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EDITORIAL NOTE

Treaties and international agreements, as well as national laws and trade dispute resolution case law, have spawned a complex and ever-expanding body of basic law as a result of the rise of international commerce. Given the tremendous interdependencies between the many nations that rely on trade for their economic prosperity, the amount of literature covering the issue of international commerce continues to rise on a yearly basis. Indeed, the international community has made significant efforts every decade since the first trade rules and organizations were founded to update old laws, adopt new rules, and handle new difficulties arising from social, technical, and economic advances.

Despite the fact that international trade is more efficient and integrated than ever before, the business is nonetheless plagued by a number of challenges. These challenges are causing problems and making it more difficult for supply chains all across the world to operate at their best. Tariffs, trade deficits, Brexit, the global market, sweatshops, child labor, sanctions, embargoes, renegotiating NAFTA, the EU, and the WTO; the apparently infinite alphabet of interest groups, treaties, organizations, and trade agreements has dominated the international stage recently.

The intricacy of the issues encompassing trade is overwhelming. While financial thinking doesn't ensure goal of the issues, an incredible asset of decisive reasoning carries clearness to the conversation of recent developments. The capacity to decide near advantage through open door cost, the capacity to distinguish motivators and anticipate coming about conduct, and the capacity to utilize market interest examination of specific work and asset markets, assist understudies with saving the feeling of worldwide trade issues and slice through the manner of speaking of media reports.

It gives us immense pleasure to roll out the inaugural volume of the NLIU – International Trade Law Journal. The Journal was established in the hope of fostering a deeper understanding of International Trade Law as well as its role in the development of the global economy and various allied fields. The Journal seeks to increase legal scholarship in India about an extremely diverse and wide topic.

The inaugural volume encapsulates engaging and relevant debates on various aspects of International Trade and Investment law including the Trade Labour Linkage within WTO, Public Health Emergency and Necessity Defence under African BITs and Competition

Policy, Digital Platform Regulation and Trade Law among others. The Journal has attempted to publish legal scholarship that focusses on both contemporary as well as interdisciplinary legal issues.

This journal's accentuation is on principal, long haul, foundational issues and potential arrangements, in the radiance of exact perceptions and experience, as well as hypothetical and multi-disciplinary methodologies. It gives significant studies of arrangements, discussions, or court and council cases and contribute humbly to advancing harmony, world government assistance, and upgrade of the personal satisfaction for all people groups. This volume of the journal gives an unmistakable and brief prologue to the crucial parts of global trade regulation, introducing the fundamental construction and standards of this complicated area of regulation, close by explanation of explicit GATT and WTO legitimate guidelines and foundations.

This volume would not have come to fruition without the assistance of the Journal's Patron, Prof. (Dr.) V. Vijayakumar, Director of National Law Institute University, Bhopal, and faculty-in charge Prof. (Dr.) Monica Raje, Professor in International Trade Law, National Law Institute University, for their constant support.

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Gender Mainstreaming In Free Trade Agreements: A Study Of The Commonwealth Nations

Sreelakshmi S. Kurup[1]

Trade and gender have become an enthralling topic of discussion in contemporary international trade. The nexus between these two unique phenomena is worth exploring. Moreover, the incorporation of gender – based provisions in trade agreements by a few countries is a progressive step in this front. The aim of this paper is to expose the impeccable link between international trade and gender through the concept of gender mainstreaming as manifested in the trade agreements of the Commonwealth nations. Before we delve any further, two primaryquestions ought to be answered: a) What is gender mainstreaming? b) Why gender mainstreaming?

What is gender mainstreaming?

Gender mainstreaming, according to UN Women, refers to a "globally accepted strategy for promoting gender equality."[2] The organization also clarifies that mainstreaming gender cannot be perceived to be an end in itself, but rather a strategy or an approach to satisfy the broader goal of gender equality.[3] The Council of Europe defined gender mainstreaming in the year 1998.[4] Additionally, an elaborate and notable definition was put forth by ECOSOC in this context.[5]Apart

[1] Research Fellow at Centre for Trade and Investment Law, New Delhi (India).

[2] UN Women, 'Gender Mainstreaming', <https://www.un.org/womenwatch/osagi/gendermainstreaming.htm> accessed 20 August 2021.

[3] ibid.

[4] Council of Europe, 'What is gender mainstreaming?', <https://www.coe.int/en/web/genderequality/what-is-gender-mainstreaming> accessed 20 August 2021.
"[t]he (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making."

[5] United Nations, 'Report of the Economic and Social Council for the year 1997', p.24 <https://undocs.org/A/52/3/REV.1(SUPP)> accessed 23 August 2021
"…the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality".

from such a comprehensive definition, ECOSOC has also provided certain principles pertaining to gender mainstreaming from the perspective of United Nations, which include non-assumption of gender neutrality; constant and systematic monitoring of accountability of gender-mainstreaming practices; broadening of women's participation at decision-making levels; institutionalization of gender – mainstreaming through concrete steps, processes and mechanisms across the various parts of the United Nations; confirmation that gender mainstreaming neither replaces targeted women-specific policies, legislations, etc., nor does it substitute gender units or focal points; and finally, additional financial and human resources from all available United Nations resources as well as unambiguous political, so as to achieve the goal of gender mainstreaming.[6]

Gender mainstreaming as a concept traces its origin to the 1995 Beijing Declaration and Platform for Action, The Fourth World Conference on Women, held at Beijing, China.[7] This is considered to be the landmark conference which culminated the efforts of the previous three conferences to ensure equality amongst men and women both in law as well as in practice.[8] The other three world conferences of women were held in Mexico City (1975), Copenhagen (1980) and Nairobi(1985).[9] The significance of the Beijing conference lies in the fact that it led to the famous Beijing Declaration and Platform for Action, adopted by 189 countries unanimously.[10]

Why gender mainstreaming?

Gender mainstreaming is a major component in the development matrix of any nation. Its inclusion as one of the Sustainable Development Goals by the United Nations clearly substantiates the relevance of gender in the development process. More specifically, the United Nations Sustainable Development Goal 5 deals with Gender Equality, and hence, gender mainstreaming becomes a tool to implement

[6] United Nations, *Report of the Economic and Social Council for the year 1997* (n 4), pgs. 24-25.
[7] United Nations, 'Conferences Women and Gender Equality', <https://www.un.org/en/conferences/women/beijing1995> accessed 23 August 2021.
[8] ibid.
[9] UN Women, 'World Conferences on Women', <https://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women> accessed 10 October 2021
[10] United Nations, *Conferences Women and Gender Equality* (n 6).
See also: United Nations, 'Report of the Fourth World Conference on Women', <https://undocs.org/en/A/CONF.177/20/Rev.1> accessed 12 September 2021.

gender equality. This in turn acts towards satisfying the mandate of the United Nations as well. Trade being one of the primordial components of a nation's development, the trade agreements ought to reflect gender-unbiased approach so as to fulfil the various targets of the UN SDG 5.[11] Only such a broad initiative can result in complete global development in the gender debate.

With specific reference to the World Trade Organization, gender mainstreaming has gained substantial progress and attained greater significance over the years. For instance, the Joint Declaration on Trade and Women's Economic Empowerment concluded at the Ministerial Conference at Buenos Aires in 2017 specifically appreciated gender inclusivity to boost socioeconomic development from the perspective of sustainability.[12] Subsequently, the most recent breakthrough is the establishment of an Informal Working Group on Trade and Gender established on 23 September 2020, composed of WTO members as well as observers.[13] This working group has been chaired by Iceland and Botswana.[14] Moreover, exactly a year later (that is, 23 September 2021) the co-chairs of the working group presented an outcome document for the 12th Ministerial Conference to be held at Geneva from November 30 to December 3, 2021.[15] The outcome document was prepared by the "Friends of Gender" group, which consists of 19 WTO members, 4 international organizations, and the WTO Secretariat.[16] This draft provides for recommendations for WTO members to proceed with their work which enable them to enhance women's participation in international trade.[17]

It becomes, therefore, crystal clear that international trade provides substantial emphasis upon gender. This can be further inferred from the provisions in the trade

[11] United Nations, 'Sustainable Development', <https://sdgs.un.org/goals/goal5> accessed 30 November 2021.
[12] World Trade Organization, 'Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017', <https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf> accessed 08 October 2021.
[13] World Trade Organization, 'Informal Working Group on Trade and Gender', <https://www.wto.org/english/tratop_e/womenandtrade_e/iwg_trade_gender_e.htm> accessed 19 September 2021.
[14] ibid.
[15] World Trade Organization, 'Trade and Gender Informal Working Group co-chairs present draft outcome document for MC12', <https://www.wto.org/english/news_e/news21_e/women_23sep21_e.htm> accessed 25 September 2021.
[16] ibid.
[17] ibid.

agreements. On account of the diversity in the nature and structure of free trade agreements, the author, in this paper, has restricted to the trade agreements of Commonwealth nations only. It is also noteworthy that the multifariousness of the trade agreements entered into by the Commonwealth nations between countries across the globe is a clear indicator of the ranging degree of priority of these nations in the issue of constructing a harmonious relationship between trade and gender. Accordingly, Part III of the paper examines this perspective through an empirical analysis.

Gender mainstreaming and the Commonwealth nations

Gender equality is one of the core principles enshrined in the Commonwealth Charter of 2013.[18] Further, the Commonwealth Plan of Action for Gender Equality 2005-2015 focuses on four dimensions of gender: a) Gender, democracy, peace and conflict; b) Gender, human rights and law; c) Gender, poverty eradication and economic empowerment; d) Gender and HIV/AIDS.[19]

Further, the Gender Equality Policy of October 2019 by the Commonwealth Secretariat primarily targets the following components:[20]

a. update the Commonwealth Secretariat staff on the linkages between gender and other policy and program priorities;
b. focus on improving the skills of the staff as well as to formulate more programs and projects from the perspective of gender equality through the idea of gender mainstreaming;
c. enhance the level of commitments within as well as across the Divisions of the Commonwealth Secretariat to "identify, design, implement, monitor and report"[21] about gender equality results; and
d. contribution towards enhanced gender equality inside the Secretariat and to improvise the impact of the Secretariat's assistance through effective gender mainstreaming.

[18] The Commonwealth, 'The Charter of the Commonwealth', <https://thecommonwealth.org/sites/default/files/page/documents/CharteroftheCommonwealth.pdf> accessed 23 October 2021.
[19] Commonwealth Foundation, 'Commonwealth Gender Plan of Action Monitoring Group', <https://commonwealthfoundation.com/project/cgpmg/> accessed 30 September 2021.
[20] The Commonwealth Secretariat, *Gender Equality Policy* (2019) p.6.
[21] ibid.

Furthermore, the Commonwealth Secretariat has identified gender mainstreaming as a cross cutting outcome in its Commonwealth Secretariat Strategic Plan 2017/18-2020/21. The Strategic Plan highlights under Youth and Social Development that women and girls amongst other vulnerable groups are safeguarded against harmful practices and violence.[22] It also states that the significance of women empowerment is a crucial facet for inclusive sustainable development as pointed out in the Plan.[23] Finally, the Plan also ensures formulation of gender – sensitive policy and legal frameworks to prevent discrimination based on gender and promote the empowerment of women and girls.[24] It is interesting to note that in part 3.6.2 of the Plan (para 42), it has been clearly stated that the Commonwealth and the United Nations Sustainable Development Goals share the same commitments on gender mainstreaming and gender equality.[25]

The ideals of the Commonwealth Secretariat are very ambitious when comparedto the commitments of Commonwealth nations on gender mainstreaming as evident from the text of its various trade agreements. Based on the author's careful study of all the majorfree trade agreements of the Commonwealth nations, it becomes clear that each group of the Commonwealth nations provides a unique structure pertaining to the provisions on gender.

The priorities of Commonwealth nations in the case of gender and trade could be witnessed from the positioning of the specific gender-based provisions in the trade agreements. The next section of this paper, thus, scrutinizes these provisions to provide an analysis of the existing framework of gender mainstreaming in the trade agreements of the Commonwealth nations.

Gender mainstreaming and trade agreements: A critical analysis

[22] Youth and Social Development, *Commonwealth Secretariat Strategic Plan* (2017/18-2020/21), part 3.3.
[23] ibid. para 30, part 3.3:
Whilst reaffirming the importance of women's leadership, equitable participation and empowerment as critical drivers for inclusive sustainable development, the Commonwealth shall continue to address women's social, economic and political roles in society. The Women's Forum, introduced at CHOGM 2015, provides an important platform to support this work.
[24] ibid. para 31:
The Secretariat will work with member countries to address violence against women and girls and work alongside judiciaries and other partners to promote and strengthen evidence-based, gender sensitive policy and legal frameworks that prevent discrimination, empower women and girls to participate, represent and lead in political, social and economic spheres.
[25] ibid.

The trade agreements of Commonwealth nations differ in their structure and content when dealing with incorporating the spirit of gender mainstreaming into them.

Africa

Amongst all the trade agreements of Africa, only South African Development Community (SACU); United Kingdom – SACU and Mozambique; East African Community (EAC); United Kingdom – Kenya; European Union – Eastern and Southern African States; United Kingdom – Eastern and Southern African States; and European Union – South Africa are the agreements which incorporate provisions on gender. The following table summarizes the status of gender-based provisions in African trade agreements:

Name of the Free Trade Agreement	**Coverage**	**Gender-related Provision**
EFTA – SACU	Goods only	N
EU – SADC	Goods only	N
South African Development Community (SADC)	Goods only	**Y** Art. 5 (1) (k)
United Kingdom - SACU and Mozambique	Goods only	**Y** Annex VII, Part I, Art. 1 (8).
European Union – Cameroon	Goods only	N
United Kingdom – Cameroon	Goods only	N [Only in the Annex, no substantive provision]
European Union – Ghana	Goods only	N
East African Community (EAC)	Goods and Services	**Y** Art. 5 (3) (e); Art. 6 (d); Art. 9 (5); Art. 50 (1); Chapter 22.
United Kingdom – Kenya	Goods only	**Y** Art. 83 (2) (i) (iii); Art. 89 (g)(ii).
European Union – Eastern and Southern Africa States	Goods only	**Y** Title III, Art. 35 (f) (ii); Art. 38 (h); Annex IV (2) (a) (iii), (g).
Mauritius – India	Goods and Services	N
Mauritius – Turkey	Goods only	N

United Kingdom - Eastern and Southern Africa States	Goods only	**Y** Art. 34 (f) (ii); Art. 37 (2) (h).
Namibia – Zimbabwe	Goods only	N
European Union – South Africa	Goods only	**Y** Title IV, Art. 54; Title V, Art. 66; Title VI, Art. 86.

As the table indicates, East African Community (EAC), European Union – Eastern and Southern African States; and European Union – South Africa tradeagreements have the most coverage of gender – based provisions. And amongst these three agreements, East African Community provides the maximum coverage. For example, in the case of East African Community, Article 5 deals with 'Objectives of the Community'[26] while Article 6 which deals with 'Fundamental Principles of the Community' explicitly states gender equality as one of the components of good governance.[27] Further, in Article 9 which pertains to 'Establishment of the Organs and Institutions of the Community', the significance of gender balance during appointments of staff across various organisations and institutions of the Community is emphasized.[28] Further, while detailing upon on the election of members of the National Assembly[29] the agreement mandates, to the extent possible, representation of women in it. Finally, a very important aspect of the agreement is its Chapter 22 which is 'Enhancing the Role of Women in Socio-Economic Development' wherein Article 121 provides for the Role of Women in Socio-Economic Development and Article 122 deals with the role of women in business.[30]

[26] Chapter 2, Art.5 (3) (e), Treaty for the Establishment of East African Community.
[27] Chapter 2, Art.6 (d), East African Community.
good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;
[28] Chapter 3, Art.9 (5), East African Community.
In the appointment of staff and composition of the organs and institutions of the Community, gender balance shall be taken into account.
[29] Chapter 9, Art. 50 (1), East African Community:
The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.
[30] Chapter 22, Articles 121 and 122, East African Community.

Asia

Asia is one of the Commonwealth members with trade agreements having the least commitments on gender. Only Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and European Union – Singapore[31] has provisions pertaining to gender. However, CPTPP is more comprehensive in this context. For instance, in CPTPP, in its Chapter 19 on Labour[32]; Chapter 21 on Cooperation and Capacity Building[33]; and Chapter 23 on Development[34] provide for gender equality and inclusiveness in their provisions.

The table below provides a glimpse over the status of gender – based obligations in the FTAs of Asian countries:

Name of the Free Trade Agreement	**Coverage**	**Gender-related Provision**
South Asian Free Trade Agreement (SAFTA)	Goods only	N
ASEAN – Australia-New Zealand	Goods and Services	N
ASEAN – China	Goods and Services	N
ASEAN – Hong Kong, China	Goods and Services	N
ASEAN – India	Goods and Services	N
ASEAN – Japan	Goods only	N
ASEAN - Korea, Republic of	Goods and Services	N
ASEAN Free Trade Area	Goods only	N
Brunei Darussalam – Japan	Goods and Services	N
Trans-Pacific Strategic Economic Partnership	Goods and Services	N
India – Bhutan	Goods	N

[31] Section B, Art. 12.4.

[32] CPTPP, Chapter 19, Art. 19.10 (6) (n) (ii): *promotion of equality of, elimination of discrimination against, and the employment interests of women;*

[33] CPTPP, Chapter 21, Art. 21.2 (2) (b): *promotion of education, culture and gender equality.*

[34] CPTPP, Chapter 23, Art. 23.4:

1. The Parties recognise that enhancing opportunities in their territories for women, including workers and business owners, to participate in the domestic and global economy contributes to economic development. The Parties further recognise the benefit of sharing their diverse experiences in designing, implementing and strengthening programmes to encourage this participation.

2. Accordingly, the Parties shall consider undertaking cooperative activities aimed at enhancing the ability of women, including workers and business owners, to fully access and benefit from the opportunities created by this Agreement. These activities may include providing advice or training, such as through the exchange of officials, and exchanging information and experience on:

(a) programmes aimed at helping women build their skills and capacity, and enhance their access to markets, technology and financing;

(b) developing women's leadership networks; and

(c) identifying best practices related to workplace flexibility.

India – Japan CEPA	Goods and Services	N
India – Malaysia CECA	Goods and Services	N
India – Mauritius CECPA	Goods and Services	N
India – Singapore CECA	Goods and Services	N
India – Sri Lanka	Goods only	N
India – Korea CEPA	Goods and Services	N
Chile – Malaysia	Goods only	N
Japan – Malaysia	Goods and Services	N
Malaysia – Australia	Goods and Services	N
New Zealand – Malaysia	Goods and Services	N
Pakistan – Malaysia	Goods and Services	N
Turkey – Malaysia	Goods only	N
Pakistan – China	Goods and Services	N
Pakistan – Sri Lanka	Goods only	N
China – Singapore	Goods and Services	N
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	Goods and Services	**Y** Chapter 19 (Labour), Art. 19.10 (6) (n) (ii); Chapter 21 (Cooperation and Capacity Building), Art. 21.2 (2) (b); Chapter 23 (Development), Art. 23.4.
Costa Rica – Singapore	Goods and Services	N
EFTA – Singapore	Goods and Services	N
European Union – Singapore	Goods and Services	**Y** Section B, Art. 12.4
Gulf Cooperation Council (GCC) – Singapore	Goods and Services	N
Japan – Singapore	Goods and Services	N
Jordan – Singapore	Goods and Services	N
Korea – Singapore	Goods and Services	N
New Zealand – Singapore	Goods and Services	N
Panama – Singapore	Goods and Services	N
Peru – Singapore	Goods and Services	N
Singapore – Australia	Goods and Services	N
Singapore – Chinese Taipei	Goods and Services	N
Turkey – Singapore	Goods and Services	N

United Kingdom – Singapore	Goods and Services	N
United States – Singapore	Goods and Services	N
Pakistan – Sri Lanka	Goods only	N

Caribbean and Americas

These groups of nations are relatively more progressive in the area of trade and gender. The following table substantiates this claim:

Name of the Free Trade Agreement	**Coverage**	**Gender-related Provision**
EU - CARIFORUM States	Goods and Services	**Y** Part 1 (Trade Partnership for Sustainable Development), Art. 5; Chapter 5, Art. 191
United Kingdom - CARIFORUM States	Goods and Services	**Y** Part 1, Art. 5; Chapter 5, Art. 191.
Canada – Chile	Goods and Services	**Y** Appendix 1, Art. G-14 *Bis*
Canada – Colombia	Goods and Services	N
Costa Rica – Canada	Goods only	N
Canada – Honduras	Goods and Services	N
Israel-Canada	Goods only	**Y** Chapter 12 (Trade and Labour), Annex 12.9 (1) (i); Chapter 13 (Trade and Gender).
Jordan – Canada	Goods only	N
Canada - Korea, Republic of	Goods and Services	N
Canada – Panama	Goods and Services	N
Canada – Ukraine	Goods only	**Y** Chapter 13, Annex 13-A (1) (j)
EFTA – Canada	Goods only	N

European Union – Canada	Goods and Services	**Y** Section D, Art. 8.10 (2) (d)
United Kingdom – Canada	Goods only	N
United States-Mexico-Canada Agreement (USMCA/CUSMA/T-MEC)	Goods and Services	**Y** Preamble, Chapter 23 (Art. 23.9, Art. 23.12 (5) (j), (l)

Amongst the trade agreements in the table above, EU – CARIFORUM States and USMCA majorly include gender – related provisions. For instance, in EU – CARIFORUM, Article 5 of Part I which pertains to Trade Partnership for Sustainable Development provides for "Monitoring" and states that "… the Agreement is properly implemented and the benefits for men, women, … deriving from their Partnership are maximised."[35] Further, the agreement clearly states under social aspects under Article 191 that the Parties intend to abide by their commitments in the 2006 Ministerial declaration on Full Employment and Decent Work by the ECOSOC.[36]

In the case of USMCA, the Preambular language itself provides for equalitybetween men and women and the latter's participation in "domestic, regional, and international trade and investment".[37] Additionally, Chapter 23 of the agreement which deals with labor specifically ensures that gender discrimination at workplace is prohibited[38] and all other associated issues on gender are adequately addressed.[39]

[35] EU – CARIFORUM, Part I, Art. 5.
[36] EU – CARIFORUM, Title IV, Chapter 5, Art.191 (2).
[37] USMCA, Preamble.
[38] USMCA, Art. 23.9
The Parties recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. Accordingly, each Party shall implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job-protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.
[39] USMCA, Art. 23.12 (5) (j), (l).:
(j) addressing gender-related issues in the field of labour and employment, including:
(i) elimination of discrimination on the basis of sex in respect of employment, occupation, andwages,
(ii) developing analytical and enforcement tools related to equal pay for equal work or work of equal value,
(iii) promotion of labour practices that integrate and retain women in the job market, and building the capacity and skills of women workers, including on workplace challenges and in collective bargaining,

Europe

Majority of the trade agreements of Europe incorporate provisions on gender in their texts. The following tabulation provides an overview on the status of gender- based provisions in these trade agreements.

Name of the Free Trade Agreement	**Coverage**	**Gender-related Provision**
European Union – Albania	Goods and Services	**Y** Art. 99 (Social Cooperation); Art. 100.
European Union – Algeria	Goods only	**Y** Chapter 3, Art. 74 (2) (d).
European Union - Bosnia and Herzegovina	Goods and Services	**Y** Art. 100
European Union – Central America	Goods and Services	**Y** Art. 32, Art. 42 (1) (f), Art. 43, Art. 44, Art. 45 (4); Art. 46, Art. 47, Art. 286.
European Union – Chile	Goods and Services	**Y** Art. 44, Art. 45.
European Union – Columbia and Peru	Goods and Services	N
European Union - Côte d'Ivoire	Goods only	N
European Union – Egypt	Goods only	**Y** Art. 42, Art. 65.

(iv) consideration of gender issues related to occupational safety and health and other workplace practices, including advancement of child care, nursing mothers, and related policies and programs, and in the prevention of occupational injuries and illnesses, and
(v) prevention of gender-based workplace violence and harassment;
(l) addressing the opportunities of a diverse workforce, including:
(i) promotion of equality and elimination of employment discrimination in the areas of age, disability, race, ethnicity, religion, sexual orientation, gender identity, and other characteristics not related to merit or the requirements of employment, and
(ii) promotion of equality, elimination of employment discrimination, and protection of migrant workers and other vulnerable workers, including low waged, casual, or temporary workers;

European Union – Faroe Islands	Goods only	N
European Union – Georgia	Goods and Services	**Y** Art. 348, Art. 349 (e).
European Union – Iceland	Goods only	N
European Union – Israel	Goods only	**Y** Title VIII, Art. 63.
European Union – Japan	Goods and Services	N
European Union – Jordan	Goods only	**Y** Art. 82.
European Union - Korea, Republic of	Goods and Services	**Y** Art. 13.1 (2)
European Union – Lebanon	Goods only	**Y** Art. 65 (1) (b), (2).
European Union – Mexico	Goods and Services	N
European Union - Moldova, Republic of	Goods and Services	**Y** Art. 31, Art. 32 (f), art. 375 (h).
European Union – Montenegro	Goods and Services	**Y** Art. 101, Art. 102.
European Union – Morocco	Goods only	**Y** Art. 71 (c).
European Union – Norway	Goods only	N
European Union - Overseas Countries and Territories (OCT)	Goods only	**Y** Art. 10 (2) (c).
European Union – Pacific States	Goods only	N
European Union – Palestine	Goods only	**Y** Art. 45, Art. 58,
European Union – Serbia	Goods and Services	**Y** Art. 101, Art. 102.
European Union - Switzerland – Liechtenstein	Goods only	N
European Union – Syria	Goods only	N
European Union – Tunisia	Goods only	N

European Union – Ukraine	Goods and Services	**Y** Art. 291, Art. 420 (l).
European Union – United Kingdom	Goods and Services	**Y** Art. 8.3 (8) (b), Section 2 (Art. 6 (9).
European Union – Vietnam	Goods and Services	**Y** Art. 13.4 (1), Art. 13.14 (1) (e).
United Kingdom – Albania	Goods and Services	N
United Kingdom – Central America	Goods and Services	N
United Kingdom – Chile	Goods and Services	**Y** Title V (Art. 44, Art. 45), Annex IV (Art. 12).
United Kingdom – Colombia	Goods and Services	N
United Kingdom - Côte d'Ivoire	Goods only	N
United Kingdom – Ecuador and Peru	Goods and Services	N
United Kingdom – Egypt	Goods only	N
United Kingdom – Faroe Islands	Goods only	N
United Kingdom – Georgia	Goods and Services	**Y** Art. 231 (h), Art. 322, Art. 323 (e).
United Kingdom – Ghana	Goods only	N
United Kingdom – Israel	Goods only	N
United Kingdom – Japan	Goods and Services	**Y** Preamble, Art. 8.30, Chapter 21 (Trade and Women's Economic Empowerment), Art. 23.4.
United Kingdom – Jordan	Goods only	N

United Kingdom - Korea, Republic of	Goods and Services	N
United Kingdom – Kosovo	Goods only	N
United Kingdom – Lebanon	Goods only	N
United Kingdom - Moldova, Republic of	Goods and Services	**Y** Art. 32, Art. 33 (f), Art. 342 (h).
United Kingdom – Morocco	Goods only	N
United Kingdom – North Macedonia	Goods and Services	N
United Kingdom – Norway and Iceland	Goods only	N
United Kingdom – Pacific States	Goods only	N
United Kingdom – Palestine	Goods only	N
United Kingdom – Serbia	Goods and Services	N
United Kingdom - Switzerland – Liechtenstein	Goods only	N
United Kingdom – Tunisia	Goods only	N
United Kingdom – Turkey	Goods only	N
United Kingdom – Ukraine	Goods and Services	**Y** Art. 377, Art. 378 (l) – Chapter 20.
United Kingdom – Vietnam	Goods and Services	N

It is clear from the table above that European Union – Central America is the most elaborate trade agreement in commitments on gender. For instance, the trade agreement in its Article 32 discusses 'Conflict Prevention and Resolution' and states that the Parties shall cooperate in efforts "to efforts developed to help children, women and elderly people", strategies and other policies to combat xenophobia and discrimination based on several grounds, including gender;[40]

[40] EU – Central America, Title III, Art.41 (2) (h).

employment and social protection;[41] education and training;[42] public health;[43] programmes addressing violence against women;[44] and protection of human rights of the vulnerable groups including women.[45] Another notable provision is article 47 which deals with "Gender" specifically. Its incorporation focuses to ensure equal participation of men and women "in all sectors of political, economic, social and cultural life"[46] in addition to ensuring the effective implementation of the CEDAW. The provision primarily safeguards women against discrimination and ensures their integration in all fields of development.[47] Finally, article 286 which incorporates the provision on multiple labour standards and agreements specifically state that the Parties will promote development policies which shall benefit women, amongst other groups.[48]

Pacific

The trade agreements entered into by the countries in the Pacific region substantially lack in gender – related commitments. For instance, out of all the trade agreements which were examined, only Peru – Australia indicated the existence of such provisions. Article 20.2 of the agreement which deals with cooperation and capacity building refer to "protection of vulnerable groups, including women, children, people with disabilities and indigenous people"[49] while Article 22.4

[41] EU – Central America, Title III, Art. 42 (1) (f):
ensure the respect for the fundamental principles and rights at work identified by the International Labour Organization's Conventions, the so-called Core Labour Standards, in particular as regards the freedom of association, the right to collective bargaining and non- discrimination, the abolition of forced and child labour, and equal treatment between men and women.

[42] EU – Central America, Title III, Art. 43 (1)(a):
promote equitable access to education for all, including young people, women, senior citizens, indigenous peoples and minority groups, paying special attention to the most vulnerable and marginalised segments of society.

[43] EU – Central America, Title III, Art. 44 (2):
Special attention shall be given to sectoral reforms and to ensure an equitable access to qualityhealth services, food and nutritional security in particular for vulnerable groups such as the disabled, elderly people, women, children, and indigenous peoples.

[44] EU – Central America, Title III, Art.45 (4).

[45] EU – Central America, Title III, Art. 46 (2):
Cooperation shall include the protection of human rights and the equal opportunities of vulnerable groups, the creation of economic opportunities for the poorest, as well as specific social policies aimed at the development of human capacities through education and training, access to basic social services, social safety nets and justice with a particular focus on the disabled and their families, children, women and the elderly, among others.

[46] EU – Central America, Title III, Art.47 (1).

[47] EU – Central America, Title III, Art. 47.

[48] EU – Central America, Title VIII, Art. 286.

[49] Peru – Australia, Art.20.2 (2) (g).

specifically deals with 'women and economic growth'.[50] The following table captures the status of the provisions in the trade agreements of the Pacific region:

Name of the Free Trade Agreement	**Coverage**	**Gender-related Provision**
Chile – Australia	Goods and Services	N
Australia – China	Goods and Services	N
Australia - New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)	Goods and Services	N
Australia - Papua New Guinea (PATCRA)	Goods only	N
Hong Kong, China – Australia	Goods and Services	N
Indonesia – Australia	Goods and Services	N
Japan – Australia	Goods and Services	N
Korea, Republic of – Australia	Goods and Services	N
Pacific Agreement on Closer Economic Relations Plus (PACER Plus)	Goods and Services	N
Peru – Australia	Goods and Services	**Y** Art. 20.2 (2) (g), Art. 22.4.
Thailand – Australia	Goods and Services	N
United States – Australia	Goods and Services	N
Pacific Island Countries Trade Agreement (PICTA)	Goods only	N

[50] Peru – Australia, Art. 22.4.

1. The Parties recognise that enhancing opportunities in their territories for women, including workers and business owners, to participate in the domestic and global economy contributes to economic development. The Parties further recognise the benefit of sharing their diverse experiences in designing, implementing and strengthening programmes to encourage this participation.

2. Accordingly, the Parties shall consider undertaking cooperative activities aimed at enhancing the ability of women, including workers and business owners, to fully access and benefit from the opportunities created bythis Agreement. These activities may include providing advice or training, such as through the exchange of officials, and exchanging information and experience on:

(a) programmes aimed at helping women build their skills and capacity, and enhancing their access to markets, science and technology, and financing;

(b) developing women's leadership networks; and

(c) identifying best practices related to workplace flexibility.

China – New Zealand	Goods and Services	N
Hong Kong, China – New Zealand	Goods and Services	N
New Zealand – Korea, Republic of	Goods and Services	N
New Zealand – Chinese Taipei	Goods and Services	N
Thailand – New Zealand	Goods and Services	N

The Reality behind Gender-based commitments in the trade agreements of Commonwealth nations

The form and content of trade agreements provides only a single, legal perspective of how the Commonwealth nations engage with gender in their trade relations. A detailed scrutinization of the individual policies of each of these nations should be read in line with the commitments in trade agreements to get a comprehensive outlook. However, this is beyond the scope of this paper. Here, the author's target is to expose the scheme of gender-sensitive provisions in the trade agreements entered into by the Commonwealth nations vis-à-vis the theoretical lacunae associated with gender-mainstreaming in those trade agreements. From the extant skeleton of gender – based provisions in trade agreements, the following bi-level analysis becomes quintessential:

a) Why is there a strong divergence amongst the trade agreements of the Commonwealth nations to include gender – based commitments?

Each country is provided with its own discretion to include gender – based provisions in their trade agreements. Even though Commonwealth countries have been active players in promoting gender-equality, as is explained in the earlier parts of this paper, their trade agreements still require to adapt to the change. It is an optimistic reality that since some agreements have undergone metamorphosis in this regard, we could expect a positive, rapid shift in the structure of the potential international trade agreements.

b) Does the inclusion of gender-friendly provisions in trade agreements of Commonwealth nations provide a holistic approach towards the nations' priority for gender in trade?

In the present design, it is conspicuous that out of all the Commonwealth nations, European Union has the greatest number of trade agreements which address gender – based priorities. Some of such key provisions have been explained under Part III of this paper. Undoubtedly, they do strive to prevent discrimination againstwomen and to ensure their active inclusion in all practical fields. However, a few theoretical issues remain to be addressed in the general scheme of gender mainstreaming in international trade agreements, such as the following:

I. *The challenge of intersectionality*: The trade agreements do highlight that there should not be any discrimination between men and women in society, for instance, at workplace. This does not, yet, delves deep into the notion of"women" in its entirety. To elaborate, there have always been massive movements on Black Feminism by feminists such as Angela Davis.[51] In her collection of essays, 'Women, Race and Class', she observes that during the period of slavery, black women (similar to black men) were treated as chattel; and "..was first a fulltime worker for her owner, and only incidentally a wife, mother and homemaker"[52]. The struggle of African women had always been focussed by feminists such as Sojourner Truth, for example, in her speech 'Ain'tI A Woman?', she becomes vocal and expresses her disappointment on racial discrimination.[53] This raises the issue of double subjugation, which in this case,reflects the condition of being subjugated as a woman and as a "black". It is crucial to note that the trade agreements fail to identify this aspect of intersectionality in substantive detail.

II. *Restrictive interpretation of 'gender' and 'gender mainstreaming'*: The contemporary society restricts all legal connotations of gender to include women alone, as confirmed by the trade agreements. There should be an examination on the significance of including legally recognized "transgender" community aswell under its ambit. This would, undoubtedly, raise major repercussions in the

[51] Angela Y. Davis, *Women, Race and Class (*first published Random House, 1981, Vintage Books, 1983) pgs. 9.

[52] ibid.
See also: Charlotte Perkins Gilman, The Home: Its Work and Its Influence (Urbana, Chicago, London:University of Illinois Press, 1972. Reprint of the 1903 edition), pgs. 30.

[53] Sojourner Truth, 'Speech Entitled "Ain't I a Woman?"' (Women's Convention, Ohio, 1851) <https://thehermitage.com/wp-content/uploads/2016/02/Sojourner-Truth_Aint-I-a- Woman_1851.pdf> accessed 17 February 2022.

society, yet it remains inevitable to revisit the definition of 'gender' and 'gender-mainstreaming' to include all forms of gender. Several countries such as India, Australia and New Zealand, amongst others, have already recognized "third gender" legally.[54] Therefore, this progress should incentivize in revamping the existing "binary" norms of gender to set forth a new phase to gender equality in international trade agreements. When a few countries volunteer to become torchbearers, there could soon be a silver lining in this front.

III. *The relevance of a gender-inclusive approach in trade agreements*: One of the rudimentary concerns is that there lacks a considerable awareness on the urgency to adopt a gender-sensitive approach in trade agreements. A 2020 UNCTAD Policy Brief on Trade and Gender specifically recommends that to identify the gaps in gender equality using organized data and statistics and to address them, a conceptual framework to measure gender equality in trade becomes crucial.[55] Further, it also recommends that statistics and data which are disaggregated on the basis of sex from the perspective of intersectionality attains primordial relevance to comprehend the impact of gender in trade policy and to formulate measures to strengthen them.[56]

In short, gender mainstreaming, devoid of its theoretical underpinnings, provides international trade agreements with no scope to address the serpentine concerns which the potential era of trade and gender regime could bring forth.

Conclusion and Way Forward

To foster the development of gender in international trade, hence, all dimensions of gender should be included. It should therefore be an inclusive approach. The trade agreements provide only a representation of the gender – framework which needs to be updated to adhere to the constant changes in the connotation of gender. A failure to respect the novation in this sensitive sphere, results in an absolute futility

[54] Valentine Pasquesoone, '7 Countries Giving Transgender People Fundamental Rights the U.S. Still Won't' (*MIC*, 4 September 2014) <https://www.mic.com/articles/87149/7-countries-giving- transgender-people-fundamental-rights-the-u-s-still-won-t> accessed 17 February 2022

[55] UNCTAD, *Assessing the Impact of Trade Agreements on Gender Equality: Canada-EU Comprehensive Economic and Trade Agreement* (2020) <https://unctad.org/system/files/official-document/UNWomen_2020d1_en.pdf> accessed 17 February 2022, p6.

[56] ibid.

to the concept of development itself. This is an area which the concerned authorities should open their eyes to.

Indeed, as already stated in the preceding parts of this paper, the exclusive purpose of this article is to explain the restrictive interpretation in the concept of "gender" and "gender mainstreaming" using the case study of international trade agreements of the Commonwealth nations. There ought to be a decoupling effect from the conventional understanding of gender mainstreaming. In the context of international trade agreements, this decoupling effect would imply the idea of engaging with the concept of gender and gender mainstreaming, as provided in trade agreements, in a complete and veritable manner, by dissecting the spirit of theterm 'gender.' Therefore, let's work towards a holistic and nuanced international trade law regime which upholds the real mandate of gender equality and development. This progress could be expedited by a proactive check on the way forward.

The way forward can hence be looked at as:

1. The concerned authorities should work towards revamping the present conceptual interpretation on the terms 'gender' and 'gender mainstreaming' to respect and permit variations in them;
2. The existing trade agreements should amend themselves, and the potential trade agreements ought to be sufficiently ambitious to imbibe the pioneering trend in trade and gender;
3. There ought to be significant awareness amongst the officials including diplomats, who hold the key to the scheme of international trade agreements, to appreciate the relevance of including the gender component in such trade agreements;
4. The public should also be consulted- mainly the "marginalized" communities before innovating the contemporary scaffolding of trade agreements to dissect the trade and gender discourse; and finally,
5. The possibility of subsequent threats in the trade and gender phenomena should be examined from the grassroot levels, such as, for instance, an extensive evaluation of the specific government policies, fallacies of a country's past

practice(s) and lessons learned, vis – a – vis, its development target within the global setting.

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Regulatory Capacity And Rationality Of States To Protect Environmental And Public Health Under The SPS Agreement

Juan Pablo Gómez Moreno[1]

Public policy issues such as the preservation of environmental and public health are paramount to international law.[2] Particularly, since the United Nations Conference on the Human Environment in 1972, followed by the Rio Declaration in 1992,[3] these issues became of the utmost importance.[4] As a consequence of this regulatory agenda, today there are several instruments that deal with such matters, for example, the Convention on Biological Diversity (CBD)[5] and the Cartagena Protocol on Biosafety,[6] among others. Within the World Trade Organization (WTO), one of the key developments is the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[7]

The SPS Agreement deals with sanitary and phytosanitary (SPS) measures, which are those concerning the protection of "human, animal or plant life or health."[8] Further, the SPS Agreement covers only measures that protect life and health from specified risks such as those arising from food safety or pests and diseases.[9] To this day, Members have brought claims before the WTO Dispute Settlement Body (DSB) arising from SPS measures a total of 51 times.[10] Additionally, by 2008, approximately 245 trade concerns related to SPS matters had been brought before the WTO Committee on SPS Measures.[11]

[1] Assistant Professor, Universidad de los Andes, Columbia.

[2] Allyn L Taylor, 'Global Health Law: International Law and Public Health Policy' [2017] International Encyclopaedia of Public Health 268.

[3] Rio Declaration on Environment and Development, United Nations, A/CONF.151/26, vol I., 14 August 1992.

[4] Philippe Sands, 'History', *Principles of International Environmental Law* (Cambridge University Press 2003), 25 et seq.

[5] Convention on Biological Diversity, United Nations, *Treaty Series*, (vol. 1760, p. 79), as available on https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf.

[6] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, United Nations, *Treaty Series*, (vol. 2226, p. 208) <https://treaties.un.org/doc/Treaties/2000/01/20000129%2008-44%20PM/Ch_XXVII_08_ap.pdf.>

[7] Tracey Epps, *International Trade and Health Protection: a critical assessment of the WTO's SPS Agreement* (Elgar 2008).

[8] SPS Agreement, Art. 1.1 and Annex A1.

[9] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013), 1828.

[10] World Trade Organization, 'Disputes by Agreement' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A19>.

[11] Op. cit. Epps (2008), 32.

Recent global events underscore the importance of these issues, particularly regarding states' *regulatory capacity* to manage environmental and public health crises.[12] Circumstances such as natural catastrophes and epidemics in the past years have tested state responses to protect their population and environment[13] to the point that some of these events even paved the way for milestone WTO cases discussing larger issues of the relationship between trade and health. By way of example, the 2011 Fukushima nuclear disaster gave place to the *Korea–Radionuclides* case in 2015,[14] while the use of genetically modified organisms (GMOs) in food products set the grounds for the *EC–Biotech* dispute in 2003.[15]

Against this backdrop, a fair amount of case law and literature has been produced on the issue of SPS measures within the framework of the WTO. However, for the most part, the relevant literature highlights that, since the *EC-Hormones* case in 1996, the decisions of WTO Panels and the Appellate Body (AB) have been rather ambiguous on the treatment of relevant issues pertaining to the scope of the SPS Agreement, for example, the balancing of the *regulatory capacity* of states and the need of scientific evidence.[16] Additionally, academic research has focused on very specific issues of the relevant provisions of the SPS Agreement like the application of the precautionary principle[17] and the use of scientific evidence.[18]

This article considers that previous academic efforts to unravel the intricacies of the SPS Agreement are fundamental to its understanding. Nonetheless, this work intends to separate itself from existing literature by avoiding specialised questions and proposing a broad review of the case law in light of the object and purpose of the Agreement. Specifically, the research question of this article is whether some of the most relevant provisions of the SPS Agreement, as interpreted by previous

[12] Peter G Danchin and others, 'The Pandemic Paradox in International Law' (2020) 114 American Journal of International Law 598.
[13] ibid.
[14] Jinho Song, 'Perspectives on a Severe Accident Consequences—10 Years after the Fukushima Accident' (2021) 2 Journal of Nuclear Engineering 398.
[15] Laurence Boisson de Chazournes and MakaneMoiseMbengue, 'GMOs and Trade: Issues at Stake in the EC Biotech Dispute' (2004) 13 Review of European, Comparative & International EnvironmentalLaw 289.
[16] Reinhard Quick and Andreas Blüthner, 'Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case' (1999) 2 Journal of International Economic Law 603.
[17] Jan Bohanes, 'Risk Regulation in WTO Law A Procedure-Based Approach to the Precautionary Principle' (2002) 40 Columbia Journal of Transnational Law 323.
[18] Lukasz Gruszczynski, 'Science in the Process of Risk Regulation under the WTO Agreement on Sanitary and Phytosanitary Measures' (2006) 7 German Law Journal 371.

WTO Panels and the AB, contribute or not to make the objectives of the treaty become a reality and to lead WTO Members towards those ends.

In other words, what this work tries to unearth is, on one hand, the overarching objectives of the SPS Agreement; and, on the other hand, how the official interpretation of its core provisions has put WTO Members closer or farther away from the goals of the treaty. Given the extent of this publication, the scope of review is limited to Articles 2.2, 3, and 5 of the SPS Agreement, which arguably incorporate some of the key elements of the treaty. Currently, this research is relevant because in order to protect environmental and public health, states should be aware of the degree of *regulatory capacity* that they have to adopt SPS measures, which in the context of the WTO is disciplined by the SPS Agreement.[19]

To study the relationship between the interpretation of Articles 3 and 5.7 of the SPS Agreement in light of the objectives of the treaty, this article is divided in four core sections. Section 1 proposes a set of two SPS overarching objectives that are based on Article 2.2 of the SPS Agreement, which will work as a legal metric. Section 2 refers to Articles 2, 3.1, and 3.2, concluding that the ambiguity in the interpretations of the DSB about the concept of 'sufficient scientific evidence' has led to a diminished *regulatory rationality*. Lastly, Section 3 focuses on Articles 3.3 and 5.7 and concludes that, given the restrictive interpretation of these provisions, Members' *regulatory capacity* has become narrow.

Regulatory Capacity and Rationality: Article 2.2 as a Source of SPS Objectives

Previous research has inquired into the interpretative problems of the SPS Agreement without much consideration of the overarching goals of the treaty. However, this approach is of fundamental importance as analysing Members' *regulatory capacity* in light of the objectives implied in the SPS Agreement bridges interpretative practice and the 'object and purpose' of the treaty. This methodology stems from Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which is key in treaty interpretation.[20] Further, Article 31 of the VCLT results

[19] Helen L Walls, Richard D Smith and Peter Drahos, 'Improving Regulatory Capacity to Manage Risks Associated with Trade Agreements' (2015) 11 Globalization and Health 14.
[20] Richard K Gardiner, *Treaty Interpretation* (Oxford University Press 2008).

relevant inasmuch as its rules are incorporated into WTO law through Article 3.2 of the Dispute Settlement Understanding (DSU) and relevant case law.[21]

Commentators have clarified that interpreters shall extract the object and purpose of a treaty from its relevant provisions.[22] In the context of the SPS Agreement, it is noteworthy that different parts of the treaty make reference to wide array of objectives. For instance, the language of the Preamble incorporates goals such as improving the phytosanitary situation of Members and minimising the trade effects of their SPS measures,[23] while specific provisions reflect in their headings additional principles such as 'harmonisation'[24] and 'transparency.'[25] All of these goals could fall within the scope of this work. Despite the foregoing, when assessing the objectives of the SPS Agreement, this research places a particular focus on the objectives outlined in Article 2.2 of the treaty.

As mentioned before, a notable feature of the SPS Agreement is that provision headings reflect general principles rather than specific obligations. For instance, the heading of Article 2 is 'Basic Rights and Obligations.' This shows that the role of this provision is influencing other parts of the Agreement rather than incorporating an autonomous and self-contained standard. In this sense, Article 2.2 is a cornerstone provision of the SPS Agreement.[26] As explained by commentators, para. 1 of Article 2 incorporates the right of Members to adopt and maintain SPS measures, but this right is immediately qualified by the subsequent paragraphs.[27] Notably, para 2 requires that such measures are both 'necessary' and founded on a 'scientific basis'.[28] The provision reads as follows:

> Members shall ensure that any sanitary or phytosanitary measure is applied *only to the extent necessary* to protect human, animal or plant life or health,

[21] PR, *Peru-Additional Duty on Imports of Certain Agricultural Products*,WT/DS457/R and Add 1., as modified by ABR, WT/DS457/AB/R, adopted 31 July 2015, para. 7.9.
[22] David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 Vanderbilt Journal of Transnational Law 565.
[23] Steve Charnovitz, 'Preamble SPS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO Technical Barriers and SPS Measures*, vol 3 (Brill Nijhoff 2007).
[24] SPS Agreement art. 3.
[25] ibid art. 7.
[26] Anja Seibert-Fohr, 'Article 2 SPS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO Technical Barriers and SPS Measures*, vol 3 (Brill Nijhoff 2007), 394.
[27] Lukasz Gruszczynski, 'The Role of Science in Risk Regulation under the SPS Agreement' (2006) EU Working Paper LAW, 6.
[28] ibid

> is based on scientific principles and is not maintained without sufficient *scientific evidence*, except as provided for in paragraph 7 of Article 5 (emphasis added).

In this vein, Article 2 has a 'trickle-down' effect in other provisions of the SPS Agreement. According to the Panel in *US–Poultry (China)*, Article 2 informs all other provisions of the SPS Agreement.[29] For instance, the AB in *EC-Hormones* stated that Article 5 should constantly be read together with Article 2 because the elements that define the basic obligations set out under the different paragraphs of Article 2 impart meaning to the specific obligations in Article 5.[30] As pointed out by Seibert-Fohr,[31] if Article 2 was not intended to have systemic effects in other provisions, it would have been sufficient for it to allow Members to adopt SPS measures compliant with the Agreement, without elaborating on the obligations that it incorporates in paras 2-3.

Hence, this article considers that structural objectives of the SPS Agreement can be extracted from this provision.[32] Particularly, Article 2.2 incorporates two key elements of the SPS Agreement, the concept of 'necessity' and the notion of 'scientific evidence.'[33] As will be explained below, a high-level review of these elements leads to conclude that the treaty pursues the following objectives: (i) granting Members the capacity to protect values of public interest (*regulatory capacity*) and (ii) keeping regulatory measures under control to prevent arbitrary regulation (*regulatory rationality*). The following subsections will refer to these objectives lying within the concepts of 'necessity' and 'scientific evidence.'

'*Necessity' and Regulatory Capacity*

Under Article 2.2 of the SPS Agreement, Members shall ensure that SPS measures are applied 'only to the extent necessary' to protect human, animal, or plant life or health.[34] However, these terms have not been interpreted squarely by WTO decision-making bodies. A common resource in treaty interpretation of

[29] PR, *United States-Certain Measures Affecting Imports of Poultry from China,* WT/DS392/R, adopted 25 October 2020, para. 7.142.
[30] ABR, *Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February (1998) 180.
[31] Op. cit. Seibert-Fohr (2007) 394.
[32] Op. cit. Quick and Blüthner (1999) 619.
[33] Op. cit. Gruszczynski (2006) 6.
[34] SPS Agreement, Article 2.2.

international trade law instruments is referring to similar language in other provisions of the Covered Agreements.[35] Therefore, as an immediate reference, factfinders could rely on previous interpretations of the term 'necessary' in Article XX of the General Agreement on Tariffs and Trade (GATT 1994) to extract the meaning in Article 2.2 of the SPS Agreement, particularly as there is a rich variety of Panel Reports regarding the 'necessity test.' Further, according to the negotiation history of the SPS Agreement, it is a further elaboration of Article XX(b) GATT 1994.[36]

Despite the foregoing, WTO Panel Reports show a somewhat different approach, finding interpretative guidance in other provisions of the SPS Agreement, which is also the rule of 'context' in treaty interpretation.[37] In *Australia–Salmon*, the AB suggested that a measure beyond this 'necessity' is that which reflects a higher level of protection than the 'appropriate level of protection' (ALOP) determined by an importing Member.[38] Following the same reasoning, the Panel in *India-Agricultural Products* considered that Articles 5.6 and 2.2 should be read together, finding that Respondent's measures were inconsistent with Article 5.6 because they were significantly more trade-restrictive than required to achieve certain ALOP.[39] This assessment is reinforced by practical considerations of the AB that a violation of Article 5.6 of the SPS Agreement would also constitute a violation of Article 2.2.[40]

A stand-alone research question is to what extent 'necessity' in Article 2.2 of the SPS Agreement should be interpreted as 'necessity' in GATT 1994. This article does not address this issue but argues instead that, at least from a policy perspective, the regulatory language embedded in Article XX of GATT 1994 is relevant to enlighten the purposes of the SPS Agreement.[41] As explained by McGrady,[42]

[35] Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2009) 21 European Journal of International Law 605, 630.
[36] Boris Rigod, 'The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)' (2013) 24 European Journal of International Law 503.
[37] VCLT, Article 31(2); Asif H Qureshi, *Interpreting WTO Agreements* (Cambridge University Press 2015).
[38] ABR, *Australia-Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para.213, footnote 166, paras. 340, 346-347.
[39] PR, *India-Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R, WT/DS430/R/Add.1, adopted 19 June 2015, paras.7.603, 7.615-7.617.
[40] ABR, *Australia-Salmon*, para.213, footnote 166.
[41] Op. cit. Quick and Blüthner (1999), 638.
[42] Benn McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2009) 12 Journal of International Economic Law 153, 153-154.

'necessity' in WTO Covered Agreements recognizes a Members' regulatory goals and its capacity to address them. In this vein, provisions recognising Members' powers to address non-trade objectives through regulatory action will incorporate nuances into the assessment of a WTO inconsistency.

This means that, when a trade restrictive measure is put in place by one or more Members which pursue the protection of a value of public interest, the DSB cannot *ipso facto* consider it to be a violation of the Covered Agreements but must engage in a genuine exercise of weighing and balancing the interests at stake.[43] This approach was confirmed by the AB in *Korea-Beef*, which stated that the more vital the interests at stake are, the easier it would be to accept as necessary a measure to safeguard them.[44] Hence, it is paramount to remember that there is a connection between the 'necessity' of a measure and the importance of protecting certain non-trade objectives such as environmental and public health.[45]

'Scientific Evidence' and Regulatory Rationality

Article 2.2 of the SPS Agreement also requires measures to be based on scientific principles and not be maintained without sufficient scientific evidence. The AB in *EC–Hormones* stated that this provision, as well as the considerations on risk assessment in Article 5.1, is essential to maintain the balance in the SPS Agreement between trade and the life and health of humans and animals.[46] As pointed out by Gruszczynski,[47] 'the scientific basis, as required by the SPS Agreement, hasbecome one of the important factors in the assessment of the compatibility with international trade rules.' Accordingly, even a measure that is not discriminatory and was adopted in good faith may violate the SPS Agreement if it does not conformto scientific standards.[48] This is an illustration of the type of norms that constitute what Hudec[49] calls 'post-discriminatory' WTO law.

[43] ABR, *Korea-Beef*, para. 164.
[44] ABR, *Korea-Measures Affecting Imports on Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 162.
[45] See, for instance, Art. XX(b) of the GATT 1994.
[46] ABR, *EC Hormones*, para. 177.
[47] Op. cit. Gruszczynski (2006), 6.
[48] ibid
[49] Robert Hudec, 'Science and "Post-Discriminatory" WTO Law' (2003) 26 Boston College International and Comparative Law Review 185.

Here, considering the negotiation history of the SPS Agreement is key. The SPS Agreement was developed at the Uruguay Round[50] following the interest of the Members to develop the contents of Article XX(b) of the GATT.[51] While it was not intended to be a stand-alone agreement at first, the SPS Agreement ended up as such due to Members' concerns on regulating trade and health with transparency.[52] Bearing this in mind is of great importance to understand the objectives of the SPS Agreement because, as explained by Sykes,[53] states considered that, under the GATT 1994, regulators were free to adopt whatever regulations they wished, even if these were disproportionate to foreign suppliers. Then, the SPS Agreement was seen as a treaty that, by way of reference to scientific standards[54], could introduce into international trade regulation requirements of *regulatory rationality*.[55]

Diminished Regulatory Rationality

Article 2: Ambiguity of 'Sufficient Scientific Evidence'

While 'scientific evidence' is key to the SPS Agreement, its meaning is not crystal clear. The definition of the terms 'scientific' and 'evidence' was considered by the Panel in *Japan-Apples*, where it compared them with the notion of 'pertinent information' in Article 5.7 to conclude that circumstantial data was not 'scientific evidence.'[56] This only refers to the degree of scientific evidence, which is a question different from the terms themselves, and only means that the amount of evidence expected under Article 3, as opposed to the 'supposedly'[57] flexible standard under Article 5.7, is higher. In the same vein, the AB in *Japan-Agricultural Products II*, concluded that 'sufficient scientific evidence' existed when there was a rational or

[50] Background Note by the Secretariat, 'Sanitary and Phytosanitary Regulation Affecting Trade in Agriculture', GATT Doc. MTN.GNG/NG5/W/41 (2 Feb. 1988), 2–4.
[51] 'Summaries of the Main Points Raised during the Meetings of the Working Group on Sanitary and Phytosanitary Regulations and Barriers', e.g., GATT Doc. No.MTN.GNG/NG5/WGSP/W/1 (28 Oct. 1988) and GATT Doc. No. MTN.GNG/NG5/WGSP/W/2 (14 Nov. 1988).
[52] Marianna B Karttunen, *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown* (Cambridge University Press 2020).
[53] Alan O. Sykes, Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View, 3 Chi. J. Int'l L. 353, 356 (2002).
[54] Op. cit. Gruszczynski (2006), 6.
[55] ibid.
[56] PR, *Japan*-Apples, para. 8.92.
[57] Section 3(B) of this paper will show that this distinction is illusory in the case law.

objective relationship between the SPS Agreement and the scientific evidence at issue, which should be determined on a case-by-case basis.[58]

But when does this rational or objective relationship actually exist? The interpretation of the AB is quite unclear. Certainly, one could argue that the whole aspect of a 'case-by-case' analysis is that a clear standard cannot be established. Accordingly, some authors consider that factfinders may have consciously decided to refrain from offering a clear-cut standard to have a greater degree of flexibility.[59] While this is a valid approach applied frequently by the DSB, it lacks a reliable methodology to assess SPS compliance. Particularly, from a regulatory perspective, countries will not have *ex ante* a clear standard to evaluate their SPS measures prior to implementation, being subject to a later DSB decision to know if certain SPS program was 'sufficiently' backed by scientific evidence.

A separate issue is defining scientific evidence as such. To this end, the two terms that constitute the overarching concept have been interpreted separately. The word 'scientific' was defined by the AB in *EC-Hormones* as 'having or appearing to have an exact, objective, factual, systematic or methodological basis and relating to, or exhibiting the methods or principles of science.'[60] Another definition considers 'scientific evidence' as 'evidence gathered through scientific methods, excluding by the same token information not acquired through a scientific method.'[61] Yet, these concepts do not contribute to unravelling the enigma on the sufficiency of scientific evidence because they are still quite uncertain. Further,not only these definitions are extremely vague, but as pointed out by Gruszczynski[62] they are tautological, adding nothing but more ambiguity.

Despite the vagueness of the standard, the AB has offered certain guidelines such as 'the characteristics of the measure at issue, quality and quantity of scientific evidence.'[63] Additionally, part of the case law has suggested that a lack of connection between the risk and the SPS measure will point to an absence of rational connection.[64] However, this falls short as the DSB has limited the

[58] ABR, *Japan Agricultural Products II*, para.84.
[59] Op. cit. Gruszczynski (2006), 9 et seq.
[60] ABR, *EC-Hormones*, footnote 172.
[61] PR, *Japan-Apples*, para. 8.92.
[62] Op. cit. Gruszczynski (2006), 9.
[63] ABR, *Japan-Agricultural Products II*, para. 84.
[64] ABR, *Japan-Apples*, para. 164.

interpretation to open-ended terms that appear empty and do not offer sufficient tools for a regulator to determine if its SPS measures meet the standard of sufficient scientific evidence. Besides, the relevant literature underscores additional issues of uncertainty in the interpretation of these terms.

For instance, Peel[65] indicates that the outstanding definitions of scientific evidence under the SPS Agreement are very broad and suggest minimum constraints in terms of methodological requirements. Mainly, the reality of scientific practice demands a high standard of rigor and care in the determination and assessment of methodological questions related with evidentiary matters, aiming towards best industry practices. On the contrary, the interpretations of the DSB have reduced 'scientific evidence' and its 'sufficiency' within the SPS Agreement to ambiguous and ill-defined standards that have grown apart from scientific practice in the last 30 years, since the Uruguay Round. Notably, this is quite uncommon in domestic and regional approaches to SPS regulation, where there are clear guidelines that scientific standards are to be treated with informed deference.[66]

The rulings of WTO decision-making bodies give factfinders a high degree of discretion to determine the existence or not of sufficient scientific evidence. As pointed out by Covelli and Hohots,[67] they would suggest that there is almost a *de novo* standard of review, where these bodies can determine whether evidence is sufficient for the justification of an SPS measure. A great concern here is the ruling of the AB in *EC-Hormones*, followed in subsequent disputes, that factfinders should not be deferent to the opinion of experts but engage with it substantively.[68] Even though trade experts may consult with relevant stakeholders or environmental agencies on SPS matters, they do not necessarily have specialised knowledge on such technical issues and may end up imposing their views on questions of scientific evidence, which again impacts the stability of the system.[69]

Articles 3.1 and 3.2: Soft Interpretation of Conformity to Scientific Standards

[65] Jacqueline Peel, 'Risk Regulation under the WTO SPS Agreement: Science as an International Normative Yardstick' (2004) Jean Monnet Working Paper, 5.
[66] David A Wirth, 'The Role of Science in the Uruguay Round and NAFTA Trade Disciplines' (1994) 27 Cornell International Law Journal 817, 843.
[67] Nick Covelli and Viktor Hohots, 'The Health Regulation of Biotech Foods under the WTO Agreements' (2003) 6 Journal of International Economic Law 773, 783.
[68] ABR, *EC-Hormones*, para. 117.
[69] Op. cit. Covelli and Hohots (2003), 783.

There are also interpretative problems with Article 3 as such, which result from its three subparagraphs. Article 3.1 establishes that 'Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations.' Article 3.2 refers to SPS measures that 'conform to' these standards and determines that they will be deemed to be necessary. Article 3.3 states that Members may introduce or maintain SPS measures that result in a higher level of protection than that of international standards if there is a scientific justification or if this results from the level of sanitary or phytosanitary protection a Member determines to be appropriate under Article 5.

The Panel in *EC-Hormones,* which dealt with the prohibition of imports of meat and meat products to which certain hormones were administered for growth purposes, addressed the differences between Articles 3.2 and 3.3. Notably, it held that the terms 'conform to' in Article 3.2 and 'based on' in Article 3.3 meant the same.[70] The AB reversed this finding stating that it was deliberate that negotiators used different terms so that an effective interpretation of the language of the treaty could not lead to the same meaning.[71] The AB then interpreted that 'based on' suggested a relative relationship between the SPS measure and the international standard, so it did not need to accommodate completely to such guidelines, while 'conform to' meant full compliance with the standard.[72]

According to the AB, the difference between these provisions is that the first does not suggest full compliance with international standards.[73] However, factfinders disregarded that 'based on' is qualified with the word 'shall' in Article 3.2. While interpreting paragraph 5.2 of the Doha Ministerial Decision, the Panel in *US-Clove Cigarettes* emphasised that the use of the word 'shall' instead of 'should' or 'may' suggested that the intention of the parties was to make an obligation binding.[74] Accordingly, commentators have strongly criticised the indistinct treatment of

[70] PR, *EC-Hormones*, paras. 8.72-8.73.
[71] ABR, *EC-Hormones*, para. 164.
[72] Ibid.,para. 163.
[73] ABR, *EC-Hormones*, para. 163.
[74] PR, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, para. 7.575.

voluntary and mandatory language in the WTO Covered Agreements for interpretation.[75]

The case of *EC-Hormones* is a textbook example of this problem. As referred by McNiel,[76] the interpretation of the AB reduces mandatory language in Article 3.1, which uses the word 'shall', to nothing but an 'idealistic but wholly unenforceable objective.' Conversely, mandatory language in the provisions seems to suggest that Members were expected to base their SPS measures on international standards.[77] Then, the contrary reading of Article 3.1 by the AB is troublesome because it reduces the strength of an obligation designed to pursue a high degree of harmonisation between domestic and international SPS guidelines for purposes of uniformity to 'soft scientific standards.'[78] Further, this interpretation is also contrary to the duty of WTO factfinders to not diminish the obligations of Members.[79]

The policy impact of this interpretation is also noteworthy. As authors have pointed out, under this ruling, Members gain nothing from basing their measures on international standards as opposed to differing from them completely.[80] Hence, they may argue that they considered the international guidelines to a certain extent and disregard them in a substantive part. Additionally, the interpretation seems to conflict with the object and purpose of the SPS Agreement[81] as Recital 5 dictates that the treaty is signed 'desiring to further the use of harmonised sanitary and phytosanitary measures among Members, based on international standards, guidelines, and recommendations (…), which enshrines the goals of harmonisation of SPS measures, and the impact envisioned by the negotiators.[82]

In this regard, the interpretation of measures 'based on' and 'conforming to' international standards harms the object and purpose of 'scientific evidence' within

[75] Rambod Behboodi, '"Should" Means "Shall": A Critical Analysis of the Obligation to Submit Information under Article 13.1 of the DSU in the Canada - Aircraft Case' (2000) 3 Journal of International Economic Law 563.
[76] Dale E McNiel, 'The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban' (1998) 39 Virginia Journal of International Law 89.
[77] ibid., 123.
[78] Ryan D Thomas, 'Where's the Beef-Mad Cows and the Blight of the SPS Agreement' (1999) 32 Vanderbilt Journal of International Law 487, 491, 509-510.
[79] DSU, Article 3.2.
[80] Op. cit. Gruszczynski (2007), 7.
[81] Oliver Landwehr, 'Article 3 SPS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO Technical Barriers and SPS Measures*, vol 3 (Brill Nijhoff 2007), 427.
[82] Regine Neugebauer, 'Fine-Tuning WTO Jurisprudence and the SPS Agreement: Lessons from the Beef Hormone Case' (2000) 31 Law and Policy in International Business 1255, 1263.

the SPS Agreement. As explained above, if Members expected to incorporate science in the treaty and bring *regulatory rationality* to SPS measures, then international standards were to be included in such a way that they appear to bethe appropriate means to achieve this end. Additionally, the Agreement explicitly pursues the harmonisation of domestic measures with these standards. However, when such parameters are made discretional to the will of Members, the effectiveness of the SPS Agreement is diminished.

Narrow Regulatory Capacity

Article 3.3: Misapplication of High Standards to a Flexible Provision

Article 3.3 also reads that Members may introduce SPS measures that result in a higher level of SPS protection than provided in international standards, 'if there is a scientific justification, *or* as a consequence of the level of sanitary or phytosanitary protection, a Member determines to be appropriate under the relevant provisions of paragraphs 1 through 8 of Article 5' (emphasis added). Accordingly, in the *EC-Hormones* case, EC argued that the word 'or' implied that it was possible to demonstrate 'scientific justification' even by means different to those in a risk assessment exercise under Article 5.[83] However, the AB considered that this distinction had very limited effects and was 'more apparent than real.'[84]

The previous interpretation misapplied the standard of Article 3.3 by mixing it with Article 5. A similar approach, this time confusing Article 3.3 with Article 2, was followed by the AB in *Japan Agricultural Products II.* Here, the AB stated that a 'scientific justification' under Article 3.3 existed when there was a rational relationship between the SPS measure and the available scientific information.[85] The latter assessment, as the one in *EC-Hormones,* is also contrary to effective interpretation as it equates 'scientific justification' under Article 3.3 to 'sufficient scientific evidence' under Article 2.2. Notably, the AB has rushed to conclude that the term 'or' in Article 3.3 has no significant meaning. As demonstrated by Aher,[86] uncertainty as to whether this word should be read as an inclusive or an exclusive connector is common. But, when compared with the position adopted by the DSB

[83] EC Appellate Submission, *EC-Hormones*, para. 88.
[84] ABR, *EC-Hormones*, para. 176.
[85] ABR, *Japan-Agricultural Products II*, para. 79.
[86] Martin Aher, 'Deontic Contexts and the Interpretation of Disjunction in Legal Discourse' (2013) 58 Canadian Journal of Linguistics 13.

in other cases debating the interpretation of the same connector, Article 3.3 is clearly an exception because in the past the term 'or' has been interpreted to suggest different alternatives.[87]

The practical implication of this approach is that, while on the paper Members are granted a right not to base their SPS measures on international standards, *de facto* case law has created an unwritten requisite that they will still have to undertake a stringent risk assessment as incorporated in Articles 2 and 5 of the SPS Agreement.[88] This has important implications relating to Members' *regulatory capacity*. While the SPS Agreement seems to refer to a broad standard of 'scientific justification' defined in footnote 2 of the text, the AB decided to make it equivalent to the restrictive test in Articles 2 and 5. Notably, this constraint on *regulatory capacity* is a major shortcoming of DSB's interpretative practice as it disregards the fact that Article 3.3 reflects a common regulatory reality as described below.

Members' agencies and national scientific bodies entrusted to regulate the protection of environmental and public health, which have been in place for years even before the SPS Agreement came to existence, tend to implement standards above the level of protection of international instruments.[89] By way of example, Footer[90] explains that, during the negotiations of the SPS Agreement, large countries such as the US were interested in getting a sufficient degree of freedom to base SPS measures on scientific standards developed by their 'trustworthy' domestic authorities. For instance, entities such as the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA), which are in charge of regulating controlled goods such as medicines and food products in the US, as well as the protection of the environment and other SPS issues, are key to governmental regulatory action and have a background of over 100 years of intervention in national public policies.[91]

[87] PR, *United States-Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add. 1 to Add. 3, adopted 21 March 2005, as modified by ABR, WT/DS267/AB/R, paras. 7.1484-7.1497.
[88] ibid.
[89] Sidney A Shapiro, 'International Trade Agreements, Regulatory Protection, and Public Accountability' (2002) 54 Administrative Law Review 435.
[90] Mary E Footer, 'Post-Normal Science in the Multilateral Trading System: Social Science Expertise and the EC–Biotech Panel' (2007) 6 World Trade Review 281, 287-288.
[91] Emily Marden, 'Risk and Regulation: U.S. Regulatory Policy on Genetically Modified Food and Agriculture' (2003) 44 Boston College Law Review 733.

Other treaties with a similar background also confirm that this is an important matter of *regulatory capacity*. Relevant literature accepts that WTO CoveredAgreements and the North American Free Trade Agreement (NAFTA) have deep connections.[92] In this sense, it is useful to highlight that under the NAFTA, the regulatory right of states to impose measures with a higher level of protection thanthat of international guidelines is clear and grants a high degree of discretion in favour of regulatory authorities.[93] Specifically, Article 712.1 of the NAFTA expressly recognizes the right of each party to 'adopt, maintain, or apply any sanitary or phytosanitary measure (…) including a measure more stringent than aninternational standard, guideline or recommendation.' Also, Article 713.3 states that:

Nothing in Paragraph 1 shall be construed to prevent a Party from adopting, maintaining, or applying, in accordance with the other provisions of this Section, a sanitary or phytosanitary measure that is *more stringent* than the relevant international standard, guideline or recommendation (emphasis added).

Hence, the issues discussed in this section regarding the interpretation of Article 3 of the SPS Agreement demonstrate that, as stated by Landwehr,[94] the rulings ofthe AB in *EC-Hormones* and other cases 'ha[ve] changed Art. 3 beyond recognition.' Certainly, as pointed out by the AB, 'Article 3.3 is not a model of clarity in drafting and communication.'[95] But this cannot justify the fact that the intricacies of the SPS Agreement have led the DSB to conclude that provisions such as Article 3 must be left without effect.[96] In this regard, an interesting point to consider are the interpretative alternatives that WTO factfinders left behind for misapplying high standards to flexible provisions. As authors have accurately noted, accepting the AB's approach, it is still troublesome to accept a scenario based on the idea that the drafters of the Agreement defined 'scientific justification' in a footnote when, at the same time, they expected one part of Article 3.3 to be invalidated.[97]

[92] Richard H Steinber, 'Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development' (1997) 91 American Journal of International Law 231.
[93] Op. cit. Wirth (1994).
[94] Op. cit., 426.
[95] ABR, *EC-Hormones*, para. 175.
[96] Ibid., para. 176.
[97] Op. cit. Quick and Blüthner (1999), 614.

Article 5.7: The Myth of 'Precaution' in SPS Regulation

As clarified by Laowonsiri,[98] Article 5.7 only applies to situations where there is not sufficient scientific evidence. For a measure to be adopted under Article 5.7, three additional conditions must be met:[99] (i) that it is adopted 'on the basis of available pertinent information;' (ii) that the Member imposing the measure seeks to 'obtain the additional information necessary for a more objective assessment of the risk;' and (iii) that the Member also reviews the measure accordingly 'within a reasonable period of time.' To a certain extent, this enshrines an important degree of *regulatory capacity* because, even in the absence of scientific grounds as demanding as those in other provisions, *regulatory rationality* could be extracted from a Member's need to address an SPS situation in its territory.

An important question that arises again in this provision is the meaning of 'scientific evidence.' Following relevant literature, this means all evidence gathered in accordance with scientific principles to support or counter a hypothesis.[100] But there is an important difference between 'scientific evidence' and 'available pertinent information' that arises in this provision. Seemingly, the second is a more flexible category as the SPS Agreement itself suggests that it is different to 'scientific evidence' and that it is a concept of a subsidiary application, appearing only 'in cases where relevant scientific evidence is insufficient.' Some argue that this opens the door for considerations of information obtained through alternative sources such as public deliberation, public values, and consumer data and attitudes.[101]

Despite the foregoing, on this issue, the AB has taken a somewhat radical approach. In *Japan-Apples,* it pointed out that, while 'scientific evidence' and 'available pertinent information' are different concepts, the second must be relevant to the first.[102] Not only is this ambiguous, damaging again the purpose of WTO interpretation to provide for the effective meaning of autonomous terms, but also sets the threshold too high for Members to implement SPS measures based on

[98] Akawat Laowonsiri, 'Application of the Precautionary Principle in the SPS Agreement' (2010) 14 Max Planck Yearbook of United Nations Law Online 563, 569-570.
[99] PR, *Japan-Agricultural Products II*, paras. 8.56-8.60.
[100] Brian A Maurer, 'Models of Scientific Inquiry and Statistical Practice: Implications for the Structure of Scientific Knowledge' in Mark L Taper and Subhash Lele R (eds), *The nature of scientific evidence: statistical, philosophical, and empirical considerations* (University of Chicago Press 2004).
[101] David Winickoff and others, 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law' (2005) 30 Yale Journal of International Law 81.

'available pertinent information' because they will have to meet the same standard of 'scientific evidence'. Consequently, the outstanding interpretation of this term results in the *de facto* restriction of Members ability to present a successful justification of its SPS measures under Article 5.7, narrowing *regulatory capacity*.

There are other interpretative insufficiencies in Article 5.7. The AB has considered that even cases where there is available evidence, but it does not lead to reliable or conclusive results, would be considered scenarios of 'insufficient scientific evidence.'[103] Again, this is extremely ambiguous: when is a Member supposed to know that there are not 'reliable or conclusive results?' An example of this is the case of *EC-Hormones*, where there was scattered scientific knowledge on the potential negative health effects of certain hormones used in beef but there was no certainty as to the specific causes and effects of said risks, limiting Members' right to regulate them. All in all, as suggested by the doctrine, the case law does not distinguish inconclusive results from scientific uncertainty.[104] Additionally, from previous rulings, it is clear that the provision deals with scenarios of insufficient evidence but not if it covers a situation where such evidence is missing.[105]

On its face, Article 5.7 enshrines the *regulatory capacity* of Members in defence of their population or environment.[106] This comes from the perception of the state as an agent with the duty to protect its nationals and act to do so under the rules of caution. As recognized by the AB in *EC-Hormones*, governments commonly act from perspectives of prudence and precaution where risks of irreversible life terminating, damage to human health is concerned.[107] Yet, as recognized by Stoll and Strack,[108] the authority granted by Article 5.7 to impose precautionary measures is not a 'safe harbour', but rather a very limited one. As stated by the Appellate Body in *Japan-Apples*, it does not free a Member for conducting a risk assessment and thus the terms of Article 5.1 seem to apply.[109]

[103] ABR, *Japan-Apples*, para. 185.
[104] Op. cit. Gruszczynski (2006), 22.
[105] Op. cit. Stoll and Strack (2007), 459.
[106] Markus Wagner, 'Interpreting the SPS Agreement: Navigating Risk, Scientific Evidence and Regulatory Autonomy' (2016).
[107] ABR, *EC-Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 124.
[108] Op. cit. Stoll and Strack (2007), 459.
[109] ABR, *Japan-Apples*, WT/DS245/ABR/R, para. 179.

Again, this can be traced back to the influence of Article 2.2. in other provisions. The AB in *Japan-Agricultural Products II* stated that the context of the word 'sufficient' in Article 2.2, more generally, the phrase 'maintained without sufficient scientific evidence', includes Article 5.7.[110] This means that it must be considered in the interpretation of the provision. Such an approach is problematic because it gives place to a confusing debate on whether Article 5.7 is an exception to Article 2.2 or whether it incorporates an independent right or obligation. In the same dispute, the AB determined that Article 5.7 operates as a qualified exception from the obligation under Article 2.2.[111] But the Panel in *EC-Biotech* disagreed and considered instead that Article 5.7 sets forth an autonomous right.[112]

This difference is not minor, and it remains unsettled. Its complexities are illustrated by the inconsistencies of the case law regarding the burden of proof of Article 5.7. According to general procedural law, the party who asserts is responsible for presenting proof thereof.[113] This is reflected in the concept of the *prima facie* case, 'which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case.'[114] Conversely, for an affirmative defence, the Respondent bears the burden of proof.[115] On Article 5.7 of the SPS Agreement, the Panel in *Japan-Agricultural Products II* placed the burden of proof on the Complainant,[116] but the subsequent Panel in *Japan-Apples* assigned it to the Respondent.[117]

Should we then treat Article 5.7 as a right or an exception? The positions of the DSB seem to be open-ended and accidental rather than rational. Even accepting thatArticle 5.7 is a defence, why does the same AB in the same case deal with Article 3.3, which has a similar structure, in a completely different way if not for a bare

[110] ABR, *Japan-Agricultural Products II*, WT/DS76/R, para. 74.
[111] Ibid., para. 80.
[112] PR, *EC-Biotech*, para. 7.2969.
[113] ABR, *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R, para. 335.
[114] ABR, *EC-Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 104; John Barcelo, 'Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement' (2009) 42 Cornell International Law Journal 23.
[115] PR, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, para. 9.57.
[116] PR, *Japan-Agricultural Products II*, WT/DS76/R, para.8.58 et seq.
[117] PR, *Japan-Apples*, WT/DS245/R, para.8.212.

inconsistency?[118] Authors like Charnovitz[119] have commented that Article 5.7 should not be addressed as an exception or put the burden of proof on the Respondent. But the reality is that the adequate way to approach this provision, far from transparent, is 'disorderly and incoherent.[120] In this sense, a useful tool disregarded by the DSB is to give greater importance to the interpretative context of the SPS Agreement found in Article XX(b) of the GATT 1994.

From a historical point of view, the SPS agreement is an agreement drafted from a public policy perspective because it is a development of Article XX(b) of the GATT 1994, which includes general exceptions for measures of environmental or public health.[121] This means that, if certain conditions are met, states are allowed adegree of regulatory freedom even when it is contrary to trade liberalisation.[122] This is illustrated in Recital 8 of the Preamble of the SPS Agreement, which reads in relevant part that it is an effort to elaborate rules for the application of the provisions of GATT 1994 on SPS measures, in particular the provisions of Article XX(b).' However, unlike other WTO Agreements, the SPS Agreement confers Members' a 'right to regulate' and not just an 'exception.'

This is a structural difference that tends to be neglected. While GATT 1994 also grants Members *regulatory capacity*, it does so under the general exceptions in Article XX.[123] What this implies is that protecting environmental and public health is seen in GATT 1994 as a 'rare' situation, which to some extent makes sense considering the minimal success of these measures under Article XX cases. But the case for the SPS Agreement is completely different as there are no such exceptions and the treaty itself is a development of the regulatory powers of Members, a feature that has important effects. For instance, a right to regulate

[118] Joost Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes.EC - Hormones, Australia - Salmon and Japan - Varietals' (1999) 2 Journal of International Economic Law 641, 657.

[119] Steve Charnovitz, 'The Supervision of Health and Biosafety Regulation by World Trade Rules' (2000) 13 Tulane Environmental Law Journal 271, 289.

[120] Tomer Broude, 'Genetically Modified Rules: The Awkward Rule–Exception–Right Distinction in EC–Biotech' (2007) 6 World Trade Review 215.

[121] Thomas Cottier and Petros C. Mavroidis, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law: Past, Present, and Future* (University of Michigan Press, 2000).

[122] ibid.

[123] Rüdiger Wolfrum, 'Article XX. General Exceptions [Introduction]', *WTO - Trade in Goods* (Brill 2009).

maintains the burden of proof on the Complainant to show inconsistency.[125] Also, Panels have considered that exceptions, unlike rights, must be construed narrowly.[126]

If the previous section discussed risk to *regulatory rationality* under the notion of 'scientific evidence', this one is clearly about 'necessity' to regulate. As argued by some authors, the SPS Agreement is a trade instrument and not a vehicle for environmental protection.[127] But it still pursues a balance of objectives between trade liberalisation and the protection of non-trade objectives.[128] The importance of international standards is already in Articles 3.1 and 3.2, while risk assessment methods are covered in Article 5. What happens then when a state needs to regulate these levels? The interpretation of the AB does not hold water under *Scenario A2*, where there is a high need to regulate but 'available science' cannot be equated to an international standard under Article 3.2 or 'insufficient evidence' under Article 5.7.

Indeed, it is important to have interpreters and stakeholders that avoid basing decision-making within sensitive matters of public policy and trade barriers on subjective or arbitrary grounds. But this cannot be extended to the point of regulatory suffocation and leave behind the reality of public policy, much influenced by public concern even without resulting in protectionist objectives.[129]

Hence, previous DSB interpretations of Article 5.7 have been quite restricted. This does not align with the sense of 'precaution' in international law, which this provision supposedly reflects. From a broader international law perspective, Principle 15 of the 1992 Rio Declaration states that the precautionary approach 'shall be widely accepted' to prevent damages to the environment. Further, it states that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing' measures to prevent degradation.[130] This language is replicated in para. 9 of the CBD and Article 10.6

[125] ibid
[126] PR, *United States-Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989, para. 5.27.
[127] Op. cit. Neugebauer (2000), 1258.
[128] Op cit. Epps (2008).
[129] Pascal Lamy, 'The Place of the WTO and Its Law in the International Legal Order' (2006) 17 European Journal of International Law 969, 979.
[130] ibid

of the Cartagena Protocol on Biosafety, which altogether say that insufficient relevant scientific information cannot be an obstacle to prevent a threat.

There is no doubt that, compared with other international instruments aligned under the principle of precaution, Article 5.7 is a creature of a different kind.[131] Actually, the AB in *EC-Hormones* reviewed this exact issue and concluded that a more flexible approach to Article 5.7 was not feasible because the precautionary principle had not been adopted by states as a principle of customary international law.[132] Consistent with this approach, the Panel in *EC-Biotech*, called it 'too controversial and unsettled in international law'.[133] A justification under Article 5.7 not only requires compliance with several conditions and tends to be interpreted narrowly, but is also based on unreasonable presumptions, for example, that scientific certainty is always obtainable and must be granted to the highest extent.[134]

Turning to a review of SPS regulatory reality, it is clear that standing interpretations of Article 5.7 also raise significant concerns. As it deals with the notion of 'precaution', this provision is notably a problem for the objective concerned with Members' 'necessity' to regulate. While in appearance Article 5.7 is an important regulatory mechanism, its application would seem to reduce it to plain rhetoric. A powerful regulatory scenario here is that in which there isa high necessity to address an SPS concern and a low degree of available evidence. Apparently, here a member would have to turn a blind eye or risk a WTO inconsistency. A precise, example of this is the Covid-19 pandemic.

Members were aware of the existence of a global health crisis and implemented measures, involving in many cases SPS regulations, to protect their population on the face of a 'necessity' to safeguard values of public interest.[135] In the early stages of the pandemic, the scientific minutiae of the disease was still uncertain and even leading stakeholders like the World Health Organisation (WHO) to have lacked sufficient scientific evidence on the causes and effects of COVID-19, as well as

[131] Op. cit. Stoll and Strack (2007), 464.
[132] ABR, *EC-Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 123.
[133] PR, *EC-Biotech*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.89.
[134] Ibid 465.
[135] Giegling J, 'China's Recent Restrictions on Trade and the SPS Agreement' (*EJIL: Talk!* 18 January 2021) <https://www.ejiltalk.org/chinas-recent-restrictions-on-trade-and-the-sps-agreement/>.

the appropriate regulations.[136] Comparing such a situation, where risks and science come at a completely different pace, with the outstanding interpretative framework of the SPS Agreement, which limits both *regulatory rationality* and *regulatory capacity*, important concerns might appear in the debate.

Conclusion

This article intended to assess the *regulatory capacity* of Members to face environmental and public health issues within the purview of the SPS Agreement. To this purpose, it analysed the concepts of 'scientific evidence' and 'necessity' enshrined in Article 2.2 and then proposed a typology of SPS objectives based on both cross-cutting ideas. Then, it looked at the problems in the interpretation of certain provisions of Articles 2, 3 and 5.7 of the SPS Agreement, as well as their consequences for the relevant objectives of the treaty. This study illustrated the vagueness of the Agreement and how it has been turned into ambiguity by WTO factfinders. In the end, such inconsistencies showed that neither *regulatory rationality* nor *regulatory capacity* has been afforded adequate protection.

To date, WTO Members have been found to have acted inconsistently with their obligations under the SPS Agreement in all of the cases.[137] And, while some authors have strong positions on why the SPS Agreement should not be 'greened' because it is merely a trade instrument,[138] this article does not agree that the debate should be narrowed down in that way, cutting down change.[139] On the contrary, it considers that shortcomings in the assessment of SPS issues by the WTO should be put in a larger context of regulatory reality and global debates on the relationship between international trade and environmental and public health. Despite all of the complexities in its previous rulings, the AB itself has acknowledged that the Agreement embodies the duty of Members to safeguard the health of its people.[140]

As shown in this article, currently there is not a systemic or adequate development of a real *regulatory capacity* in the context of the SPS Agreement and the ultimate

[136] Paddeu F, 'COVID-19 and Defences in the Law of State Responsibility: Part I' (*EJIL: Talk!*, 17 March 2020) <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/>.
[137] Van den Bossche and Zdouc (2013), 1829.
[138] Op. cit. Neugebauer (2000), 1258.
[139] Gary P Sampson and others (eds), *Trade, Environment, and the Millennium* (United Nations University Press 1999), 225-227.
[140] ABR, *EC-Hormones*, WT/DS26/AB/R, para. 177.

message seems to be that trade concerns will always prevail in the interpretation.[141] Besides, authors like Bloche[142] have pointed out that the SPS Agreement merely 'reacts' to environmental and public health measures but cannot promote them on itself. This is even more concerning in real-life regulatory scenarios that the Agreement seems unable to address such as scientific divergence or the outburst of health crises where Members' only guiding principle sometimes are the ethics of its duty to protect.[143] Nonetheless, this does not mean that everything is lost as the improvement of interpretative standards and more balanced approaches may come.

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[141] Bruce A Silverglade, 'The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?' (2000) 55 Food and Drug Law Journal 517.

[142] Gregg Bloche, 'WTO Deference to National Health Policy: Toward an Interpretive Principle' (2002) 5 Journal of International Economic Law 825, 845.

[143] AK Simonds and DK Sokol, 'Lives on the Line? Ethics and Practicalities of Duty of Care in Pandemics and Disasters' (2009) 34 European Respiratory Journal 303.

Public Health Emergency and Necessity Defense under African BITs that Lack Non-Precluded Measure Provision

Isaias Teklia Berhe[1]

Force majeure, distress, and necessity are the defenses that states are entitled to invoke under international law to defend or preclude the wrongfulness of their acts in times of emergency. During the outbreak of the Covid-19, these defenses are available for states. However, the defense of *force majeure* will oblige states to demonstrate that they were absolutely prevented from complying with their international obligation by Covid-19 rather than arguing that they were entitled to take responsive action under the circumstances. The defense of distress will also oblige states to demonstrate a very narrow relationship that requires specific action. Hence, states will inevitably depend on the defense of necessity to argue that under the circumstance of the Covid-19, they were entitled to take actions to mitigate or avoid severe damage of their vital interest.

Necessity defense permits states to act in an otherwise illegal act in response to an occurrence of an emergency, and if not acted illegally, severe damage would result.[2] Necessity is a term without ordinary meaning that determines if a measure that a state implemented is necessary to achieve a certain goal. Courts and tribunals have been developing criteria to determine if a certain action is necessary to achieve a stated goal.[3] Customarily the discussion of necessity is limited to the work of the International Law Commission (ILC) 'narrow and rigid formulation'[4] under Article 25 of Articles on Responsibility of States for International Wrongful Acts (ARSIWA). States, courts, and authors generally accept that the drafting of ARSIWA reflects customary international law.[5]

[1] Lecturer, College of Business and Social Sciences, School of Law, Eritrea.

[2] James R. Fox, *Dictionary of International and Comparative Law* (Oceana TM Publication, 2003) 226.

[3] Mitchell, Andrew D. and Henckels, Caroline, Variations on a Theme: Comparing the Concept of Necessity in International Investment Law and WTO Law (2013) 14(1) Chicago JIL 92, 98; *see also* Jiirgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59(2) ICLQ 325, 337.

[4] Jorge E. Vinuales, State of Necessity and Peremptory Norms in International Investment Law (2008) 14(1) LBRof the Americas79, 79– 80

[5] Ibid*;* Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex art. 25, U.N. Doc. A/56/49 (Vol. I)/Corr.4, (2001) (hereinafter ARSIWA).

Besides its customary international law source and its codification by the ILC in ARSIWA, necessity defense has been a debatable international economic law principle—specifically in investment and trade agreements. Despite the specific root that it has and definition given in customary international law, BITs and trade agreements like the General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO) and other regional free trade agreements mention necessity or give a context of the defense.[6]

Even though investment and trade laws are part of the same international law field, international economic law, the necessity defense background in both areas is different. Some argue that the WTO laws on necessity are relevant to interpret necessity clauses in investment disputes as well; they argue so because the International Center for Settlement of Investment Disputes (ICSID) cited the WTO's reasoning in cases like the *Continental Causality* case.[7] The WTO dispute settlement bodies, the Panels, and the AB have been applying a steady and refined framework to adjudicate necessity, unlike the ICSID.[8] Galvez noted that 'WTO panels and the AB examine the necessity exception through a test that assesses the link between the respondent state's measure and its policy objective'.[9] However, there has been an argument that as per the early GATT/WTO history, the panel used to show some trade inclined interpretations of GATT provisions as the ICSID did in its early necessity related case.[10] The current interpretation of necessity in the WTO gives due consideration to 'states regulator autonomy'.[11]

African international investment law is governed by a complex, fragmented, and diverse set of bilateral, regional, and international legal documents. These legal documents comprise BITs, regional investment agreements, free trade agreements with investment provisions, and customary international law.[12] These legal

[6] Cynthia C. Galvez, 'Necessity, Investor Rights, and State Sovereignty for NAFTA Investment Arbitration' (2013) 46 CILJ 143, 147.
[7] *Continental v. Argentina Republic*, ICSID Case No. ARB/03/9, Award, 192 (Sept. 5, 2008) <http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf> accessed 14 February 2021
[8] Galvez (n 6) 154.
[9] ibid.
[10] Michael Ming Du, 'The Rise of National Regulatory Autonomy in the GATT/WTO Regime' (2011) 14(3) JIEL 639, 665; *see also* Galvez (n 6) 155.
[11] ibid; Galvez 155.
[12] Hamed El-Kady1 and Mustaqeem De Gama, 'the Reform of the International Investment Regime: An African Perspective' (2019) ICSID Review 1-14.

documents are accompanied by some influential non-binding regional investment documents, models, and drafts—even though these are not binding instruments, they are still considered as they are influential for 'African countries investment policy directions'.[13]

Like other states in other continents, African states also highly depend on BITs for attracting the flow of Foreign Direct Investment (FDI). African states started to sign BITs in the 1960s with the industrialized European states and the USA; these states then became the principal source of FDI to Africa.[14]Due to the economic development status difference between the home states (Europe and USA) and the host states (African states), these BITs are called 'North-South BITs'. However, African states are currently receiving a flow of FDI from southern countries, including China, India, Brazil, and Indonesia, etc. and BITs signed with these developing economies are referred to as South-South BITs.[15]

So far, African states have signed 881 BITs. Even though African states started to sign BITs in 1960, most BITs were signed in the 1990s and 2000s.[16] According to United Nations Conference on Trade and Development (UNCTAD), out of these 881 BITs, 520 are in force in Africa.[17] As the main feature of BITs is dispute settlement, African states have been subject to international disputes for claims made based on the BITs. Many argue that the dispute settlement provision in the BITs has driven African states into more investment disputes with private persons.[18] As of 2016, there were 111 investment cases against African states.[19]Amongthese, Egypt has faced the most number of cases (25 cases). Egypt is even the number three defendant in the ICSID, after Argentina and Venezuela. One of the recent

[13] Ibid.

[14] Talkmore Chidede, 'The Right to Regulate in Africa's International Investment Law Regime' (2019) 20 Oregon RIL 437, 438; Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18(3) JWIT 414, 414

[15] Chidede ibid 438 & 460; Lauge Skovgaard Poulsen 'The Politics of South-South Bilateral Investment Treaties, In Broude, Tomer, Busch, Marc L. and Porges, Amelia, (eds.) *The Politics of International Economic Law* [C]. (Cambridge University Press 2011)

[16] Mbengue & Schacherer (n 14) 416.

[17] Luigi Benfratello, Anna D'Ambrosio, and Alida Sangrigoli, 'International Investment Agreements and FDI Inflows in Africa' (2019) <https://siecon3-607788.c.cdn77.org/sites/siecon.org/files/media_wysiwyg/289-benfratellodambrosio-sangrioli.pdf accessed> 24 February 2021; Hamed and De Gama (n 12).

[18] ibid.

[19] ibid.

ISDS of Egypt involves the invocation of the doctrine of necessity—*Unión Fenosa Gas, S.A. v. the Arab Republic of Egypt.*[20]

Currently, the world is facing a deadly virus. On 30 January 2020, the WHO acknowledged that the spread of COVID-19 becomes a 'Public Health Emergency of International Concern' under Article 1 of the International Health Regulations (2005) and on March 2020, the WHO declared the virus a pandemic.[21] It has been almost two years since most states announced public health emergencies to tackle the virus's spread. The pandemic forced states to impose lockdowns and other restrictions to control and mitigate the virus's spread. This pandemic has impacted every aspect of states' lives—social, economic, and legal impact. The paper focuses on the pandemic's legal implications on the conduct of foreign investment. The paper limits its scope of discussion to the public health emergency declared (due to Covid-19), and the invocation of necessity defense under the BITs signed by African states for potential foreign investors' claim of violation of their protection under the same BITS.

Most of these BITs do not contain NPM or necessity provisions. The non-existence of a general exception or necessity clause in the BITs would arguably create a legal problem, given the complexity of disputes that arise under BITs. One may argue that as long as the necessity defense is part of customary international law, African states can rely on the customary law even if the BITs does not contain NPM provision. However, the necessity defense under customary law puts high standards or threshold for states to meet[22], and tribunals strictly interpret it. Besides the strict and narrow interpretation requirement of necessity under customary law, tribunals did disagree on the relevance of customary law interpretation to investment issues.It should be noted that the application and interpretation of necessity under customary international law (Article 25 of ARISWA) is not only restricted to BITs that lack NPM. E.g., in the Argentina case, some of the ICSID tribunals interpreted the NPM (necessity clause) under BIT based on customary international law and others did not apply the customary law to interpret the NPM clause under the BITs—and it led

[20] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018)
[21] Mao-wei Lo, 'Legitimate Expectations in a Time of Pandemic: The Host State's Covid-19 Measures, Its Obligations and Possible (2020) 13 CAAJ 249, 251
[22] Articles on Responsibility of States for Internationally Wrongful Acts (n 5)

to conflicting decisions. However, the paper restricts the discussion on necessity defense to African BITs that lack NPM—the application of necessity defense under the customary international law.

Thus, considering the above issues—a large number of BITs, FDI inflow, vulnerability to ISD, unavailability of NPM in most BITs and Covid-19 outbreak—African states will deal with international claims soon in a more significant number. It is against this background that this paper examines these BITs and the place of the necessity defense.

The Outbreak of Covid-19, Impact, States Reactions and Public Health Emergency Analysis

WHO Declaration, Impact and African States Reactions

The WHO, on 11 March 2020, declared the spread of the Covid-19 virus a pandemic.[23] Following the WHOs declaration of Covid-19 as a pandemic officially in March 2020, States started implementing measures to mitigate or prevent the virus's spread. Most states have taken harsh public health measures against the virus's spread.[24] Many African states declared emergencies as well. Following their declaration, they started to implement nationwide lockdowns and restrictions. Implementing some measures to contain the virus started as early as 2 January 2020 by the Ivory Coast. Other African States followed suit; they began to implement heightened scrutiny at airports, examining passengers, etc.[25] According to an updated report of the International Center for Non-For-Profit Law (ICNL), 149 new measures in response to the spread of the virus identified in 46 African

[23] Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV), World Health Organization, (30 Jan. 2020), <www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of- the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel- coronavirus-(2019-ncov)> accessed 2 December 2020); Federica Paddeu and Kate Parlett, 'COVID-19 and Investment Treaty Claims (2020) Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2020/03/30/covid-19-and-investment-treaty-claims/> accessed 5 January 2021

[24] OECD Policy Responses to Coronavirus (COVID-19), Foreign direct investment flows in the time of COVID-19 (2020) <www.oecd.org/coronavirus/policy-responses/foreign-direct-investment-flows- in-the-time-of-covid-19-a2fa20c4/> accessed 13 February 2021; PSC Reports, 'The dangers of states of emergency to combat COVID-19 in Africa' (2020) <https://issafrica.org/pscreport/psc-insights/the- dangers-of-states-of-emergency-to-combat-covid-19-in-africa> accessed 13 February 2021

[25] Marguerite Massinga Loembé, Akhona Tshangela, Stephanie J. Salyer, Jay K. Varma, Ahmed E. Ogwell Ouma and John N. Nkengasong, 'COVID-19 in Africa: the Spread and Response' (2020) 26 Nature Medicine, 999 <www.nature.com/articles/s41591-020-0961-x> accessed 13 February 2021

countries.[26] The center reported '35 declarations of a state of emergency, national health emergency, or a state of national disaster or calamity'.[27] Whereas the Report of the ICNL focuses on the Sub-Saharan countries, the North African countries also declared public health emergencies and implemented other legislative measures related to the Covid-19.[28] Beside the lockdowns and other forms of restrictions, governments imposed restrictions or suspensions of the monetary, financial, and banking services, to curb the economic and financial impact of the Covid-19.[29] Some governments also banned the export of medicine, medical supplies, and foods.[30]

[26] African Government Responses to COVID-19, 'An Overview from the COVID-19 Civic Freedom Tracker' (2020) International Center for Not-For-Profit Law <www.icnl.org/post/analysis/african- government-response-to-covid-19> accessed 13 February 2021

[27] ibid*;*

1. *17 declarations of states of emergency:* Angola; Botswana; Chad; Cote d'Ivoire; Democratic Republic of the Congo; Eswatini/Swaziland; Ethiopia; Gambia; Gabon; Guinea; Guinea Bissau; Lesotho; Mozambique; Namibia; Senegal; and Sierra Leone.
2. 8 *declarations of national states of disaster or calamity:* Angola; Cape Verde; Guinea Bissau; Sao Tome and Principe; (states of calamity); Malawi; Mozambique; South Africa; and Zimbabwe (states of disaster).
3. *10 declarations of (public) health emergencies:* Botswana; Burkina Faso; Republic of Congo; Equatorial Guinea; Liberia; Madagascar; Niger; Sao Tome and Principe; Sudan; Togo.
4. Sierra Leone imposed a 12-month state of emergency before recording its first COVID case.

[28] Thomas Herman, Eva Maarek, Nila Wilde, François Adao and Sharif Abousaada (eds), 'COVID-19: Initial Responses of Certain African Countries (Africa)' (2020) *Legal Briefings Herbert Smith Freehills*<www.herbertsmithfreehills.com/latest-thinking/covid-19-initial-responses-of-certain- african-countries-africa> accessed 15 February 2021

E.g. 1. Algeria issued executive decrees for the closure of land and sea borders and the suspension of flights and sea services to and from Algeria, the suspension of all intra-urban and inter-wilaya public transportation and railway traffic in the country, the Bank of Algeria adopted instruction No. 05-2020 on 6 April 2020 to limit banking prudential requirements etc…

2. Egypt implemented restrictive measures to address the pandemic since 23 April 2020. Some of the measure include, "the total closure of cafes, restaurants, museums, casinos, nightclubs, sports clubs, public parks and beaches; a ban on public gatherings such as conferences, exhibitions, sporting events or cultural events; the closure of all airports until further notice etc."

3. Morocco declared a state of health emergency on 19 March 2020 by a decree. The measures implemented pursuant to the state of emergency include, the closure of borders; the suspension of international flights; the closure of ports except for goods; containment (including closure of schools and mosques) etc.

4. Nigerian President Muhammadu Buhari signed the COVID-19 Regulations 2020 that requires, the restriction of movement, the suspension of all commercial and private air travel etc…

[29] ibid.

[30] Nathalie Bernasconi-Osterwalder, Sarah Brewin, Nyaguthii Maina, Protecting against Investor–State Claims Amidst COVID-19: *A call to action for governments*, International Institute for Sustainable Development, Commentary (2020) <www.iisd.org/articles/protecting-against-investor-state-claims- amidst-covid-19-call-action-governments> accessed 19 February 2021; Joshua Paffey, Lee Carroll, Josephine Allan and Kala Campbell, Investor-state disputes arising from COVID-19: balancing public health and corporate wealth, (2020) <www.lexology.com/library/detail.aspx?g=89234581-29f2-4284- 97e5-47a98010b3ca> accessed 23 February 2021

Inevitably these measures enforced to prevent or mitigate the virus's spread would have impacted foreign investors in the African host countries, whose investment is protected by BITs. It is expected that these foreign investors will initiate ISDS against African states to challenge some of the measures as a violation of BITs—a violation of specific protections under the treaties.[31] Most BITs signed by African states contain ISDS provision that allows foreign investors to initiate a case in an international forum. Upon initiating an ISDS to challenge the Covid-19 measures, there will be a contentious issue as to whether the measures so implemented violate the substantive provision of an investment agreement or whether the states can defend by invoking necessity defense.

The Outbreak of Covid-19 and Public Health Emergency Analysis

In this section, the paper discusses if the virus's outbreak fits within the emergency framework for states to act or take necessary measures.

So far, there has been no decided case where necessity defense is invoked due to public health crises or emergencies. As it is already alluded to in the previous sections, different international courts and tribunals discussed and decided cases of necessity related to different occurrences of emergencies; namely, economic emergencies,[32] environmental,[33] use of force,[34] and public order or civil unrest.[35] These courts or tribunals adopted a different interpretation method of necessity, taking into account the specific emergency. The world is fighting the outbreak of the deadly virus Covid-19 since early 2020. The gravity of the danger that Covid-19 posed is undoubtedly high. However, it is worthy of discussing how the outbreak of the virus can be labeled as public health emergency where states

[31] Kit De Vriese, COVID-19 and War Clauses in Investment Treaties: A Breach through the Wall of State Sovereignty? (2020) Blog of the EJIL <www.ejiltalk.org/covid-19-and-war-clauses-in-investment- treaties-a-breach-through-the-wall-of-state-sovereignty/> accessed 15 February 2021. The author wrote, "[a]s with previous crises, in particular the Argentinian economic crisis, it is highly probable that investors will file claims under international investment agreements."; Nathalie *et al*., Nathalie Bernasconi et al. also noted that '[a]t a time when states are facing public health and economic challenges on an unparalleled scale, the need to avoid ISDS claims has never been greater.'

[32] The ICSID cases on the Argentina economic crisis, e.g. *CMS Gas Transmission Co v. Argentine Republic* ICSID Case No ARB/01/8 (2015) 44 ILM 1205 para 354

[33] *Case Concerning the Gabacikovo-Nagymaros Project*, I.C.J. Reports 7, 2-40 (1997), Judgment (Sept. 25, 1997). https://www.un.org/press/en/1997/19970926.ICJ549.html> accessed 19March 2021

[34] *Oil Platforms, Iran v United States, Judgment, merits,* ICJ GL No 90, [2003] ICJ Rep 161, ICGJ 74 (ICJ 2003), 6th November 2003, International Court of Justice; see also *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States,* Merits, Judgment, (1986) ICJ Rep 14,ICGJ 112 (ICJ 1986).

[35] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* case (n 20)

may disregard some of their international obligations (treaty or customary law) to safeguard their interest in protecting public health.

Generally, occurrences of emergencies have been described or defined in relation to national security. Security experts expand the definition of 'national security' "from an exclusive or predominating focus on 'traditional' threats imperiling the physical integrity of the state like military conflicts, to clearly non-traditional threats like the *influenza pandemic*" (emphasis added).[36] A multidimensional definition, supported by Desierto defines national security as;

"National security entails the pursuit of psychological and physical safety, which is largely the responsibility of national governments, to prevent both direct andindirect threats and risks primarily from abroad from endangering the survival of these regimes, their citizenry, or their ways of life."[37]

Others also define emergency with national security that goes beyond physical safety or territorial sovereignty. E.g., Mark Tushnet's defines an emergency as;

"An 'emergency' occurs when there is general agreement that a nation or some part of it faces a sudden and unexpected rise in social costs, accompanied by a great deal of uncertainty about the length of time the high level of cost will persist . . . 'Emergency powers' describes the expansion of governmental authority generally and the concomitant alteration in the scope of individual liberty, and the transferof important 'first instance' law-making authority from legislatures to executive officials in emergencies."[38]

Worth noting as it may, in the ICSID tribunal in the *LG&E v. the Argentine Republic* case,[39] it was argued that Article XI of the Argentina BIT applies only to

[36] Diane A. Desierto, *Necessity and National Emergency Clauses Sovereignty in Modern Treaty Interpretation* (Martinus, Nijhoff Publishers, 2012); Ryan Manton, *Necessity in International Law* (Oxford University, 2016); Sharon L. Caudle, 'National Security Strategies: Security from What, for Whom, and by What Means' (2009) 6(1) JHSEM 1, 4

[37] ibid Desierto; *see also* Michael Evans, 'Towards an Australian National Security Strategy: A Conceptual Analysis' (2007) 3(4) Security Challenges 113, 123; see also Michael Evans, 'The Case for a National Security Strategy' (2018) Quadrant Online <https://quadrant.org.au/magazine/2008/04/the-case-for-a-national-security-strategy/> accessed 19 February 2021

[38] Mark Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation of Powers Regulation (2008) 3(4) IJLIC 275

[39] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, op. cit., decision on liability (October 3, 2006)

emergencies amounting to military action and war. However, the tribunal rejected the argument by 'reasoning that when a State's economic foundation is under siege, "the severity of the problem can equal that of any military invasion'"[40]. Thus, based on the consensual definition of an emergency in relation to national security described above, the outbreak of Covid-19 is undoubtedly posing an unprecedented threat to countries' public health safety. We are beholding unprecedented outbreak of a pandemic. Almost all states are engulfed by the fast spread of the virus, and the social costs they are bearing are enormous.

It may be argued that African states are less affected by the virus than other states (including developed states).[41] Nevertheless, the WHO's declaration of the virus's outbreak as a pandemic and threat to international public health is the most authoritative ground to argue that African states, like every state across the globe, are similarly affected. The above-mentioned experts' definitions of emergency in relation to national security identifies specific pointers of national security emergency like the occurrence of 'serious threat and/or damage to a nation's existence and/or way of life, the temporary (but also uncertain) duration of such emergencies, and the marshalling of extraordinary governmental powers and resources to meet such emergencies'.[42] Covid-19 caused a severe threat to the way of life of the people in Africa. The Covid-19 guidelines or restrictions issued to contain the virus hit hard the countries' weak economy and the economically disadvantaged or poor people of the continent. The governments of African states were forced then to act—to declare an emergency and spearhead their resources to tackle the virus's spread.

Desierto described the definition of emergency (with the national security) as a reflection of the legislative definition of national security or national emergency of democratic countries like the USA, Canada, and the UK.[43] As far as this section's issue is concerned, as a result of the Covid-19 outbreak, African countries declared

[40] William J. Moon, 'Essential Security Interests in International Investment Agreements' (2012) 15 JIEL 481, 485-86.
[41] Statista, Number of coronavirus (COVID-19) Cases in the African Continent as of February 23, 2021, by country <www.statista.com/statistics/1170463/coronavirus-cases-in-africa/> accessed April 2021.
[42] ibid 148.
[43] ibid 147.

emergencies according to their legislative authorization. E.g., in South Africa,[44] Equatorial Guinea[45], Guinea,[46] Ethiopia,[47] Angola,[48] and Liberia.[49] Some African countries did not declare a total state of emergency. Nevertheless, they have been acting by enforcing legislation and enforcing measures to tackle the virus's outbreak and give effect to the WHO's declaration of a pandemic and call for international cooperation. To name some of the countries that implemented stringent legislation under their constitutions are Nigeria,[50] Kenya,[51] and Mauritius.[52]

[44] Klaus Kotzé, 'Responding to Covid-19: Emergency Laws and the Return to Government in South Africa' <www.tandfonline.com/doi/full/10.1080/13183222.2021.1844503> accessed March 4 2021
On 15 March 2020, South African president Cyril Ramaphosa responded to Covid-19 (virus) by declaring a national State of Disaster in terms of the Disaster Management Act (Act) which is provided for in Section 37.1 of the current South African Constitution.

[45] Covid-19 Alert, Equatorial Guinea Extends State of Emergency <www.worldaware.com/covid-19- alert-equatorial-guinea-extends-state-emergency-2-weeks-may-1-april-29> accessed 4 March 2021. In Equatorial Guinea a state of health emergency has been enacted by Decree 42/2020.

[46] Health Alert: Guinea, Government Declares Health State of Emergency Through April 10 2020 <www.osac.gov/Content/Report/40a1108c-10f1-4b57-a6ca-1854d9b519f2> accessed 4 March 2021. Guinea declared a state of emergency.

[47] Pursuant to the constitutions and the parliament Ethiopian Prime Minister promulgated Proclamation 3/2020 - A State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact <www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=110046&p_count=26&p_classification=01> accessed 16 February 2021

[48] Decreto Presidencial No. 81/20 de 25 de Março <www.lexlink.eu/conteudo/geral/ia-serie/3933652/decreto-presidencial-no-8120/14793/por-tema> accessed 16 February 2021.

[49] COVID-19 Declaration of National Health Emergency by the Ministry of Health, Liberia <www.oit.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=110079> accessed 15 February 2021. On 22 March 2020, Liberia made a "Declaration of National Health Emergency," followed by approval of the parliament pursuant to Article 88 of the Constitution.

[50] Cheluchi Onyemelukwe, The Law and Human Rights in Nigeria's Response to the COVID-19Pandemic (2020) <https://blog.petrieflom.law.harvard.edu/2020/06/04/the-law-and-human-rights-in- nigerias- response-to-the-covid-19-pandemic/> accessed 15 February 2021; Lukman Abdulrauf, 'Nigeria's Emergency (Legal) Response to COVID-19: A Worthy Sacrifice for Public Health? (2020) <https://verfassungsblog.de/nigerias-emergency-legal-response-to-covid-19-a-worthy-sacrifice-for- public-health/> accessed 15 February 2021. 'President Muhammadu Buhari called upon his emergency powers under the extant Infectious Diseases Law – the Quarantine Act 1926…..'

[51] Despite the power of the president in Article 58 of the constitution, Kenya President did not declare emergency and total lockdown. Whereas he issued Executive Order No 2 of 2020 National Emergency Response Committee on Coronavirus to tackle the virus. The executive order is available <www.health.go.ke/wp-content/uploads/2020/06/Executive-Order-No-2-of-2020_National- Emergency-Response-Committee-on-Coronavirus-28.2.20.pdf> accessed 16 February 2021; Sam Alosa. 2020. Constitutionalism and Covid-19 In Africa – Focus On Kenya <https://ancl- radc.org.za/node/637> accessed 16 February 2021

[52] Sudhirsen Kowlessur, Bhushan Ori, Paul Zimmet, Jaakko Tuomilehto, Pierrot Chitson, and Yogeshwaree Ramphula, Tackling the COVID-19 pandemic in paradise: the Mauritian experience (2020) <www.ncbi.nlm.nih.gov/pmc/articles/PMC7515597/> accessed 16 February 2021; Thomas Herman et al. (n 32). Mauritius the COVID-19 (Miscellaneous Provisions) Act 2020 (the "COVID-19 Act") and the Quarantine Act 2020 (the "New Quarantine Act") were passed on 15 May 2020 and published in the Government Gazetteon 16 May 2020.

If an issue arises whether the outbreak of Covid-19 is an emergency that threatens national security or public health of a state, it is less likely to argue negatively. Seeing the current public health crisis through the prism of the national security and emergency analysis of authors, it is safe to argue that the pandemic poses a considerable threat to the state's national security, which guarantees the implementation of measures. Most importantly, the WHO first declared a 'public health emergency of international concern' and later declared the spread of Covid-19 a pandemic and called states to take appropriate measures to contain the spread—this serves as an authoritative source for states to act. Even though the amount of threat posed by the Covid-19 is overwhelming, tribunals are going to face a new type of emergency to deal with during ISDS.

Given the facts of the outbreak of Covid-19 and its socio-economic impact, ISDS that challenge the measures taken during the outbreak are predicted to be initiated by foreign investors. States are provided many defenses under customary international law and permitted to take necessary measures under BITs. Moreover, necessity is one of the leading legal tools invoked by states during emergencies. Hence, the following sections discuss the current emergencies vis-à-vis the doctrine of necessity defense under African BITs and the application of customary international law.

African BITs without Necessity Clause and Public Health Emergency

Introduction

Many research works on the doctrine of necessity that covers the general international law, ICSID, WTO, South Asian, NAFTA, etc., have been produced and has contributed much to the debate. However, either the existence or the interpretation of the necessity defense in the African BITs has not been getting due attention. The international legal framework for investment in Africa comprises BITs and regional investment and trade agreements—and non-binding regional investment documents and models[53] that influence African countries' investment practices. African states signed 881 BITs, and around 520 are in force. From these 520 African BITs in force, 200 BITs are identified and examined from the UNCTAD website.

[53] ibid

The discussion of the necessity doctrine in international investment law dichotomizes BITs into BITs without a necessity or an exception clause and BITs with necessity or NPM clause. The paper however, focuses on the African BITs that lack NPM or necessity provision.

General Framework for theAnalysis of BITs without Necessity Clause

The paper examined 200 BITs ratified by African countries and 154 of these BITs do not contain necessity clause or general exception. Thus, the majority of African BITs are without necessity clause or NPM. One may argue that the reason for the lack of the exception is because African states concluded the BITs decades before (first, second or third generation BITs); the time where inserting NPM in BITswas not popular. However, some BITs with NPM were concluded with African states in the 1980s.[54]

The legal contention that arises with the absence of NPM, 'with necessary clause', is thus how African states can rely on the defense of necessity during ISDS to defend their actions during the Covid-19 outbreak. It goes without saying, those states have to rely on customary international law even if they appear before an international tribunal for a claim made based on a specific BIT. E.g., Egypt was a Respondent in the *Unión Fenosa Gas S.A. v. Arab Republic of Egypt* case.[55] The claimant sued Egypt before the ICSID for violation of the Egypt-Spain BIT for measures that Egypt took during the civil and political unrest or commonly known as the *Arab Spring* that took place in 2011 and the following few years.[56] Egypt relied on necessity defense under customary international law to defend its case, because the Egypt-Spain BIT does not have NPM with a necessity clause. The tribunal interpreted the defense according to the strict and narrow prerequisites of customary international law, and it rejected Egypt's plea. The following paragraphs attempts to answer; first, why states should make a resort to necessity defense under

[54] Cameroon-USA BIT, ratified in 1989; Cameroon-Luxembourg BIT ratified in 1981;

[55] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (n 20); *see also* Janice Lee, 'The 2011 Egyptian Revolution and the Defense of Necessity: Case Note on the Award in Unión Fenosa Gas, S.A. V. Egypt' (2018) 11(2) CAAJ 305, 306

[56] Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt (26 Apr 1994) <https://jusmundi.com/en/document/treaty/en- agreement-on-the-reciprocal-promotion-and-protection-of-investments-between-the-kingdom-of- spain-and-the-arab-republic-of-egypt-egypt-spain-bit-1992-tuesday-3rd-november-1992> accessed 12 January 2021

customary international law. Second, whether it is affordable for African states to invoke necessity defense under customary international law to defend the measures they took during Covid-19 if foreign investors initiate ISDS against them in an international tribunal.

Interpretation of Article 25 of ARSIWA vis-à-vis African BITs without NPM

Firstly, according to article 38(1)(b) of the Statute of ICJ, customary international law is one of the international law sources with almost universal application.[57] It is "a general practice accepted as law"—constituted of state practice and *opino juris*. The doctrine of necessity fulfills the requirement of state practice, and *58pinionjuris*—authors[58] and ICJ[59] have confirmed the customary law status of necessity in many instances.[60] States invoke necessity under customary law if a violation of an international obligation is established based on primary rules—e.g., violation of obligations under *jus ad bellum, jus in bello,* environmental law, or any other regime of international law. The rules that govern the invocation of necessity—whether an act or omission wrongfulness is precluded—are called secondary rules.[61] Thus, successful invocation of necessity under customary international law offers 'a shield against an otherwise well-founded claim for the breach of an international obligation'.[62] However, it provides several strict conditions or very high thresholds for states to meet.[63]

Usually, at least two reasons necessitate a resort to invoke customary international necessity doctrine when a host state breaches a BIT provision.[64] The first reason given is because as BITs do not contain a necessity clause, states and tribunals resort to necessity defense requirements as provided in the customary international law or

[57] Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, ; Laurence R. Helfer & Ingrid B. Wuerth, 'Customary International Law: An Instrument Choice Perspective' (2016) 37(4) Michigan JIL 563.
[58] Desierto (n 36).
[59] *Oil Platform case* (n 34).
[60] Daniel Bodansky and John R. Crook, 'Symposium: The ILC's State Responsibility Articles – Introduction and Overview' (2002) 96(4) AJIL 773.
[61] August Reinisch, 'Necessity in investment Arbitration (2010) 41 NYIL 137, 148-49.
[62] ARSIWA (n 5) art. 25.
[63] Daniel (n 60).
[64] Amit Kumar Sinha, 'The Necessary' Nexus Requirement Link in General Exceptions of South Bilateral Investment Treaties and Some Insight on Its Interpretative Approach in the South Asian Context' (2017) 5 CJCL 129

Article 25 of the ARSIWA. The second reason tribunals resort to customary international law is when a BIT by itself permits the application of international law rules. Based on the provision of a BIT that opens room for applying other international law rules, tribunals may resort to applying necessity defense under customary international law.[65] It should be noted that Article 42(1) of the ICSID allows the application of international law rules in the settlement of disputes, particularly when tribunals face the problem of interpretation, which is the case with necessity interpretation.

However, the application of necessity defense under customary international law for claims made based on BITs or the use of customary law interpretation of necessity clause of a general exception under BITs is not without criticism.[66] The criticisms and reactions to the customary law application of necessity to investment claims came after the ICSID tribunal's inconsistent ruling in the Argentina cases. The specific requirements of necessity under customary international law are specified under Article 25 of the ARSIWA. The provisions requirements as dissected into elements are; (a) there must be a grave and imminent peril; (b) the peril must threaten a state's essential interest; (c) the state's act was the 'only way' to safeguard the interest from that peril; (d) the state's actions must not seriously impair another essential interest;[67] and (e) the state must not contribute to the situation of necessity. The paper examines the Covid-19 situation and the measures that African states have enforced vis-a-vis the specific requirement or elements of Article 25 of ARSIWA as follows.

The 'Grave and Imminent Peril' Element of Article 25 of ARSIWA and Covid- 19

The first requirement is that there must be a grave and imminent peril. Here, this element of 'grave and imminent peril' is interpreted as there must be an imminent danger or risk that gravely harms a state's essential interest. The harm may not

[65] Few African BITs also allow the application of other relevant principles of international law, e.g., s*ee* the Rwanda-US BIT which authorizes the application of relevant rules of international law under article 30.

[66] Desierto (n 36); Galvez (n 6).

[67] Article 25 of ARSIWA (n 5); Federica Paddeu and Freya Jephcott, 'COVID-19 and Defenses in the Law of State (2020) Blog of EJIL <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of- state- responsibility-part-ii/> accessed 26 February 2021.

necessarily befall for a state to act in a state of necessity; a state can act out of necessity to avert certain damage from happening.[68] The spread of Covid-19 seems to fulfill the requirement of grave and imminent peril because its spread causes imminent danger of grave harm to the population across the world—its fast rate of infection, its deadly nature, and its risk of mutation create grave peril.[69]

The 'Essential Interest' Element of Article 25 of ARSIWA and Covid-19

The second element is that the peril must threaten an 'essential interest'. The spread of the Covid-19 virus threatens states' lives and their population's health, which is undoubtedly an essential interest.[70] At the same time, declaring the spread of the virus as a Public Health Emergency of International Concern, the WHO noted that Covid-19 creates a grave risk to persons' health and lives in all countries.[71] Federica Paddeu and Freya Jephcott cited the *National Grid v Argentina,* and they wrote that the safety and security of one state's population and the continuous operation of its governmental apparatus and services are considered an essential interest in ISDS or SSDS.[72] Thus, measures taken to safeguard the lives and well-being of the population during the Covid-19 fulfill the requirement of 'essential interest'.

The 'Only Way' Element of Article 25 ARSIWA and the Covid-19 Related Measures

The third requirement under article 25 of ARSIWA is that a state's measure must be the 'only way' available in the circumstances to safeguard a vital interest from damage. If a state has an alternative way to address the danger (no matter its cost and expediency), necessity defense will not be successful.[73] It is stated above that protecting essential interest in relation to the outbreak of Covid-19 is to safeguard the lives of the population and their health. It may be debatable to identify a certain or definite way to handle the spread of the virus—mainly until effective vaccines are produced and made available to the public. African states have been implementing certain measures to 'contain and mitigate' the virus's spread to protect the essential interest. These are strict lockdowns, social distancing measures,

[68] ibid.
[69] ibid.
[70] See Mao-wei Lo (n 21).
[71] ibid.
[72] Paddeu and Jephcott (n 69).
[73] Janice Lee (n 57) 311; Paddeu and Jephcott ibid

accompanied by quarantining, the prohibition of gatherings, etc. Worth noting is that the WHO recommended some of the states' public health measures to contain or mitigate Covid-19.[74] Considering the seriousness of the virus's spread, the set of public health measures enforced, including those recommended by the WHO, may be regarded as the 'only way' to protect a vital interest. However, some by-products of the pandemic situation may not suit the strict view of tribunals on the 'the only way' clause.

First, Governments have enforced 'significant economic policy actions to forestall, or cushion, the economic consequences of the public health crises'.[75] These kinds of measures, even though they are the ultimate impact of the pandemic, tribunals may not take them as the only means to prevent or mitigate the virus. Second, considering individual cases, some measures enforced by states might be strictly unnecessary or redundant. E.g., Federica Paddeu and Freya Jephcott argued, '[t]ravel bans are unlikely to be the only way (or a reasonable way, even) to deal with the epidemic once the virus has become widespread within a territory'.[76] Generally, African states are also less affected by the Covid-19 comparing to the developed countries. This less impact may also be brought before tribunals to challenge the severity or necessity of the measures based on the 'only way' clause. Thus, this clause will be problematic for African states during ISDS taking into account the strict view of tribunals on this requirement, the non-strict public health measures implemented, some redundant public health measures enforced, and the fact that thespread of the virus less impacts Africa.

The ILC commentaries on article 25 of ARSIWA treat the 'only way' clause as strict.[77] Accordingly, tribunals also interpret the clause strictly. The necessity analysis in the *Unión Fenosa v. Arab Republic of Egypt* case was centred on the requirement of whether Egypt's act of cutting electricity to the Damietta Plant was 'the only way' to protect an essential interest from the grave and imminent peril.

[74] Listings of WHO's response to COVID-19 (2020) <www.who.int/news/item/29-06-2020- covidtimeline> accessed 22 March 2021. E.g. 'on 16 April 2020 WHO issued guidance on considerations in adjusting public health and social measures, such as large-scale movement restrictions, commonly referred to as "lockdowns".'

[75] OECD Policy Responses to Coronavirus (COVID-19) (n 24)

[76] Paddeu and Jephcott (n 69)

[77] *Commentaries to the Draft Articles on Responsibility of States for International, Wrongful* Acts (2001) United Nations, International Law Commission 83-85; Andrew D. and Henckels (n 3) 110

Consistent with the ILC commentaries on ARSIWA, the tribunal strictly interpreted the clause and rejected Egypt's argument of cutting electricity to the Damietta Plant was the only means to safeguard a vital national interest in handling the civil unrest during the revolution.[78] It said that the revolution was not 'the proximate cause for curtailing gas supplies to the Plant. Instead, the proximate cause was Egypt's long-standing policies as to the "development of gas deposits, electrical power generation, the national grid and the preferential use of gas for users and consumers in Egypt.'"[79] Thus, the act was not the only means for the Egypt to protect its vital interest against a grave and imminent peril. Similarly, the ICSID tribunal on the *Suez v. Argentina* rejected Argentina's necessity plea by noting that the measures challenged by the claimant were not the only way that Argentina could protect its vital interest. The tribunal also noted that the Argentina government's 'policies and their shortcomings significantly contributed to the crisis', which is also the case in the *Unión Fenosa vs. Egypt.*[80]An ICSID tribunal in the *LG&E v. Argentina* case affirmed the strict interpretation of the clause. It said, to meet the requirement of Article 25 of the ARSIWA, the measure must be the 'only means available to the State in order to protect an interest'.[81] Therefore, it is against this background of interpretation of the 'only way' clause of Article 25 of ARSIWA that African states will invoke necessity defense to defend potential investment claims that would challenge measures taken during the Covid-19 outbreak.

The 'Serious Impairment of Essential Interest of a State' Element of Article 25 of ARSIWA and Covid-19 Measures

The fourth element of Article 25 of ARSIWA is that 'the act must not seriously impair a vital interest of another State or of the international community as a whole.' The state's interest in protecting the safety of its citizens prevails over the interest of investors in third countries. Hence, tribunals acknowledge this interest of host states.[82] Given the fact that the threat posed by Covid-19, the WHO's call to apply the public health guidelines, African states lack adequate health facilities, and the temporary nature of the measures implemented to mitigate or contain the spread of

[78] *Unión Fenosa v. Arab Republic of Egypt* Award (n 20) 12; Janice Lee (n 57) 314
[79] *Unión Fenosa v. Arab Republic of Egypt* Award; Janice Lee, *ibid*.
[80] ibid 318.
[81] *LG&E v. Argentina* (n 39) 250
[82] Paddeu and Jephcott (n 69)

the virus, arguably the package of measures may not seriously impair the interest of another state or the international community.[83] It may be argued that some measures implemented such as export curb of essential medicines or other essentialgoods may have violated the clause that says an 'act must not seriously impair an essential interest of another State or of the international community as a whole'.[84] One of the primary distinction of the current public health emergency from other previous emergencies is that it is a global crisis. Unlike the Argentina economic crisis, it is not a crisis that is restricted within the national boundary of a single state.[85] During ISDS, it will be contentious to determine if such acts (restriction of export) 'seriously impair the state's essential interest or states toward which the obligation exists or the international community as a whole'. Despite the plausibility of arguing that such actions seem to harm other states' vital interests orthe international society, African states can argue that their socio-economic conditions forced them to put the restrictions.

The 'Contribution' Element of Article 25 of ARSIWA and the African States Acts

Lastly, Article 25 of ARSIWA requires a state who by its act or omission contributed to the state of necessity is not entitled to rely on necessity defense. The state's contribution that relies on necessity defense needs to be 'sufficiently substantial and not merely incidental or peripheral'.[86] The ICJ in the *Gabcíkovo-Nagymaros Project* case noted that Hungary was not entitled to depend on necessity defense to exclude the wrongfulness of its acts as long as it 'had helped, by act or omission to bring about the state of alleged necessity'.[87] In the investment claims that rose from Argentina's financial crisis, the contribution requirement was critically considered. The tribunal in the *Impregilo v. Argentina* rejected Argentina's plea of necessity defense ruling that Argentina contributed to the state of necessity with 'well-intended but ill-conceived policies'.[88] In the *Unión Fenosa v. Egypt*, even though

[83] ibid.

[84] Reed Smithl International Arbitration Focus: Investor-State Arbitration (2020) International Arbitration https://www.reedsmith.com/-/media/files/perspectives/2020/reed-smith-international- arbitration- focus-edition-2-investorstate-arbitrat.pdf> accessed 27 March 2021

[85] Ibid

[86] Commentary (n 81) para 20.

[87] ibid

[88] *Impregilo S.p.A. v. Argentine Republ*ic.(ICSID Case No. ARB/07/17).Award, para. 356; Joshua Paffey et al. (n 34)

the tribunal ruled out Egypt's necessity plea based on the other elements, on the issue of the contribution, the tribunal applied the ILC commentaries—contribution must be 'sufficiently substantial and not merely incidental or peripheral'. The tribunal said, 'Egypt did not subjectively intend that social unrest should take place, leading to the Egyptian revolution and its consequences of 2011 -2014. It did not cause or foresee the consequences of the global financial crisis of 2007-2008'.[89] The tribunal on the *Urbaser v. Argentina*[90] interpreted "contribution" narrowly that requires a degree of fault.[91]

Foreign investors may also challenge the African state's plea of necessity for Covid-19 related measures based on the clause of contribution. It may be argued that the states contributed to the spread of the virus by failing to prepare in advance, and there was a failure in having good public health policies. However, states may argue that the virus's outbreak was unforeseen and did not intend to take the measures if it was not for the virus's fast spread. The WHO called even the virus 'novel' coronavirus (nCoV) because it is a new strain that has never been found in human beings before.[92] Of course, the analysis of contribution and other elements of Article 25 will also depend on specific cases or specific measures adopted by African states and their impact on foreign investors' specific substantive rights under BITs.

General Observations and Recommendations

The first impression on the necessity plea analysis for measures adopted to mitigate or contain the virus's spread may look favourable for African states even if their BITs do not contain specific necessity provisions. However, given the ILC commentary, strict interpretation of Article 25 of ARSIWA and tribunals/courts narrow and strict view of necessity under customary international law, it will not be easy for African states to succeed on their necessity plea—even if Covid-19 is deadly and caused serious damage to the life and economy of states. If African states invoke necessity, they will need to demonstrate the measures they implemented

[89] Janice Lee (n 57) 316
[90] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v.The Argentine Republic*, ICSID Case No.ARB/07/26.
[91] Paddeu and Jephcottk (n 69)
[92] Baton Rouge General, What does Novel Coronavirus mean (2020)

were the only means, and their previous conduct did not contribute to the state of necessity.

It should be remembered that all Argentina's necessity arguments based on customary international law did not succeed.[93] As discussed above, states are required to meet the extremely high threshold. Tribunals tend to examine any alternative options available to a state in a given situation, even if the alternative measure is found to be costly or inconvenient.[94] During ISDS, it is the discretion of tribunals to determine whether the alternative action could have realized a similar result without violating the state's duty under the specific BIT toward the investor. The tribunal on the *Unión Fenosa v. Egypt* rejected the necessity plea under customary international law partly because Egypt did not show that the actions it took were the only means to thwart the danger to an essential interest.[95] While affirming/supporting the strict interpretation of the plea of necessity clause, authors argue that 'a reasonable balancing of the factual circumstances should also be made by tribunals applying the test. Otherwise, a restrictive and literal reading of the "only way'' criteria may entirely prevent the application of the defense of necessity, even in situations where it may actually be appropriate'.[96] Taking into account specific circumstances of cases, strict observance of the rule may lead to 'unnecessary speculation on the part of tribunals on state policy'. Janice Lee cited Kent and Harrington that share the same opinion and wrote;

> [W]hen the State claiming the defense acts in times of crisis, it 'acts under pressure and severe time and information limitations'. However, by the time the Tribunal adjudicates the matter, it does so without any of these pressures, 'with the privilege of comfortably listening to a variety of experts and opinions, and with the advantage of possessing significantly more information on the crisis'.[97]

As is alluded to in the previous section, many ISDS are expected to be initiated. The majority of African BITs are silent on the defense of necessity. It is left for

[93] Andrew D. and Hanckels (n 3) 109
[94] Nathalie Bernasconi*et al*. (n 30)
[95] ibid
[96] Janice Lee (n 57) 318.
[97] ibid 319; Avidan Kent & Alexandra R. Harrington, "The Plea of Necessity under Customary International Law: A Critical Review in Light of the Argentine Case*s"* Chester Brown & Kate Miles (eds) In *Evolution in Investment Treaty Law and Arbitration* (2011)

tribunals to interpret the non-insertion of necessity. As tribunals are established for a specific case, the interpretation of the silence of the BITs and the application of necessity under customary international law will differ. They may lead to possible inconsistent rulings, as shown in the Argentina case.[98] And the paper argues that taking into account the gravity of the threat posed by Covid-19 and its impact on states' socio-economic activity, tribunals should interpret the necessity pleas under customary international law by making a reasonable balancing of factual circumstances. There are some factors that tribunals should consider. E.g., the treaty-based nature of the claims, the uncertainty of the mitigating and controlling mechanism of the virus, the virus's deadly nature, and its fast infection rate that gave states little time to prepare, the WHO declaration of a pandemic, the African state's underdeveloped public health facilities, etc.

In addition to the loss that investors sustain due to the Covid-19 restrictions and lockdowns, Africa's people also suffered tremendously, like worsening poverty, unemployment, hunger, decrease in social welfare, increase social inequality, death, etc. Thus, while interpreting the customary defense, tribunals have to consider the impact of the virus and the measures implemented on Africa's people. Considering the people's suffering resulting from the Covid-19 related measures enforced by African states may help tribunals strike a balance between the conflicting interest of foreign investors and host states.

Conclusion

States have been fighting the deadly Covid-19 virus since early 2020. Intending to control and mitigate the virus's spread, states declared public health emergencies and enforced different measures. Even though the objectives of the measures were to protect public health, it negatively affects foreign investors' rights and protections in the host states. Inevitably, foreign investors are expected to initiate the Investor-State Dispute Settlement (ISDS) in the Post-Covid-19 time to challengethe measures they believe violated their rights under Bilateral Investment Agreements (BITs). African states will not be an exception to the post-Covid-19 ISDS, as long as they take packages of strict measures. The paper, thus, analyzes

[98] Nathalie Bernasconi (n 30) 5.

the invocation of necessity defense as the defense is more likely to be invoked by host states to defend the measures they take in relation to Covid-19.

The paper determined the virus's outbreak as a public health emergency that would warrant taking actions to mitigate or prevent the spread. Supported by many authors and state practices, an outbreak of a disease that threatens the public is considered a national security issue. And states are entitled to act under emergency. With the unprecedented threat and damage incurred by the Covid-19 coupled with the WHO declaration of a pandemic, the paper argues that it is unlikely anyone would challenge the existing public health emergency that warrants states to implement measures aimed at mitigating and controlling the virus's spread.

Determining the application of necessity defense for measures implemented to contain or mitigate the spread of the Covid-19 during an investment dispute is at the heart of the paper. Out of the 200 BIT visited, 154 of them do not contain NPM provisions. Thus, in case of dispute, to challenge the Covid-19 related measures, the African states will invoke necessity based on the customary international law. The paper analyzed the Covid-19 related measures vis-à-vis the element of Article 25 of ARSIWA. Article 25 of ARSIWA's third element, 'the only way,' requirement and the fifth element, 'contribution,' arguably will put a high standard for African states to meet. The prevailing customary law interpretation is strict and narrow. The paper argues that tribunals have to interpret the customary defense by making a reasonable balancing of factual circumstances and considering the exceptional factual realities that the spread of Covid-19 has brought. The factors that need consideration are the gravity of the threat posed by Covid-19, its fast infection rate that gave states little time to prepare, the WHO declaration of a pandemic, the African state's underdeveloped public health facilities, the spread's impact on states' socio-economy, and the treaty-based nature of the claims of foreign investors. Tribunals may also need to assess the measures implemented (restrictions, closure, and lockdowns) and their impact on the people of African states to strike a balance between the conflicting interest between foreign investors' interests and the host state's freedom to regulate in times of crises or emergency.

All in all, strict interpretation or application of the customary requirement of the necessity defense to Covid-19 related measures by tribunals may be a recipe for

African states to consider terminating or scraping their BITs. Moreover, such decisions of states will be a setback to the development of international investment law. Some states are already deciding to terminate their BITs because of the restraint while taking measures on public policy areas, e.g., South Africa,[99] Pakistan[100] , and India.[101]Thus, a balanced interpretation of necessity defense in times of crisis will be a good service to the international investment law. It will play a critical role in keeping the international investment law practice through BITs intact, at least until states can develop universal or multilateral investment agreements.

Table. 1. African BITs

No	Bilateral Investment Agreement without NPM	Date of Entry into Force
1	Agreement for the Promotion and Protection of Investments Between the Republic of Italy and the Arab Republic of Egypt	2 March 1989
2	Agreement Between The Swiss Confederation and The Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments	7 June 2010
3	Agreement between Government of the F. D. R. of Ethiopia and the P. R. of China Concerning the Encouragement and Reciprocal Protection of Investments	11 May 1998
4	Agreement between the Governments of the F. D. R. of Ethiopia and the Government of Malaysia for the Promotion And Protection of Investments	22 October 1998

[99] Xavier Carim, International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa. Investment Policy Brief (2015) 4 South Center 4 <www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf>; accessed 23 March 2021. 'South Africa has initiated processes to terminate its BITs. Over the course of 2012 and 2013, South Africa formally notified those European countries with whom it had BITs that it would terminate the treaties'.

[100] Mushtaq Ghumman, Most of BITs to be scrapped (2021) Bilaterals.org. <www.bilaterals.org/?most- of- bits-to-be-scrapped>; accessed 23 March 2021. 'Pakistan has reportedly decided to scrap most of its existing Bilateral Investment Treaties (BITs) as these pacts are shrinking the government's policy space with respect to adopting measures of public interest while attracting international litigation'.

[101] Nishith Desai Associates, Bilateral Investment Treaty Arbitration and India *With special focus on India Model BIT of 2016* (2018) <www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Bilateral_Investment_Treaty_Arbitration_andIndia-PRINT-2.pdf>; accessed 23 March 2021. 'As a result of the growing surge of BIT claims, India unilaterally terminated several BITs in 2016…'

5	Agreement between the Swiss Federation and Democratic Republic of Ethiopia for the Promotion and Reciprocal Protection of Investments	26 June 1998
6	Agreement between the F. D. R. of Ethiopia and the Kingdom of Denmark Concerning Promotion and Reciprocal Protection of Investments	24 April 2001
7	Agreement on Reciprocal Promotion and Protection of Investments between the Government of the F. D. R. of Ethiopia and the Government of the I. R. of Iran	21 October 2003
8	Agreement for the Promotion and Protection of Investments between the Arab Republic of Egypt and the Federal Democratic Republic of Ethiopia	27 May 2010
9	Agreement between the Government of the F. D. R. of Ethiopia and the Republic of France for the Reciprocal Promotion and Protection of Investments	25 June 2003
10	Treaty between the Federal Republic of Germany and the Republic of Kenya Concerning the Encouragement and Reciprocal Protection of Investments	7 December 2000
11	Agreement between the Government of the U.K. of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments	13 September 1999
12	Agreement between the Government of the Republic of Kenya and the Government of the United Arab Emirates on Promotion and Protection of Investments	5 June 2017
13	Agreement between the Government of the R. of Finland and the Government of the Republic of South Africa on Promotion and Reciprocal Protection of Investment	03 October 1999
14	Agreement between the Government of the R. of South Africa and the Government of the F. R. of Nigeria for the Reciprocal Promotion and Protection of Investments	27 July 2005
15	Agreement between Government of the R. of South Africa and the Government of the R. of Zimbabwe for the Promotion and Reciprocal Protection of Investments	15 September 2010
16	Agreement Between the Government of the P. R. of China and the Government of R. of South Africa concerning the Reciprocal Promotion and Protection of Investments	01 April 1998

17	Agreement Between the Kingdom of Sweden and the Republic of South Africa on the Promotion and Reciprocal Protection of Investments	01 January 1999
18	Agreement between Government of the Republic of India and the Government of the Republic of Sudan for Promotion and Protection of Investments	10 October 2010
19	Agreement between the Government of the Republic of Italy and Government of the State of Eritrea on the Promotion and Protection of Investment	14 July 2003
20	Agreement between the Government of Ghana and the Government of Malaysia for the Promotion and Protection of Investment	18 April 1997
21	Agreement between the Government of the P. R. of China and the Government of R. of Ghana Concerning the Encouragement and Reciprocal Protection of Investments	22 November 1990
22	Agreement between the U. K. of Great Britain and Northern Ireland and the Government of R. of Ghana for the Promotion and Protection of Investments	25 October 1991
23	Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Federal Republic Of Nigeria	19 January 2006
24	Agreement Between the Government of the P. R. of China and the Government of the F. R. of Nigeria for the Reciprocal Promotion and Protection of Investments	18 February 2010
25	Agreement between the Government of Italian Republic and the Government of the F. R. of Nigeria on the Reciprocal Promotion and Protection of Investment	22 August 2005
26	Agreement Between the Government of the Russian Federation and the Government of the R. of Zimbabwe for the Promotion and Reciprocal Protection of Investments	10 September 2014
27	Agreement between the Government of the P. R. of China and the Government of the R. of Zimbabwe on the Encouragement and Reciprocal Protection of Investments	01 March 1998
28	Agreement on encouragement and reciprocal protection of investments between the Government of the R. of Zambia and the Government of the K. of the Netherlands	01 March 2014

29	Agreement between the government of the Republic of Korea and the Government of the Republic of Gabon For the Promotion and Protection of Investments	09 August 2009
30	Agreement between the Government of the U. R. of Cameroon and U. K. of Great Britain and Northern Ireland for the Promotion and Protection of Investments	07 June 1985,
31	Agreement Between The Government of the R. Of Seychelles And The Government of the French R. On The Reciprocal Promotion And Protection Of Investments	28 December 2014
32	Agreement between the Government of the R. of South Africa and the Government of the R. of Senegal for the Promotion and Reciprocal Protection of Investments	29 December 2010
33	Agreement between the Government of the R. of Turkey and the Government of the R. of Senegal Concerning the Reciprocal Promotion and Protection of Investments	17 July 2012
34	Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments	05 March 2005
35	Agreement between the Government of the F. D. R. of Ethiopia and the Government of the K. of Sweden on the Promotion and Reciprocal Protection of Investments	01 October 2005
36	Agreement on encouragement and reciprocal protection of investments between the F. D. R. of Ethiopia and the Kingdom of the Netherlands	01 July 2005
37	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments	01 October 1975
38	Agreement between Japan and the Republic of Egypt Concerning the Encouragement and Reciprocal Protection of Investments	14 January 1978
39	Agreement between the Government of the Arab Republic of Egypt and the the P. R. of China Concerning the Encouragement and Reciprocal Protection of Investments,	01 April 1996

40	Agreement between the Arab Republic of Egypt and the Republic of Hungary on the Promotion and Reciprocal Protection of Investments	21 August 1998
41	Agreement between the Governments of the Hashemite K. of Jordan and the Arab Republic of Egypt on the Mutual Promotion and Protection of Investments	11 April 1998
42	Agreement Between the Government of The Arab Republic of Egypt And the Government of Malaysia for the Promotion and Protection of Investments	03 February 2000
43	Agreement on the Promotion and Protection of Investments between the Governments of the Arab Republic of Egypt and the D. P. R. of Korea	12 January 2000
44	Agreement between the Governments of the Russian Federation and the Arab R. of Egypt on the Encouragement and Mutual Protection of Capital Investments	12 June 2000
45	Agreement between the he Government of the Arab Republic of Egypt and the Government of the Republic of Bulgaria	08 June 2000
46	Agreement between the Government of the Arab R. of Egypt and the Government of the R. of Malta for the Promotion and Reciprocal Protection of Investments	17 July 2000
47	Agreement between the Governments of the Arab Republic of Egypt and the K. of Denmark Concerning the Promotion and Reciprocal Protection of Investments	29 November 2000
48	Agreement· between the Governments of the Kingdom of Thailand and the Arab Republic of Egypt for the Promotion and Protection of Investments	27 February 2020
49	Agreement between the Government of the Republic of Austria and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments	24 April 2002
50	Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments	05 September 2002
51	Agreement between the Swiss Confederation and the Republic of Ghana on the Promotion and Reciprocal Protection of Investments	16 June 1993

52	Agreement between the Government of the K. of Denmark and the Government of the R. of Ghana concerning the Promotion and Protection of Investments	06 January 1995
53	Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana	25 November 1991
54	Agreement between the Government of Malaysia and the Government of the Republic of Guinea for the Reciprocal Encouragement and Protection of Investments	24 February 1997
55	Agreement on economic co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya	11 June 1970
56	Agreement between the Governments of the R. of Kenya and the R. of Burundi for the Reciprocal Promotion and Protection in relation to foreign investments	1 April 2009
57	Agreement between the Government of the Republic of Kenya and the Government of the State of Kuwait for the Promotion and Reciprocal Protection of Investments	22 April 2015
58	Treaty of Friendship and of Commerce between the Swiss Confederation and the Republic of Liberia	22 September 1964
59	Agreement between the Governments of the U. K. of Great Britain and Northern Ireland and the K. of Morocco for the Promotion and Protection of Investments	14 February 2002
60	Agreement between the Government of the Republic of Turkey and the Government of Kingdom of Morocco for the Promotion and Protection of Investments	30 May 2004
61	Agreement on the Promotion and Protection of Investments between the Government of the R. of Korea and the Government of the K. of Morocco	8 May 2001
62	Agreement between the Government of the K. of Morocco and the Government of the R. of Finland on the Promotion and Reciprocal Protection of Investments	6 April 2003
63	Agreement between the Government of the Italian R. and the Government of the R. of Mozambique on the Promotion and Reciprocal Protection of Investments	17 November 2003

64	Agreement between the Governments of the R. of Mozambique and the K. of the Netherlands Concerning the Encouragement and the Reciprocal Protection of Investments	1 September 2004
65	Agreement between the Belgium-Luxembourg Economic Union and the R. of Mozambique on the Reciprocal Promotion and Protection of Investments	1 September 2009
66	Agreement Between the Governments of The R. Of Korea and the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investment	1 February 1999
67	Agreement between the Government of Romania and the Government of the Federal Republic of Nigeria on the Reciprocal Promotion and Protection of Investments	3 June 2005
68	Agreement between the Governments of the Kingdom of Sweden and the Federal Republic of Nigeria on the Reciprocal Promotion and Protection of Investments	1 December 2006
69	Convention concerning the reciprocal encouragement and protection of investments between the Belgo-Luxembourg Economic Union and Rwanda	25 September 1985
70	Agreement on Reciprocal Promotion and Protection of Investments between the Governments of the I. R. of Iran and the Government of the R. of South Africa	5 March 2002
71	Agreement between the Governments of the Republic of Mauritius and the Republic of South Africa for the Promotion and Reciprocal Protection of Investments	23 October 1998
72	Agreement between the Swiss Confederation and the Republic of Zambia on the Promotion and Reciprocal Protection of Investments	7 March 1995
73	Agreement between the Governments of the U. K. of Great Britain and Northern Ireland and Mauritius for the Promotion and Protection of Investments	13 October 1986
74	Agreement between the Government of Mauritius and Kingdom of Sweden on Investment Promotion and Protection Agreement	1 June 2005
75	Agreement between Government of the Republic of Mauritius and the United Republic of Tanzania on Investment Promotion and Protection	2 March 2013

76	Agreement between the Government of United Arab Emirates and the Government of Mauritius for the Promotion and Reciprocal Protection of Investments	28 December 2017
77	Agreement between the Swiss Confederation and the Republic of Zambia on the Promotion and Reciprocal Protection of Investments	6 May 2016
78	Agreement between the Government of the Russian Federation and the Libyan Arab Jamahiriya on the Promotion and Reciprocal Protection of Investments	23 March 2009
79	Agreement between the Government of the Republic of Singapore and the Libyan Arab Jamahiriya on the Promotion and Protection of Investments	22 December 2011
80	Agreement between the Republic of Turkey and the Libyan Arab Jamahiriya on the reciprocal promotion and protection of investments	22 April 2011
81	Agreement Between the Governments of the Kingdom of Morocco and the Dominican Republic on the Promotion and Reciprocal Protection of Investments	4 January 2007
82	Agreement between the Governments of the Kingdome of Morocco and the Republic of El Salvador on the Promotion and Reciprocal Protection of Investments	29 May 2002
83	Agreement between the Governments the Kingdom of Jordan and the Kingdom of Morocco on the Mutual Promotion and Protection of Investments	7 February 2000
84	Agreement between the Governments of the Republic of Indonesia and the Kingdom of morocco for the Promotion and Protection of Investments	21 March 2002
85	Agreement between the Governments of the Republic of Cyprus and the Seychelles for the Reciprocal Promotion and Protection of Investments	19 March 1999
86	Agreement between the Governments of the Republic of Seychelles and the French Republic on the Reciprocal Promotion and Protection of Investments	28 December 2014
87	Agreement between the Governments of the U. K. of Great Britain and Northern Ireland and the R. of Sierra Leone for the Promotion and Protection of Investments	20 November 2011

88	Agreement between the Swiss Confederation and the Republic of Uganda Concerning the Encouragement and Reciprocal Protection of Investments	8 May 1972
89	Agreement between the Governments of the U. K. of Great Britain and Northern Ireland and the R. of Uganda for the Promotion and Protection of Investments	24 April 1998
90	Agreement on encouragement and reciprocal protection of investments between the Republic of Uganda and the Kingdom of the Netherlands	1 January 2003
91	Agreement between the Governments of the K. of Denmark and the Republic of Uganda concerning the Promotion and Reciprocal Protection of Investments	10 November 2005
92	Agreement between the Governments of the Republic of France and theRepublic of Uganda on the Reciprocal Promotion and Protection of Investments	20 December 2004
93	Agreement between the Governments of the Republic of Serbia and the P. D. R. of Algeria on the Reciprocal Promotion and Protection of Investments	25 November 2013
94	Agreement between the Government of the R. of Finland and the Government of the P. D. R. of Algeria on the Reciprocal Promotion and Protection of Investments	25 February 2007
95	Agreement between the Governments of the F. D. R. of Ethiopia and the P. D. R. of Algeria on the Reciprocal Promotion and Protection of Investments	1 November 2005
96	Agreement between the Government of the R. of Korea and the Government of the D. P. R. of Algeria for the Promotion and Protection of Investments	30 September 2001
97	Agreement between the Governments of the Kingdom of Jordan and the P. D. R. of Algeria on the Reciprocal Encouragement and Protection of Investments	5 June 1997
98	Agreement between the Governments of the U. K. of Great Britain and Northern Ireland and the P. R. of Benin for the Promotion and Protection of Investments	27 November 1987
99	Agreement between the Governments of the Investment Protection U. K. of Great Britain and Northern Ireland andthe P. R. of the Congo for the Promotion and Protection of Investments	9 November 1990

100	Agreement between the Government of the R. of Korea and the Government of the I. R. of Mauritania for the Promotion and Protection of Investments	21 July 2006
101	Agreement between the Governments of the F. R. of Nigeria and the U. K. of Great Britain and Northern Ireland for the Promotion and Protection of Investments	11 December 1990
102	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria	1 February 1994
103	Treaty the Federal Republic of Germany and the Republic of Namibia Concerning the Encouragement and Reciprocal Protection of Investments	21 December 1997
104	Agreement between the Republic of Namibia and the Swiss Confederation on the Promotion- and Reciprocal Protection of Investments	26 April 2000
105	Agreement between the Government of Malaysia and the Government of the Republic of Namibia for the Promotion and Protection of Investments	2 November 1994
106	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Namibia	1 October 2004
107	Agreement between the Republic of Austria and the Republic of Namibia for the Promotion and Protection of Investments	1 September 2008
108	Agreement between the Confederation of Swiss and Democratic Republic of Sudan Concerning the Encouragement and Reciprocal Protection of Investments	14 December 1974
109	Agreement on economic and technical co-operation between the Government of the K. of the Netherlands and the Government of the D. R. of the Sudan	23 March 1972
110	Agreement between the Governments of the F. D. R. of Ethiopia and the R. of the Sudan on the Reciprocal Promotion and Protection of Investment	15 May 2001
111	Agreement between the Governments of the Kingdom of Jordan and the R. of Sudan on the Mutual Promotion and Protection of Investments	3 February 2001

112	Agreement between the Governments of the U. K. of Great Britain and Northern Ireland and the Tunisian Republic or the Promotion and Protection of Investments	4 January 1990
113	Agreement Between the Republic of Turkey and the Republic of Tunisia Concerning the Reciprocal Promotion and Protection of Investments	28 April 1994
114	Agreement between the Governments of the Republic of Tunisia and the Republic of Indonesia on the Promotion and Protection of Investments	12 September 1992
115	Agreement between the Government of the Kingdom of Jordan and the Government of the Republic of Tunisia on the Mutual Promotion and Protection of Investments	23 November 1995
116	Agreement between the Governments of the K. of Denmark and the R. of Tunisia Concerning the Promotion and Reciprocal Protection of Investments	11 April 1997
117	Agreement between the Czech Republic and the Republic of Tunisia for the Promotion and Reciprocal Protection of Investments	8 July 1998
118	Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Tunisia	1 August 1999
119	Agreement between the Government of the F. D. R. of Ethiopia and the Government of the R. of Tunisia for the Promotion and Protection of Investments	2 October 2004
120	Agreement on the Reciprocal Promotion and Protection of Investments between the Government of the I. R. of Iran and the Government of the R. of Tunisia	27 March 2003
121	Agreement between the Government of the R. of Finland and the Government of the R. of Tunisia on the promotion and protection of investments	4 September 2003
122	Agreement between the People's Republic of China and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of investments	1 July 2006
123	Agreement between the Swiss Federal Council and the Government of the Republic of Tunisia on reciprocal promotion and protection of investments	8 July 2014

124	Investments on the Promotion and Reciprocal Protection the Republic of Zimbabwe and the Swiss Confederation· between	9 February 2001
125	Agreement on encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands	1 May 1998
126	Agreement between the Governments of the U. K. of Great Britain and Northern Ireland and the R. of Burundi for the Promotion and Protection of Investments	13 September 1990
127	Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments	1 November 2005
128	Agreement between the Governments of the F. D. R. of Ethiopia and the Libyan Arab Jamahiriya Concerning the Encouragement and Reciprocal Protection of Investments	25 June 2004
129	Agreement between the Governments of the F. D. R. of Ethiopia and the Republic of France for the Reciprocal Promotion and Protection of Investments	7 August 2004
130	Agreement Between the Governments of the F. D. R. of Ethiopia and the Republic of Yemen on the Reciprocal Promotion and Protection of Investment	15 April 2000
131	Agreement between the Government of the F. D. R. of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments	4 June 1999
132	Agreement between the Federal Democratic Republic of Ethiopia and the state of Kuwait for the Encouragement and Reciprocal Protection of Investment	12 November 1998
133	Agreement between the Swiss Confederation and the Republic of the Gambia on the Promotion and Reciprocal Protection of Investments	30 March 1994
134	Agreement between the Government of the Republic of the Gambia and the state of Qatar for the Reciprocal Promotion and Protection of Investments	3 March 2011
135	Agreement on encouragement and reciprocal protection of investments between the Republic of the Gambia and the Kingdom of the Netherlands	1 April 2007

136	Agreement between the Kingdom of Morocco and the Government of the Republic of the Gambia on the Reciprocal Promotion and Protection of Investments	12 October 2011
137	Agreement between the Republic of Ghana and Swiss Confederation on the Promotion and Reciprocal Protection of Investments	16 June 1993
138	Agreement between the Federal Governments of the F. R. of Yugoslavia and the R. of Ghana for the Reciprocal Promotion and Protection of Investments	7 July 2000
139	Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana	1 July 1991
140	Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt	26 Apr 1994
141	Agreement between the Governments of the Republic of Korea and Burkina Faso for The Promotion and Protection of Investments	14 April 2010
142	Agreement between the Government of Malaysia and the Government of Burkina Faso for the Mutual Promotion and Protection of Investments	18 August 2003
143	Agreement between the Republic of Botswana And the Swiss Confederation on the Promotion and Reciprocal Protection	13 April 2000
144	Agreement between the Governments of the U. K. of Great Britain and Northern Ireland and the R. of Cote D'Ivoire for the Promotion and Protection of Investments	9 October 1997
145	Agreement on the Promotion and Protection of Investments between the Governments of A. R. of Egypt and Mongolia	25 January 2005
146	Agreement between the Governments of the A. R. of Egypt and the Government of the Republic of Slovenia on the Mutual Promotion and Protection of Investments	07 February 2000
147	Agreement between The Arab Republic Of Egypt And The Republic Of Cyprus For The Promotion And Reciprocal Protection Of Investments	09 June 1999

148	Agreement between Bosnia and Herzegovina and the A. R. of Egypt Concerning The Promotion And Reciprocal Protection 0f Investments	29 October 2001
149	Agreement between the Republic of Croatia and the Arab Republic of Egypt Concerning the Promotion and Reciprocal Protection of Investment	02 May 1999
150	Agreement on the Promotion and Protection of Investments between the Government of the Socialist Republic of Vietnam and the Government of the Arab Republic of Egypt	04 March 2002
151	Agreement between the Government of the Slovak Republic and the Government of The A. R. of Egypt for the Promotion and Reciprocal Protection of Investments	01 January 2000
152	Agreement between the Government of The A. R. of Egypt And The Government of the Republic of Latvia for the Promotion and Protection of Investments	06 March 1998
153	Agreement between the Arab Republic of Egypt and the Republic of Poland for The Reciprocal Promotion and Protection Of Investments	17 January 1998
154	Agreement on encouragement and reciprocal protection of investments between the Governments of the Republic of Malawi and the Kingdom of the Netherlands	01 November 2007

Table 2: African BITs that contain NPM or General Exceptions

No	African BITs with NPM provision	Entry into Force
1	Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments	16 December 2016
2	Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment	06 April 1989
3	Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment	14 September 2017

4	Agreement between the Governments of the Republic of Finland and the R. of Kenya for the Reciprocal Promotion and Protection of Investments	2 October 2009
5	Agreement between the Governments of the Republic of Korea and the Republic of Kenya for the Promotion and Protection of Investments	03 May 2017
6	Treaty between the Governments of the U. S. A. and the R. of Rwanda Concerning The Encouragement and Reciprocal Protection of Investment	01 January 2012
7	Treaty between the Governments of the U. S. A. and Mozambique Concerning the Encouragement and Reciprocal Protection of Investment	03 March 2005
8	Treaty between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments	29 May 1991
9	Agreement between the Governments of the Republic of Finland and the F. R. of Nigeria on the Promotion and Protection of Investments	20 March 2007
10	Agreement between the Government of Canada and the Government of the Republic of Côte D'Ivoire on Promotion and Protection of Investments	14 December 2014
11	Agreement between the Governments of the Republic of Korea and the Republic of Cameroon for the Promotion and Protection of Investments	13 April 2018
12	Agreement between the Government of the Arab Republic of Egypt and Government of the Republic or Singapore on Promotion and Protection of Investments	15 April 1997
13	Agreement between the Governments of the Republic of India and the Republic of Senegal for the Promotion and Protection of Investments	17 October 2009
14	Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments	05 August 2016
15	Agreement between the Governments of the F. D. R. of Ethiopia and the State of Israel for the Reciprocal Promotion and Protection of Investments,	14 December 2006

16	Treaty between the U. S. A. and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments	27 June 1992
17	Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments	3 November 1997
18	Agreement between the Governments of the Republic of Finland and the Arab Republic of Egypt on the Promotion and Protection of Investments	05 February 2005
19	Agreement between the Governments of the R. of Mauritius and the Arab R. of Egypt on the Reciprocal Promotion and Protection of Investments	17 November 2014
20	Agreement between the Governments of the Arab R. of Egypt and the R. of Iceland for the Promotion and Reciprocal Protection of Investments	15 June 2009
21	Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea	27 March 2017
22	Agreement between the Governments of the R. of Mozambique and the R. of Mauritius for the Promotion and Reciprocal Protection of Investments	26 May 2003
23	Agreement between the Governments of the R. of Finland and the R. of Mozambique on the Promotion and Reciprocal Protection of Investments	21 September 2005
24	Agreement between the Government of Japan and the R. of Mozambique on the Reciprocal Liberalization, Promotion and Protection of Investment	28 August 2014
25	Agreement between the Governments of the Republic of Korea and the Republic of Rwanda for the Promotion and Protection of Investments	16 February 2013
26	Agreement between the Governments of the R. of Mauritius and the P. R. of China for the Reciprocal Promotion and Protection of Investments	8 June 1997
27	Agreement between the Governments of the Republic of Indonesia and the Republic of Mauritius on the Promotion and Protection of Investments	28 March 2000

28	Federal Republic of Germany and Mali Treaty concerning the promotion and reciprocal protection of capital investment	7 August 1981
29	Agreement between Canada and Mali for the Promotion and Protection of Investments	8 June 2016
30	Agreement Between the Governments of Canada and the Republic of Benin for the Promotion and Reciprocal Protection of Investments	12 May 2014
31	Treaty between the Governments of the U.S.A and the P. R. of the Congo Concerning the Reciprocal Encouragement and Protection of Investment	13 August 1994
32	Agreement Between Canada and Mali for the Promotion and Protection of Investments	8 June 2016
33	Agreement between the Governments of the R. of Finland and the R. of Namibia on the Promotion and Protection of Investments	21 May 2005
34	Treaty between The United States of America and the Republic of Tunisia Concerning the Reciprocal Encouragement and Protection of Investment	7 February 1993
35	Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment	28 July 1989
36	Agreement between the Governments of the Republic of Finland and the F. D. R. of Ethiopia on the Promotion and Protection of Investments	3 May 2007
37	Belgo-Luxembourg Economic Union and U. R. of Cameroon Convention concerning the reciprocal promotion and protection of investments	01 November 1981
38	Agreement between the Arab Republic of Egypt and the F. R. of Germany concerning the Encouragement and Reciprocal Protection of Investments	16 June 2005
39	Treaty between the F. R. of Germany and the F. D. R. of Ethiopia Concerning the Encouragement and Reciprocal Protection of Investments	04 May 2006
40	Treaty between the Federal Republic of Germany and the Republic of Liberia for the promotion and reciprocal protection of investments	22 November 1967

41	Agreement between the Governments of the Republic of Estonia and the K. of Morocco for the reciprocal promotion and protection of investments	4 November 2011
42	Treaty between the Federal Republic of Germany and Sierra Leone concerning the Encouragement and Reciprocal Protection of Investments	10 December 1966
43	Federal Republic of Germany and Benin, Treaty concerning the promotion and reciprocal protection of capital investment	18 July 1985
44	Federal Republic of Germany and Mali Treaty concerning the promotion and reciprocal protection of capital investment	16 May 1980
45	Agreement between the Kingdom of Spain and The Republic Of Namibia on the Promotion and Reciprocal Protection of Investment	28 June 2004
46	Agreement between the R. of Zimbabwe and the F. R. of Germany Concerning the Encouragement and Reciprocal Protection of Investments	14 April 2000

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Forthcoming Indian Regulation Of Personal And Non-Personal Data: Impact On International Data Flows

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The free flow of personal and non-personal information across borders remains a significant prerequisite for trade and commerce. Data protection and privacy legislations, which restrict the flow of data across borders, are often called upon balance considerations of free flow of information with privacy protection. As the world is witnessing a rise in protectionist frameworks on privacy with limitations on cross-border transfers, businesses may find it more difficult to navigate through these requirements, in an increasingly interconnected world. This may also have an unintended effect of creating walled national garden networks. As India is poised to introduce a comprehensive framework for regulation of personal and non- personal data, in the form of a Data Protection Bill, its effect on the free flow of information is yet to be comprehensively examined. Provisions on the flow of information which affect outward, inward transfers of personal and non-personal data are likely to impact a wide range of sectors and affect the potentiality of equivalence. This note seeks to highlight and discuss provisions under the law which affect outward cross-border transfers and examine these in light of best practices and global equivalents. Recent developments in jurisdictions such as European Union have also been revealing requirements to record assessments of laws of third countries to which resident data is transferred. In this context, this note proposes to identify exemptions and other provisions which are likely to have deterrence against inward transfers due to fears of State surveillance or access by other public authorities. The prevalence of these provisions is likely to have a significant impact on data processing activities such as those undertaken as a part of business process outsourcing services and may consequently impact trade. The legislation also proposes regulation of non-personal data and includes notorious provisions which may have a demonstrable impact on the protection of intellectual property, and data-associated rights and may take away economic and commercial

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value associated with vast non-personal datasets. This note also seeks to dissect such provisions and illustrate the potential impact that the exercise of such powers may have on the data economy and trade in a world increasingly reliant on machine learning and data-driven decisional systems.

Introduction

Free flow of information is one of the most underrated considerations and factors in analysing trade between countries globally. The contribution of legal frameworks towards the architecture of a protectionist or enabling liberal framework for the flow of information has an important role to play in the development of cordial trade relations, sharing of technology and growth and development of digital economies across the world. In an analysis focusing on the cost of data protectionism, India was regarded to have lost trade gains of at least twenty percent attributable to a protectionist or restrictive regime on data sharing and restrictions on cross-border flow.[3] As per a study by European Centre for International Policy Economy, forced data localization norms led to a negative impact on growth and investments in many countries, including India (at almost 0.1%).[4] This may also highlight the need for developing a universal baseline, through reforms in rules by international organizations, such as the World Trade Organization (**WTO**) in promoting internet openness, and inclusivity and incorporating clear guidance for national policies inhibiting or restricting cross-border flows.

National legislations on data may have various approaches to deal with the cross-border flow of data. While generally, there exist minimal restrictions on the importation of data, export may heavily be regulated based on the nature of the regime. Some countries adopt an extremely protective and restrictive policy regarding data flow, which may restrict outflows based on data controls, governmental approvals or stringent consent norms. For instance, the Personal Information and Protection Law, 2021(**PIPL**) in China requires data localization and restricts outbound transfers of certain categories of personal data, except where

[3] Cost of data protectionism, Ferracane et al. (2018b)
[4] European Centre for International Political Economy (ECIPE), The Costs of Data Localisation: Friendly Fire on Economic Recovery (2014), available at, https://ecipe.org/publications/dataloc/

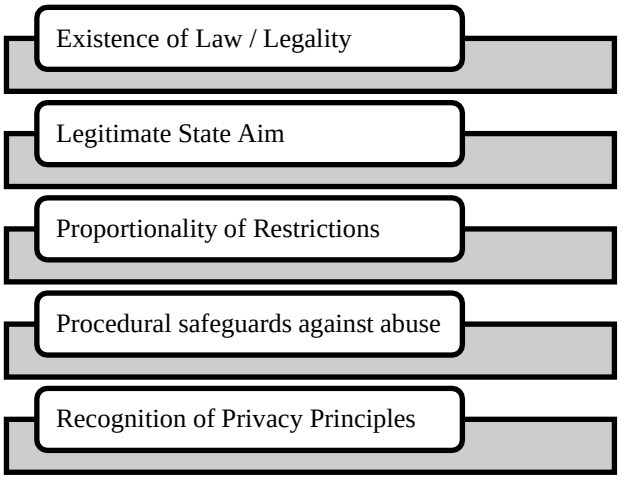
specific governmental permissions have been obtained.[5] Such legislations tilt the balance in favour of national security over ensuring free movement of data globally and may sometimes contribute to the creation of national internets.[6]

Some other jurisdictions may prioritise free flow considerations and link outbound transfers with consent or other safeguarding conditions. European Union's (**EU**) General Data Protection Regulation (**GDPR**) enables the cross-border flow of personal data through identified conditions, such as equivalence[7], binding corporate rules[8], standard contractual clauses[9], or alternatively, may require explicit consent from data principals, as a recognized exception. While a uniform global data protection standard throughout may not be feasible considering varying socio-economic-political considerations of individual member states, the need to develop and adhere to a common denominator in terms of the capability of data protection legislations, and handling of foreign citizens' information and data subject rights must be developed. More importantly, national standards have to be evolved in a manner to support cross border data transfer to ensure economic growth and stability.

Indian data protection regime vis-à-vis cross border data flow

In the case of *Puttaswamy*[10], the Supreme Court of India reaffirmed the right to privacy within the meaning of life and personal liberty under Article 21 of the Constitution of India, 1950. Theoretically, this right extends to citizens as well as non-citizens[11], thereby presumably allowing non-citizens to approach Indian courts to pursue remedies against unlawful interference with the right to privacy. The Supreme Court recognized a three-fold test of legality, legitimacy and proportionality to measure and detect unreasonable interference to privacy.

[5] PIPL, Article 40.
[6] *Freedom on the Net 2021; China, available at* https://freedomhouse.org/country/china/freedom- net/2021
[7] GDPR, Article 45.
[8] GDPR, Article 47.
[9] GDPR, Article 46.
[10] *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India*, 2017 10 (SCC) 1.
[11] *Power Measurements Ltd. v. U.P. Power Corporation Ltd. and Ors*., 2003 (2) AWC 1642 b.



The evolution of the three-step test, presumably from the proportionality gallons of the *Modern Dental College* case[12], has led to the adoption of the proportionality standard to infringement of privacy. The three-step test postulates the existence of law, the legitimate state aim required to be established and the proportionality of the restriction. Within the proportionality test, as imported from Aharaon Barak's Proportionality[13], the focus appears to be on establishing the four-fold requirements of purpose, the relation between measures and objectives, non-availability of less-intrusive means and balancing of rights and State prerogatives.

The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (SPDI Rules)

The SPDI Rules, issued under the Information Technology Act, 2000 propose a limited and sparse framework for regulating personal data, which has largely been regarded as insufficient under Indian law. Unlike popular belief that an absence of a strong data privacy framework may propel information trade, India is unlikely to be assessed as being 'equivalent' under EU, Singaporean or other jurisdictions which is likely to result in free or easier data flows.

The SPDI Rules enable cross border flow of sensitive personal data under specific circumstances. While no conditions are prescribed for transfer outside India for personal data or sensitive personal data, the information may be transferred outside

[12] *Modern Dental College & Research Centre v. State of Madhya Pradesh &Ors.*, (2016) 7 SCC 353.
[13] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012).

India to a country or entity which ensures an equivalent level of data protection as provided the under the SPDI Rules[14] on the basis of the necessity of such transfer and consent of the provider of information.

Sectoral Regulators

Sectoral regulators have introduced specific requirements relating to cross-border data transfers, mandatory local storage requirements and other information security and storage requirements relating to data security and integrity, apart from the overarching information technology legislation, which forms a part of the Indian data privacy regulatory landscape.

(a) Reserve Bank of India (RBI): Notably, the Storage of Payment System Data Circular[15] requires payment system providers and other participants in the payments ecosystem (flow-down) to store customer data, payment sensitive data, payment credentials and transaction data within India. While there is no restriction on the transfer of such information outside India for processing, such information must be brought back and stored within India. Such data localisation requirements may pose a burden for global operations, thereby processing data outside India.

(b) Insurance Regulatory and Development Authority of India (IRDAI)**:** With reference to the insurance sector, Rule 3(9) of the IRDAI (Maintenance of Insurance Records) Regulations, 2015 requires electronic records of policies issued and claims to be stored only within India. This would pose an issue to international entitles which may require storing data outside Indian territory.

(c) National Company Law Tribunal (NCLT)**:** Rule 3(5) of the Companies (Accounts) Rules, 2014 issued under the Companies Act provides for data localisation provisions. Data such as books of account, papers of the company, etc. in electronic copies have to be stored in India. Thus, it introduced additional compliance for companies operating in India.

[14] SPDI Rules, Rule 7.

[15] Storage of Payment Data, available at: https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11244

[16] Frequently Asked Questions, Storage of Payment System Data, available at https://m.rbi.org.in/scripts/FAQView.aspx?Id=130#:~:text=The%20entire%20payment%20data%20shall,except%20in%20cases%20clarified%20herein.&text=The%20data%20should%20include%20end,of%20a%20payment%20message%20%2F%20instruction.

(d) Broadcasting Sector & FDI**:** The Consolidated Foreign Direct Investment Policy, 2020 under Annexure 6 prescribe additional conditions applicable to the broadcasting sector. The policy restricts companies from transferring subscribers' databases to any person or place outside India unless specifically permitted by relevant laws. This may potentially restrict foreign companies from accessing subscriber information from central locations unless remotely accessed or accessed through personnel located in India.

(e) Telecom & Unified License Agreements: The Unified License Agreement (**UL**) restricts licensees (of all kinds) from transferring any accounting information relating to subscribers or any user or subscriber information to any person or place outside India, *albeit* existing and prospective future restrictions on foreign holding of the telecommunications sector in India. Foreign data flows in telecommunications and imports of telecommunications equipment have been recently subject to heavy scrutiny with policy implementation right from cabinet oversight in the form of the National Security Directive on Telecommunications Sector.[17]

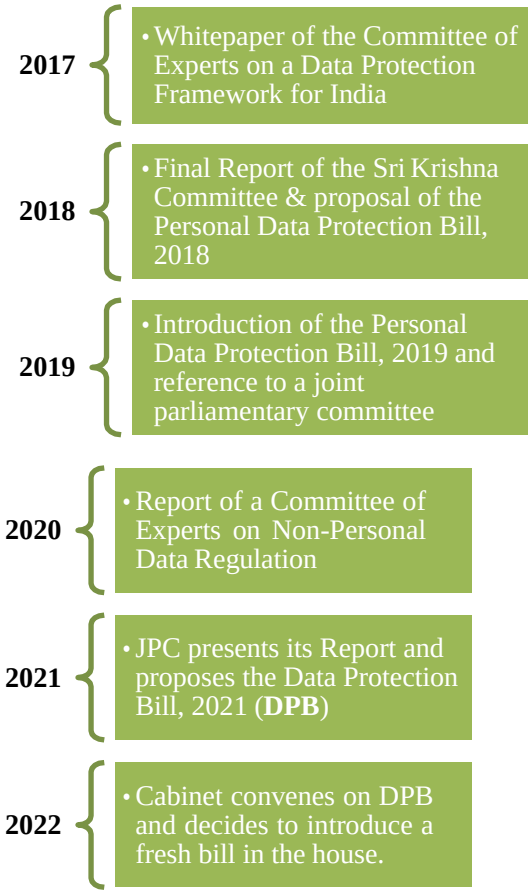
(f) Aadhaar information: Collection and retention of Aadhaar data have been at the helm since the discourse on data law in India commenced. As Aadhaar law evolved, data localization trends soon became applicable, as Aadhaar regulations soon required authentication (AUA) and e-KYC (KUA) user agencies to store all Aadhaar information within India only and maintain all their servers and Aadhaar related infrastructure within India only.[18]

Forthcoming Law

The Privacy Judgment has also recognized certain key privacy principles recognized in the White Paper (as discussed below) which have been incorporated and applied as part of key privacy principles as part of constitutional realms of privacy law. While forthcoming law developments have traversed miles through to

[17] Amendments to the Unified License in the context of the National Security Directive n Telecom Sector <https://dot.gov.in/sites/default/files/2021%2003%2031%20UL%20Proc%20AS- I.pdf?download=1>
[18] Aadhaar (Authentication) Regulations, 2016, Rule 22(1).

reach a developmentally crucial stage in the formulation of privacy law in India, it may be important to trace important developments.



Srikrishna Committee Report (Report)

The White Paper of the Committee of Experts on a Data Protection Framework for India[19] was released in 2017 and it outlined recommendations for a data protection regime in India. Pursuant to public suggestions and widespread deliberations, the Ministry of Electronics and Information Technology and the Committee of Experts under the chairmanship of Justice B. N. Srikrishna released the Srikrishna Committee Report of the Committee of Experts (the **Report**) in 2018[20].

The Report acknowledges the importance of data flow for a healthy digital economy with the caveat of a reasonable level of protection. It recognizes the multiple models

[19] Ministry of Electronics and Information Technology, *White Paper of the Committee of Experts on a Data Protection Framework for India* (2017)
[20] Report of the Committee of Experts headed by Justice (Retd) B. N. Sri Krishna <https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf>

of controls available in ensuring adequate protection of personal data in cross-border situations and examines EU and other jurisdictional examples, including adequacy, specific government permissions and model contracts. It emphasizes the suitability of model contracts in serving the interests of a free and fair digital economy and focuses on non-governmental intervention in such situations, apart from intra-group schemes where transfers are within the same group. Having said so, the report reserves its opinion on the need for the Government to make adequacy assessments which may have reduction int transaction costs, positive incentives.

One of the key considerations to identifying exceptions to the free flowof personal data is one relating to risks of foreign surveillance. The Report identifies the risk that wide-worded legislations such as the American law; Foreign Intelligence Services Act of 1978 (**FISA**) have in mass surveillance, especially in a heightened risk of internet intermediaries emerging in the United States. The Report acknowledges the need to strike a balance and to identify categories of sensitive data which may warrant further protection, such as genetic, biometric, health, Aadhaar or other markers which may be critical to State or personal interests and may be subject to local processing and making all other information freely transferable, thus opting a balanced approach to the transfer of personal data.

Data Protection Bill, 2021

The forthcoming data protection lawis currently being deliberated upon by the Central council of ministers (the cabinet) and is likely to be reintroduced in the form of fresh legislation, in thesame or similar essence[21] after a Joint Parliamentary Committee (**JPC**) submitted its Report of the Joint Committee on the Personal Data Protection Bill (**JPC Report**) to the Parliament.

Clause 34 of the DP Billpermits the transfer of sensitive personal data with explicit consent, in addition to any of the grounds of adequacy, approved intra-group schemes, contracts or specific approvals. The undefined category of critical

[21] Surabhi Agarwal, 'Fresh legislation may replace Data Protection Bill', *Economic Times*, (New Delhi, 17 February 2022) <https://economictimes.indiatimes.com/tech/technology/fresh-legislation- may-replace-data-protection-bill/articleshow/89624369.cms> accessed 23 February 2022

personal data may not be transferred, save on the express permission of the Central Government on emergent grounds, including medical emergencies. The previously discussed foreign surveillance apprehension was addressed, with a specific provision restricting entities from sharing sensitive data with foreign governments or agencies unless such sharing is approved by the Central Government. However, on a cursory comparison with the Report and its 2019 counterpart, the DP Bill suffers from some infirmities:

(a) The DP Bill permits contracts or intra-group schemes to be disapproved if the object of transfers is against public policy or even state policy. Not only that the definitional ambit may be cast wide, but the inclusion of State policy, makes policy prerogatives of the Government and any data transfers which run contrary tothe same, subject to disapproval;

(b) Permission of the Central Government prior to the disclosure of sensitive personal data may not be practicable for entities in all situations, especially where foreign law does not permit disclosures to thirdparties or governments. Penalties or liability in such situations may prove to be a double-edged sword, in such instances and may be taken into consideration;

(c) Lack of guidance on what may constitute critical personal data mayprove to be troublesome in assessing the applicability of its provisions.

Non-Personal Data Framework

The Government of India constituted a committee of experts to deliberate on a non-personal data framework which released its final report in December 2020.[22] This proposed framework sets out a definitional ambit of non-personal data (**NPD**) and a framework for regulating NPD through data businesses and by establishing a data-sharing architecture. It recognizes high-value datasets, purpose-based sharing of NPD, proposes ownership of NPD by data custodians, community and establishment of a non-personal data authority (**NPDA**). However:

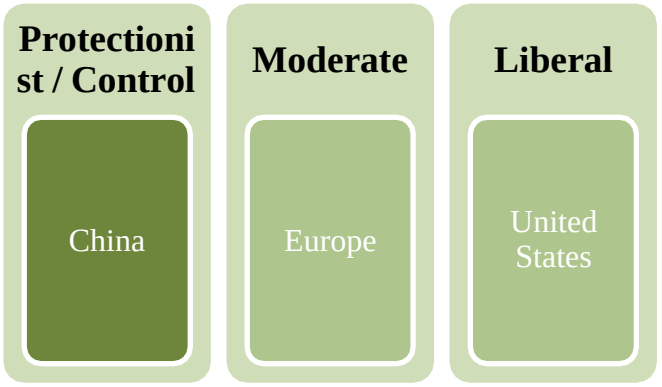
[22] Report by the Committee of Experts on Non-Personal Data Governance Framework, December 2020, available at https://ourgovdotin.files.wordpress.com/2020/12/revised-report-kris- gopalakrishnan-committee-report-on-non-personal-data-governance-framework.pdf

(a) The framework proposes that NPD inherits sensitivity from underlying personal data, therefore, sensitive personal data and critical personal data may be subject to certain restrictions even after being anonymized;

(b) The framework proposes mandatory meta-data sharing by data custodians, including high-value datasets which may result in potential dilution of value in intellectual property, proprietary information and protection of trade secrets.

(c) The NPD framework does not accurately balance detriments of free flow restrictions on NPD vis-à-vis benefits of trade and commerce.

International Perspective



Countries across the world adopt a unique approach to data privacy legislations.Some adopt overtly protectionist or control focussed measures such as permissions for transfers, identifying huge brackets of impermissible categories, widespread restrictions on transferability and limited consent usability while others may adopt more liberal measures such as consent or mere contract-driven transfers with little or no focus on measures or transfer protections, like in the United States, particularly owing to scattered state and domain-specific legislations.

Protectionist or control driven

Localization mandates, wide extra-territoriality, security assessments, administrative interventions, and governmental approvals apart from cross-border restrictions are often the markers of protectionist or control driven privacy frameworks. China's new PIPL passed in August 2021, forming the main data security and data privacy law, is a comprehensive framework which encapsulates many elements of the protectionist framework highlighted above. While the

framework boasts of consent-focussed processing, prior consent for sharing, protection against automated decision making resulting in differential treatment of data subjects and rights of data subjects, it also includes:

(a) Cross-border transfers being subject to security assessments by the Cyberspace Administration of China (**CAC**) or security certification by CAC or standard contracts or agreements stipulated by CAC;
(b) Restriction on critical information infrastructure operators or entities that use large volumes of personal data to localize data or undergo security assessment by CAC; and
(c) Reciprocal measures against countries which impose discriminatory measures against China in relation to personal information protection.

Moderate approach

A moderate approach to data privacy legislation would attempt to balance privacy protection, and national security concerns with free trade and attempt to make ease of business a priority in legislative approaches and regulation. This is one of the key defining approaches to the GDPR. The GDPR permits transfers of personal data of EU residents to third countries on grounds of adequacy decisions, binding corporate rules, standard contractual clauses or on the basis of explicit consent. Processing, on the other hand, is permitted on the basis of consent or contract. The absence of localization, specific government authorizations, security clearances are some of the key defining absent features to mark departure of a control-driven approach.

While it is widely touted that the DP Bill is based on the GDPR, there is a significant departure in terms of the journey in which the DP Bill has traversed through time. As the Bill has morphed from its original form, it has lost more of its essence from the GDPR and absorbed more characteristics of a protectionist framework with localization mandate, specific governmental permissions, and state policy considerations in intra-group policies among others.

Liberal approach

Liberal approaches to privacy legislation are rarely witnessed, usually attributable to a lack of privacy legislations or where multiple provinces or states have multiple legislations. Generally, liberal approaches may weigh in a free flow of data, while protecting privacy, but may generally have a higher risk appetite for risk in privacy protection, at the altar of trade and free flow of goods and services, underlying them, personal data. Owing to its federated nature, the United States has witnessed scattered privacy legislation and fewer initiative from states on privacy, with limited states and provinces willing to legislate comprehensively on privacy. Many states which have legislated on privacy have introduced limited privacy legislation only.

At the federal level, apart from the Fourth Amendment as a constitutional prerogative, the Privacy Act, 1947, guardrails privacy and public notice requirements for federal agencies. Generally, state governments exercise decisional control over legislations and regulations relating to data privacy within a state. Further, laws which have been enacted by states have been limited in domain and approach which shall be examined.

Many states have passed multiple legislations which have introduced comprehensive privacy legislations such as California and Colorado. Virginia, however, has no such laws have any provisions for cross-border transfers.

International Agreements

There have been increasing arguments that the General Agreement on Trade in Services (**GATS**) may stand violated with the introduction of forced data localization mandates. This may have to be examined further. Needless to say, the cross-border flow of information principally relates to situations where services flow in a cross-border supply mode from one member territory to another, i.e. in a Mode 1 situation. A data localization mandate which mandates local storage of personal information of customers affects the supply of service in a particular sector, treats foreign service suppliers in a less favourable manner, affords them

less favourable treatment than their domestic counterparts and runs at risk of violating the national treatment principle. Further, a localization mandate may limit the number of service suppliers because it "totally prevents use by service suppliers of one, several or all means of delivery that are included in mode 1"[24] which may run the risk of violating market access obligations under GATS.

These obligations are, however, generally justified under measures necessary to maintain public order, legal compliance, prevention of fraud, protection of privacy, protection of confidentiality and safety of individuals. However, in line with GATS, such grounds, must satisfy the weighing and balancing test and such localization measures must not constitute arbitrary or unjustifiable discrimination on trade in services. States may also claim a security exception, in highly limited circumstances.[25]

Conclusion

This forthcoming data regulation presented a unique opportunity to further liberate the cross-border flow of information and facilitate trade and the growth of an industry. Free flow of personal, as well as non-personal data remains crucial to trade, and minimal barriers to such flow must remain priorities for regulation.

This is especially true for regulations concerning non-personal data. Given that non-personal data does not contain personal information attributable to an individual, concerns of privacy, security and regulatory oversight must be minimal and such flow must be facilitated to reduce regulatory hindrances for business, thereby promoting trade and commerce. Jurisdictions such as the EU have adopted regulations for the free flow of non-personal data.[26] While the proposed non-personal data framework is a step in that direction, it misses the bus on the distinctions that it makes between Indian and non-Indian entities, restrictions on the flow of information, mandatory data sharing and dilution of anonymity safeguards.

[24] WTO Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, (20th April, 2005)
[25] Article XIV, GATS (1995)
[26] Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union.

Personal data, on the other hand, warrants a higher privacy protection standard than non-personal data. While there is little doubt that such protection must exist in the form of consent of data subjects, security safeguards, record keeping and other compliances, the efficacy of cross-border restrictions or localization mandates in such protection may be limited. The growth of digital trade would necessitate regulation to be formulated in such a manner to postulate the least restriction to the free flow of personal data.

Understandably, a definitive subset of sensitive personal data may be subject to higher thresholds of restrictions on cross-border flow or local storage, as the case may be. As opposed to hard localization, such information, however, may be permitted to be transmitted, from an autonomy perspective, on the basis of consent or on other valid grounds of assurance of adequate safeguards.

Consequently, Indian data protection legislation may have to be further revisited and tailored to bolster trade and commerce while ensuring that it adequately protects rights and privacy of residents.

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Professional Ethics For Counsels Engaged In WTO Litigation: A Look At Rules Of Confidentiality And Conflict Of Interest

Indumugi C.[1]

Introduction

In one of the first disputes before the Appellate Body ('AB'),[2] the question of whether a private lawyer can represent a government before the WTO Dispute Settlement Body ('DSB') was affirmatively decided. There has been increasing scholarly attention in the field of professional ethics for counsels appearing before international courts and tribunals.[3] However, ethical standards for counsels engaged in World Trade Organization ('WTO') disputes have been largely unaddressed.[4]

Although the relevance of this discussion might seem distant in the face of more impending issues such as the restoration of the Appellate Body, the WTO could concurrently regularize the role of counsels appearing before the DSB. Regulating professionals that appear before the DSB on behalf of member countries, can serve an important legitimizing function for the organization. The AB's observation in *EC - Bananas* regarding a private lawyer's representation of a WTO member, including by appearing and orally pleading on the government's behalf set the tonefor the sovereign's right to decide and choose its legal counsel. In particular, this right is not bound by distinctions of nationality. There are two obvious benefits of this ruling for member countries. One, it allows sovereign countries to be guided bylawyers of their choice and trust. Two, it enables developing countries and least

[1] Final year student, Tamil Nadu National Law University

[2] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (adopted on 25 September 1997) para 12.

[3] Arman Sarvarian, *Professional Ethics at the International Bar* (OUP 2013); Andreas R. Ziegler and Kabre R. Jonathan, 'The Legitimacy of Private Lawyers Representing States Before International Tribunals' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (OUP, 2019); Jean- Pierre Cot, 'Appearing "for" or "on Behalf of" a State: The Role of Private Counsel Before International Tribunals', in Nisuke Nando and others (eds.), *Liber Amicorum Judge Shigeru Oda, vol. II*, (Kluwer Law International, 2002), 835 ('Cot').

[4] Rambod Behboodi, 'Ethical rules for counsel in WTO litigation', Conference organized by SABE, Foreign lawyer section of the Ordre des avocats de Genève at the World Trade Organization (11 March 2019) <https://www.kslaw.com/attachments/000/006/790/original/Ethical_rules_for_counsel_in_WTO_litigation.pdf?1552686834> accessed 18 November 2021.

developed countries ('LDCs') to seek competent lawyers outside their country, to best protect their economic interests on an equal footing against countries that have built a strong capacity for WTO dispute resolution. Having consented to a private lawyer, a WTO member has in effect "legitimized" their representation through such counsel.

This case note seeks to analyze the ethical standards of counsels at the WTO through limited guidance available in the panel and appellate body reports, complemented by the International Law Association's ('ILC') Hague Principles of Ethical Standards for Counsel Appearing before International Courts and Tribunals.[5] It particularly will explore the standards developing for the rules of 'confidentiality' and 'conflict of interest' as applied in WTO disputes.

Rule of Confidentiality

The Rule of Confidentiality is ethics-speak for secrecy in communications between Attorneys and their clients. Underlying this professional responsibility is the idea that clients will be induced to make more factual disclosures, that will enable the lawyer to strategize their case. Article 3.4 of the Hague Principles also places attorney-client privilege as a duty, unless the disclosure is authorized by the client.[6] This duty is said to apply in the preparatory stages, during the proceedings, and continues to exist after its conclusion. The contours of the rule of confidentiality in WTO litigation shift the focus from client-attorney privileges to the confidentiality of proceedings alone. The Dispute Settlement Understanding ('DSU') incorporates substantive obligations on confidentiality of panel

[5] The ILA Hague Principles on Ethical Standards for Counsel before International Courts and Tribunals ('Hague Principles')
[6] ibid Rule 2.4, 3.4

Deliberations[7] and appellate body proceedings,[8] the anonymity of panel reports,[9] and the confidentiality of written submissions rendered by theparties.[10]

Previous panel and appellate body reports have engaged with issues arising in the 'confidentiality of proceedings'. The Panel in *Korea-Alcohol* has observed that Article 4.6 of the DSU, which asks parties to keep the consultation stage deliberations 'confidential', does not prevent them from using such information during the proceedings before the Panel. The confidentiality element only applies between the parties, not divulge any information to the external parties not involved in those consultations.[11] Later, the Panel in *Brazil – Aircraft* adopted special procedures for protecting sensitive business information.[12] The procedure detailed in Annex I of the panel's report allowed for the disclosure of such information to other approved persons, provided they have been engaged by the member country to represent it. However, such other parties were also fully bound by the confidentiality requirements of the DSU. A similar rule can also be gleaned from *Thailand-H Beams*, where the AB had removed a law firm that represented Poland, on account of breach of confidentiality, because an *amicus curiae* brief from a Polish civil society group made explicit references to Thailand's written submissions.[13]

It is observable that the rule of confidentiality takes a different color in WTO litigation. This does not imply that confidentiality in the form of attorney-client privilege in the WTO is entirely absent. The silence of the WTO Agreements and DSB on attorney-client privilege only points to the fact that WTO as an institution sees no reason to regulate contractual obligations between the member countries

[7] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), Article 14.1 ('DSU')
[8] ibid art. 17
[9] Meredith Kolsky Lewis, 'The Lack of Dissent in WTO Dispute Settlement' (2006) 9 JIEL 4,895– 931.
[10] DSU (n 5) art. 18.
[11] Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS85/R, (adopted on 17 February 1999),para 10.23.
[12] Panel Report, *Brazil – Aircraft II*, WT/DS46/RW/2, (adopted on 20 August 1999), Annex I, Article VII of the Procedures Governing Business Confidential Information.
[13] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DC122/AB/R, (adopted on 5 April 2001), paras 62- 78.

and the private counsels they recruit. Case laws from other international adjudicatory bodies such as the European Court of Human Rights[14] and the International Court of Justice (ICJ)[15] demonstrate the recognition of the principle of non-interference in the communications of States with lawyers. The recognition of this principle in many national jurisdictions, and by the ICJ as a "plausible" right of States to protected and secret communications with their legal advisers, since its recognition as general principle of law under Article 38 of the Statue of ICJ.[16] It could be possible for the state alleging breach of confidentiality to argue that by virtue of Article 3.2 of the DSU, WTO agreements have to be read in accordance with customary rules of interpretation of public international law, which includes attorney-client privilege.

Notwithstanding this possibility, breach of contractual obligations or ethical rules that a lawyer is bound by in their national laws, will not be addressed by the WTO. Hence, there is a lack of normative framework for the regulation of privatelawyers appearing before the WTO DSB. It has been noted that international lawyers do not incur personal liability for their conduct before international courts,[17] but some authors take the exception that individuals must face specific actions for their conduct as private counsels to States.[18] In addition, attorney-client privilege remains a 'silent' concept in the WTO due to the lack of enforcement mechanisms. In contrast, the confidentiality of proceedings and conflict of interest has been spelt

[14] *Versini-Campinchi et Crasnianski v. France*App no. 49176/11 (ECtHR, 16 June 2016).

[15] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (Request for the indication of provisional measures: Orders), 3 March 2014, I.C.J. Reports 2014, 147.

[16] ibid 27; (Two days before the first hearing of the arbitral tribunal established before the Permanent Court of Arbitration, some documents, data and correspondence between was removed from the office of an Australian lawyer working for Timor-Leste. The court's order recognized the Timorese government's right to confidentiality of communications with its legal advisers to be "at least plausible"); United Nations, Statute of the International Court of Justice, 18 April 1946, U.N.T.S. No. 993, art 38; Vienna Convention on the Law of Treaties, 27 January 1980, 1155 U.N.T. S 33, art 31(3)(c). [17] Riad Daoudi, *Notion de representation en droit international public* (Librairie Générale de Droit et de Jurisprudence, 1980), 65– 66.

[18] *The 'Grand Prince' Case (Belize v. France)*, Declaration of Judge *ad hoc* Cot, para 49; See also Stephan Wilske, 'Sanctions against Counsel in International Arbitration – Possible, Desirable or Conceptual Confusion?' (2015) 8 Contemporary Arabian Asian Journal2, 141, 164.

out in the DSU and its Rules of Conduct,[19] thereby making them enforceable claims. The Rules of Conduct adopted by the DSB seek to guarantee the "integrity, impartiality, and confidentiality" of the dispute settlement system. They apply to all "covered persons" as defined in Paragraph 1 Section IV of the Rules, which include Panel members, Appellate Body members, experts assisting panels, arbitrators, members of the Textile Monitoring Body, and the WTO Secretariat and Appellate Body Secretariat staff. Nonetheless, the Rules of Conductdo not envisage 'private counsels' as a covered person that could potentially compromise the integrity or impartiality of the system.

Rule of Conflict of Interest

Ethical issues that may potentially arise between the attorney and the present client, by virtue of conflicting interests of previous clients of the attorney or third parties are addressed by the rule of conflict of interest. Article 4.2 of the Hague Principles highlights that where a former client is closely related to the proceedings in which the lawyer is representing a new client, they must obtain the express authorization of the former client to continue the engagement. As in the case of domestic laws concerning professional ethics for lawyers, there are multiple scenarios where conflicts of interest[20] might arise in WTO litigation. This is due to the twin factor that nationality does not matter in representing a WTO member, and there is a very limited pool of trade lawyers, which makes conflicts of interest inevitable. Even if a lawyer with trade law expertise is available within the country, oftentimes developing countries and Least Developed Countries hire lawyers based out of Geneva to represent them to reduce costs.[21] The Panel in *EC-Tariff Preferences* observed that it is the individual lawyer's duty to ensure there are no conflicts of interest.[22] In *EC-Sugar*, the AB noted the involvement of a private law firm representing Mauritius which had also represented two corporations in the national

[19] Rules of Conduct for the Understanding on Rules and Procedures Concerning the Settlement of Disputes, WT/DSB/RC/1, 11 December 1996 <https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm> accessed 18 November 2021.
[20] Hague Principles, rule 4.
[21] Gregory Shaffer and others, 'Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity' University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 14-08, 17.
[22] Panel Report, *European Communities -Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/R (adopted on 20 April 2004), para 7.8.

courts, with commercial interests in the outcome of the WTO dispute. This situation was flagged by Australia as being "*perceived or apprehended* [as a] conflict with the basic principle that appearance and representation before the Appellate Body is limited to *Members and their counsel*."[23] By implication, Australia was arguing that the involvement of this particular law firm will in a way make the two corporations' interests and views be represented before the AB. The AB made no findings on this issue, as Mauritius confirmed that the law firm only represented the disputing member before the WTO's AB. Without considering relevant evidence to show the independence of the law firm from its previous clients, merely a statement from the member country was referred to, to conclude that conflict of interest does notexist. The threshold to prove an absence of conflict of interest has been reduced to a confirmatory statement, rather than material and probative evidence. Addressing conflicts of interest substantively will enhance the dispute settlement mechanism's integrity, which the Rules of Conduct has as one of its aims.

The following section explores three pivots that steer open the possibilities for conflicts of interest in WTO litigation: the absence of proximity between the private counsel and the State; the lack of a permanent association between them; and the costs involved in WTO litigation.

Absence of Proximity

The Proximity between the counsels and the State that they represent is a legitimacy-inducing factor in international proceedings. Non-proximity raises questions regarding the reliability of the counsels in their representation of the government and its local realities. The absence of proximity between the private counsels and the State gives rise to multiple questions that are only met with silence when perusing the DSU. The Tribunal of the ITLOS in *Grand Prince* had considered this factor as pivotal because the foreign agent employed by Belize was not well-placed, to appraise the tribunal of "the seeming inconsistencies in the

[23] Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WTO Doc. WT/DS265/AB/R (adopted on 19 May 2005), para 11.

statements of different government departments and agencies in Belize".[24] In a similar vein, Judge Oda in the case of *Armed activities on the territory of the Congo*, noted that a State appearing before the ICJ was represented by a private lawyer from another highly developed country instead of a person "holding high office in the Government acting as Agent".[25] The underlying idea behind these criticisms is that the more proximate a lawyer is to the high offices of the government involved in the case, the more *legitimacy* is attributed to the legal counsel's representation.

When analysing consequences of the lack of proximity between the private legal counsel and the WTO member it represents, there are issues that might arise which are not actionable and therefore, not investigated further. Firstly, as a 'representative', the lawyer is the link between the State and the DSB, and is consequently reserved a pedigree of *reliability*.[26] As much as a lawyer requires legal expertise, they also require a good understanding of domestic conditions and local realities. In *Grand Prince*, the agent provided incomplete and contradictory information concerning the registration of the vessel and the position of Belize as to the nationality of the fishing vessel.[27] This is not to suggest that the absence of a nationality requirement is the only reason for *lesser reliability*. Any lawyer subscribing to "adversarial" legal ethics[28] tends to believe that the client they represent must be vigorously defended within the bounds of the law, even if it is not a morally responsible approach. The WTO requires a responsible lawyer, whose representation is tempered by the duty to ensure the integrity of, and compliance with the spirit of WTO law.

Lack of Permanent Association

A continued association between the legal counsel and the State can provide a bright-line indicator regarding whose interests are represented before the WTO. If a particular law firm or private counsel's expertise is repeatedly sought by the

[24] *Grand Prince* (n 17) Judgment, Separate Opinion of Judge Anderson, 20 April 2001.
[25] *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000, Declaration of Judge Oda, 132.
[26] Cot (n 1) 842; Michael J. Matheson, 'Practical Aspects of the Agent's Role in Cases Before the International Court' (2002)1 Law and Practice of International Criminal Tribunals 473.
[27] *Grand Prince* (n 17) Declaration of Judge *ad hoc* Cot, para 14.
[28] Christine Parker, 'A critical morality for lawyers: four approaches to lawyers' ethics'(2004) 30 MonULR 1, 49-74.

member country, it could be an indication of trust between the client and the attorney, and evade possible doubts concerning the involvement of private interests. There are specific risks associated with lack of a 'permanent association' between the private legal counsel and the government it represents. Countries make a choice to empanel counsels or law firms to specific WTO disputes. This, in turn, presents a situation where a private law firm with profiteering ambitions tries to forward its interests in seeking maximum profits as opposed to being representative of the member country. For example, although States can use other amicable modes of international dispute settlement to find a diplomatic solution to a dispute and significantly reduce the costs, there has been a tendency to judicialize disputes.[29] States have various means to resolve their disputes, notably by consultation, good offices, mediation, conciliation, and arbitration.[30] Depending on the type of the dispute, it may be useful to explore other means of resolving them. However, the private counsels assisting a government may have conflicting interests as their expertise is mainly sought for judicial resolution and not a diplomatic resolution of the dispute. Therefore, the private legal counsels may *pass through* these options without taking recourse to them.

Costs of WTO Litigation

Counsel fee paid by the government to the private legal counsel is also a potential source of conflict. The underlying idea is that some lawyers/agents can let the proceedings drag on as long as possible to maximize their profiteering interests. In a different context, the WTO Panel in *EC-Bananas* highlighted the risk of high fees paid to private counsels, and the disproportionately large financial burdens it could entail for developing countries.[31] A solution to this problem emerged in the form

[29] Judge Cot also expressed his concern of "a proliferation of applications that are manifestly unfounded inspired by law firms for reasons having nothing to do with the interests of the Applicant State". *Grand Prince* (n 17) Declaration of Judge ad hoc Cot, para 13.
[30] DSU (n 5) arts. 4, 5, 25.
[31] "There was a question in our minds whether the admission of private lawyers to Panel meetings, if it became a common practice, would be in the interest of smaller Members as it could entail disproportionately large financial burdens for them". See Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R (adopted on 25 September 1997) para 7.12

of the Advisory Centre on WTO Law ('ACWL') located in Geneva providing WTO legal aid to developing and least-developed countries at lower costs.[32] However, the ACWL has a very limited capacity and there are a large number of developing and LDC disputes that are 'missing' because of the costs involved in WTO disputes.[33]

The connection that can be drawn from high legal costs on the one hand, and conflict of interest on the other, is again redirecting us to look at the actors who are financially fuelling these disputes. The WTO is not immune to "interest mobilization" from private enterprises when disputes concerning a particular sector or product of interest arise.[34] Notably, the role of private law firms employed by Airbus and Boeing in prompting the large civil aircraft disputes at the WTO is an indication of the underlying material interests at stake in WTO disputes.[35]Another example of transnational corporate political activity is apparent from the involvement of Philip Morris, the multi-national tobacco manufacturing company and multiple tobacco companies around the world in the *Plain Packaging* dispute in the WTO.[36] Their collective transnational mobilization piloted 35 third party members to the dispute. Arguably then, there is nothing wrong with private interests being indirectly represented at the WTO given that international trade is being carried out by them.[37] However, as Philippe Sands notes,[38] in a case in which the lawyer acting as counsel for a State is being paid legal fees by a private actor with an interest in the case, the fact that it may be receiving instructions from both cannot be precluded. Additionally, if private interests financing the legal representation of

[32] For an overview of ACWL's charges, see ACWL's website, <https://www.acwl.ch/download/basic_documents/management_board_docs/ACWL-MB-D-2007- 7.pdf> (last accessed, 24 August 2021).
[33] Chad P. Bown and Bernard M. Hoekman, 'WTO dispute settlement and the missing developing country cases: engaging the private sector' (2005) 8 JIEL 4, 861-890.
[34] Dirk De Bièvre and others, 'International institutions and interest mobilization: The WTO and lobbying in EU and US trade policy' (2016) 50 JWT 2, 289-312.
[35] Ryan Brutger, 'Litigation for Sale: Private Firms and WTO Dispute Escalation' (2017) <https://ipespeakerseries.mit.edu/sites/default/files/images/Litigation_For_Sale_9-14- 17_Full_VERSION.pdf> last accessed 18 November 2021.
[36] Panel Report, *Australia — Tobacco Plain Packaging (Indonesia)*, WTO Doc. WT/DS467/R (adopted on 27 August 2018).
[37] Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (BIP 2003).
[38] Philippe Sands, 'Interaction between Counsel and International Courts and Arbitral Tribunals: Ethical Standards for Counsel', in Rüdiger Wolfrum and Ina Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (Springer, 2012), 128.

countries is acknowledged, it regurgitates the resource imbalance that ACWL tries to rectify. Countries that have the financial backing of multi-national companies with vested interests in the outcome of the dispute, can demonstrate a more rigorous tendency to judicialize disputes even when the dispute could have been settled at the stage of consultations. Altogether, this highlights the idea that the increasing cost of engaging in WTO litigation is a potential source for conflict of interest because they incentivize longer proceedings than necessary.

The above factors indicate that the possibility of conflicts of interest that are ripe in WTO litigation. As sovereign countries choose private lawyers to act as counsels or agents in international disputes against them, they do so at their own risk.[39] If the member countries intend to regularize the international lawyers representing them in WTO disputes, the duty falls on them to organize their representation and standard terms of engagement. Accountability of private lawyers to the member countries that they represent and the DSB, safeguards the integrity of the adjudication and enhances the legitimacy of WTO dispute settlement as a whole.

Conclusion

This note looked at how the DSB has engaged with professional ethics of counsels in WTO litigation, through the application of the rules of 'confidentiality' and 'conflict of interest' in its practice. It can be seen that there has been very minimal engagement with the ethical role of the counsels, and such engagement is relegated as secondary objective of speedily resolving disputes.

Non-interference in the communications between the State and the lawyer engaged by it is impliedly understood as a general principle of international law under Article 38 of the Statute of the ICJ. Its applicability to WTO disputes is plausible, but there is a lack of enforcement mechanisms for any breaches that might occur. The rule of conflict of interest is mired with multiple normative issues due to the fact that nationality does not matter in representing a WTO member and the real issue of the very limited pool of trade lawyers available. The Rules of Conduct adopted by the

[39] *Grand Prince* (n 17) Declaration of Judge ad hoc Cot, para 15.

DSB recognize these ethical rules but do not explicitly include private counsels as 'covered persons'. Therefore, it is unclear if the professional ethical obligations spelt out in the Rules of Conduct are applicable and enforceable against counsels. The covered persons under the current Rules of Conduct could be extended to include counsels engaged in the dispute settlement processes.

There are other ways to address the lack of a forum for addressing ethical issues concerning a counsel's representation. Firstly, WTO's DSB can, in and of itself, regulate the ethical duties of a private counsel appearing before it as part of its 'panel procedures'. Regarding panel procedures, the DSU merely states that procedural aspects should provide sufficient flexibility to "ensure high-quality panel reports without unduly delaying the process".[40] To the limited extent to which the DSB can engage with the procedural aspects of the disputes, it can provide clarity and legitimacy to the role of private counsels appearing before it. Secondly, creation of a WTO Bar is also a plausible option, considering the limited number of international trade law practitioners. However, a 'WTO Bar' might involve costs that individual professionals should incur in its creation and maintenance. In any case, such a WTO Bar might limit the inter-crossing of international lawyers across streams of their choice. Thirdly, a limited way can be seen in national disciplinary bodies, but their effectiveness in regulating the ethical duties of lawyers engaged by the government for international disputes entails dangers. Unlike international courts and tribunals that have the competence to develop standards for professional ethics based on their needs and cultures, national bar councils often lack the expertise to *a priori* articulate the role of the counsel appearing before the WTO DSB. Finally, taking into account the particular nature of the role of counsels in the WTO DSB, this note suggests that a standing set of common rules, independent of national bars but mindful of not acting in variance with the divergent national practices would be one way to ensure a careful, well- informed, and deliberate outcome.

Considering the ethical roles of private counsels appearing for WTO members may be useful as it serves an important legitimizing function of their role and the

[366] DSU (n 5) art 12.2.

institution itself. This is because professionalization is directly linked to the interests of the DSB to preserve 'integrity, impartiality, and confidentiality'. Substandard procedural integrity can endanger the confidence of the wider WTO membership in the fairness of the DSU. There is a manifest interest for member countries, and panel or appellate body members to promote ethics regulating counsel conduct.

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Trade Labour Linkage Within WTO: The Conflict Of Protectionist Rhetoric And Social Imperative

Ayushi Singh[1]

Introduction

The World Trade System has concerned itself with evolving priorities, reflective of the changing dynamics of the world economy, since its formalised establishment with the General Agreement on Tariffs and Trade (GATT) in 1947. This was followed by its metamorphosis into the World Trade Organisation (WTO) and its progress since then. This focal point of international trade has come a long way from a "rich man's club"[2] with a relatively homogeneous membership operating on traditional theories such as Ricardo's Comparative Advantage to a stage where varied perspectives, particularly in relation to developing economies, are considered.[3] By the eclipse of the GATT, the perception and scope of the agreement had relatively expanded to incorporate provisions of exceptions, waivers, and sub-systems of preferences within the existing trade order aimed at addressing concerns of developing countries.[4] This contextual evolution of WTO as it progressively added depth to the multilateral structure of trade has been significant to its success. The author, through the course of this article, aim to analyse whether the contentious proposition of trade-labour linkage is one of the elements that should be considered at this critical juncture of impending upheaval within the trading system. It attempts to answer the question of whether such social policy aims can suitably be placed within an institution originating to dismantle economic barriers.[5]

From one perspective, Labour Standard clauses become potentially relevant as a negotiation point in bilateral trade agreements since import-competing producers of developed countries find it in their interests to push for higher labour standards in

[1] Penultimate year student of law, Dr. Ram Manohar Lohiya National Law University, Lucknow
[2] Francine Mckenzie, *GATT and Global Order in the Postwar Era* (CUP 2020) 176.
[3] WTO, 'How the WTO Deals with the Special Needs of an Increasingly Important Group' (*WTO)* <https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf> accessed 22 February 2022. [4] Jagdish N. Bhagwati, Pravin Krishna and Arvind Panagariya (eds), *The World Trade System: Trends and Challenges* (MIT Press 2016) 1-3.
[5] Kofi Addo, *Core Labour standards and International Trade: Lessons from Regional Context* (Springer Publication 2015) 4.

the name of fair-trade[6] to reduce the competitive advantage of low wage labour intensive countries which they perceive as inherently unfair competition. Moreover,it is argued that if some people can be forced to work against their will, often for below-minimum wages, or even no wages at all, this reduces the demand for labour and exerts downward pressure on wages and conditions of others.[7]The term "race to the bottom" is often borrowed from the dissenting judgment[8] of J. Brandeis to explain the perceived ripple effect of the competitive advantagegained by way of low labour standards on the workers of importing countries.

While this represents a more "egoistical"[9] reasoning governed by the purported self-interest of the more developed countries in protecting real wages and the labour standards of their workers, it is supplemented by a more morally oriented argument driven by "altruistic"[10] intents of advancing labour standards worldwide since low labour standards are likely to result in violation of workplace rights in the long-term.[11]

This supportive stance on the matter of trade-labour linkage faces staunch opposition from developing nations with low-cost export orientations such asBrazil, Egypt, India, and Malaysia[12] who built their case by poking holes in the theoretical concerns raised by the side they perceive as protectionist in disguise aiming to reduce the inherent competitiveness of the exporting countries.

[6] Anuradha R.V. and Nimisha Singh Dutta, 'Trade and Labour under the WTO and FTAs' Centre for WTO Studies Discussion Paper 9, 8 <https://wtocentre.iift.ac.in/Papers/Trade%20Labour%20Study.pdf> accessed 11 December 2021.
[7] R. Zandvliet, 'Trade, investment and labour: interactions in international law', (Leiden University Repository, 2019) <https://scholarlypublications.universiteitleiden.nl/access/item%3A2977132/view> accessed on 4 December 2021.
[8] *Liggett Co. v. Lee 288* U.S. 517, 557–560 (1933).
[9] Jagdish Bhagwati, 'Free Trade and Labour' 4 <http://www.columbia.edu/~jb38/papers/pdf/ft_lab.pdf> accessed on 4 December.
[10] ibid.
[11] Jonathan P. Hiatt & Deborah Greenfield, 'The Importance of Core Labour Rights in World Development'(2004) 26 MichJ of Intl L39, 48.
[12] Anuradha R.V. and Nimisha Singh Dutta, 'Trade and Labour under the WTO and FTAs' (n 5) 7.

Thus, an evaluation of both sides of the equation is required before one could argue in favour of trade-labour linkage. The inclusion of raising standards of living and sustainable development as WTO objectives in the Preamble to the Agreement establishing the WTO alone is insufficient to posit that there is a glaring absence of explicit provisions for enforcement of labour rights within the WTO mandate. Even more so since this deliberate omission within the WTO Framework is not for lack of discussions on the matter. It is so because the matter of trade-labour linkage has been put under the microscope time and again[13] at the instance of the developed side of the world economy often represented by the United States and the European Union.[14]

The Present Position of WTO

As it stands, the WTO members have expressed their outwardly support to a narrower set of internationally recognised "core" standards, reflective of basic human rights recognised internationally. The International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work[15] reflects a consensus on these core labour standards that include freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

Pertinently, these core labour standards do not entail the controversial discussion of other labour standards such as wages, working hours, vacations since a consensus was difficult to reach and reassurances were assumed on the grounds that these objectives could be realised under the umbrella right of "collective bargaining".[16]

[13] WTO, 'A Difficult Issue for Many WTO Member Governments' <https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm> accessed 9 December 2021
[14] Kofi Addo (n 4) 7.
[15] ILO, 'Declaration on Fundamental Principles and Rights at Work'(1998).
[16] ILO, General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), The Minimum Wage Fixing Recommendation, 1970 (No. 135) (Report III (Part 1B), ILC, 103rd Session, Geneva, 2014) 62–67.

Regardless of its importance, the minimum wage has not been included in the fundamental principles of labour protection by the ILO. This is despite the fact that in 2014 *General Survey* on minimum wage systems, the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) suggested that there is renewed interest in minimum wage policy which could be linked to the increase in the number of vulnerable workers, the widening income inequality in many countries and concerns about the erosion of the purchasing power of wages due to inflationary tendencies.[17]

Moreover, since conventional trade theories as well as contemporary trade relations rely extensively on comparative advantage owed to labour efficiency or factor endowments and the differences in domains thereof for countries to manufacture trade relations, the WTO has explicitly retained its support for their continued existence.[18] It can be argued that this is due to the apprehension that inclusion of labour standards would operate to the detriment of the comparative advantage enjoyed by 'particularly low-wage developing countries'[19]. Conventionally, the approach of WTO towards Labour Clauses has been to firmly reject the use of such clauses as protectionist barriers to trade as agreed upon in the 1996 Ministerial Conference of WTO in Singapore. Limiting its role to ensuring free trade flow for sustainable growth and development, WTO asserts that flourishing international trade and liberalisation encourages the promotion of labour standards. Moreover, while it supports the progressive approach of the ILO in principle, WTO essentially identifies labour concerns as the primary responsibility of the ILO and precludes the enforcement of such obligations under the WTO mechanism.

Opposition to Trade-Labour Linkage

It is important to understand that labour standards other than core standards such as minimum wage or working hours and conditions, can be seen to have a substantial

[17] Fundamental Principles and Rights at Work: From Challenges to Opportunities, (ILO, Report VI, ILC, 106th Session, Geneva, 2017) 16.
[18] Singapore Ministerial Declaration (18 December 1996) WT/MIN (96)/DEC.
[19] ibid.

and direct impact on both sides of the equation. Firstly, they have the most direct and tangible impact on living conditions for workers. Secondly, these categories of labour standards clearly have a demonstrable impact on competitive advantage as experienced by labour intensive exporting countries- as maintaining these standards relatively low decreases their cost of production, which is conventionally associated with higher trade.

However, the suggestion of enforcing such social clauses by way of trade sanctions permitted within WTO is argued against on multiple grounds that empirically erode the presumptions operated upon in favour of the linkage. A holistic understanding of trade-market behaviour has led certain studies to conclude that countries with low core labour standards do not necessarily enjoy a better global export performance than high-standards countries; in fact, studies associate higher core labour standards with economic growth and productivity.[20] Moreover, the proposition of race to the bottom also lacks empirical support.

The opponents go a step further to highlight that the linkage could be fruitless in terms of implementation since arguably mandatory standards will not improve wages and working conditions of workers in poor countries.[21] In fact, immediate enforcement of such standards might adversely impact the workers'[22] economic welfare worldwide, including developing nations along with developed and industrialised nations.[23] Essentially, their argument boils down to opposing this attempt at protectionism with the evasive position that the solution to the problem lies in assisting developing countries to achieve economic growth and development that, in turn, would enhance labour standards.[24] Jagdish Bhagwati[25] makes another pertinent observation that the incorporation of social clauses as enforceable under WTO means relying on trade sanctions. However, understandably complex

[20] Dale Andrews and Douglas Lippoldt, *International Trade and Core Labour Standards* (OECD 2000) 33.
[21] Robert Stern and Katherine Turrell, 'Labour Standards and the World Trade Organization' (WTO, 2003) <www.wto.org/english/forums_e/ngo_e/labour_standards_e.doc.>.
[22] ibid.
[23] Raj Bhala, 'Clarifying the Trade-Labour Link'(1998) 37 Colum J Transnatl L 11, 17.
[24] Kofi Addo (n 4) 6.
[25] Jagdish Bhagwati, 'Free Trade and Labour' (n 8) 5.

problems such as child labour cannot be solved through trade sanctions and instead require a ground-root approach with cooperation between the State and voluntary sector instead of trade sanctions.

However, while these conclusions may appear obvious and correct in the first instance to sufficiently declare the proposition of trade-labour linkage to be another attempt at trade distortion, we need to lookbehind the curtain to analyse other reasons for supporting the linkage.

The Rationale for WTO Intervention

The Limitations of ILO

Initially, it is pertinent to understand that the International Labour Organisation, despite its success, has its limitations and lacks the persuasive factor of absolute economic interests that is inherent to any negotiations that are done under the purview of the WTO or trade negotiations in general. In the case of the ILO, the adoption of the conventions is of a voluntary nature falling within the ambit of private law as regulated by employment law practices pertaining to domestic enterprises. The WTO law, on the other hand, deals with public international law by restraining WTO Members from taking trade-restrictive measures and by ensuring that a greater degree of equity in international economic relations is achieved. Furthermore, the ILO conventions and standard settings are non-binding,and as such, the ILO cannot legally enforce them, in sharp contrast to the provisionsof international trade law, which are legally enforceable. Thus, the proponents contend that since ILO seems to lack the enforcement power to achieve compliance,the WTO is the appropriate venue for setting legally binding standards protecting labour rights, especially since the dispute settlement processes typically included intrade agreements can be seen as a distinct advantage in ensuring that labourstandards are enforced.[26] A significant advantage is that under the rules of the WTO,the reports of the panel and the Appellate Body are automatically adopted by the

[26] Kofi Addo (n 4) 25.

WTO Dispute Settlement Body, unlike the GATT era, whereby a WTO Member could block the adoption of the panel report.[27]

However, this proposition is tenuous at best when we assess the functioning of the WTO currently. The infrastructural cracks within the member-consensus-driven WTO[28] have aggravated over the years to reach a critical point of breakdown of the Dispute Settlement Understanding (DSU) which is primarily responsible for enforcement of rights and obligations of members. WTO is plagued by stalled negotiations pertaining to an amendment to the rulebook or progress on the development agenda[29], resulting in an increase in the number of regional, inter-regional and bilateral agreements within members.[30] DSU faces inordinate delay and blocked appointments, particularly rendering the Appellate Body ineffective.[31] Moreover, the recourse to DSU can be taken in accordance with Article XXIII:1 of the GATT 1994 that allows claims where any Member considers that a benefit accruing to it directly or indirectly under the GATT 1994 is being nullified or impaired because of the failure of another Member to carry out its obligations. In pursuance to this, any incorporation of labour clauses within the General Exceptions as often proposed will put the onus on the Member state setting labour standards to defend any challenges to them principally for violation of substantive obligations under WTO.[32] This, instead of facilitating the universal transition towards higher standards, would operate to the detriment of the purpose.

The Empirical Relation between Trade and Labour Standards

With this understanding of why the entire discussion is relevant for the WTO, the trade-labour linkage is put more into perspective when we consider the economic parameters. The empirical data exists in support of either side and certain studies

[27] Arts. 16.4, 17.14, Dispute Settlement Understanding (WTO).
[28] Article IX:1, Agreement Establishing the World Trade Organisation, 1995.
[29] WTO, 'Day 5: Conference ends without consensus' Geneva, 2003, 1<https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm> accessed on 27 February 2022.
[30] Kofi Addo (n 4) 10, 11.
[31] Jennifer Hillman, 'Three Approaches to Fixing the World Trade Organisation's Appellate Body', Institute of International Economic Law Georgetown University Law Center <https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix- to-WTO-AB.pdf> accessed on 1 March 2022.
[32] Appellate Body Report, *United States- Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body 35 1.L.M. 626, 627, May 20 1996.

happen to be in favour of affective correlation between progressive social conditions such as minimum labour standards and the affluence of trade[33]. According to the Organisation for Economic Co-operation and Development (OECD), core labour standards will not necessarily affect comparative advantage negatively and indeed may have a positive effect.[34] Palley (1999) refers to evidence in the OECD 1996 study that, on average, countries that improved the rights of freedom of association experienced an increase in GDP growth and manufacturing output in the five-year period afterwards.[35] However, the same cannot be said for minimum wage requirements. While there is considerable research that favours a negative correlation between labour standards and trade performances, the OECD refers to Rodrik (1996)[36] as a reliable study. Here in looking at a range of determinants of comparative advantage, Rodrik found that labour standard variables are not statistically significant overall with a caveat that when the sample is divided into high- and low-income countries, the child labour variable becomes statistically significant in some specifications. The OECD further discusses a methodological weakness of studies that are carried out on the links between labour standards and trade performance. Prevailing labour standards that are observed occur endogenously, as a consequence of broader industrial or development policies seen collectively. But the studies treat them *exogenously*[37], such that impact of these standards on corresponding trade metrics is seen only as a consequence of the particular labour legislation instead of the larger policy context. Accordingly, this leads to econometric results showing a positive correlation between export performance and suppression of labour rights that are capturing the relative success of various developmental strategies rather than the impact of labour standards themselves.

[35] Sarosh Kuruvilla, 'Linkage Between Industrialization Strategies and Industrial Relations/Human Resource Policies: Singapore, Malaysia, the Philippines, and India'(1998) Industrial and Labour Relations Rev 49, 635-657; Keith E. Markus, 'Regulatory standards in the WTO: Comparing intellectual property rights with competition policy, environmental protection, and core labor standards' (2002) 1 World Trade Rev 144, 145-152.
[36] Dale Andrews (n 19).
[37] Ibid.

The False Conception of Competitive Advantage

However, even more significant than these debatable studies from either side of the proposition that can be interpreted to suit the conclusions of the authors is that the very foundation of the debate i.e. the supposed creation or reduction of competitive advantage through its link to labour, can be put under the microscope. Ricardo's original theory is based on a perfect market while undeniably, numerous distortions pervade global markets and the current trade order exists within various barriers to free trade despite the obvious objectives of WTO and other trade bodies, such as intellectual property protections, the marketing power of major brands, anticompetitive practices, and large volumes of intra-corporate trade.[38] Moreover, the implication of this theory that high-wage countries would be unable to compete with low-wage countries is heavily countered by economic theories that posit that lower wages reflect low productivity levels, and such sector-specific variations in productivity and costs determine trade patterns.[39] Consequently, it is often observed that a relatively small portion of the world's exports are traded in a perfect market which implies that Ricardo's theory has not truly materialised[40], meaning that reasonably the debate of trade-labour linkage cannot be concluded entirely on empirical studies influencing competition and economic growth.

Limitations of Liberalisation for Developing Countries

This provides us room to question whether the promise of trade liberalisation has lived up to its true potential for developing countries to be an instrument for alleviating poverty and promoting and protecting economic, social, and cultural rights. In this respect, economists Joseph Stiglitz and Andrew Charlton reported in 2005 that, by some estimates, forty-eight of the least developed countries have suffered annual economic losses of close to USD 600 million since they began

[38] Joel R Paul, 'Do International Trade Institutions Contribute to Economic Growth and Development?' (2003) 44Va J Intl L 285, 292–96 <https://repository.uchastings.edu/faculty_scholarship/627/>.
[39] International Monetary Fund, 'International Labour Standards and International trade' (1997) <https://www.imf.org/external/pubs/ft/wp/wp9737.pdf> accessed on 28 February 2022.
[40] Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 646.

implementing WTO agreements,[41] losses that no doubt reduced those states' capacities to ensure economic, social, and cultural rights.

This arguably points to a systemic bias against developing nations within the WTO which can arguably exacerbate the trade-labour linkage. However, another perspective on the matter is the insufficiency of the current system to deliver on its inherent objective of addressing poverty and living standards.

An interesting observation as to the objectives of WTO was made by Dani Rodrik[42] where he pointed out that while originally expanding trade was viewed as a means towards the end of raising standards of living and encouraging sustainable development- in practice, maximizing trade has attained significance and trade has become the lens through which development is perceived rather than the other way around. Further, according to Lacarte (Former Chairman of the WTO Appellate Body, "*behind the terminology of the Preamble of the WTO Agreement and the many provisions. . . there is the living reality that affects untold millions of people. This is a crucial facet of trade that is imperfectly conveyed and understood*".[43] Significantly, it is often observed that while WTO strengthens the world economy by promoting trade and investment, there is not necessarily a corresponding increase in employment and income growth and in case there is, the quality of such employment is dubious. This insight puts the issue of labour standard clauses into perspective such that the swift side-lining of their significance in trade negotiations appears fundamentally ignorant of the original principles of WTO.

Moreover, it can be argued that liberalization itself may trap a developing state in primary production and low cost and unskilled manufacturing[44], where it has a current comparative advantage owing to technological and investment limitations, but which may prove to be disadvantageous in the long term since it operates on eroding or preventing the installation of the requisite social security nets to prevent

[41] Joseph E Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (OUP 2005) 47.
[42] Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton, NJ: Princeton University Press 2007) 213-214.
[43] J.A. Lacarte, 'Transparency, public debate and participation by NGOs in the WTO: A WTO perspective'(2004) 7 J of Intl Economic L 686.
[44] Dinah Shelton (n 39) 647.

exploitation of the work force. This effectively calls for the promotion of certain safeguards within the existing structure to prevent the impairment to the capacity of states to engage in the progressive development of economic, social, and cultural rights. This may be argued to cause shrinkage of the policy space for the developing countries but the existing WTO rules impose liberalisation in a manner that threatens the regulatory capacities of a state in respect to essential services and utilities already.[45] Therefore, the trade-labour linkage appears a more balanced approach to offset the disadvantages of conventional trade liberalisation, essential to create a synergy between economic law regimes and economic social and cultural rights, as well as civil and political rights in a manner more holistic than the customary focus on promoting the rights of a privileged few, namely foreign tradersand investors.[46]

The equation of Rights and Costs

Since every right is said to have cost,[47] our linkage proposition requires a figurative cost-benefit analysis of measuring the cost of labour rights to trade interests which would require a rather subjective understanding of value not agreeable to the capitalistic sensibilities but aligning with a more human-oriented perspective such that high-quality jobs encourage more security, productivity and growth. There is a section of scholars that argue that economic human rights can not only induce greater productivity but also reduce wasteful administrative costs, leading to improvements in overall economic and social well-being.[48]

Even still, one can argue ensuring human economic rights such as those centred around workers cannot be without economic cost. However, this cost must be evaluated in the context of widening income inequalities,[49] which was clearly attested to during the COVID-19 Pandemic. This cost cannot be addressed within the conventional law and economics structure wherein the simple assumption is that

[45] ibid
[47] Jose E Alvarez, 'Critical Theory and the North American Free Trade Agreement's Chapter Eleven' (1997) 28 U Miami Inter-Am L Rev 303, 307–309.
[48] Martha T. McCluskey, Frank Pasquale & Jennifer Taub, 'Law and Economics: Contemporary Approaches' (2016) 35 Yale L & Pol'y Rev297, 303.
[49] Frank Pasquale, 'Eleven Things They Don't Tell You About Law & Economics: An Informal Introduction to Political Economy and Law' (2019) 37 (1) L & IneqI 97, 108-109 <https://scholarship.law.umn.edu/lawineq/vol37/iss1/8> accessed 11 December 2021.
[50] UNDESA, *World Social Report 2020* <https://www.un.org/development/desa/dspd/world-social-report/2020-2.html> accessed 12 December 2021.

essentially market order transcends trade and politics without considering how re-structuring of the market could generate better economic and social outcomes. The author relies on a more realistic political perspective addressing economic concerns, that posits that legal entitlements do not necessarily intervene in naturally productive market production; instead, it may enable the shrugging off of existing market constraints in order to lead the economy to a more sustainable version of prosperity.[51] The argument essentially boils down to a contentious perception that adequate labour standards ought to be the norm that fosters economic growth instead of promoting economic gains at the cost of such standards which are essential to a sustainable and welfare-oriented approach to development.

Understanding State and Trade Order

We can easily see the merit of this argument when we contextualise it in the modern disposition of state and welfare. It is posited that combined market forces along with globalisation are weakening the welfare state which will fail to survive in its present size.[52] Thus, the nature of the welfare state will need to reconstruct itself in a way to address maximization of economic opportunity but that may manifest itself in various forms for different countries. One solution to such a requirement in the modern context is going beyond ad-hoc methods of redistribution of income by way of welfare policies and instead operating on the legal rules and governance systems[53] to orient them intrinsically towards more egalitarian access to economic opportunity free from abuse and exploitation at the hands of the few. The author proposes that trade-labour linkage is one such avenue of correcting the scale of power, ensuring an environment that fosters individual achievement instead of thrusting generations into the vicious cycle of poverty.

A historical analysis further assists in highlighting the significance of the author's proposition. According to Ruggie, the initial trade order in the post-war decades

[51] Frank Pasquale (n 47) 107.
[52] Dennis Patterson and Ari Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade* (Cambridge University Press 2008) 34.
[53] Frank Pasquale (n 47) 107.

can be evidently perceived as a "fusion of power and legitimate social purpose"[54], essentially pointing out that the multilateral system had elements of domestic interventionism that were instruments for ensuring policies such as full employment. For instance, the permeation of domestic social concerns was significant enough to permit the use of otherwise prohibited quantitative restrictions to address the balance of payment issues arising out of domestic policies.[55] Consequently, Varellas III[56] argues that there is a need for the post-neoliberal age of international trade order to operate on the organising principle of working towards a more balanced trading system akin to the original socially protective one that orients itself in favour of human needs before the rights of multinationals and investors.[57] The balance would be restored to the trade order with the elevation of social concerns like the protection of society, human needs, and other conditions conducive to human flourishing in the broadest sense over maximizing corporate profits.[58] The viability of this theoretical proposition is supported by the recent shift in WTO dynamics wherein major players like the US and the European Union have demonstrated tangible intent to incorporate social clauses within their Regional Trade Agreements (RTA).[59]

Scope of Trade-Labour Linkage within WTO

Traditional Trade

The suggestion of Trade-labour linkage is of course not foreign to the very fabric of WTO. In fact, proponents have analysed the existing framework to justify at leasta tentative narrative of compatibility of such linkage within the larger scheme of WTO aspirations[60], even if they cannot assert labour clauses as independently enforceable without further amendments to the provisions of the WTO Agreement. Interestingly, prior to WTO, historically, countries imposed duties against 'social dumping' in order to offset the comparative advantage of foreign goods that were produced by workers who worked excessive hours, prison workers, or other

[55] John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 Intl Org 38, 393.
[56] Frank Pasquale (n 47) 44-45.
[57] Ibid 136.
[58] ibid 140.
[59] Karl Polanyi, *The Great Transformation* (Beacon Press Books 1957) 257-258.
[60] Kofi Addo (n 4) 11.
[61] Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries* Report of the Appellate Body,WT/DS246/AB/R, 7 April 2004.

violations of international labour standards.[62] We understand this proposition based on the definition provided by Charnovitz who describes social dumping as "the export of products that owe their competitiveness to low labour standards".[63] A caveat needs to be attached here that this definition uses a threshold that is not necessarily related to international obligations or domestic law where other scholars take a more restricted approach. The essence of Charnovitz's discussion of social dumping can be connected to his proposition that policy coordination enhances the effectiveness of policies, especially in the case of the labour standards–trade relationship[64] given the impact of trade relations on labour which is a factor of production. Thus, it can be tenuously argued that there is at least room for such discussions regarding the utility of standard labour clauses within the WTO to enforce fairer trade practices even though dumping specifically is aimed at industries and not workers.

Interpretative space after Singapore Declaration

Secondly, Zandvliet[65] very relevantly points out that numerous scholars have considered the legal implications of the Singapore Declaration. According to Guzman, it shows that the WTO is "determined to keep labor issues at a distance." Other scholars have argued that mentioning labour standards is already a large step[66] and that the Declaration may be dismissive of the option of an amendment to the WTO Agreements, but it does nothing to prevent taking an approach towards expansive interpretation of existing provisions[67] by using the Singapore

[62] Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview'(1987) 126 Intl Labour Rev 565, 576-577.
[63] ibid 565,566.
[64] Steve Charnovitz, 'Environment and Health Under WTO Dispute Settlement' (1998) 32 The Intl Lawyer 916, 901–21.
[65] Zandvliet (n 6) 83.
[66] Thomas Cottier and Alexandra Caplazi,'Labour Standards and World Trade Law: Interfacing Legitimate Concerns' in Thomas Cottier (ed) *The Challenge of WTO Law: Collected Essays* (Cameron May 2007) 10.
[67] Cf. Robert Howse, 'The World Trade Organization and the Protection of Workers' Rights'(1999) 3 Jof Small and Emerging Business L131, 168.

Declaration as a "justification" to take labour standards into account when interpreting the WTO Agreements.[68]

General Exceptions

Thirdly, we need to consider the provision of General Exceptions that allow member states to implement trade-restricting measures on the ground of human rights concerns to determine whether the provision can realistically expand its scope to operate over labour concerns as well. These are relevant since one reading of WTO rules suggests that the national treatment obligation[69] would consider measures on the basis of production or processing methods that could involve human rights or labour rights violations as trade-restrictive[70] and consequently be in violation of the substantive principle, requiring an exception for implementation. GATT 1994 Article XX does provide for certain exceptions to free trade provisions. Article XX permits a Member to impose barriers to trade, not otherwise permitted under GATT, for certain reasons relating to social policy. Members may impose barriers to trade as an exception under GATT for measures "necessary to protect human, animal or plant life or health"[71] provided they can demonstrate appropriate regulatory intent, and the measure should not be an 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail'. This provision is significant in its potential in an argument that measures seeking to enforce human and labour rights in supply chains are necessary to protect the health of workers.

Extraterritorial Extension

However, the argument is plagued with uncertainty on many grounds, including firstly, the issue of extraterritoriality since to the extent that measures seek to protect the health of another country's citizens, they would constitute extraterritorial measures. This is highlighted by the GATT Panel in the case of *US–Tuna Dolphin*

[68] Hendrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions'(2015) 18 Jof Intl Economic L 383, 404- 405.
[69] Article III, GATT, 1994.
[70] European Parliament, *WTO rules: Compatibility with human and labour rights* (2021) 4 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689359/EPRS_BRI(2021)689359_EN. pdf> accessed on 11 December 2021.
[71] Article XX(b), GATT, 1994.

II[72] where they stated that those measures which force other countries to change their policies and are only effective when such changes have occurred, could not be considered necessary for the protection of animal life or health in the sense of Article XX (b).

The primary line of argument against this supposition is the accepted extraterritorial nature of provision of Article XX Paragraph (e) which is the only explicit reference to labour conditions in the WTO legal framework. It allows member states to take trade-restrictive measures "relating to the products of prison labour." This is premised upon the idea that prison labour leads to unfair competition with free labour, as prisoners are often required to work and minimum wage legislation is not applicable.[73] To put it into perspective, we consider how the moral element of prison labour is disappearing with contemporary human rights law where there is a clear separation between prison labour and forced labour, In fact, the ILO Convention No 29 explicitly excludes "any work or service exacted from any person as a consequence of a conviction in a court of law" from the definition of forced labour[74] along with other instruments. Consequently, the economic parameters of a comparative advantage appearing out of non-compliance with minimum wage regulations become the most relevant. By a theoretical extension, it can be argued that economic limitations operate as coercive pressure to force workers into jobs without adequate renumeration.[75]

WTO's detachment from human rights

Secondly, it is also very relevant that conventionally, WTO dispute settlement body hardly ever concerns itself directly with human rights, although several panel decisions have concerned challenges to environmental and health measures. Even in such cases, there is an overwhelming percentage of negative findings regarding the compatibility of challenged social measures with WTO rules that may reinforce

[72] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Report of the Panel WT/DS381/R, 15 September 2011.
[73] Zandvliet (n 6) 48.
[74] Art 2.2(c), ILO Forced Labour Convention (No. 29) (1930).
[75] *People's Union For Democratic Rights v Union Of India & Others* 1982 AIR 1473, 1983 SCR (1) 456.

the chilling effect of WTO law[76] on the policy space of states. Thus, any interpretations in favour of the linkage would be a drastic leap.

Interpretative Leaps

Thirdly, even with this tentative positioning of labour clauses within WTO, there are other challenges that need to be confronted before any success can be envisioned. Firstly, deciding on an adequate benchmark to determine the level of protection that the importing state would deem adequate for workers in the exporting state without impeding the latter's regulatory sovereignty. To put into perspective how difficult a proposition this is would require a reference to treaties such as the 1981 Occupational Safety and Health Convention which does not prescribe a certain level of standards. Instead, it requires states to "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health, and the working environment."[77] The convention is therefore too indeterminate to be used as a benchmark that the WTO Dispute Settlement Body can rely on.

Moreover, any measures relating to labour clauses would need to comply with the requirements set forth in the introductory paragraph of Article XX. The *chapeau* of Article XX requires that "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and that they do not constitute "a disguised restriction on international trade." Importantly, the interpretation of these conditions is influenced by the essential objective of the *Chapeau* which is the prevention of 'abuse of the general exceptions.'[78]

When considering discrimination, the justification of the measures is an open-ended exercise under the *Chapeau* wherein legitimate objectives can optimistically include recognised needs set out in the WTO Agreement or in multilateral instruments adopted by the international organisation[79], leaving considerable breathing-space for policy[80]. However, the import restrictive measure must be

[76] Dinah Shelton (n 39) 654.
[77] Art 4.1, Occupational Safety and Health Convention (No. 155), 1981.
[78] US-Gasoline (n 31).
[79] Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body WT/DS246/AB/R, 20 April 2004.
[80] Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreement: A Reconstruction' (2015) 109 American Jour of Int Law, 118, 95-125.

'necessary' such that no alternate measures reasonably available to the member would achieve the same objective in a less discriminating manner[81], rendering the defence of labour clauses a complex tussle between opposing views.

While the first issue of non-arbitrariness requires observation as to the implicit difficulty in arriving at a universal standard, the second issue is even more of a roadblock in a substantive manner since the dual role of labour clauses as disguised trade-restrictive measures is a prominent argument made by countries. Firstly, labour clauses would operate disparately on member states depending on their level of development and prevailing regulations. Since the *Chapeau* limitsthis condition to countries with "same conditions", the labour standards-based measures would need to incorporate sufficient flexibility in the definition of standards along with time-bound obligations to not inordinately provide unfair advantages to one producer country over the other.[82]

Bartel's analysis[83] of this second condition of the *Chapeau* presents two alternates that vary in their degree of restrictive control on regulatory autonomy. "Disguise" has been interpreted to mean the implementation of measures for improper purposes by cloaking them under the guise of ostensibly legitimate purposes. The prohibition of measures with *any* illegitimate purpose, however minor compared to the legitimate purpose, along with measures solely or primarily for illegitimate purposes, is likely to reduce the potential space for labour clauses within this exception.

Given the linkage's precarious balance on these conditions, it is important to note to assuage opponents that a further safeguard in the form of good faith is already erected within the framework to prevent the abusive exercise of states' rights.[84] Bartel constructed the spectrum of understanding that can be attached to the doctrine of abuse of rights read into the Chapeau[85] which at its most extended scope, would prohibit measures that unnecessarily harm or discriminate against a

[81] US-Gasoline (n 31).
[82] Permanent Court of Arbitration, *North Atlantic Coast Fisheries (UK v US)*, (1910) 11 RIAA 189.
[83] Lorand Bartels (n 77).
[84] Appellate Body Report, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body WT/DS58/RW, 15 June 2001.
[85] US-Gasoline (n 31).

WTO member under any of the subparagraphs of Article XX. Thus, these instrumentalities attached to the Chapeau would ensure adequate scrutiny of labour clauses on different parameters to assuage concerns of purported protectionism.

Conclusion

Labour provisions are increasingly becoming more common in free trade agreements and regional mostly between developed and developing countries,[86] over the last couple of decades, especially G7 regional trade agreements where theyare a usual feature that lays emphasis on upholding labour standards while also providing enforcement measures for their compliance. The European Union is also progressively evolving its commitment to core labour standards and as a remarkable first, sought to enforce labour standard obligations against a partner State, South Korea.[87] With these operating analogous international bodies laying down newer benchmarks in their support for global labour concerns and incorporating them as an indispensable part of trade negotiations, it can be argued that the WTO should do the same.

It must be said that while there are substantial empirical economic studies arguable from both sides of the proposition, the moral and jurisprudential arguments for enforcement of labour standards simultaneously with trade, focusing on reconciliation of economic interests with legal and social equity, are invariably compelling from the perspective of sustainable development. The sustainability factor is compelling from the perspective that there is a pattern of social behaviour which surfaces as a result of the collision between the marketization of life and what Polanyi called "the reality of society" inevitably leads to political and social movements that seek to restore social protection."[88]

The proponents of the inclusion of labour standard provisions in trade agreements are further supported by the fact that the introduction of new areas, including trade

[86] Kofi Addo (n 4) 7.
[87] D. Van 't Wout, 'The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements' (2021) Asia Eur J 1.
[88] Karl Polanyi, *The Great Transformation* (Beacon Press Books1957) 257-258.

in services and protection of intellectual property rights, under the ambit of WTO is setting a precedent for the protection of labour standards in trade agreements. Their stance effectively questions why intellectual property rights and worker rightsshould not be treated as equally important and deserving of protection[89], especiallywith the close connection of labour to trade as a factor of production.

As of now, WTO lends recognition to core standards without any enforcement but in a more real context, the contemporary requirement goes beyond and demands an address of the widening income inequalities contributed to by international tradein its own right. This begets the question as to what obligations, and to what extent, can be placed on the WTO in search of universal labour standards. A collaborative structure or close liaison[90] between ILO and WTO is often proposed with the WTO supporting full integration of developing countries within the multilateral trading system and lending the review mechanism while the ILO ensures conducive conditions for raising of labour standards, particularly through its supervisory and enforcement mechanism.[91] Not only will these nexus establish a multilateral enforcement mechanism building on the procedure of each body, but it will also assist in bridging the gap between the non-governmental organisations such as employers' associations, and global unions on behalf of all workers and the WTO decision-making body. Building on the framework of RTAs but replacing the same, this joint commission could operate on an ad-hoc basis to deal with individual labour issues.[92] Utilising the General Exceptions for the purpose of establishing thelinkage offers a relatively bleak opportunity given the *Chapeau* and potential for drawn-out challenges unless negotiations can move decisively in the direction of turning labour standards into substantive obligations for members, even on limitedgrounds.

[89] Kofi Addo (n 4) 8.
[90] ILO Declaration of Philadelphia, 1944.
[91] Kofi Addo (n 4) 28.
[92] ibid 322.

However, it is also undeniable that there are legitimate concerns regarding the potential dangers of incorporation of labour standards in WTO such as the coercive impact on sovereign policy space, abuse of the process where developing nations are incapable of meeting the established benchmarks for reasons of genuine limitations, and ample literature pointing towards the inability of the linkage to deliver on the objective of improving living standards of workers.[93] This intensifies the trade-labour linkage by introducing the next element of appropriate enforcement mechanism to be considered to be ideally incorporated within the WTO. The negative ramifications of using trade sanctions against the countries failing to meet the requisite labour standards are crucial to the future of this linkage and can easily dismantle any progress that may be achieved. In place of trade sanctions, it is suggested that a system of incentives such as tariff reductions and preferential treatment[94] for developing countries to promote higher labour standards can be introduced. While the non-binding nature of such provisions may be considered counterproductive to the objective or rendering it futile, supplementing it with a comprehensive package of financial assistance and capacity building[95] can work as an effective incentive in the long run and is likely to ensure sustainable improvements. At the same time, the lack of political will that is currently eroding the viability of the WTO as a platform for negotiations needs to be countered by procedural tools that would facilitate consensus and unstick negotiations such as by use of authoritative interpretations wherein a three-fourths majority vote to resolve ambiguities in the WTO text.[96]

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[93] Anuradha R.V. and Nimisha Singh Dutta, 'Trade and Labour under the WTO and FTAs' (n 5) 11.
[94] ibid 35.
[95] ibid.
[96] Robert Lighthizer, "Opening Plenary Statement of USTR Robert Lighthizer at the WTO Ministerial Conference" (2017) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/opening-plenary-statement-ustr> accessed 1 March 2022.

The Digital Markets Act and non-discrimination under WTO law

Aditi Verghese[1]

Digitalization has raised various policy challenges for competition authorities, particularly in digital platform markets. Recommendations vary on whether these are best addressed through better enforcement of existing or tweaked competition rules or through new regulations prohibiting the largest digital platforms from engaging in specified conducts. The European Commission's proposed Digital Markets Act would seek to designate certain providers of platform services as "gatekeepers" and impose specific obligations on them. It is estimated that almost all the entities caught by the measure would be from the United States, raising concerns regarding discrimination. This note provides an overview of the most relevant World Trade Organization rules and previous disputes, namely regarding non-discrimination in the GATS and TRIPS Agreements, as well as thoughts on how a dispute on this issue may be resolved.

Competition Policy and Digital Platform Regulation

Digitalization has raised various challenges for competition authorities.[2] Many have authored or commissioned reports,[3] undertaken market studies[4] and applied existing competition laws and tools to digital markets and new business models. Some jurisdictions have amended laws and guidelines to adapt competition rules to address specific practices.[5]

Much attention has focused on digital platforms and their features that have implications for competition, such as multi-sidedness, zero price, economies of

[1] Policy Lead, International Trade and Investment at World Economic Forum, Geneva Switzerland.
[2] Akman, Pinar, *Competition Policy in a Globalized, Digitalized Economy* (World Economic Forum, 2019), 8-12.
[3] *See* Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry – Final Report* (2019); Jason Furman et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (2019); Crémer, Jacques, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (2019); Stigler Center for the Study of the Economy and the State, *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee: Report* (2019); Japanese Ministry of Economy, Trade and Industry, *Fundamental Principles for Rule Making to Address the Rise of Platform Businesses Formulated* (2018); BRICS Competition Law and Policy Centre, Digital Era Competition: A BRICS View (2019).
[4] *See* Competition and Markets Authority (CMA), *Online platforms and digital advertising market study final report* (2020); ACCC, *Digital advertising services inquiry: Final report* (2021).
[5] *See* Germany, 'Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions (GWB- Digitalisation Act)' (19 January 2021); Anti-Monopoly Committee of the State Council, *Anti-Monopoly Guidelines of the Anti-Monopoly Committee of the State Council on Platform Economy* (7 February 2021).

scale and scope, direct and indirect network effects and use of data.[6] The size of the largest platforms, their unique position in digital markets and their considerable market share have also been considered relevant.

Some jurisdictions are considering *ex ante* regulation to address anti-competitive practices of large digital platforms that may not be adequately dealt with through competition law enforcement *ex post*. Of these, the most advanced is the Digital Markets Act proposal[7] by the European Commission. The European Parliament's Committee on the Internal Market and Consumer Protection (IMCO) adopted its position on the Commission's DMA proposal on 23 November 2021 and proposed some changes.[8] The European Parliament adopted amendments to the Commission's proposal on 15 December 2021.[9] The matter was sent back for inter-institutional negotiations.

Certain features of the proposed measure have led to some claiming that they would violate the World Trade Organization (WTO) commitments of the European Union (EU).[10] This note examines the key features of the DMA[11] that raise concerns and how they might be approached under relevant WTO provisions. Since the DMA lays down obligations for service suppliers, including some with respect to their intellectual property, the focus will be on non-discrimination provisions in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The note concludes with a short discussion of how the US may respond, given that the majority of companies

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[6] United Nations Conference on Trade and Development, *Competition issues in the digital economy: Note by the UNCTAD secretariat* (TD/B/C.I/CLP/54, 1 May 2019), 3-5.

[7] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM/2020/842 final, 2020).

[8] European Parliament, 'Digital Markets Act: ending unfair practices of big online platforms' (Press Release, 23 November 2021) <www.europarl.europa.eu/news/en/press-room/20211118IPR17636/digital-markets-act-ending-unfair-practices-of-big-online-platforms> accessed 28 November 2021. The changes can be seen here: European Parliament Committee on the Internal Market and Consumer Protection (IMCO), 'Compromise Amendments replacing all relevant amendments' (version 18 November 2021) <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2021/11-22/DMA_Comrpomise_AMs_EN.pdf> accessed 5 December 2021.

[9] European Parliament, *Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)) <https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2021/12-15/0499/P9_TA(2021)0499_EN.pdf> accessed 20 March 2022.

[10] *See* Meredith Broadbent, *Implications of the Digital Markets Act for Transatlantic Cooperation* (Centre for Strategic & International Studies, September 2021); King & Spalding LLP for the Computer & Communications Industry Association, *The EU Digital Market Act: Targets Discrimination Against U.S. Companies in Violation of WTO Commitments and Threatens the Re-Set of Trade Multilateralism and of Trans-Atlantic Relations* (8 June 2021).

[11] For more detailed discussion on the DMA itself, see for instance, Akman, Pinar, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (forthcoming, European Law Review 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625> accessed 12 December 2021.

within the scope of the proposed measure are US companies.

The Digital Markets Act and WTO Law

The DMA designates certain providers of 'core platform services' as 'gatekeepers' if 1) they have a 'significant impact on the internal market', 2) the core platform service they operate is an 'important gateway for business users to reach end users', and 3) they currently have, or foreseeably will have, an 'entrenched and durable position'.[12] In the Commission's proposal there is a rebuttable presumption that a platform satisfies these three criteria if 1) its annual turnover in the European Economic Area (EEA) is at least EUR 6.5 billion in the previous three financial years or it has an average market capitalization of EUR 65 billion in the previous financial year and it provides a core platform service in at least three member states; and 2) it has 45 million monthly active end users and 10,000 yearly active business users in the EU of each of the preceding three financial years.[13] The December 2021 amendments adopted by the European Parliament increase the turnover threshold to EUR 8 billion and the market capitalization to EUR 80 billion.[14] They also include web browsers, virtual assistants and connected TV in the list of core platform services.[15]

Gatekeepers are subject to the obligations set out in Article 5 and 6 of the DMA in respect of the core platform services they provide.

Non-discrimination under the GATS

GATS Article XVII (National Treatment) requires WTO members, for sectors they have made commitments on in their respective schedules, to accord treatment no less favourable to services and service suppliers of other members than it accords to its own. According to the Panel in *China – Electronic Payment Services*, Article XVII covers "all measures affecting the supply of services".[16]

The elements of a claim under Article XVII are: whether the services are in the member's schedule and if any limitations apply; whether the measure affects the supply of the services; and whether it accords less favourable treatment to services or service suppliers than like domestic services or service suppliers.[17]

In its schedule, the European Union has generally inscribed no limitations to its

[12] European Commission, *Digital Markets Act* (n 7) art 3.1.
[13] ibid art 3.2.
[14] European Parliament, *Amendments adopted* (n 9) Amendment 80.
[15] European Parliament, *Amendments adopted* (n 9) Amendments 64-66.
[16] WTO, *China: Certain Measures affecting Electronic Payment Services – Report of the Panel* (16 July 2012) WT/DS413/R [7.652].
[17] WTO, *China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Panel* (12 August 2009) WT/DS363/R [7.944].

national treatment obligations for modes 1, 2 and 3 of supply for the sectors that are most likely to be relevant here, including "computer and related sectors", "telecommunications services" and "advertising".[18]

The obligations placed on gatekeepers under the DMA could be found to affect the supply of core platform services, as they prohibit certain business practices, require certain conducts and may raise the cost of supply. The Commission's impact assessment estimated the yearly cost of compliance for each gatekeeper at EUR 1.41 million.[19] The Commission is empowered to impose fines between 4-20% of total worldwide turnover in the event of non-compliance.[20]

While the treatment may be formally identical or formally different, what is relevant is whether it modifies the conditions of competition in favour of like domestic services or service suppliers.[21]

As explained above, the DMA designates entities as gatekeepers based on certain qualitative and quantitative criteria, but not on foreign origin. Hence, treatment is formally identical between foreign and domestic services and service suppliers.

Of the 22 companies examined by Mariniello and Martins, 12 meet the requirements for being designated a gatekeeper in the IMCO version of the rules (EUR 8 billion turnover and EUR 80 billion market capitalization).[22] Of these, all are US companies except for SAP (Germany) and Vivendi (France). While Booking.com is based in the Netherlands, its parent company, Booking Holdings, is a US company.

Many US undertakings will fall outside the scope of the gatekeeper definition. For instance, Mariniello and Martins estimate that this will be the case for AirBnB (US), Twitter (US), Zoom (US), Spotify (Sweden), Uber (US), Expedia (US), Ebay (US), Zalando (Germany) and Slack (US).[23] However, in the context of GATT Article

[18] Malta, Cyprus and Poland are "unbound" for some subsectors. World Trade Organization, 'Trade in Services: European Union Schedule of Specific Commitments' (GATS/SC/157, 7 May 2019) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/SCHD/GATS-SC/SC157.pdf&Open=True> accessed 12 December 2021.

[19] European Commission, *Commission Staff Working Document Executive Summary of the Impact Assessment Report Accompanying the Document Proposal for a Regulation of The European Parliament and of The Council on contestable and fair markets in the digital sector (Digital Markets Act)* (2020) <https://ec.europa.eu/info/sites/default/files/impact-assessment-dma_en.pdf> accessed 20 March 2022, 104.

[20] European Parliament, *Amendments adopted* (n 9) Amendment 193.

[21] GATS art XVII:3; WTO, *China: Electronic Payment Services* (n 16) [7.687].

[22] The 12 companies are Google, Amazon, Microsoft, Apple, Facebook, SAP, Oracle, Salesforce, Booking Holdings, PayPal, Yahoo (Verizon) and Vivendi. Mariniello, Mario and Catarina Martins, 'Which platforms will be caught by the Digital Markets Act? The 'gatekeeper' dilemma' (Bruegel Blog 14 December 2021) <www.bruegel.org/2021/12/which-platforms-will-be-caught-by-the-digital-markets-act-the-gatekeeper-dilemma/> accessed 17 December 2021. Note that the 15 December 2021 European Parliament amendments include "connected TV" within core platform services, which will likely bring Netflix within the gatekeeper definition.

[23] Mariniello and Martins (n 22).

III:4, the fact that only some imports (and not all) faced less favourable treatment than like domestic products has been considered sufficient to find inconsistency with the provision.[24] The Panel's determination will depend on the pool of undertakings considered in the examination and the ratios of foreign and domestic firms in the group of firms within the scope of the measure and beyond it.

Would the services or service providers on either side of the threshold and within and outside the list of core platform services be considered "like" services or service providers? The Panel in *China – Electronic Payment Services* stated, "like services are services that are in a competitive relationship with each other".[25] Whether end consumers and business users found these platform services substitutable will be relevant. While the Panel in *EC – Bananas III (Ecuador)* found that providers of like services were like service suppliers,[26] the Panel in *China – Electronic Payment Services* considered this a rebuttable presumption[27].

Would the size and position of the service providers categorized as gatekeepers be relevant in distinguishing them from other service providers not caught by the measure? The European Commission, in instituting thresholds, was concerned that small firms not be unduly burdened. The Appellate Body stated in *Argentina – Financial Services* that "a separate and additional inquiry into the regulatory objective of, or the regulatory concerns underlying, the contested measure" was not relevant to determining whether the measure afforded treatment no less favourable.[28] Further, the Appellate Body in *EC – Bananas III* explained that the "aims and effects" of a measure are not relevant to determining whether it is consistent with GATS Article XVII.[29]

GATS Article II (Most-Favoured-Nation Treatment) requires WTO members to accord "treatment no less favourable" to another member's services or service suppliers than it accords to "like" services or service suppliers of any other country. This may be relevant if the final thresholds selected are such that they exclude foreign, non-US entities from being designated as gatekeepers. Notably, this obligation applies to all sectors.

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[24] WTO, *Canada: Certain Measures Concerning Periodicals – Report of the Appellate Body*, (30 June 1997) WT/DS31/AB/R, 29.
[25] WTO, *China: Electronic Payment Services* (n 16) [7.700].
[26] WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas – Complaint by Ecuador – Report of the Panel* (22 May 1997) WT/DS27/R/ECU [7.322].
[27] WTO, *China: Electronic Payment Services* (n 16) [7.705].
[28] WTO, *Argentina – Measures Relating to Trade in Goods and Services – Report of the Appellate Body* (14 April 2016) WT/DS453/AB/R [6.106].
[29] WTO, *European Communities - Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body* (9 September 1997) WT/DS27/AB/R [241].

GATS Article XIV (General Exceptions) allows members to adopt measures necessary to fulfil certain listed policy objectives. Policy objectives relevant here may include "to protect public morals or to maintain public order", the latter being only valid where there is a "genuine and sufficiently serious threat" to a fundamental interest of society; or "to secure compliance with laws or regulations" which are not inconsistent with the GATS.[30] In *EU – Energy Package*, the Panel accepted the EU's position that the security of energy supply was a fundamental interest of society.[31] The oft-stated objective of the DMA is ensuring fairness and contestability in digital markets.[32] The EU will need to show that this fits in the list of legitimate objectives in Article XIV.

The measure must be "necessary" to achieve the objective, and this may be assessed based on "texts of statutes, legislative history, and pronouncements of government agencies or officials", as well as "the structure and operation of the measure".[33] The European Commission's proposal explains that an EU-wide, ex-ante regulation is necessary to protect the fairness and contestability of the services covered, given that competition rules do not necessarily cover the kinds of conducts that the regulation identifies to be anticompetitive in the context of digital gatekeepers and does not move swiftly enough. It also finds it necessary to apply uniform rules across the single market to digital platforms that operate cross-border to avoid fragmentation.[34]

The measure must also meet the requirements of the *chapeau* of GATS Article XIV, that is, it must not constitute "arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services".

On the latter point, statements from EU officials have been scrutinized. Andreas Schwab, Member of European Parliament and Rapporteur for the DMA, was quoted by the Financial Times in May 2021 as having said that the focus was on the biggest firms and that it was not necessary to go down the list and add a European gatekeeper 'just to please [US president Joe] Biden'.[35] A previous (June 2021)

[30] GATS art XIV.
[31] WTO, *European Union and its Member States: Certain Measures Relating To The Energy Sector – Report of the Panel* (10 August 2018) WT/DS476/R [7.1156].
[32] European Commission, *Digital Markets Act* (n 7).
[33] WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body* (7 April 2005) WT/DS285/AB/R [304].
[34] European Commission, *Digital Markets Act* (n 7) 1-6.
[35] Javier Espinoza, 'EU should focus on top 5 tech companies, says leading MEP' (Financial Times, 31 May 2021) <www.ft.com/content/49f3d7f2-30d5-4336-87ad-eea0ee0ecc7b> accessed 28 November 2021.

version of the proposal put forward by Mr. Schwab effectively removed all European companies from the scope of the gatekeeper definition.[36] Public statements by government officials have been considered and weighed against other evidence by Panels in various contexts.[37] However, the design and structure of the measure itself is likely to be more relevant.

Finally, in determining whether less trade restrictive alternative measures are available, the Panel may consider the discussion in the Commission's impact assessment report,[38] various reports on digital markets by competition authorities and other material putting forward the need for ex-ante regulation over competition law enforcement, as well as the practical need for thresholds in the application of such regulation. The complainant may also put forward other less stringent and binding approaches, such as that being adopted in the United Kingdom[39]. However, the ability of such alternatives to meet the objective set out by the EU will need to be assessed.

Non-discrimination obligations under the TRIPS Agreement

Some of the obligations under the DMA may also raise concerns under the TRIPS Agreement. These may include obligations preventing gatekeepers from using data in competition with business users where the data were generated through the activities of business users; and obligations requiring gatekeepers to provide advertisers and publishers access to performance measuring tools and information, business users real-time access and use of data generated by the business user or its end users, and third-party search engines access to "ranking, query, click and view data" generated on the gatekeeper's search engine.[40]

The national treatment obligation under TRIPS Article 3 requires treatment no less favourable to foreign nationals regarding the protection of intellectual property, including copyright, patents and undisclosed information, which are most relevant here.

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[36] *Mariniello and Martins* (n 22).

[37] See, for instance, WTO, *European Communities and Certain member States: Measures Affecting Trade in Large Civil Aircraft – Report of the Panel* (30 June 2010) WT/DS316/R [7.1919]; WTO, *Australia: Subsidies Provided to Producers and Exporters of Automotive Leather – Report of the Panel* (25 May 1999) WT/DS126/R, fn 210; WTO, *Canada: Periodicals* (n 24) 29.

[38] European Commission, Directorate-General for Communications Networks, Content and Technology, Sunderland, J., Herrera, F., Esteves, S., et al., *Digital Markets Act: impact assessment support study: annexes*, (Publications Office, 2020) <https://data.europa.eu/doi/10.2759/230813> accessed 20 March 2022, 41.

[39] Gov.UK, "A new pro-competition regime for digital markets" (9 August 2021) <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets> accessed 20 March 2022.

[40] DMA art 6.1(a), (g), (i), (j).

Computer programmes and compilations of data are protected under Article 10, and limitations and exceptions must be confined to "special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder", according to Article 13.

Patents confer exclusive rights to prevent third parties from using the patented product or process.[41] Limited exceptions are allowed under Article 30 if they "do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties". Where a Member's law allows for use of a patent by the government or a third party without authorization from the right holder, a number of conditions must be respected, including judicial review, adequate remuneration and consideration of individual merits.[42]

Finally, Members are required to protect undisclosed information that has commercial value because it is secret.[43] The purpose of this provision is to protect against unfair competition.

These provisions may be raised in the context of the obligations described above.

What Next?

Given that the main companies that would be within the scope of the DMA are US companies, it is relevant to consider how the US government may respond. The US is unlikely to rely on the WTO's stalled dispute settlement system to challenge this measure, though they may file a complaint. The EU and US have no other trade agreements with each other in force. The EU-US Trade and Technology Council may provide a venue for discussion. Working Group 5 on Data Governance and Technology Platforms will engage in discussions 'effective measures to appropriately address the power of online platforms and ensure effective competition and contestable markets'[44] and the EU-US Joint Technology Competition Policy Dialogue was launched on 7 December 2021[45].

The US may also choose to investigate the measure and retaliate unilaterally (or threaten to do so) under Section 301 of the Trade Act of 1974. Under the previous US administration, investigations were initiated into digital services taxes (DST) in

[41] TRIPS art 28.1.
[42] TRIPS art 31.
[43] TRIPS art 39.1-2.
[44] European Commission, 'EU-US Trade and Technology Council Inaugural Joint Statement' (29 September 2021) <https://ec.europa.eu/commission/presscorner/detail/en/statement_21_4951> accessed 11 December 2021.
[45] European Commission, 'Competition: EU-US launch Joint Technology Competition Policy Dialogue to foster cooperation in competition policy and enforcement in technology sector' (7 December 2021) < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6671> accessed 11 December 2021.

11 jurisdictions, including Austria, France, Italy, Spain and the United Kingdom, under Section 301.[46] There too, the fact that DST revenue thresholds caught primarily US technology firms and excluded domestic ones and the selection of services covered by the measure were considered relevant in finding the tax discriminatory.[47] Tariffs were threatened, suspended and eventually, under the Biden administration, terminated on 18 November 2021.[48] Termination came with agreement from these European countries to apply a transitional approach until Pillar 1 of the OECD/G20 solution to tax challenges arising from the digitalisation of the economy[49] was implemented.[50]

It remains to be seen how the current administration will approach the digital platform regulation issue. Clearly, the dynamics are different; there are no intergovernmental negotiations to update competition rules as there were for corporate income tax rules. But as more jurisdictions contemplate similar *ex ante* rules for digital platforms, they will undoubtedly be watching any challenges to the DMA very closely.

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[46] Office of the United States Trade Representative, 'Section 301 – Digital Services Taxes' <https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes> accessed 28 November 2021.

[47] United States Trade Representative, *Section 301 Investigation: Report on France's Digital Services Tax* (2019), 31-47.

[48] Office of the United States Trade Representative, 'Termination of Actions in the Section 301 Digital Services Tax Investigations of Austria, France, Italy, Spain, and the United Kingdom and Further Monitoring' (Federal Register, vol. 86, no. 220, 18 November 2021).

[49] OECD/G20 Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (8 October 2021).

[50] US Department of the Treasury, *Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect* (21 October 2021).

What is Wrong with the Concept of "Even-Handedness" inArticle 2.1 of the TBT Agreement?

Anita Dangova[1]

Introduction

Article 2.1 of the TBT Agreement prohibits the adoption of technical regulations under which imported products are treated less favorable than domestic or foreign products. According to the Appellate Body (AB) in *US-Clove Cigarettes*, "the existence of a detrimental impact [...] is not dispositive of less favorable treatment."[2] What must be analyzed by a panel is "whether that technical regulation is even-handed [and thus the detrimental impact on imports stems exclusively from a legitimate regulatory distinction], in order to determine whether it discriminates against the group of imported products."[3] However, the way this concept has been developed in *US-Tuna II*,*US-Clove Cigarettes*, and *US-COOL* is contentious and problematic.[4] In this paper it will be argued that the concept of "even-handedness" fails to bring adequate results in light with the object and purpose of the TBT Agreement. It will be shown that the sequence of the AB's analysis under Articles 2.1 and 2.2 of the TBT Agreement needs to change. The rationale behind this research paper is related to the recent proliferation of technical regulations, which clearly led to an increase of disputes on the WTO level, including the EU-Certain measures concerning palm oil and oil palm crop-based biofuels (Malaysia);[5] the EU–Palm Oil (Indonesia);[6] and the United States- Origin Marking Requirement.[7]

[1] LLM, International Trade and Investment Law, University of Amsterdam
[2] Appellate Body Report, *US –Clove Cigarettes*, para.182.
[3] ibid
[4] Appellate Body Report, *US-Tuna II*; Appellate Body Report, *US– Clove Cigarettes*; Appellate Body Report, *US–COOL*.
[5] European Union and certain Member states — Certain measures concerning palm oil and oil palm crop-based biofuels, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds600_e.htm.
[6] European Union — Certain measures concerning palm oil and oil palm crop-based biofuels, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm.
[7] United States — Origin Marking Requirement, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds597_e.htm.

Judicial Activism with a Wrong End – the Inadequate Development of the "Even-Handedness" Test

Article 2.1 of the TBT Agreement does not contain a general exception similar to Article XX of GATT. As stated by Mitsuo Matsushita, a former AB member, that absence was compensated by the AB's judicial activism, resulting in a contextual and teleological interpretation of Article 2.1, which gave rise to the development of the "even-handedness" test.[8] In other words, the concept of "even-handedness" finds no textual basis in the TBT Agreement. Thus, it can be seen that the AB developed a new element under Article 2.1 that went "further than mere interpretation, and may amount to judicial law-making."[9] It could be argued that a dangerous precedenthas been set in that there is nothing to prevent future law- making by the AB underthe guise of a teleological interpretation of the covered agreements.[10]

To identify the gaps in the judicial activism in relation to the concept of "even-handedness," we need to look at how that concept was developed. The AB in *US-Tuna II* approached the determination of "even-handedness" by asking whether the differing treatment resulting from the measure at issue was proportionately calibrated to address the risks of dolphins being killed while fishing tuna all around the world.[11] The interpretative test for "even-handedness" was further developed in *US-Clove Cigarettes,* where the AB stated that the "even-handedness" of a technical regulation asks for a careful scrutinization of "the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue."[12]

[7] Mitsuo Matsushita, *The World Trade Organization: Law, Practice and Policy*, (3rd edn, OUP 2015), 451.
[8] Vicky Heideman, 'The legitimate regulatory distinction: challenging the boundary between interpretation and law-making in the appellate body' (2016) The Graduate Institute, Centre for Trade and Economic Integration <https://repository.graduateinstitute.ch/record/294796?ln=en> accessed 2 November 2021.
[9] Vicky Heideman, "The legitimate regulatory distinction: challenging the boundary between interpretation and law-making in the appellate body" (2016) The Graduate Institute Geneva <https://repository.graduateinstitute.ch/record/294796?ln=en> accessed on 20 October 2021.
[10] Appellate Body Report, *US–Tuna II*, paras293–297.
[11] Appellate Body Report, *US –Clove Cigarettes,* (n 1)
[12] Appellate Body Reports, US – COOL, para. 271 (quoting Appellate Body Report, US – Clove Cigarettes, para.182).

This approach was followed in *US-COOL*,[13] where the AB reaffirmed that its assessment would seek to respond whether the measure was not "even-handed" due to being designed and applied in a manner, constituting arbitrator unjustifiable discrimination.[14] In this case, the dispute concerned the US country of origin labeling rules for muscle cuts of meat. Canada and Mexico claimed that such a legislative regime was treating imported products less favorably and was more trade-restrictive than necessary, thus being inconsistent with the GATT and TBT Agreements.

According to the Professor of EU law Maria Weimer, "the recognition of the WTO as a legitimate global institution depends on its ability to reconcile two fundamental objectives: the respect for the right to regulate (e.g. on environmental or public health matters) on the one hand and the need to give due regard to the interests and concerns of foreign constituencies affected by domestic regulation on the other hand."[15] The way the "even-handedness" test has been developed and applied by the AB demonstrates an insufficient level of external accountability. The AB's approach is liable to give rise to victories, that come at the expense of great losses for the party, that has won the case. Further to the application of the test in *US-Tuna II*, the US was allowed to extend its standards under the measure to also cover tuna fishing outside the Eastern Tropical Pacific Ocean [ETP] to achieve compliance. Thus, the finding that the US measures were inconsistent with Article 2.1 for lack of "even-handedness" was "pyrrhic victory for Mexico."[16] In other words, the calibration test does not reflect a delicate balance between "the Member's right to regulate and, on the other hand, the duty to respect the treaty rights of the other members".[17] That is why, Maria Weimer, expresses the criticism that the "'even-handedness' does not mainly improve consideration or regard for affected

[14] Appellate Body Reports, US–COOL, para. 340.
[15] Maria Weimer, "Reconciling regulatory space with external accountability through WTO adjudication"(2017) 30 (4) Leiden Journal of International Law, 44<https://dare.uva.nl/search?identifier=81a4c58d-d2a1-46ee-8542-7eddb083f53a> accessed 22 February 2021.
[16] ibid 36.
[17] ibid 35.

foreigners,"[18] and an approach that raises the external level of accountability of a WTO member vis-a-vis affected foreigners should be adopted.

Further to that, it may be reassuring that the AB has tried to integrate the concepts of "arbitrary" and "unjustifiable" discrimination in the "even-handedness" test in *US-COOL*. According to some academics, this maybe "more problematic than helpful," because these two concepts have never been defined by WTO jurisprudence. As a result, such ambiguity could "create a scenario of uncertainty in TBT-related disputes." Criticism is also expressed towards the AB's assessment of necessity and proportionality of a measure as a part of the "even-handedness" test in *US-COOL*.[19] The reason is that overlap between Articles 2.1 and 2.2 of the TBT Agreement has occurred, since the necessity and proportionality analysis typical for Article 2.2, has been integrated into the examination of Article 2.1.[20] Consequently, the elements of Article 2.2 are at risk of becoming a part of the analysis of Article 2.1, which would place Article 2.2, and its necessity test, at risk of being reduced to non-utility.[21]

Contrary to these concerns, it can be argued that the "arbitrary" and "unjustifiable" discrimination concepts raise the justification and external accountability level of the "even-handedness" test. Indeed, the Appellate Body in *US-COOL* relied primarily on the concepts of "arbitrary" and "unjustifiable" discrimination to conclude that the unjustified disproportionate burden imposed by the US labelling measures rendered these measures inconsistent with Article 2.1. The concept of proportionality, which has arguably created an overlap, is introduced in this case as means of considering the adverse effects on specific producers, the design and application of the measure, and whether the burden was rationally connected to the objective.[22] In *US-COOL* it was concluded that the detail and accuracy "of the origin information that upstream producers are required to track and transmit," was significantly greater than the origin information, which retailers were required to

[18] ibid, 1.
[19] ibid.
[20] ibid 187,205.
[21] ibid,205.
[22] Appellate Body Reports, *US – COOL*, para.346.

communicate to consumers through the mandatory retail labels.[23] Thus, disproportionality was established. Therefore, the "arbitrary" and "unjustifiable" discrimination concepts go beyond the mere consideration of calibration between the measure at issue and the risk that it seeks to prevent. As a result, an "even-handedness" test with an "arbitrary" and "unjustifiable" discrimination element can well improve the regard to foreigners, affected by disproportionately burdensome measures, adopted by other WTO members.

If proportionality becomes an element of Article 2.1, it might be more useful that the AB ties up the analysis of Articles 2.1 and 2.2 of the TBT Agreement, thus avoiding the inutility of Article 2.2.[24] Besides, it could be suggested that the AB adopts a reasonableness test to identify whether a WTO member "has had a sufficient evidentiary basis for reasonably designing" the requirements under its measure.[25] Alternatively, the AB could ask this WTO member to gather more evidence and information prior to designing the contested measure. Adding such reflective principles in the application of the "even-handedness" test, such as the duty to consider, give reasons and gather more evidence, can be a step forward towards improving the due regard for affected foreigners.[26] The test must include a higher burden of justification from the regulating state, especially in disputes between developed and less developed states.[27]

Let's take as an example the recent dispute between the EU and Malaysia, regarding certain measures imposed by the EU and its Member States concerning palm oil and oil palm crop-based biofuels from Malaysia. The legislative measures adopted by the EU define palm oil as an unsustainable feedstock for the production of biofuel. Based on the Regulation, oil palm crop-based biofuels cannot be counted

[23] ibid
[24] Fay Valinaki, 'Repairing the Defects' of Article 2.1 of the WTO Technical Barriers to Trade Agreement: An Amendment Proposal' (2016) 43(1) 65-95 Wolters Kluwer <https://kluwerlawonline.com/journalarticle/Legal+Issues+of+Economic+Integration/43.1/LEIE2016_004> accessed 25 October 2021
[25] Maria Weimer (n 14)43
[26] ibid 44
[27] ibid 1

towards EU renewable energy targets.[28] Malaysia argued that the measures adopted by the EU, as well as the related measures adopted by EU Member States, confer unfair benefits to EU domestic producers of certain biofuel feedstocks, such as rapeseed oil and soy, and the biofuels produced therefrom, at the expense of palm oil and oil palm crop-based biofuels from Malaysia, and challenges the legislation under a variety of TBT Agreement provisions, including Articles 2.1 and 2.2.[29] Clearly, the legislative criteria provided within the EU Regulation does not take into account different circumstances in a particular country or of a particular production, and as Malaysia notes, it does not take into account features unique to tropical regions, which have a considerably larger forest cover than other WTO Members, such as the EU. Therefore, it is very likely that Malaysia successfully challenges the Regulation under Article 2.1, if, while applying the concept of even-handedness, the Panel and AB apply reflective principles and the concept of proportionality.

The Sequence of the TBT Agreement's Analysis: Another Big Issue

According to the TBT Agreement's preamble, WTO members desire to ensure through the Agreement that technical regulations and standards do not create unnecessary obstacles to international trade. That desire is further encoded under Article 2.2 of the Agreement. Thus, the prevention of unnecessary obstacles to international trade is a foundational objective, that forms the very basis of the creation of the Agreement. As explained by Petros C. Mavroidis, the Political Affairs Director of the Ministry of Foreign Affairs of Greece, "the whole logic of the TBT Agreement is to impose a restraint on regulatory activity [...]. It does so also by asking regulators to think of the necessity to intervene at all. And it does so finally by imposing an obligation to adopt the least restrictive measure when

[28] Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, *OJ L 133,* Articles 4 and 5 of which identify the cumulative criteria that must be met in order to certify biofuels, bioliquids and biomass fuels as low ILUC-risk. These criteria include the sustainability and GHG emissions saving criteria and the need to comply with additionality requirements.

[29] European Union and certain Member states — Certain measures concerning palm oil and oil palm crop-based biofuels, available at:https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds600_e.htm.

regulating."[30] In his opinion, the non-discrimination under Article 2.1 is meant to ensure that the otherwise necessary measures have not been implemented in a manner that does not observe an "even-handedness" requirement.[31] Yet, the AB's analysis under the TBT Agreement does not commence with a necessity analysis, but rather with a determination of product-likeness, less-favourable treatment, and "even-handedness." According to Ravi Soopramanien, an attorney-at-law and former Legal Officer at the WTO, "the Appellate Body's TBT analysis [...] not only ignores the proportionality standard: it ignores the proper sequencing of a TBT dispute."[32] That position is also supported by Petros C. Mavroidis, in whose opinion the AB has committed an error in interpreting the two obligations, namely non-discrimination and necessity, when determining the consistency of technical regulations and/or standards with the TBT Agreement "as if they wereindependent from or parallel to each other."[33] As he states, "these are not two independent obligations but, rather, one coherent whole."[34] In the same way, professors Gabrielle Marceau and Joel Trachtman reveal that, although the TBT Agreement provides no explicit guidelines on how its provisions should interact, some authors have suggested that the "'even-handedness' requirement, should serve as a consideration secondary to the 'necessity' requirements of Art. 2.2. In so doing, it would function in similar fashion to the chapeau of Article XX GATT following the 'necessity' test under Art. 2.2.[35]

It shall be recalled that the sequence of analysis under Article XX of GATT takes place in the reverse order: first, the nexus between the contested measure and the stated objective is evaluated, and, second, it is identified whether the measure passes

[30] Petros C. Mavroidis, 'Last Mile for Tuna (to a Safe Harbour): What Is the TBT Agreement All About?' (2019) 30(1) OUP 279, 288 <http://www.ejil.org/pdfs/30/1/2947.pdf> accessed 30 October 2021.
[31] ibid.
[32] Ravi Soopramanien, 'Never For-GATT: What Recent TBT Decisions Reveal About the Appellate Body 's Analysis of Environmental Regulation Under the WTO Agreements' (2017) 17(1) Sustainable Development Law & Policy 12 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1584&context=sdlp> accessed 30 October 2021.
[33] Petros C. Mavroidis (n 31).
[34] ibid, 299.
[35] Gabrielle Marceau, Joel P. Trachtman, 'Technical Barriers to Trade,' [2013] OUP.

the arbitrary and unjustifiable discrimination or "even-handedness"[36] test under the 'chapeau' of Article XX, as shown in *US-Shrimp*. That is why, Ravi Soopramanien provides that had the Appellate Body [in *US-Tuna*] steered closer to the text of the TBT Agreement, by focusing less on discrimination (as there was none present) and more on the feasibility of lesser trade-restrictive alternatives, it could have availed itself of some of the lesser trade-restrictive alternative measures proposed by the complainant, Mexico, to strike down the US measure on other grounds.[37] In other words, such analytical approach would have included a consideration of Mexico's interests and concerns – something, that the calibration test had missed.

Besides, the current "Article 2.1, first, Article 2.2, second" approach is likely to keep producing inconsistent rulings in respect of policies with similar effects. In *US-Shrimp* the US tried to justify its policies by referring to Article XX of GATT. Under the 'chapeau' of Article XX, a measure cannot be justified if arbitrary or unjustifiable discrimination is established.[38] The AB criticized the US policy for its lack of flexibility and consideration of local conditions in the exporting countries.[39] Accordingly, the requirements of Article XX, the 'chapeau,' were not met. In the *US-Tuna II*, however, the US policy with very similar effects was accepted as "even-handed," provided that it applied equally to not only fisheries within but also beyond the ETP. In contrast with the *US-Shrimp*, the AB in *US- Tuna II* did not consider whether the US should have consulted with exporting countries, giving them a voice to suggest comparable alternative measures able to protect dolphins. Thus, there was a striking difference between the sequence, language and justification requirements imposed by the AB in *US-Shrimp* and *US- Tuna II*.

That is why, the AB should first start with assessing the necessity of a contested measure, ensuring that WTO members adopt the least trade-restrictive alternative, as required under Article 2.2 of the Agreement.[40] Further, no additional enquiry into less favorable treatment should be required where the measure at issue is

[36] ibid, 290.
[37] Ravi Soopramanien (n 33), 15.
[38] GATT 1994: General Agreement on Tariffs and Trade 1994, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994] article XX.
[39] Appellate Body Report, *US-Shrimp*.
[40] Petros C. Mavroidis (n 31), 299.

deemed disproportionate.[41] If the measure is found proportionate, then the next question should be whether the necessary measure has been applied in a non-discriminatory manner. In this part of their analysis, the WTO courts should inquire into whether the necessary measure is applied in an even-handed manner across WTO members.[42] In simple words, it is desired that the sequence in the analysis of Articles 2.1 and 2.2 of the TBT Agreement is changed, as suggested by Petros C. Mavroidis and other professionals.[43]

Conclusion

To summarise, the prevailing view in respect of the "even-handedness" concept is that the test is inadequate, as it does not necessarily improve the situation of foreign countries, affected by a certain measure. In addition, academics think that introducing concepts such as "arbitrary" and "unjustifiable" discrimination to the test creates risks for Article 2.2 of the TBT Agreement. However, the WTOjurisprudencehasshownthatpolicieswitharbitraryorunjustifiablediscrimination effects will not be allowed under Article 2.1, which reduces the WTO members' regulatory freedom. As a result, the set concepts can lead to the proper consideration of the interests and concerns of affected foreigners. That could affect the utility of Article 2.2. To avoid such a risk, a possible approach could be to tie up the analysis under Articles 2.1 and 2.2.

Second, a change of the sequence of the analysis under these Articles is needed. The sequence should start with an assessment of the necessity of the contested measure, including the availability of less trade-restrictive alternatives, and, if such necessity is established, continue with an examination of whether the measure is applied in an "even-handed" manner. That is the proper path towards ensuring that the whole logic behind the TBT Agreement is followed, and its object and purpose
–are respected.

[41] Ravi Soopramanien (n 33), 15.
[42] Petros C. Mavroidis (n 31), 299.
[43] ibid 299.

Ghana's State Of Affairs On Business And Human Rights In The Light Of The Decision In The Case Of Lungowe v. Vedanta (2019)

Francis Kofi Korankye-Sakyi[1]

Introduction

In 2013, when a delegation constituted from the United Nations (UN) Working Group visited Ghana at the invitation of the government to assess the business and human rights (BHRs) situation in the country, it was found that industry players in the business community of Ghana had little information from the Government of Ghana about the Guiding Principles on Business and Human Rights (the Guiding Principles)or any other kind of communication about human rights obligations emanating from their operations.[2] The team equally observed that 'there was very low awareness among local businesses and industry associations about human rights and business responsibilities as defined in the Guiding Principles.'[3] It only noted that some business associations, such as the Ghana Chamber of Mines, had made some efforts to promote responsible business conduct. Ghana has a high dependency tendency on foreign direct investments (FDIs) that covers the various sectors including, but not limited to, natural resource exploitation, large and small-scale mining, agriculture activities, finance, service and manufacturing.[4] This implies that critical BHRs issues relating to the environment, participation, access to information and benefit/dividends sharing may arise.

[1] Faculty of Law, College of Humanities and Legal Studies, University of Cape Coast, Ghana.

[2] United Nations, 'Report of the Working Group on the Issue of Human Right and Transnational Corporations and Other Business Enterprises' (Human Rights Council, 2014)

[3] United Nations, ibid (n 1).

[4] FK Korankye-Sakyi & KA Dwomoh 'Towards a Conducive Investment Climate within ECOWAS: The Case for the Amendment of Sections 27 and 28 of the Ghana Investment Promotion Centre Act 865 of 2013' (2021)1(1) UCC Law Journal, 57; Santander, 'Ghana: Foreign Investment' (2020). <https://santandertrade.com/en/portal/establish-overseas/ghana/investing> accessed 2 May 2021; DD Sasu 'Foreign Direct Investment (FDI) in Ghana 2009-2019' (2021) <https://www.statista.com/statistics/1170982/foreign-direct-investment-fdi-in-ghana/> 5 June 2021; Knoema 'Ghana- Net Foreign Direct Investment Inflows in Current Prices <https://knoema.com/atlas/Ghana/topics/Economy/Balance-of-Payments-Capital-and-financial-account/Net-FDI-inflows> on 11 May 2021; M Asiamah et al. 'Analysis of the Determinants of Foreign Direct Investment in Ghana' (2018) 26(1) Journal of Asian Business and Economic, 56-75.

Over the last decade, BHRs as a legal issue is receiving international attention. The theory underpinning this momentum is that, while governments have the primary duty to protect and promote human rights, it is also imperative upon businesses to be held responsible to respect human rights.[5] On 16 June 2011, the Human Rights Council of the UN endorsed the Guiding Principles per resolution 17/4 as the global policy framework for the promotion and protection of human rights and business.[6] This normative framework provides a global standard for preventing and addressing the risk of adverse human "impacts" associated precisely with business operations. The Guiding Principles is a follow-up document to the implementation of the *Protect, Respect and Remedy Framework for Business and Human Rights* (the Framework)[7] and provides a definitive position on the relationship between business and human rights. It also acknowledges the importance of access to effective judicial and non-judicial remedies. The Guiding Principles does not createnew international law obligations, limits or undermine any legal obligations a state may have undertaken or be subject to under international law concerning human rights.[8] On this score, the Guiding Principles is anchored on three pillars:[9] Pillar 1:The State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; Pillar 2: The corporate responsibility to respect human rights, which means to avoid infringing on the human rights of others and addressing adverse human rights impacts with which they are involved; and Pillar 3: The need for greater access by victims to an effective remedy, judicial and non-judicial. It must be underlined that these GuidingPrinciples apply to all states and all business enterprises, both transnational and national, regardless of their size, sector, location, ownership and structure.[10]

[5] AM Pascal 'Business and Human Rights, from Theory to Practice and Law to Morality: Taking a Philosophical Look at the Proposed UN Treaty' (2021) 20 Philosophy of Management**,** 167–200 https://doi.org/10.1007/s40926-020-00150-0; SR Ratner 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 The Yale Law Journal, 443-545.

[6] The United Nations, 'Guiding Principles on Business and Human Rights' (New York and Geneva, 2011).

[7] The UN, 'Protect, Respect and Remedy Framework for Business and Human Rights' <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie- protect-respect-remedy-framework.pdf> 25 June 2021.

[8] The United Nations (n 5).1.

[9] ibid.

[10] ibid.

Though, asoftlaw, it hasbeenobservedthatthecommitmentofthe African Union(AU) member states to the Guiding Principles are very low.[11] This is against the backdrop that in September 2014, AU committed by calling on its member states to implement the Guiding Principles. Unlike the Republic of Kenya that has developed a comprehensive National Action Plan based on the Guiding Principles, other countries like Ghana, Nigeria, South Africa, Mozambique, Zambia, Ethiopia, Uganda, Mauritius, Tanzaniaand Moroccoareintheprocessofdevelopingtheirs. Othersareyettoattempt anything.

AsAUSecretariat andtheAUpolicyorgansarecurrentlyworkingtowardstheadoption of a Draft Policy on BHRs,[12] the responsibility to sanitise the business environment on the African continent to strike a balance between the needs of businesses and the rights of the people to a fair life and environment, and to offer a better safety net to Africans by making businesses more responsive to human rights makes it critical for Ghana to have comprehensive research on its BHRs environment. This article is to inform national draft policy and make input towards the adoption and effective implementation of the proposed policy in the nearest future.

There is a plethora of studies on various forms of human rights violations. However, the focus of these studies suggests that some inbred elements of research on human rights issues, especially from the perspective of business have been ignored. For example, on access to justice vis-a-vis transnational corporate justice, there is some work, but without sufficiently exploring the human rights angle.[13] Thisstudy aims to discuss the effectiveness of the different legal instruments and mechanisms available to address the issue of access to justice for adverse human rights impacts of Multinational companies (MNCs) in the light of the *Vedanta case*. It will cover

[11] Business and Human Rights Resource Centre, 'Addressing Human Rights Impacts of Business in Eastern and Southern Africa' (Workshop Report,Tanzania, April 2018) <https://www.somo.nl/addressing-human-rights-impacts-of-business-in-eastern-and-southern-africa- current-state-of-affairs-and-the-way-forward/> accessed 25 May 2021.

[12] Business and Human Rights Resource Centre, 'African Union Set on Making Businesses More Responsive to Human Rights Through Development of a Policy On Business & Human Rights.' https://www.business-humanrights.org/en/latest-news/african-union-set-on-making-businesses-more- responsive-to-human-rights-through-development-of-a-policy-on-business-human-rights/ (n.d.) accessed 25 May 2021.

[13] S Varvastian & F Kalunga 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe' (2020) 9(2) Transnational Environmental Law, 323-345.

global, regional and domestic legislative and normative environments on BHRs in Ghana. It examines how human rights violations in business environments are addressed adequately in Ghana, particularly by identifying existing challenges and legal environments for addressing them. It will propose a national draft policy on BHRs based on the UN Guiding Principles, by adopting a more responsive and coherent legal policy approach.

Objectives

To assess the existing policy and regulatory framework on BHRs in Ghana.

1. To identify the BHRs challenges that confront the judicial system in Ghana.
2. To make recommendations for a policy for BHRs in Ghana.

Research Questions

1. What is the current policy and legal framework on BHRs in Ghana?
2. What challenges confront the judiciary in adjudicating BHRs matters in Ghana?
3. What is the way forward for addressing BHRs concerns in Ghana?

Methodology

As a review paper, this article adopts the doctrinal desktop research approach. With this approach, I drew much from secondary sources such as books, policy frameworks, journal articles, case law and other obligatory tools. This approach was useful because this paper is source-based and focuses on policies, statutes, and other legal documents.[14] According to Hutchinson, the desktop method is relevant when a researcher wants 'to work within the parameters of the [law] in order to make recommendations for reform.'[15] This is in line with the objective of this paper as it aims to proffer policy recommendations based on the conclusions of the paper.

Literature review

[14] A. Kharel 'Doctrinal Legal Research' (26 February 2018) <https://ssrn.com/abstract=3130525 or http://dx.doi.org/10.2139/ssrn.3130525> accessed 26 August 2021.
[15] T. Hutchinson 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' 2015 (3) Erasmus Law Review, 130.

Ghana is one of the leading countries in Africa with enormous resource concentration.[16] It was the first country sub of the Saharan to gain independence in 1975 from the British. It is a West African country situated on the coast of the Gulf of guinea, boarded on the east with Togo, west with Cote D'Ivoire and **northwest and** north with Burkina Faso. Though relatively small in population, it has rich natural resources comprising, gold, bauxite, magnesium, aluminium, diamond. It is also the leader in the production of gold in Africa and second to the Ivory Coast in the production and export of cocoa beans in the world. Its total population was estimated at 30,777,000 in 2020.[17] Rural and urban distribution of the populations stands at 43.9% and 56.1% respectively as at 2018 statistical figures.[18] Ghana is rich in forest reserves and agricultural land. About 69% of Ghana's landmass is used for agricultural purposes, including but not limited to theproduction of cocoa, oil palm, rubber, coffee, cashew, cereals and tubers. Despite decades of political instability dominated by military rules, mismanagements, corruption after the overthrow of the first republic under Dr Kwame Nkrumah, the country began recovery towards economic improvements after the 1990s and it is holding its own in the comity of nations despite its recent quagmires. Ghana is a middle-income country. Ghana is largely considered a shining model for political and economic reforms in Africa.[19] Its economic recovery programme has largely been led by the private sector since the introduction of the Economic Recovery Programme (ERP) led by the International Monetary Fund (IMF) since 1981.[20] Ghana is the first Sub- Saharan African nation to achieve the target of halving extreme poverty under Millennium Development Goal 1.[21] The history of Ghana with international trade dates back to its contact created with the first Europe-based (European)

[16] FK Korankye-Sakyi, *Factoring as a Means of Promoting Small and Medium Scale Enterprises: The Case for a Legal Framework for Credit Factoring in Ghana* (LL. M Thesis, Faculty of Law, University of Pretoria, South Africa 2019).

[17] JD Fage, EA Boateng, Maier, J Donna & O Davies 'Ghana *Encyclopedia Britannica*' <https://www.britannica.com/place/Ghana> accessed 18 March 2021.

[18] ibid.

[19] UNDP, 'Ghana' (n.d.) <https://www.gh.undp.org/content/ghana/en/home/countryinfo.html> accessed 19 May, 2021.

[20] Korankye-Sakyi FK, Abe OO &Yin ET, *Revisiting MSMEs Financing Through Banking Reform Processes: Assessing the Ghanaian Legal Experiences.* In Peprah JA, Derera E, Ngalawa H & Arun E (eds.), Financial Sector Development in Ghana: Exploring Bank Stability, Financing Models, and Development Challenges for Sustainable Financial Markets. *(*Palgrave Macmillan Publishers, London, forthcoming).

[21] ibid; UNDP, ibid (n 564).

merchants in sub-Saharan Africa who traded with the then Gold Coast, first in gold and later in slaves. According to National Human Development Report for Ghana cited by UNDP, the poverty rate of Ghana stood at 21.4% as of 2016 while per capita income to GDP was $3,980.20 during the period under consideration.[22] Ghana has enjoyed increasingly and relatively stable and deepening democratic governance over the last two decades in the sub-region. This has had a positive effect on investor confidence and anchored its economic growth trajectory. The ramifications of the welcome economic atmosphere on BHRs matters is what this research seeks to identify and make a case for an effective legal environment to contain the fallouts of these economic dynamics.

Image: *Encyclopedia Britannica, Inc*

On human rights protection and promotion generally, Ghana has a mark of high commitment.[23] In contemporary legal and institutional frameworks, Ghana has given many efforts to advance this course. Chapters five and six of the 1992 Constitution of the Republic of Ghana (the Constitution) make available all that is

[22] ibid
[23] AO Atiemo 'Religion and Human Rights: Towards the Inculturation of Human Rights in Ghana' (2010) <https://research.vu.nl/ws/portalfiles/portal/42191722/chapter+7.pdf> accessed 11 May 2021.

necessary as provisions to protecting the fundamental human rights of all citizens.[24]

State institutions created under the Constitution[25] as well as and non-governmental organisations (NGOs)[26] involved in human rights advocacy are responsible for creating awareness on human rights and the government's role in protecting human rights. The human rights situation indicates that since 1992, the enactments of new legal instruments[27] targeted at the enjoyment of human rights have led to a remarkable improvement in the human rights situation in Ghana.[28] Ghana is one country that has ratified most of the international bills of rights under the auspices of the UN and AU including the African Charter on Human and Peoples' Rights and the United Nations' Universal Declaration of Human Rights (UDHR).[29]

The Constitution makes fundamental human rights and freedoms under Chapter five "enshrined" provisions which "shall be respected and upheld by the Executive, Legislature and the Judiciary" and everybody including "natural and legal persons" in Ghana.[30] The legal personality of a company or business incorporated under the jurisdiction of Ghana under the Company Law of Ghana[31] has been well established under case and legal precepts,[32] i.e. the separate legal personality of a company is trite law in Ghana.[33] This regulatory order is not peculiar to Ghana[34,] but a global phenomenon concerning the legal status surrounding business

[24] The 1992 Constitution of Ghana. Chapter of Five of the Constitutions deals in totality to the fundamental human rights.
[25] They include: Commission on Human Rights and Administrative Justice (CHRAJ), the National Commission on Civic Education (NCCE), the Domestic Violence and Victim Support Unit (DOVVSU) of the Ghana Police Service, and the Department of Social Welfare; the Ghana National Commission on Children (GNCC) and the Ministry of Gender, Women and Children Affairs (MOGWAC).
[26] The NGOs include: Ark Foundation; the Muslim Family and Counseling Services, Centre for the Development of People (CEDEP), the Coalition on the Rights of the Child, FIDA.
[27] Among them are the Domestic Violence Act (2007); the Disability Act (2006); Whistle Blowers" Act (2006); Human Trafficking Act (2005) and the Juvenile Justice Act, (2003). Others are the Criminal Code (repeal of criminal Libel and Seditious Laws) Act, (2001) and the Children's Act (1998).
[28] Atiemo ibid (n 22)
[29] United Nations, 'Universal Declaration of Human Rights' https://www.un.org/en/about- us/universal-declaration-of-human-rights accessed 21/ June 2021
[30] Constitution of Ghana, 1992 art 12(1).
[31] Companies Act, 2019 (Act 992).
[32] *Salmon v Salmon & Co* [1897] AC 22; *Morkor v Kuma* (East Coast Fisheries Case) [1998-1999]at 632; *Appenteng and Others v Bank of West Africa Ltd* [1961] GLR 199.
[34] ibid.

incorporations as separate legal persons.[35] Even though there is an appreciable level of awareness of the citizens on various aspects of human rights, it seems from the literature that most discussions on human rights sensitisations exclude BHRs issues, hence this article. This is necessary to identify the critical issues peculiar to Ghana like business operational abuses and to address the adverse impacts of these abuses on the rights of citizens affected by such activities. It is always thought that MNC, especially in developing countries, have the propensity to abuse human, environmental and labour rights in the global economy.[36] As noted earlier, it, however, appears that it is rather impossible to regulate the operations of such MNCs to respect all rights and privileges of the communities of their activities, as well as international standards.[37]

Following the Rana Plaza incident of 24 April 2013 in Bangladesh, where a clothing factory collapsed in the Savar sub-district of Bangladesh, killing more than 1,100 people and injuring more than 3,000, the international discussions on BHRs heightened with scattering attacks on European MNCs operating in less developed countries. The same incidence has also brought up concern under public international law for the need to tighten regulations to protect the vulnerable who are all the time at the receiving ends of these abuses.[38] It has on many scholarly platforms also '[stirred] debate over worker safety in the effort to drive down prices for international manufacturers and consumers.'[39] The cause of the Rana Plaza disaster has wholly been attributed to irresponsible business practices.[40]

[35] *Salmon v Salmon*, ibid (n 577); JJ Alvarez Rubio & K Yiannibas (eds.) 'Human Rights in Business Removal of Barriers to Access to Justice in the European Union' (Taylor & Francis Group, New York 2017).
[36] Alvarez Rubio &Yiannibas, ibid (n 34)
[37] ibid
[38] ibid
[39] K Dinesh (ed.) '*Case Study: Ethics, Supply Chains: The Rana Plaza Disaster*' In Consumer Behavior (Oxford University Press, Oxford 2015); Collapse at Rana Plaza; Case Study. (2021). <https://ethicsunwrapped.utexas.edu/video/collapse-at-rana-plaza>accessed 10 May 2021. See also**:** The Rana Plaza Disaster <https://www.gov.uk/government/case-studies/the-rana-plaza-disaster> accessed 10 May 2021; V Yusha *The Role of Multinational Corporations and of the State in Promoting Human Rights in Bangladesh: A Case Study of the Rana Plaza Factory Collapse* (Thesis, Malmö University, Faculty of Culture and Society 2018)43; N Sinkovics, SF Hoque & RR Sinkovics 'Rana Plaza Collapse Aftermath: Are CSR Compliance And Auditing Pressures Effective?' 2016 29(4) Accounting, Auditing & Accountability Journal, 617.
[40] Alvarez Rubio & Yiannibas (n 34).

Unfortunately, this conduct of irresponsible business conduct has become synonymous with most MNCs.

According to Roorda and Leader, the policy context of BHRs in countries where remedies for human rights violations have been sought are changing to incorporate mandatory human rights principles of due diligence; obligations for parent companies to ensure human rights compliance in their business activities, as well as corporate groups and supply chains liabilities.[41] These steps also include considering parent companies to implement and monitor human rights policies as a compliance requirement and reporting on human rights risks encountered in the course of their operations.[42] Indeed, human rights due diligence (HRDD) as it has come to be known, is a current jargon around BHRs advocacy in the last decade.[43] The impact of this advocacy on the back of HRDD is culminating in the acceptance of many advanced countries incorporating BHRs tenets in legislative enactments. In fact, according to Quijano and Lopez, in most cases in Europe, liability lies for failure to comply with HRDD provisions and for causing harm to any other third party.[44]

Many MNCs in the events of human rights abuses have preferred to litigate under the host state's domestic laws, especially when they find out sanctions within such jurisdictions are weak, compromised and non-deterring. Again, most parent companies push their human rights obligations on subsidiaries when confronted with responsibilities due to gross human rights violations in host states. These shirking of responsibilities are not without judicial backings. Since 2013, the ruling by the United States Supreme Court in the case of *Kiobel v Royal Dutch Petroleum Co*. (2010), the Supreme Court of the United States, which dealt withjurisdictional matters on BHRs became the landmark case in support of the position above. However, since 2019, the *Vedanta Resources PLC and another v Lungowe and others* (2019), the United Kingdom House of Lords, ruling has become the most

[41] G Quijano & C Lopez 'Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?' 2021 Business and Human Rights Journal, 1.
[42] ibid
[43] ibid
[44] J Bonnitcha & R McCorquodale 'The Concept of Due Diligence inthe UN Guiding Principles on Business and Human Rights' (2017) 28(3) The European Journal of International Law, 901.

important judicial decision in the area of BHRs under international law. The reason for the overwhelming acceptance of the *Vedanta case* over the *Kiobel case* in international human rights jurisprudence is that the former case extended the jurisdiction of the UK court beyond its territories to cover its nationals in transnational businesses involved in human rights violations whiles the latter case restricted the US court's jurisdiction. This has been lauded and become a judiciary precedent for transnational businesses and human rights matters in the light of the facts and holdings of the case.

Impacts of multinational businesses on livelihoods in Ghana

Theories of globalisation and the globalised world encourage liberalisation and deregulation of economic frontiers for the facilitation of trade and investments, either from local or foreign enterprises. In the words of Bailey, the global economy today is "a completely tangled group of strands that are endlessly intertwined."[45] Since the inception of Ghana's attachment to the Bretton Woods Institutions from the period of the so-called ERP, the country through its laws has made clear gestures towards the attraction of MNCs.[46]

Korankye-Sakyi et al. have argued that "[T]he economic engine of every country is its [businesses] through which jobs are created, wealth distributed to the very commoner of the society, and to eradicate financial inequality."[47] This position in effect does not limit the scope of such businesses to only indigenous enterprises and Micro, Small and Medium-sized Enterprises (MSMEs) but also, to a large extent, covers MNCs operating under different sectors or industries. The contributions of FDI, in this case, cannot be overestimated. The impacts of MNCs must therefore be assessed to underscore the level of influence on BHRs discussions. This section outlines and assesses the impacts on the Ghanaian livelihoods as well as the national

[45] V Bailey 'Negative Impacts of Multinational Corporations' (2018) <https://bizfluent.com/info-8110394-negative-impacts-multinational-corporations.html accessed 9 June 2021
[46] ibid
[47] ibid

economy through the corporate social responsibilities (CSRs) of the MNCs as a result of their investments and community projects and programmes.

MNCs are conduits for the advancement of socio-economic development in many countries, including Ghana.[48] This comes as a windfall out of what has been already outlined as a positive outcome of the globalisation of the economies of the world. Activities of MNCs are channelled through trade, foreign direct investment and transfer of knowledge and technology. Under various segments of the economy, the contributions of the MCNs include, but are not limited to, supports for local enterprises, CSRs to communities of operations and central government's activities, capacity building support, creation of market opportunities, supply of technology, inputs diversification and supply foreign exchange through taxes and expenditure in the economy.

Ghana has so far benefited from the operations of MNCs by way of revenue generations. These inflows continue to support the expenditure and development portfolios of the government. This intersects with the position of the Latifi that MNCs provide a source of revenue for the development and stability of developing economies.[49] By way of export and import activities that characterise the nature of the MNCs, the government can generate tax and customs revenues from them to build its economy. By establishing subsidiaries and branches in various parts of the country, local government structures are also able to generate revenue through levies and licenses to support their development activities as well.

Another impact of MNCs on the economy is their ability to partner and support local MSMEs. In many cases, the MNCs with their industrial strengths are in a position to afford manufacturing plants and production equipment that is also availed to the local businesses at reduced operational costs and also access intermediary and unfinished raw materials for industrial use.[50]

[48] PA Williams, G. Frempong, M Akuffobea & J Onumah 'Contributions of Multinational Enterprises to Economic Development in Ghana: A Myth or Reality? (2017) 6(12) International Journal of Development and Sustainability, 2068.
[49] M Latifi "Multinational Companies and Hot Partnership in Rural Development: A Network Perspective on the Lamco Case' (2004).
[50] ibid.

In terms of direct and indirect jobs, the employment opportunities under the ambit of MNCs has tremendously helped in reducing the unemployment situation in the country. More employment in any country has significant implications for its economy, national security and mortality rate. Ghana Investment Promotion Centre (GIPC) Investment Bulletin sources from 2010 to 2015 indicated that MNCs in Ghana alone contributed to employment creation by availing a total of 300,230 non-farm jobs to the citizens. It is significant to note as high as 87% of such jobs went to Ghanaians alone.[51] CSR is a contemporary assessment tool for the sensitivity of businesses to their social and community environment. In many cases, CSRs have become key tools for reaching to areas of operations of most MNCs in Ghana. In the broad spectrum of community requests and expectations, areas such as education, health, safety, sponsorship and grants, peace and security are but few that receive CSRs from MNCs.[52]

In contrast to these advantages, MNC activities can have negative consequences on the livelihoods and economies of their host countries. In many instances, some MNCs have had the impetus to undermine the sovereignty of host countries through the nefarious operation with saboteurs to capture economic markets and trade in a way that satisfies their ideologies. Powerful lobbyists behind some MNCs are capable of controlling national interests against the will of the people themselves. Home nation political interests are sometimes able to supplant themselves on the host nations.[53] In the long run, the common citizen suffers the brunt of such subterfuge. In the larger picture, the activities of some MNCs and their control mechanisms can cause a nation to lose control of its economy. This is always reflected in the ability of the country to hold on to its balance of payments receipts and control its economic stability amid saboteur external factors. Xaxx has confirmed that MNC can fly wealth from local communities of their operations into

[51] Latifi (n 593)
[52] ibid
[53] O'Reilly, 'Business Ethics and Corporate Governance' (2021) 2nd ed. <https://www.oreilly.com/library/view/business-ethics-and/9789332511255/xhtml/c12s9.xhtml> accessed 22 May 2021.

a consolidated vault of their home and parent companies.[54] In most instances, this leads to the impoverishment of host countries.[55]

Again, this is made possible by the unregulated activities of these companies through the compromises leading to the exploitation of the natural resources of the country. On this score, Bailey states it succinctly thus:

"With few ties to any one political entity, their desire to work cheaply and efficiently often is at odds with sound environmental practices. With their power position when lobbying for beneficial environmental regulations that their desire for increased revenue can override their need to regulate environmental impacts."[56]

Finally, exploitation of labour becomes synonymous with MNCs when they are not under the proper policy and legal regulations and sanctions. It is also a challenge for a country's own ability to attract the needed human capital into the public service because a lot of MCs can lure potential labour force into their operation until abuse is rampant and unmitigated. In most developing country cheap labour isa matter of course because of the high level of unemployment and decent work from the governments. According to Bailey,

"[W]ith profit being the primary goal and the world as their environment, multinational corporations can afford to pick and choose when it comes to finding governments that enact employment laws that benefit their business over the workers. Their head office may be in a country with stringent employment laws, but they're free to set up factories in economic deserts where people are eager to work for pennies a day. These workers tend to be low-skilled, resulting in a general loss of quality in the product line. Also, corporations tend to build in

[55] ibid
[56] ibid

countries without strict health and safety laws, adding to the social decline of host countries."[57]

MNCs do not conform to loyalty to any country over the other and only play by the rules of their corporate interest. Their uncertainty of operations creates uncertainties for both countries and workers of their operations.

The Lungowe v. Vedanta Case (2019) and implications for legislation in Ghana

The *Vedanta v. Lungowe Case* appeared before the United Kingdom Supreme Court and was determined finally on 10 April 2019 based on issues of extraterritorial jurisdiction, BHRs and civil claims. The plaintiffs, in this case, were some 1,826 Zambians, predominantly farmers from four communities of the Chingola District. They claimed that the Nchanga Copper Mine (NCM) polluted their source of water for domestic consumption and farming purposes. The claimants contended inter alia that Vedanta set health, safety, and environmental standards that its subsidiary Konkola Copper Mines plc (KCM) was to comply with, and same exercised a "very high level of control and direction" over KCM. At trial, the UK Court in *Vedanta v. Lungowe* was to determine whether or not civil claims for negligence brought by the claimants against an English parent company (Vedanta) and its Zambian subsidiary KCM for damages experienced in Zambia can proceed in English courts. Even though the case was originally conceived as a domestic case of derelict, the decision arrived at by the Court presented a much forward attempt to hold MNCs accountable for their international torts on human rights under internationallaw.[58]

In the suit, they identified KCM as owners and operators of the NCM. KCM is jointly owned by Vedanta and the Zambian government. The claimants' case against Vedanta relied mostly on several "group-wide policies and guidelines" adopted by Vedanta, as parent company concerning operations and management atits mining sites. For instance, though KCM is a joint business venture, the Court

[57] Bailey (n 589).
[58] VH Tara 'International Decisions' (2020) 114(1) The American Journal of International Law Vol. 114(1), 111.

agreed with the claimants that "materials published by Vedanta state that its ultimate control of KCM is not . . . to be regarded as any less than it would be if wholly owned." In this sense, the Court asserted that for a parent company to assume a duty of care toward third parties "depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary." This relationship offered the opportunity for Vedantato control its subsidiary, KCM. The court per Lord Briggs stated a representative view of how group-wide policies would lead to a duty of care by the parent company for the conduct of its subsidiary in three ways: (1) where the guidance itself is defective; (2) where the "parent does not merely proclaim them, but takes active steps" to ensure the guidance is implemented; and (3) where the parent "in published materials . . . holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so."

In defense, the defendants argued that the claimants' rights of jurisdiction lied in the domestic court of Zambia against its subsidiary KCM and not to pursue Vedantato secure English jurisdiction over their real target. The UK court also relied on Zambian law to hold that Zambian courts as an adherent of the English common law legal system would naturally interpret principles of negligence in line with the English common law.[59] The Court in this sense came short of judging the Zambian legal system. The trial judge held that the proper place for the case against KCM was England with the reason that the claimants were not assured of adequate legal representation due to their inability to fund the lawsuit.

On appeal, brought by each defendant on its own, they contended that the claimants were wrongfully pursuing Vedanta to get KCM to defend itself in English courts, other than in a Zambian court. They further averred that relying on the "group-wide policies" to conclude that Vedanta owed a duty of care for the impact of KCM would amount to promulgating "a new category of common law negligence." Thiswas outrightly rejected by Lord Briggs. The appeal brought to the fore two issues that the court took up in its judgment. The first issue was for the court to deal with

[59] ibid 56.

standards required to assess a parent company's responsibility for harms caused by its subsidiaries in common law negligence. For the implementation of the Guiding Principles, this issue is deemed important for international human rights jurisprudence.[60] On the second issue on whether or not England was the proper forum for trial against KCM other than Zambia, it was held that the court recognised that the claimants could only be guaranteed "substantial justice" in a jurisdiction where they would have appropriate legal representation. Even though the trial judge had agreed that Zambia could have the proper place for trial against KCM, he did not allow that because of the "closely related claim against Vedanta."

In its unanimous verdict, Lord Briggs on behalf of the Court emphasised the right of access to substantial justice for the victims. Lord Briggs posited that "parent companies that hold themselves out in public disclosures as overseeing the human rights, environmental, social, or labour standards employed by their subsidiaries assume a duty of care to those harmed by the subsidiary." This enunciation is considered to transform the way companies would approach their policies on human rights due diligence and accountability.[61] The trial court again affirmed that Vedanta's group-wide policies created a real, triable issue against the parent company. To the Court, the claimants' pursuit extended beyond the benefit of securing the court's jurisdiction over KCM Vedanta but also to cover Vedanta.[62] In the end, the Supreme Court of the UK agreed with the trial judge that the proper place for the case against KCM was England.

The implication for Ghana on the score of the principles from *Vedanta* is to take a proactive step at legislating by way of policy or enabling legislation based on Article 36 (4) and chapter 5 of the Constitution. Apart from considering enacting specific laws to deal with jurisdictional issues of BHRs, it is also instructive to take note of the extraterritorial issues that would inure especially to local people as possible claimants against mother companies domiciled abroad.

[60] Tara (n 58) 110.
[61] ibid.
[62] ibid.

Normative development on BHRs law in Ghana

The Constitution of Ghana is the foremost legal framework of the country for the regulation of all economic objectives, including the regulation of FDIs.[63] This legal environment naturally has given Ghana an urge in attracting FDIs, mostly involving MNCs.[64] Apart from the general precepts on human rights under, especially, Chapter 5 of the Constitution, there is no yet specific domestic legislation on BHRs in Ghana. Business regulations, as far as compliance is concerned, is rather taken care of under distant laws.

Ghana's foremost attempt towards a greater effort to advance BHRs was in July 2013 when the government officially invited two members of the Working Group of the UN[65] on the issue of human rights and TNB operations in the country.[66] The deliberations were held among all relevant stakeholders, namely, Government, Parliament, business enterprises and industry associations, affected stakeholders, civil society organisations, the Ghana Commission on Human Rights and Administrative Justice and other stakeholders.[67]

According to a report of the UN, the objectives of the visit were:

To raise awareness of, and advocate for, implementation of the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex)[68]…; identify current initiatives, developments, opportunities, challenges and good practices to prevent and identify adverse impacts of business activities on human rights; and identify any particular challenges faced by groups at risk of being in vulnerable situations.[69]

The visit conferred with the stakeholders to identify critical issues that havepotential and actual propensities to impact negatively on businesses as well as assessthe efforts underway to ensure the respect for human rights by businesses in

[63] Constitution of Ghana, 1992 art 36(4).
[64] ibid.
[65] United Nations (n 547).
[66] ibid.
[67] ibid.
[68] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (New York/Geneva, 2011).
[69] United Nations, ibid (n 547).

Ghana.[70] The experts confirmed that the fast pace of economic growth in Ghana demands a reciprocal focus on strengthening institutions to oversee business activities effectively.[71] Some critical findings of the group were that in the mining sector, in particular, there exist legacy issues; in the cocoa supply chain and informal sector, child labour was a challenge; and access to land and resettlement for local people for livelihoods was a major problem.[72] Underlining these issues was the fact that businesses and government have over the years failed to engage meaningfully with affected communities and avail information to them for the necessary inputs into decisions affecting their human rights.[73] Just at the time when Ghana's Industrial Policy was launched in June 2011, the Government of Ghana also approved the National Policy on Public-Private Partnership (NPPPP).[74] The essence of the latter policy was to accelerate private-sector participation in infrastructure and public service delivery. The NPPPP considered why public- private partnerships integrate the highest standards of environmental, climate and social safeguards, especially for vulnerable groups in society. It is was on this basis that the Working Group emphasised the need for the country to maintain its human rights obligations when any of its public agencies contracted with the private sector for the delivery of public services. It was the same for ensuring that all Government's decisions for public-private partnerships integrated impact assessments and human rights mechanisms through due diligence.[75] All these mechanisms will require the necessity to equip the judiciary and para-legal agencies of the country to undertake effective monitoring compliance with regulations and legislation regulating such businesses.[76] Ghana has signed and ratified eight out of all nine of the core international human rights treaties. It has also ratified all eight

[70] ibid.
[71] Korankye-Sakyi (n 561).
[72] United Nations (n 1).
[73] ibid.
[74] Ghana, Ministry of Finance and Economic Planning "National Policy on Public Private Partnerships (PPP): Private Participation in Infrastructure and Services for Better Public Services Delivery (June 2011) <http://www.mofep.gov.gh/sites/default/files/docs/pid/ppp_policy.pdf> accessed 12 May 2021
[75] United Nations (n 1).
[76] ibid; FK Korankye-Sakyi 'The Role of International Financial Institutions in Protecting the Vulnerable during Pandemics: Focus on World Bank in Developing Economies' (2021)21(2) Journal of Business Diversity, 170.

fundamental International Labour Organisation (ILO) Conventions, as well as 44 of the 177 ILO technical conventions in force as of 2013.[77] In essence, apart from the international treaties and protocols Ghana has signed and ratified largely, the country's effort at developing specific laws and policies for the regulation of BHRs has been insignificant. In a nutshell, there is no domestic policy of BHRs for Ghana.

Analysis of case law jurisprudence on BRHs in Ghana

There is a plethora of case emergence and development of case law jurisprudence over the liabilities of MNCs in European domestic courts that cover the facts on human rights violations against community interests in their host states.[78] This is contrary to the story in Africa, and especially for Ghana, where alleged negative impacts of human rights by MNCs have not found a place in the ordinary courts for redress. In few cases, affected communities have taken solace in the home statesof subsidiary companies to successfully hold parent companies liable for negligence in tort and subsequently awarded compensations.[79] In the absence of a compelling and substantive legal framework for seeking claims against subsidiaries in host countries, most victims rather rely on the legal arrangements in the home states of parent companies to seek redress. This is because case law precedents reveal that the success of claims against parent companies in matters of BHRs depends largely on the viability of such claims. To this end, the legal conduit adopted by claimants has been through the common law tort of negligence where the duty of care has become the key element for the determination of culpability of defendants or otherwise.[80] For example, in the case of *Caparo Industries v Dickman,*[81] the

[77] The United Nations (n 4).

[78] L Roorda & D Leader '*Okpabi v Shell and Four Nigerian Farmers v Shell*: Parent Company Liability Back in Court' (2021) Business and Human Rights Journal, 1; See: E Aristova 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14 Utrecht Law Review, 6; L Roorda, *Adjudicate This! Foreign Direct Liability and Civil Jurisdiction in Europe* In A Bonfanti (ed.) Business and Human Rights in Europe (Routledge, Abingdon 2018); D Augenstein, 'Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy' (2018) 18 Human Rights Law Review 593; L Enneking Foreign Direct Liability and Beyond (Antwerp, Intersentia 2012); R Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the PositionOutside the United States' (2011) 3 City University of Hong Kong Law Review, 1.

[79] *Owusu v. Jackson* (Case C-281/02) [2005] ECR I-1383; *Okpabi and others v. Royal Dutch Shell plc and Another* [2021] UKSC 3; *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v. Lungowe and Ors.* (Respondents) [2019] UKSC 20; *Four Nigerian Farmers and Stichting Milieudefensie v. Royal Dutch ShellPlc and Another* [2021] ECLI: NL.

[80] *Okpabi and others v Royal Dutch Shell plc and another,* (n 86).

[81] *Caparo Industries v Dickman* [1990] 2 AC 605.

issues were determined to be whether there was foreseeability in damage caused; whether defendant and claimant were in sufficient proximity to each other; and whether it would be "fair, just and reasonable" to impose a duty of care on the defendant.[82] Like other common law legal systems, the critical legal question in many judicial precedents terminates in answering whether parents companies would be liable under dereliction of duty of care to employees or third parties affected by activities of their subsidiaries in host countries.[83] Another context because of which claimants may be encouraged to seek extraterritorial interventions in BHRs complaints are based on the doctrine of *f*orum *non conveniens*. Under the English legal system (common law), *f*orum *non conveniens applies when* a domestic (host nation) court may decline to exercise jurisdiction by reason that a court in another country (usual with the same legal system), which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action. It suggests that the elected forum in which the case may be tried is more suitably for the interests of all the parties and the ends of justice.[84] In many cases of BHRs involving MNCsand local peoples, this principle has been activated to seek justice.[85]

An assessment through this paper reveals that there has been little case law on the BHRs situation in Ghana, especially with those involving MNCs.[86] Cases so far considered are not typical BHRs cases involving MNCs or private enterprises for that matter. In those instant cases,[87] there is no reference to any BHRs legal authority, either in law or policy from which the Ghanaian courts relied on to arrive at their decisions. That makes it even direr for a policy framework that will deal with even domestic human rights issues concerning labour conditions. This is not

[82] The Implications for Parent Company Accountability' (2019) 5 Business and Human Rights Journal, 130.
[83] *Owusu v Jackson* (Case C-281/02) [2005] ECR I-1383; *Vedanta Resources Plc and Konkola Copper Mines Plc.*
[84] *Spiliada Maritime Corporation* v *Cansulex Ltd* [1987], AC 460, particularly 476.
[85] See *Andrew Owusu v. Jackson*, (trading as 'Villa Holidays Bal-Inn Villas')
[86] See: *The Commissioner, CHRAJ & 2 Ors v. Ghana National Fire Service & Attorney-General (*Unreported Judgment of the High Court, Accra, Human Rights Division, in Suit No. HR 0063/2017 delivered on 23 April 2018); *Mrs. Abena Pokuaa Ackah v. Agricultural Development Bank* Civil (Appeal No: J4/31/2015, 28th July, 2016)
[87] ibid

to say that there are not many MNCs in Ghana and their activities are not impacting negatively on human rights. Many factors may be assigned for this scenario. In the mining sector alone, statistics indicate that 70 percent of total FDI inflows to Ghana over the last 15 years went to the minerals sector alone.[88] Ghana is also a net producer of petroleum products.[89] Apart from a few sub-contractors, almost all companies in the mining and oil and gas sector are of the expatriate origin or have their parent companies headquartered in Europe of America.[90]

Indeed, apart from the absence of the appropriate institutional and normative legal space to assist in the orientation of the citizen and also help them to seek redress, there is also the remote reason discussed by Korankye-Sakyi in the topic "The civil justice reform debate: An African perspective."[91] According to him, "…the formalistic Western-system of civil justice jurisprudence under either civil or common law legal system is regarded as cumbersome and unappealing to the African citizen and the marginalised in particular."[92] He argued that "it is [therefore] not for want of legal precincts that discourages the African from staying away from civil suits or judicial remedies but it is because the socio-cultural and religious tendencies play a defining role for the African in such instances."[93] In this regard, many civil complaints are lost on the way through informal settlements or abandonment to save time, avoid the cost and maintain social order.

Conclusions

This article essentially highlights both judicial and non-judicial remedies; jurisdictional impediments and applicable law barriers to citizens' grievances. This study identified that, for varied reasons, there are few reported cases on BHRs cases

[88] NS Energy, 'Top Five Gold Mining Countries of Africa from Ghana to Burkina Faso' (2020) <https://www.nsenergybusiness.com/news/top-gold-mining-countries-africa/> accessed 28 July 2021; Williams, et al., ibid (n 47).
[89] International Trade Administration, 'Ghana-Country Commercial Guide: Oil and Gas' (2020). <https://www.trade.gov/knowledge-product/ghana-oil-and-gas> accessed 8 July 2021
[90] Examples of these companies in the petroleum industry are Tullow Ghana, Cosmos Energy, ENI, ExxonMobil, Hess Ghana Limited, Schlumberger, Baker Hughes, Weatherford, Ocean Rig and Technip.
[91] FK Korankye-Sakyi, *The Civil Justice Reform Debate: An African Perspective*InYin ET &Kofie N, (eds.) Advancing Civil Justice Reform and Conflict Resolution in Africa and Asia: Comparative Analyses and Case Studies (IGI Global Publishers, New York 2021) 46.
[92] ibid.
[93] ibid.

in the Ghanaian setting[94] and none was taken up at the foreign jurisdictions based on the doctrine of *fo*rum *non conveniens,* and that must not be taken to be the absence of violations but rather must be of a greater concern to the government to address the inherent suppression in the legal and policy space as a result of the lack of the facilities to address BHRs concerns.

As stated, the Guiding Principles do not create new international law obligations, limits, or undermine any legal obligations a state may have undertaken or be subject to under international law about human rights. From the issues discussed in this paper, the areas for critical concern in the BHRs jurisprudence in Ghana should include, but are not limited to the political will of the government to protect its citizens, and the ability to assemble the data for a proper framework on BHRs for the country, the ability of the government to assemble the needed and appropriate resources to initiate the road to a policy for BHRs, the timeous efforts to get the draft policy in place for follow-ups.

First, itisclearfromtheexistingpolicyandregulatoryframeworkonbusinessthatthere is no framework on BHRs in Ghana except for distant laws on general commercial activities, civil case precedents and specific industry laws.[95] This addresses the first objective of this paper to assess the existing policy and regulatory gaps from Ghana's point of view in regulating BHRs. This serves as a note for Ghana to consider framing and legislating the right policy and law to govern BHRs interrelationships in the manner that sinks with the international protocols on BHRs.

[94] *The Commissioner, CHRAJ & 2 Ors v Ghana National Fire Service & Attorney-General (*Unreported Judgment of the High Court, Accra, Human Rights Division, in Suit No. HR 0063/2017 delivered on 23 April 2018); *Mrs. AbenaPokuaaAckah v Agricultural Development Bank* Civil (Appeal No: J4/31/2015, 28th July, 2016).

[95] The Companies Act, 2019 (Act 992); The Sale of Goods Act, 1962 (Act 137); the Income Tax Act, 2015, (Act 896) as amended; the Free Zones Act, 1995, (Act 504); Criminal Offences Act, 1960 (Act 29); the Petroleum (Exploration and Production) Act, 2016 (Act 919)Petroleum Explorationand Production (General) Regulations, 2018 (L.I 2359); the Investment Promotion Centre Act, 2013 (Act 865); Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204); the Environmental Protection Agency Act, 1994 (Act 490); Minerals and Mining Act 2006, (Act 703)as amended.

Second, as is often said "creating jobs and wealth are good, but the social and environmental costs can be extreme." MNCs by their wealth and influence wield significant economic power in every sphere they find themselves in and can dictate the direction of governance. This makes it difficult for the poor masses to defend themselves against the violations of their human rights and defend the untameable exploitation of their exhaustive natural resources. This requires that state government must be able to intervene with the right policies before the occasioning of such abuses and also strengthen their legal structures to take on such MNCs in times of actual abuses. The state must take on the responsibility to defend its citizens, first against abuses and also seek the appropriate remedies to resolve their grievances.

Last, the position of Ghana in the architecture of the AfCFTA making it the epicentre of the trade interactions on the continent must awaken it to put in place, at least, a normative framework to safeguard its citizens and environment in general from human rights abuses that may be occasioned by the MNCs. By the position of Ghana in the architecture of the AfCFTA, MNCs would eventually take advantage of the market situation of the country with an influx of trade and investment portfolios. Ghana as an attraction for FDI, therefore, has no option other than to work toward adopting a framework on BHRs in the shortest possible time.