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Responsiveness of the African Continental Free Trade Agreement to diet-related non-communicable diseases: A human rights analysis

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Summary: *Non-communicable diseases are the leading cause of death world-wide and have increased significantly on the African continent. Changing diets are a significant contributor where people are given more access to unhealthy foods. Trade liberalisation has been revealed as a structural driver of the so-called 'nutrition transition'. There have been calls to take a human-rights based approach to trade law, and specifically in the context of food, to protect diets under the rights to food and health. In 2008 the Special Rapporteur on the Right to Food proposed practical steps to introduce a human rights lens to trade law*

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which can protect food environments. This article measures the African Continental Free Trade Agreement against these proposed measures. It focuses on AfCFTA due to its potential to impact on inter and intra-regional trade. AfCFTA also recognises the importance of human rights in a trade law context as part of the text of its establishing agreement. an obligation indeed rests on the South African legislature urgently to implement similar laws to save the lives and protect the various other rights of unsafely abandoned infants. It is proposed that 'baby savers' and 'baby safe haven laws' urgently should be introduced in South Africa to prevent further deaths through the unsafe abandonment of infants in places such as toilets, pit latrines and open fields.

Key words: *public health; non-communicable diseases; trade law; African Continental Free Trade Agreement; right to food*

1 Introduction

The trade landscape has grown significantly since the creation of the General Agreement on Tariffs and Trade (GATT) in 1948 which was a multilateral instrument aimed at reducing trade barriers and eliminating trade preferences.¹ In 1995 the World Trade Organisation (WTO) was created,² forming the largest multilateral trading regime in the world and consisting of over 60 agreements, annexures, decisions and understandings.³ However, the WTO regime allows for the creation of certain preferential trade agreements (which prescribe preferential tariffs) and free trade agreements (which aim to eliminate tariffs).⁴ There has also been an explosion of regional trade agreements (RTAs) – reciprocal preferential trade agreements and free trade agreements within specified geographic areas – with 342 RTAs in force as of 14 March 2021.⁵ Perhaps the most exciting and ambitious development in the international trade architecture is the 2018 launch of the African Continental Free Trade Area (AfCFTA) which will partner all the member states of the African Union (AU) (although Eritrea has not yet signed the establishing agreement).⁶

1 General Agreement on Tariffs and Trade 1948 (GATT).

2 Agreement Establishing the World Trade Organisation 1994 (Marrakesh Agreement).

3 WTO 'Understanding the WTO: The Agreements' (n/d), https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (accessed 30 July 2021).

4 Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, 28 November 1979 (L/4903, BISD 26S/203).

5 WTO 'Regional trade agreements database' 15 March 2021, <http://rtais.wto.org/UI/Public-MaintainRTAHome.asp> (accessed 16 August 2021).

6 African Union 'List of countries which have signed, ratified/acceded to the Agreement Establishing the African Continental Free Trade Area' 8 October

This project is aimed at significantly increasing intra-African trade, which has developed at a much slower pace than trade between African and external trade partners, or external trade partners *inter se*.⁷

However, it is not only the trade landscape that has changed. A global recognition of a 'nutrition transition' in low and middle-income countries has been noted.⁸ Diets in low and middle-income countries have changed and become increasingly energy dense, leading to nutrition-related non-communicable diseases such as cancer, hypertension, cardiovascular disease and diabetes mellitus.⁹ This is particularly concerning in the context of the growing amount of non-communicable disease-related deaths – 70 per cent of all deaths worldwide,¹⁰ of which an increase in the prevalence of non-communicable diseases in sub-Saharan Africa of 11 per cent has been noted between 1990 and 2017.¹¹ During the same period the average caloric intake of persons living in Africa has increased by 16 per cent with the most significant increases in the intake of free sugars and fats – known indicators for nutrition-related non-communicable diseases.¹² Commentators do not regard trade liberalisation (the removal of trade barriers) and the growth in nutrition-related non-communicable diseases as unrelated. There have been several academic studies that show trade agreements as structural drivers for nutrition-related non-communicable diseases and link these agreements to the decreased ability of governments to implement public health policies to counteract this trend.¹³

As international trade law falls within the broader scheme of international law, there has been a growing call to rely on the human rights obligations of states to intervene in unbridled trade

2019, <https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA%20%282%29.pdf> (accessed 14 March 2021).

7 P Osakwe, J Nkurunziza & B Bolaky 'Economic development in Africa report 2013: Intra-African trade – Unlocking the private sector' (2013) 19.

8 BM Popkin 'The nutrition transition: An overview of world patterns of change' (2004) 62 *Nutrition Review* 140-143.

9 As above.

10 World Health Organisation Regional Office for Africa 'Non-communicable disease' (n/d), <https://www.afro.who.int/health-topics/noncommunicable-diseases> (accessed 16 August 2021).

11 HN Gouda et al 'Burden of non-communicable diseases in sub-Saharan Africa, 1990-2017: Results from the Global Burden of Disease Study' (2017) 7 *Lancet* e1375-e1387.

12 S Gebremedhin & T Bekele 'Evaluating the African food supply against the nutrient intake goals set for preventing diet-related non-communicable diseases: 1990 to 2017 trend analysis' (2021) 16 *PLoS* e0245241.

13 Eg, A Schram et al 'A conceptual framework for investigating the impacts of international trade and investment agreements on non-communicable disease risk factors' (2018) 33 *Health Policy and Planning* 123; see part 6 below for further discussion on this.

liberalisation by framing the issue as a rights-issue: invoking the rights to life, health and food (among others). This can lead to formulating, interpreting and implementing trade agreements in a fashion that can be more responsive to the change in the food landscape and concurrent growth in nutrition-related non-communicable diseases. This article explores the way in which the use of international human rights law can assist in preventing, or at least reducing, the negative impact of trade agreements on the African continent. It specifically focuses on the potential role of the AfCFTA due to its scope, novelty and its interaction with other RTAs on the continent to impact the food landscape in Africa. The article will sketch the background of trade in Africa to assist readers in understanding the role of AfCFTA and its potential scale, along with highlighting the nutrition transition in Africa. The article then anchors the discussion of the prevention of nutrition-related non-communicable diseases in the interplay between human rights and trade law, by highlighting the rights that are impacted when adequate prevention of nutrition-related non-communicable diseases is not present, and reviewing the arguments from commentators as to why and how trade law should be responsive to human rights. Finally, the article considers recommendations for making trade agreements more human rights-responsive in the context of the right to food, and assesses the AfCFTA at the hand of these recommendations.

2 Background: African regional trade law and the introduction of AfCFTA

Historically, African countries have experienced little trade among themselves, while trade with partners outside of the region has increased significantly.¹⁴ Even the infrastructure reflects this tendency, with railways being built from the interior of the continent to the coast, rather than between borders that otherwise are difficult to traverse.¹⁵ A mechanism to address this deficit is the introduction of regional economic communities (RECs), usually through the creation of a RTA.¹⁶ There are several RECs on the continent, of which the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern

¹⁴ Osakwe, Nkurunziza & Bolaky (n 7) 19.

¹⁵ SE Barnekow & KG Kulkarni 'Why regionalism? A look at the costs and benefits of regional trade in Africa' (2017) 18 *Global Business Review* 105; C Mutume 'How to boost trade in Africa' *African Renewal* September 2002, <https://www.un.org/africarenewal/magazine/september-2002/how-boost-trade-within-africa> (accessed 16 August 2021).

¹⁶ As above.

and Southern Africa (COMESA) arguably are the largest, covering significant territory in Africa.

ECOWAS was established in 1975 through the Treaty of Lagos.¹⁷ It is composed of 15 countries with over 300 million people in its joint territories.¹⁸ ECOWAS transcended to that of a trade community, but also seeks to achieve broader economic and political integration. For example, ECOWAS members signed a mutual defence pact that created a regional armed force.¹⁹ Eight of the members of ECOWAS are also part of a joint customs union (West African Economic and Monetary Union (UEMOA)) which has adopted certain common external tariffs and contains combined indirect taxation regulations.²⁰ ECOWAS members enjoy preferential trade.²¹ Shortly after the establishment of ECOWAS the Southern African Development Coordinating Conference was established in 1980, and then converted into SADC in 1992. It joins 15 Southern African states (with an estimated 257 million people) together in an organisation aimed at facilitating trade and other broader integration goals.²² In 2005 parties signed the Protocol on Trade which established a Free Trade Area (for 13 of the 15 members). EAC was first founded in 1967 but later collapsed. It was revived in 2000 with original membership being Kenya, Tanzania and Uganda, but with Burundi and Rwanda joining in 2007, and South Sudan joining in 2016.²³ In 2005 the EAC Customs Union became operational;²⁴ in 2010 a Common Market was launched;²⁵ and in 2013 EAC members signed a protocol to establish a monetary union before 2023.²⁶ COMESA started in 1994 and was established 'as an organisation of free independent sovereign states which have agreed to co-operate in developing their natural and human resources for the good of all their people'.²⁷ It is a free trade area with 21 members and roughly overlaps with the

17 Economic Community of West African States 'History' (n/d), <https://www.ecowas.int/about-ecowas/history/> (accessed 16 August 2021).

18 As above.

19 African Union Profile 'Economic Community of West African States' (n/d) 6, <https://web.archive.org/web/20110626213148/http://www.africa-union.org/Recs/ECOWASProfile.pdf> (accessed 16 August 2021). at 6

20 As above.

21 Barnekow and Kulkarni (n 15) 110.

22 South African Development Community 'History' (n/d), <https://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 16 August 2021).

23 East African Community 'History of the EAC' (n/d), <https://www.eac.int/eac-history> (accessed 16 August 2021).

24 As above.

25 East African Community 'Common Market' (n/d), <https://www.eac.int/common-market> (accessed 16 August 2021).

26 East African Community 'Monetary Union' (n/d), <https://www.eac.int/monetary-union> (accessed 16 August 2021).

27 Common Market for Eastern and Southern Africa (COMESA) 'What is COMESA' (n/d), <https://www.comesa.int/what-is-comesa/> (accessed 16 August 2021).

geography of SADC and EAC.²⁸ It also established a customs union.²⁹ While these RECs created the framework for enhanced regional trade, it did not meet the ultimate pan-African vision of promoting trade throughout the entire continent.

In 2013 member states of the AU agreed on a joint growth and development plan for the continent titled Agenda 2063.³⁰ Agenda 2063 will be implemented through five 10-year implementation plans.³¹ The RECs are identified as key stakeholders for coordinating the implementation of the relevant 10-year plans among members and broadly monitoring and evaluating the implementation at a regional level. Agenda 2063 identified 12 flagship initiatives, including the creation of a Continental Free Trade Area which aims to accelerate growth of intra-African trade (specifically to double trade by 2022) and to use trade as a mechanism for rapid sustainable growth and development throughout the entire continent.³² Negotiations of this initiative among member states were launched in 2015.³³ Finally, the Agreement Establishing the African Continental Free Trade Area (Establishing Agreement) entered into force in May 2019.³⁴ It built on negotiations of the Tripartite Free Trade Area, which comprises the Southern African Development Community, The East African Community and the Common Market for Eastern and Southern Africa,³⁵ but recognises several additional RECs: Arab Maghreb Union (UMA); the Community of Sahel-Saharan States (CEN-SAD); the Economic Community of Central African States (ECCAS); and the Intergovernmental Authority on Development (IGAD) and, of course, ECOWAS.³⁶

According to its Preamble, it is a mechanism to fulfil the aspirations of a 'continental market with the free movement of persons, capital, goods and services, which are crucial for deepening economic integration, and promoting agricultural development, food security,

28 As above.

29 Treaty Establishing the Common Market for Eastern and Southern Africa 1994, arts 63-66.

30 African Union 'Agenda 2063: Background Note' 13 October 2015 2, https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf. (accessed 16 August 2021).

31 COMESA (n 27) 3.

32 COMESA (n 27) 12.

33 African Union 'Decision on the Launch of Continental Free Trade Area Negotiations' 14 June 2015, Assembly/AU/Dec. 569 (XXV).

34 Trade Law Centre 'The African Continental Free Trade Area: A TRALAC guide' August 2020, <https://www.tralac.org/documents/resources/booklets/4062-afcfta-a-tralac-guide-7th-edition-august-2020/file.html> (accessed 16 August 2021).

35 L Abrego et al 'The African Continental Free Trade Agreement: Welfare gains estimates from a general equilibrium model' (2019) 4.

36 African Continental Free Trade Agreement (2018) (AfCFTA) Preamble read with art 1.

industrialisation and structural economic transformation'.³⁷ It is the second-largest trade agreement since the creation of the WTO.³⁸ Its implementation is to occur over two phases: Phase 1 marks the liberalisation of goods and services and dispute settlement.³⁹ Phase 2 will relate to competition, investment and intellectual property policy.⁴⁰

3 Nutrition landscape and the commercial determinants of health in Africa

Research by the WHO in 2015 estimated that non-communicable disease -related deaths account for 70 per cent of deaths worldwide.⁴¹ The rate of non-communicable disease-related deaths is also estimated to increase by 17 per cent globally, and 27 per cent in the African region before 2030.⁴² Several African states already report that more than 50 per cent of their domestic deaths are caused by non-communicable diseases.⁴³ In sub-Saharan Africa the rate of non-communicable diseases increased from 18,6 per cent to 29,8 per cent between 1990 and 2017.⁴⁴ More than 40 per cent of deaths in East Africa are attributable to non-communicable diseases.⁴⁵ In North Africa statistics on overweight and obesity, specifically, reveal an increase in over-nutrition in the region, with Egyptian adults showing the most concerning rates of obesity at an estimated 46,6 per cent.⁴⁶ WHO AFRO estimated that by 2030 non-communicable diseases would become the leading cause of death in sub-Saharan Africa.⁴⁷

This increasing prevalence of non-communicable diseases coincides with major changes in the economies, diets and activity levels of people in sub-Saharan African countries.⁴⁸ Over the past

37 As above.

38 RY Simo 'Trade in services in the African Continental Free Trade Area: Prospects, challenges and WTO compatibility' (2020) 23 *Journal of International Economic Law* 66.

39 AfCFTA (n 36) art 4.

40 AfCFTA (n 36) art 7.

41 World Health Organisation Regional Office for Africa (n 10).

42 As above.

43 As above – Mauritius, Namibia and Seychelles.

44 Gouda et al (n 10)

45 T Siddharthan et al 'Non-communicable diseases in East Africa: Assessing the gaps in care and identifying opportunities for improvement' (2015) 34 *Health Affairs* 1508.

46 S Toselli et al 'Prevalence of overweight and obesity in adults from North Africa' (2014) 24 *European Journal of Public Health* 32.

47 JI Bigna & JI Noubiap 'The rising burden of non-communicable diseases in sub-Saharan Africa' (2019) 10 *The Lancet Global Health* e1295-6.

48 T Reardon et al 'The processed food revolution in African food systems and the double burden of malnutrition' (2021) 28 *Global Food Security* 100466. driving them to buy processed food and food prepared away from home to save

five decades there has been an increasing proliferation of ultra-processed foods and a shift to Western diets in sub-Saharan Africa.⁴⁹ This has led to a nutrition transition and a growing double burden of malnutrition in African states where there simultaneously is a burden of undernutrition, stunting and wasting alongside increasing levels of obesity.⁵⁰ This increase in obesity is linked to higher rates of consumption of pre-packaged and lower quality foods in East Africa,⁵¹ which in turn is linked to increased access to foreign staple foods, the availability of processed foods and the marketing of unhealthy products.⁵² A review of non-communicable diseases in North Africa and the Middle East shows significant increases in the average degree of energy consumed per person in North African countries, for instance. Algeria's average calorie intake per person per day increased from 1 820 to 3 094 between 1969 and 2005.⁵³ The Global Nutrition Report indicates that 52 per cent of African adolescents have a sugar-sweetened beverage daily, while only 70 per cent have a fruit daily or 78 per cent have a vegetable daily.⁵⁴ In addition, the consumption of packaged food per capita per year has grown from 54 to 71 kilograms in 2017, while trends in North and Latin America show a reduction in packaged food consumption.⁵⁵ A study in West Africa shows high rates of daily consumption of snack foods: 25,7 per cent of children in Niger up to 45,5 per cent in Côte d'Ivoire.⁵⁶ A trend analysis of Cameroon, Kenya, Nigeria and South Africa revealed that 'global economic integration (trade and investment), beyond the pure generation of wealth (GDP), is linked to intermediate (overweight and obesity) and distal (CVD death) health outcomes'.⁵⁷ The analysis showed that all countries increased

arduous home-processing and preparation labor. In the past several decades, this trend has accelerated with a surge on the supply side of the processing sector and small and medium enterprises (SMEs).

- 49 NP Steyn & ZJ Mchiza 'Obesity and the nutrition transition in sub-Saharan Africa' (2014) 311 *Annals of the New York Academy of Sciences* 89-90.
- 50 Reardon et al (n 48) 100466.driving them to buy processed food and food prepared away from home to save arduous home-processing and preparation labor. In the past several decades, this trend has accelerated with a surge on the supply side of the processing sector and small and medium enterprises (SMEs).
- 51 Siddharthan et al (n 45) 1508.
- 52 V Raschke & B Cheema 'Colonisation, the New World Order, and the eradication of traditional food habits in East Africa: Historical perspective on the nutrition transition' (2008) 11 *Public Health Nutrition* 669.
- 53 AM Sibai et al 'Nutrition transition and cardiovascular disease risk factors in Middle East and North Africa countries: Reviewing the evidence' (2010) 57 *Annals of Nutrition and Metabolism* 198.
- 54 Development Initiatives '2018 Global Nutrition Report: Shining A light to spur action on nutrition' (2018) 83, <https://globalnutritionreport.org/reports/global-nutrition-report-2018/> (accessed 16 August 2021).
- 55 Development Initiatives (n 54) 90.
- 56 S Nordhagen, AM Pries & R Dissieka 'Commercial snack food and beverage consumption prevalence among children 6-59 months in West Africa' (2019) 11 *Nutrients* 2715.
- 57 A Schram, R Labonté & D Sanders 'Urbanisation and international trade and investment policies as determinants of non-communicable diseases in sub-

their imports of cereal and cereal products as well as sweeteners such as sugar, honey and sugar products.⁵⁸ Disturbingly, this trend existed alongside persistent rates of food insecurity.⁵⁹ This perhaps is not unsurprising given the lessons from history that showed the impact of new trade paradigms on the impact of indigenous diets: For example, the introduction of trade with South-East Asia in the 1500s led to the assimilation of foreign ingredients into local diets.⁶⁰ Despite the increasing prevalence in obesity, many countries in sub-Saharan Africa remain in the early stages of nutrition transition and, for this reason, it remains possible to reverse the trajectory of the non-communicable disease epidemic.⁶¹

The role of trade agreements in this transition is often referred to as a commercial determinant of health. Broadly speaking, the commercial determinants of health is a term that refers to 'factors that influence health which stem from the profit motive'.⁶² An important sub-set of these factors is what is termed the commercial determinants of non-communicable diseases, which links the rise of transnational food and drink companies and the growing trend of consumption of ultra-processed food and drinks with the increase in the burden of non-communicable diseases.⁶³ The role of trade agreements as commercial determinant for non-communicable diseases is discussed in more detail below.⁶⁴

4 NCD prevention: 'Protecting' the rights to food, health, and life of the person

The scholarship and legal position on a human rights-based approach to non-communicable disease prevention are relatively new and continue to develop. Non-communicable diseases, and particularly nutrition-related non-communicable diseases, as well as preventative

Saharan Africa' (2013) 56 *Progress in Cardiovascular Disease* 297.

58 As above.

59 As above.

60 Raschke & Cheema (n 52) 664.

61 Z Abrahams, Z Mchiza & NP Steyn 'Diet and mortality rates in sub-Saharan Africa: Stages in the nutrition transition' (2011) 11 *BMC Public Health* 11.

62 R West & T Marteau 'Commentary on Casswell (2013): The commercial determinants of health' (2013) 108 *Addiction* 686-687, although a recent systematic study showed no uniform definition and identified several definitions with different focal points: C de Lacy-Vawdon & C Livingstone 'Defining the commercial determinants of health: A systematic review' (2020) 20 *BMC Public Health* 1022.

63 K Buse, S Tanaka & S Hawkes 'Healthy people and healthy profits? Elaborating a conceptual framework for governing the commercial determinants of non-communicable diseases and identifying options for reducing risk exposure' (2017) 13 *Global Health* 34.

64 K Buse & M Mialon 'An overview of the commercial determinants of health' (2020) 16 *Global Health* 74.

interventions, implicate a broad array of human rights. Patterson et al suggest that a state's response to obesity can implicate a wide array of social, cultural and political rights including (non-exhaustively) the rights to life, health, food, education, freedom of association, freedom of speech, privacy, information and non-discrimination.⁶⁵ However, this part will focus on the relationship between non-communicable diseases, and the rights to health, life and food.

The Preamble to the Constitution of the World Health Organisation (1946) was the first recognition of a right to health and included a definition that included 'complete physical, mental and social well-being', not merely the absence of disease. This right to health was further recognised in article 25 of the United Nations Declaration of Human Rights, which states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The right to health was further expanded in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁶ read with General Comment 14 which outlined the right to health as including both a right to access health care as well as addressing the underlying determinants of health including 'access to safe and potable water and adequate sanitation, an adequate supply of safe food, *nutrition* and housing, healthy occupational and environmental conditions'.⁶⁷

Whether these rights encompassed the prevention of nutrition-related non-communicable diseases was initially not clear. General Comment 14 limited a state's obligations in respect of genetic and life style-related diseases.⁶⁸ However, in both the General Comment

65 D Patterson et al 'Identifying a human rights-based approach to obesity for states and civil society' (2019) 20 *Obesity Reviews* 48-50.

66 International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).
67 ESCR Committee General Comment 14: The Right to the Highest Attainable Standard of Health (art 12) E/C.12/2000/4 (2000) para 11 (our emphasis).

68 General Comment (n 67) para 9: 'The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services

and other statements on the right to health, there has been a growing recognition that nutrition-related non-communicable diseases are not a result of individual behaviour and choices but, in many respects, are a result of environments and exposure to risk factors. This is reflected in the increasing number of statements recognising the obligations under the rights to food and health in preventing nutrition-related non-communicable diseases.

The 2011 Moscow Declaration acknowledged that ‘the right of everyone to the enjoyment of the highest attainable standards of physical and mental health cannot be achieved without greater measures at global and national levels to prevent and control NCDs’. At a high-level meeting of the General Assembly on the prevention and control of NCDs in 2018, member states explicitly adopted a rights-based approach to non-communicable disease prevention and affirmed that

the primary role and responsibility of governments at all levels in responding to the challenge of non-communicable diseases by developing adequate national multisectoral responses for their prevention and control, and promoting and protecting the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and underscore the importance of pursuing whole-of-government and whole-of-society approaches, as well as health-in-all-policies approaches, equity-based approaches and life-course approaches.⁶⁹

The 2014 UN Special Rapporteur on the Right to Health’s report on unhealthy foods, non-communicable diseases and the right to health expressly outlined the state’s duties to prevent nutrition-related non-communicable diseases as part of the state’s obligations to respect, protect and fulfil the right to health.⁷⁰ In this report the Special Rapporteur also discussed the aspects of human rights related to the responsibility of the food and beverage industry and recognised that the right to health requires that industry to ‘refrain from engaging in activities that negatively impact the right of people to the highest attainable standard of health’.⁷¹ This report mirrored the report of the 2011 UN Special Rapporteur on the Right to Food (De Schutter) to the Human Rights Council where he discussed the right to food and the ‘triple challenge’ of food security, adequate nutrition and

and conditions necessary for the realisation of the highest attainable standard of health’ (our emphasis).

69 United Nations General Assembly, 17 October 2018, A/RES/73/2, <https://undocs.org/en/A/RES/73/2> (accessed 16 August 2021).

70 Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover, 1 April 2014 (A-HRC-26-31).

71 Report of Special Rapporteur (n 70) 12.

overweight and obesity.⁷² One of the most notable aspects of the report is the discussion of poverty and its links to non-communicable diseases. De Schutter outlines how poorer households may be less educated about unhealthy diets but also may lack the resources to improve their diets.⁷³ De Schutter posited that the role of a human rights framework is two-fold, namely, the protection of the right to an adequate diet and ensuring a transition to more sustainable diets.⁷⁴

At a regional level, the African Charter on Human and Peoples' Rights (African Charter) recognises the right to health as the right of every individual 'to enjoy the best attainable state of physical and mental health'.⁷⁵ In *SERAC*⁷⁶ the African Commission on Human and Peoples' Rights (African Commission) developed the right to life and the right to health under articles 4 and 16 of the African Charter respectively as including a right to food.⁷⁷ The Commission explicitly recognised the link between the right to food and other guaranteed rights:⁷⁸

The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens.

The African Commission goes further in its 2019 Resolution where it links the right to food to the requirement of nutritional quality, and mandates states to strictly regulate the marketing of industrialised and highly-processed food – categories of food items regarded as non-nutritious and unhealthy.⁷⁹

Consequently, both at regional and international level there appears to be a human rights imperative for states to take action to prevent and control non-communicable diseases.

72 Report submitted by the Special Rapporteur on the Right to Food, Oliver de Schutter, 26 December 2011 (A/HRC/19/59).

73 Report of Special Rapporteur (n 72) para 8.

74 Report of Special Rapporteur (n 72) para 20.

75 African Charter on Human and Peoples' Rights (1981) art 16.

76 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (SERAC).

77 *SERAC* (n 76) para 64-65.

78 As above.

79 Resolution on the Right to Food and Nutrition in Africa, 10 November 2019, ACHPR/RES.431(LXV)2019, <https://www.achpr.org/sessions/resolutions?id=462> (accessed 11 May 2022).

5 Growing recognition of human rights in trade law

The start of modern international trade and investment law did not incorporate human rights concerns. The Bretton Woods Agreements – which established the now-World Bank and International Monetary Fund – and the General Agreement on Tariffs and Trade (GATT) – the predecessor to the WTO, the provisions of which were adopted by the WTO – made no mention of human rights.⁸⁰ This is not surprising given that the Universal Declaration of Human Rights was adopted in 1948, while the Bretton Woods Agreements were concluded in 1944 and the GATT in 1947.⁸¹ However, to view these multilateral trade treaties and human rights treaties as completely removed from one another is not accurate. Their origins can both be traced back to post-World War II measures to increase prosperity, stability and international cooperation.⁸²

Commentaries on international trade agreements have increasingly started to consider its human rights impact. The Office of the High Commissioner for Human Rights has prepared a number of reports on human rights, globalisation, trade and investment.⁸³ Trade agreements have also been increasingly recognising human rights objectives, albeit not always expressly. For instance, relevant to the topic of this article, we note that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that member states may 'adopt measures necessary to protect public health

80 P Alston 'Resisting the merger and acquisition of human rights by trade law: A reply to Petersmann' (2002) 13 *European Journal of International Law* 820.

81 As above.

82 H Lim 'Trade and human rights: What's at issue?' (2001) 35 *Journal of World Trade* 276; see art 55 of the United Nations Charter which provides, among others, that the United Nations shall promote 'higher standards of living' amongst the backdrop of creating 'conditions of stability and well-being which are necessary for peaceful and friendly relations among nations'; and the Marrakesh Agreement (n 2) which provided that contracting parties should conduct endeavours with the view to raising standards of living.

83 Commission of Human Rights 'The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights' E/CN.4/Sub.2/2001/13; Commission of Human Rights 'Globalisation and its impact on the full enjoyment of human rights' E/CN.4/2002/54; Commission of Human Rights 'Liberalisation of trade in services and human rights' E/CN.4/Sub.2/2002/9; Commission of Human Rights 'Human rights, trade and investment' E/CN.4/Sub.2/2003/9; Commission of Human Rights 'Human rights and trade' Submission to the 5th WTO Ministerial Conference, Cancun, Mexico, 10-14 September 2003; Commission of Human Rights 'Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalisation' E/CN.4/2004/40; Commission of Human Rights 'The right of everyone to the enjoyment of the highest attainable standard of physical and mental health – Mission to the World Trade Organisation' E/CN.4/2004/49/Add.1; Commission of Human Rights 'Mainstreaming the right to development into international trade law and policy at the World Trade Organisation' E/CN.4/Sub.2/2004/17; Commission of Human Rights 'Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalisation' (E/CN.4/2005/41).

and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement'.⁸⁴ This recognition does not automatically amount to a human rights-based approach to applying its provisions,⁸⁵ but laid the foundation for instruments such as the DOHA declaration, which called for a reading of TRIPS that aligns with a state's duties to promote public health.⁸⁶

African RECs have a more express incorporation of human rights concerns: The EAC Treaty prescribed the protection and promotion of rights under the African Charter as a fundamental principle and even ties the qualification of membership to the observation of human rights, and the treaties establishing ECOWAS and SADC commit members to the protection and promotion of 'fundamental rights'.⁸⁷ Closely linked to this is the incorporation of human rights as guiding principles in economic initiatives both regionally, such as the New Partnership for Africa's Development (NEPAD), and from possible donor countries, such as the African Growth and Opportunity Act in the United States (AGOA).⁸⁸

Petersmann argues for three reasons why developing and giving clarity to the relationship between human rights and trade law is increasingly becoming necessary.⁸⁹ First, human rights might be an important legal context for the interpretation of trade agreements. For example, article 3(3) of the Dispute Settlement Understanding (DSU) of the WTO provides that customary rules of interpretation of international law is a mechanism to preserve the rights and obligations of members under covered agreements (agreements specifically listed in the DSU).⁹⁰ In turn, the Vienna Convention on

84 Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement (2005) art 8.

85 Commissioner for Human Rights 'The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights' E/CN.4/Sub.2/2001/13 para 21.

86 DOHA Declaration on the TRIPS Agreement and Public Health, 20 November 2001 WT/MIN(01)/DEC/2.

87 SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 92.

88 Musungu (n 87) 93. However, these initiatives should not be regarded without criticism. Eg, AGOA mandates the protection of private property rights, which is a subject of debate in the region, and could pose some very direct conflicts such as when intellectual property rights such as patents over medicine clash with the right to health of persons protected under the African Charter.

89 E Petersmann 'The "human rights approach" advocated by the UN High Commissioner for Human Rights and by the International Labour Organisation: Is it relevant for WTO law and policy?' (2004) 7 *Journal of International Economic Law* 608-613.

90 Annex 2 of the Marrakesh Agreement (n 2), and Appendix 1 thereof which sets out the covered agreements for the DSU.

the Law of Treaties – which generally is considered to contain several important rules of customary international law – provides that when interpreting treaties '[t]here shall be taken into account ... any relevant rules of international law applicable in the relations between the parties'.⁹¹ Second, the perception that trade liberalisation leads to the improved 'total welfare' of the state has been challenged, and trade liberalisation is increasingly being understood to disproportionately benefit producers, and to omit the protection of the interests of the vulnerable.⁹² Third, trade rules and the protection of human rights serve complementary functions which would benefit from a reconciliatory approach.⁹³ Economic welfare is a key component to realising human rights, and human rights protection promotes economic welfare. For example, one cannot enjoy the realisation of socio-economic rights such as access to health, food, housing and social security in a state of poverty. Equally, without the protection of non-discrimination, wealth might only be enjoyed by an elite few in a country.

The Special Rapporteur on the Right to Food has also made an argument that allowing trade law to be self-contained from other international obligations is problematic: First, human rights law occupies a hierarchically superior normative position.⁹⁴ The United Nations Charter provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.⁹⁵ Article 55(c) of the Charter provides that the UN shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all', while article 56 provides that '[m]embers pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'. Attempting to view trade law and human rights law separately can lead to a reality in which states can undermine their human rights obligations.⁹⁶

Perhaps a clear example can be found in the protection and promotion of children's rights – which Cathaoir and Hartley

91 Vienna Convention on the Law of treaties (1969) art 31(3)(c).

92 Petersmann (n 89) 611.

93 Petersmann 612.

94 O de Schutter 'A human rights approach to trade and investment policies' (2008) Conference Paper: Confronting the global food challenge: Finding new approaches to trade and investment that support the right to food 3.

95 Charter of the United Nations (1945) art 103.

96 De Schutter (n 94) 14.

considered central in addressing obesity.⁹⁷ The United Nations Convention on the Rights of the Child (CRC) enjoys almost universal recognition: Every member of the UN is a party to CRC except the United States which is a signatory.⁹⁸ For example, CRC provides that the ‘best interests of the child shall be the primary consideration’ in all actions concerning children.⁹⁹ It also recognises the right of the child to enjoy the highest attainable standard of health and that states shall take appropriate measures to combat malnutrition and provide adequate food.¹⁰⁰ It is difficult to imagine how trade disputes under the DSU, at least, cannot consider the provisions of CRC as ‘relevant rules ... in the relations between parties’, and consider the best interests of the child and the child’s health as factors when determining trade disputes.

6 Potential impact of trade agreements on the nutrition landscape of a country

Friel et al identify the following three pathways to how trade agreements can influence the nutrition landscape of a country: the impact of the removal of tariff and non-tariff barriers on imports; the impact of tariff reduction on government spending; and the promotion of foreign direct investment as a door for increased unhealthy food producers to enter local markets.¹⁰¹ The Special Rapporteur on the Right to Food mentions the impact of the mandatory removal of barriers in the context of ‘regulatory chill’ – where states are unwilling to intervene in markets to promote certain objectives (such as promoting health concerns) for fear of being sanctioned under trade agreements.¹⁰² The Special Rapporteur also echoes the concern about the reduction in government income.¹⁰³ In addition to these concerns, the impact of trade agreements on the ability to levy excise taxes or use custom tariffs as a way to influence consumer behaviour is also of importance.

97 KÓ Cathaoir & M Hartlev ‘The child’s right to health as a tool to end childhood obesity’ in A Garde, J Curtis & O de Schutter (eds) *Ending childhood obesity: A challenge at the crossroads of international economic and human rights law* (2020) 57.

98 United Nations Convention on the Rights of the Child (1989) (CRC).

99 Art 3(1) CRC.

100 Arts 24(1) & 2(c) CRC.

101 S Friel et al ‘A new generation of trade policy: Potential risks to diet-related health from the Trans-Pacific partnership agreement’ (2013) 9 *Global Health* 46.

102 De Schutter (n 94) 14; see also S Friel & D Gleeson ‘Emerging threats to public health from regional trade agreements’ (2013) 381 *Lancet* 1507.

103 As above.

6.1 Increased imports of unhealthy commodities

The ascension to trade agreements are correlated to increased imports of unhealthy commodities.¹⁰⁴ A systematic review of 17 quantitative studies on the impact of implementing trade agreements revealed an increase in the import of unhealthy food products after import tariffs were reduced, including an increase in processed food: in India after local liberalisation reforms in the 1990s; in Central America after the introduction of the US-Central American Free Trade Agreement (CAFTA) and prior bilateral agreements between the United States and Central American countries; in Fiji and Samoa after implementing several trade liberalisation policies driven by accession to the WTO and in response to local environmental and political factors.¹⁰⁵ With the introduction of the Central America-Dominican Republic-Free Trade Agreement (CAFTA-DR) several countries announced removing tariffs on cookies, frozen pizza, corn chips, baked crackers, potato chips and sugar confectionary.¹⁰⁶ Following the signature of the North American Free Trade Agreement (NAFTA) imports of, among others, corn, high-fructose corn syrup, and snack foods from the United States to Mexico increased.¹⁰⁷ Shockingly, in an attempt to protect their processed food industry, the United States attempted to negotiate an explicit ban on front-of-pack-nutrition labelling – a policy viewed as a measure to promote healthy consumer choices.¹⁰⁸ A study of the relationship between increased foreign direct investment (FDI) associated with trade openness in Cameroon, Kenya, Nigeria and South Africa, and dietary habits reveals a disproportionate increase in the import of sugar and sugar products, with a growing rate of daily caloric intake of the population (with the exception of Kenya).¹⁰⁹ The rates of undernourishment remained stagnant.¹¹⁰

104 B Townsend & A Schram 'Trade and investment agreement as structural drivers for NCDs: The new public health frontier' (2020) 44 *Australian and New Zealand Journal of Public Health* 92.

105 P Barlow et al 'The health impact of trade and investment agreements: A quantitative systematic review and network co-citation analysis' (2017) 13 *Global Health* 5; AM Thow & C Hawkes 'The implications of trade liberalisation for diet and health: A case study from Central America' (2009) 5 *Global Health* 11; AM Thow et al 'Trade and the nutrition transition: Strengthening policy for health in the Pacific' (2011) 50 *Ecology of Food and Nutrition* 33.

106 Thow & Hawkes (n 105) 11.

107 SE Clark et al 'Exporting obesity: US farm and trade policy and the transformation of the Mexican consumer food environment' (2012) 18 *International Journal of Occupational Environmental Health* 54 61.

108 R Labonté 'Trade, investment and public health: Compiling the evidence, assembling the arguments' (2019) 15 *Global Health* 4.

109 Schram (n 57).

110 As above.

6.2 Increased foreign direct investment

The impacts of NAFTA on the Mexican food landscape also show the impact of increased foreign direct investment. Increased FDI often is a goal of trade liberalisation and the resulting trade agreements created to facilitate the goal. FDI allows transnational food corporations to extend their production, distribution and marketing channels.¹¹¹ The largest portion of US investment in the Mexican food industry is in soft drinks and malt beverages and highly-processed food.¹¹² Fast food companies such as McDonald's, KFC, Pizza Hut and Taco Bell have rapidly proliferated across Mexico.¹¹³ Piercing of local markets is also accompanied by aggressive marketing techniques. For example, in the late 1990s sugar-sweetened beverage (SSB) producers used child-directed marketing in schools in Mexico and Columbia which led to a 50 per cent increase in SSB consumption among children.¹¹⁴ Hints of FDI negatively impacting the food systems between African states among themselves are already evident in the growing dominance of South African supermarket chains in neighbouring countries: Botswana, Egypt, Lesotho, Malawi, Mauritius, Madagascar, Mozambique, Namibia, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.¹¹⁵ Research suggests that supermarkets increase access to unhealthy foods by pricing such items at rates of between 30 per cent and a 110 per cent lower than healthy alternatives.¹¹⁶ Another example of the possible skewing of increased FDI in the food sector is the investment under the New Alliance for Food Security and Nutrition in Africa, which was launched under the auspices of the G8 and is aimed at investing in the agri-food sector in Burkina Faso, Benin, Côte d'Ivoire, Ethiopia, Ghana, Malawi, Mozambique, Nigeria, Senegal and Tanzania.¹¹⁷ Five of the top six investors are producers of SSBs or alcoholic beverages and their total investment between 2012 and 2017 amounts to US \$1 890 800.¹¹⁸ This dovetails with the broader trend of agricultural FDI in sub-Saharan Africa, where

111 Friel (n 101).

112 Clark et al (n 107) 60.

113 As above.

114 C Hawkes, M Chopra & S Friel 'Globalisation, trade, and the nutrition transition' in R Labonté et al (eds) *Globalisation and health: Pathways, evidence and policy* (2009) 254-255.

115 Schram (n 57).

116 D Sanders et al 'Public health and processed food imports in South Africa' (2011) Report prepared for the Department of Trade and Industry South Africa.

117 Directorate-General for External Policies, European Parliament 'New Alliance for Food Security and Nutrition in Africa' (2015) 4, [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/535010/-EXPO_STU\(2015\)535010_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/535010/-EXPO_STU(2015)535010_EN.pdf) (accessed 20 August 2021)

118 C Husmann & Z Kubik 'Foreign direct investment in the African food and agriculture sector: Trends, determinants and impacts' (2019) 12, <https://www.econstor.eu/bitstream/10419/204641/1/1663183198.pdf> (accessed 20 August 2021).

investment in breweries and distilleries (8 per cent), sugar and confectionary (8 per cent) and the soft drink sector (4,6 per cent) is noteworthy.¹¹⁹

6.3 Reduction in tariff revenue

African countries have a higher reliance on trade taxes than other regions, which can be ascribed to difficulties in domestic tax administration which tend to lead to a concentration on 'easy' taxes.¹²⁰ The impact of tariff reductions thus could disrupt the available income to governments. Kassim compares several studies on trade liberalisation and trade tax revenues and found an inconsistent narrative: Depending on the subject of the study, trade liberalisation could either lead to a reduction in revenue, or an overall improvement due to increased total trade.¹²¹ The United Nations Conference on Trade and Development (UNCTAD) estimates that short-term loss of government revenue due to AfCFTA implementation can cause a revenue shock (an estimate of up to US \$4,1 billion) but estimates that longer-term economic growth will counteract this effect.¹²² A modelling of East African countries and the implementation of AfCFTA paints a different picture: There is a revenue loss in Kenya (US \$14,2 million); Uganda (US \$13,5 million); Tanzania (US \$5,3 million); Burundi (US \$4,3 million); and Rwanda (US \$3,9 million). While Kenya, Uganda and Burundi will experience a longer-term positive trade effect, Rwanda and Tanzania are likely to not see the revenue loss offset.¹²³

6.4 Regulatory chill

Trade agreements can also be used to challenge public health policy initiatives. We have already seen several instances where

119 Husmann & Kubik (n 118) 13.

120 African Trade Policy Centre 'Fiscal implications of trade liberalisation on African Countries' (2004) ATPC Work in Progress 5, <https://repository.uneca.org/handle/10855/5551> (accessed 20 August 2021).

121 L Kassim 'The revenue implication of trade liberalisation in sub-Saharan Africa: Some new evidence' (2016) University of Kent 5, <https://www.kent.ac.uk/economics/repec/1605.pdf> (accessed 20 August 2021).

122 M Saygili, R Peters & C Knebel 'African Continental Free Trade Area: Challenges and opportunities of tariff reductions' (2017) UNCTAD Research Paper 15, 8, 12, <https://unctad.org/webflyer/african-continental-free-trade-area-challenges-and-opportunities-tariff-reductions> (accessed 20 August 2021).

123 IMB Shinyekwa, ENW Bulime & AK Naittahi 'African Continental Free Trade Area: The potential revenue, trade and welfare effects for the East African Community' (2020) Economic Policy Research Centre Paper 153, 24, <https://www.africaportal.org/publications/african-continental-free-trade-area-potential-revenue-trade-and-welfare-effects-east-african-community/> (accessed 20 August 2020).

trade concerns were used to challenge tobacco control measures and nutrition labelling that would assist in identifying unhealthy foods.¹²⁴ For example, despite legal analysis indicating that the plain packaging for tobacco labelling would be compliant with trade obligations in Australia, the WTO dispute settlement machinery was still invoked.¹²⁵ Nutrition labelling is even more vulnerable to these trade challenges as there is no international standard or convention regarding nutrition labelling.¹²⁶ A systematic review of statements made in the WTO TBT Committee between 2010 and 2020 found that commercial actors managed to positively sway Committee discussions on ten alcohol policies, including challenges to South African and Kenyan local policies.¹²⁷ For example, a proposed policy to include stricter health warnings on alcohol products in Kenya was challenged based on a perceived lack of evidence and was asked to reconsider a health warning label by the European Union in favour of non-restrictive policies such as public education.¹²⁸

The use of investor-state dispute settlement regimes in free trade agreements allows foreign private investors to directly bring forward trade concerns and even claim financial compensation from states.¹²⁹ An explosion of these claims against states have been noted where commercial entities challenge regulations that impact the value of their local investments and are perceived to amount to expropriation.¹³⁰ These claims have increased in number and claim value.¹³¹ For example, in 2015 the WTO Technical Barriers to Trade Committee received 54 trade concerns, of which one in every three related to public health issues.¹³² Even where governments have been successful in defending trade challenges against non-communicable disease prevention measures, the litigation has been costly and results in 'regulatory chill', something to which sub-Saharan countries are particularly susceptible.¹³³

124 AM Thow et al 'Nutrition labelling is a trade policy issue: Lessons from an analysis of specific trade concerns at the World Trade Organisation' (2018) 33 *Health Promotion International* 564-568.

125 H Jarman 'Attack on Australia: Tobacco industry challenges to plain packaging' (2013) 34 *Journal of Public Health Policy* 375.

126 Thow et al (n 124) 569.

127 Barlow et al 'Industry influence over global alcohol policy via the World Trade Organisation: A qualitative analysis of discussions on alcohol warning labelling, 2010-19' (2022) 10 *Lancet* e429-e437.

128 As above.

129 CL McNamara et al 'Glossary on free trade agreements and health part 1: The shift from multilateralism and the rise of "WTO-Plus" provisions' (2021) *Journal of Epidemiology and Community Health* Jan 5: jech-2020-215104.

130 Labonté (n 108) 2.

131 As above.

132 P Barlow 'Trade and investment agreements: Implications for health protection' (2017) 51 *Journal of World Trade* 160.

133 A Garde & J Zrilić 'International investment law and non-communicable diseases prevention: An introduction' (2020) 21 *Journal of World Investment and Trade*

7 Opportunities to improve the human rights responsiveness of trade agreements

During his tenure as the United Nations Special Rapporteur on the right to food De Schutter offered a detailed framework through which to consider the interaction of international trade and investment law and human rights.¹³⁴ This framework is one of the first attempts to understand the interaction of these two fields and offers four practical ways in which to make trade agreements more human rights-responsive.¹³⁵ The framework is also developed with a unique understanding of food systems, which is key in the discussion on nutrition-related non-communicable diseases, and trade and investment issues.¹³⁶

First, De Schutter argues for the inclusion of general exception clauses and flexibilities in trade agreements that allows states to escape certain obligations under trade agreements without fearing sanctions (the aforementioned 'regulatory chill'). For example, article XX of GATT provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health ...

Similar wording is found in the General Agreement on Trade in Services, other RTAs or even built upon as in the EU-Mercosur Association Agreement, which provides that '[a]rticle XX of the GATT 1994 ... is incorporated into and made part of [this] Chapter' and that article XX(b) of GATT 'includes environmental measures, such as measures taken to implement multilateral environmental agreements'.¹³⁷ These exceptions as formulated in GATT has been interpreted by the UN Secretary-General to be reflected on and linked to the protection of several human rights, including the right to food and health.¹³⁸ However, in practice these provisions in the GATT have

668.

134 De Schutter (n 94) 15.

135 As above.

136 De Schutter (n 94) 6.

137 Trade part of the EU-Mercosur Association Agreement (2019) art 13; the Trans-Pacific Partnership Agreement uses a similar formulation.

138 United Nations Secretary-General 'Globalisation and its impact on the full enjoyment of all human rights' A/55/342 para 17.

not led to a decision based on human rights concerns before the Dispute Settlement Panel or Appellate Body.¹³⁹ In addition, the Office of the High Commissioner for Human Rights makes the point that formulating the mechanisms to promote human rights as exceptions rather than guiding principles already creates an impression of subordination of human rights.¹⁴⁰

Second, the use of an *ex ante* human rights assessment is encouraged.¹⁴¹ Similar calls to conduct a human rights impact assessment (HRIA) of trade agreements have been frequent from a range of other actors:¹⁴² several United Nations Treaty Committees¹⁴³ and the Office of the High Commissioner for Human Rights.¹⁴⁴ On a national level, the Canadian Parliament called for a HRIA of the Canada-Columbia Free Trade Agreement.¹⁴⁵ The purpose of the HRIA is to evaluate the potential impact of negotiated provisions on human rights, specifically in the food environment. This evaluation occurs on several levels: The substance of the treaty is probed to consider the availability, accessibility, acceptability and adaptability of the provision of socio-economic rights; the procedures in the treaty are probed to consider which oversight structures exist within the treaty to monitor for human rights violations; and, finally, the HRIA can act as the basis for claims of human rights violations in future.¹⁴⁶ The European Commission has extended its sustainability impact assessment process to evaluate the human rights responsiveness of all proposed trade agreements.¹⁴⁷ Several HRIAs in various forms, scopes and complexities have been undertaken: The National Human Rights

139 Lim (n 82) 284.

140 United Nation High Commissioner of Human Rights 'The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights' E/CN.4/Sub.2/2001/13 para 22.

141 De Schutter (n 94) 17.

142 J Harrison & A Goller 'Trade and human rights: What does "impact assessment" have to offer?' (2008) 8 *Human Rights Law Review* 589.

143 ESCR Committee 'Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant' E/C.12/1/Add.100; CEDAW Committee 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Colombia' CEDAW/C/COL/CO/6; CRC Committee 'Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations El Salvador' CRC/C/15/Add.232.

144 United Nations High Commissioner for Human Rights 'Report of the High Commissioner on Human Rights, Trade and Investment' E/CN.4/Sub.2/2003/9 para 2.

145 Report of the Standing Committee on International Trade, Human Rights, the Environment and Free Trade with Colombia (2008) Ottawa: Communication Canada para 44, <https://www.ourcommons.ca/Content/-Committee/392/CIIT/Reports/RP3580301/ciitrp05/ciitrp05-e.pdf> (accessed 20 August 2021).

146 De Schutter (n 94) 18.

147 J Zerk 'Human rights impact assessment of trade agreements' (2019) 9, <https://www.chathamhouse.org/sites/default/files/2019-02-18Human-RightsTradeAgreements.pdf> (accessed 20 August 2021).

Commission of Thailand assessed the Thailand-US FTA, the CAFTA-DR and Pacific Agreement on Closer Economic Relations.¹⁴⁸

Third, De Schutter – alive to the criticism of some of the shortcomings of *ex ante* assessments – also advocates the inclusion of sunset or *rendez-vous* clauses. This clause allows for *ex post facto* HRIAs to be conducted and then allows revision of the original agreement to correct aspects that have resulted in negative outcomes.¹⁴⁹

Fourth, using the same reasoning as Petersmann above in ‘importing’ human rights obligations as part of the interpretation of trade agreements, and relying on arguments of the normative superiority of human rights obligations in the hierarchy of international law, De Schutter argues that where trade agreements and human rights obligations cannot be reconciled, the trade agreement must be set aside and disapplied.¹⁵⁰

8 How does AfCFTA measure up?

Using the four mechanisms proposed by De Schutter, the AfCFTA is measured for its human rights responsiveness.

First, AfCFTA employs a general exception clause (as has become practice). The AfCFTA Protocol on Trade in Goods provides in article 26:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between State Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this Protocol shall be construed as preventing the adoption or enforcement of measures by any State Party that are:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health ...

The Protocol on the Trade in Services provides the same exceptions.¹⁵¹ AfCFTA also contains a waiver clause that permits a state party to request a waiver of any obligation under the Agreement and which can be granted by a decision of three-fourths of the state parties.¹⁵² The waiver is subject to annual review.¹⁵³ The inclusion of these

148 As above.

149 De Schutter (n 94) 20.

150 De Schutter 19.

151 AfCFTA Agreement (n 34) art 15, Protocol.

152 Art 15(1) AfCFTA Agreement.

153 Art 15(2) AfCFTA Agreement.

clauses nominally checks De Schutter's requirement but is likely to face the same obstacles that the previous interpretation of similarly-worded clauses in other trade agreements suffered.

In terms of the use of *ex ante* human rights impact assessment, a HRIA was conducted jointly by the Economic Commission for Africa, the Friedrich-Ebert-Stiftung and the Office of the United Nations High Commissioner for Human Rights.¹⁵⁴ The HRIA made several relevant recommendations in relation to ensuring that AfCFTA is alive to challenges to domestic food environments: Members of AfCFTA should maintain an exclusion list of tariff lines to be temporarily excluded from tariff liberalisation to protect vulnerable groups (such as food insecure groups);¹⁵⁵ it is necessary to negotiate the maintenance of policy space in the final treaty, that is, to keep open the ability to implement measures in certain areas such as the food environment;¹⁵⁶ the treaty should establish a mechanism to monitor and evaluate the human rights compliance of eliminating non-tariff barriers;¹⁵⁷ and, finally, ongoing data collection before and after the adoption of AfCFTA is important for accurate assessments of the impacts of the implementation of AfCFTA on vulnerable groups.¹⁵⁸

In June 2019 AfCFTA published Annex 5 to the agreement relating to non-tariff barriers which creates several bodies responsible for monitoring, coordinating and implementing the elimination of non-tariff barriers.¹⁵⁹ There is nothing in the annex to indicate that these bodies would concern themselves with any possible human rights implications of eliminated barriers but, rather, the bodies seem to be structured to promote consistent, clear and rapid elimination instead. These bodies are also to interact with REC Non-Tariff Barrier (NTB) Monitoring mechanisms where the use of REC NTB mechanisms are encouraged as a first remedy.¹⁶⁰ COMESA and ECOWAS have established such NTB mechanisms which really act as a mechanism to complain about the failure to eliminate a non-tariff barrier practically instead of providing a platform to advocate the continued existence or reintroduction on a NTB.¹⁶¹ The schedule of tariff concessions are still outstanding, with the result that it is not possible to comment on

154 FES 'Report: The Continental Free Trade Area (CFTA) in Africa – A human rights perspective' (2017), https://www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssess-ment.pdf (accessed 20 August 2021).

155 FES (n 155) 16.

156 FES 17.

157 FES 18.

158 FES 14.

159 AfCFTA (n 34) Annexure 5, arts 6-9.

160 Art 12(2) AfCFTA (n 34).

161 Borderless Alliance 'Register a complaint', http://www.tradebarrierswa.org/register_complaint; trade-barriers.org/register-_complaint (accessed 20 August 2021).

products that are on or excluded from the exclusion list.¹⁶² However, it seems that an exclusion list will be issued, but no more than 3 per cent of tariff lines may be included in this list.¹⁶³

In terms of the inclusion of a *rendez-vous* clause, a similar clause is present in article 28 of the Establishing Agreement which provides that the '[Establishing] Agreement shall be subject to review every five (5) years after its entry into force, by State Parties, to ensure effectiveness, achieve deeper integration, and adapt to evolving regional and international developments'. No reference is made to a HRIA being required as part of this process. The responsiveness of AfCFTA to human rights will be dependent upon how this review process occurs practically and if a HRIA forms an integral part of this process.

In terms of using human rights as an interpretative tool, conceptually, AfCFTA is already more responsive to human rights in so far as actually recognising human rights as part of the text of its Establishing Agreement. AfCFTA specifically recognises the importance of human rights for the development of international trade and economic cooperation, and reaffirms the rights and duties of member states in terms of other agreements to which they are party.¹⁶⁴ Under article 3 it provides as one of its objectives to promote sustainable and inclusive socio-economic development.¹⁶⁵ However, this is not surprising given the express recognition the RECs have given human rights. In addition, similar to the DSU, the Protocol on Rules and Procedures on the Settlement of Disputes provides that the Dispute Settlement Panel and the Appellate Body 'shall interpret the provisions of the Agreement in accordance with the customary rules of interpretation of public international law, including the Vienna Convention on the Law of Treaties, 1969'.¹⁶⁶ Thus, the text of the Establishing Agreement can be used to motivate the use of human rights obligations in other treaties to guide disputes or general interpretation of the Establishing Agreement.

162 G Erasmus 'When will trade under AfCFTA preferences become a reality' (2019), <https://www.tralac.org/documents/events/tralac/2741-tralac-brief-when-will-trade-under-afcfta-preferences-become-a-reality-march-2019/file.html> (accessed 20 August 2021).

163 AfCFTA Secretariat 'The schedules of tariff concessions', <https://afcfta.au.int/en/schedules-tariff-concessions> (accessed 20 August 2021).

164 AfCFTA (n 36) Preamble.

165 Art 3(e) AfCFTA (n 36).

166 Art 30 AfCFTA (n 36).

9 Steps forward

In terms of possible avenues for the AfCFTA to be responsive to food environments and counter-act (or at least not contribute to) the growing burden of non-communicable diseases moving forward, there are a few possible steps. The tariff schedules were still to be finalised¹⁶⁷ and, therefore, it is not possible for state parties to negotiate for higher tariffs for energy-dense and ultra-processed foods, or even place such items on the exclusion list. The renegotiation of treaty provisions can be accompanied by a detailed *ex post facto* HRIA of the impact of AfCFTA across its member states to ensure that no unintended negative human rights consequences ensue. This renegotiation could also be the mechanism to introduce oversight and control bodies responsible for monitoring human rights compliance in a clear manner. Finally, the interpretation of the Agreement and the determination of disputes ultimately is in the hand of member parties. Being guided in the realities of what is required to realise the right to food is a powerful tool which can be easily accommodated under the text of the Agreement and can be employed flexibly. This will require appropriate national action, which will most likely be couched in broader national non-communicable disease policies and legislation that consider food systems holistically.

10 Conclusion

AfCFTA is a major development in the global trade architecture and has the ability to reshape and reinvigorate trade among African states. At the time of its implementation and negotiation of further phases in its development, the member states of AfCFTA have the benefit of a comprehensive and growing body of evidence on the potential role of trade agreements in changing food environments, as well as the benefit of the development of international trade law to increasingly acknowledge the role of international human rights law. While it is not possible at this early stage to assess whether or not the implementation of AfCFTA marks a new era of human rights responsive trade agreements, it is possible to note some encouraging developments. Ultimately, the individual member states have the duty to ensure that the future development and interpretation of AfCFTA is human rights-responsive, and in particular responsive to the rights to food, health and life. This should be done not only at implementation phase, but during further negotiations relating to AfCFTA instruments. A failure to take up this call will likely result in

¹⁶⁷ At the time of submission.

states violating treaty obligations in terms of international human rights law.