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### Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)

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# *Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)*

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*There is a gap in the legal scholarship on African regional trade agreements (RTAs) that links law and development to narratives of developmental regionalism. This article addresses the gap by making the case for an explicit linking of Law and Development scholarship and Developmental Regionalism in African RTAs. First, the article argues that the cross-pollination of the fields provides an opportunity for a more rigorous understanding of developmental regionalism in African RTAs. Second, the article that developmental regionalism as an analytical tool responds to and encapsulates the multidimensional character of African RTAs. Third, the article argues for a more rigorous engagement with the role of law in African RTAs. Since African RTAs incorporate economic and non-economic ideas, the article against the failure narratives that are produced by dominant legal formalist thinking. These dominant modes of legal thinking privilege Eurocentric legal thoughts embedded in transplanted trade agreements. In conclusion therefore, the article argues that our understanding of African RTAs as 'flexible legal regimes' or in anti-formalist terms is deepened by an explicit linkage of the fluid concept of development to the selective implementation of the RTAs based on the priorities of African states.*

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## Introduction

The discourse of regionalism in Africa and the legal regimes of African regional trade agreements (RTAs) have been studied in the shadow of established and long-standing regimes in Europe.<sup>1</sup> The linear comparison of the African regional trade regimes to the European counterpart has entrenched the narrative failure of the African RTAs. African RTAs are not simply trade enhancing regimes like their European counterparts.<sup>2</sup> African RTAs are multidimensional. They have both economic and non-economic objectives as well as formal and informal regimes. The fetishizing of Eurocentric traditional assumptions about the formal and narrow nature of trade agreements and their neoclassical emergence underplays the multidimensional and eclectic nature of African RTAs. Dominant Eurocentric understandings of the RTAs have failed to account for the structures of unequal regional economic development, legacies of colonialism, informality, and the murky coexistence of African RTAs in a complex world order. The multiple objectives of African RTAs center social, economic, political, environmental, physical infrastructure, electioneering monitor, conflict resolution and regional security among other associated development initiatives. Hence, they are loosely described as development-oriented models of RTAs.

Yet, there is a gap in the scholarship on African RTAs that theoretically analyzes the linkages and overlaps between the concept of developmental regionalism and the insights that can be derived from Law and Development (L&D) scholarship. In this article, I contend that the cross-fertilization of ideas in both areas engender a deeper and theoretically grounded understanding of African RTAs.<sup>3</sup> Although some

1 KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (Princeton University Press, 2014).

2 RICHARD FRIMONG OPPONG, *LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA* (Cambridge University Press, 2011); JAMES T. GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS FLEXIBLE LEGAL REGIMES* (Cambridge University Press, 2011); KOFI OTENG KUFUOR, *THE INSTITUTIONAL TRANSFORMATION OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES* (Routledge, 2017).

3 On Law and Development scholarship, see Luis Eslava, *The Developmental State: Independence, Dependency and the History of the South*, in *THE BATTLE FOR INTERNATIONAL LAW: SOUTH-NORTH PERSPECTIVES ON THE DECOLONIZATION ERA* (Jochen von Bernstorff & Philipp Dann eds., Oxford University Press, 2019); YONG-SHIK LEE, *LAW AND DEVELOPMENT: THEORY AND PRACTICE* (London: Routledge, 2018); DAVID M. TRUBEK ET AL., *LAW AND THE NEW DEVELOPMENTAL STATE: THE BRAZILIAN EXPERIENCE IN LATIN AMERICAN CONTEXT* (Cambridge University Press 2013); Stephanie de Moerloose, *Law and Development as a Field of Study: Connecting Law with Development*, 10(2) L. & DEV. REV. 179 (2017); Gabriel Garcia, *The Rise of the Global South, the IMF and the Future of Law and Development*, 37(2) THIRD WORLD Q. 191 (2016); Yong Shik-Lee, *Call for a New Analytical Model for Law and Development*, 8(1) L. & DEV. REV. 1 (2015);

research now theorize developmental regionalism, only a handful of them draws on the theory and praxis of L&D to enrich developmental regionalism.<sup>4</sup> The concept of ‘developmental regionalism’ and its contours in African RTAs vary and maps on to the heterogeneity of Africa.<sup>5</sup>

Developmental regionalism remains crucial to the aspirations of African States as exemplified by the Agreement Establishing the African Continental Free Trade Area Agreement (AfCFTA).<sup>6</sup> As the frontiers of developmental regionalism in the 21st century gains greater prominence in the AfCFTA<sup>7</sup> and sub-regional organizations, there is an urgent need for critical engagement with the concept. It is important for legal academic scholarship to analyze and provide guidance on the contours of developmental regionalism and the varying roles of law; with a view to not only deepening our understanding of African RTA regimes but also establish a pathway for policy experts in a way that advances Africa’s interests.<sup>8</sup>

This article argues against the uncritical narrative of ‘development’ and concept of developmental regionalism in African RTAs.<sup>9</sup> To address the gap in

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David M. Trubek & Alvaro Santos, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (Cambridge University Press, 2006).

- 4 See generally JONATHAN BASHI RUDAHINDWA, *REGIONAL DEVELOPMENTALISM THROUGH LAW: ESTABLISHING AN AFRICAN ECONOMIC COMMUNITY* (Routledge, 2018) (studying regionalism in Africa and the various ways in which law can be used to address the particular issues raised by regional schemes across the continent. The author contemplates the role that law can play to help achieve the various objectives assigned to regional schemes in the context of the Treaty of Abuja). SAID ADEJUMOBİ & CYRIL OBI, *DEVELOPMENTAL REGIONALISM AND ECONOMIC TRANSFORMATION OF SOUTHERN AFRICA* (Routledge, 2020). In particular, see Said Adejumoobi & Zebulun Kreiter, *The Theory and Discourse of Developmental Regionalism*, in, *DEVELOPMENTAL REGIONALISM AND ECONOMIC TRANSFORMATION OF SOUTHERN AFRICA* (Said Adejumoobi & Cyril Obi eds., Routledge, 2020) (arguing that “Regionalism must not only spur regional economic growth and relative even development for the member states but also ensure palpable benefits through the provision of regional public goods for the citizens of the region, which will invariably increase their sense of regional identity and commitment to the regional integration project.”).
- 5 Richard Gibb, *Regional Integration and Africa’s Development Trajectory: Meta-Theories, Expectations and Reality*, 30(4) *THIRD WORLD Q.* 701–21, 701 (2009).
- 6 *Agreement Establishing the African Continental Free Trade Area Agreement*, African Union, [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf).
- 7 Dr. Faizel Ismail, *A ‘Developmental Regionalism’ Approach to the AfCFTA* (Trade and Industrial Policy Strategies, Working Paper, 2018) (arguing that adopting a “developmental regionalism” approach to trade integration provides the best prospects for the AfCFTA to catalyze the process of transformative industrial development, cross-border investment and democracy, governance, peace and security in Africa). Dauda Garuba, *ECOWAS’s Experience in developmental regionalism*, in *DEVELOPMENTAL REGIONALISM AND ECONOMIC TRANSFORMATION OF SOUTHERN AFRICA* (Said Adejumoobi & Cyril Obi Eds., Routledge, 2020).
- 8 For an analysis of “African-Centered” intellectual property regime, see Titilayo Adebola, *Mapping Africa’s Complex Regimes: Towards an African Centred AfCFTA Intellectual Property Protocol*, 1 *AFR. J. INT’L ECON. L.* (2020).
- 9 Instances of the uncritical and neoliberal way in which developmental regionalism is deployed is

theorizing the 'development' in developmental regionalism, I make explicit the interconnection between L&D and Developmental Regionalism in African RTAs. While the article acknowledges the shortcomings of mainstream L&D scholarship, it contends that these critiques do not foreclose its cross-pollination for theorizing a rigorous understanding of how development in African RTAs is understood.

Expressly linking developmental regionalism to L&D scholarship enriches how African RTAs are understood and distinguishes their analysis from the dominant models based on neo-classical economics that relegate African RTAs as inferior regimes. A compelling justification for regional integration in Africa is to achieve economic independence, and equitable development of the Member States. Linking regionalism to L&D helps to account for the multidimensional aspects of developmental regionalism in Africa. The linkage also brings to the forefront of the discourse, the co-existence of the economic and non-economic aspects of Africa's peculiar and overlapping interests in regional cooperation. Further, expressly linking African RTAs to L&D scholarship offers a unique interdisciplinary lens that makes it possible to address not only the peculiar historical, economic and political context of the different trade agreements, but also their legal trajectory.

This article does not propose a guide of the role of law *in* developmental regionalism in Africa. The actual operation of law varies from one society to another. The heterogeneity of legal paradigms in African societies and their differing impacts on our understanding of the formal and informal aspects of the RTAs should be studied on their own terms. In this context, I agree with Maxwell Chibundu that

[l]aw, flowing from the experiences of the people, forms an essential backdrop of the social institutions within which the quest is undertaken. Incorporating the understanding of those generally ignored experiences into a field that aims for universality, that equates glo-

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evident in some of the United Nations Economic Commission for Africa's reports. For example, ... 'developmental regionalism' [is] at the centre of its strategy for growth and structural transformation, current global trends show a growing scepticism towards regional integration and trade agreements. It is therefore critical that Africa not backtrack on its commitments to continental trade liberalization and related structural reforms through the [AfCFTA]. Trade remains a key driver of productivity, growth and welfare gains. It is also an important means of implementation and financing of the Africa development agenda. However, current concerns about the unequal distributive impact of trade require efforts to ensure a progressive pro-poor [AfCFTA]...

See UNECA, *Assessing Regional Integration in Africa VIII, "Bringing the Continental Free Trade Area About"* (Oct. 2017), [https://www.uneca.org/sites/default/files/PublicationFiles/aria8\\_eng\\_fin.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf).

balism with Westernization and economic success with development and humanitarianism, is the challenge for law and development.<sup>10</sup>

The article argues that rethinking developmental regionalism as an analytical tool avoids strappings of prescriptive analysis. Developmental regionalism is most developed in the Southern African sub-region.<sup>11</sup> It's contours will vary and expand based on the developmental priorities of the different sub-regions in Africa. Hence, conceptualizing developmental regionalism as an analytical tool avoids falling into the critique of universality and the applicability of regimes across Africa without adaptability to the peculiar socio-economic reality of the region. In conclusion, the article argues that our understanding of African RTAs as 'flexible legal regimes' or in anti-formalist terms is deepened by an explicit linkage of the fluid concept of development to the selective implementation of the RTAs based on their priorities.

This article proceeds as follows. In Part I, which is divided into two sections, I explore the development narratives embedded in the RTAs and contend that multidimensional development aspirations are baked into African RTAs. The first section concludes with a description of my understanding of developmental regionalism as can be gleaned from the RTAs. The second section conceptualizes the incoherence of developmental regionalism as a distinct feature of the multiplicity of African RTAs.<sup>12</sup> This argument is based on two further sub-points: first, since the concept of development is eclectic, the article argues that developmental regionalism need not be described in static and linear terms. Second, the incoherence of developmental regionalism is reflective of the heterogeneity and post-colonial reality of African States and the diverse social, economic, political and physical infrastructure development goals they pursue. In Part II, I draw on the scholarship on L&D, to broaden the theorizing of developmental regionalism. I periodize the trajectory of African RTAs into three overlapping moments and link the ideas to deepen our understanding of the theoretical genealogy of developmental regionalism.

10 See Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29(2) CASE WESTERN RESERVE J. INT'L L. 169–261, 261 (1997).

11 SAID ADEJUMOBI & CYRIL OBI, *DEVELOPMENTAL REGIONALISM AND ECONOMIC TRANSFORMATION OF SOUTHERN AFRICA* (Routledge, 2020).

12 This argument builds in part on James Thuo Gathii's discussion of the features of African RTAs. James Gathii, *African Regional Trade Agreements as Flexible legal Regimes*, *supra* note 2.

## I. PART I

### A. 'Development' Narratives in African RTAs

The RTAs of the various Regional Economic Communities (RECs) in Africa have substantive economic development aspirations embedded in them. They are in part a development strategy for the regions to combat the under-development legacies of colonialism. Economic cooperation in Africa is also a means of augmenting the external vulnerabilities of the cooperating states.<sup>13</sup> This section of the article discusses some of the provisions in the trade agreements of the RECs and the AfCFTA. It argues that the RTAs mirror a multidimensional development model. In short, that aspirations of economic development are baked into the constituting treaties of African RTAs.<sup>14</sup>

In West Africa, the Revised Treaty establishing the Economic Community of West African States (ECOWAS) aims "... to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, maintain and enhance economic stability, ... and contribute to the progress and development of the African Continent" and the adoption of a Community.<sup>15</sup> Developmental aspirations are further ingrained in connection with gender, tourism, socio-economic development, energy, population, social affairs, industrial, food and agriculture, human and financial resources to mention a few.

In East Africa, the objective of the Treaty Establishing the East African Community (EAC) is to "develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit."<sup>16</sup> Article 5(3) of the EAC Treaty provides that in pursuing the objectives, the community shall ensure "the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of

13 See Melaku Desta, Guillaume G  rout & Jamie MacLeod, *Safeguarding the African Continental Free Trade Area from Externally-Imposed Threat of Fragmentation*, AFRONOMICS LAW.COM (Mar. 14, 2019), <https://www.afronomicslaw.org/2019/03/14/safeguarding-the-african-continental-free-trade-area-from-externally-imposed-threats-of-fragmentation/>.

14 S.K.B ASANTE, *REGIONALISM AND AFRICA'S DEVELOPMENT* (Macmillan Press Ltd., 1997).

15 *Economic Community of West African States Treaty*, art. 3(1), <https://www.ecowas.int/ecowas-law/treaties/> [hereinafter ECOWAS Treaty]. See also *id.* art. 3(2)(k) (incorporates a commitment to the promotion of balanced development of the ECOWAS region with particular attention paid to the landlocked and small island Member States).

16 *Treaty for the Establishment of the East African Community*, art. 5(1), [https://www.eacj.org/?page\\_id=33](https://www.eacj.org/?page_id=33).



the Partner States” and in a way that would lead to equitable economic development. Like the ECOWAS counterpart, Article 5(e) of the EAC Treaty provides for “... the mainstreaming of gender in all its endeavors and the enhancement of the role of women in cultural, social, political, economic and technological development.”<sup>17</sup> Others include, energy, industrialization, science and technology to mention a few. However, unlike the ECOWAS Treaty, the EAC Treaty incorporates sustainable development.

In Southern Africa, the objective of the Declaration and Treaty of the Southern African Development Community (SADC) as codified in Article 5(1)(a) is the promotion of “sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.” The SADC also commits to mainstreaming gender in the process of community building, achieve sustainable utilization of natural resources and effective protection of the environment while strengthening and consolidating the long standing historical, social and cultural affinities and links among the people of the SADC.<sup>18</sup>

Mostly recently, the Agreement Establishing the African Continental Free Trade Area commits among other objectives to the promotion and “...attainment of sustainable and inclusive socio-economic development, gender equality; ... industrial development through diversification and regional value chain, agricultural development and food security....”<sup>19</sup> African RTAs codify broad political and socio-economic considerations underpinned by such principles as variable geometry, flexibility, and special and differential treatment.<sup>20</sup>

The foregoing shows the development-oriented nature of African RTAs. In my

17 *Treaty for the Establishment of the East African Community*, art. 5(3)(a)(b)(d)(e)(g), [https://www.eacj.org/?page\\_id=33](https://www.eacj.org/?page_id=33). For an excellent analysis of the gender gap in international economic law in Africa, see Clair Gammage & Mariam Momodu, *The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies*, 1 AFR. J. OF INT’L ECON. L. (2020).

18 *Treaty of the Southern African Development Community*, art. 5(1)(g)(h)(k), [https://www.sadc.int/files/5314/4559/5701/Consolidated\\_Text\\_of\\_the\\_SADC\\_Treaty\\_-\\_scanned\\_21\\_October\\_2015.pdf](https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf).

19 *Agreement Establishing the African Continental Free Trade Area (AfCFTA)*, art. 3(c)(g), [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf).

20 *Agreement Establishing the African Continental Free Trade Area (AfCFTA)*, art. 5 (c)–(d), [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (provides that the agreement shall be governed by the principles of variable geometry; flexibility and special and differential treatment). See also UNECA, *Assessing Regional Integration in Africa VIII, “Bringing the Continental Free Trade Area About”* 9 (Oct. 2017), [https://www.uneca.org/sites/default/files/PublicationFiles/aria8\\_eng\\_fin.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf); James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35(3) NORTH CAROLINA J. INT’L L. & COM. REG., 572 (2010).

view, the theorizing this development-orientation of African RTAs has not been rigorous enough. The analysis that have examined the connection critiques and sometimes inadvertently reverts to the Eurocentric models that they criticize. First, while early studies of developmental regionalism made the connections with L & D discourse, the cross-pollination was limited and studies of African RTAs from the 1990s have not consistently built on it. For example, while Jonathan Rudahinwa's acknowledges the limited applicability of Eurocentric, and neo-liberal economic orthodoxy at the heart of African RTAs as ill-suited for achieving development in Africa,<sup>21</sup> Babatunde Fagbayibo rightly acknowledges that despite Rudahinwa's "... criticisms of the unsuitability of Eurocentric methods in advancing regionalism, [he] showed more bias towards the European Union (EU) as an apt referential tool for integration through the law."<sup>22</sup> Likewise, contemporary examination of African RTAs has not sufficiently grounded the analysis in the developmental state phenomenon in Africa. In the past decade, there has been emphasis on human rights, millennium development goals, sustainable development goals, infrastructure development and the role of public-private partnerships. While these are now being examined to tease out and enrich their theoretical genealogies, this article makes the case for linking them to L&D. Second, in the limited situations where they have been theorized, most of the scholarship that link L&D discourse to regionalism were undertaken by International Relations scholars, with only a handful of legal scholars explicitly engaging in the subject. Third, contemporary engagement with developmental regionalism by political scientists, economists and legal scholars have been more descriptive and less critical or analytical. This leaves a significantly weak connection between L&D and African RTAs. While there is a significant utility to describing the contours of developmental regionalism, developmental priorities differ. One should also be cautious of offering a one-size-fits all definition because of the eclectic nature of development as a concept.

With the foregoing in mind, I argue that developmental regionalism encapsulates historical, contemporary and evolving praxis of regional economic cooperation in Africa. Theoretically, developmental regionalism draws on the analytical tools of law, post-colonial studies, economics, politics and sociology to inform our understanding of the multidimensional character of African RTAs. Development oriented African

21 Rudahindwa, *supra* note 4, at 27.

22 Babatunde Fagbayibo, *REVIEW V of Regional Developmentalism through Law: Establishing an African Economic Community*, Jonathan Bashi Rudahindwa, Routledge, 2018, AFRONOMICSLAW.COM (June 3, 2019), <https://www.afronomicslaw.org/2019/06/03/review-v-of-regional-developmentalism-through-law-establishing-an-african-economic-community-jonathan-bashi-rudahindwa-routledge-2018/>.

RTAs foreground the interconnectedness of law, not necessarily the primacy of law in African RTAs. African RTAs are about economic and non-economic goals. Traditional aspects such as trade, investment and intellectual property, are today complemented by regional physical infrastructure projects, industrial agendas, human rights, sustainable development and climate change. To this list, one can add regional value chains and digital trade as emerging frontiers in Africa's development-oriented regionalism. In my view, understanding developmental regionalism in these broad terms of theory and evolving praxis of African RTAs, while constructing and engaging how these expand our understanding of existing theoretical approaches, offer a more hopeful account of rethinking economic cooperation in Africa on their own terms. In situating the analysis as co-constitutive and expanding L&D, the analysis and regime avoids the charge of African exceptionalism. In this regard, Maxwell Chibundu's observation is also instructive: "Societies do not function as autarchies; they borrow from others and are stimulated by outside exposures. Outside influences, however, are digested as part of the local story, not as the source of or the substitute for local experiences."<sup>23</sup>

## **B. Incoherence and Eclecticism of Developmental Regionalism: A Defining Feature of African RTAs**

Developmental regionalism in African RTAs is incoherent. It is incoherent in the sense that different sub-regions define the concept relative to their priorities. While some of the features especially the economic ones may be common, the non-economic aspects differ.<sup>24</sup> My goal in this section therefore is not to make the case for a coherent analysis of developmental regionalism. Rather, my argument for conceptualizing the incoherence of developmental regionalism in Africa as a distinct feature is predicated upon two arguments: first; since the concept of *development* is eclectic and defies a coherent definition, we need not infuse developmental regionalism with a static and linear understanding. Second, the incoherence of developmental regionalism is reflective of the heterogeneity and post-colonial reality of African States and the diverse social, economic, political and physical infrastructure development goals they pursue.

<sup>23</sup> Chibundu, *supra* note 10, at 242.

<sup>24</sup> See generally *supra* note 7. Dauda Garuba, *ECOWAS's Experience in developmental regionalism*; Soren Scholvin, *Developmental Regionalism and Regional Value Chains: Pitfalls to South Africa's Vision for the Tripartite Free Trade Area*, 53(3) AFR. SPECTRUM 115–29, 118 (2018); Zoleka Ndayi, *In Quest of Regional Integration in Africa: Can the AU/NEPAD Reconcile Economic Plurilateralism with Developmental Regionalism?*, 6(1) J. AFR. RENAISSANCE STUDIES - MULTI-, INTER- AND TRANSDISCIPLINARITY 78–93 (2011).

In this regard, I question the position of institutions such as the United Nations Conference on Trade and Development (UNCTAD) that argue for a “... comprehensive, [and] coherent developmental integration agenda ....”<sup>25</sup> In my view, given the diversity and heterogeneity of African states, the important question here is why do we need one? How does one describe a universal vision of development for African states in a coherent and cohesive order that mirrors the unequal development and power asymmetry? In short, can African States have a fair-trade regime that centers their developmental interest without an overarching universal definition?

The *development* in developmental regionalism in Africa must be read critically. Development as a concept is eclectic. While it is possible to describe what constitutes development relative to a moment and era, a universal definition of development is not ideal. Amartya Sen, for example argued that development entails political freedom, economic choice, and protection from poverty.<sup>26</sup> To David Trubek & Mark Galanter, development is “progressive social, political, and economic changes in developing countries”.<sup>27</sup> Such definition, although more holistic than economic growth centric development, leaves unclear the metrics of development, particularly, social development. Globally, two of the most common categories of development are human development and sustainable development.<sup>28</sup> The United Nations Development Programme (UNDP) identifies the ability to lead a long and healthy life, ability to acquire knowledge, and the ability to achieve a decent standard of living as making up the Human Development Index.

25 *Economic Development in Africa: Intra-African Trade: Unlocking Private Sector Dynamism*, United Nations Conference on Trade and Development (UNCTAD) (2013), at 96, [https://unctad.org/en/PublicationsLibrary/aldcafrica2013\\_en.pdf](https://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf) (last visited July 13, 2020).

26 AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (Anchor Books, 2000).

27 David Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WISC. L. REV. 1062, 1062 (1974). See also Myrdal's definition of development as “movement upward of the entire social system”. Gunnar Myrdal, *What is Development?* 8(4) J. ECON. ISSUES 729 (1974).

28 See UNDP, *Human Development Indices and Indicators: 2018 Statistical Update*, at 1 (UNDP, 2018). A detailed analysis of human and sustainable development (sustainability) is outside the scope of this work. For robust analysis of ‘Human Development’, see Purusottam Nayak, *Human Development: Concept and Measurement*, in *GROWTH AND HUMAN DEVELOPMENT IN NORTH EAST INDIA* 3–18 (Oxford University Press, 2010); Sabina Alkire, *Dimensions of Human Development*, 30(2) WORLD DEVELOPMENT 181 (2002). For in-depth exposition on what sustainable development means, see Robert Kates et al., *What is Sustainable Development: Goals, Indicators, Values, and Practice*, 47(3) ENVTL.: SCIENCE & POLICY FOR SUSTAINABLE DEV. 8 (2005).

It acknowledges the diversity and heterogeneity of Africa cultures, the inequality of their economies and the evolutionary nature of the non-trade specific socio-economic cooperation projects.

Regional developmentalism, properly so-called is an analytical framework that centers the social, economic, political, environmental and associated concerns of African states. The task of delineating its contours then is not a static one, rather, it is one which evolves from within and from below based on the practices of African states parties in regional economic cooperation.

Further, understanding the nature of regional economic cooperation in Africa as distinct from their European counterparts and other traditional narratives necessarily entails an acknowledgment of the co-existence of the freedom of choice of what development policy goals furthers the national aspirations of the member states. Developmental regionalism simultaneously centers the different interests of cooperating Africa states without dispensing the need to integrate African economies into the global economy. Developmental regionalism therefore not only includes historical economic policy approaches such as collective self-reliance that was codified in the Lagos Plan of Action of 1980, but offers a broad foundation for economic, social, environmental, and physical cooperation for governments and the private sector. In this regard, growing public-private partnerships, interstate physical infrastructure development corridors, special economic zones, and regional value chains exemplify the emerging contours of developmental regionalism.

Academic scholarship that delineate the contours of developmental regionalism have either focused on economic growth and infrastructure development or not focused enough on the role of law and its distributive impact on African RTAs. As far back as 1971, John W. Sloan, a political scientist, wrote

... economic integration among developing countries may more properly be described as developmental regionalism because it is designed not only to expand trade but also to encourage new industries, to help diversify national economies, and to increase the region's bargaining power with the developed nations.<sup>29</sup>

29 John W. Sloan, *The Strategy of Developmental Regionalism: Benefits, Distribution, Obstacles and Capabilities*, 10(2) J. COMMON MARKET STUD. 138, 143 (1971); For the analysis of the Asian contexts, see Andrew Harding, *Multi-Level, Recursive Law and Development: Singapore's Legal Role in ASEAN*, 5 ASIAN J. L. & Soc'y 251 (1971); Christopher Dent & Peter Richter, *Sub-*

Sloan further defined developmental regionalism as covering the “joint policies of economic cooperation, coordination, and integration among underdeveloped countries designed to accelerate the rate of development of both member states and the geographical region”.<sup>30</sup> Developmental regionalism will not only aid the expansion of trade, but encourage new industries, diversify national economies and increase the bargaining power of the developing regions in the global economy. With the State as the principal actor in the national context, developmental regionalism was historically state-centric and allowed very little political space for other actors as central governments direct policy and shape the regional administrative organs. Developmental regionalism however does not cure external dependency, but only moves dependency ‘closer’ home; a situation Sloan considers more “politically acceptable”.<sup>31</sup>

Developmental regionalism shared the optimism that it would diversify the export portfolio of developing countries, by shifting the external to the regional partners, and gradually loosen the tight grip of economic imperialism that developed countries held over the developing states of the post-colony. The ultimate goal of developmental regionalism, in Sloan’s view, is the equitable transformation of the economies of the cooperating member states into a more integrated, self-reliant regional economy that will sustain economic growth. Sloan however recognizes the limitations of the proposal in noting that the main obstacle to achieving developmental regionalism is the plague of underdevelopment. In concluding his article, Sloan notes as follows:

Developmental regionalism is not a panacea for the problems of the third World; its success is dependent upon domestic reforms and generous aid from the industrialized countries . . . The response to disappointments must be to search for new forms of regional cooperation rather than withdrawal into extreme forms of nationalism . . . The fundamental dilemma of developmental regionalism is that it increases the burdens upon member-states which already bear the heavy burden of underdevelopment.<sup>32</sup>

In my view, and unlike Sloan, I contend that developmental regionalism has an emancipatory component for African states. Although this may not have been

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*Regional Cooperation and Developmental Regionalism: The Case of BIMF-EAGA*, 33(1) CONTEMP. SOUTHEAST ASIA 29 (2011).

30 Sloan, *supra* note 31, at 142.

31 *Id.*

32 Sloan, *supra* note 31, at 162.



apparent in the 1970s when Sloan's article was published, the situation is different today. Developmental regionalism in contemporary African RTAs is at heart about centering Africa's economic development and trade relations on their own terms. The international economic order and the inequality it creates is skewed significantly against developing African countries. No single socio-economic developmental strategy will simultaneously address African States' international subjugation while uplifting them from the enduring legacies of colonialism. As such, I argue for a re-imagining of developmental regionalism as a series of steps in a long continuum of multiples strategies for African states. From this point of view, recognizing its emancipatory potential is critical.

Re-orientating the coloniality of roads, routes and their design in contemporary Africa is another key aspect of developmental regionalism. Physical infrastructure in the colonial era were designed to aid the strategies of the colonizers.<sup>33</sup> In trade context, the roads and the routes led outside the country and the continent. The road infrastructures in colonial Africa were not designed to foster intra-African trade. Further, the colonial partition of African states deepened the poor connectivity — air and road — in Africa.<sup>34</sup> The subsequent lack investment in road infrastructure both to enhance connectivity and boost movement of goods and services has contributed to the poor performance of formal trade in Africa. In this context, developmental regionalism is also emancipatory because of the promise of re-orienting the path dependency and colonial routes in road infrastructure regional development corridors.<sup>35</sup> Sloan's analysis, understandably did not discuss the role of law in the process of developmental regionalism and how it may be a constraint to the equal distribution of the gains of regional integration. Notwithstanding the blind spots in Sloan's analysis, situating African RTAs in the structures of inequality, power asymmetry and unstable national, regional and international contexts that they emerged sheds more light on the predicaments that these states confront.

At the sub-regional level, Southern African is the region where developmental

33 Libbie Freed, *Networks of (colonial) power: roads in French Central Africa after World War I*, 26(3) HIST. & TECH. 203–223 (2010).

34 Makau W. Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

35 While not without its own challenges, the South African-Mozambique Toll Road is an example a road project designed through public private partnership with a view to exploring new pathways for African states in infrastructure, trade and investment. See Ian Taylor, *The Maputo-Witbank Toll Road: Lessons for Development Corridors?* (DPRU Policy Brief No. 00/P5, Dec. 2000).

regionalism has been shaped the most in Africa.<sup>36</sup> The Southern African approach to regional developmentalism centers physical infrastructure, and industrial production as key drivers of development. Sören Scholvin's analysis of developmental regionalism and regional value chains in the context of the Tripartite Free trade Area (TFTA) and South Africa in particular draws on the Sloan's conceptualization. Scholvin, argues that "developmental regionalism is about proactive economic policies advanced and coordinated by the states of the region in question – as opposed to a politically passive approach of mere liberalisation."<sup>37</sup> For South Africa, emerging as a leading country in regional value chain and serving as a hub is critical to their national policy.<sup>38</sup> Like Sloan, Scholvin notes that there are challenges to actualizing these aspirations: overcoming Africa's infrastructure gap and the idea of regional value chains as the path towards industrialization is problem laden.<sup>39</sup>

At the regional level, in the context of the AfCFTA, Faizel Ismail argues that a developmental regionalism approach to "trade integration provides the best prospects for the AfCFTA to catalyze the process of transformative industrial development, cross-border investment and democracy, peace and security in Africa."<sup>40</sup> Developmental regionalism Faizel argues

... include cooperation between African countries in a regional integration framework on four parallel and interconnected pillars: a) cooperation on building mutually beneficial trade integration (fair trade integration); b) cooperation on industrial development and upgrading in regional value chains (transformative industrialization); c) cooperation on investment in cross-border infrastructure and trade facilitation; and d) cooperation on the building of democracy, good governance and peace and security.<sup>41</sup>

36 Adejumobi & Obi, *supra* note 4.

37 Scholvin, *supra* note 24.

38 *Mapping Global and Regional Value Chains in SACU: Sector-Level Overviews*, World Bank Group, (2016), <https://openknowledge.worldbank.org/handle/10986/23790>.

39 "Corresponding debates are far from actual implementation and setting up RVCs will lead to win-lose situations – with barely surmountable conflicts over who receives the most lucrative segments of such value chains. South Africa's focus on trade in goods means that the much greater potential of trade in services is neglected. Taking a very critical perspective, one may even argue that South Africa tries to use the TFTA as a means to make the regional states adopt its own version of protectionist industrial development, which implies that the opportunities for interlinking RVCs with GVCs will be ultimately foregone." Scholvin, *supra* note 24, at 125.

40 Faizel, *supra* note 7, at 6.

41 *Id.* at 13. Faizel relies on Said Adejumobi and Zebulun Kreiter's review of the literature on developmental regionalism six key features they deduced.

These features include: i) a strong institutional architecture and capacity to drive the regional



Faizel's analysis reincarnates Sloan's argument with a contemporary take on the multidimensional aspects of regional economic cooperation in Africa. Thus, while it is therefore more expansive, it is also descriptive. Indeed, as I have argued in this article, it does not reflect all the possible contours of development as it is economy centric. Some of the substantive development themes that are missing from Faizel's description include: climate change, human rights, environmental protection and gender equality. This limitation underscores the need to further expand the theoretical basis for developmental regionalism in Africa. By so doing, we also open developmental regionalism to an explicit analysis of the role of law in African RTAs. For the avoidance of doubt, developmental regionalism pivots away from the institutionalist market-led regionalist perspective which has been dominant in African RTAs and scholars have highlighted its weakness to African regional economic integration process.<sup>42</sup>

## II. PART II

### A. Genealogies of Law, Development and Developmental Regionalism

In this section, I draw on L&D scholarship to broaden the basis for theorizing developmental regionalism. This has two advantages. First, the linkage offers a broader basis for theorizing developmental regionalism in African RTAs and therefore compliments existing scholarship on developmental regionalism. Similarly, the linkage offers a useful alternative to the Vinerian classic model of economic integration and the neoclassical economic model which do not adequately fit the trajectory of African

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integration agenda; ii) a clear articulation of goals, objectives, essence, nature, and direction of the regional integration project, and the benefits of regional integration as a mechanism for facilitating regional development; iii) ensuring peace and security as a composite and foundation of a regional integration agenda; iv) evolving complementary and symmetrical benefits for all member states involved in the regional development project; v) articulation of regional public goods and development priorities necessary for facilitating economic transformation in the region including on infrastructure, trade, agriculture and food security, private sector development and industrialization; and vi) evolving a bond of common regional citizenship and identity necessary for regional human capital mobilization.

The above quote is cited in Faizel's article as "Adejumobi, S. and Kreiter, Z. 2016. The Theory and Discourse of Developmental Regionalism. Paper Prepared for Presentation at a Regional Forum on: Developmental Regionalism, Peace and Economic Transformation in Southern Africa organized by ECASRO- SA and APN-SSRC in collaboration with the SADC Secretariat and hosted by the Government of Kingdom of Swaziland from 28-30 September 2016, Ezulwini, Swaziland. UNECA, SADC, SSRC, APN."

42 James T. Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes between Markets and States*, 45 VILL. L. REV. 971 (2000).

RTAs. Second, the linkage offers developmental regionalism as an analytical tool that maps on to the multidimensional character of African RTAs. As argued in Part 1 of this article, this also dispenses with the need to define the concept in any specific terms. Describing the concept of developmental regionalism is helpful, such endeavours are however not exhaustive. Regional developmentalism is fluid and will reflect the contemporary orthodoxies of the day and the economic and non-economic priorities that each regional economic community deems fit. The approach also avoids a one-size - fits - all approach to the role of law in explicating developmental regionalism. Chibundu offers an instructive approach on how African's should imagine the role of law in economic development projects.

Central to the role of law in development is the dialectical understanding of law as a significant and frequently effective force in shaping behavior, embedded within and springing from the institutional structures and social practices of a community. The conventional approach to law and development focuses on one or the other. Because much of that work has been undertaken by Western scholars among whom the instrumentalist and positivist view of law as behavior molding has tended to command broad acceptance, the synthetic balance of the dialectic has been missing. An imperative for law and development is restoring to the field discussion of the nature, structure, and relevance of the social practices of the people and societies whose lives the field purports to seek to understand. The utility of a dialectical methodology lies not in establishing the dominance of one set of relationships, but in its efficacy to illuminate the convergence of the numerous forces always at work even in the simplest of social interactions.<sup>43</sup>

My aim therefore is not to draw a linear line that fits the African RTA regime into the narratives of L&D. Rather, my purpose is modest: to deepen the theoretical analysis of developmental regionalism in narratives of African RTA by demonstrating the linkages in ideas and their diffusion through institutions at different times and expanding same as an expansion of the discursive field of L&D.

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43 Chibundu, *supra* note 10, at 255.

### *i. Law and Development and Developmental Regionalism*

L&D scholars categorize the history of L&D into moments that include—“Law and the Developmental State”; “Law and the Neoliberal Market”; and “the Critique of Neoliberalism”.<sup>44</sup> Whereas the first two moments are characterized by dominant economic development theories namely the state-led development and neoliberalism, the third is largely heterogeneous—a “catch-all phrase for a combination of policies that seem difficult to categorize as developmentalist or neoliberal, or to unscramble using the common policy vernaculars of the post-neoliberal period”.<sup>45</sup> A major feature of the third L&D moment is the recognition of non-market values, including legal reforms and the rule of law, as constituting essential components of the developmental agenda.<sup>46</sup> L&D rose to prominence in the 1950s and 1960s from the work of development assistance projects of the United States government, international agencies, and private foundations working with government and legal institutions in the developing countries. In a sense, L&D describes the relationship(s) between law and economic development in the particular context of the developing or Third World countries.<sup>47</sup>

More broadly, its ideas, projects, and strategies are aimed at transforming the economic, political and social space of developing countries mainly through law and the ‘reform’ of the legal system. The practice of L&D is the self-conscious effort to change law and legal institutions to achieve some or specific goals such as designing

44 TRUBEK & SANTOS, *supra* note 3, at 1–18. See also David Kennedy, *The Rule of Law, Political Choices, and Development Common Sense*, in TRUBEK & SANTOS, *supra* note 3, at 95–173 (periodizing L&D into four phases—post-war consensus (1945–1970); period of crisis and retrenchment (1970–1980); Washington consensus (1980–1995); and chastened Neoliberalism (1995–present)).

45 David Kennedy, *Law and Development Economics: Toward a New Alliance*, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY, 63 (David Kennedy & Joseph E. Stiglitz eds., Oxford University Press, 2013).

46 Yong-Shik Lee, *General Theory of Law and Development*, 50(3) CORNELL INT’L L. J. 415, 422 (2017).

47 See Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of “Scholars in Self-Estrangement”*, 25(3) AM. J. COMP. L. 492–530 (1977). See VIJAY PRASHAD, *THE DARKER NATIONS: A PEOPLE’S HISTORY OF THE THIRD WORLD* xv (The New Press, 2007) (arguing that the Third World was not a place, but a project through which the peoples of Africa, Asia and Latin America dreamed of a new world); Sundhya Pahuja, *Appendix one: a note on the use of ‘Third World’*, in, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 261–62 (Cambridge University Press, 2011). See also ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (Princeton University Press, 1995).

strategies, policies, agreements to foster socio-political and economic growth.<sup>48</sup> Arguably, the unresolved question remains how such socio-political and economic development can be attained. The transplantation of laws and legal frameworks of the first moment failed to provide answers.<sup>49</sup> The prioritization of the market and obscuration of the 'State' of the second moment has also failed. Indeed, the absence of empirical basis for the claims of L&D that legal reforms translate into developmental strides remains a key criticism of the L&D movement.<sup>50</sup> In Peer Zumbansen and Ruth Buchanan's view, "L&D brings into dialogue a wide range of legal and non-legal fields, and thus becomes part of scholarly and policy discourses ranging from development studies, economics and economic geography, and trade law to post-colonial studies."<sup>51</sup> The shape of the space where the interactions of multidisciplinary approaches occur nevertheless remains constituted by legal ideas.<sup>52</sup> The point of the foregoing is that L&D and the dominant ideas that underpin African RTAs map on to each other. I return to this point below in my mapping of the overlapping periods and ideas that show the trajectory of African RTAs.

## ***ii. Anti-formalism and Flexibility as the Analytical Tool of Law and Developmental regionalism***

Developmental regionalism as an analytical tool exists in the shadow of dominant and evolving socio-economic, political and legal contexts. I contend that formalism and legal positivist thinking embedded in traditional trade agreements has facilitated the narrative of failure African RTAs. In particular, this conceptualization of the role of law inelegantly excludes the phenomenon of cross-border informal trade in Africa RTAs. Likewise, legal formalism is antithetical to informal trade in Africa. In response to this, I contend that flexibility arguments and anti-formalism show the

48 David M. Trubek, *The Owl and the PussyCat: Is there a future for Law and Development?*, 25 WIS. INT'L L. J. 235–42, 235 (2007–08).

49 Trubek & Galanter, *supra* note 27.

50 David Trubek, *Law and Development 50 Years On*, at 1 (University of Wisconsin Law School; Legal Studies Research Paper Series Paper No. 1212).

51 RUTH MARGARET BUCHANAN & PEER ZUMBANSEN, *LAW IN TRANSITION: HUMAN RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE* 1–2 (Hart Publishing, 2014).

52 On the constitutive role of law or what it means to say that law constructs social relations, see Alan Hunt, *Law as a Constitutive Mode of Regulation*, in *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* 310–33 (Rutledge, 1993); Douglas Litowitz, *The Social Construction of Law: Explanations and Implications*, 21 STUDIES IN L., POL. & SOC'Y 215 (2000).

inadequacy of legal formalism as the dominant form of legal thought by which we should understand African RTAs.

Pluralizing the modes of legal thought in African RTAs and their counterparts to include the formalist and anti-formalist approaches to understanding their legal regimes will not only open up regional developmentalism to a broader application of the African context but will also demonstrate the concreteness of Africa's contribution to international economic law in general.

Pluralizing the roles of law in developmental regionalism is a necessary inference and indeed consequence of the behaviour of African States in regional economic relations. As such, the ensuing analysis should not be interpreted as an attempt to fit the practices of African states into the dominant legal thinking of the role of law by L&D scholarship. Rather, the aim is to incorporate the strategic deployment of law by African states in regional projects to reveal the deliberateness with which they interplay formalist and anti-formalist or flexible approaches in pursuit of their preferred goals. Chibundu's views are further instructive here:

In post-colonial African societies, the essence of law is neither the maintenance of tradition, nor the bringing of modernity to African societies. The future does not require that Africans choose between dualism and Westernization. The difficult but necessary role for law lies in helping Africans decipher and articulate principled mechanisms by which their experiences can be structured and institutionalized. In doing so, borrowing some of the language of legitimation in the Western legal tradition is likely to be unavoidable, but the direct approximation of the practices represented by such language may be solely coincidental.<sup>53</sup>

### ***iii. First Moment: State-Led Regionalism***

This period primarily covers the era from early independence of African States to 1980 when neoliberalism became the dominant economic orthodoxy. Regional integration in Africa is closely associated with contested notions of development, and in particular, modernity.<sup>54</sup> The state orchestrated development was based on a series of assumptions that included the idea that import-substitution program and

<sup>53</sup> Chibundu, *supra* note 10, at 261.

<sup>54</sup> Gibb, *supra* note 5, at 705. For a critique of modernity as it epitomizes the genealogy of the good governance narratives, see Gathii, *supra* note 52.

protectionism in the internal market will generate growth. With the State as the principal actor, the dominant economic development ideas at the national level were projected onto the regional development platform. It is therefore unsurprising that similar assumptions about import substitution industrialization and consequential emphasis on protectionism that dominated the state-led development era were a fundamental aspect of regionalism in Africa in the 1970s.<sup>55</sup>

In the first moment, it was thought that the transplantation of rules from the West would enhance the pursuit of economic and political development by developing countries. The Westernization of “the legal infrastructure of the Third World countries was expected to create neutral, more accessible and more responsive government institutions.”<sup>56</sup> The legal theory of this period combined a number of ideas that in broad terms understood the role of law as “instrumental” and “purposive.”<sup>57</sup> Law, accordingly, has the capacity to bring about the social, economic and political changes that are conducive to development such as industrialization processes, judicial strengthening or the general mechanism for growth of national economies. Law was further considered as “subordinate to social purposes – implementing, fulfilling, and accomplishing the objectives of the society, rather than expressing a priori limits or historical commitments to be respected or purposes of its own to be achieved.”<sup>58</sup> In other words, the role of law was interpreted in the light of the developmental aspirations of the state.

Formalism in law was conceived as critical and instrumental to the achievement of economic and political developmental goals. It was the positivistic conception of law that triumphed under the dominant aegis of the liberal legalist school.<sup>59</sup> Specifically, “rules were developed, interpreted, and applied without careful attention

55 According to Estela Carmona de Hanlon, old regionalism was inspired “by the protectionist and industrializing actions typical in the 1950s–1970s ... The 1950–1970s is usually seen as a period of shallow integration, the “old regionalism”, inspired by the need of developing countries to reinforce the structural economic reform process.” See Estela Carmona de Hanlon, *Old Regionalism versus New Regionalism in the Context of the EU-Mercosur Agreement*, 237–272, 238 (Nº 12/13 2007/08, Revista De La Facultad De Ciencias Juridicas). See also Maxwell Chibundu, *Africa's Economic Reconstruction: On Leapfrogging, Linkages, and the Law*, 16(2) THIRD WORLD LEGAL STUD. 17–41 (2003).

56 Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22(1) WISCONSIN INT'L L. J. 1, 19 (2004).

57 David Kennedy, “The Rule of Law”, *Political Choices, and Development Common Sense*, in, Trubek and Santos, *supra* note 3, at 103.

58 *Id.* He notes further that “the purpose of the legal order itself was the consolidation of national economic and political authority—often associated with national self-determination and decolonization—rather than say, the integration of local economic life into a global economy, or the facilitation of private exchange and private ordering through supplementary regulatory interventions.” *Id.* at 102–03.

59 Chibundu, *supra* note 10, at 215.

to policy goals” and context of the periphery societies.<sup>60</sup> In the context of African countries, the legal positivist/formalist underpinning of the rules reflect a legacy of the colonial laws that were inherited by many of the newly independent colonies.<sup>61</sup> These laws were distant from the reality and context of the diverse economic, political and cultural settings of African countries and regional economic integration practices that were constructed on the principles of pan-Africanism. In this regard, rather than the legal positivist legal regime, the norm of pan-African solidarity plays a significant role in regulating and constraining interstate behavior among African states.<sup>62</sup> Formalism thus resulted in the weak enforcement and low legitimacy among the cooperating member. The legal thought was distant from the shared experiences of the member states.

The role of law was consequently implicit in the practices of the state. As many of the African States were not comfortable ceding sovereign powers to a supranational regional body, legal formalism was the gold standard for the post-colonial African states. The high commitment to sovereignty and therefore legal formalism however worked differently in the economic cooperation. Whereas law was formal in the national context to protect the states’ economic and sovereign territories, it was flexible or anti-formalist at the regional levels and hence implicit. In other words, while African states recognized that law can be instrumental to regional economic development, its role as a tool for facilitating the economic relations between the parties for largely anti-formalist. This simultaneous and strategic use of law of both formalist and anti-formalist legal strategies in pursuit of national and regional characterizes the other moments of L&D.

#### ***iv. Second Moment: Developmental Regionalism***

From the 1980s, neoliberalism was promoted globally by the Bretton Wood Institutions as the dominant economic development orthodoxy.<sup>63</sup> The global spread of neoliberalism

60 According to Trubek, “development planners argued that ‘*formalist law teachers* taught that law was an abstract system to be applied by rigid internal rules without concern for policy relevance and impact; *formalist legislatures* copied foreign models or followed abstract principles instead of studying social context and shaping rules for instrumental ends ... Formalist practitioners [also issued] interpretations based on some abstract logical system or rote application of formulae thus impeding rather than fostering progress.” David Trubek, *supra* note 3, at 76.

61 “Colonial laws are laws for a special purpose to govern situations that were regarded as exceptional. They were intended to enable optimal extraction of value from foreign territories while disciplining populations that were felt as inferior and dangerous.” Martti Koskeniemi, *Colonial Laws: Sources, Strategies and Lessons?*, 18 J. HIST. INT’L L. 248–77, 251 (2016).

62 Luwan Dirar, *Norms of Solidarity and Regionalism: Theorizing State Behaviour among Southern African States*, 24 MICHIGAN STATE INT’L L. REV. 667, 668–69 (2016).

63 For a history of neoliberalism, see DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (Oxford



was a key episode in the good governance agenda and the forms institutional proliferation they required. In African RTAs, the policy effect of neoliberalism was only started gaining effect in the 1990s. This coincided with the rise of different wave of regional integration in Africa in the 1990s when regional communities “... became involved in regional security and good governance issues, which later created a political opening to transform” of many African RTAs.<sup>64</sup> Consequently, this translated into the revision of the establishing treaty of some of the regional economic communities. For example, in the context of the ECOWAS Court of Justice; Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister argue, that “the renewed governmental support for a court in the early 1990s reflected a growing sense that deeper regional integration required a judicial body to resolve disputes and interpret legal rules.”<sup>65</sup> The point here is that the expansion that this era witnessed in the 1990s is a consequence of changes in the global economy with direct consequence on the relationship between developing countries and the liberal trading order.<sup>66</sup>

The spread of neoliberalism in African RTAs led to the studies dubbed of “new regionalism” in the 1990s by International Relations scholars. Old regionalism which mapped on to the First moment is a set-up “associated with the promotion of regional self-reliance through industrialization and protectionism”.<sup>67</sup> Old regionalism’s emphasis on protectionism, albeit at a regional scale, is in response to the perceived adverse effects of colonial era international trade structure which confined developing states to the peripheral as producers of raw materials, while industrialized states occupied the position of core countries. New regionalism is a

... network of power relationships co-constructed by myriad multiple-actor, cross-border coalitions of states, intergovernmental organizations ..., and civil society ... Significantly, the emerging architecture of regional

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University Press, 2007); JOHN TOYE, *DILEMMAS OF DEVELOPMENT: REFLECTIONS ON COUNTER-REVOLUTION IN DEVELOPMENT THEORY AND POLICY* (Wiley-Blackwell, 1987).

64 Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107(737) AM. J. INT’L L., 736, 740 (2013); See also KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (Princeton University Press, 2014).

65 Alter, *supra* note 66, at 746.

66 See SONIA E. ROLLAND & DAVID M. TRUBEK, *EMERGING POWERS IN THE INTERNATIONAL ECONOMIC ORDER: COOPERATION, COMPETITION AND TRANSFORMATION*, 3401–35 (Cambridge University Press, 2019).

67 Rudahindwa, *supra* note 4, at 17.



political and economic interactions ... includes several indigenous large or conglomerate financial institutions, multinational cross-border transport and telecommunications industry operators, as well as business coalitions and advocacy networks representing a variety of economic sectors, firm sizes, and genders that developed over the past two decades<sup>68</sup>

The preference for global dependency as against ‘neighborhood dependency’ is a key difference between the old and new regionalism. In the dispensation of new regionalism, states are “encouraged to open up their economies to the global market and the international economic order through freer trade and the implementation of liberal economic rules”.<sup>69</sup> In Africa, while new regionalism accurately describes aspects of regionalism, some of the core ideas of the old regionalism remain. Most glaringly, the states are still the only actor in economic integration related disputes that arise from the RTAs with capacity to sue before the regional courts.<sup>70</sup> To the extent that deeper integration into the international economy and open markets are values common to both neoliberalism as represented in the second moment of L&D and the globalization-theme of new regionalism, there is a compelling case to combine them further to understand developmental regionalism.

Neoliberalism as a development approach has been applied in many Third World countries “as a particular form of policy-related doctrine ... combined with concrete proposals for institutional reform that would move societies towards”<sup>71</sup> specific outcomes such as market fundamentalism. As early as 1990s, economists have started questioning policy directions of neoliberalism.<sup>72</sup> Neoliberalism entails an opening of the market

68 Okechukwu C. Iheduru, *Regional Integration and the Private Authority of Banks in West Africa*, 41(2) INT’L STUD. REV. 273–302 (2012); Samuel O. Oloruntoba, *ECOWAS and Regional Integration in West Africa: From State to Emerging Private Authority*, 14(7) HISTORY COMPASS 295–303 (2016).

69 Rudahindwa, *supra* note 4, at 19.

70 *Afolabi v. Nigeria*, Case No. ECW/CCJ/APP/01/03, Judgment (Apr. 27, 2004).

71 See Terry Flew, *Six Theories of Neoliberalism*, 122(2) THESIS ELEVEN 49–71, 64 (2014). Flew synthesizes the varying uses of the term neoliberalism to include: (i) an all-purpose denunciatory category; (ii) an institutional framework characterizing particular forms of national capitalism; (iii) the way things are; (iv) a dominant ideology of global capitalism; (v) a form of governmentality and hegemony; and (vi) a variant within the broad framework of liberalism as both theory and policy discourse.

72 Joseph E. Stiglitz, Keynote at Annual World Bank Conference on Development Economics (Apr. 28, 1999), available at <http://siteresources.worldbank.org/INTABCEWASHINGT0N1999/Resources/stiglitz.pdf>; (last visited July 12, 2020). Stiglitz’s critique draws attention to the interconnectedness of various factors – political, economic, social and cultural – as relevant to the implementation of development policies.

to external forces. In the African context, James Gathii contends that the diffusion of neoliberalism from Western centers of the World is “being reproduced in the periphery.”<sup>73</sup> Neoliberalism thus required the integration of the national and regional economies into the global economy with emphasis on export-led development. The general belief among development economists is that the import-substituting industrialization has not produced any meaningful growth in developing countries and that their economies are in need of restructuring “so as to reduce inefficiency, increase international competitiveness, and generally promote greater reliance on export-linked growth.”<sup>74</sup> With the spread of policies such as deregulation and privatization, the outward orientation of neoliberal regionalism has led to the “diminution of the ability of both states and interstate organizations to control aspects of trade and monetary relations.”<sup>75</sup> In advocating for open and free market, the proponents of neoliberalism contend that economic development in Third World countries can only be realized through trade liberalization and the dismantling of developmental ideas that pitch the state as the sole development agent.<sup>76</sup> Regional trade agreements needed to reflect the current transformation of the world, that is, “[g]lobalization and regionalization are intimately connected, and must thus be understood within the same framework, together shaping the emerging world order.”<sup>77</sup>

With respect to law, unlike the state-led era, neoliberalism placed greater emphasis on law. The conception of law did not change from the first moment – law “remained a pragmatic and purposive instrument of policy.”<sup>78</sup> Law in its formalist sense was at the forefront of institutional and regulatory developments in the neoliberal regime. Although the instrumental value of law to development was a dominant aspect of the

73 See James Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 422–71, 455 (2011) (noting that various manifestations of neoliberalism are being “produced, reproduced, and diffused around the world simultaneously”).

74 See Eva A. Paus, *Economic Growth through Neoliberal Restructuring? Insights from the Chilean Experience*, 29(1) J. DEVELOPING AREAS, 31, 32 (1994).

75 James H. Mittelman, *New Regionalism in the Context of Globalization*, 2(2) GLOBAL GOVERNANCE 189–213, 191 (1996).

76 James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFFALO HUM. RIGHTS L. REV. 107 (1999).

77 “With regard to context, the new regionalism needs to be related to the current transformation of the world, a more multipolar rather than the old bipolar world order, which is to a large extent shaped by globalization.” FREDRIK SÖDERBAUM, *THE POLITICAL ECONOMY OF REGIONALISM: THE CASE OF SOUTHERN Africa* 30 (Palgrave Macmillan, 2004).

78 Kennedy, *supra* note 3, at 137. Speaking on the nature of the legal theory of neoliberalism, Kennedy notes that “the implicit – and sometimes explicit – legal theory of neoliberalism seemed to forget much of what had been commonplace within the domain of legal theory for more than a century about both the limits of law as an instrument of social change, and the plasticity of legal rules and standards.” *Id.* at 143.

first era of development and by extension old regionalism; under the new regionalism, “...under the rubric of rule of law, good governance, or best practices, the legal and institutional environment of economic growth has become a site of interest and activity in the world of development.”<sup>79</sup> Affirming the growing importance of law in the second moment, legal reform in this era is no longer limited to the role of law in fostering economic growth, law itself has become a constitutive element of development and is critical to the achievement of social objectives.<sup>80</sup> However, as Kerry Rittich points out, despite the importance attributed to law for specific purposes, “there is a new consciousness of the limits of law and a new interest in non-regulatory ... issues.”<sup>81</sup> This is evidenced by the emphasis on “soft norms of regulation and non-legal norms as well as the expanded role given to non-state actors in functions ranging from norm generation to monitoring and compliance.”<sup>82</sup> The resurgence of associated legal reforms in African states reflected a “fundamental optimistic perspective on the role of law ... in development” at three levels: “whether particular characteristics of a society’s legal system play a significant causal role in determining its prospects for development – in short, law matters”; the possibilities for meaningful reforms – that legal systems change in response to deliberate efforts at reform; and “their ability to identify the legal reforms that will ultimately promote development.”<sup>83</sup> As such, the rise of regional economic community courts, regional parliaments and other institutional aspects of the RECs distinguished them from the first era.

A few examples will suffice for now. In relation to ECOWAS, distinct from the 1975 establishment treaty,<sup>84</sup> the revised ECOWAS treaty emphasized the pooling of sovereignties, necessity to respond to changes in the international scene to “derive greater benefits from those changes”, the need for an enabling legal environment, and established the ECOWAS Court of Justice.<sup>85</sup> It further recognized human rights as enshrined under the African Charter on Humans and People’s Rights, included a

79 See Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, 204 (David M. Trubek & Alvaro Santos eds., Cambridge University Press, 2006).

80 *Id.*

81 *Id.*

82 *Id.*

83 See Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Sceptics* 1–60, 5 (N.Y.U. L. Econ., Working Paper No. 133, 2018).

84 ECOWAS Treaty, *supra* note 15.

85 *Revised Treaty of the Economic Community of West African States*, Preamble, arts. 56–59, (1993), <https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf> [hereinafter *Revised ECOWAS Treaty*].

chapter on the environment and natural resources, recognized the right of the press, women and development, and elaborated on social and cultural rights.<sup>86</sup> The revised ECOWAS Treaty went further to establish the Economic and Monetary Union (EMU) and mandated Member States to “give priority to the role of the private sector and joint multi regional enterprises in the regional economic integration process”.<sup>87</sup> Further to Article 35, a custom union was subsequently established. In apparent recognition of the imbalance between the more established economies and the smaller states, the revised draft provides for the “promotion of balanced development of the region” and recognizes the equality of Member States as a fundamental principle.<sup>88</sup>

The impact of globalization and neoliberalism on the revised ECOWAS treaty is not in doubt. Yet, it will be a mischaracterization to describe the transition as a complete switch from the local (protectionist) to the global. It is more like the creation of a confluence where the ‘global’ requirement of neoliberalism meets and mixes with the local imperatives of protectionism.<sup>89</sup> Hence, while referring to the need to “adapt” international trends and cooperate with third party States and organizations, its first two principles are “inter-dependence of Member States” and “solidarity and collective self-reliance”.<sup>90</sup> And despite conferring a pride of place to businesses and market forces, Member States, for example, committed to cooperate to “protect the prices of agricultural export commodities on the international market”.<sup>91</sup>

86 *Revised ECOWAS Treaty*, *supra* note 87, arts. 29–31; 60–66.

87 *Revised ECOWAS Treaty*, *supra* note 87, art. 54.

88 *Revised ECOWAS Treaty*, *supra* note 87, art. 3(2)(k), 4(a).

89 In this regard, Maxwell Chibundu argues that:

one of the dominant features of contemporary globalization is the perception of the creation of a transnational community in which geopolitical boundaries are reduced to no more than bureaucratic nuisances. In this view, power is rendered innocuous, and its use invisible. Law applies indifferently to persons of all nationalities. The ascendance of non-governmental entities as the purveyors of power is hailed as a blessing because it reduces the influence of governments in the making of international law. The values that these entities espouse and which, presumably, are thereby embedded in the international legal system that they foster, are those which promote the interest of the individual over those of the State, human rights over State rights, democracy over autocracy, and legality over lawlessness.

See Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7(1) IND. J. GLOBAL LEGAL STUD. 79–116, 107 (1999) (exploring inter alia, how often do we take a stance outside of our self-created universe to consider the ramifications of our prescriptions? Above all, what are the connections between rules, practices, and institutions, and can these connections be created or maintained within a universalist frame of reference?).

90 *Revised ECOWAS Treaty*, *supra* note 87, art.4(b).

91 *Revised ECOWAS Treaty*, *supra* note 87, art. 25(1)(d).

Figure 1 – The Three Overlapping Moments of Regionalism in Africa

First Moment	Second Moment	Third Moment
State-centric	Open regionalism	Active sub-regional Courts
Protectionist	Glocalization	Economic and non-economic agenda
Import Substitution	Neoliberalism/Market liberalization	Rise of PPPs
Industrialization	Non-State parties	Power Imbalance
Power imbalance	Conflicting supranational agenda	Regional Value Chains
Non-economic goals	Economic and non-economic agenda	Competition Law
Power Imbalance	Establishment of sub-regional courts	Sustainable Development
No supranationalism	Rise of Public Private Partnerships (PPP).	Regional Development
	Power Imbalance	Corridor
		Digital Trade

v. The Third Moment – Developmental Regionalism

While the three moments bleed into one another in some respects, the Third Moment is still unravelling. As can be gleaned from the map above, the *Third Moment* of regional cooperation in Africa carries on some of the ideas from the first era, while it has also ushered in some new agenda. Most notably, strategic litigation before the sub-regional courts and the various competition law regimes emerging in the sub-regional communities are at the forefront of the new era. In the past decade and a half, the sub-regional courts in Africa have gone from courts without cases to an active alternative forum of litigation.<sup>92</sup> The substantive issues litigated before these courts include but are not limited to environmental law issues<sup>93</sup>; the right to education; civil and political rights;<sup>94</sup>

92 JAMES THUO GATHII, THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (Oxford University Press, forthcoming 2020).

93 Eghosa Osa Ekhatior, *International Environmental Governance: A Case for Sub-regional Judiciaries in Africa*, in HUMAN RIGHTS AND THE ENVIRONMENT UNDER AFRICAN UNION LAW 209–31 (Michael Addaney & Ademola Oluborode Jegede eds., Palgrave Macmillan, 2020); Michael Addaney, Elsabe Boshoff & Michael Gyan Nyarko, *Protection of Environmental Assets in Urban Africa: Regional and Sub-Regional Human Rights and Practical Environmental Protection Mechanisms*, 24 (2) AUST’L J. HUM. RTS. 182 (2018); James Thuo Gathii, *Saving the Serengeti: Africa’s New International Judicial Environmentalism* 16(2) CHICAGO J. INT’L L. 386 (2016).

94 Solomon Ebobrah, *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives*, in THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA: INTERNATIONAL, REGIONAL AND NATIONAL PERSPECTIVES 274–302 (Danwood Mzikenge Chirwa & Lilian Chenwi eds., CUP, 2016); Milej Tomasz, *Human Rights protection by*

business and human rights<sup>95</sup>; and mega-politics disputes.<sup>96</sup> Africa's sub-regional courts have also begun a trend of entertaining economic integration and trade related disputes. In this regard, the East African Court of Justice, arguably the most dynamic of the sub-regional courts and the OHADA Common Court of Justice and Arbitration have been at the forefront of adjudicating over trade disputes.<sup>97</sup>

The rise of competition law regimes in Africa's sub-regional economic communities is another distinctive and emerging feature of the Third Moment.<sup>98</sup> Regional competition law regimes such as the COMESA Competition Commission,<sup>99</sup> the ECOWAS Regional Competition Authority,<sup>100</sup> the EAC Competition Authority among others now exist in Africa with modest substantive work being done. The African Continental Free Trade Area Agreement also has the negotiation of a competition law regime as part of its agenda.<sup>101</sup> While the analysis of these sub-regional competition law regimes is beyond the scope of this article, the regimes complement existing national competition frameworks and regional economic integration efforts as key building blocks of an emergent African regional trade regime. Further, contemporary frontiers of developmental regionalism extend to public-private partnerships<sup>102</sup>, regional value

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*international courts—What role for the East African Court of Justice?*, 26(1) AFR. J. INT'L & COMP. L. 108 (2018).

- 95 James Thuo Gathii, *Variation in the use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice*, 79(1) LAW & CONTEMP. PROBS. 37 (2016).
- 96 Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (James Thuo Gathii, Oxford University Press, forthcoming 2020).
- 97 Harrison Mbori's excellent contribution to this inaugural issue buttresses this point and examines the important jurisprudence emerging from some of the sub-regional courts in Africa. See Harrison Otieno Mbori, *Case Commentary on the British American Tobacco v Attorney General of Uganda (EACJ) and GETMA International v The Republic of Guinea (OHADA CCJA)*, 1 AFR. J. INT'L ECON. L. (2020).
- 98 For a concise mapping of the development of this regime, see Tim Büthe & Vellah Kedogo Kigwiru, *The Spread of Competition Law and Policy in Africa*, 1 AFR. J. INT'L ECON. L. (2020); See also ELEANOR M. FOX & MOR BAKHOUM, MAKING MARKETS WORK FOR AFRICA: MARKETS, DEVELOPMENT, AND COMPETITION LAW IN SUB-SAHARAN AFRICA (Oxford University Press, 2019).
- 99 The COMESA Competition Commission, available at <https://www.comesacompetition.org>
- 100 ECOWAS, *ECOWAS launches Regional Competition Authority* (May 27, 2019), <https://www.ecowas.int/ecowas-launches-regional-competition-authority/>.
- 101 Vellah Kedogo Kigwiru, *The Cooperation on Competition Policy under the African Continental Free Trade Area*, 17(1) MANCHESTER J. INT'L ECON. L. 98–121 (2020).
- 102 Olabisi D. Akinkugbe, *The Dilemma of Public-Private Partnerships as a Vehicle for the Development of Regional Transport Infrastructure in Africa*, 6(2) L. & DEV. REV. 3–28 (2013); AUGUSTINE EDOBOR ARIMORO, PUBLIC-PRIVATE PARTNERSHIPS IN EMERGING ECONOMIES (Routledge, 2020).



chains<sup>103</sup>, services<sup>104</sup> and the digital economy.<sup>105</sup> Perhaps more than any other era, the Third moment, directly challenges pessimistic assessment of African RTAs. In other words, in contrast to the claim by Percy Mistry in 2000 that “Africa’s commitment to integration appears to have been visceral rather than rational, more rhetorical than real”, the Third Moment illustrates a substantive and progressive move in the practice of African RTAs.<sup>106</sup> The modest progress that I argue in favour here does not preclude the existence of challenges. African RTAs after all are not exceptional in these challenges. The point here is that African RTAs for too long existed in the shadow of the vestiges and legacies of colonialism and Euro centric understanding of RTAs.

### III. CONCLUSION

This article examined the need to deepen the analysis of developmental regionalism in Africa by expanding its theoretical foundations. African RTAs as developmental regionalism have evolved in parallel to some of the emergent and dominant trends in L&D scholarship. While acknowledging the shortcomings of L&D, the article demonstrates that our understanding of African RTAs is enriched by the cross-pollination of ideas with L&D. The interconnectedness argument developed in this article is not absolute. It has its limitations like any other theory, it does not explain everything. However, it elevates the discourse of developmental regionalism in Africa beyond a set of descriptive features useful for a particular region. The article also argues that the roles of law in African RTAs oscillate between formalist and anti-formalist legal regimes. Both approaches co-exist in African RTA praxis as they are strategically deployed by member states in pursuit of economic and or non-economic regional goals.

103 Scholvin, *supra* note 24; Daniel Omoro Achach & Patrick Wasonga Anam, *Of Global Rush for Personal Protective Equipment, Regional Value Chains and Lessons for Africa*, AFRONOMICSLAW.COM (May 5, 2020), <https://www.afronomicslaw.org/2020/05/05/of-the-global-rush-for-personal-protective-equipment-regional-value-chains-and-lessons-for-africa/>.

104 Regis Y. Simo, *Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility*, 3(1) J. INT’L ECON. L., 65–95 (2020).

105 Franziska Sucker, *COVID-19 pushes digital solutions and deepens digital divides: What role for African digital trade law?*, AFRONOMICSLAW.COM (May 9, 2020), <https://www.afronomicslaw.org/2020/05/09/covid-19-pushes-digital-solutions-and-deepens-digital-divides-what-role-for-african-digital-trade-law/>.

106 Percy Mistry, *Africa’s record of regional economic integration*, 99 AFR. AFF. 553–73 (2000).