African Journal of International Economic Law

Volume 2 | Fall 2021

SHERIA PUBLISHING HOUSE

AfronomicsLAW

African Journal of International Economic Law

Volume 2 | Fall 2021

Sheria Publishing House

AfronomicsLAW

Published by Sheria Publishing House, Nairobi
P.O. Box 56095 – 00200
Nairobi , Kenya.

Design & Layout by Almond Print Ltd.

Table of Contents

Contents

Lead Articles

African Practice In International Economic Law

Case Note

Book Reviews

Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development

Katrin Kuhlmann*

Abstract

There is a growing consensus that we are at a turning point in international trade law and international economic law (IEL) more generally, signaling the possibility for a more inclusive and sustainable approach to law and development. The multilateral system of trade rules has reached an impasse, and the COVID-19 pandemic, resulting economic crisis, and mounting issue of climate change highlight vulnerabilities that the current rules-based system is ill-equipped to address. These include systemic vulnerability at the State level and vulnerabilities at a more disaggregated, stakeholder-specific level that impact individuals and communities. Given that more vulnerable and less diverse economies, racial and ethnic minorities, indigenous and rural populations, and smaller enterprises tend to be disproportionately underrepresented in the global economic system, it is time to issue a strengthened call for new normative frameworks and a concrete plan of action for inclusive trade and development. The vulnerabilities of "State" and "subject" also argue for fresh approaches that incorporate more diverse legal innovations and go beyond narrow "best practices" in IEL.

This paper contributes to the literature in two ways. First, it compares legal approaches for addressing vulnerability at both the State and stakeholder levels, framing legal and regulatory design and implementation in light of inclusive and sustainable development. In the context of State vulnerabilities, the paper incorporates traditional approaches to trade and development, namely use of special and differential treatment and the assertion of "policy space", as well as growing trends to incorporate flexibility and sustainable development into legal mechanisms. The article goes beyond this foundation, however, to present a lens through which to assess rules and their impact at the more individual or stakeholder level, linking a "bottom-up" approach to law

* Visiting Professor of Law, Georgetown University Law Center and President and Founder, New Markets Lab (NML). This article builds upon an earlier publication for the Afronomicslaw Symposium on the Vulnerability in the Trade and Investment Regimes in the Time of COVID-19 2020. *See* Katrin Kuhlmann, *Flexibility and Innovation*, *infra* note 2. The author would like to thank Salma Shitia, Cristen Bauer, Beneva Davies-Nyandebo, and Sandrine Siewe for their invaluable research support over the course of the 2020-21 academic year, as well as Aline Bertolin for her comments on an advanced version of the draft. Also, thanks to colleagues at Georgetown University Law Center, in particular the Fall Colloquium of the Institute for International Economic Law (IIEL), for feedback on this research. Finally, the author would also like to thank the board, staff, international legal specialists, and legal fellows, past and present, of NML, in particular Susan Sechler, Eugene Terry, Jung-ui Sul, Shannon Keating, Karen Bosman, Adron Naggayi Nalinya, Tara Francis, Mushfiqur Rahman, Indulekha Thomas, Justin Bryant, Luke Warford, Megan Paster, and the many others who have participated in NML's ongoing law and development lab.

and development with the more traditional State-to-State model. This aspect of the paper draws upon a decade of empirical work conducted in sub-Saharan Africa and Asia and illustrative case studies to highlight an approach that could inform future IEL.

The paper's second contribution is the presentation of an analytical framework, or topology, and preliminary set of options that allow for comparison of the design and implementation of economic law across seven dimensions: (1) special and differential treatment; (2) flexibility; (3) sustainable development; (4) equity; (5) engagement, inclusiveness, and transparency; (6) legal and regulatory gateways; and (7) implementation and impact. Across all seven dimensions, the paper highlights innovative legal and regulatory approaches present in both trade agreements and domestic law. The seven dimensions, and the methodology presented in the paper, establish the basis for a broader research agenda that maps and eventually measures inclusive design and implementation of international and national economic law, collectively referred to as "inclusive regulation". Ultimately, the paper proposes a new model for using economic law to better address both systemic and individual vulnerabilities as we usher in a new chapter in international trade law and IEL.

I. Introduction

The system of rules surrounding international economic law (IEL), and international trade law more specifically, has reached a turning point. Movements in law and development correspond with movements in legal and economic history,[1] and the COVID-19 pandemic and climate change, coupled with the impasse within the World Trade Organization (WTO), signal that yet another shift is underway. The current turning point is leading to the need for a systemic retooling of international law and development focused more on equity and inclusiveness,[2] economic dignity,[3] shared voice in the global trading system among the Global North and South,[4] sustainable development and environmental sustainability,[5] and distributive justice.[6]

1 Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* The New Law and Economic Development: A Critical Appraisal (D. Trubek & A. Santos eds., 2006).

2 *See* Robert Howse & Kalypso Nicolaïdas, *Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large,* 79 L. & Contemp. Probs. 259, 282 (2016), available at https://scholarship.law.duke.edu/lcp/vol79/iss2/12. *See also* Gillian Moon, *Trade and Equality: A Relationship to Discover,* 12 J. Int'l Econ. L. 617 (2009); Chantal Thomas, *Income Inequality and International Economic Law: From Flint Michigan to the Doha Round, and Back* (Cornell Legal Stud., Rsch. Paper No. 19-08, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3341523; Jennifer Harris, *Making Trade Address Inequality,* 48 Democracy J. (Spring 2018), available at https://democracyjournal.org/magazine/48/making-trade-address-inequality/; Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion* 2019 U. Ill. L. Rev. 1, 29 (2019), available at https://www.illinoislawreview.org/wp-content/uploads/2019/03/Shaffer.pdf; Timothy Meyer, *The Law and Politics of Socially Inclusive Trade,* 2019 U. Ill. L. Rev. 32 (2019); Katrin Kuhlmann, *Flexibility and Innovation in International Economic Law: Enhancing Rule of Law, Inclusivity, and Resilience in the Time of COVID-19*, Afronomicslaw, (Aug. 27, 2020) [hereinafter *Flexibility and Innovation*], https://www.afronomicslaw.org/2020/08/27/flexibility-and-innovation-in-international-economic-law-enhancing-rule-of-law-inclusivity-and-resilience-in-the-time-of-covid-19.

3 *See* Abhijit Banerjee & Esther Duflo, Good Economics for Hard Times (2019).

4 *See* James Thuo Gathii, *Fairness as Fidelity to Making the WTO Fully Responsive to All Its Members*, 97 Proc.

This not only presents an opportunity to reimagine the design and application of economic rules across and within borders, it also provides an opening to think beyond the usual limitations of geography and bias that can be inherent (explicitly or implicitly) in economic law. Despite the challenges that have led to the current turning point, it ushers in the chance to consider legal innovations from a much broader pool of countries, including those in the Global South,[7] and also creates the space to incorporate the needs of a much wider range of legal stakeholders into IEL. In doing so, the current moment presents an opportunity to craft and implement more diverse legal and regulatory approaches that could better address vulnerabilities and achieve a new "globalization" that is truly global.[8]

While existing trade rules have worked well in some situations, such as providing the ground rules for reducing discrimination in trade and strengthening supply chains, they have been ill equipped to address a number of the vulnerabilities exposed by the pandemic. [9] In addition, the current system has long struggled with achieving a more equitable distribution of economic benefits.[10] Confronting these challenges

Am. Soc'y Int'l L. Ann. Meeting 157, 157 (2003) [hereinafter *Fairness as Fidelity*]; Dani Rodrik, The Globalization Paradox (2011); Sonia E. Rolland & David M. Trubek, Emerging Powers in the International Economic Order: Cooperation, Competition, and Transformation (2021).

5 *See* Gabrielle Marceau & Fabio Morosini, *The Status of Sustainable Development in the Law of the World Trade Organization, in* Arbitragem e Comercío Internacional (Umberto Celli Junior et al. eds., 2013). *See also* Thabo Fiona Khumalo, *Sustainable Development and International Economic Law in Africa*, 24 L. Democ. & Dev. 133 (2020); Kuhlmann et al., Trade Policy for a Resilient, Inclusive, and Sustainable Development in A New International Economic Order (June 2020), available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_4460da2de0e746dd81ad32e003cd0bce.pdf; Kuhlmann et al., *Reconceptualizing Free Trade Agreements Through a Sustainable Development Lens*, NML (July 27, 2020) [hereinafter *Reconceptualizing FTAs*], available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_8b66c44bd19b4683b974eaa267fd4070.pdf.

6 *See* Abdul Hasib Suenu, *Distributive Justice, SDT Provisions, and the African Continental Free Trade Agreement*, Afronomicslaw (Mar. 18, 2019), available at https://www.afronomicslaw.org/index.php/2019/03/18/distributive-justice-sdt-provisions-and-the-african-continental-free-trade-agreement; David Trubek et al., *World Trade and Investment Law in a Time of Crisis: Distribution, Development, and Social Protection*, *in* World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization (A. Santos et al. eds., 2010). *See also* Harlan Grant Cohen, Comment, *What is International Trade Law For?*, 113 Am. J. Int'l L. 326-46 (2019); Nicolas Lamp, *How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements*, 30 Eur. J. Int'l L. 1359 (2019), to be expanded upon in Anthea Roberts & Nicolas Lamp, Six Faces of Globalization: Who Wins, Who Loses, and Why it Matters (forthcoming 2021).

7 *See* Obiora Chinedu Okafor & Maxwel Miyawa, *Africa as a "Theatre" of International Law and Development: Knowledge, Practice, and Resistance*, *in* Oxford Handbook of Law and Development (forthcoming).

8 In his Grotius Lecture, Gathii concludes by emphasizing "we can all agree that issues of race and identity have so far been underemphasized, understudied, and undertheorized in international law," and "a full accounting of our discipline would be incomplete without critical approaches such as Third World Approaches to International Law or Critical Race Theory." Gathii, Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law: The Promise of International Law: A Third World View, at 27 (June 25, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509. *See also* Makau Mutua, *What is TWAIL?,* 94 Am. Soc'y Int'l L. Proc. 31 (2000); Olabisi Akinkugbe, *Reflections on the Value of Socio-Legal Approaches to International Economic Law in Africa,* 22 Chi. J. Int'l. L. 1 (2021); Olabisi D. Akinkugbe, *Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)*, 1 Af. J. Int'l. Econ. L. 297 (2020).

9 *See* Kuhlmann, *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic,* U.N. Econ. & Soc. Comm'n Asia & Pac. (Sep. 24, 2021) [hereinafter *Handbook*], https://www.unescap.org/sites/default/d8files/knowledge-products/Handbook%20FINAL%2029Sept2021%28edited%29.pdf.

will require both maintaining the foundation of law that has served important goals, particularly a number of aspects of the multilateral rules established under the WTO that now also underpin many regional trade agreements (RTAs), while revisiting the "legal ground rules"[11] of trade and IEL in areas that require attention. In doing so, it will be important to critically assess what Gathii calls a "façade of neutrality regarding how the rules of the international trading regime are crafted, applied, and adjudicated."[12] It will also necessitate looking at what drives and informs these rules in the first instance, evaluating both what individuals need and what lawyers and policymakers take into account when designing economic laws and treaties. Overall, this exploration will have implications for how international trade agreements and national law are drafted, discussed, and applied.

This paper presents a comparative, socio-legal approach for mapping trade and economic rules, both international and domestic, in the context of inclusive and sustainable development across seven dimensions:[13] (1) special and differential treatment; (2) flexibility; (3) sustainable development; (4) equity; (5) inclusiveness, engagement, and transparency; (6) legal and regulatory gateways; and (7) implementation and impact, including distributive effects.[14] While some of these are already present in international legal approaches to varying degrees others, particularly the more "stakeholder-driven" dimensions,[15] are largely absent in a meaningful way. Through empirical research and real-world examples, this paper provides entry points for all seven of these dimensions, setting the stage for a broader comparative law mapping and research agenda to address current gaps in the system, systemic capacity challenges, and responsiveness to existing vulnerabilities and inequalities.

A number of vulnerabilities surface at the systemic level that provide context for this approach. These include unequal voice in setting global rules, uneven influence in

10 *See* Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality (2019).

11 *See* Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 Legal Stud. F. 327 (1991).

12 *See* Gathii, *Fairness as Fidelity*, *supra* note 4, at 157.

13 These factors are based on research and a socio-legal and empirical approach developed by the author and practiced through the law and development organization, NML. While just a starting point, this approach will form the basis for a broader research agenda and a digital comparative law database under development by NML and its partner Verdentum that will house legal and regulatory options across the seven dimensions of inclusive and sustainable development presented in this paper and establish a comparative law library that can be built out over time, ideally in partnership with academic institutions and local partners.

14 Implementation is used throughout this discussion in several interrelated contexts. One involves the institutional changes, resources, and set of government interventions, including development of new laws and regulations, needed to implement the obligations in a trade agreement. *See* Jean-Pierre Chauffour & David Kleimann, Presentation at the Society for International Economic Law's Third Biennial Global Conference: The Challenge of Implementing Preferential Trade Agreements in Developing Countries – Lessons for Rule Design (July 12, 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2104183#. Implementation will also be used to refer to the ongoing process of applying laws and regulations in practice, particularly through national law, as well as the interplay between these different contexts.

15 The term "stakeholders" is used to represent a broad range of individuals, communities, and voices from the field. Stakeholder vulnerabilities are diffuse and interconnected, exhibiting "capillarity" in terms of the impact of legal dimensions and decisions on different populations, vulnerable groups, and individuals. *See, e.g.,* Jeffrey Alwang et al., *Vulnerability: A View from Different Disciplines* (Soc. Prot. Discussion Paper Series, Paper No. 115, 23304, 2001), available at https://documents1.worldbank.org/curated/en/636921468765021121/pdf/multi0page.pdf.

determining the flow of global resources (such as medicines, vaccines, and food during a health crisis), susceptibility to trade shocks and crisis, and uncertainty in the efficacy of policies and laws. They also include longstanding vulnerabilities such as disparities in economic diversity and export earnings, unequal capacity to benefit from trade, and geographic and product-based market considerations.[16] Alongside these systemic vulnerabilities, the paper addresses vulnerabilities at the stakeholder and community levels, or "subject" vulnerabilities,[17] that impact marginalized races and ethnic groups, vulnerable communities, women, and individuals facing varying circumstances that contribute to economic dignity and the ability to benefit from trade. These include explicit or inherent bias in rules and regulations, unequal voice in the rulemaking process, information asymmetries, and other considerations. As this paper will discuss, while the approaches to address these different types of vulnerabilities intersect, they are not the same, and greater attention is needed on how IEL plays a role at both the systemic and stakeholder/field levels.

While the paper will focus on qualitative dimensions of inclusive law and regulation, relevant measures are worth noting. As the rules of the international trading system increasingly extend beyond the WTO to encompass RTAs, which are generating law in new areas,[17] understanding differences in context, design, application, and adjudication across these instruments will become increasingly important. National law, which flows from these international legal instruments and often informs them as well, is also important. In addition, the UN Sustainable Development Goals (SDGs) are relevant, as is human rights law, which provides the basis for a number of the SDGs. The target for SDG 17.10, for example, is directly related to trade law, recognizing the need to "promote a universal, rules-based, open, non-discriminatory and *equitable* multilateral trading system" (emphasis added).[19] However, although the SDGs offer some guidance on how trade rules could address vulnerability, they do not provide a more precise roadmap on how to more comprehensively incorporate equitable and inclusive approaches into trade law and its implementation, necessitating complementary tools and approaches. Such as roadmap could include more inclusive options for trade rules, enhanced capacity, multilateral and regional cooperation, and methods for incorporating broader development considerations and the needs of individuals into the trade rulebook.

16 *See* U.N. Conf. Trade & Dev., Trade and Development Report 2014: Global Governance and Policy Space for Development [hereinafter T&D Rep.], U.N. Doc. UNCTAD/TDR/2014, U.N. Sales No. E.14. ILD.4 (2014), https://unctad.org/system/files/official-document/tdr2014_en.pdf. *See also* Jürgen Habermas, The Theory of Communicative Action (1984).

17 *See* Martha Feinman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J. L. & Feminism (2008).

18 RTAs are increasingly creating law in additional areas, including digital regulation, gender, traditional knowledge, competition, and other areas. As Howse & Nicolaïdas highlight, RTAs introduce the possibility of innovation in economic law, however, it remains important that "regional deals must not exploit asymmetries of power vis-à-vis the rest of the world." *See* Howse & Nicolaïdas, *supra* note 2, at 282. *See also* Chris Brummer, Minilateralism: How Trade Alliances, Soft Law, and Financial Engineering are Redefining Statecraft (2014).

19 Rep. of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators, Annex IV, U.N. Doc. E/CN.3/2016/2/Rev.1 (2016) [hereinafter UN SDGs].

This paper is particularly focused on the different dimensions of inclusive law and development that a redesign of trade's "legal ground rules" will need to take into account in light of systemic and stakeholder-driven vulnerabilities. It does this in several phases. First, the paper will examine how international trade law currently incorporates development considerations, including through special and differential treatment and use of "policy space", flexibility in rules, and sustainable development. Building upon this foundation, the discussion will then shift to an additional set of characteristics that are central to inclusive trade and development but not fully captured under current approaches. These include equity; inclusiveness, engagement, and transparency; legal and regulatory gateways that present opportunities to tailor rules to stakeholder needs and development priorities (and create the space for stakeholders to voice their own needs in legal and regulatory design); and impact and implementation. The paper concludes with a number of "options" for inclusive trade rules that appear in international and domestic law across the seven dimensions and which could be expanded upon to address future vulnerabilities. These options also highlight the importance of moving beyond narrow conceptions of "best practices" to encompass more diverse legal innovations, highlighting how different regions and States have designed and applied rules to put the needs of vulnerable individuals and communities first, while creating spaces for effective communication and engagement in the rulemaking process.

II. The Building Blocks of Inclusive Trade Law: Special and Differential Treatment, Flexibility, and Sustainable Development

Development is certainly not a new concept in the field of international trade law. The link between trade and development dates back to the start of the multilateral trading system and the General Agreement on Tariffs and Trade (GATT).[20] Since then, global trade rules have become more expansive, and the initial foundation for trade and development has been further developed through multilateral rules and RTAs. Throughout this history, development-led trade approaches at the institutional level have largely focused on enhanced market access, safeguarding of developing countries' economic interests, and flexibility and capacity building. These approaches, however, have not focused systemically on an affirmative use of law to drive development and have overlooked some key challenges.[21]

20 General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 55 U.N.T.S. 194, 258, *as incorporated and modified by* General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1869 U.N.T.S. 154 [hereinafter GATT]. The 1958 Haberler Report marked a significant "landmark" in the evolution of trade and development, highlighting the importance of addressing vulnerabilities such as insufficient export earnings, fluctuating commodity prices, and agricultural protectionism, which led to calls for addressing developed country trade barriers in particular. *See* Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When, and How?*, at 3-4 (World Trade Org. Econ. Rsch. & Stat. Div., Working Paper No. ERSD-2004-03, 2004).

21 Kuhlmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Model for Trade and Development Law*, 51 Geo. J. Int'l L. 4 (2020); *see also* Kuhlmann, *Reframing Trade and Development: Building Markets Through Legal and Regulatory Reform*, E15 Initiative (Nov. 2015) [hereinafter E15], available athttp://e15initiative.org/publications/reframing-trade-and-development-building-markets-through-legal-and-regulatory-reform/.

A. Special and Differential Treatment and Policy Space as Tools for Development-Led Trade

Trade and development have traditionally been viewed through two interrelated approaches, special and differential treatment (S&DT, also referred to as S&D or SDT) and "policy space," both of which provide necessary but not sufficient entry points for inclusive trade rules. S&DT can be broadly defined as "special rights" for developing countries,[21] while policy space generally refers to the flexibility governments have within trade rules to put in place policies that will best achieve equitable and sustainable development and other policy objectives.[22] S&DT and policy space were designed to address certain vulnerabilities, namely differences in economic diversity and export earnings, infant industry and balance of payments considerations, trade protectionism (particularly in sectors such as agriculture), and lack of capacity to engage in trade.[23] While both tend to be focused at the State-to-State level, exercise of policy space also necessarily involves domestic law.[24] The link between S&DT and broader development considerations is apparent in the SDG targets, which explicitly reference S&DT in Target 10.a "Implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements."[25] As elaborated below, both S&DT and policy space can be effective if used well but problematic if not well tailored.

22 WTO Secretariat, Special and Differential Treatment Provisions in WTO Agreements and Decisions, WTO Doc. WT/COMTD/W/239 (Oct. 12, 2018) [hereinafter WTO S&DT], available at https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm. *See also* James Bacchus & Inu Manak, *The Development Dimension: What to do About Differential Treatment in Trade*, Cato Institute (Apr. 13, 2020), https://doi.org/10.36009/PA.887; Keck & Low, *supra* note 20; D.B. Magraw, *Existing Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms*, 60 Colo. J. Int'l Envtl. L. & Pol'y 69 (1989).

23 UNCTAD, established in 1964 as part of the push to integrate trade and development, defines policy space as "the freedom and ability of a government to identify and pursue the most appropriate mix of economic and social policies to achieve equitable and sustainable development that is best suited to its particular national context". *See* T&D Rep., *supra* note 16, at 34. *See also* Jagdish Bhagwati, In Defense of Globalization (2004); Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. Int'l Econ. L. 405 (2005); Alisa DiCaprio & Kevin P. Gallagher, *The WTO and the Shrinking of Development Space: How Big is the Bite?,* 7 J. World Inv. & Trade 781 (2006); Sheila Page, *Policy Space: Are WTO Rules Preventing Development?,* Overseas Dev. Inst. 1 (Jan. 22, 2007), https://cdn.odi.org/media/documents/106.pdf. Economist Dani Rodrik has been a longstanding proponent of policy space within the framework of IEL, especially for developing economies that could benefit from the adoption of measures to advance industrial development and economic diversification. *See, e.g.,* Dani Rodrik, Straight Talk on Trade: Ideas for a Sane World Economy (2018); Dani Rodrik, The Globalization Paradox (2011).

24 *See* Keck & Low, *supra* note 20, at 3-4.

25 After all, "the greatest buffer in cushioning the effects of globalization is at the state level". *See* Howse & Nicolaïdas, *supra* note 2, at 278. *See also* Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico,* 52 Va. J. Int'l. L. 551 (2012); James J. Nedumpara, *Imagining Space in India's Trade and Investment Agreements* (São Paulo L. Sch. Fundação Getulio Vargas – Fgv Direito SP Rsch Paper Series, Legal Stud. Paper No. 113, 2014); Manoj Mate, *The WTO and Development Policy Space in India*, 45 Yale J. Int'l. L. 285 (2020).

Legally, the integration of S&DT and policy space into the broader system of trade rules has evolved over time, beginning with Article XVIII of GATT 1947 that allows for policy space in the context of infant industry protection and balance of payments challenges.[27] Several key legal provisions incorporate S&DT into the rules, including Part IV of the GATT (1965) which established the principle of non-reciprocity (Article XXXVI:8 of Part IV)[28] and the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) which codifies aspects of S&DT, noting that S&DT should "be designed and, if necessary, modified, to respond positively to the development, financial, and trade needs of developing countries."[29] In addition to GATT Article XVIII, GATT Part IV, and the Enabling Clause, S&DT appears throughout the WTO Covered Agreements in 183 instances.[30] S&DT provisions also appear in RTAs, including the African Continental Free Trade Area (AfCFTA) that includes fifty-four African States[31] and the Regional Comprehensive Economic Partnership (RCEP) agreement among China, Japan, Australia, New Zealand, South Korea, and the Association of Southeast Asian Nations (ASEAN) members.[32]

The WTO has developed a typology for S&DT that includes the range of measures and related programs: (1) Longer Time Periods for Implementing Agreements and Commitments; (2) Measures to Increase Trading Opportunities for Developing Country Members; (3) Flexibility of Commitments, of Action, and Use of Policy Instruments; (4) Provisions Requiring WTO Members to Safeguard the Interests of Developing Country Members, including S&DT provisions across disciplines and WTO agreements; (5) Support to Help Developing Countries Build Capacity; and (6) Provisions Relating to Least Developed Country (LDC) Members.[33] In assessing measures that fall within these categories, the legal language of S&DT is particularly relevant. Hege and Wouters catalogue a number of duties for developed and developing country members, as well as for the WTO as an institution, and privileges stemming from S&DT, along with five types of rights for developing countries: (a) right of delayed application, (b) right to exemptions, (c) right to reduced commitments, (d) right to presumption, and (e) right to temporary derogation.[34] Accordingly, the

26 *See* UN SDGs, *supra* note 19.

27 GATT, *supra* note 20, Article XVIII.

28 Aside from non-reciprocity, Part IV of the GATT contains largely "best endeavor" language that lacks legal force. *See* Keck & Low, *supra* note 20, at 4. *See also* Kuhlmann & Agutu, *supra* note 21; Pallavi Kishore, *Special and Differential Treatment in the Multilateral Trading System*, 13 Chi. J. Int'l L. 363 (2020).

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

30 WTO S&DT, *supra* note 22.

31 Agreement Establishing the African Continental Free Trade Area, Mar. 21, 2018, 58 I.L.M. 1028 [hereinafter AfCFTA]. *See also* Lily Sommer & Jamie MacLeod, *How Important is Special and Differential Treatment for an Inclusive AfCFTA?*, *in* Inclusive Trade in Africa: The African Continental Free Trade Agreement in Comparative Perspective 71 (David Luke & Jamie MacLeod eds., 2019); Kuhlmann & Agutu, *supra* note 21.

32 Regional Comprehensive Economic Partnership Agreement, Preamble, Nov. 15, 2020, https://rcepsec.org/legal-text/ [hereinafter RCEP].

33 WTO S&DT, *supra* note 22.

language used to represent S&DT, flexibility, and the other inclusive trade dimensions is important to consider in the context of the design and implementation of trade rules.

Much of the debate around policy space and S&DT has focused on how much room international trade rules, including WTO rules and regional trade agreements, leave for domestic regulatory discretion,[35] as well as where this discretion is particularly important in the context of development. Within the literature, there is disagreement over whether international trade rules provide sufficient space for States' ability to design rules tailored to development.[36] A number of critiques of the global trading system have focused on the extent to which international law reduces policy space to respond to domestic concerns, particularly for developing countries. Some have argued that international trade law limits policy space too much in areas that are particularly important for sustainable development, such as agriculture, intellectual property rules, investment, and subsidies.[37] On the other hand, proponents emphasize that the system of global trade rules provides ample room for States to regulate in the interest of development.[38] In reality, however, international trade law both restricts and preserves policy space, albeit to differing degrees in different contexts and sometimes within different legal areas.[39]

The efficacy of these approaches, as usual, rests in the details and depends upon both the particular priorities and vulnerabilities that need to be addressed and how law is designed and implemented. S&DT has had a mixed record, due to issues with enforceability, complex procedural requirements, weak institutional capacity, and lack of strategy and evidence backing its application.[40] S&DT has been a useful tool in some regards, particular with respect to the flexibility it provides as discussed below.

---

34 Vineet Hedge & Jan Wouters, *Special and Differential Treatment under the World Trade Organization: A Legal Typology* (KU Leuven Ctr. Glob. Governance Stud., Working Paper No. 227, 2020). The authors find that 86 percent of S&DT provisions (195 out of 227) create legally binding obligations, although many are not enforceable. *Id.* at 51. Of these, 115 duties are duties (57 of which apply to developed country members and 16 of which apply to developing country member, including duties to inform or notify), 39 privileges, and 41 rights. *Id.* Duties extend from language such as "shall consider", "shall take account of", or "shall consult" (which is qualified language that does present a duty but may not be fully enforceable), *id.* at 22-23; privileges derive from language such as "may" or "should," *id.* at 32; while the different types of rights flow from language such as "developing Members shall have the flexibility," *id.* at 28.

35 *See* Dominique Bruhn, *Global Value Chains and Preferential Trade Agreements: Promoting Trade at the Cost of Domestic Policy Autonomy?* (Aug. 8, 2014), available at https://ssrn.com/abstract=2464136.

36 For a helpful summary of the different positions on policy space reflected in legal and economic scholarship, see Mate, *supra* note 25. Mate also notes that there has not been sufficient precision in conceptualizing policy space at the legal, institutional, and compliance levels. *Id.* at 287.

37 *See* Thomas Bernhardt, *North-South Imbalances in the International Trade Regime: Why the WTO Does Not Benefit Developing Countries as Much as it Could*, 12 Consilience: J. Sustainable Dev. 123 (2014).

38 *See* Shaffer, *supra* note 2. *See also* Alice Amsden & Takashi Hikino, *The Bark is Worse than the Bite: New WTO Law and Late Industrialization*, 570 Annals Am. Acad. Pol. & Soc. Sci. 104 (2002); Alice Amsden, *Promoting Industry Under WTO Law*, *in* Putting Development First: The Importance of Policy Space in the WTO and International Financial Institutions (Kevin P. Gallagher ed., 2005).

39 *See* Page, *supra* note 23, at 4.

40 Hedge & Wouters estimate that only 21 percent (47 S&DT provisions) "actually result in differential treatment." *See* Hedge & Wouters, *supra* note 34, at 51. *See also* Hesham Youssef, *Special and Differential*

It is typically more reactive than proactive, however, and largely overlooks legal design and implementation, particularly at the national level.[41] Further, because policymakers are often not aware of the full range of needs and vulnerabilities that must be taken into account when designing trade agreements and domestic law, there is a persistent gap in effective application of policy space and S&DT. As a result of these different factors, S&DT is often more State-focused than stakeholder-focused and better suited to addressing institutional capacity challenges than actual stakeholder needs.

S&DT is an important dimension to map in terms of inclusive trade, however. While this is well documented across WTO Agreements,[42] it is not nearly as well documented in the context of RTAs, calling for greater focus on RTA options.[43]
It is also important to take stock of the current debate surrounding S&DT and its relationship to vulnerability. As currently designed, S&DT applies to developing countries and LDCs only, with special focus on LDCs. Although LDCs are clearly defined and designated based on UN criteria, "developing country" has not been defined in the context of WTO rules, and countries currently self-designate. Because roughly two-thirds of WTO members have self-designated as developing countries, a number of more advanced economies have pressed for further differentiation and clearer limits on what constitutes a developing country.[44] RTAs have also addressed this issue of differentiation to a degree, sometimes noting different categories within S&DT, such as small and vulnerable economies, small island developing nations, and other categories. Still, how to differentiate among countries remains an open issue. The most comprehensive proposal in the context of vulnerability is the Trade Vulnerability Index (TVI), which is based on a number of vulnerability categories (or proxies, with preliminary mapping against S&DT provisions): "export concentration; export destination; trade shock; trade openness; dependence on strategic imports; reliance on external finance; market share of global trade, remoteness; instability of agricultural

Treatment for Developing Countries in the WTO (South Ctr., Trade-Related Agenda, Development, and Equity (T.R.A.D.E) Working Paper, 1999), available at https://www.iatp.org/sites/default/files/Special_and_Differential_Treatment_for_Deve_2.htm; Constantine Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* 20 (World Bank Pol'y Rsch., Working Paper No. 2388, 2000); Keck & Low, *supra* note 20; Hoekman, *supra* note 23; Kuhlmann, E15, *supra* note 21.

41 *See* Kuhlmann & Agutu, *supra* note 21, at 751; *see also* Kuhlmann, E15, *supra* note 21.

42 With respect to S&DT in the WTO context, see WTO S&DT, *supra* note 22; *see also* J. Jason Cotton et al., *Using a Trade Vulnerability Index to Determine Eligibility for Developing-Country Status at the WTO: A Conceptual Response to the Ongoing Debate*, at 2 (Shridath Tamphal Ctr. for Int'l Trade L., Rsch. Working Paper, 2019), available at https://shridathramphalcentre.com/wp-content/uploads/2019/10/Using-Trade-Vulnerability-Index-for-Determining-WTO-Developing-Country-States_WorkingPaper_Sept_2019-3.pdf; Hedge & Wouters, *supra* note 34.

43 With respect to S&DT in the RTA context, see Paul Baker, *Handbook on Negotiating Sustainable Development Provisions in Preferential Trade Agreements*, U.N. Econ. & Soc. Comm'n Asia & Pac. (2018); Kuhlmann, *Handbook*, *supra* note 9.

44 Leading the debate are the United States, Europe, Canada, and Norway, with some developing economies (albeit to a lesser extent) pushing for more differentiation based on other criteria. *See* Cotton et al., *supra* note 42, at 2.

production; economic diversification; small size; susceptibility to natural disasters and climate change (with health pandemics more recently added); market flexibility; and political, social and environmental governance".[45] The TVI can be a helpful prism through which to view current design and application of S&DT in the context of WTO disciplines and RTAs, particularly in the context of sustainable development.

B. Flexibility and Sustainable Development in WTO Rules and Regional Trade Agreements

Along with S&DT (and policy space), two additional qualitative dimensions related to inclusive trade are becoming more prevalent in international agreements. These are flexibility, which is a hallmark of S&DT, and sustainable development, which is referenced in the WTO Preamble[46] and increasingly incorporated into international trade rules.

Flexibility is central to the concept of S&DT, and the provisions that provide flexibility in "commitments, action, and use of policy instruments" are among the most numerous of the S&DT provisions.[47] Flexibility is also apparent in provisions under RTAs, both in the context of S&DT and more broadly. Because of this broader context, flexibility is treated as a separate category for purposes of the approach presented in this paper.[48] Flexibility in rules includes the exemption in GATT Art. XI on quantitative restrictions that gives all States the space to address shortages of food or other essential products.[49] In addition, GATT Art. XIX, GATT Art. XX (General Exceptions), the WTO Agreement on Safeguards, the WTO Agreement on Subsidies and Countervailing Measures, and Art. XIV of the General Agreement on Trade in Services (GATS) all encompass some degree of flexibility. Although use of flexibilities tends to arise in legal approaches established under the rules,[50] flexibility can sometimes imply a "suspension" of or departure from the rules, which can present

45 *Id.* at 16-19.

46 The Preamble to the WTO reflects the priority of sustainable development: "*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources *in accordance with the objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." Marrakesh Agreement Establishing the World Trade Organization, pmbl., April 15, 1994, 1867 U.N.T.S. 154 (emphasis added).

47 There are forty-four such provisions among the 183 S&DT provisions in the WTO covered agreements; only provisions to safeguard the interests of developing country members counts a greater number of provisions (forty-seven). Hedge & Wouters, *supra* note 34, at 12.

48 The AfCFTA references both S&DT and flexibility in its principles, signaling a distinction between these dimensions. AfCFTA, *supra* note 31, Art. 5 (d).

49 *See* Kuhlmann, *Handbook*, *supra* note 9.

50 *See* Mate, *supra* note 25.

51 *See, e.g.*, Simon J. Evenett & Richard Baldwin, *Revitalizing Multilateral Trade Cooperation: Why? Why Now? And How?*, *in* Revitalising Multilateralism: Pragmatic Ideas for the New WTO Director-General 9 (Simon J. Evenett & Richard Baldwin eds., 2020), available at https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general.

its own set of challenges.[51] Interestingly, the pandemic has reinforced the need both for greater certainty in rules overall and greater flexibility and innovation in how particular rules are developed and applied in the context of particular circumstances.[52] Flexibility has taken on new significance during the pandemic, as States and international institutions have been confronted with both localized and shared vulnerabilities in the face of the global health crisis.[53] As the pandemic has highlighted, flexibility with respect to certain essential goods, including medicines and food, is especially important. In addition to the flexibilities noted above under GATT Article XI, which also references but does not define "essential" products, [54] relevant flexibilities exist under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),[55] which is discussed in Section IV, and the WTO Agreement on Agriculture and WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

Flexibility in RTAs can sometimes be seen in the agreement structures themselves. African trade agreements, for example, tend to be more flexible treaty instruments, incorporating variable geometry and differing geographic and economic circumstances.[56] These aspects can be particularly important for addressing vulnerability.[57] African RTAs provide a compelling model for flexibility due to their multidimensional nature, blending "economic and non-economic objectives [… and] formal and informal regimes."[58] African trade agreements also exhibit flexible cooperation "instead of rules requiring scrupulous and rigorous adherence."[59] The WTO Trade Facilitation Agreement, which contains a unique approach to S&DT tailored to countries' needs and capabilities, has characteristics in common with African RTAs; trade facilitation in both the WTO and African RTA context is linked with other dimensions important to inclusive trade, such as transparency.[60]

Given the importance of agriculture to development, as well as in the S&DT and policy space debate,[61] several aspects of S&DT and flexibility related to agriculture are

52 *See* Kuhlmann, *Flexibility and Innovation*, *supra* note 2.

53 *Id. See also* Trubek et al., *supra* note 6.

54 GATT, *supra* note 20, Article XI.2(a).

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

56 *See* Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. Int'l L. & Com. Reg. 571 (2010) [hereinafter *AFTAs*]. *See also* Arinze Bryan Okiche, *Reconsidering the Flexibility Paradigm of African Regional Trade Agreements and Informal Trade Arrangements,* Afronomicslaw (July 8, 2020), available at https://www.afronomicslaw.org/2020/07/08/reconsidering-the-flexibility-paradigm-of-african-regional-trade-agreements-and-informal-trade-engagements.

57 *See* Kuhlmann, *Flexibility and Innovation*, *supra* note 2.

58 Akinkugbe, *supra* note 8, at 293.

59 *See* Gathii, *AFTAs*, *supra* note 56, at 573; *see also* Kuhlmann, *Flexibility and Innovation*, *supra* note 2.

60 *See* Tsotang Tsietsi, *In Pursuit of Transparency for Trade Facilitation in Southern Africa,* Afronomicslaw (Mar. 16, 2021), available at https://www.afronomicslaw.org/index.php/category/analysis/pursuit-transparency-trade-facilitation-southern-africa; *see also* Tsotang Tsietsi, *Trade Facilitation in the Southern African Development Community: The Potential Contribution of the World Trade Organization's Trade Facilitation Agreement,* Thesis presented in Department of Commercial Law, Faculty of Law University of Cape Town (2020) (on file with author).

61 For a discussion on the WTO's agricultural rules and policy space, see Ahmad Mukhtar, *Policy Space for Sustainable Agriculture in the World Trade Organization Agreement on Agriculture*, U.N. Food & Agric. Org. (2020), https://www.fao.org/3/ca9544en/CA9544EN.pdf. *See also* Hoekman, *supra* note 23, at 6.

worth noting.[62] These include flexibilities under the WTO Agreement on Agriculture and relevant aspects under other WTO agreements, such as the Agreement on Technical Barriers to Trade (TBT Agreement).[63] In particular, the WTO Agreement on Agriculture offers flexibility in the form of policy instruments (subsidies/domestic support programs),[64] including higher de minimis thresholds for trade-distorting subsidies, use of certain subsidies for investment and agricultural inputs,[65] and availability of certain export subsidies for net food importing countries.[66] S&DT is also part of the SPS Agreement, particularly under Articles 9 and 10,[67] although other aspects of the SPS Agreement are relevant in this context as well.[68] S&DT in the SPS context mainly includes time-limited exceptions and phased implementation along with capacity building support to develop national legislation, establish institutions and laboratories, and information dissemination.[69] S&DT has also included focus on developed country SPS measures and their impact on developing economies,[70] which remains an important area of concern. Despite these mechanisms, however, numerous challenges still exist in the agricultural sector, calling for greater focus on effectiveness.[71]

Another key dimension of inclusive trade is sustainable development, which encompasses environmental sustainability as well as the broader vision articulated by the SDGs. Sustainable development is central to addressing vulnerability, [72] as, by its definition, it involves balancing the needs of individuals and communities in the present against the needs of future generations. For the purposes of this paper,

62 *See* Neha Mishra, *Ensuring Food Security Through WTO Rules: Should the 'Policy Space' be Expanded?,* Pub. Sphere (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848685.

63 WTO S&DT, *supra* note 22. According to the WTO, there are 13 S&DT provisions in the WTO Agreement on Agriculture, 9 of which are flexibility options. *Id.* at 21.

64 *See also* Cotton et al., *supra* note 42, at 22

65 *See* Youssef, *supra* note 40, at 17-20; *see also* Keck & Low, *supra* note 20, at 22..

66 *See, e.g.,* Hoekman, *supra* note 23, at 9.

67 Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). According to the WTO, there are 6 S&DT provisions in the WTO SPS Agreement, of which an equal number focus on safeguarding the interests of developing country members, transitional time periods, and technical assistance. A number of additional guidelines and decisions of the SPS Committee apply as well. WTO S&DT, *supra* note 22, at 26.

68 These include Article 14 (delayed application) and Paragraph 9 of Annex B (WTO Secretariat should inform developing countries of notifications that may affect them). *See* Youssef, *supra* note 40, at 21-22.

69 Constantine Michalopoulos, *Trade Policy and Market Access Issues for Developing Countries: Implications for the Millennium Round* 42 (World Bank Pol'y Rsch., Working Paper No. 2214, October 1999) [hereinafter *Trade Policy*].

70 *See* World Trade Org., Draft G90 Ministerial Declaration, WTO Doc. JOB/GC/160; JOB/TNC/65 (Nov. 28, 2017); *see also* Michalopoulos, *Trade Policy*, *supra* note 69, at 65.

71 *See* Manuela Tortora, UNCTAD, *Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet*, U.N. Doc. WEB/CDP/BKGD/16 (Jan. 2003), available at https://moam.info/special-and-differential-treatment-and-development-issues-in-unctad_5a0032d71723dd5ab2ef8de5.html.

72 Sustainable development can be defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Rep. of the World Comm'n on Env't and Dev., G.A. Res. 42/187, U.N. Doc. A/Res/42/87, at 46 (Dec. 11, 1987).

"sustainable development" and "sustainability" will be discussed in both a narrower sense focused on environmental rules and in the broader sense as envisioned in the UN SDGs, which cover multiple, interconnected areas of law (including labor rules as well).

Sustainable development is becoming more prevalent in international trade law, building upon the language in the preamble to the WTO.[73] Sustainable development is central to the use of GATT Article XX exceptions, which is one of the main avenues for exercising policy space.[74] The "balancing act" inherent in sustainable development is perhaps most clearly illustrated in the use of GATT Article XX exceptions, which are also incorporated into most RTAs.[75] In particular, Article XX establishes exceptions for measures taken to protect human or animal life or health (GATT Article XX (b)) and conservation of exhaustible natural resources (Article XX (g)).[76] Notably, however, these exceptions are designed to be applied by individual States in response to particular circumstances, not by multiple States due to shared vulnerabilities.

Newer RTAs also reflect a broader dimension of flexibility that allows legal instruments to be adapted to changing circumstances and multi-factor priorities. This can take different forms. The AfCFTA, for example, includes "review and revise" provisions that allow the legal instruments to adapt as circumstances evolve, including provisions calling for periodic review or incorporation of additional instruments as needed.[77] The U.S.-Canada-Mexico Agreement (USMCA) meanwhile contains a "sunset clause" calling for review and termination after a period of time if the parties do not affirm an interest in extending.[78]

Sustainable development is also increasingly appearing in RTAs in a more expansive sense, including the Comprehensive Economic and Trade Agreement (CETA) between Europe and Canada (CETA),[79] which contains a sustainable development chapter along with provisions focused on environment (and labor). U.S. trade agreements also focus on aspects of sustainable development, in particular environment, labor, and workers, which may expand under the current administration.[80] Other RTAs, such as

73 Sustainable development also appears in a very limited context in WTO case law. Marceau & Morosini, *supra* note 5, at 60.

74 *See* Santos, *supra* note 25.

75 For example, the Comprehensive Economic and Trade Agreement, Article 22.5, Oct. 30, 2016, O.J. L 11/23 (Jan. 14, 2017) [hereinafter CETA], http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, incorporates GATT Art. XX (CETA, Article 28.3), as does the Agreement between the United States of America, the United Mexican States, and Canada, Can.–Mex.–U.S., Dec. 13, 2019. [hereinafter USMCA], *mutatis mutandis,* in Art. 32.1.

76 GATT, *supra* note 20, Art. XX (b) & (g).

77 AfCFTA, *supra* note 31, Art. 8.

78 USMCA, *supra* note 75, Art. 34.7.

79 CETA, *supra* note 75, Art. 22.4. *See also* Winfried Huck & Claudia Kurkin, *The UN Sustainable Development Goals (SDGs) in the Transnational Multi-Level System*, 78 Heidelberg J. Int'l L. 375 (2018).

80 *See* Terrence P. Stewart, *U.S. Trade Policy Under a Biden Administration and a Democratically-Controlled Congress – How Will a Search for Social Justice and More Equitable Distribution of Benefits Affect Trade Laws and Negotiations?*, Current Thoughts on Trade (Jan. 13, 2021), available at https://currentthoughtsontrade.com/2021/01/13/u-s-trade-policy-under-a-biden-administration-and-a-democratically-controlled-congress-how-will-a-search-for-social-justice-and-more-equitable-distribution-of-benefits-affect-trade-laws-and-negoti/.

the AfCFTA, reference sustainable development, even though African RTAs do not fully encompass sustainable development as yet.[81] Perhaps the most expansive of all RTA models with a sustainability focus is the Agreement on Climate Change, Trade, and Sustainability (ACCTS) currently under negotiation between Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland, which will establish a foundation of rules on combatting climate change and eliminating fossil fuel subsidies.[82]

While this increasing focus on flexibility and sustainable development signals an important move towards more inclusive trade, these dimensions, along with S&DT and policy space, have largely left inequality and vulnerability unaddressed, particularly at the community and individual levels. Recognizing this continued gap, the next section presents additional, stakeholder-focused dimensions of inclusive trade. When combined with the approaches discussed in this section, these "bottom-up" dimensions could better inform legal design and implementation, tailoring the rules to address vulnerability and systemic flaws in economic law as States negotiate multilateral and regional trade instruments and domesticate them through national law.[83]

III. The Missing Dimensions of Inclusive Trade: Equity, Inclusiveness, Legal and Regulatory Gateways, and Impact Tailored to the Needs of Individual Stakeholders

Although there is currently a trend towards inclusive trade and sustainable development, as the preceding section illustrates, the current approaches are too narrowly construed, particularly with respect to stakeholder-focused vulnerabilities. Thus, one of the purposes of this paper is to highlight dimensions of inclusive trade that are often overlooked, in particularly dimensions that focus on the experience of those living under the law.[84] After all, it is generally those living under the laws, not those making them, who are the most vulnerable. The challenge, however, is that understanding stakeholder needs or voices from the field often requires a different analysis than assessing legal flexibilities available to States. This section will begin with two interconnected "case studies" involving different dimensions of stakeholder-based vulnerabilities and "inclusive regulation", drawing out broader lessons learned

81 Khumalo, *supra* note 5. The AfCFTA does include the objective to promote and attain *sustainable and inclusive socio-economic development*, gender equality and structural transformation of the State Parties (emphasis added; AfCFTA, *supra* note 31, Art. 3 (e)). For a discussion of the development dimensions of the AfCFTA, see Kuhlmann & Agutu, *supra* note 21.

82 *See* Ronald P. Steenbilk & Susanne Droege, *Time to ACCTS? Five Countries Announce New Initiative on Trade and Climate Change*, Int'l Inst. Sustainable Dev. (Sep. 25, 2019), https://www.iisd.org/blog/time-accts-five-countries-announce-new-initiative-trade-and-climate-change.

83 There are notable differences between common law and civil law jurisdictions in this regard, although, even in civil law jurisdictions where treaties have direct application, domestic law and regulation are often needed to incorporate additional, more detailed measures.

84 *See* Tamar Megiddo, *The Missing Persons of International Law Scholarship: A Roadmap for Future Research, in* International Law as Behavior 230-64 (Harlan Grant Cohen & Timothy Meyer eds., 2021); Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine,* 29 Case W. Res. J. Int'l L. 167 (1997).

that point to an expanded view of the legal and regulatory choices that States should consider in the context of inclusive and sustainable trade and development.

To a degree, the dimensions discussed in this section require shifting some focus away from the institutions that govern trade and into the realm where trade rules are applied in practice. If indeed "the life of the law has not been logic: it has been experience",[85] how should experience factor into inclusive law and regulation? Accordingly, the approach in this section is based on over ten years of empirical work[86] and socio-legal methods.[87] Overall, this includes over a hundred field-based missions that relied upon comparative legal research, hundreds of stakeholder interviews, tailored questionnaires and surveys, deep analysis of national rules and regulations, and process mapping and tracing, all designed to assess how law was working in practice, where gaps existed, and how local partners could be more directly engaged in addressing legal and regulatory challenges relevant to economic and social development.[88]

Empirical analysis of how international trade and economic law are designed and applied in practice provides useful insight into how to understand the "context, object, and purpose" of law.[89] It can also question aspects of international law, which "call[s] for empirical study to test and build theory regarding the conditions under which international law is formed and those under which it has effects", employing a mix of "empirical findings, abstract theorizing, real-world testing, and back again."[90] The approach presented in this section involves just such a mix of findings and testing, focusing on the conditions under which international (and national) law take effect through a combination of empirical methods and real-world application to present new channels for addressing individual vulnerabilities into economic and trade law.

The case studies below are illustrative of a methodology and broader body of work that spans sub-Saharan Africa, Asia, and, to a lesser (but growing) extent, Latin America and points to larger patterns in inclusive legal and regulatory design and implementation. The substantive focus of the empirical work described in this section is also illustrative, and, although agricultural rules are primarily discussed below,

85 Oliver Wendell Holmes, The Common Law 1 (1881).

86 *See* Shaffer & Tom Ginsburg, *Empirical Work in International Law: A Bibliographical Essay* (Minn. Legal Stud., Rsch. Paper No. 09-32, 2009). *See also* Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1991).

87 *See* Reza Banakar & Max Travers, *Law, Sociology, and Method*, *in* Theory and Method in Socio-Legal Research 1-25 (Reza Banakar & Max Travers eds., 2005); Adam Chilton et al., *The Social Science Approach to International Law,* 22 Chi. J. Int'l. L. 1 (2021); Akinkugbe, *supra* note 8.

88 This section is based upon a series of projects and programs designed by the author and colleagues as part of the ongoing work of the NML, which was established to provide insight into how international trade rules and domestic law could be better designed and applied from the perspective of economic and social development. This work has benefitted from funding from the William and Flora Hewlett Foundation, Bill and Melinda Gates Foundation, Syngenta Foundation for Sustainable Agriculture, Alliance for a Green Revolution in Africa, U.S. Agency for International Development, and other partners, some of which are specifically noted, although the analysis contained herein is that of the author alone.

89 *See* Gathii, *Fairness as Fidelity*, *supra* note 4, at 157.

90 *See* Shaffer & Ginsburg, *supra* note 82, at 1 (emphasis removed). Shaffer and Ginsburg also note that "while generalizing from any specific domain can be risky, in the aggregate, a series of particular analyses help to provide a picture of how international law as a whole works, and why it works differently in discrete areas." *Id.* at 21.

the approach applies much more widely and has been used to assess regional trade agreements, focus on trade and gender, and conduct comparative assessments of the regulation of investment, services, intellectual property rights (IPRs), and the digital economy.

So what does this approach illustrate that differs from the work summarized in the preceding section? First, it emphasizes that broad flexibilities still need to be tailored to individual stakeholders, whose needs will be different than the needs of States, while simultaneously emphasizing the importance of national law alongside international and regional law. To the extent that international economic law has focused on domestic or national law, it has primarily done so based on the practices of the most powerful economies.[91] However, individual and community needs, as highlighted in the case studies, include can often be better addressed through local or regional good practices rather than the wholesale incorporation of legal structures from countries with more advanced systems and more diverse economies. African law, for example, is replete with inclusive and innovative aspects that may be more suited (but lesser known) than Western law, which often serves as a benchmark.

The approach also shines light on the importance of both comparative legal approaches and legal and regulatory diversity. Understanding how trading partners have implemented international rules differently, including different ways in which S&DT or the exercise of policy space have been applied, is as important as (or perhaps even more important than) understanding the history behind these provisions. Relatedly, the empirical work and socio-legal context explored in this section shine some light on what Akinkugbe has referred to as "pluraliz[ing] the false universal narratives of conventional IEL."[92] Comparative law is an important aspect of this paper's focus on inclusive trade and development and will require that a more diverse set of legal approaches be better documented, understood, and encompassed in legal and regulatory design, even in the context of trade rules that strive for harmonization.

Finally, the approach highlights that engagement in the legal system is essential and cannot be achieved through legal provisions or high-level capacity building alone, even though both remain important. Engagement is a continuous process, which ideally should be stakeholder-driven, and deeper work in this area could inform future trade agreements and the design of national law. Engagement at the national and sub-national level provides particular insight into the S&DT and policy space debate, as it is where policy space is ultimately exercised. National law also holds the potential to shape future international law, particular in the current multi-polar system with proliferating RTAs. Ultimately, even if S&DT provides the opening for more inclusive trade, a deeper process of ensuring inclusivity and equity must operate in parallel at the national legal level. These lessons will be illustrated through the discussion below and integrated into the dimensions summarized in Section IV.

91 *See* Anthea Roberts, Is International Law International?, at 43-46 (2017).
92 *See* Akinkugbe, *supra* note 8, at 4.

A. Understanding Economic Law Through a Stakeholder Lens

The analysis in this section starts not with an international agreement but with the experience of a particular stakeholder, in this case a farm in the Southern Highlands of Tanzania, that sought to create greater diversity in Tanzania's local economy and exports (one of the goals of S&DT efforts as noted in the preceding section). This may seem relatively small in the context of international trade law, but the lessons that resulted from this case study provide important insight into the design and implementation of trade law more broadly. The experiences of one farm, scaled to the level of a trade corridor, and eventually expanded to regional trade bodies, highlight the importance of inclusive legal interventions and illustrate how legal flexibility can be applied in practice. They also underscore the dichotomy between "law in books" and "law in action"[93] in a trade law context, providing critical insight given the normative shift currently underway.

i. Tanzanian Legal Reform in the Context of Food Security as an Illustrative Case

The broader policy context in which the first phase of the case study began illustrates a connection between the development landscape and the legal and regulatory environment. Notably, the initial phase of the case study began in around 2010, not long after the 2007-8 global food crisis, which also exposed systemic and stakeholder-level vulnerabilities (in all their capillarity), with important lessons for the pandemic crisis the world faces today. As context for the early stage of the case study, then Tanzanian President Jakaya Kikwete prioritized agriculture and food security through a number of initiatives, including the Kilimo Kwanza (Agriculture First) policy approved in 2009 and participation and leadership in international efforts, including the World Economic Forum's New Vision for Africa, the Grow Africa initiative, and the G8 Global Alliance for Food Security and Nutrition. A key component of these efforts was the Southern Agricultural Growth Corridor of Tanzania (SAGCOT),[94] which launched in 2010 as an agricultural development corridor with both a food security and sustainability focus. Although this paper does not seek to assess these broader policy efforts, the issues discussed in the context of the case study were directly linked with Tanzania's commitments under these initiatives, including the Global Alliance for Food Security and Nutrition. Tanzania was also a party to a regional agreement that covered the regulation of agricultural inputs, including seed, and allowed for mutual recognition of rules and procedures among Kenya, Tanzania, and Uganda.[95] Tanzania

93 Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

94 *See* Beth Jenkins, *Mobilizing the Southern Agricultural Growth Corridor of Tanzania: A Case Study,* Harv. Kennedy Sch. Corp. Soc. Resp. Initiative (2012), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/report_48_SAGCOT.pdf.

95 Association for Strengthening Agricultural Research in Eastern and Central Africa (ASARECA) & Eastern and Central Africa Programme for Agricultural Policy (ECAPAPA) Agreement, 4 ECAPAPA Monograph Series (2002).

was also a party to the WTO and a number of regional trade bodies, including the East African Community (EAC) and the Southern African Development Community (SADC), the latter of which had also developed regionally integrated rules for seed.

The interconnected phases of the case studies take place in Tanzania against this backdrop. Economic, social, and legal interventions were designed in the wake of the food security crisis to address vulnerability through increased yields, improved market connections for smallholder farmers, and more diversified crop production. The first phase of the case study involved a local farming enterprise seeking to diversity the economy through a socially-focused business model that would develop high-quality, high-yielding certified seed potato, commercializing the sector and ultimately impacting around 150,000 small holder farmers, mainly women, who had been using low-yielding seed potatoes for a number of years.[96] This was exactly the type of investment the larger policy context was designed to encourage.

The farm immediately confronted a range of legal and regulatory issues when it tried to introduce a new product to the local market (certified seed potato) and scale its operations. Substantively, there were issues related to the application of SPS rules and a host of other non-tariff measures, such as licensing and registration measures.[97] While these were challenging for development of the domestic agricultural sector, they were also precisely the type of issues that could have been taken into account with more tailored use of legal flexibilities.

Ultimately the legal and regulatory issues that arose presented a challenge not because Tanzania's laws or the regional rules were inconsistent with international law, but because of gaps in implementation, inclusiveness, and engagement. For example, finding the relevant rules and understanding how they would be applied was a gap, as was the significant regulatory discretion in the process. The regional trade agreement referenced above ultimately reduced this regulatory discretion, allowing the enterprise to successfully import seed potato germplasm that had been tested and approved in Kenya and then undergo a much shorter period of testing and regulatory approval in Tanzania. However, the enterprise was the first "test case" for the agreement's implementation, as the agreement had pre-dated the investment but had never been applied in practice before.

With private and public support, including an unusually intensive legal capacity building effort, the enterprise's legal and regulatory hurdles were addressed one at a time.[98] While this was a slow process, it provided an opportunity to document their

96 *See Improving Livelihoods, Removing Barriers: Investing for Impact in Mtanga Farms,* Glob. Impact Inv. Network (Nov. 28, 2011), https://thegiin.org/research/publication/improving-livelihoods-removing-barriers-investing-for-impact-in-mtanga-farms.

97 Some of the issues encountered related to application of the WTO SPS Agreement, but Tanzania did have "policy space" within which to implement the agreement, and these issues did not constitute actionable "non-tariff barriers". In any event, a challenge of uneven application of SPS rules would have had to come from a trading partner and would not have been available to a domestic non-state actor.

98 The first phase of the case study was done under the TransFarm Africa pilot project undertaken with the support of the William and Flora Hewlett Foundation. The author coordinated work to identify and address legal and regulatory challenges that impacted these opportunities, first out of the German Marshall Fund and Aspen Institute and later out of a non-profit organization established in 2010, which is now NML.

experience in detail, seeing through their eyes the challenges that arose as the rules were applied in practice.[99] Ultimately, the enterprise was able to resister and certify the new, high-yielding seed potato varieties, introducing them into the local market and creating precedent under the new regional agreement.

ii. Practical Applications Generalized from Phase I of the Case Study

Although a complete discussion of the legal and regulatory details that underpinned the case study is beyond the scope of this paper, several key lessons learned are worth noting. First, the enterprise's ability to invest in a new sub-sector (potatoes) was very closely linked with the application of domestic SPS regulations and implementation of a regional trade agreement, even though the enterprise was not trading across borders. Interestingly, an international agreement proved to be a significant factor in the enterprise's success; however, when the case study began, the enterprise had no knowledge that such an agreement existed. It took an insightful Tanzanian official to point out the regional agreement, which had yet to be operationalized (NB: this agreement, and in a number of ways the type of experiences detailed in the case studies, provided the basis for broader, more integrated regional rules.)

Second, it is worth emphasizing that the challenges faced by the enterprise were not due to gaps in the law on the books. In fact, the Government of Tanzania had put in place a quite comprehensive legal system for seed due to the broader development and food security priorities noted above. Tanzania, an LDC, had been able to take advantage of the full range of S&DT options in implementing its WTO obligations, and this flexibility was likely one reason that Tanzania's system had been developed to the extent highlighted in the case study. However, there was a significant challenge related to "law in action", and the case study uncovered uneven implementation of the rules, particularly for a newer market entrant and a relatively unfamiliar crop like potato. Had the process of engagement been more inclusive as the rules were developed, it is possible that the enterprise would have been more aware of national law and the relatively new trade agreement. Further, had the new trade agreement been better publicized, perhaps under transparency obligations, it is possible that its existence would have been more widely known, although it is likely that this did not happen because it was narrow in scope and not a more traditional trade agreement.

99 For a more detailed discussion of Phases I and II of the case study, see Kuhlmann, *Streamlining Seed Regulatory Systems: Lessons Learned from Registering New Seed Potato Varieties in Tanzania*, teaching case study on file with the author. Comparative lessons are also drawn from NML's use of "Regulatory Systems Maps" and a program on regional seed regulation co-designed with the Syngenta Foundation for Sustainable Agriculture that began in 2015. The Regulatory Systems Maps (see Figure 1) break laws and regulations down into step-by-step components, allowing for more focused study of how domestic law reflects stakeholder and legal diversity and highlighting where development-focused intervention could be applied to better respond to the needs of different stakeholders. The Regulatory Systems Maps also provide a basis for comparisons between countries' laws and changes in law or regulation within an individual State.

Viewed in light of the issues discussed in Section II of this paper, the legal and regulatory issues that arose during the different phases of the case study highlighted other aspects that needed to operate in parallel. S&DT had been applied, and the agreement in question provided for staged implementation consistent with the flexible model set by other African trade agreements. Taken alone, these factors may have suggested that flexible application of the rules could lead to desired development outcomes and a pathway for addressing vulnerabilities caused by the global food crisis. Yet, the case studies reinforces that these more State-focused dimensions of inclusive trade are necessary but not sufficient without also incorporating a stakeholder-focused approach, as expanded upon below. It also highlights an important dimension of flexibility in economic law tied to economic context that is so little explored in literature.

iii Scaling the Law and Food Security Case Study Throughout Tanzania

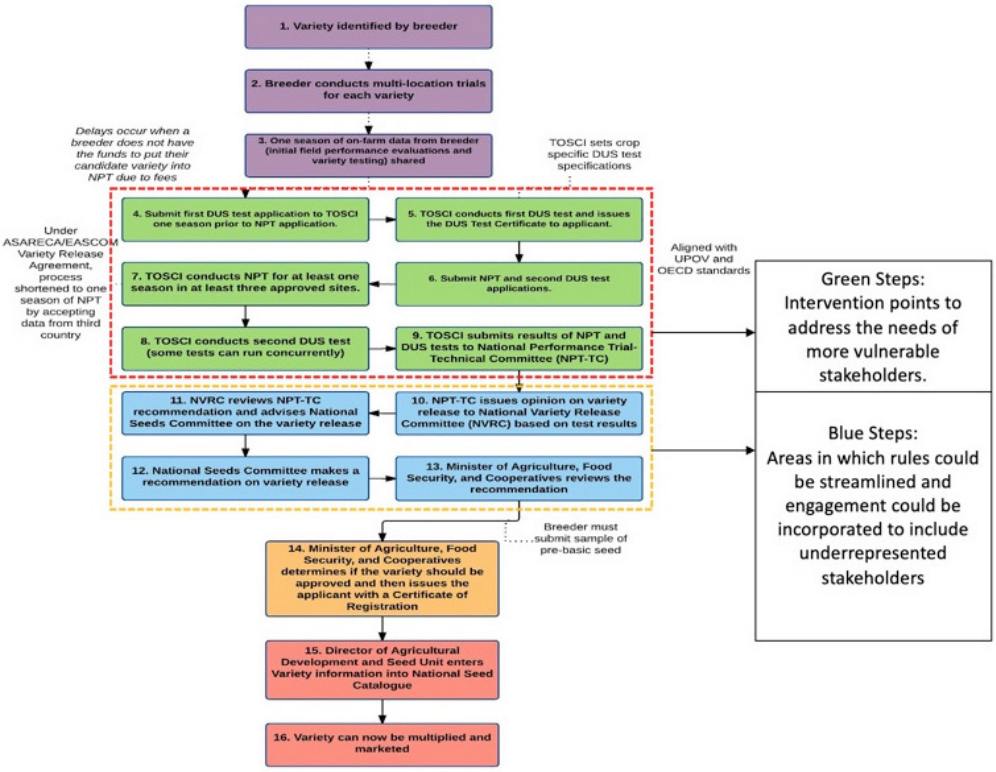
A successful result in the enterprise-focused phase of the case study led to better implementation of rules for registering and certifying seed and the introduction of high-quality seed potatoes into the market that produced yields ten times the national average, ultimately contributing to food security and agricultural development. In the wake of that success, what is described for purposes of this paper as the second phase of the case study began along the SAGCOT corridor in partnership with the New Markets Lab (NML),[100] with support from the Alliance for a Green Revolution in Africa (AGRA) and the U.S. Agency for International Development. This phase focused on scaling up the knowledge and experience gained at the enterprise throughout the SAGCOT agricultural trade corridor stretching from Dar es Salaam to Tanzania's border with Zambia. This phase also tracked with the Government of Tanzania's commitments under the New Alliance for Food Security and Nutrition, and the project helped assess how relevant legal commitments were being implemented in practice.

The corridor-wide phase involved consultations with over ninety stakeholders from the public and private sectors to understand whether the experience of the single agricultural enterprise was becoming more common as the new rules were implemented. It also involved an extensive legal review that included nearly seventy laws, regulations, guidelines, international agreements, and other measures. Working closely with SAGCOT and local representatives from the private sector, government,

100 The author and colleagues traveled the SAGCOT corridor to interview stakeholders on their experiences navigating Tanzania's seed rules and regulations and developed a series of legal tools to build knowledge and improve implementation. For additional detail, see NML & Southern Agricultural Growth Corridor of Tanzania Centre Ltd., *A Legal Guide to Strengthen Tanzania's Seed and Input Markets*, Alliance for a Green Revolution (April 2016) [hereinafter, *Tanzania Legal Guide*] (made possible through support provided by the U.S. Agency for International Development, under the terms of Cooperative Agreement No. AID-OAA-A-13-00040, and managed by The Alliance for a Green Revolution in Africa (AGRA); the opinions expressed therein are those of the author(s) and do not necessarily reflect the views of the U.S. Agency for International Development), available at https://docs.wixstatic.com/ugd/0959633a4f751a4c83488982341082f530aa32.pdf.

and NGOs, NML mapped Tanzania's entire regulatory system related to seed (including registration and certification of seed, IPR, and trade) across a range of legal instruments and developed and validated a Legal Guide for the seed sector and a series of Regulatory Systems Maps (See Figure 1) that depicted key regulatory processes step by step. The mapping process involved a combination of legal analysis, in-country consultation, crowd-sourced input, dialogue, and tailored updates.

Figure 1: NML Regulatory Systems Map Highlighting Legal and Regulatory Gateways and Opportunities for Inclusive Regulation[101]



This more detailed approach proved to be important, since most enterprises were neither aware of the updated agricultural rules, nor had their experiences paralleled those of the enterprise in the first phase. The maps allowed stakeholders to pinpoint more precise gaps, implementation challenges, and intervention points for Inclusive Regulation (these Legal and Regulatory Gateways are shown by the dotted sections above that correspond with the green and blue portions of the map).[102] The maps and other legal tools developed in the second phase which were used to build capacity among local stakeholders and generate concrete interventions to improve implementation of the regulatory system for seed and other inputs in practice.

101 Adapted from *Tanzania Legal Guide*. *See id.*
102 *Id.*

iv. Practical Applications Generalized from Phase II of the Case Study

The maps shown in Figure 1 provided a visual representation of the intersection between rules on paper and rules in action. The "Legal and Regulatory Gateways" depicted in the maps correspond with practical steps that enterprises and other stakeholders encounter in navigating a particular aspect of the legal and regulatory system and also signify intervention points to make the rules more equitable, inclusive, and efficient. The process for developing the maps was modeled largely on experience developed mapping non-tariff measures as a trade negotiator.

The maps have proven to be an important tool for information sharing and engagement to discuss regulatory options and their impact on diverse stakeholders.[103] In addition, delving deeply into the details of laws and regulations highlights important issues with respect to equity inclusiveness. Were the laws designed with certain stakeholders or certain crops in mind? If not intentionally so, were they operating this way in practice? How was their design related to Tanzania's overall development goals and the vulnerabilities the government wished to address? Was there a disconnect between the design of the laws and their implementation in practice? Were the needs of small farmers, women, and other stakeholders adequately reflected?

Each colored cluster represents a distinct part of the regulatory process, with relevant international agreements and standards referenced that inform law in these areas. The highlighted areas in Figure 1 illustrate how Legal and Regulatory Gateways could be used to consider important factors like equity, inclusiveness, and regulatory diversity. The green shaded steps all involve testing and evaluation. While these steps are largely aligned with SPS disciplines and international standards, some of the requirements and procedures could be tailored to address the needs of more vulnerable stakeholders. Ideally this phase of the process could also incorporate direct input through a space for communicative action that would allow stakeholders to directly voice their needs and interests. The blue shaded steps all involve government discretion in the registration process, highlighting not only ways in which the rules could be streamlined but also areas in which engagement of underrepresented stakeholders could be improved. Again, while these steps may not be per se inconsistent with international law, States can choose how to design these processes with local stakeholders and development considerations in mind. For each of the gateways,

103 One important change that occurred as a result of the case study was that the number of testing seasons required before a new seed variety could be formally released into the market was reduced significantly. When the first phase of the case study began, the sixteen-step process depicted in Figure 1 could potentially repeat six times, and the risk of repeated testing was higher for new crops like potatoes that were less commercially recognized and more linked with the livelihoods of small farmers and food security. By the conclusion of the second phase of the case study, as tested during the first phase, this had been reduced to two seasons (or one if a relevant regional agreement applied), in alignment with RTA requirements and Tanzania' commitments under the New Alliance for Food Security and Nutrition. Tanzania also made requirements for vegetable crops more flexible, eliminating one type of testing that is not as suitable to vegetable crops (the national performance trials (NPT) testing depicted in the green Regulatory Gateways), as vegetables have characteristics and risks that differ substantially from field crops.

both individually and as a group (denoted by the highlighting), different options are available to policymakers, providing a lens through which to identify and discuss possible interventions that could make legal and regulatory processes more efficient, less expensive, and, most importantly, more equitable. For example, the procedures shown in the green block of steps could be tailored to address the needs of indigenous communities, which may not be able to navigate this complex process. In terms of options, other African countries' laws (and the laws of countries in Asia and Latin America) contain relevant innovations,[104] discussed below, that could be considered.[105]

A number of lessons that arose from the second phase of the case study extended well beyond Tanzania's borders. Tanzania is a party to several regional economic communities (RECs), namely SADC and the EAC. At the time that both phases of the case study were unfolding, Tanzania was also participating in regional discussions on harmonized seed regulations, and Tanzania's experiences implementing the more limited regional agreement under the first phase of the case study helped to inform more extensive regional rules within the RECs, including during the second phase of the case study and extending well beyond the case study as well.

Further, while not the focus of the case study, the maps highlighted other important dimensions as well. As noted, when the case study began, Tanzania's laws had recently been amended to follow international standards. They were, however, largely modeled on European seed law, which turned out to present a great deal of complexity in terms of implementation. In Tanzania's case, both the enterprises using the rules and the regulators applying them could have benefitted from a design better suited to Tanzania's system. This, in turn, would have led to more equitable implementation as well. In other words, studying Tanzania's laws at this more granular level, in the context of international standards and "good practices" but also with local needs in mind, highlighted ways in which Tanzania could not only exercise policy space but could also innovate within the bounds of international law.

The Legal and Regulatory Gateways shown in the maps also present a window for identifying entry points for addressing the equity and sustainability dimensions presented in this paper, while also linking trade and human rights law. While many countries may have broad constitutional provisions that incorporate human rights relevant to food security and stakeholders' rights, the provisions in more specific laws can sometimes limit exercise of these rights. Understanding the structure of economic rules at the national level can, therefore, be imperative. Many stakeholders share an interest in making sure that laws are designed and applied in a way that is more sustainable and equitable, taking into account, in particular, the needs of small farmers, vulnerable stakeholders, SMEs, and women working in the agricultural sector.[106] However, as both phases of the case study highlight, this does not always happen in practice even with good intentions. Neither public nor private sector

104 *See* Okafor & Miyawa, *supra* note 7.

105 Kuhlmann & Bhramar Dey, *Using Regulatory Flexibility to Address Market Informality in Seed Systems: A Global Study*, 11 Agronomy 1, 16 (2021), https://www.mdpi.com/2073-4395/11/2/377.

stakeholders have a reliable way to access information on the regulatory options and innovations that exist in other parts of the world (or even within their own legal systems, since approaches in one sector or sub-sector could learn from and inform approaches in other sectors), reinforcing the need for more systemic approaches to legal design. Addressing these gaps in legal design and, most importantly, creating opportunities for those affected by laws and regulations to voice their needs will be a pivotal point in changing the narrative of trade.

B. Additional Lessons Learned and Their Implications for "Best Practices" and Legal and Regulatory Options

The research and illustrative case studies described above have revealed notable patterns in how countries regulate within and across borders, as well as highlighted "options" and good practices in regulation that have emerged from within sub-Saharan Africa and other developing markets, including those that benefit marginalized stakeholders. This has significant implications for regional and international law and highlights the need for both deeper comparative law initiatives and more detailed study of how law operates in practice.

At the comparative law level, while national rules are often catalogued benchmarked against "best practices", this does not reflect the full range of options possible under international law. Indeed, this approach may reinforce the false assumption that there is just one way of designing and implementing the rules.[107] Although benchmarking tools can be helpful for comparing systems, they can also overlook the legal diversity and unique features that can make national law and trade agreements, including African trade agreements, a powerful contribution to the international legal system.

The methodology described above highlights this diversity, however, and since the case studies were concluded, it has been applied in multiple countries in sub-Saharan Africa, including Kenya, Uganda, Rwanda, Tanzania, Malawi, Zambia, Zimbabwe, Mozambique, South Africa, Ghana, Nigeria, Senegal, and Mali.[108] This comparative legal and regulatory work in over a dozen countries has been benchmarked

106 These goals underpin many capacity building programs For example, the author led a 2013 workshop with approximately forty women-led agricultural enterprises in Tanzania and SAGCOT, with support from the German Marshall Fund, that highlighted ways in which the legal and regulatory system for agricultural trade impacted women. These findings were incorporated into the case study, and several of the stakeholders were included the consultations and validation meetings. NML and Aspen Network of Development Entrepreneurs also developed a *Legal Guide for Women Entrepreneurs in East Africa* in 2016 that included legal considerations particular to women in trade, agriculture, and land tenure (on file with author).

107 *See* Akinkugbe, *supra* note 8, at 4.

108 *See, e.g., Tanzania Legal Guide*, *supra* note 100; Kuhlmann & Yuan Zhou, *Seed Policy Harmonization in the EAC and COMESA: The Case of Kenya* (2015); Zhou & Kuhlmann, *Seed Policy Harmonization in SADC and COMESA: The Case of Zimbabwe* (2015); Kuhlmann & Zhou, *Seed Policy Harmonization in ECOWAS: The Case of Ghana* (2016); Kuhlmann et al., *Seed Policy Harmonization in ECOWAS: The Case of Nigeria* (2018); Kuhlmann et al., *Seed Policy Harmonization in COMESA and SADC: The Case of Zambia* (2019); Kuhlmann et al., *Seed Policy Harmonization in COMESA and SADC: The Case of Zambia* (2019), all available from NML at https://www.newmarketslab.org/casestudies. The model is also currently being extended to Ethiopia.

against WTO and other international measures, including the rules of four of the main RECs on the continent, the EAC, SADC, the Common Market for Eastern and Southern Africa (COMESA), and the Economic Community of West African States (ECOWAS).[109] This empirical work has produced nearly a hundred maps similar to Figure 1, and, as the maps have evolved, they have expanded to include additional details, such as (a) areas in which what is written into law or regulation differs from stakeholder experience in practice; (b) areas in which law and regulation are changing; (c) areas of law and regulation that have changed but are not yet implemented; (d) aspects that require more detailed measures (e.g., regulations, guidelines, etc.) to become operational; (e) cost and average time of regulatory procedures; (f) gender considerations, and other factors.

Comparison of these maps has allowed for a deeper dive into the different ways in which national and regional rules are designed, implemented, and shaped by development factors, even when underpinned by the same international rules. At the national level, it has highlighted options along the seven dimensions discussed in this paper that can address vulnerabilities like lack of economic diversification, poor productivity, and limited opportunities for diversity, both in terms of products and market stakeholders. At the regional and global levels, these findings have contributed to balancing market access with food security; implementing and building upon existing international, regional, and national good practices; and establishing more inclusive markets over time.[110]

The mapping has also been extended to other issues, including digital regulation, IPRs, and other trade issues. As the section below highlights, a number of examples of "options" for inclusive trade exist. These include "different rules for different types of business, rules designed to address the needs of a certain group (for example, in response to discrimination or economic vulnerability), or some other differentiation".[111]

In the context of the case study, stakeholders and the government might have considered additional options tailored to the needs of Tanzania's small farmers, and some such options did factor into the second phase in particular. These could include options for reducing testing requirements for certain seed varieties or ensuring that farmers' varieties are eligible for variety registration, as countries like Benin, Brazil, and Peru have done.[112] It could also include more flexible systems for plant breeders' rights (PBR),[113] and countries such as India and Malaysia have established such systems to

109 NML has partnered with the Syngenta Foundation for Sustainable Agriculture and its Seeds2B program on regional seed regulation since 2015, which has resulted in a series of case studies (*Id.)* and other publications. *See also* Kuhlmann, *Regional Seed Harmonization in Sub-Saharan Africa: A Comparative Assessment*, Syngenta Found. (2015), https://www.syngentafoundation.org/sites/g/files/zhg576/f/seedpolicy_new_africa_regulation_comparative_analysis_september_2015.pdf. NML has also partnered with Emerge Centre for Innovations-Africa and the East African Community (EAC), through AGRA, on the EAC's new seed and fertilizer laws and policies, and in 2020, NML began a program as part of a consortium led by the Alliance for a Green Revolution in Africa and Common Market for Eastern and Southern Africa (COMESA), with support from USAID, focused on implementation of regional seed regulations in Eastern and Southern Africa.

111 Kuhlmann & Dey, *supra* note 105, at 3 (citing Kuhlmann, *Flexibility and Innovation*, *supra* note 2).

112 *Id.* at 16.

allow for expanded farmers' privilege and, in Malaysia's case, establish a less stringent standard for seed variety registration and PBR.[114] Options for signaling product quality also exist beyond the complicated process for certifying seed that the enterprise in the case study pursued, such as more flexible quality control measures like truth-in-labeling (India, South Africa, and Nepal maintain this option, for example), quality declared seed schemes that can be administered in local regions, and community-focused seed clubs and associations that focus in particular on the needs of smaller farmers, such as those in Vietnam, Myanmar, and Zimbabwe.[115] Similar options exist outside of agricultural regulation, of course. For every legal issue or sector, a diverse range of inclusive legal options exist that correspond with the needs of vulnerable communities and stakeholders, as briefly illustrated in the section below.

IV. Mapping the Seven Dimensions of Inclusive Law and Regulation to Address Systemic and Stakeholder Vulnerabilities

Ultimately, building an inclusive approach to trade law, or other areas of IEL, will come down to options for applying and sometimes reshaping international and domestic law and regulation. These will include possibilities for exercising law in a way that is compliant with the WTO and other trade instruments,[116] while also addressing development and human rights considerations,[117] as well as options for designing and applying the rules to address vulnerability at different levels. Identifying these options, however, can be a difficult task that requires extensive comparative legal research.[118]

113 States have different approaches to implementing the provisions of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised on November 10, 1972, on October 23, 1978, and on March 19, 1991 (UPOV Convention), available from the International Union for the Protection of New Varieties of Plants (UPOV) at https://www.upov.int/edocs/pubdocs/en/upov_pub_221.pdf. Some countries have adopted national legislation on plant breeder's rights, one of the ways in which the sui generis requirement of TRIPS Art. 27(3)(b) can be met, that still allow farmers to use saved seed from previous crops for future use and for exchange with other farmers. This practice, also known as "farmer's privilege," is considered an important practice for inclusive seed systems and is allowed under the UPOV 1978 Convention, but, while the UPOV 1991 Convention limits this practice further, which is often stressed as the "best practice", it does allow members to limit the scope of plant breeders' rights within certain parameters. This exercise of "policy space" by States could be important to addressing farmers' needs and vulnerabilities. *See, e.g.,* Bram De Jonge & Peter Munyi, *A Differentiated Approach to Plant Variety Protection in Africa*, 19 J. World Intell. Prop. 28 (2016). While the WTO TRIPS Agreement contains a provision on *sui generis* protection for plant varieties, traditional varieties and landraces are often not eligible for plant variety protection, and local communities cannot hold rights in most countries. *See also* New Mkts. Lab, Local Seed Collection and Protection of Farmer-Developed Seed Varieties: Regional and International Frameworks (2018); Loretta Feris, *Protecting Traditional Knowledge in Africa: Considering African Approaches*, 4 Afr. Hum. Rts. L.J. 242, 243 (2004).

114 Kuhlmann & Dey, *supra* note 105, at 15.

115 *Id.* at 19.

116 Mate writes of the "availability and viability of alternate WTO-compliant policy choices." *See* Mate, *supra* note 25, at 288.

117 *See, e.g.,* Moon, *supra* note 2; Howse & Ruti G. Teitel, *Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization* (Friedrich-Ebert-Stiftung Dialogue on Globalization Occasional Paper Series, Paper No. 30, Apr. 2007), http://library.fes.de/pdf-files/iez/global/04572.pdf.

While this section advocates for a collaborative approach to expanding this research base, most stakeholders will have neither the time nor the resources to undertake this type of analysis every time a question of legal design or implementation arises. Many will also continue to contend with the lack of an inclusive process in rulemaking at all levels. For States, the pressures to follow established legal models from powerful economies, whether the United States, Europe, or China, are also considerable, adding a layer of vulnerability in terms of legal autonomy and diversity. As a result, even where options exist, it may not be possible to exercise them, particularly in a way that can serve the needs of a more diverse group of stakeholders. With a broader set of open-access data on legal and regulatory options, however, some of these vulnerabilities could be addressed in a more context-specific way and, over time, perhaps be reduced. This section summarizes examples of options and innovations across the seven dimensions for inclusive law and regulation that address the vulnerabilities that frame this discussion. These seven dimensions provide the foundation for a research agenda on how to incorporate inclusive and sustainable development into trade rules and economic law. Before providing examples of options that fall within each of the seven dimensions, however, it is important to note several assumptions that underpin this research. First, these options will often correspond with WTO, international treaty, RTA, and national legal provisions, but they will not focus on international or national case law, at least not initially. While case law is extremely valuable and provides a very useful frame of reference, the day-to-day application of laws and regulations also deserves greater attention, and, as the case studies above highlight, the day-to-day application of rules and regulations impacts a diverse group of stakeholders most directly. Many important issues will never rise to the level of litigation or even regulatory challenge and will instead be worked out through more discrete procedures and practices. Questions of how to apply the law will be continuous, even as new precedent is created.

Second, the research described in this section will complement but not replicate the important work done under other initiatives, including categorization of S&DT done by the WTO and other initiatives, including the TVI, and databases on RTAs (for example, the World Bank project and database on Deep Trade Agreements (DTAs), the Design of Trade Agreements (DESTA) Database, the WTO RTA Exchange, and the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) Trade Intelligence and Negotiation Adviser (TINA)), to name but a few.

Finally, the methodology will not simply focus on the design of rules and regulations, it will also begin to assemble information on how law is applied or implemented in practice. Initially, this will focus on data gathered through the Regulatory Systems Maps, with new ways of comparing the maps added in as the research is expanded. Over time, it will also involve other methods for assessing

118 For example, Kuhlmann & Dey's comparative study was conducted over a year-long period; however, the author and NML had been researching many of the comparative legal and regulatory options, such as more flexible approaches to seed variety registration, IP, and seed certification, for over a decade. *See* Kuhlmann & Dey, *supra* note 105.

implementation of laws and regulations, particularly in the context of the distributive effects of trade and economic law.

Following is a brief summary of the seven dimensions discussed in this paper, with examples of the types of legal and regulatory options that exist within these categories: (1) special and differential treatment; (2) flexibility; (3) sustainable development; (4) equity; (5) inclusiveness, engagement, and transparency; (6) legal and regulatory gateways; and (7) implementation and impact.

(1) Special and Differential Treatment

As discussed in Part II, S&DT is a central component of inclusive trade law. S&DT options have been well documented at the WTO level and appear throughout the WTO covered agreements. As the most recent example of S&DT, the WTO TFA and its provisions provide particularly interesting options, as the TFA allows States to prioritize and schedule implementation of commitments based on particular capacities and needs.[119] This is a notable example of S&DT and flexibility, and the WTO TFA's approach to phasing in implementation of commitments over time based on needs and resources, and intentionally integrating capacity building,[120] could serve as a model for future obligations.[121]

S&DT is also incorporated into a number of RTAs. The AfCFTA, for example, incorporates S&DT in a number of provisions, including in the agreement's objectives, Protocol on Trade in Goods, and Protocol on Trade in Services.[122] Notably,

119 Agreement on Trade Facilitation arts. 14-16, Feb. 22, 2017, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401. *See also* Kuhlmann, *Post-AGOA Trade and Investment: Policy Recommendations for Deepening the U.S. Trade and Investment Relationship*, Testimony before the U.S. International Trade Commission, Washington, D.C. (Jan. 28, 2016); NML & Harvard Law & Int'l Dev. Soc'y, Harvard Law School Trade Innovation Initiative: Summary of Findings on Trade and Development in Free Trade Agreements (2015), https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/7cb5a0_37610cba6cde4f02afb3d0cfa3ab7fb8.pdf; Kuhlmann, *Handbook*, *supra* note 9; Howse & Nicolaïdas, *supra* note 2, at 271.

120 Howse & Nicolaïdas emphasize that capacity building assistance was integral to the WTO TFA and not an "afterthought", in contrast the TRIPs Agreement, for example. *Id.* at 277 (citing Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization,* 14 World Trade Rev. 643, 659-62, 669-70 (2015)).

121 *See* Wanjiku Waweru, *Trade Facilitation Measures: Avoiding a 'One Size Fits All' Approach*, Afronomicslaw (Apr. 26, 2019), https://www.afronomicslaw.org/index.php/2019/04/26/trade-facilitation-measures-avoiding-a-one-size-fits-all-approach; Tsietsi, *supra* note 60.

122 AfCFTA, *supra* note 31, Art. 5 (d). Relevant S&DT provisions include: AfCFTA Art. 5 (c) and (d) and Art. 15; The Protocol on Trade in Goods, Preamble, Article 6 (provision of flexibilities that shall include special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis), Article 11 (modification of tariff concessions), Article 17 (trade remedies), Article 24 (infant industries), Articles 26 (general exceptions), Article 27 (security exceptions), and Article 28 (balance of payments difficulties), with Article 29 covering technical assistance and capacity building. AfCFTA, Protocol on Trade in Goods, Mar. 21, 2018, 58 I.L.M. 1028, 1043 [hereinafter AfCFTA Protocol on Trade in Goods]; Protocol on Trade in Services Preamble, Article 7 (flexibilities such as transitional periods, on a case by case basis, to accommodate special economic situations and development, trade and financial needs of the state parties), Article 14 (balance of payment difficulties), Article 15 (general exceptions), Article 16 (security exceptions), Article 23 (modification of schedules and concessions), and Article 27 (technical assistance and capacity building) AfCFTA, Protocol on Trade in Services, Mar. 21, 2018, 58 I.L.M. 1028, 1053 [hereinafter AfCFTA Protocol on Trade in Services]. *See also* Sommer & MacLeod, *supra* note 31; Kuhlmann & Agutu, *supra* note 21.

the AfCFTA's Protocol on Trade in Goods and Protocol on Trade in Services recognize States' different levels of development and particular needs, which are notable in terms of addressing vulnerabilities. The AfCFTA's Protocol on Trade in Services specifically refers to "least developed, land locked, island states, and vulnerable economies in view of their special economic situation and their development, trade, and financial needs,"[123] moving beyond the usual distinctions based largely on economic measurements, and taking into account "other factors, such as level of industrialization, size of the agricultural sector, resource endowments, proximity to ports, and conflict status."[124]

As an additional example of S&DT in an RTA, the RCEP Agreement references S&DT, as well as the need for "flexibility", for some of the parties, namely Cambodia, Laos, Myanmar, and Vietnam.[125] The RCEP also incorporates S&DT for LDCs into dispute settlement (Chapter 19), noting that other parties should exercise due restraint in pursuing disputes against LDCs, which tracks with the WTO's Dispute Settlement Understanding, and otherwise take into account S&DT. It is too soon to assess the impact of these provisions, but their implementation should be tracked going forward.[126]

(2) Flexibility

Flexibility is an important aspect of inclusive law and development, particularly during periods of uncertainty or crisis, although it does need to be carefully crafted and exercised. Flexibility in international agreements, regional rules, and domestic laws and regulations can be important both for policymakers and the stakeholders who are using these systems. Flexibility here relates to legal provisions and structural aspects that allow States to respond to changing circumstances and the needs of stakeholders. As a result, this dimension is particularly focused on how rules can be better adapted to address vulnerabilities in practice and should not be viewed as a replacement for predictable rules themselves.

Flexibility can appear in many forms in international trade law and IEL more broadly, ranging from use of soft law instruments[127] to building block approaches that apply variable geometry. Both are reflected in the AfCFTA,[128] for example, as well as in other African trade agreements. The AfCFTA also specifically refers to "flexibility" alongside other dimensions such as S&DT and sustainable development, including language in the AfCFTA Protocol on Trade in Goods that calls for the need to provide flexibilities, special and differential treatment, and technical assistance to State parties

123 AfCFTA Protocol on Trade in Services, *supra* note 122.
124 Kuhlmann & Agutu, *supra* note 21 (referencing Sommer & MacLeod, *supra* note 31).
125 RCEP, *supra* note 32, pmbl.
126 Farhaan Uddin Ahmed, *Special and Differential Treatment of LDC Parties in RCEP's Dispute Settlement Mechanism: Mere Words or Effective Safeguard?*, Afronomicslaw (Feb. 17, 2021), https://www.afronomicslaw.org/index.php/category/analysis/special-and-differential-treatment-ldc-parties-rceps-dispute-settlement-mechanism.
127 *See* Rolland & Trubek, *supra* note 4.
128 AfCFTA, *supra* note 31, Art. 5(c).

with special needs.[129] Flexibility can also be incorporated into RTA design through "living agreement mechanisms" that allow for monitoring, adjustments, and assessment of implementation needs over time.[130] These can include the flexibility to "review and revise", which is gaining attention, particularly in a crisis context, although this type of flexibility should be balanced with the need for transparency and predictability in rules.[131] As noted, a number of agreements incorporate some aspect of this principle, ranging from the AfCFTA, which provides for periodic review and addition of instruments as needed (Art. 28 and Art. 8, respectively),[132] to the USMCA with its sunset clause. International agreements exhibit flexibility as well. In international trade law, this is most often noted in the context of plurilateral agreements, such as the Information Technology Agreement,[133] which may become a more viable model with WTO negotiation and adjudication functions at an impasse. Several new plurilateral agreement, including those on environmental goods, investment facilitation, services, and digital trade, are currently underway.[134]

The pandemic has highlighted the importance of legal flexibility in a number of respects, ranging from classification of essential goods, agreements between States to facilitate trading during an emergency, and States' ability to waive standards and requirements that might prevent vulnerable stakeholders from accessing essential goods and services.[135] One example of such an option is the Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic signed between New Zealand and Singapore that waives import tariffs on essential goods, including medical goods and food, and establishes an agreement to avoid export restrictions on essential goods, all in order to address vulnerabilities posed by the COVID-19 pandemic.[136]

At the multilateral level, flexibilities in IP rules remain important in the context of vulnerability.[137] One example is the flexibilities on access to medicines incorporated

129 The Preamble to the Protocol on Trade in Goods states: "In conformity with the objective of the AfCFTA in ensuring comprehensive and mutually beneficial trade in goods, State Parties shall, provide flexibilities to other State Parties at different levels of economic development or that have individual specificities as recognised by other State Parties. These flexibilities shall include, among others, special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis." AfCFTA Protocol on Trade in Goods, *supra* note 122, art. 6.

130 Chauffour & Kleimann, *supra* note 14, at 7.

131 *See* Diane Desierto, *The Human Costs of Exiting Trade Agreements: The Right to Development in an Era of Policy Uncertainty*, EJIL:Talk! (Oct. 27, 2017), https://www.ejiltalk.org/the-human-costs-of-exiting-trade-agreements-the-right-to-development-in-an-era-of-policy-uncertainty/.

132 AfCFTA, *supra* note 31, arts. 28 & 8.

133 Howse & Nicolaïdas, *supra* note 2, at 271.

134 *See* Gary Clyde Hufbauer, *Focused Trade Agreements Can Sustain the WTO in Time of Economic Nationalism*, Peterson Inst. Int'l Econ. (Apr. 12, 2021), https://www.piie.com/blogs/realtime-economic-issues-watch/focused-trade-agreements-can-sustain-wto-time-economic.

135 For a more comprehensive presentation of flexibilities in RTAs during time of crisis, see Kuhlmann, *Handbook*, *supra* note 9.

136 Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic para. 2, N.Z.-Sing., Apr. 15, 2020, available at https://perma.cc/WWG4-JRAC.

137 *See, e.g.*, Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. Int'l L. & Pol. 1 (2018). *See also* Kasim Musa Waziri & Awomolo O Folasade, *Protection of Traditional Knowledge in Nigeria: Breaking the Barriers*, 29 J.L. Pol'y & Globalization 176 (2014).

into the TRIPS Agreement, which are particularly relevant to addressing systemic vulnerabilities in light of the pandemic and have a strong connection with the SDGs as well.[138] TRIPS flexibilities on access to medicines include TRIPS Articles 31 and TRIPS 31*bis* (which is notably the only amendment to the WTO agreements), allowing countries to use compulsory licenses to override intellectual property rights in order to compel production or export of generic medicines to address public health concerns.[139] While these flexibilities, particular under TRIPS 31*bis,* have not been used in practice frequently, they have been successfully leveraged to drive down drug prices. Currently, a number of States are supporting expanded flexibilities through a TRIPS waiver.[140] This, however, should also be evaluated in terms of its projected impact, drawing from the lessons of the flexibilities in using compulsory licensing to spur production.

Flexibilities also appear throughout domestic laws as well. In addition to the agricultural examples noted above,[141] India's patent law incorporates flexibility on patentable subject matter and compulsory licensing to create domestic procedural and legal flexibilities.[142] Based on comparative work to date, numerous examples of domestic legal flexibility exist, although they are not yet well documented, and assessing flexibilities across substantive rules could present helpful options for States and stakeholders alike.

(3) Sustainable Development

Sustainable development is also receiving increased focus, both in the context of environmental sustainability and climate change, as well as more broadly in line with the SDGs. [143] Like flexibility, sustainable development appears in a number of forms throughout a variety of legal instruments. These range from language in the WTO preamble and preambles and objectives of RTAs, including the AfCFTA,[144] to incorporation of exceptions that provide the space to address environmental and health considerations.

---

138 *See* Henning Grosse Ruse-Khan, *A Comparative Analysis of Policy Space in WTO Law* (Max Plank Inst. Intell. Prop., Competition & Tax L. Rsch. Paper Series, Paper No. 08-02, 2008). *See also* Antony Taubman, *TRIPS Jurisprudence in the Balance: Between the Realist Defense of Policy Space and a Shared Utilitarian Ethic*, *in* Ethics and Law of Intellectual Property: Current Problems in Politics, Science, and Technology (Lenk et al. eds., 2007).

139 Decision of the General Council on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (2003).

140 *See* Colm Quinn, *Rich vs. Poor (Again) at WTO*, Foreign Pol'y (Mar. 10, 2021), https://foreignpolicy.com/2021/03/10/wto-intellectual-propert-waiver-india-south-africa/. In early May, the United States and EU announced their support of the proposal for an IP waiver for the COVID-19 vaccine. *See Statement from Ambassador Katherine Tai on the COVID-19 TRIPS Waiver*, Off. U.S. Trade Representative (May 5, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver.

141 *See* Kuhlmann & Dey, *supra* note 105.

142 Nedumpara, *supra* note 25, at 6. *See also* Amy Kapczynski, *Harmonization and its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 Cal. L. Rev. 1571 (2009).

Options also include sustainable development chapters in RTAs, including the CETA[145] and UK-EU Agreement. The latter contain provisions focused on sustainable development as well as environment and labor, drawing a link with the SDGs.[146] A number of other RTAs incorporate aspects of sustainable development, including the CPTPP,[147] which includes chapters on development, labor, and environment, and the USMCA.[148] The ACCTS agreement under negotiation will likely move the needle further in terms of RTA options for sustainability and development, with provisions on climate change and elimination of fossil fuel subsidies that may act as precedent for other agreements. In addition, it will be interesting to watch how incremental agreements, like the AfCFTA, incorporate provisions on sustainable development as they evolve, particularly in ways that are tailored to development needs.[149] While linked to the SDGs, sustainable development rules in trade agreements have been met with some skepticism as well, raising concerns that they as not well aligned with development needs.[150] Overall, it is important to ensure that sustainable development provisions intersect with other dimensions of inclusive trade and do not act as a form of disguised protectionism.

Sustainable development appears throughout domestic law as well. Sustainability provisions are common in agricultural regulations, including regulations on agricultural inputs as discussed above, trade rules, and investment provisions. These could also be combined with other areas of law, such as in investment rules that balance States' policy space.[151] SDG Target 17.15 explicitly links policy space with sustainable development, noting the importance of "respect[ing] each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development".[152] This is an important reminder that policy space in the area of sustainable development needs to be tailored to particular needs and approached in a way that respects both different legal traditions and the rights and needs of different stakeholders. The emphasis on sustainability, in both a broad and narrow sense, is only increasing, and cataloguing options in this area, both in RTAs

143 While SDGs 12, 13, 14, and 15 refer to environmental sustainability in particular, all of the SDGs are relevant in the context of this dimension. UN SDGs, *supra* note 19.

144 For a discussion of the development dimensions of the AfCFTA, *see* Kuhlmann & Agutu, *supra* note 21.

145 *See* Huck & Kurkin, *supra* note 79. The Agreement in Principle of the EU-Mercosur Trade Agreement, which is yet to be ratified, also contains a chapter on trade and sustainable development. *See EU–Mercosur Trade Agreement: The Agreement in Principle and its Texts*, Eur. Comm'n (Jul. 12, 2019), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048.

146 *Id.* at 375.

147 *See* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Chapter 19 (Labor), Chapter 20 (Environment), Chapter 23 (Development), Mar. 8, 2018, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents [hereinafter CPTPP].

148 *See* Alvaro Santos, *The New Frontier for Labor in Trade Agreements*, *in* World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization 6 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019).

149 *See* Khumalo, *supra* note 5; *see also* Kuhlmann & Agutu, *supra* note 21.

150 *Id.* at 1.

151 *See, e.g.,* Talkmore Chidede, *The Right to Regulate in Africa's International Investment Regime*, 20 Or. Rev. Int'l L. 437, 461 (2019). *See also* Kuhlmann & Agutu, *supra* note 21.

152 UN SDGs, *supra* note 19.

and domestic law, will help identify options for more inclusive and sustainable trade in the future.

(4) Equity

Building equity considerations into international and national economic law and regulation is perhaps one of the most important ways in which to address vulnerability and build inclusive and sustainable legal frameworks. As noted above, equity issues factor into every aspect of national and international economic law, and priority must be placed on identifying a range of options to tailor the design and implementation of economic law to the needs of economically marginalized communities, racial and ethnic minorities, small farmers, SMEs, women, and indigenous groups and to applying these options whenever possible.[153]

In RTAs, equity considerations are beginning to get incorporated into agreement provisions, including language on inclusion of vulnerable groups, provisions and chapters on gender and indigenous communities, special rules for SMEs, and other approaches. The range of options in this area, however, has only just begun to unfold, and current options sometimes lack detail and implementation. Equity tracks with the SDGs in many respects, including Target10.3 of "ensur[ing] equal opportunity and reduc[ing] inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard." [154]

As the preceding section discusses, socio-legal approaches, focused on stakeholder needs, are critical in order to identify how equity considerations could be incorporated into international economic law and related domestic law.

Some of the examples above regarding agricultural regulation illustrate how the needs of rural communities and farmers could be better aligned with legal and regulatory design and implementation, including the implementation of international agreements. The rights of indigenous communities and protection of traditional knowledge and biodiversity are also central to this approach. National rules and procedures for recording and protecting rights in countries like Ethiopia, Kenya, Tanzania, South Africa, Zambia, India, Peru, Thailand, Malaysia, and Vietnam provide important examples of legal and regulatory models and options.[155] International obligations, such as access and benefit sharing established under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits and International Treaty for Plant Genetic Resources for Food and Agriculture, provide a framework upon which to build and could open the door for more affirmative

153 *See, e.g.*, Alex T. Johnson et al., *A Transatlantic Plan for Racial Equity and Justice,* Just Sec. (Feb. 8, 2021), https://www.justsecurity.org/72968/a-transatlantic-plan-for-racial-equity-and-justice/ (calling for integrating economic empowerment of "communities marginalized by systemic racism" in negotiations for a U.S.-U.K. Free Trade Agreement).

154 UN SDGs, *supra* note 19.

155 *See* Kuhlmann & Dey, *supra* note 105.

rights for local communities once domesticated into national law and implemented in practice.[156] Labor laws and provisions in trade agreements could also be viewed through an equity framing, particularly if coupled with bottom-up approaches to focus on the needs of workers.

One area in which trade measures could be made more equitable is through tailored approaches to address the particular circumstances facing women.[157] While a number of WTO Members have affirmed a commitment to gender through the 2017 Joint Declaration on Trade and Women's Empowerment,[158] some recent RTAs contain more tangible options in terms of gender-focused provisions and chapters.[159] Overall, the World Bank and WTO report that 80 RTAs (including 69 notified to the WTO) contain provisions on gender and women's issues.[160] To date, five RTAs incorporate a separate gender chapter, namely, the Chile-Uruguay, Canada-Chile, Argentina-Chile, Chile-Brazil, and Canada-Israel FTAs[161] Of these, only the Canada-Israel FTA subjects the gender provisions to dispute settlement mechanisms if amicable avenues for resolving disputes fail.[162] While RTAs often focus on softer requirements, such as establishment of committees and agreement to coordinate on gender issues, a combination of soft and hard commitments could be beneficial.[163] Gender chapters may also take a page from commitments in labor and environment and link to relevant international treaties,[164] or they could incorporate minimum legal standards on important legal issues.[165]

Although RTA provisions and chapters on gender are an important step towards building one aspect of equity into trade agreements, they are often not designed to address tangible challenges facing women or facilitate development in the sectors in which women work. This pervasive challenge can be seen in the African RECs as well, which do address gender to an extent but do not fully recognize the diverse roles that women occupy in an economy.[166] However, innovations such as the EAC's Simplified Trade Regime and Non-Tariff Barrier Reporting, Monitoring, and Eliminating

156 For a more extensive discussion of the intersections between indigenous rights and IEL, including international trade law, see Sergio Puig, *International Indigenous Economic Law*, 52 U.C. DAVIS L. REV. 1243 (2019); Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements (John Burrows & Risa Schwartz eds., 2020).

157 *See, e.g.,* Kuhlmann et al., *Reconceptualizing FTAs*, *supra* note 5.

158 *See* José-Antonio Monteiro, *Gender-Related Provisions in Regional Trade Agreements* (World Trade Org. Econ. Rsch. & Stat. Div., Staff Working Paper No. ERSD-2018-15, 2018), https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf.

159 *See, e.g.*, Sama Al Mutair et al., *Trade & Gender: Exploring International Practices That Promote Women's Economic Empowerment*, TradeLab (May 17, 2018), https://www.tradelab.org/single-post/2018/05/17/Trade-and-Gender-1.

160 World Bank & World Trade Org., Women and Trade: The Role of Trade in Promoting Gender Equality (2020), https://www.wto.org/english/res_e/booksp_e/women_trade_pub2807_e.pdf.

161 *Id.*; Kuhlmann et al., *Reconceptualizing FTAs*, *supra* note 5.

162 Kuhlmann et al., *supra* note 5.

163 *Id.*

164 *See* Mia Mikic & Vanika Sharma, *Feminising WTO 2.0*, *in* Revitalising Multilateralism: Pragmatic Ideas For The New WTO Director-General 250 (Simon J. Evenett & Richard Baldwin eds., 2020), https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general.

165 *Mainstreaming Gender in Free Trade Agreements*, Int'l Trade Ctr. (Jul. 2020), https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf.

Mechanism, which is incorporated into several RECs and now the AfCFTA as well, show some promise.[167]

These provisions have application for other vulnerable stakeholders, including small enterprises, and other dimensions of inclusive trade as well. Comprehensive gender strategies are needed, and, on the African continent, gender should also be mainstreamed into the operationalization of the AfCFTA through the national implementation strategies that are currently under development,[168] particularly if done in a way that integrates the needs of local stakeholders in the process.

Another example, among the many that need to be included within this dimension, is digital trade rules that building inclusion and address the digital divide. Although digital access to goods and services has been a lifeline to many during the pandemic, the digital divide has only deepened.[169] While innovations in national law will be particularly important in this regard, digital inclusion could be incorporated into RTAs as well, as the Digital Economy Partnership Agreement (DEPA) highlights.[170] The DEPA includes specific language that emphasizes digital inclusion for indigenous communities, women, rural populations, and low socio-economic groups.[171] The ECOWAS data protection rules, which include a specific reference to human rights and "fundamental liberties" of the data holder, are also a notable option.[172]

166 These agreements fail to recognize "the diverse roles of women as traders, workers, and consumers in African economies [which] has sustained inequalities through the guise of the development discourse". Clair Gammage & Mariam Momodu, *The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies,* 1 Af. J. Int'l. Econ. L. 1, 1 (2020).

167 *Id.* at 1, 3.

168 Nadira Bayat, *A 'Business Unusual' Approach for Gender Equality under the AfCFTA*, 9 ECDPM Great Insights Mag. (2020), available at https://ecdpm.org/great-insights/african-continental-free-trade-area-agreement-impact/business-unusual-gender-afcfta/#:~:text=A%20'business%20unusual'%20approach%20for%20gender%20equality%20within%20the%20AfCFTA&text=In%20this%20way%2C%20AfCFTA%20implementation,a%20key%20role%20to%20play.

169 Franziska Sucker, *COVID-19 Pushes Digital Solutions and Deepens Digital Divide: What Role for African Digital Trade Law,* Afronomicslaw (May 9, 2020). *See also* World Econ. F., Accelerating Digital Inclusion in the New Normal 5 (2020), available at http://www3.weforum.org/docs/WEF_Accelerating_Digital_Inclusion_in_the_New_Normal_Report_2020.pdf.

170 Digital Economy Partnership Agreement, June 12, 2020, Sing. Min. Trade & Indus., https://www.mti.gov.sg/-/media/MTI/Microsites/DEAs/Digital-Economy-Partnership-Agreement/Digital-Economy-Partnership-Agreement.pdf [hereinafter DEPA]. The draft negotiated agreement text for the Partnership Agreement between the EU and Members of the Organisation of African, Caribbean, and Pacific States also includes provisions on the digital divide. *See* Negotiated Agreement Text for the Partnership Agreement between the European Union/ The European Union and its Member States, of the One Part, and Members of the Organisation of African, Caribbean and Pacific States, of the Other Part, Apr. 15, 2021, Eur. Union, https://ec.europa.eu/international-, partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf.

171 DEPA art. 11.1.

172 Supplementary Act A/SA.1/01/10 on Personal Data Protection Within ECOWAS, Feb. 16, 2015, ECOWAS, available at http://www.tit.comm.ecowas.int/wp-content/uploads/2015/11/SIGNED-Data-Protection-Act.pdf

(5) Legal and Regulatory Gateways

As the discussion above highlights, mapping and tracking legal and regulatory gateways provide a glimpse into how law actually affects different stakeholders in practice rather than assuming that all will be impacted equally and where inclusive legal and regulatory approaches could be integrated. In the trade context, while a number of gateways tend to track with common non-tariff regulatory measures (registration, licensing, and certification requirements, for example), this method for mapping rules and regulations has broader application and can be used for IEL provisions, regional rules, and national laws, including those on finance, digital trade, and land tenure. Gateways can also be very useful in assessing laws and regulations from the perspective of vulnerabilities, development priorities, and legitimate legal and policy goals. They highlight important intervention points for incorporating inclusive and equitable legal approaches, addressing common hurdles and reducing discretionary practices that compound vulnerability for many stakeholders, and improving compliance with legal requirements. Too many gateways may also reflect the adoption or importation of law not ideally suited to particular circumstances, and a more detailed examination could lead to better design and implementation, incorporating legal innovation from the Global South.[173]

Mapping legal and regulatory gateways can be very useful in several regards. It allows for comparisons across countries (for example, the regulatory process depicted in Figure 1 in Section III, for example, involves fewer steps in some countries that are part of the same RTAs). At an international level, mapping can also pinpoint areas in which mutual recognition of standards and procedures might be an option or could present challenges, due to differences in how rules are designed to function. Finally, maps are particular useful as an entry point for other dimensions in this methodology, since they highlight concrete intervention points for incorporating equity, sustainability, inclusiveness, and flexibility, in particular, into fit-for-purpose, inclusive legal and regulatory design.

(6) Inclusiveness, Engagement, and Transparency

Inclusiveness and engagement ultimately indicate the degree to which, and process through which, affected communities and individuals can participate in the rulemaking process. Its importance can be seen in the case study discussed in Section III, where SMEs, NGOs, and local organizations representing the interests of farmers and women were engaged in a process for legal and regulatory change in the agricultural sector that would not have occurred absent a more hands-on, inclusive approach. As the case studies illustrated, many stakeholders are not aware of the range of economic rules that affect them day-to-day or the international agreements that could change these realities.

173 *See* Okafor & Miyawa, *supra* note 7.

While many are not aware of all of the economic rules affecting them, even fewer have the opportunity to participate in the process of shaping economic and trade rules. Trade agreements, including the newer RTAs, are notoriously concluded "behind closed doors" with limited public participation,[174] which has implications for the degree to which the needs of developing economy parties and more vulnerable stakeholders are integrated.

Trade agreements and national law can only have an impact if they are implemented in an inclusive way, which necessarily hinges on knowledge of the rules and a process for engagement. However, it is important to note that, while improving inclusiveness and engagement can be done through capacity building efforts, these aspects also need to be integrated into the rules themselves and sustained through a comprehensive and locally-supported process – created in tandem with local initiatives and processes that are already in place – in order to be effective.

Engagement and inclusiveness do appear in global and national trade rules in different forms and relate to both States and stakeholders. The SDGs reflect a priority on engagement and inclusiveness, and Target 10.6 highlights the importance of "ensur[ing] enhanced representation and voice for developing countries in decision-making in global international economic and financial institutions in order to deliver more effective, credible, accountable and legitimate institutions."[175] SDG Target 16.8 further notes the importance of "broaden[ing] and strengthen[ing] the participation of developing countries in the institutions of global governance.[176]

RTAs can also include provisions on engagement, including in areas like labor and environment,[177] which are linked with sustainable development more broadly as discussed above. Newer RTAs increasingly include provisions designed to increase participation of a broader range of stakeholders, which is particularly relevant in terms of addressing systemic and even individual vulnerabilities.[178] In addition to provisions that call for engagement and consultation, procedural rules allowing for amicus briefs are another example of an option to enhance engagement and inclusiveness.[179]

Transparency is another dimension of inclusive trade and development that has proven to be particularly important in times of crisis and vulnerability when rules tend to change quickly, and it is closely linked with inclusiveness and flexibility.[180] In terms of international trade rules, WTO members are bound by the requirements established under Article X of the WTO, as well as a range of other provisions, and

174 *See, e.g.,* Farhaan Uddin Ahmed, *Special and Differential Treatment of LDC Parties in RCEP's Dispute Settlement Mechanism: Mere Words or Effective Safeguard?*, Afronomicslaw (Feb. 17, 2021), available at https://www.afronomicslaw.org/index.php/category/analysis/special-and-differential-treatment-ldc-parties-rceps-dispute-settlement-mechanism.

175 UN SDGs, *supra* note 19.

176 *Id.*

177 Free Trade Agreement art. 18.7, U.S.-Peru, Apr. 12, 2006, available from Off. U.S. Trade Representative at https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf.

178 *See* Howse & Nicolaïdas, *supra* note 2, at 271 (emphasizing the importance of inclusiveness to antifactionalism).

179 *Id.*; *see also* Kuhlmann et al., *Reconceptualizing FTAs*, *supra* note 5.

180 *See id.* at 277 (indicating that transparency can bridge inevitable conflicts between flexibility and inclusiveness).

transparency provisions appear throughout RTAs as well. Transparency tends to arise in RTAs in four common forms: (1) provisions designed to increase participation in the rulemaking process, (2) notification of new rules or changes to existing rules, (3) disciplines on accountability, and (4) mechanisms for cooperation and information pooling.[181] Notification requirements in RTAs usually complement the multilateral notification obligations contained in the WTO covered agreements, and in some cases deepen commitments. For instance, the 2020 Korea-New Zealand FTA imposes a general obligation on parties to notify one another of not only actual measures but also proposed measures deemed to be of material effect.[182] RTAs also include provisions that aim to ensure the general availability of information on trade measures. Notably, the RCEP (as do other RTAs) highlights certain categories of information as especially relevant, a practice that might be useful in addressing vulnerability.[183] It is important, however, that these provisions are not drafted too narrowly.[184]

Transparency is particularly important to all who are affected by economic rules, and, as the pandemic has highlighted, it is central to addressing vulnerability at the global, State, and individual levels. Transparency is also particularly important during a crisis, given the propensity of governments to change laws and regulations and the challenge many stakeholders have in accessing information on existing and new rules.

(7) Implementation, Impact, and Distributive Effects

The final dimension of inclusive trade relates to implementation of economic rules and their impact, including more equitable distribution, in practice. This dimension can help assess how well laws and regulations measure up to stated or shared goals (these could come from policies, customs, or other expressed values) or a causal relationship between the rules and their affect in practice. Assessing the impact, and in particular the distributive effects, of law is, however, a formidable task. As a starting point, implementation of RTAs could be better assessed, including through institutional reform and capacity building.[185] This should also be coupled with application of the lessons outlined in Section III, including the mapping described under Legal and Regulatory Gateways, to better understand how international agreements are being implemented through national law at a more granular level, tracking with other dimensions discussed in this section.

181 *See* Kuhlmann, *Handbook*, *supra* note 9.

182 Free Trade Agreement art. 17.5(l), N.Z.-S. Kor., Mar. 23, 2020, available from N.Z. Ministry Foreign Affs. & Trade at https://www.mfat.govt.nz/assets/Trade-agreements/Korea-NZ-FTA/NZ-Korea-FTA-consolidated-text.pdf.

183 RCEP, *supra* note 32, art. 4.5(l).

184 *See* Kuhlmann, *Handbook*, *supra* note 9, at 154.

185 For a discussion of implementation of preferential trade agreements, see Chauffour & Kleimann, *supra* note 14, at 4-5 (highlighting aspects of implementation drawn from World Bank case studies, namely translation of trade agreement commitments into national law, establishment or reform of relevant institutions, inter-agency coordination and management, institutional capacity building, creation of enforcement mechanisms (e.g., conformity assessment agencies), private sector capacity building to enhance compliance, and sustained budgetary resources).

Substantively, research on impact and distributive effects could begin with what Trubek, Santos, and Thomas refer to as the "background norms" of economic law, which include property and contracts; when combined with "foreground norms" like labor and possibly health rules and regulations (in addition to environmental laws), these could be assessed to more extensively address vulnerabilities.[186] Better understanding legal options across substantive areas, particularly in the context of the other dimensions noted above, would also related to impact and distributive elements and enhance economic dignity, and this dimension in particular will be expanded upon in future work.

Over time, this dimension could also include approaches to more fully evaluate the impact and equitable distribution of laws by employing some of the tools used in economic assessments, tailored, of course, to the realities of designing, enforcing, and living under, economic rules and regulations.

V. Conclusion and Way Forward

International law provides a solid foundation for inclusive trade and sustainable development, setting the stage for a new, more equitable era in international trade rules and IEL more generally. By combining the more traditional tools available to States (such as S&DT and policy space, particularly if applied strategically) with bottom-up approaches that can incorporate the needs of different stakeholders, both systemic and more specific vulnerabilities could be better addressed. As this paper illustrates, the experiences of those living within the law tend to be overlooked as rules are designed and agreements negotiated, with more well-resourced stakeholders and more advanced economies often setting the agenda and leaving important gaps in the options available to address the needs of more vulnerable stakeholders. In addition, legal innovations, while abundant in Africa and around the world, are often sidestepped for more narrow "best practices." Yet, it is precisely this innovation that can be best tailored to particular needs and circumstances. Achieving greater equity and inclusion in international and national economic law is a significant challenge, but a more focused assessment of economic law and its implementation could shift the balance towards broad-based, sustainable development.

The seven dimensions for inclusive law and regulation presented in this paper allow for a systemic evaluation of economic law in the context of development. Approaching trade law and regulation through these different dimensions will give rise to more diverse RTA options and fit-for-purpose regulatory approaches with the potential for deeper impact, while still maintaining a rules-based system for open trade. By cataloguing and comparing options, States and stakeholders could more fully consider ways to make the rules of trade more equitable, drawing upon innovative practices that arise in all corners of the world. Through this new approach to law and regulation, the next era of global trade law would be more inclusive and better able to meet the sustainable development challenges on our horizon.

186 Trubek et al., *supra* note 6, at 7.