123] and the Pan-African Intellectual Property Organization (PAIPO),[124] making the AfCFTA's focus timely. African countries that are members of the WTO have also incorporated provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS

[118] *See* Yeukai Mupangavanhu, *The Protection of Intellectual Property Rights Within the Continental Free Trade Area in Africa: Is a Balance of Innovation and Trade Possible?*, 15 INT'L J. BUS. ECON. & L. 4, 16 (2018); s*ee also* Katrin Kuhlmann, *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*, Testimony before the United States International Trade Commission (July 30, 2019).

[119] *See* Y. Mupangavanhu, *African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization*, 59 J. AFR. L. 1, 1–2 (2015).

[120] "In view of the imminence of these negotiations, however, it would be prudent to consolidate them [with negotiations under the AfCFTA] to avoid duplication and proceed from a single undertaking approach." United Nations Econ. Comm'n for Afr., African Union, African Dev. Bank & United Nations Conference on Trade and Dev., *Assessing Regional Integration in Africa IX: Next Steps for the African Continental Free Trade Area* 109 (2019).

[121] Agreement on the Creation of the African Regional Intellectual Property Organization, Dec. 9, 1976, https://www.wipo.int/edocs/lexdocs/treaties/en/ap001/trt_ap001_002en.pdf [hereinafter Lusaka Agreement].

[122] Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, Mar. 2, 1977, https://www.wipo.int/edocs/lexdocs/treaties/en/oa002/trt_oa002.pdf [hereinafter Bangui Agreement].

[123] *See* NEW MARKETS LAB, ECONOMIC IMPACT ASSESSMENT AND LEGAL REVIEW AND ANALYSIS OF THE EAST AFRICAN COMMUNITY SEED AND FERTILIZER LEGISLATION (forthcoming 2020).

[124] Statute of the Pan-African Intellectual Property Organization, Jan. 30, 2016, https://au.int/en/node/32549.

Agreement)[125] into domestic law and have used S&D under the TRIPS Agreement to differing degrees.[126]

One overarching issue that must be considered is how the AfCFTA partner states will structure some form of continental IP law. A recent report by the United Nations Economic Commission for Africa (UNECA), AU, African Development Bank, and the United Nations Conference on Trade and Development (UNCTAD) notes three options, which reflect approaches in current structures: (a) establishing regional cooperation in IP (e.g., the approach under the AU); (b) creating a regional IP filing system (e.g., ARIPO's regional trademark filing system, which extends to its nineteen member states); and (c) developing one unified continental law or unifying law on a regional basis (e.g., OAPI's system).[127] A unified legal approach would be the most challenging to achieve under the AfCFTA and would represent a departure from some existing regional models, including ARIPO. While it could be beneficial to harmonize IP law, too rigid a continental structure might leave less room for individual countries to regulate according to their needs. The WTO TFA model, which contains differentiated and staggered commitments, could also be instructive when considering the Protocol's structure.[128]

Africa's existing law and broader proposals on IP[129] are illustrative of where the AfCFTA might substantively press forward to reshape international law and re-balance the rights of different

[125] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

[126] *See* Gervais, *supra* note 116, at 533.

[127] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 107.

[128] *See* SIGNE & VAN DER VEN, *supra* note 12, at 8.

[129] While African nations have pressed for changes in IP law multilaterally, many of these proposals have failed to gain sufficient traction in multilateral negotiations (which themselves have faced setbacks, including the stalled Doha Development Round). *See* Council for Trade-Related Aspects of Intellectual Property Rights, *Joint Communication from the African Group: Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement*, WTO Doc. IP/C/W/404 (June 26, 2003) [hereinafter Joint Communication].

stakeholders.[130] Based on legal trends in sub-Saharan Africa and other RTAs, the AfCFTA's Protocol on Intellectual Property Rights is likely to address the following issues:[131]

1. **Tailored Approach to Traditional IP Issues**, which would include a number of forms of IP, building upon international law but leveraging appropriate flexibilities to enable the rules to work for the greater benefit as Africa's markets develop.[132] For example, due to the large informal sector in African economies, areas of IP that affect informal innovation (and informal enterprises as they become more integrated in formal markets) could be prioritized, such as trade secrets and confidential information.[133] The Protocol on Intellectual Property Rights could also include a greater focus on other forms of IP important to the continent's development, such as a framework on geographic indications (this could be done through a *sui generis* system or a system of certification and collection marks),[134] that advances the AU's Continental Strategy for Geographical Indications in Africa 2018-2023.[135] It could also include a regional approach to IP exhaustion, which could support regionally integrated markets.[136]
2. **Continental Approach on Plant Variety Protection (PVP)**, which balances the needs of breeders with protection for traditional and farmers' varieties in order to preserve

[130] Efforts to include IP protection for access to medicines may be illustrative of how a change in law in this area could be incorporated at the multilateral level. Bethel Uzoma Ihugba & Ikenna Stanley Onyesi, *International Intellectual Property Agreements as Agents of Sustainable Development of Developing Countries*, 9 AFR. J. LEGAL STUD. 1, 10 (2016).
[131] *See* Doha Declaration, *supra* note 67; *see also* United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 103.
[132] *See, e.g.*, Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. INT'L L. & POL. 1 (2018).
[133] Mupangavanhu, *supra* note 118, at 18.
[134] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 129.
[135] Afr. Union Dep't Rural Econ. & Agric., Continental Strategy for Geographical Indications in Africa 2018–2023 (2019), https://au.int/sites/default/files/documents/36127-doc-au_gis_continental_strategy_enng_with-cover-1.pdf.
[136] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 129.

biodiversity and improve food security.[137] An approach in this area could incorporate elements of international law, including the WTO TRIPS Agreement, International Convention for the Protection of New Varieties of Plants (UPOV Convention),[138] and other legal instruments discussed below, as well as African national law. It might also reference relevant aspects of the OAU African Model Legislation for the Protection of the Rights of Local Communities, Farmers, and Breeders, and for the Regulation of Access to Biological Resources (OAU Model Law),[139] which, for example, recognizes communal intellectual property rights based on customary law and traditional practices.[140] Flexibilities that currently exist in African national law, such as provisions in some countries' national laws (Uganda and Burundi, for example) that provide for farmers' rights alongside PVP, should also be preserved.[141]

3. **Protection for Developing Countries' Genetic Resources and Traditional Knowledge**, including through mandatory disclosure requirements, a strengthened system for patent research, and traditional knowledge registries in order to recognize rightsholders of genetic resources and traditional knowledge, prevent misappropriation by outside rightsholders,

[137] *See* Bram De Jonge & Peter Munyi, *A Differentiated Approach to Plant Variety Protection in Africa*, 19 J. WORLD INTELL. PROP. 28 (2016). While the WTO TRIPS Agreement contains a provision on *sui generis* protection for plant varieties (TRIPS Agreement), traditional varieties and landraces are often not eligible for plant variety protection, and local communities cannot hold rights in most countries. *See* NEW MARKETS LAB, LOCAL SEED COLLECTION AND PROTECTION OF FARMER-DEVELOPED SEED VARIETIES: REGIONAL AND INTERNATIONAL FRAMEWORKS (2018).

[138] International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, 1861 U.N.T.S. 282 (revised on 10 Nov. 10, 1972, Oct. 23, 1978, and Oct. 28, 1973).

[139] Organization of African Unity, African Model Legislation for the Protection of the Rights of Communities, Farmers, and Breeders, and Access to Biological Resources (2000).

[140] *Id.* arts. 1, 17, 23.

[141] These countries' laws incorporate a farmer's privilege flexibility that existed under UPOV 1978 but is not part of UPOV 1991, although, based on UPOV 1991, it appears that this privilege could still be maintained if explicitly established under national (and, by extension, regional or continental) law. *See* NEW MARKETS LAB, *supra* note 123.

and protect cultural rights and biodiversity.[142] A *sui generis* right to traditional knowledge, as reflected in the OAU Model Law, could also be explored.[143] Rulemaking in this area would address gaps in international law and reflect legal trends evident in some African national and regional legal systems, as discussed below.

4. **Incorporation of Measures on Public Health**, including alignment with TRIPS Article 31 *bis*, which allows for flexible use of compulsory licenses to respond to public health needs (this includes both use of compulsory licenses to produce generic medicines and importation of generic pharmaceuticals by countries that do not have manufacturing capability).[144] These measures could perhaps be expanded in light of the global COVID-19 health crisis to include a broader range of medicines, vaccines, medical equipment, and medical devices,[145] as well as better administration of available flexibilities.
5. **A System for Effective Implementation and Enforcement** that corresponds to national and regional needs and capacities and incorporates S&D and targeted technical assistance.

Among these issues, protection for genetic resources and traditional knowledge is likely to be highlighted as a priority in discussions on the AfCFTA Protocol on Intellectual Property Rights and is the focus of the comparative discussion that follows.[146] The practice of "bioprospecting" has received increasing scrutiny, particularly as research, development, and commercialization of

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[142] *See Joint Communication*, *supra* note 129.

[143] Loretta Feris, *Protecting Traditional Knowledge in Africa: Considering African Approaches*, 4 AFR. HUM. RTS. L.J. 242, 243 (2004).

[144] TRIPS Agreement art. 31 *bis*; s*ee also* Harris, *supra* note 117, at 386.

[145] *See* Jennifer A. Hillman, *Six Proactive Steps in a Smart Trade Approach to Fight COVID-19*, COUNCIL ON FOREIGN REL. (Mar. 20, 2020), https://www.thinkglobalhealth.org/article/six-proactive-steps-smart-trade-approach-fighting-covid-19.

[146] Traditional knowledge is a living body of knowledge passed on from generation to generation within a community. *See* WORLD INTELL. PROP. ORG. (WIPO), KEY QUESTIONS ON PATENT DISCLOSURE REQUIREMENTS FOR GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE (2017), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047_19.pdf.

biotechnology-based products have increased,[147] with allegations of "biopiracy" in cases in which indigenous knowledge is patented for profit.[148] Under existing law, indigenous communities are often not allowed to reap the full economic benefits of their traditional knowledge and practices.[149]

While trade rules on traditional knowledge and genetic resources have been proposed at the multilateral level, including through African proposals to the WTO that have highlighted the importance of strengthening provisions for genetic resources and traditional knowledge in international legal regimes and the TRIPS Agreement, these issues remain outside of the multilateral system of rules.[150] Requests to address this gap have only intensified since the Doha Round due to an increase in the use of genetic resources,[151] but they have not been successfully operationalized. The AfCFTA is likely to become a platform for legal change in this area, building upon domestic and international law both within and outside of the international trade space.

In the area of genetic resources and indigenous rights, related treaties (namely the Convention on Biological Diversity,[152] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol),[153] and International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA))[154] would provide a foundation for trade law and platform

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147 *See* Grant E. Isaac & William A. Kerr, *Bioprospecting or Biopiracy?: Intellectual Property and Traditional Knowledge in Biotechnology Innovation*, 7 J. INTELL. PROP. 35 (2004).

148 *See, e.g.*, Kasim Musa Waziri & Awomolo O Folasade, *Protection of Traditional Knowledge in Nigeria: Breaking the Barriers*, 29 J. OF L. POL'Y & GLOBALIZATION 176 (2014).

149 *Id.*

150 Doha Declaration, *supra* note 67, ¶ 19.

151 *See* ISAAC RUTENBERG, MARISELLA OUMA & PETER MUNYI, INTELLECTUAL PROPERTY IN KENYA (2019).

152 Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

153 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity to the Convention on Biological Diversity, Oct. 29, 2010, UNEP/CBD/COP/DEC/X/1.

154 International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 3, 2001, 2400 U.N.T.S. 303.

for consultation in developing more robust legal protection. The AfCFTA could address the gap on trade rules to protect genetic resources and indigenous communities by integrating relevant protections into the Protocol on Intellectual Property Rights, including through provisions such as mandatory disclosure requirements, traditional knowledge registries, and a clear system for patent research when indigenous knowledge and communities are involved. The AfCFTA is likely to go beyond existing law in some cases, such as disclosure requirements for patent examination, perhaps extending the TRIPS disclosure requirement to genetic resources and traditional knowledge. If incorporated into the AfCFTA, an expanded disclosure requirement for traditional knowledge would also need to be assimilated into national law and implemented in order to ensure that traditional knowledge and genetic resources are protected. The AfCFTA could also define affirmative IP rights for traditional knowledge and genetic resources, enhancing international law in this area.

1. Relevant Aspects of African Regional IP Law

Existing African regional law provides insight into the direction that the AfCFTA Protocol on Intellectual Property Rights might take. For example, the ARIPO Swakopmund Protocol provides the foundation for ARIPO member states to enact laws for the protection of traditional knowledge and traditional cultural expressions. It also ensures the protection of traditional knowledge and cultural expressions based on access and benefit sharing.[155] The ARIPO Harare Protocol on Patents and Industrial Designs requires a clear and complete disclosure of an invention,

[155] Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization, § 9, Aug. 9, 2010.

in terms that can be understood, before it can be carried out,[156] and similar disclosure requirements could be applied to traditional knowledge and genetic resources.

Relevant measures exist at the REC level as well, although a number of these are in the form of policies that do not have the same binding effect as regional law. COMESA has put in place a Policy on Intellectual Property Rights and Cultural Industries and is developing guidelines for national IP policies in this area.[157] The EAC has an IP policy on health-related flexibilities, which is particularly noteworthy given the current global health situation.[158] SADC has also been working on a regional IP framework, building on the 2017 Protocol for the Protection of New Varieties of Plants (Plant Breeders' Rights) in SADC.[159]

2. Traditional Knowledge and Genetic Resources in African National IP Law

Several African nations include protection for traditional knowledge and genetic resources in their IP regimes, which could indicate how the AfCFTA's provisions may evolve in this area. The Constitution of Kenya recognizes the role of science and indigenous technologies in the country's development,[160] and requires that the Kenyan state ensure sustainable exploitation, management, and conservation of genetic resources and the environment; ensure equitable benefit sharing, protection, and enhancement of biodiversity and IP in indigenous knowledge; and ensure that environmental and natural resources benefit the people of Kenya.[161] Kenya's Traditional Knowledge Act of 2016 provides for the protection of traditional knowledge "that is generated,

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[156] Protocol on Patents and Industrial Designs Within the Framework of the African Regional Intellectual Property Organization (ARIPO), § 3(10), Dec. 10, 1982 [hereinafter *Harare Protocol on Patents and Industrial Designs*].
[157] *See* COMESA, COMESA POLICY ON INTELLECTUAL PROPERTY RIGHTS, http://www.ip-watch.org/weblog/wp-content/uploads/2013/05/Comesa-IP-policy-May-2013.pdf (last visited Aug. 3, 2020).
[158] *See* EAC SECRETARIAT, EAC REGIONAL INTELLECTUAL PROPERTY POLICY ON THE UTILISATION OF PUBLIC HEALTH-RELATED WTO-TRIPS FLEXIBILITIES AND THE APPROXIMATION OF NATIONAL INTELLECTUAL PROPERTY LEGISLATION (Feb. 2013), https://ipaccessmeds.southcentre.int/wp-content/uploads/2019/12/EACTRIPSPolicy.pdf.
[159] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 109.
[160] CONSTITUTION art. 11(2) (2010) (Kenya).
[161] *Id.* art. 69(1).

preserved and transmitted from one generation to another but within a community for economic, ritual, narrative, or recreational purposes individually or collectively."[162] Rights are granted to holders of traditional knowledge to authorize exploitation of their traditional knowledge and to prevent exploitation and use without consent.[163] Kenya's 2016 Act provides for the development of a registry of rights holders and their traditional knowledge to protect the rights of local communities in case of a violation;[164] this could be a practice that is spread continent-wide through the AfCFTA.[165]

South Africa's 2013 Intellectual Property Law also provides some protection for traditional knowledge.[166] The 2013 amendment to the law (Amendment Act No. 28 of 2013) incorporated the recognition of certain traditional and indigenous terms or expressions; however, there is no duty to disclose relevant information to the South African Patent Office.[167]

Other African nations, including Ethiopia, Djibouti, Tanzania, and Zambia, also include a level of protection for traditional knowledge and genetic resources in their legal systems.[168] For example, Ethiopia's rules provide for access and benefit sharing of traditional knowledge and

[162] The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33, Part 2.6 (2016) KENYA GAZETTE SUPPLEMENT No. 154.
[163] *Id.* at 25.
[164] *Id.* at 8.
[165] The Kenya Industrial Property Institute (KIPI) also established a "Traditional Knowledge (TK) and Genetic Resources (GR) Unit" within the patent division to address issues of intellectual property rights relating to traditional knowledge associated with genetic resources (including access and benefit sharing and disclosure requirements) for indigenous and local communities. *Id.* § 10.
[166] *See* Intellectual Property Laws Amendment Act 28 of 2013 (S. Afr.).
[167] *See id.*
[168] Proclamation No. 482/2006 Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation (2006), FEDERAL NEGARIT GAZETA (Ethiopia); Law No. 50/AN/09/6th on the Protection of Industrial Property (Djibouti); Traditional and Alternative Medicine Act, No. 23 (2002) (Tanzania); The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, No. 16 (2016) (Zam.).

genetic resources,[169] as does Zambia's law,[170] which extends to folklore as well. Djibouti's law on industrial property includes a disclosure requirement for inventions obtained from traditional knowledge and genetic resources.[171]

3. Provisions on Traditional Knowledge and Genetic Resources in Other RTAs

Other RTAs are beginning to incorporate similar issues, although law is not well developed in this area, as noted above. For example, Article 18.16 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides for the recognition of traditional knowledge, quality patent examination for traditional knowledge, and cooperation by all parties through their local agencies to enhance their understanding of traditional knowledge in relation to genetic resources.[172] In the Andean region, Bolivia, Colombia, Ecuador, Peru, and Venezuela has established protection for genetic resources and preservation of indigenous communities' right to determine how traditional knowledge will be used, including through disclosure requirements.[173]

As this section highlights, the AfCFTA could be a driver for development-focused IP rules, particularly in areas like traditional knowledge and genetic resources where current trade law falls short. S&D flexibilities will continue to be important, particularly as countries develop law in new areas, but it will be equally important that African nations and their stakeholders use the rulemaking process to advance their rights, consistent with the AfCFTA's approach to S&D.

[169] Proclamation No. 482/2006 Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation (2006) at 3.18, FEDERAL NEGARIT GAZETA (Ethiopia).
[170] The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, No. 16 (2016) at 3.20 (Zam§§
[171] Law No. 50/AN/09/6th on the Protection of Industrial Property at art. 34 (Djibouti).
[172] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) art. 18.16, Mar. 8, 2018.
[173] Andean Community, Decision No. 391 Establishing the Common Regime on Access to Genetic Resources ¶ 7, Jul. 2, 1996, http://www.sice.oas.org/trade/JUNAC/decisiones/DEC391e.asp.

B. *Investment Law*

International investment law is also undergoing significant reform and, once again, the AfCFTA could provide a legal basis to rewrite the rules in a way that better integrates the interests of African nations, companies of all sizes, and communities. Investment rules relate to a number of SDGs, including SDG 1 (No Poverty), 2 (Zero Hunger), SDG 3 (Good Health and Well Being), SDG 8 (Decent Work and Economic Growth), 9 (Industry, Innovation and Infrastructure), and SDG 13 (Climate Action), and others, which have a clear link with investment, although all of the SDGs are relevant in the investment context.[174]

While the AfCFTA's Protocol on Investment is likely to cover only intra-African investment, the overall investment policy landscape is insightful. Currently, the investment policy landscape within Africa is fragmented and, in some cases shifting (such as South Africa's recent changes to its investment regime, discussed below). There are currently 854 bilateral investment treaties (BITs) (514 in force), of which 169 are intra-African (forty-four in force).[175]

While investment is regarded as critical to Africa's growth,[176] investment agreements, including the BITs, have recently been subject to criticism and targeted reform.[177] Several of the overarching criticisms of investment regimes in general center around their failure to consider Africa's unique circumstances;[178] their lack of ability to preserve policy or regulatory space and

[174] Kuhlmann, *supra* note 118, at 4.
[175] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 215.
[176] *See* Albert H. De Wet & Renee Van Eyden, *Capital Mobility in Sub-Saharan Africa: A Panel Data Approach*, 73 S. AFR. J. ECON. 22 (2005).
[177] *See* Nicolette Butler & Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organization*, 64 NETHERLANDS INT'L L. REV. 43 (2017).
[178] *See* Talkmore Chidede, *The Right to Regulate in Africa's International Investment Regime*, 20 OR. R. INT'L L. 437, 461 (2019).

the host state's right to regulate;[179] rules and procedures that favor foreign investors over domestic stakeholders;[180] inconsistency in arbitral jurisprudence under investor-state dispute settlement (ISDS);[181] lack of transparency in the selection of independent arbitrators and application of due process;[182] and failure to focus on areas that are central to development, such as infrastructure and downstream activities.[183]

Within Africa, national and regional initiatives, discussed below, have addressed some of these issues. At the same time, global reform efforts are also underway. UNCTAD Investment Policy Framework for Sustainable Development calls for a number of reforms, including, for example, legal reform and investment in key SDG-related sectors, including basic infrastructure, food security, climate change mitigation and adaptation, and health and education. [184]

ISDS has been a particular area of focus for reforms,[185] as has the movement away from fair and equitable treatment to a "right to regulate" model, as evidenced by recent changes to the SADC Protocol on Finance and Investment and more broadly.[186] As this section will highlight, the AfCFTA is likely to incorporate elements of national legal reforms (such as South Africa's 2015 Protection of Investment Act[187] and abrogation of BITs), regional investment approaches, and pan-

[179] African nations have been "rule takers" in investment treaties; while developed nations have entered into investment treaties to protect investors, African nations have entered into these agreements to attract investment, which have lacked "substantial provisions on the host state's right to regulate." *Id*. at 467.
[180] *See* Simon Lester, *Reforming the International Investment Law System*, 30 MD. J. INT'L L. 70 (2015).
[181] Butler & Subedi, *supra* note 177, at 44.
[182] Emily Osmanski, *Investor-State Dispute Settlement: Is there a Better Alternative?*, BROOK. J. INT'L L. 639, 658 (2018).
[183] *See* Alec R. Johnson, *Rethinking Bilateral Investment Treaties In Sub-Saharan Africa*, 59 EMORY L.J. 919, 921 (2010).
[184] United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, 123, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (2015).
[185] Osmanski, *supra* note 182.
[186] South African Development Community Protocol on Finance and Investment art. 14, Aug. 18, 2006(hereinafter SADC Protocol on Finance and Investment); Chidede, *supra* note 178, at 452.
[187] South Africa Protection of Investment, Act 22 of 2015 (S. Afr.).

African developments. With respect to the latter, the draft Pan African Investment Code (PAIC) is emerging as a "unique legal instrument" due to its "Africa-specific" and development-led model,[188] which could clearly establish important guidance for the AfCFTA's Investment Protocol. However, a decision was reached at the 2017 AfCFTA Negotiating Forum not to annex the PAIC to the AfCFTA at this stage since it is not yet a binding agreement.[189]

Based on legal trends in sub-Saharan Africa and other RTAs, the AfCFTA Protocol on Investment is likely to address the following issues:

1. **Tailored Dispute Resolution**: ISDS may not be included in the AfCFTA and could be replaced with state-to-state dispute resolution, which would be consistent with changes to African regional and national law (for example, the SADC Protocol on Finance and Investment and South Africa's revised Investment Act discussed below). This would represent a departure from exhaustion of local remedies before parties can proceed to arbitration,[190] as it removes the right of an investor to bring claims against host states in international tribunals.[191] It is also likely that alternative dispute resolution will be integrated into the AfCFTA, as reflected in the PAIC and SADC Model BIT, perhaps with a sharing of costs between the investor and the host state.[192] These approaches to dispute

[188] Makane Moïse Mbengue & Stefanie Schacherer, *The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime*, 18 J. WORLD INV. & TRADE 3, 414, 415 (2017).
[189] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 215.
[190] See Martin Dietrich Brauch, Exhaustion of Local Remedies in International Investment Law (2017), https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law.
[191] U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2017, at 110, U.N. Sales No. E.17.II.D.3 (2017).
[192] Jack J. Coe Jr., *Settlement of Investor-State Disputes through Mediation—Preliminary Remarks on Processes, Problems and Prospects*, *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 74 (R. Doak Bishop ed., 2009).

resolution and ISDS would also align with recent changes in other RTAs, as discussed below.

2. **Safeguarding the Right to Regulate**: As recent changes in African regional law, such as the SADC Protocol on Finance and Investment, highlight,[193] the right to regulate is likely to be an issue in the AfCFTA Investment Protocol. While some African regional rules include FET,[194] the right to regulate is gaining ground as a way to balance the rights of foreign investors with the rights and needs of domestic stakeholders, including investors. A related possible approach would be to include standard protection coupled with exceptions that act as safeguards for the host state.
3. **Establishment of an African Investment Institution**: This proposal has been floated by a number of institutions and could take a variety of forms, including even an African Investment Court.[195] If an African Investment Court is established (UNCTAD's 2015 "Investment Policy Framework for Sustainable Development" envisions replacing ad hoc arbitral tribunals with a standing court with appointed or elected judges and an appeals chamber), this would involve various legal considerations, such as the competence of the court and consensus from states for its establishment.[196]
4. **Inclusion of Sustainable Development Provisions**: Sustainable development provisions could be included in the AfCFTA Protocol on Investment, which would be consistent with the AfCFTA's reference to sustainable development. In addition, given recent changes in

[193] SADC Protocol on Finance and Investment, *supra* note 186, art. 6; *see also* Tinashe Kondo, *A Comparison With Analysis of the SADC FIP Before and After Its Amendment*, 20 POTCHEFSTROOM ELEC. L.J. (2017).
[194] For example, COMESA's Investment Agreement maintains FET. Investment Agreement for the COMESA Common Investment Area art. 14, May 23, 2007.
[195] U.N. Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, 108, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (2015).
[196] *See* Bernasconi, N., *"Rethinking Investment-Related Dispute Settlement," International Institute for Sustainable Development*, 6 INV. TREATY NEWS 2 (May 2015).

African national law, such as South Africa's move to abrogate its BITs and amend its investment regime, as discussed below, BIT reform is likely to connect with the AfCFTA discussions to a degree. Sustainable development may also be part of broader BIT reform (the SADC Model Bilateral Investment Treaty Template, discussed below, makes this link), and as BITs are reformed, transition and survival clauses could help ensure a smooth shift to new provisions as old treaties are replaced.

5. **Enactment of Special Provisions Extending Investment Protection to Small and Medium-Sized Enterprises (SMEs):** Integrating SME-focused provisions into the AfCFTA's Protocol on Investment would be in keeping with the agreement's overall development focus, and provisions could be designed to engage a broader range of stakeholders.

In particular, the removal of ISDS and focus on the "right to regulate" will likely be important issues for the AfCFTA, as discussions in the context of the PAIC,[197] the SADC Protocol on Finance and Investment,[198] and individual country experiences highlight.

1. Pan-African Investment Code

AfCFTA officials have emphasized the influential role the PAIC will have in drafting the AfCFTA's Protocol on Investment,[199] although it has not been formally linked to the AfCFTA as noted above. The PAIC text, which was finalized in late 2015 but is not yet in force, resulted from efforts to focus on trade and investment for economic growth and sustainable development in

[197] Mbengue & Schacherer, *supra* note 188, at 442.
[198] SADC Protocol on Finance and Investment, *supra* note 186, art. 14; *see also* Tinashe Kondo, *supra* note 193.
[199] INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, SHIFTING INTERNATIONAL INVESTMENT LAW TOWARD SUSTAINABLE DEVELOPMENT: STRATEGIES FOR RENEGOTIATION, REFORM AND DEFENCE 8 (2019), https://www.iisd.org/events/12th-annual-forum-developing-country-investment-negotiators..

Africa,[200] and contains substantial changes in investment rules seen as important to Africa, including incorporation of the right to regulate.[201] The PAIC provides for the introduction of investment incentives and incorporates MFN and national treatment, with exceptions based on the specific needs of member states,[202] reflecting the differentiated approach discussed in Section II.

The PAIC also provides for state-to-state dispute resolution through consultations, negotiations, or mediation and, if all else fails, recourse to the African Court of Justice for a final and binding decision.[203] States may still apply ISDS based on a governing agreement; however, disputes should first go through some form of alternative dispute resolution (this may include negotiation, consultation, and/or non-binding third party mediation or other mechanisms), with arbitration as a last resort. Arbitration will be governed by the United Nations Commission on International Trade Law (UNCITRAL) rules and is subject to the exhaustion of local remedies.[204]

2. African Regional Investment Law

There is also a body of African regional law on investment, which likely will be integrated into the AfCFTA Protocol on Investment based on AfCFTA Article 19, with national domestication and implementation to follow over time. Among the regional investment regimes, the SADC Protocol on Finance and Investment (SADC Protocol) would perhaps prompt the most significant changes.[205] The SADC Protocol reflects common MFN and national treatment

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[200] African Union Comm'n, Econ. Aff. Dep't, *Draft Pan-African Investment Code* (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf [hereinafter Pan-African Investment Code].

[201] Mbengue & Schacherer, *supra* note 188, at 439.

[202] Including preferential treatment in market schemes to encourage specific investors; financial incentives in the form of grants, loans and insurance at lower rates; and fiscal incentives, such as tax holidays and reduced tax rates. Pan-African Investment Code, *supra* note 200, arts. 6–8, 10.

[203] Pan-African Investment Code, *supra* note 200, art. 41.

[204] Pan-African Investment Code, *supra* note 200, art. 41.

[205] SADC Protocol on Finance and Investment, *supra* note 186.

protections[206] and prohibits expropriation or nationalization except for public purposes, following due process of law and "subject to the payment of prompt, adequate, and effective compensation."[207] The SADC Protocol also incorporates S&D through preferential treatment for LDCs in the form of non-reciprocity and cooperation and capacity building programs.[208]

Perhaps one of the most notable features of the SADC Protocol is that it no longer includes a provision on Fair and Equitable Treatment (FET), since SADC member states voted to delete that aspect of the Protocol in August 2016.[209] This change reflects an expanded right to regulate that affords greater policy space to SADC member states.[210] Generally, the right to regulate is not absolute and can be limited under investment agreements.[211] Investment tribunals have interpreted standard FET clauses to encompass a broad scope of states' obligations in publicly sensitive areas like renewable energy, waste management, public health issues, and access to water.[212] The SADC Protocol is clear in its right to regulate and also sets limits on foreign investment in sensitive sectors, which include restriction on foreign ownership in the extractives sector (such as mining and oil and gas), transport and telecommunications, banking and insurance, and media.[213]

In 2012, SADC also finalized a non-binding Model Bilateral Investment Treaty Template to be used as guidance for SADC member state governments with regard to future investment

[206] SADC Protocol on Finance and Investment, *supra* note 186, art. 6.
[207] SADC Protocol on Finance and Investment, *supra* note 186, art. 5.
[208] SADC Protocol on Finance and Investment, *supra* note 186, art. 20.
[209] SADC Protocol on Finance and Investment, *supra* note 186, art. 20.
[210] SADC Protocol on Finance and Investment, *supra* note 186, art. 14..
[211] *See* YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN INTERNATIONAL INVESTMENT LAW: THE SEARCH FOR BALANCE BETWEEN PUBLIC INTEREST AND FAIR AND EQUITABLE TREATMENT 1, 4 (Kluwer Law International, 2019).
[212] *See id.* at 2.
[213] SADC Protocol on Finance and Investment, *supra* note 186, art. 1.

treaty negotiations.[214] The Template explicitly recognizes the link between FDI and sustainable development. The drafting committee of the SADC Model BIT opted out of including an ISDS section, noting the trend among states and UNCTAD's recommendations in this area.[215] The SADC Model BIT recommends state-to-state dispute settlement, with preference given to alternative dispute settlement mechanisms other than arbitration, including mediation through recognized institutions (arbitration may be sought if a dispute cannot be settled if within a prescribed (three-year) time period).[216] In addition, the SADC Model BIT Template promotes exhaustion of local remedies, and an investor must demonstrate to a tribunal that there are no other legal measures available to resolve the underlying claim.[217]

COMESA also has an Investment Agreement, which recognizes the role of trade and investment in sustainable growth and development. In contrast to the SADC Protocol, though, the COMESA Investment Agreement does contain FET provisions.[218] COMESA's Investment Agreement also includes S&D, recognizing that member states are at different stages of development and providing flexibility based on differing situations.[219] COMESA member states are also required to afford national treatment,[220] with exceptions, to be assessed on a case-by-case basis including the possible effect on third parties and local communities.

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[214] The SADC Model BIT Agreement was developed in July 2012 by representatives from Malawi, Mauritius, Namibia, South Africa, and Zimbabwe. Southern African Development Community (SADC), Model Bilateral Investment Treaty Template With Commentary, at 3, (2012).

[215] U.N. Conference on Trade and Development, *UNCTADs Reform Package for the International Investment Regime*, 47 (2018).

[216] South African Development Community (SADC), Model Bilateral Investment Treaty Template with Commentary, art. 28 (2012).

[217] *Id.* art. 29.

[218] Investment Agreement for the COMESA Common Investment Area, *supra* note 194.

[219] *Id.* art. 14.3.

[220] *Id.* art. 17.

3. South Africa's Investment Law

In 2015, South Africa passed a new investment law, the South African Protection of Investment Act (2015 Investment Act), which substantially overhauled the country's investment regime and which highlights sustainable development and economic growth.[221] Perhaps the most significant change in South Africa's 2015 Investment Act was the removal of ISDS, which stemmed from a challenge by Italian investors to the country's Black Economic Empowerment (BEE) Act,[222] and the South African's government's assessment that the ISDS mechanism protected economic interests of investors while ignoring essential domestic needs.[223] The 2015 Investment Act calls for mediation and arbitration supported by the South African Department of Trade and Industry as recourse in the case of investment disputes,[224] although investors can also use alternative dispute settlement mechanisms available in the Republic of South Africa through a competent court, independent tribunal, or statutory body.[225] The South African government may also consent to international investment arbitration between South Africa and the investor's home state subject to the exhaustion of local remedies.[226] This shows a clear preference for domestic remedies to solve disputes between investors and host states, consistent with the emerging trend.[227]

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[221] South African Protection of Investment, Act 22, 2015 (S.Afr.).

[222] Piero Foresti, Laura de Carli v. Rep. of S. Afr., ICSID Case No. ARB(AF)/07/1, Award of the Tribunal, ⁋ 64 (Aug. 4, 2010), .

[223] Mmiselo Freedom Qumba, *South Africa's Move Away from International Investor-State Dispute: a Breakthrough or Bad Omen for Investment in the Developing World?*, 52 DE JURE L.J. 358, 360 (2019).

[224] Protection of Investment Act, *supra* note 187, § 13.

[225] *Id.* at § 13(5).

[226] *Id.* at § 13(4).

[227] In 2018, Tanzania, a SADC member state, carried out reforms designed to reduce exposure to international investment arbitration claims, including the elimination of "international arbitration" from Public-Private Partnership (PPP) Agreements. Ibrahim Amir, *A Wind of Change! Tanzania's Attitude Towards Foreign Investors and International Arbitration*, (December 28, 2018), http://arbitrationblog.kluwerarbitration.com/2018/12/28/a-wind-of-change-tanzanias-attitude-towards-foreign-investors-and-international-arbitration/. Under amendment to Tanzania's PPP law (Section 22, Tanzania's Public-Private Partnership Law, as amended, Act No. 9), foreign parties to PPP Agreements can only seek recourse under Tanzanian local law.

While an exhaustive assessment of other countries' investment laws was beyond the scope of this paper, other African countries' laws do reflect a preference for domestic remedies and alternative forms of dispute resolution as well.[228]

4. Investment Reform in Other RTAs

The Comprehensive Economic Trade Agreement (CETA) between Canada and Europe is the first RTA to remove the traditional ISDS provision and replace it with a two-tiered tribunal system with appellate review for the settlement of disputes.[229] The permanent first instance investment tribunal is authorized to hear investment matters, excluding those of a purely contractual nature or fraudulent or abusive claims,[230] and the appellate tribunal may review issues of law and fact based on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), such as manifest excess of powers.[231] This change also came about in the face of criticism on ISDS, causing Canada and the EU to negotiate an updated form of the agreement and remove ISDS.[232] Notably, the CETA also contains provisions for parties who may not have the financial resources to institute a dispute, particularly SMEs, and for claims with de minimis damage levels (in such circumstances, a case may be heard by a third country member upon agreement by the disputing parties, with respondents to such a case required to give "sympathetic consideration" to the request).[233] CETA contains common

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[228] *See, e.g.*, Law on Investment, Law No. 3/93, art. 25 (Mozam.); Investment Code, Law No. 3/2011, art. 19 (Guinea-Bissau); Investment Code, Law 1/24, art. 17 (Burundi).

[229] Elsa Sardinha, *Towards a New Horizon in Investor–State Dispute Settlement? Reflections on the Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA)*, 54 CAN. Y.B. INT'L L. 311, 365 (2016).

[230] *See* Comprehensive Economic and Trade Agreement, Can.–E.U., art. 29.2, Oct. 30, 2016, 2017 O.J. (L11) 23.

[231] Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 52(1)(b), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[232] Sardinha, *supra* note 229, at 314.

[233] Comprehensive Economic and Trade Agreement, Can.–E.U., *supra* note 230, arts. 8.27(9), 8.23(5).

precondition for parties to undertake consultations before proceeding to arbitration;[234] mediation, although not mandatory like consultations, is recognized as an alternative form of dispute settlement enabling parties to shift from a costly arbitral process.[235]

The investment provisions in the newly signed United States-Mexico-Canada Agreement (USMCA) signal a significant change in the ISDS landscape for North America.[236] Canada has completely withdrawn from ISDS under the new treaty, which is a notable departure from earlier practice under the North American Free Trade Agreement (NAFTA),[237] and has consented to ISDS only for legacy investment claims that will expire three years after NAFTA's termination.[238] Investors will have to resort to local remedies and use Canadian courts to settle their investment claims under the USMCA.[239] Disputes between the United States and Mexico are subject to limited ISDS for a subset of industries (petrochemicals, telecommunications, infrastructure, and power generation)[240] dependent upon provisions in the annexes,[241] and claims are restricted to an "Annex Party" (only the United States and Mexico under Annex 14-D, for example).[242] The USMCA does

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[234] *Id.* art. 8.22(1)(b).

[235] *Id.* art. 8.20(1).

[236] Agreement between the United States of America, the United Mexican States, and Canada (USMCA) Ch.14, Can.–Mex.–U.S., Dec. 13, 2019. [hereinafter USMCA].

[237] Chapter 14 of the USMCA replaces Chapter 11 of the NAFTA. Under NAFTA Chapter 11, investment provisions applied to "investors of another Party" and "investment of investors of another Party" are subject to carve outs.

[238] USMCA, *supra* note 236, at Annex 14-C ¶ 3.

[239] USMCA, *supra* note 236, at 14.2(4).

[240] Ana Swanson & Jim Tankersley, *Trump Just Signed the U.S.M.C.A.: Here's What's in the New NAFTA*, N.Y. TIMES (Jan. 29, 2020), https://www.nytimes.com/2020/01/29/business/economy/usmca-deal.html.

[241] Claims can only be brought under transition provisions contained in Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), and Annex 14-E (Mexico–United States Investment Disputes Related to Covered Government Contracts).

[242] Martin J. Valasek, Alison G. FitzGerald & Jenna Anne de Jong, *Major changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement*, NORTON ROSE FULBRIGHT (Oct. 2018), https://www.nortonrosefulbright.com/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement.

recognize FET as interpreted under customary international law,[243] consistent with the general practice of states,[244] and also recognizes the parties' inherent right to regulate, resolving to preserve the flexibility of the parties to set legislative and regulatory priorities and protect legitimate public welfare objectives, such as health, safety, and environmental protection.[245]

It is likely that the AfCFTA Protocol on Investment will be shaped by both African regional trends in investment law as well as international developments in investment rules. Tailored S&D provisions should also be incorporated into the AfCFTA Protocol on Investment, although, once again, African nations and stakeholders should use development of the AfCFTA Protocol on Investment to address their needs through the rulemaking process. While international investment law will likely continue to be heavily debated, the AfCFTA could be a vehicle for further change and a model for future trade agreements.

C. *Competition Law*

Although competition law has not received the same degree of international focus that IP and investment law have, it is becoming more prominent in bilateral and free trade agreements.[246] The Agreement establishing the AfCFTA states that the members will "cooperate on competition,"[247] which is the third of the three substantive issues included for negotiation of Protocols in Phase II negotiations. It is not clear yet whether AfCFTA partner states will adopt binding commitments under the Protocol on Competition Policy or simply agree to cooperate on

[243] USMCA, *supra* note 236, art. 14.6(2).
[244] *Id.* at Annex 14-A.
[245] *Id.* at Preamble. Art. 14.16 further states, "Nothing in this [Investment] Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives."
[246] *See* FRANCOIS-CHARLES LEPREVOTE, SVE FRISCH & BURCU CAN, E15 INITIATIVE, COMPETITION POLICY WITHIN THE CONTEXT OF FREE TRADE AGREEMENTS (International Centre for Trade and Sustainable Development & World Economic Forum 2015).
[247] AfCFTA, *supra* note 7, art. 4(c).

certain aspects of competition law and policy.[248] There is currently quite a bit of divergence in African legal and regulatory systems related to competition, which will necessitate application of both traditional S&D and proactive rules-based S&D. According to a recent report by UNECA, the AU, the African Development Bank (AfDB), and UNCTAD, as of 2019, out of fifty-four AU countries surveyed, twenty-three had both a competition law and authority, ten had a law but no authority, and seventeen had no competition law at all (and another four had legislation under development).[249]

Competition law will become more important as markets grow and become more integrated, enhancing access to markets, finance, and technology for firms that can take advantage of economies of scale.[250] However, other businesses, including SMEs, may find it more difficult to benefit from trade harmonization and liberalization.[251] In order to ensure positive gains for large firms and SMEs alike, African experts have stressed that competition policies and consumer protection rules will be needed to complement existing laws.[252] An increased focus on competition law, particularly if inclusive, will also help African nations achieve a number of the SDGs, such as SDG 1 (No Poverty) and SDG 8 (Decent Work and Economic Growth), among several others.

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[248] Trudi Hartzenberg, *Cooperation on Competition in the AfCFTA*, TRADE L. CTR. (May 17, 2019), https://www.tralac.org/blog/article/14078-cooperation-on-competition-in-the-afcfta.html.
[249] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at xv; *see also* SIGNE & VAN DER VEN, *supra* note 12; *Developments in Competition Law in Africa*, LEX AFRICA (Aug. 22, 2018), https://www.lexafrica.com/2018/08/developments-in-competition-law-in-africa/.
[250] *See* Robert D. Anderson, William E. Kovacic, Anna Caroline Müller & Nadezhda Sporysheva, *Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection*(World Trade Organization Economic Research and Statistics Division, Staff Working Paper No. ERSD-2018-12,Oct. 31, 2018), https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf.
[251] Mesut Saygili, Ralf Peters & Christian Knebel, *African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions*, 7 U.N. Doc. UNCTAD/SER.RP/2017/Rev.1 (Feb. 2018), http://unctad.org/en/PublicationsLibrary/ser-rp-2017d15_en.pdf.
[252] *Id.*

Some countries and regions, the EU in particular, have been pressing to integrate competition policy into international trade law for a number of years. Some time ago, a multilateral agreement on competition was proposed to address the gap between regulation of state-to-state practices at the WTO level and private anti-competitive practices[253] through a common legal approach (the latter practices would fall under national law).[254] In 1996, this proposal became part of the package of "Singapore Issues" at the WTO Singapore Ministerial Conference, where a WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established.[255] The WGTCP was to ensure that development considerations were central to evaluation of anti-competitive practices and any other areas that need to be addressed under the WTO framework.[256] Competition law, covering a range of issues and incorporating S&D provisions, was also part of the agenda at the 2001 WTO Ministerial Conference in Doha;[257] however, the issue was officially dropped from the work program of the Doha Round due to objections from developing countries, due in part to lack of capacity to implement changes in

[253] Aditya Bhattacharjea, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9 J. INT'L ECON. L. 293, 295 (2006).

[254] MARC LEE & CHARLES MORAND, COMPETITION POLICY IN THE WTO AND FTAA: A TROJAN HORSE FOR INTERNATIONAL TRADE NEGOTIATIONS? 14 (2003).

[255] World Trade Organization, Ministerial Declaration of 18 December 1996, WTO Doc. WT/MIN(96)/DEC, 36 I.L.M. 218 (1996) at ¶ 20 [hereinafter Singapore Declaration].

[256] *Id.*

[257] Paragraph 25 of the Doha Ministerial Declaration stated that the WGTCP "will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them." Doha Declaration, *supra* note 67; World Trade Organization Working Group on the Interaction between Trade and Competition Policy, Report on the meeting of 1–2 July 2002, WT/WGTCP/M/18, ¶44 (2002) (revealing that certain proposals for competition policy were dropped such as export cartel exemptions which would bring their attention to domestic authorities however countries like the United States did not see the legal basis for taking action against anticompetitive practices that do not have domestic effects). The antidumping provision that sought to shield competitors preventing abuse that is present in antidumping cases were shut down in a WTO Appellate Body Report. Appellate Body Report, *United States – Antidumping Act of 1916*, ¶133, WTO Doc. WT/DS136/AB/R &WT/DS162/AB/R (adopted Sept. 26, 2000) (stating that antidumping claims can only be brought under Article VI of GATT and the Anti-Dumping Agreement.)

competition law, insufficient support from the United States,[258] and concerns with difficulties countries could face harmonizing existing national regimes into a single standard.[259]

The inclusion of competition in AfCFTA Phase II is notable, and based on legal trends in sub-Saharan Africa and other RTAs, the AfCFTA's Protocol on Competition Policy is likely to address the following issues:

1. **Tailored Approach to Key Competition Law Issues:** These might include regulation of cartels, merger control, abuse of dominance, and anti-competitive agreements, tailored to Africa's particular circumstances.[260]
2. **Incorporation of Consumer Protection Provisions:** Consumer protection is reflected in the rules of several African RECs (i.e., COMESA, EAC, and SADC) as well as recent RTAs like the USMCA and CPTPP, as discussed below. Due to the unique focus of competition law and consumer protection, consumer protection should be approached separately from other competition issues, such as through a separate law.[261] In addition, given the increasing importance of digital trade, consumer protection should also extend to the digital space.[262] This should also be explicitly provided for in the AfCFTA Protocol on Competition Policy and subsequent work on e-commerce in Phase III.[263]
3. **Coordination Among Competition Authorities:** African competition authorities exist at the national and regional levels, with exceptions as noted, and these authorities are

[258] *See, e.g.*, Bhattacharjea, *supra* note 253, at 294.
[259] Gary Clyde Hufbauer & Jisun Kim, *International Competition Policy and the WTO*, PETERSON INST. INT'L ECON. L. (Apr. 11, 2008).
[260] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 259.
[261] *Id.* at 168.
[262] As a relevant benchmark, the CPTPP and USMCA contain consumer protection provisions for the digital economy. CPTPP, *supra* note 172, art. 14.4; USMCA, *supra* note 236, art. 19.7.
[263] *See* CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE AND NEW MARKETS LAB, DIGITAL ECONOMY ENABLING ENVIRONMENT GUIDE: KEY AREAS OF DIALOGUE FOR BUSINESS AND POLICYMAKERS (2018).

increasingly evaluating mergers and prohibited practices.[264] Some of Africa's current regional blocs, such as COMESA, ECOWAS, and CEMAC, have established regional competition authorities, but institutional gaps persist at the regional and national levels. Provisions in the USMCA and CPTPP that require the establishment of national competition authorities and coordination in competition law matters could also provide a reference point for closing the gap in national law while also establishing greater coordination on competition law.[265] Similar to IPR, different approaches could be pursued, including a pan-African competition institution (which may be difficult in the near term), competition cooperation, and/or a pan-African institution following integration through cooperation.[266]

4. **Provisions Tailored to SMEs**: As is true with other measures, the Protocol on Competition Policy should recognize special circumstances of SMEs and other entities, including the informal sector. Provisions could include a de minimis standard that would exempt SMEs from the enforcement of domestic anticompetition agencies, reducing the regulatory burden on smaller businesses and focusing actions on larger companies that would be most likely to dominate the market.[267]
5. **Focus on Key Sectors Such as Agriculture**: Agriculture could be a particular focus given the importance of the sector to food security and, as UNCTAD has noted, the challenges

[264] BAKER MCKENZIE, AN OVERVIEW OF COMPETITION AND ANTI-TRUST REGULATIONS IN AFRICA (Aug. 2019).
[265] USMCA, *supra* note 236, art. 21.1; CPTPP, *supra* note 172, art. 16.1.
[266] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 200.
[267] Bhattacharjea, *supra* note 253, at 317.

posed by more dominant larger firms that are able to exercise their buying power to affect prices and other market conditions.[268]

6. **Flexible Provisions for Enactment and Implementation of Competition Rules at the National Level:** Flexibility in competition rules would align with the differentiated approach to S&D discussed in Section III and would give countries time to make changes to national rules depending upon the status of their current legal regime. UNECA, the AU, the AfDB, and UNCTAD have advocated for a five-year transition period,[269] although, as experience with WTO disciplines has shown, legal changes and implementation of rules can sometimes take a number of years, so a longer transition period could perhaps be considered from the outset to reflect the amount of time it can take to put in place and implement new laws.[270]
7. **Differentiation in S&D**: In the area of competition law, countries are at noticeably different stages, necessitating a differentiated approach to S&D in line with the AfCFTA's provisions as discussed in Section II.[271] A differentiated approach could enable countries to meet obligations gradually as they build capacity,[272] and it would also allow for tailored S&D regarding flexibility and capacity building support.[273]

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[268] Shyam Khemani, *Applications of Competition Law: Exemptions and Exceptions* 28–29, U.N. Doc. UNCTAD/DITC/CLP/Misc.25 (United Nations Conference on Trade and Development 2002).
[269] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 78.
[270] For example, the S&D transition periods under the WTO TRIPS Agreement have been extended, in some cases several times, to account for a longer time period needed for implementation. *See* Gervais, *supra* note 116, at 509.
[271] *See, e.g.*, Global Forum on Competition, OECD CCNM/GF/COMP(2001)2/REV1 (Oct. 15, 2001), https://www.oecd.org/competition/globalforum/GlobalForum-October2001.pdf.
[272] *See* Hunter Nottage, *Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment*, J. INT'L ECON. L., Mar. 2003, at 23–47.
[273] For example, UNCTAD offers capacity building and technical assistance support on competition law and policy based on the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by General Assembly Resolution 35/63 of December 5, 1980. *See* U.N. Conference on Trade and Development, *Capacity Building and Technical Assistance on Competition Law and Policy*, United Nations, TD/B/C.I/CLP/43 (April 26, 2017) at 2.

8. **Provisions on Remedies and Resolution of Disputes**: These could be needed to both address violators and provide redress to injured parties (including consumers). In order to establish a system that is manageable given differences in national law and enforcement, civil penalties may be preferable to criminal penalties.[274]
9. **Technical Assistance and Capacity Building to Bridge Gaps in Knowledge and Resources**: This will be required in order to allow countries to build systems for competition law and participate in a regional or continental competition framework.[275]

1. African Regional Competition Frameworks

Africa has a number of regional competition regulators, including authorities in WAEMU and CEMAC, the East African Competition Authority (EACA), and the COMESA Competition Commission.[276] Cooperation among these authorities is recognized through various Memoranda of Understanding (MOUs).[277]

Recently, the COMESA Competition Commission adopted new Guidelines on Market Definition, Restrictive Business Practices and Abuse of Dominance aimed to provide clarity on interpretation of the COMESA Competition Regulations and Rules of 2013 (2013 COMESA Competition Regulations), as well as predictability for the COMESA Competition Commission. The COMESA Competition Commission was initially concentrated on merger review and has recently started investigation of restrictive practices.[278] It also provides training to national competition authorities.[279] COMESA's 2013 Competition Regulations prohibit cartels and any

[274] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 164.
[275] Doha Declaration, *supra* note 67, at 5.
[276] BAKER MCKENZIE, *supra* note 264, at 2.
[277] Pieter Steyn, *African Competition Law Developments in 2018 and the Outlook for 2019*, LEX AFRICA, (Feb. 12, 2019).
[278] Hartzenberg, *supra* note 248.
[279] *Id.*

concerted practice that distort trade[280] or competition in the regional market.[281] The COMESA Competition Regulations also prohibit the abuse of dominant position where an undertaking "occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors."[282]

The EAC enacted a regional Competition Act in 2006, which prohibits unfair business practices, price fixing, and other anti-competitive behavior.[283] Violations of the EAC Competition Act include the abuse of dominant position, exclusion of competitors from the market, and directly or indirectly imposing unfairly high or low purchasing prices.[284] The Scope of the EAC Competition Act also extends to mergers and acquisitions and includes a notification requirement upon conclusion of a merger or acquisition,[285] which may not be permitted if it leads to a dominant position in the market which would have the effect of lessening competition. The East African Community Competition Authority (EACCA) is established under the EAC Competition Act and has jurisdiction over competition matters, consumer welfare, state subsidies, and public procurement, as well as, to an extent, merger reviews.[286]

ECOWAS has had competition rules in place since 2008, and, in May 2019, the ECOWAS Regional Competition Authority (ERCA) was established for their implementation.[287] ERCA

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[280] COMESA Treaty art. 55(1), Nov. 5, 1983, https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf.
[281] COMESA Treaty art. 55(1)(b); *see also* ELEANOR FOX AND MOR BAKHOUM, MAKING MARKETS WORK FOR AFRICA: MARKETS, DEVELOPMENT, AND COMPETITION LAW IN SUB-SAHARAN AFRICA (2019).
[282] Common Market for Eastern and Southern Africa (COMESA), Competition Regulations, art. 17(1)(a), (Nov. 20, 2012) https://www.comesacompetition.org/wp-content/uploads/2014/04/2012_Gazette_Vol_17_Annex_12-COMESA-Competition-Regulations-as-at-December-2004.pdf.
[283] The East African Community, East African Competition Act § 5, Nov. 13, 2006.
[284] *Id.* ¶ 8.
[285] *Id.* ¶ 11.
[286] *Id.* ¶ 44.
[287] Prince Ifeanyi Nwankwo, *Mergers and Acquisitions under ECOWAS Competition Law*, HARV. AFR. POL'Y J., (2019).

regulates mergers that have trade distorting effects and result in the abuse of dominant market position,[288] protects consumer welfare, and promotes economic efficiency by prohibiting anticompetitive behavior that affects trade among ECOWAS States.[289]

SADC has also been developing a regional competition regime, which is slated for adoption in 2020.[290] Once established, it would regulate unfair business practices and promote competition, pursuant to the 2009 SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

These differing regional competition regimes do call into question how a mechanism for harmonization could be designed, and a pan-African authority could take different forms as noted above. This will likely be one of the areas of focus of the AfCFTA Protocol on Competition Policy.[291]

2. African National Competition Legislation

An exhaustive review of African competition law is not possible in this Article, but several practices are worth noting. Kenya has a competition authority and quite comprehensive Competition Act, for example, which forbids the use of restrictive trade practices and any other competition distorting practices,[292] prevents agreements that could limit competition in Kenya (including agreements to fix selling or purchase prices),[293] and protects against abuse of dominant position in the Kenyan market (including abuse of intellectual property rights).[294] Notably,

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[288] Economic Community of West African States, Supplementary Act A/SA.1/06/08 Adopting Community Competition Rules and The Modalities of Their Application Within Ecowas, Dec. 19, 2008, art. 7.
[289] *Id.* art. 3.
[290] Hartzenberg, *supra* note 248.
[291] United Nations Econ. Comm'n for Afr. et al., *supra* note 120, at 200.
[292] The Competition Act (Act No. 12/2010) (Kenya), Part III.
[293] *Id.* ¶ 21.
[294] *Id.*

consumer protection is also enshrined in Kenya's Competition Act, provided that goods meet relevant standards, such as product safety standards.[295]

The laws of Botswana and Namibia are also notable. Botswana's Competition Law, which was enacted in 2009 and amended in 2018, includes provisions for price fixing, mergers, bid rigging, decreased market competition, and abuse of dominant position,[296] and public interest factors may be taken into consideration, such as the effect on the welfare of consumers, SMEs, and employment.[297] Namibia's Competition Law**,** which was enacted in 2003, prohibits distortive agreements, except to the extent that they would benefit small firms or historically disadvantaged groups.[298]

3. Competition Provisions in Other RTAs

Competition provisions in other RTAs could also be instructive for the AfCFTA and adapted to the unique circumstances of the African continent. The USMCA, for example, requires that member states enact national legislation and establish national enforcement authorities to encourage competition and prohibit anticompetitive behavior (each party is also required to enact consumer protection laws to prohibit fraudulent and deceptive commercial activities), while also calling for cooperation among parties and their competition law authorities in order to deliver effective enforcement and collaboration in consumer protection policies.[299] The parties to the

[295] *Id.* ¶ 55.
[296] Competition Act (Act No. 17/2009) (Bots.).
[297] *Id.* ¶ 52.
[298] Competition Act (Act No.2/2003) (Namib.), Part 3.28(3)(b).
[299] USMCA, *supra* note 236, art. 21. The USMCA also includes transparency provisions, and parties are required to share information about national competition law enforcement policies and practices as well as exemptions and immunities.

USMCA may request consultations to address any issues that arise in relation to competition law and policy.[300]

The CPTPP also includes a chapter on competition policy that requires parties to establish competition authorities and enact national competition laws to prohibit anticompetitive business behavior.[301] Like the USMCA, the CPTPP calls for cooperation among the parties' competition authorities to ensure effective enforcement[302] and emphasizes the importance of consumer protection through national legislation addressing deceptive and fraudulent commercial practices that cause, or threaten to cause, harm to consumers.[303]

As the AfCFTA Protocol on Competition Policy is considered, traditional S&D approaches will be necessary given the variation in rules and practices in this area and countries' needs for flexibilities in developing and implementing competition law regimes. However, a proactive, rules-based approach to S&D will also be critical, and the AfCFTA Protocol on Competition Policy could be a driving force for developing competition law to benefit African nations and stakeholders. Good practices from the AfCFTA's partner states, including those in countries like Botswana and Namibia referenced above, should be catalogued and incorporated. Because the AfCFTA has prioritized this area of law, it is possible that the AfCFTA will not only drive change in competition law within Africa, but it might help put this issue back on the international agenda, perhaps in a more development-centered way, as well.

[300] USMCA, *supra* note 236, art. 21.6.
[301] CPTPP, *supra* note 172, art. 16.1.
[302] *Id.* art. 16.4.
[303] *Id.* art. 16.6.

IV. CONCLUSION: TOWARD A NEW MODEL FOR TRADE AND SUSTAINABLE DEVELOPMENT

As the AfCFTA is rolled out and implemented, it could have a profound impact on international law, reshaping economic and trade rules for Africa and beyond. Given its size, scope, and approach, the AfCFTA holds the potential to break new ground in different areas of substantive law and close the loop between trade rules and the SDGs.[304] However, even though the AfCFTA holds great promise, it still must contend with challenges, such as differences in countries' legal capacities, the need for inclusive rulemaking at the continental level, and the already complicated legal landscape of the RECs.

While confronting these issues will continue to require trade and development flexibility, consistent with traditional S&D, the AfCFTA does not stop there. It moves beyond past models to take a more forward-looking view of the role that law will play in shaping opportunities for the continent and AfCFTA partner states. The shift from "reactive" S&D, which has mainly carved out exceptions to the rules, to "proactive" S&D, focused on design and application of the rules themselves, can be seen in the AfCFTA's structure and text.[305] Importantly, this shift signals that the AfCFTA will establish a new normative basis for promoting trade and development through the rules themselves, marking a significant departure from past approaches and putting Africa in the driver's seat as trade and investment law continues to evolve internationally.

Deeper negotiation of the rules-based issues highlighted in this paper is yet to come, and, while this article sheds some light on the legal practices and trends that are likely to shape the AfCFTA's forthcoming phases, ultimately law in these areas will be determined by national and regional policy priorities and regulatory practices. As trade negotiations in other parts of the world

[304] *See* Kuhlmann, Carpentier, Francis, & Le Graet, *supra* note 43.
[305] AfCFTA, *supra* note 7, art. 19.

have highlighted, it would be beneficial to make this process as participatory, inclusive, and balanced as possible.[306] Also, as the limited comparative assessment included in this Article highlights, good practices can and should come from a range of legal systems and practices, and these should also be catalogued and considered to a greater degree.

The process of changing law through the AfCFTA will not be without its challenges. First, the parties to the AfCFTA will have to determine how to create continental law out of a set of sometimes fragmented regional legal agreements. The AfCFTA text specifically refers to the FTAs created by the RECs as building blocks for the AfCFTA,[307] so it is clear that the existing system will provide a foundation for the new agreement. While the RECs have made significant progress over the past several years, their challenges with fragmentation and incomplete implementation have also been well documented.[308] The AfCFTA can build upon these lessons learned, as well as the experiences of other global regional trading blocs where relevant, as it pursues deeper integration. Implementation issues will also intensify due to the number of countries involved and diversity in legal systems. While these challenges can be overcome, doing so will require a better understanding of the comparative legal landscape assessed in this Article along with a deeper understanding of how trade agreements, and the substantive law they generate, can be effectively implemented in practice.

Finally, the AfCFTA, while perhaps the most promising trade and sustainable development model to date, does not yet address all areas of law important to trade and sustainable development. For some issues, like gender, that are mentioned in the AfCFTA's principles, the AfCFTA may have to chart a new path forward, since real progress in changing the rules will require much more

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[306] *See* Kuhlmann, Carpentier, Francis, & Le Graet, *supra* note 43.
[307] AfCFTA, *supra* note 7, art. 5(b).
[308] *See* Iwa Salami, *Legal and Institutional Challenges of Economic Integration in Africa*, 17 EUR. L.J. 667 (2011).

than just affirmations of support. Incorporating gender equality through the rules, consistent with the AfCFTA's objective and SDG 5 (Gender Equality),[309] would be a notable innovation. The approach to gender in the Canada-Chile, Chile-Uruguay, and Canada-Israel Free Trade Agreements provides some insight, but a more comprehensive approach on trade and gender would be beneficial and could be adapted to an African context.[310] Labor and work could also be more fully integrated,[311] in line with SDG 8 (Decent Work & Economic Growth), taking note of relevant recent developments, including the USMCA, as appropriate.[312]

Further focus in other areas would also help the AfCFTA deliver on its goal of sustainable development. As the global COVID-19 pandemic has highlighted, a more robust approach on trade and public health in line with SGD 3 (Good Health and Well Being) is now critical. The AfCFTA's "building block" approach to continental integration could leverage regional value chains in order to connect net exporting areas with net importing countries and ensure delivery of needed medicines and supplies. This would depend, however, upon addressing rules in a number of areas, including market access, export restrictions, IP, and regulation of medicines and medical equipment. Some elements of such a strategy could be addressed through Phase II negotiations, such as IP as discussed in Section III. However, consistent with the approach to development-led rulemaking discussed in this Article, African nations and RECs could also take the lead in driving new rules to respond to the COVID-19 global health crisis.

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[309] AfCFTA, *supra* note 7, art. 3(e).

[310] *See, e.g.*, Sama Al Mutair, Dora Konomi, & Lisa Page, *Trade & Gender: Exploring International Practices That Promote Women's Economic Empowerment*, TRADELAB (May 17, 2018), https://www.tradelab.org/single-post/2018/05/17/Trade-and-Gender-1.

[311] *See, e.g.*, U.N. Economic Commission for Africa & Friedrich Ebert Stifting, *The Continental Free Trade Area (CFTA) in Africa—A Human Rights Perspective* (Jul. 2017), https://repository.uneca.org/handle/10855/24089.

[312] Alvaro Santos, *The New Frontier for Labor in Trade Agreements*, *in* WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 6 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019).

On a related note, a comprehensive, continental approach to food security, aligned with the Comprehensive Africa Agriculture Development Programme (CAADP), would also help deal with ongoing food insecurity and market shocks, including the pandemic and recent locust infestation, in order to further deliver on SDG 2 (Zero Hunger). It will be important that the rules on food security go beyond market access and food safety standards to address other issues related to food insecurity, such as farmers' needs (including rules affecting access to agricultural inputs,[313] agricultural finance,[314] and agricultural logistics), regulatory aspects of cross-border agricultural trade corridors (although some of these issues are reflected in the Annexes to the AfCFTA),[315] biodiversity, competition law and policy, land acquisition in investments, agricultural export bans, and a balance between rules and policy space.[316] While it is notable that some issues related to food security, such as genetic resources and competition law, could be also addressed through Phase II rules-based negotiations, this cannot take the place of a full food security strategy, which will require looking beyond standards and market access to address other issues in an inter-connected market where some countries are net food producers and others net food consumers.

Issues related to environmental sustainability and climate change are also not a focus in the current AfCFTA text, although the AfCFTA does affirm partner states' right to regulate in this area.[317] Future negotiating rounds could incorporate rules in line with SDG 13 (Climate Action),

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[313] This area of law is included in a number of existing RTAs, including COMESA, ECOWAS, and SADC, with legislation at an advanced stage in the EAC as well; however, the approaches across these RECs do differ somewhat, even though common legal elements exist. *See, e.g.*, KUHLMANN, *supra* note 28.

[314] Edward Katende & Katrin Kuhlmann, *Building a Regulatory Environment for Agricultural Finance*, (June 2019) (paper presented to Uganda Banker's Association), https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_a0e1d52d6040405c86334e2bfd8084dc.pdf.

[315] Katrin Kuhlmann, *Africa's Development Corridors: Pathways to Food Security, Regional Economic Diversification, and Sustainable Growth*, *in* FILLING IN THE GAPS: CRITICAL LINKAGES IN PROMOTING AFRICAN FOOD SECURITY 10 (2012).

[316] *See* KUHLMANN, *supra* note 18.

[317] AfCFTA, *supra* note 7, at Preamble.

including those to address barriers to trade in environmental goods and services,[318] phase out fossil fuel subsidies, and institute voluntary eco-labeling programs, taking into account S&D[319] and perhaps drawing upon the Agreement on Climate Change, Trade, and Sustainability (ACCTS) which is planned for signature in 2020.[320] The AfCFTA could also consider provisions to incorporate the circular economy, in support of SDG 12 (Responsible Consumption and Production) and 13 (Climate Action), and address overfishing, in line with multilateral initiatives, given the importance of SDG 12, 13, and 14 (Life Below Water). In addition, the AfCFTA could further align with the SDGs by building an African tailored and designed approach to rule of law, anti-corruption (which does appear in the USMCA), and institutional governance in connection with SDG16 (Peace, Justice, and Strong Institutions).[321]

Finally, given the importance of electronic commerce and cross-border services,[322] it is promising that the AfCFTA will address digital economy and e-commerce issues as is planned for Phase III.[323] The development benefits of digital transformation are significant and include creating jobs, encouraging entrepreneurship, integrating women into the workforce, and improving

[318] Environmental goods and services, according to a common definition developed in the 1990s by the Organization for Economic Co-operation and Development (OECD) and Eurostat (the EU's statistical agency), encompass goods and services to measure, prevent, limit, minimize or correct environmental damages to water, air, and soil as well as problems related to waste, noise and eco-systems. Examples include products related to clean energy generation, such wind turbines, and services to monitor cities' water supplies or support solar projects.

[319] Environmental agreements also contain some elements of S&D, although, similar to trade agreements, the trend is towards a more differentiated approach and less than full reciprocity. *See* Pauwelyn, *supra* note 82.

[320] Ronald P. Steenbilk & Susanne Droege, *Time to ACCTS? Five Countries Announce New Initiative on Trade and Climate Change*, INT'L INST. FOR SUSTAINABLE DEV. (Sept. 25, 2019), https://www.iisd.org/blog/time-accts-five-countries-announce-new-initiative-trade-and-climate-change.

[321] Kuhlmann, Carpentier, Francis & Le Graet, *supra* note 43.

[322] The World Bank has predicted significant gains for Africa through digital connectivity, with a global per capita growth rate of 1.5 per year and reduction in poverty by 0.7 percent per year. World Bank, *Digital Economy for Africa Initiative: Every African Individual Business and Government to be Digitally Enabled by 2030* 4, (June 24, 2019), http://pubdocs.worldbank.org/en/312571561424182864/062519-digital-economy-from-africa-initiative-Tim-Kelly.pdf.

[323] Ashley Hope, *AfCFTA and Digital Trade Today*, TRALAC (Working Paper No. T20WP01, 2020), at 6, https://www.tralac.org/news/article/14400.

access to finance and food.[324] Building the enabling environment for digital trade would help African governments achieve several SDGs through a technology focused lens,[325] especially SDG 1 (No Poverty), SDG 5 (Gender Equality), SDG 9 (Industry, Innovation and Infrastructure), and SDG 10 (Reduced Inequality), among others. [326] Regulation in this area could include creating a common framework for core regulatory areas in the digital economy, namely consumer protection, data protection, cyber security, and electronic transactions (which are becoming increasingly important, as the 2020 COVID-19 global health crisis has highlighted).[327] Although not all African countries currently have regulation in these areas, different approaches to digital regulation are already appearing throughout Africa, ranging from umbrella laws that cover all or most core regulatory areas in the digital space to separate laws for different aspects of digital regulation.[328] Some regional rules exist as well, such as the ECOWAS harmonized regulation of data protection, which provides for an "adequate level of protection for privacy, freedom and the fundamental rights of individuals."[329] As the discussion on IP, investment, and consumer protection highlighted, the AfCFTA might have to consider the best approach to a continental rules-based framework that can also strike a balance with domestic regulatory autonomy.[330] Digital inclusion could also be a

[324] Kuhlmann, *supra* note 118, at 3.

[325] CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE AND NEW MARKETS LAB, DIGITAL ECONOMY ENABLING ENVIRONMENT GUIDE: KEY AREAS OF DIALOGUE FOR BUSINESS AND POLICYMAKERS 8 (2018).

[326] Kuhlmann, *supra* note 118, at 4.

[327] CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE AND NEW MARKETS LAB, DIGITAL ECONOMY ENABLING ENVIRONMENT GUIDE: KEY AREAS OF DIALOGUE FOR BUSINESS AND POLICYMAKERS 9 (2018).

[328] For example, countries such as South Africa and Ghana have one overarching act covering consumer protection, cybercrime, and electronic transactions, while data protection and privacy are regulated separately. Kenya has a different approach, whereby one act covers electronic transactions and cybercrimes and another covers data protection and privacy. Nigeria, Ethiopia, and Cote D'Ivoire, in contrast, have four separate legal instruments regulating the four separate areas. While, a single law can sometimes facilitate more efficient implementation, separate laws can also allow for greater flexibility. Kuhlmann, *supra* note 118, at 5.

[329] Economic Community of West African States, Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS (Feb. 16, 2010), art. 36(1), http://www.statewatch.org/news/2013/mar/ecowas-dp-act.pdf.

[330] For an additional resource on the status of African digital regulation, see *Data Protection Africa*, ALT ADVISORY, www.dataprotection.africa (last visited on June 30, 2020).

specific focus, as highlighted by the recent Digital Economy Partnership Agreement signed by Chile, New Zealand, and Singapore which references indigenous communities, women, rural populations, and low socio-economic groups. [331]

Although the AfCFTA is still in its early stages, and more research on its design and impacts will be needed, it is a promising starting point for a new trade and investment model that could upend outdated trade models and enable all countries to benefit as Africa's market expands. Reflecting, and increasingly influencing, the broader legal and development trends highlighted in this Article, the AfCFTA is shifting the dialogue toward sustainable development and providing a much-needed channel for broader legal change in a global trade regime in need of new paths forward.

[331] Digital Economy Partnership Agreement, Singapore, Chile, and New Zealand, June 12, 2020.