

Corporate Social Responsibility and Economic Globalization: Mainstreaming Sustainable Development Goals into the AfCFTA Discourse

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There is a widely held belief that a borderless global economy brings numerous advantages including economic growth, development and welfare maximization. Globalization equally drives (and is driven by the activities of) large corporations involved in cross border operations. While corporate social responsibility (CSR) is a tool with which integrated developed economies ensure corporate behaviours remain within public interest confines, the regional integration agenda in Africa appears focused on liberalization of trade and investment at all costs. This article examines CSR in regional integration discourse, especially within the European Union, extracting important lessons for the African Continental Free Trade Area (AfCFTA). It unifies the ultimate agenda of both CSR and African regionalism in achieving sustainable development. Advising against misconstruing CSR as an unnecessary trade barrier, the article demonstrates why and how CSR values can be mainstreamed into AfCFTA discourse towards ensuring inclusive growth in Africa and improving the global competitiveness of domestic businesses.

Keywords: AfCFTA, Africa, CSR, Corporate Responsibility, Regional Integration, Sustainable Development Goals, Trade Liberalization.

1 INTRODUCTION

Globalization can be described as the closer integration of the countries and people of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders.¹ Economic globalization simply means the gradual integration of national

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¹ J. Stiglitz, *Globalisation and Its Discontents* 9 (Penguin, 2002).

economies into one borderless global economy.² Globalization comes with promises that countries will attain their full economic potentials once widely held monopolies are broken,³ and trade and investment become liberalized. With the promise of economic globalization in mind, there has been an increase in regional economic integration and cooperation across different regions.⁴ Different kinds⁵ of regional trade arrangements have been effected ranging from simple free-trade areas (that simply involve reduction in tariffs among integrating countries), customs unions, common markets, and economic unions to the ultimate stage of integration known as a political union where members become one nation all together. While Peter Van den Bossche and Werner Zdouc have given broad descriptions and identified the membership of most⁶ of the above-mentioned arrangements, the most successful has been the EU.⁷

While the idea of one borderless global economy is very beneficial, it is not without its challenges. Even if economic growth increases, unfettered globalization makes many people in certain countries worse off as not only do good things go more easily across borders, so do bad.⁸

² P. V. den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization – Text Cases and Materials* 4 (4th ed., Cambridge University Press, 2017).

³ K. Kimbugwe, N. Perdiki, M. T. Yeung & W. A. Kerr, *Economic Development Through Regional Trade: A Role for the New East African Community?* (Palgrave Macmillan, 2012), Ch. 1.

⁴ Bossche & Zdouc, *supra* n. 2, at 673.

⁵ F. Ismail, *Transformative Industrialization and Trade in the Context of the CFTA: Opportunities and Challenges* 36 (United Nations Economic Commission for Africa (UNECA), 2017). A succinct description of the hierarchy involved in regional trade arrangements was provided by Brendan Vickers in *A Handbook on Regional Integration in Africa: Towards Agenda 2063* 9 (The Commonwealth Secretariat, 2017).

⁶ Bossche & Zdouc, *supra* n. 2, at 673 & 674.

⁷ Just like the EU, integration appears to be paying off in other regions – most notably China, India and some other Asian countries – and globalization is delivering on its promises; high-productivity employment opportunities have expanded and structural change has contributed to overall growth. However, research has shown that among developing countries, consequences of globalization depend on the manner in which countries integrate into the global economy. In other cases in Latin America and sub-Saharan Africa, integration and globalization appear not to have really fostered the desirable results. See M. McMillan & D. Rodrik, *Globalization, Structural Change and Productivity Growth*, in *Making Globalization Socially Sustainable International Labour Organization and World Trade Organization* 50 (M. Bacchetta & M. Jansen eds, WTO Secretariat, 2011); see also U. Idemudia, *Corporate Social Responsibility and Development in Africa: Issues and Possibilities*, 8/7 *Geography Compass* 421–435 (2014); noting at p. 423 that the question of whether Africa lags behind all other regions on every established indicator of development is no longer necessarily contentious.

⁸ J. Stiglitz, *We Have Become Rich Countries of Poor People*, *Financial Times* (7 Sept. 2006).

As cross-border trading and regional integration arrangements proliferate, so have more large,⁹ powerful¹⁰ and influential¹¹ businesses emerged. The powers of these corporations have also raised queries on corporate complicity in, for instance, killings, drug-trafficking, money laundering, terrorism and illegal international gun trades.¹² Consequently, in his 2009 address at the Davos World Economic Forum in January, the late former Secretary-General of the United Nations, Mr Kofi Annan challenged the business community 'to give a human face to the global market'¹³ and join a 'global compact of shared values and principles' in response to global economic unease as a result of increasingly borderless nature of doing business. As effective regional mechanisms are no longer confined to trade, finance and labour policy, but have increasingly been able to initiate regional social policies across a wide range of sectors,¹⁴ integrations such as the EU has realized the dangers of unfettered globalization and initiated steps toward ensuring the core values and principles of CSR are embedded within the union.¹⁵ However, not

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- ⁹ S. Tully, *International Corporate Legal Responsibility* 13 (Wolters Kluwer 2012), noting that of the 100 largest economies in the world, 51 are corporations while only 49 are States. In Apr. 2009, according to *Forbes*, General Motors was bigger than Denmark; DaimlerChrysler was bigger than Poland; Royal Dutch/Shell was bigger than Venezuela; IBM bigger than Singapore; and Sony was bigger than Pakistan. See generally, *The Global 2000*, https://www.forbes.com/lists/2009/18/global-09_The-Global-2000_Rank.html (accessed 5 Nov. 2019); see also S. MacLeod *Towards Normative Transformation: Reconceptualising Business and Human Rights* 48 (Unpublished, PhD thesis submitted to the University of Glasgow, United Kingdom 2012), <http://theses.gla.ac.uk/3714/1/2012macleodphd.pdf> (accessed 5 Nov. 2019).
- ¹⁰ L. C. Backer *Governing Corporations: Corporate Social Responsibility and the Obligations of States*, 2(26) *Berkeley J. of Int'l L.* 503 (2008); see also J. Robé, *Globalization and the Constitutionalization of the World-Power System*, in *Multinationals and the Constitutionalization of the World Power System* 53 (J. Robé, A. Lyon-Caen & S. Vernac eds, Routledge 2016) noting that, with their enormous powers, businesses not only make countries compete to create favourable legal and regulatory environments to attract investment but also (particularly for developing states) make countries trade their sovereignty in the legal marketplace.
- ¹¹ K. Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* 4 & 5 (University of Chicago Press, 2006); see also T. Hadden, *Company Law and Capitalism* 486 & 487 (2d ed., Weidenfeld and Nicolson 1977).
- ¹² B. Choudhury, *Aligning Corporate and Community Interests: From Abominable to Symbiotic*, 2 *BYU L. Rev.* 257, at 258 & 259 (2014); see also O. K. Fauchald & J. Stigen, *Corporate Responsibility Before International Institutions*, 40 *The Geo. Wash. Int'l L. Rev.* 1027, at 1034 (2009); C. Villiers, *Corporate Law, Corporate Power and Corporate Social Responsibility*, in *Perspectives on Corporate Social Responsibility* 85 & 86 (N. Boeger, R. Murray & C. Villiers eds, Edward Elgar 2008); S. A. Aaronson, *A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO*, 41(3) *J. of World Trade* 22, 23 et seq. (2007); M. Kleiman, *Illicit Drugs and the Terrorist Threat: Casual Links and Implications for Domestic Drug Control Policy* (CRS Report for Congress), <http://www.fas.org/irp/crs/RL32334.pdf> (accessed 26 Oct. 2016); and B. M. De Miranda, *The Global Governance of Corporate Responsibility* (Conference proceedings ISSN 2048-0806, 12th International Conference on Corporate Social Responsibility, Niteroi and Rio de Janeiro, Brazil, June 2013).
- ¹³ UN Press Release SG/SM/6881, *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos* 1 (Text of Speech by Kofi Annan, 1 Feb. 1999), <https://www.un.org/press/en/1999/19990201.sgsm6881.html> (accessed 5 Nov. 2019).
- ¹⁴ N. Yeates, *Beyond the Nation State – How Can Regional Social Policy Contribute to Achieving the Sustainable Development Goals?* 1 (Issue Brief 05, UNRISD, 2017).
- ¹⁵ There are also efforts to tame these powerful businesses in other developed parts, such as in the United States. See *Doe v. Unocal*, 395 F.3d 932, 937–42 (9th Cir. 2005); and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92–93 (2d Cir. 2000); *Esther Kiobel et al. v. Royal Dutch Petroleum Company, Shell*

many indications of this realization can be observed within the regional integration discourse in Africa, especially within the African Continental Free Trade Area (AfCFTA) framework. This article therefore evaluates the world's largest regional integration initiative (AfCFTA) in terms of its CSR conception and sustainable development provisions towards forestalling the dangers of unbridled corporate-driven (and driving) globalization in Africa.

The article is divided into six sections. The first section is this introduction. Section two discusses CSR together with associated values and the construct of sustainable development. The third section provides a brief history and overview of the AfCFTA and interrogates its CSR and sustainable development provisions. The fourth section appraises CSR policy framework and measures at the EU and juxtaposes CSR against the World Trade Organisation (WTO) agreements and principles. The fourth section also demonstrates that even though it sometimes underpins arbitrary or unilateral discrimination of goods by large economies, there is really nothing antithetical between CSR standards and values, and the trade facilitation framework within the WTO regime. Section five makes a case for the mainstreaming of a harmonized CSR and sustainable development into the AfCFTA policy framework through the adoption of relevant protocol and guiding directives at the intergovernmental level of the African Union (AU) for legal transposition across national domestic jurisdictions in Africa. The article concludes at section six.

2 CSR AND SUSTAINABLE DEVELOPMENT¹⁶

Although CSR construct is usually discussed in relation to multinational companies because of their powers, CSR applies to all corporate forms: companies and corporations, small or big, domestic or transnational, private or public.¹⁷ Howard Bowen was the first person to use the phrase 'corporate social responsibility' in his 1954 book, *Social Responsibilities of the Business*.¹⁸ He defined CSR as the obligation of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which

Transport and Trading Company US Court of Appeal (2d Circuit) 06-4800-cv, 06-4876-cv (17 Sept. 2010); and also Backer, *supra* n. 10, at 504.

¹⁶ Although the terms 'sustainable development' and 'sustainability' are generally considered synonymous (and the author uses them interchangeably in this article as a core value of *corporate social responsibility*), some writers are of the view that they do not really mean one and the same. G. Aras & D. Crowther, *Sustainable Practice: The Real Triple Bottom Line*, in *Development in Corporate Governance Ad Responsibility – The Governance of Risk* 4 & 5 (G. Aras & D. Crowther eds, Emerald Group Publishing Limited 2013).

¹⁷ P. Raynard & M. Forstater, *Corporate Social Responsibility: Implications for Small and Medium Enterprises in Developing Countries 2* (United Nations Industrial Development Organization, 2012).

¹⁸ H. R. Bowen, *Social Responsibilities of the Businessman* (Harper and Row, 1953).

are desirable in terms of the objectives and values of our society.¹⁹ CSR is an important and constantly evolving²⁰ aspect of corporate governance.²¹

It is important to clarify that CSR is not discussed in this article from the widespread moralistic²² background of urging the business community to give back to the society or appealing to companies to undertake community development projects where governments appear to be failing.²³ CSR transcends the idea of simply giving back to the society out of the surpluses of businesses.²⁴ It is essentially a regulatory concept, as about the acceptance or imposition of constraints in the otherwise narrow pursuit of profit goal in the wider public interest.²⁵ This article has not discussed CSR as some community engagement exercise on an ad hoc basis and beyond the requirements of the law. It is instead conceptualized as a comprehensive corporate governance and business management model through which companies are responsible for the economic, social, and

¹⁹ *Ibid.*, at 215.

²⁰ Even if CSR origins may be traced to corporate charity and donations, certainly, CSR has gathered momentum, with many more companies, business associations, civil society organizations, and governmental and multilateral organizations associating themselves with this agenda. CSR has also become institutionalized with the growth of: company CSR departments and codes of conduct; university courses dealing with CSR and business ethics; an expanding CSR industry of consultants, NGOs, multi-stakeholder initiatives and public-private partnerships; and new forms of governmental and international regulation and market-based instruments that promote socially-responsible business and reporting. See United Nations Research Institute for Social Development (UNRISD), *Corporate Social Responsibility and Development: Towards A New Agenda?* 6 (Summaries of conference presentations, Salle XVI, Palais des Nations, Geneva 17 Nov. 2003 to 18 Nov. 2003); see also Backer, *supra* n. 10.

²¹ B. Tricker, *Corporate Governance, Principles, Policies and Practices* 349 (Oxford: Oxford University Press 2009).
²² Such CSR discourse with morality sentiments and related concepts can be found in works such as: T. K. Cheruiyot & P. Onsando, *Corporate Social Responsibility in Africa: Context, Paradoxes, Stakeholder Orientations, Contestations and Reflections*, in *Corporate Social Performance in the Age of Inresponsibility – Cross National Perspective* 95, 96 et seq. (A. Stachowicz-Stanusch ed., Charlotte: Information Age Publishing Inc 2016); D. McDonald, *The Golden Passport: Harvard Business School, the Limits of Capitalism, and the Moral Failure of the MBA Elite* (New York: HarperCollins Publishers 2017); D. McDonald, *Harvard Business School and the Propagation of Immoral Profit Strategies*, *Newsweek* 1–13 (14 Apr. 2017); Idemudia, *supra* n. 7, at 426; C. B. Pratt, *Multinational Corporate Social Policy Process for Ethical Responsibility in Sub-Saharan Africa*, 10 *J. Bus. Ethics* 527–541 (1991); G. Eweje, *Multinational Oil Companies' CSR Initiatives in Nigeria: The Scepticism of Stakeholders in Host Communities*, 49(5/6) *Managerial L.* 218–235 (2007) citing M. Ojala, *Finding Socially Responsible Companies*, 17(5) *Database* 86–89 (Oct./Nov.).

²³ A. O. Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* 9 (Cambridge University Press, 2012); also, N. Amodu, *The Responsible Stakeholder Model: An Alternative Theory of Corporate Law*, 5(1) *J. Comp. L. in Africa* 1 (2018); and N. Amodu, *Regulation and Enforcement of Corporate Social Responsibility in Corporate Nigeria*, 61(1) *J. African L.* 105 (2017).

²⁴ J. Eijssbouts, *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate* 56 (Inaugural Lecture, Maastricht University 2011); see also L. C. Backer *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 *Colum. Hum. Rts. L. Rev.* 87 (2006); and A. N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 *Del. J. Corp. L.* 649 at 651–652 (2004), where within CSR context, and 'addition to shareholders' interests, corporate officers must give weight to the interests of other corporate and societal constituencies, such as creditors, employees, customers, local communities and the environment'.

²⁵ J. E. Parkinson, *Corporate Governance and the Regulation of Business Behaviour*, in *Global Governance and the Quest for Justice Volume II, Corporate Governance* 3 & 4 (S. Macleod ed., Oxford and Portland: Hart Publishing 2016).

environmental impacts of their operations, and with which businesses remain competitive, managing the risks associated with balancing their legal, ethical, social, economic and discretionary responsibilities.²⁶

Research has shown that corporate-driven globalization appears underpinned by the fundamental assumptions²⁷ of capitalism and the shareholder primacy theory especially in the Anglo-American world.²⁸ The free flow of capital to the business community and wealth maximization for shareholders have not only significantly increased the size, power and influence of companies, but also brought in its wake incidences of market failures, financial crises, economic imbalance, human rights abuse, environmental degradation and social exclusion.²⁹ CSR has therefore arisen as a form of a countervailing power to raw exercise of corporate power.³⁰:

Further, CSR has evolved into incorporating, as part of its core values, the principles and goals of sustainable development.³¹ In fact, Michael Kerr, Richard Janda, and Chip Pitts had noted that the Canadian Government conceptualized CSR as ‘the business pursuit of sustainable development’.³² According to the World Commission on Environment and

²⁶ See generally, D. McBarnet, *Corporate Social Responsibility, Beyond Law, Through Law, For Law: The New Corporate Accountability*, in *The New Corporate Accountability: Corporate Social Responsibility and the Law* (D. McBarnet, A. Voiculescu & T. Campbell eds, Cambridge University Press 2007); see also L. Enneking, *Foreign Direct Liability and Beyond* 32 (Eleven International Publishing 2012). See also the former Australian’s Minister for Superannuation and Corporate Law (Senator Nick Sherry) had also noted that: ‘the world financial crisis is not just a corporate issue; the economy is not a private product but a critical piece of the social infrastructure ... While some commentators have speculated that the financial crisis will put a stop to CSR programs – I believe this not to be the case. Such views are driven by a misunderstanding of what CSR is all about. If anything the current crisis should accelerate its adoption. Companies may need to refocus their efforts, and concentrate on the shared values between them and the wider community in which they operate. I believe the current circumstances highlight the realities of CSR as an important means of companies to manage non-financial risk and maximize their long term value’. Bryan Horrigan, *Corporate Social Responsibility in the 21st Century – Debates, Models and Practices Across Government, Law and Business* 13 (Cheltenham, UK: Edward Elgar 2010).

²⁷ For a discussion on these assumptions and their interaction with the CSR construct, see generally Amodu, *supra* n. 23, at 6–13.

²⁸ P. Ireland, *Making Sense of Contemporary Capitalism Using Company Law*, 33(3) *Austl. J. Corp. L.* 379–401 (2018) fn 68 and surrounding texts; J. Dine, *Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?*, 1(3) *J. Hum. Rts. & the Env’t.* 44, at 57 (2012); A. Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9(3) *Rich. J. Global L. & Bus.*, 249 (2010); and A. Keay, *Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model*, 71 *Mod. L. Rev.* 663 (2008); W. Lazonick & M. O’Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, 29(1) *Econ. & Soc.* 13–35 (2000).

²⁹ J. E. Parkinson, *Corporate Power and Responsibility* 23 (Clarendon Press, 1993); P. Ireland, *Capitalism Without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality*, 17 *J. Legal Hist.* (1996); see also P. Ireland, *Company Law and the Myth of Shareholder Ownership*, 1 (62) *Mod. L. Rev.* 32 (1999) at footnotes 40–52 and at pp. 164–168; and also, E. Emeseh et al., *Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?*, II *Ger. L. J.* 230 (2010).

³⁰ D. M. Branson, *Corporate Governance ‘Reform’ and the New Corporate Social Responsibility*, 62 *Univ. Pitt. L. Rev.* 605 (2001); and J. K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (Boston: Houghton Mifflin 1952).

³¹ M. Kerr, R. Janda & C. Pitts, *Corporate Social Responsibility – A Legal Analysis* 23 (LexisNexis 2009).

³² *Ibid.*, at 32; see also M. Hopkins, *Corporate Social Responsibility: What Is It? What’s the Point? How Does It Work?*, in *Trends and Issues in Global Tourism* 281–291 (R. Conrady & M. Buck eds, Heidelberg, Berlin:

Development (WCED) report³³ titled *Our Common Future*, sustainable development is a development which meets the needs of the present without compromising the ability of the future generations to meet their own needs.³⁴

Commitment to the Brundtland Report culminated into the 1992 Earth Summit and the adoption of the Rio Declaration representing the first truly international initiative to develop a global strategy for sustainable development. Although in 2000, world leaders converged at the United Nations Headquarters to adopt the United Nations Millennium Declarations³⁵ (popularly called the millennium development goals, MDGs), this has now been overtaken in 2015 by adoption of the 2030 Agenda for Sustainable Development.³⁶ The 2030 Agenda together with its seventeen sustainable development goals (SDGs) came to force on 1 January 2016. The SDGs built on the successes of and pulls together all the strands of the 1972 Stockholm Declaration,³⁷ the 1987 Brundtland Report, the 1992 Rio Declaration³⁸ and the year 2000 MDGs. The SDGs may be summarized as focusing on the five P's of People, Planet, Prosperity, Peace and Partnership; and commits participating countries to achieving sustainable development in its three dimensions – economic,³⁹ social,⁴⁰ and environment⁴¹ – in a balanced and integrated manner. Interestingly, all countries of the world, including from Africa, have agreed to work towards achieving these goals. By the adoption of the SDGs, nations of the world have committed to strengthen and revitalize the global partnership for sustainable development and some CSR values including the building of sustainable communities, ensuring sustainable consumption and production patterns, promoting

Springer 2011). Cf. see generally, Idemudia, *supra* n. 7, at 421–435, with arguments querying whether or not CSR can lead to attaining development in Africa.

³³ The report was named after and popularly referred to as the Brundtland Report. Gro Harlem Brundtland, former Prime Minister of Norway was the chairman of the World Commission on Environment and Development (WCED).

³⁴ World Commission on Environment and Development (WCED), *Our Common Future*, Report of the WCED, 1987, annexed to United Nations General Assembly, document A/42/427.

³⁵ General Assembly resolution 55/2 of 8 Sept. 2000.

³⁶ The 2030 Agenda for Sustainable Development is a comprehensive, far reaching and demanding international agreement, comprising 17 goals, 169 integrated and indivisible targets, and 230 indicators. It also commits to support the 2015 Paris Agreement on Climate Change.

³⁷ Stockholm Declaration on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972).

³⁸ Rio Declaration on Environment and Development, in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 Aug. 1992, Annex I. The Rio Declarations from the 1992 United Nations Conference on Environment and Development (UNCED), in Rio de Janeiro, Brazil were re-affirmed at the (another Earth Summit, Rio+10) World Summit on Sustainable Development (WSSD) held in Johannesburg, Republic of South Africa in Sept., 2002. In 2012, the United Nations Conference on Sustainable Development (UNCSD), known as Rio+20 was also held in Brazil as a 20-year follow up to UNCED.

³⁹ This means economic prosperity for all in the global economy and end poverty.

⁴⁰ This represents advocacy for social inclusion and cohesion towards the general welfare of the society.

⁴¹ This pertains to the promotion of environmental sustainability.

constant, inclusive and sustainable economic growth and industrialization, amongst other goals. Nations of the world are expected to form partnerships and cooperate towards yielding the promises of globalization and ensuing no one is left behind. These are the universal commitments to which all states pledged.

Further, in its evolution as a form of countervailing power in global governance discourse, and having incorporated core values such as human rights and environmental protection, information disclosure, combating bribery, and sustainable development among others, a few international regulatory dialogues such as the United Nations Global Compact (UNGC),⁴² and the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs),⁴³ among others have also been had in the CSR domain. Therefore, towards mobilizing a global movement of sustainable businesses, the UNGC is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the area of human rights, labour, environment and anti-corruption. The UNGPs, on the other hand, constitute a unique contribution to the human rights and business agenda, and while resting on the three distinct but complementary⁴⁴ pillars of 'protect', 'respect' and 'remedy', they clarified and elaborated on the relationship and respective roles played between states and the business community in safeguarding against corporate-related human rights abuses. It would be interesting to consider regional integration efforts in Africa towards attaining some of the SDGs

⁴² United Nations Global Compact, <http://www.unglobalcompact.org> (accessed 31 Oct. 2019); see also UN Press Release SG/SM/6881, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos, Text of Speech by Kofi Annan 1 (1 Feb. 1999), <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html> (accessed 5 Nov. 2019).

⁴³ J. Ruggie, *Final Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises and Presenting the 'Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework*, A/HRC/17/31 (21 Mar. 2011), <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (accessed 5 Nov. 2019) (hereinafter simply 'UNGPs'). Beyond the Human Rights Council, the UNGPs have been endorsed or employed by individual governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization (ISO), the Organization for Economic Cooperation and Development (OECD) and the EU in developing their own initiatives in the CSR domain. A few other CSR inspired international initiatives include: the International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; the Organisation for Economic Cooperation and Development Declaration on International Investment and Multinational Enterprises, together with its Guidelines for Multinational Enterprises (hereinafter the 'OECD Guidelines'), among others.

⁴⁴ The principles embedded within the three pillars ensure the pillars form a complementary whole in that each supports the others in achieving sustainable progress and development. J. G. Ruggie, *Protect, Respect, and Remedy: The UN Framework for Business and Human Rights*, in *International Human Rights Law: Six Decades After the UDHR and Beyond* 520 (M. A. Baderin & M. Ssenyonjo eds, Ashgate 2010).

including sustainable economic growth and industrialization. This is discussed in the next part.

3 REGIONAL INTEGRATION IN AFRICA

As earlier noted, there is a common realization that in order to achieve its full economic potential, Africa needs to liberalize its trade in goods and services together with investment. Regional integration has become a useful tool to increase world trade and the successes recorded at the level of the EU and the North American Free Trade Agreement (NAFTA) have also encouraged consensus within the African region and beyond. Regional integration, in simple terms, means coming together of countries (usually in the same region) to reduce trade barriers hampering economic growth and development, and maximizing general welfare. It involves gradual elimination of trade barriers impeding free flow of goods and services and factors of production from certain sectors. For clarity of terms, although some semantic differences may technically exist among scholars,⁴⁵ the words regionalism, regional integration, economic integration and regional trade arrangements are all used interchangeably in this article to connote arrangement signalling firm commitments among states to take affirmative steps in reducing barriers to trade between the parties involved. This article seeks to highlight that while regional integration initiatives in Africa appear largely pervaded by the common motivation for economic growth and the strengthening of nascent domestic industries in Africa,⁴⁶ the founding fathers of regional integration in Africa, just as in many other regions of the world,⁴⁷ envisioned a continent progressed on the basis of principles similar to what is now called ‘developmental regionalism’,⁴⁸ an idea emphasizing the need for trade to serve as an

⁴⁵ See H. K. Mutai, *Compliance with International Trade Obligations-The Common Market for Eastern and Southern Africa* 31 & 32 (The Netherlands: Kluwer 2017); see also F. Laursen, *Comparative Regional Integration – Europe and Beyond* 3 & 4 (Ashgate Publishing Limited 2010).

⁴⁶ Although regional integration in Africa appears quite slow especially in the 1980s and the 1990s due to low levels of growth, high level of debt, political instability and overlapping regional arrangements, even if not yet at a desirable level, intra-African trade is said to have increased in recent times. Ismail, *supra* n. 5, at 7.

⁴⁷ Ismail, *supra* n. 5, at 10.

⁴⁸ This is cooperation among countries in a broader range of areas than just trade and trade facilitation, to include – e.g. – investment, research and development, as well as policies aimed at accelerating regional industrial development and regional infrastructure provision such as the building of better networks of roads and railway. See generally, F. Ismail, *A Developmental Regionalism Approach to the AfCFTA* (Trade and Industrial Policy Strategies 2018), <http://www.tips.org.za/research-archive/trade-and-industry/item/3542-working-paper-a-development-regionalism-approach-to-the-afcfta> (accessed 5 Nov. 2019); UNCTAD, ‘Trade and Development Report’ (United Nations, Geneva, 2013); see also associated concept of ‘Transformative Regionalism’ meaning an integration approach that promotes and also ensures progress in building productive capacities and achieving structural transformation for sustained development. It differs from the trade reform-centred approach to integration in the sense that it begins with an identification of the most binding constraints to development in Africa and asks how integration can contribute to lifting or relaxing these constraints. In contrast, the trade reform-centred approach to integration assumes that trade barriers represent the main obstacle to promoting regional trade in Africa and that trade is the key to poverty

instrument of accelerated industrialization and structural transformation in Africa, rather than an end in itself.⁴⁹

It is useful to situate the African regional integration agenda within some historical perspectives. Towards realizing the Pan-Africanist vision of Kwame Nkrumah's 'All Africa People's Conference' as far back as 1958 (Nkrumah is thus regarded as a champion of regional integration in Africa), and following the deteriorating economic crisis in Africa,⁵⁰ there were calls for a new world order, and the Economic Commission for Africa (ECA) was instrumental in coming up with three development blueprints for Africa namely:

- (1) There was the 1976 Revised Framework of Principles for the Implementation of the New International Order in Africa;
- (2) Three years later, at the colloquium titled 'Perspectives of Development and Economic Growth in Africa up to the year 2000', convened in Monrovia in 1979 by the Organization of African Unity (now AU), the ECA's 1976 blueprint became the intellectual and theoretical foundation of the AU's Monrovia Declaration;
- (3) One year later in 1980, at the AU's second extraordinary summit in Nigeria, the AU transformed the Monrovia Declaration into the Lagos Plan of Action, and the Final Act of Lagos (LPA), and set itself the goal of economic integration of Africa by the year 2000, through the creation of an African Economic Community (AEC).

It is interesting to note that on account of the likely failure to meet the objectives of the LPA and achieve the creation of the AEC by 2000, AU Member States in 1991 reinforced their commitments, and signed the Abuja Treaty which created the AEC, and calls for the total integration of African economies by 2025. The commitment to the eventual merger of the regional economic communities (RECs),⁵¹ and the

reduction. For the above, see P. N. Osakwe, *Transformative Regionalism, Trade and the Challenge of Poverty Reduction in Africa* (ALDC/UNCTAD, 2015), https://unctad.org/en/PublicationsLibrary/webaldc2015d1_en.pdf (accessed 5 Nov. 2019).

⁴⁹ Generally see UNECA, *Greening Africa's Industrialization* (Economic Report on Africa 2016); and UNECA, *Economic Report on Africa 2015 – Industrializing Through Trade* (Economic Report on Africa 2015), <http://www.uneca.org/publications/economic-report-africa-2015> (accessed 5 Nov. 2019).

⁵⁰ Africa turned out the worst performing region in a global audit conducted about the long-term development trends covering 1960 to 1975 by the Economic Commission for Africa at the urging of the United Nations General Assembly, and missed targets set by the UN's Second Development Decade. Kwame Akonor, *African Economic Institutions* 21 (Routledge 2010).

⁵¹ The RECs have been, and remain central institutional actors in Africa's efforts to resolve its economic development dilemmas. They are the regional groupings of African states, and the AU recognizes 8 of them viz: Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD); and, Southern African Development Community (SADC).

creation of the AEC earlier proposed by the LPA, is enshrined in the 1991 Abuja Treaty, which lays down a thirty-four-year timetable (1994–2028), in six different stages of different duration for the integration scheme. The Abuja Treaty of 1991 was largely influenced by ECA’s first executive secretary, Adedeji Adebayo, and the treaty eventually led to the 2012 Economic Commission for Africa paper titled ‘Boosting Intra-Africa Trade – Issues affecting Intra-Africa Trade, Proposed Action Plan for boosting Intra-Africa Trade and Framework for Fast Tracking of a Continental Free Trade Area’⁵² which occasioned the launch of a Continental Free Trade Area discourse by the AU.⁵³ Faizel further noted the ‘Agenda 2063’ adopted by African leaders at the AU Summit in 2015, calling for a prosperous Africa based on inclusive growth and sustainable development and expressing vision that Africa shall be a continent where the free movement of people, capital, goods and services will result in significant increases in trade and investments amongst African countries. All these preceding efforts in light of the integration agenda culminated in the historic signing of an agreement creating the AfCFTA on 21 March 2018 at the AU Summit in Kigali, Rwanda.⁵⁴ What does AfCFTA actually entail? This is discussed in the next sub-section.

3.1 AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

The AfCFTA⁵⁵ covers the entire fifty-five-Member States of Africa with a market of 1.2 billion people and a gross domestic product (GDP) of USD 2.5 trillion and as a result of the share number of participating countries, AfCFTA constitutes the world’s largest free trade area since the formation of the World Trade Organization.⁵⁶ Article 3 of the main agreement of AfCFTA contains its general objectives which include: the creation of a liberalized single Market for Goods, Services, and Movement of Persons; the promotion of sustainable economic and industrial development, through diversification and regional value chain development; and the resolution of the challenges of multiple

⁵² African Union/Economic Commission for Africa (AU/ECA), ‘Boosting Intra-Africa Trade. Issues affecting Intra-Africa Trade, Proposed Action Plan for boosting Intra-Africa Trade and Framework for Fast Tracking of a Continental Free Trade Area’ (23 Jan. 2012–30. Addis Ababa, Ethiopia).

⁵³ F. Ismail, *Advancing the Continental Free Trade Area (CFTA) and Agenda 2063 in the Context of the Changing Architecture of Global Trade* 6 (Trade & Industrial Policy Strategies, Working Paper 2016).

⁵⁴ AfCFTA was actually preceded by the 2015 Tri-Partite Free Trade Agreement (TFTA) signed among: SADC, the Southern African Development Community; COMESA, the Common Market for Eastern and Southern Africa; and EAC, the East African Community.

⁵⁵ See the Agreement Establishing the African Continental Free Trade Area and its Protocols, Annexes and Appendices at: <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> (accessed 5 Nov. 2019).

⁵⁶ African Trade Policy Centre United Nations Economic Commission for Africa, *African Continental Free Trade Area – Questions & Answers*, <https://www.uneca.org/publications/african-continental-free-trade-area-questions-answers> (accessed 5 Nov. 2019).

continental integration processes. Showing the connection between AfCFTA and sustainable development as a core CSR value as discussed in this article, the ECA confirms that⁵⁷:

The cumulative effect of AfCFTA is to contribute to the achievement of the United Nations 2030 Agenda, in particular, to the Sustainable Development Goals, from targets for decent work and economic growth (Goal 8) and the promotion of industry (Goal 9), to food security (Goal 2) and affordable access to health services (Goal 3).

On the question of what institutional arrangements are needed for the effective implementation of AfCFTA, it is noted that the responsibility for coordinating the implementation of the AfCFTA agreement will be within the AfCFTA secretariat,⁵⁸ which will form an autonomous institutional body within the AU system, and with an independent legal personality, akin to an agency of the AU. It shall work closely with the AU Commission and its departments and the Commission shall provide the necessary transitional support until AfCFTA secretariat is fully operational. The funds of the secretariat shall be sourced from the overall budget of the AU, and its headquarters, structure, roles and responsibilities shall be determined by the Council of Ministers responsible for trade.

Structurally speaking, the AfCFTA agreement is divided into seven (7) Parts, and with thirty-one (31) Articles in the main text of the agreement. The document has three (3) Protocols at the moment: one on trade in goods; the other on trade in services; and the last, on dispute settlement. AfCFTA is written in four (4) original texts which are in the Arabic, English, French and Portuguese languages, all of which are equally authentic.⁵⁹ While the AfCFTA agreement was adopted and opened for signature on 21 March 2018 in Kigali, it entered into force on 30 May 2019, thirty days after having received the twenty-second instrument of ratification on 29 April 2019. On 7 July 2019, its operational phase was launched at the 12th Extraordinary Session of the Assembly of African Union Heads of State and Government in Niamey, Niger. No doubt, the AfCFTA is truly emblematic of the flagship projects of Agenda 2063 of the AU, and with widespread reception across the continent. Both Nigeria and Benin having signed the AfCFTA agreement at the Niamey summit, and the AfCFTA having twenty-eight ratifications, Eritrea remains the only African country that is not part of the trading bloc as at 5 November 2019.⁶⁰

⁵⁷ *Ibid.*, at 4.

⁵⁸ *Ibid.*, at 9. A conference of State parties will meet to adopt the structure and organigram of AfCFTA secretariat, the staff rules and regulations, and the secretariat budget. AfCFTA secretariat is to be established in Ghana as decided and approved by the AU Assembly on 7 July 2019.

⁵⁹ Art. 31, Part VII, AfCFTA.

⁶⁰ Watch the summit at: <https://au.int/en/videos/20190707/closing-ceremony-12th-extraordinary-summit-afcfta>, also see generally, <https://au.int/en/pressreleases/20190707/operational-phase-african-continental-free-trade-area-launched-niger-summit>, both (accessed 5 Nov. 2019).

In analysing AfCFTA, it is one thing to pay lip service or at least casually mention CSR and sustainable development in the agreement, but mainstreaming the implementation of the core values of these CSR and sustainability constructs within the AfCFTA framework is another. Free trade is a means to the end of sustainable development. It is remarkable that the drafters of the AfCFTA agreement have mentioned the phrase ‘sustainable development goals’ just once in the entire agreement, and with no clear strategy or details about the methodology to attaining the SDGs (unlike, for instance, within the EU whose CSR integration framework shall be discussed below). The word ‘sustainable’ features six (6) times while the phrase ‘sustainable development’ features four (4) times in the entire document and those mentions made are included in a protocol to the agreement.

Beyond this, while AfCFTA recognizes the right of Member States to, for instance, regulate towards their overall sustainable development,⁶¹ and confirms its general objective to promote sustainable development in accordance with the SDGs,⁶² apart from the above passing mentioning and comments about SDGs and overall SD, the AfCFTA framework agreement appears to discount the need for a properly defined framework through which the said objectives can be realized. Such mere mentioning appears to have no real value in practically promoting the ideas of CSR and SD. In other words, it should not just be simply a question of inserting the words sustainable development, or even CSR in the AfCFTA, but rather seeking to mainstream throughout the document what is meant by such and how to be realized in more practical terms. For instance, there is the Southern African Development Community (SADC) Model Bilateral

Investment Treaty Template and Commentary which was completed in June 2012 by Member States of the Community (the ‘SADC Model Treaty’).⁶³ Article 1 of this template treaty mentions that:

The Main objective of this Agreement is to encourage and increase investments ... that support the sustainable development of each Party, and in particular the Host State where an investment is to be located.

This mention of the stated objective by the drafters did not start and end with the above quotation. Unlike with the AfCFTA, the drafters of the SADC

⁶¹ See the preamble and para. 2 (b) of Art. 3 in the Protocol on Trade in Services.

⁶² See para. (e) of Art. 3 of the main agreement.

⁶³ <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>, (accessed 5 Nov. 2019).

Model Treaty ensured its stated objective was sustained throughout the agreement, making certain the treaty incorporated sustainable development thinking from the beginning to the end of the text. Practically speaking, the SADC Model Treaty had gone ahead to provide specific clauses which properly mainstream the intended development agenda into the treaty beyond mere mentioning.⁶⁴ It is important to also underscore that this mere mentioning of the subject as some ‘grandiose western concept’ in the AfCFTA is a repetition of previous mistakes which led to the failures of past integration efforts, and suggestive of not haven undertaken proper legal integration as required for the achievement of the AfCFTA objectives. While the problems encountered in previous regional integration attempts in Africa ranged from⁶⁵: divergent legal systems; non-ratification and non-implementation of key obligations; lack of fully developed legal principles within the municipal law; conflict of laws; ambiguity of treaty language; lack of (financial) incentive to ensure compliance; inadequate (financial and human) resources and technical expertise for implementation; weak economic structure of African states; differing macro-economic policies; unbridled attachment to national sovereignty; to political instability and conflicts, perhaps the most crucial which appears to remain elusive till date is the absence of a proper legal harmonization through an effective legal integration exercise.⁶⁶ The fact is that the regional integration process is a creation of the law and while the process usually germinates from the political interactions and negotiations between and/or among states, legal

⁶⁴ See for instance, Part 3 of the SADC Model Treaty. Art. 10 has practical provisions in terms of the compliance of the investment plan with relevant anti-bribery and corruption policies. Art. 13 deals with compliance with environmental and social impact assessment screening. Art. 15 provides for maintaining best labour standards and safeguarding human rights and Art. 16 speaks to compliance with applicable corporate governance codes and standards, and very importantly to discussions in this article, Art. 20 underscores its earlier stated objective and gives practical provisions about the recognition of the legitimate responsibility of states, in line with customary international law, to regulate towards the attainment of sustainable development. For more discussions, see Howard Mann, *The SADC MODEL BIT Template: Investment for Sustainable Development* (IISD Investment Treaty News 2019), <https://www.iisd.org/itn/2012/10/30/the-sadc-model-bit-template-investment-for-sustainable-development/> (accessed at 5 Nov. 2019).

⁶⁵ Babatunde Fagbayibo, *Exploring Legal Imperatives of Regional Integration in Africa*, 45 *Comp. & Int'l L. J. of Southern Africa* 64–76 at 68 (2012).

⁶⁶ Legal integration is indeed indispensable for trade facilitation and effective regional integration. Muna Ndulo, *The Need for the Harmonisation of Trade Laws in the Southern African Development Community*, in *African Yearbook of International Law* 195–225, 196 (A. A Yusuf ed., 1996); J. A. P. Matipe, *Legal Integration in Colonial and Immediate Post-Colonial Sub-Saharan Africa in Unified Business Laws for Africa* 7–27 (C. M. Dickerson ed., 2d ed., 2012).

instruments, such as treaties and protocols, outline the road-map of such process.⁶⁷ The present AfCFTA framework appears to have ignored the importance of a properly defined, integrated, and shared CSR and SD policy and regulatory framework, haven only paid such nominal significance to such shared CSR values within the integration process. This diminishes the seriousness of the African integration agenda in relation to CSR implementation or achieving the SDGs. Further, the above status appears to run in the opposite direction of research showing that effective regional integration and mechanisms are no longer confined to trade and finance but have increasingly also been linked to regional social policies across a wide range of sectors.⁶⁸ Upon reviewing the provisions of the AfCFTA including the statements contained in the United Nations Economic Commission for Africa (UNECA) publication, the author joins the view of scholars⁶⁹ that the drafters and negotiators of the AfCFTA might have focused too much on regional integration in the area of free trade liberalization in terms of goods, services and investment as an end in itself without paying adequate attention to important principles embedded in concepts such as developmental regionalism, transformative regionalism,⁷⁰ and effective legal harmonization especially in relation to CSR and SD. It must be reiterated again that the incidence of free trade constitutes only a means towards achieving the end of sustainable development. If Africa intends to achieve sustainable development, Member States must properly integrate the core values of CSR within its trade agreements and find ways to encourage these globalization-driving corporations to act social responsibly and sustainably on the continent. In summary, AfCFTA appears inadequate and/or seems to have insufficiently provided the necessary and workable framework to meet the realities of modern times that have shown cross border activities and the transboundary nature of social, economic and environmental challenges arising from economic globalization and regional integration. This warrants more robust and deliberate regional social policy efforts. Further comments will later be made in this article on how AfCFTA will not constitute business as usual for corporations which routinely operate double standards⁷¹ in their activities in developed economies (with relatively strong CSR policies) as opposed to their operations in developing markets (perceived with weak

⁶⁷ Fagbayibo, *supra* n. 65, at 65; citing Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration* 221 (1999).

⁶⁸ Yeates, *supra* n. 14.

⁶⁹ Ismail, *supra* nn 5 and 48.

⁷⁰ Ismail (2018), *supra* n. 48; also, Osakwe, *supra* n. 48.

⁷¹ Dine, *supra* n. 29, at 49; *see also* Hadden, *supra* n. 11, at 486, 487 and 506.

systems). This is further discussed in section 5 below. At this stage, it would appear useful to consider the conception of CSR within the EU and its interaction within EU trade agreements and under the framework of the WTO agreements.

4 THE EU, CSR AND THE WORLD TRADE ORGANISATION AGREEMENTS

It might have taken some time, but the EU has clearly realized the dangers associated with free trade in goods and services and creating borderless economies in Europe without paying attention to corporate responsibility. This it has especially done by establishing necessary checks and monitoring systems on how responsible corporate behaviours must be carried out throughout the global value chain system. In order to discuss the EU in relation to its CSR activities and measures in modern times, some historical perspective is pertinent in the circumstance. The EU originally conceptualized CSR as essentially and inherently a voluntary idea of which regulatory and enforcement features, if at all necessary, must also be dominated by voluntarism. In 2001, the European Commission⁷² defined CSR as follows:

concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders *on a voluntary basis*'. (Emphases added)

As earlier shown in this article, this kind of CSR conception at the EU, has drawn criticisms from many commentators and scholars as an approach serving minimal benefit – from the most conservative business person, to the most ambitious ideals-driven NGO or the most market-oriented government official.⁷³ Calls have also been made at many fora for the EU to improve on its disposition toward an important concept such as CSR.⁷⁴ Like an effort to redeem EU's image as a global 'Pole of Excellence' in CSR discourse, the European Parliament noted that:

Due to its ambition to become a 'pole of excellence' for CSR, to its human rights tradition and commitment, its economic and moral influence, and its large network of external

⁷² European Union, *Communication of European Union Country's Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 Final (18 July 2001). For previous documents and actions at the EU towards CSR, see Tully, *supra* n. 9, at 24 and 25.

⁷³ H. Ward, *Corporate Social Responsibility in Law and Policy in Perspectives on Corporate Social Responsibility* 8 & 11 (N. Boeger, R. Murray & C. Villiers eds, Edward Elgar 2008); Parkinson, *supra* n. 25, at 4–7.

⁷⁴ Swedish Presidency of the European Union, *Protect, Respect, Remedy – Making the European Union Take a Lead in Promoting Corporate Social Responsibility* (Declaration 2009), http://ec.europa.eu/enterprise/policies/sustainable-business/files/deklaration_engelska_en.pdf (accessed 27 Oct. 2016).

relations, the EU is certainly one of the best positioned actors to make a true difference in the field of business and human rights.⁷⁵

It is helpful to note that owing to its essentially voluntary approach to CSR, the EU has adopted a disclosure regime whereby it enjoins companies in Member States to consider and report on non-financial (social, environmental and employee-related) matters in their annual reports (popularly referred to as the Accounts Modernization Directive).⁷⁶ Based on this, many Member States introduced non-financial disclosure requirements including France, UK,⁷⁷ Spain, Germany, Sweden, Denmark,⁷⁸ and Norway amongst others.

As the EU directive was not a mandatory disclosure of comprehensive information on CSR matters and did not give any clear guidance on the specific non-financial information to be disclosed, beyond this disclosure, there was therefore no known concrete monitoring or enforcement mechanisms to verify that the actual operations of the companies indeed comply with what has been disclosed in their annual report. Consistent with the above position, the EU has been noted to engage in a *wholehearted* adoption of the business case argument of CSR.⁷⁹

By 2011, the EU demonstrated further improvement in its regime for undertaking disclosure of social and environmental information and also improved its CSR conception. CSR was consequently defined as ‘the responsibility of enterprises for their impacts on society.’⁸⁰ Further, in 2014, the EU also acknowledged the importance of businesses

⁷⁵ J. Wouters & N. Hachez, *Business and Human Rights in EU External Relations: Making the EU a Leader at Home and Internationally* cited in MacLeod, *supra* n. 9, at 261.

⁷⁶ Council Directive (EC) 2003/51/EC, 18 June 2003 amending Directives 78/660/EEC, 83/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178/16, 2003; see also R. Smerdon, *A Practical Guide to Corporate Governance* 433 (3d ed., Sweet & Maxwell 2007).

⁷⁷ Based on the EU directives, the UK government improved on the non-financial-matter disclosure requirements through its 2013 amendment of the 2006 English Companies Act expecting qualified companies to produce a Strategic Report informing their shareholders and helping them assess how the directors have discharged their duty under s. 172 of the Companies Act in actually promoting the success of the company. See s. 414C, the Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013, Statutory Instrument 2013 No. 1970, http://www.legislation.gov.uk/ukxi/2013/1970/pdfs/ukxi_20131970_en.pdf (accessed 5 Nov. 2019).

⁷⁸ Denmark was the first country in Europe to require CSR (integrated and non-financial) reporting systems for its bigger companies. Danish Financial Statements Act 2008, operative from 1 Jan. 2009.

⁷⁹ J. Wouters & L. Chanet, *Corporate Human Rights Responsibilities: A European Perspective*, 6 Nw U.J. Int’l Hum. Rts. 262, at 266 & 267 (2008), paras 26 and 27; The CSR ‘Business Case’ argument enjoins corporate managers to consider stakeholder interests and report on non-financial matters of CSR like employee or environmental matters so long as it will make *business sense* (cost-benefit implications) to so do and such considerations are in relation to the overall economic performance of the company and without prejudice to enhancing shareholder value.

⁸⁰ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A Renewed EU Strategy 2011–14 for Corporate Social Responsibility*, COM (2011) 681 final (Brussels 25 Oct. 2011).

divulging information on sustainability such as social and environmental factors, with a view to identifying sustainability risks and increasing investor and consumer trust. This led to the historic adoption of Directive 2014/95/EU⁸¹ of the European Parliament and of the Council of 22 October 2014 which amended the Directive 2013/34/EU regarding disclosure of non-financial and diversity information, by certain large undertakings and groups.⁸²

In order to underscore the new commitment to CSR within the EU, it is beneficial to reproduce paragraph 3 of the Directive:

In its resolutions of 6 February 2013 ... the European Parliament acknowledged the importance of businesses divulging information on sustainability such as social and environmental factors, with a view to identifying sustainability risks and increasing investor and consumer trust. Indeed, disclosure of non-financial information is vital for managing change towards a sustainable global economy by combining long-term profitability with social justice and environmental protection. In this context, disclosure of non-financial information aids the measuring, monitoring and managing of undertakings' performance and their impact on society.⁸³

Legal transposition amongst the twenty-eight Member States in the EU (as well as two additional countries from the wider European Economic Area (EEA) – Iceland and Norway) was deferred till 2017. In terms of legal transposition, policy makers at the EU expect that the disclosure requirements within the locally transposed laws⁸⁴ amongst Member States will play an important role in boosting private sector action and commitment towards meeting the SDGs and the Paris Climate Agreement.⁸⁵ Figure 1 showing the level of legal transposition in domestic laws as at 2017:

⁸¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=FI> (accessed 5 Nov. 2019).

⁸² The Directive 2014/95/EU on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, also <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095> (accessed 5 Nov. 2019).

⁸³ Preamble, para. 3 of the Directive 2014/95/EU. While the EU Directive is a mandatory requirement for companies, such businesses only need to 'comply or explain' why they have not complied. See resolution 19 for instance.

⁸⁴ See for instance the UK.

⁸⁵ Global Reporting Initiative (GRI) and CSR Europe, *Member State Implementation of Directive 2014/95/EU – A Comprehensive Overview of How Member States Are Implementing the EU Directive on Non-financial and Diversity Information 4* (GRI & CSR Europe, 2017), https://www.globalreporting.org/resource/library/nfrpublication%20online_version.pdf (accessed 5 Nov. 2019).

Figure 1 Summary of Legal Transposition Stages Within Domestic Laws of EU Member States as at 2017.

→ **Transposition summary table**

Country	Definition of a Large Undertaking	Definition of a Public Interest Entity	Report Topics and Content	Reporting Framework	Disclosure Format	Auditor's involvement	Non-compliance Penalties	Safe Harbour Principle	Diversity Reporting Required
Austria	=	○	=	=	○	=	○	=	○
Belgium	○	○	=	=	○	○	○	=	=
Bulgaria	=	○	=	○	○	○	○	=	○
Croatia	=	○	=	=	○	=	○	=	○
Cyprus	=	○	=	=	=	=	○	=	○
Czech Republic	○	○	=	=	○	=	○	=	=
Denmark	○	○	=	○	○	○	○	✘	○
Estonia	○	=	=	=	○	=	✘	✘	○
Finland	=	=	=	=	=	=	○	=	=
France	=	○	=	=	○	○	○	✘	=
Germany	=	○	=	=	○	=	○	=	=
Greece	○	○	○	=	○	=	○	=	=
Hungary	=	○	=	=	○	=	○	=	=
Iceland	○	○	=	=	○	○	○	=	○
Ireland	=	=	=	=	=	=	○	=	○
Italy	=	○	=	○	○	○	○	=	=
Latvia	=	○	○	=	○	○	○	=	=
Lithuania	=	○	○	=	○	=	○	=	○
Luxembourg	○	○	=	=	=	=	○	=	=
Malta	=	=	○	=	○	=	○	=	=
The Netherlands	=	○	=	=	○	○	✘	=	=
Norway	=	○	=	=	○	=	○	✘	=
Poland	=	○	=	○	=	=	○	=	=
Portugal	○	○	=	=	=	=	○	=	=
Romania	○	○	○	=	=	○	○	=	=
Slovakia	=	○	=	○	○	=	○	✘	=
Slovenia	=	=	○	=	○	=	○	=	○
Spain	=	○	○	○	○	=	✘	=	=
Sweden	○	○	○	=	○	=	○	=	=
United Kingdom	○	=	=	=	○	○	○	=	=

Legend	=	Requirements are the same as in the Directive
	✘	Requirements have been omitted
	○	Requirements have been adapted

Source: (2017, GRI & CSR Europe) at 10.

Other than the disclosure requirements directive, and especially from 1995, further improvements can also be seen in the EU CSR and sustainability strategy as it mainstreams in its trade agreements with partners CSR⁸⁶ together with its core values of human rights protection and consideration of (business) trade impacts on the society and the environment.⁸⁷ For instance therefore, prior to concluding trade agreements, the sustainability impact assessments (SIAs) of such agreements – which would give robust analysis of the potential economic, social, human rights and environmental impacts on society, the environment, and the economy of the negotiating parties – are finalized, and complementary measures towards mitigating any negative effects are identified.⁸⁸ Accordingly, the EU is committed to negotiating agreements that promote, rather than hinder, the implementation of human rights standards by providing for an enabling environment.⁸⁹

⁸⁶ CSR clauses are now specifically added to EU trade agreements such as in Art. 13.6 of the EU-Korea Free Trade Agreement; *see also* Art. 271 (3) of the EU Columbia/Peru Free Trade Agreement. Interestingly, African countries do negotiate and insert CSR clauses in their trade agreements. *See for instance*, Art. 13 of the 2019 Cooperation and Investment Facilitation Agreement (CIFA) between Brazil and Morocco incorporating CSR and SD provisions; and Art. 14 of the 2018 agreement between Brazil and Ethiopia. *See also* similar provisions in the 2015 Brazil and Mozambique, Angola and Brazil, together with Brazil and Malawi agreements respectively. Others are <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil> (accessed 5 Nov. 2019). It is arguable though that the inserted CSR clauses in these agreements may have more to do with Brazil's impressive focus on investment cooperation and facilitation (as opposed to protection). While no investment agreement can be confirmed to have been finalized using this model at the moment, *see also* the earlier mentioned SADC Model Treaty (footnote 63 above), offering a harmonized CSR implementation approach to the 15 SADC Member States in their individual and collective negotiations of investment agreements.

⁸⁷ Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Parties (COM) 95 216 and EU Council Conclusions of 29 May 1995 (reported in EU Bulletin 1995–5, point 1.2.3); The EU 2016 Handbook for Trade Sustainability Impact Assessment (2d ed.). Brussels: European Union; *see also* the European Commission's. 2006 Handbook for Trade Sustainability Impact Assessment Handbook for Trade Sustainability Impact Assessment. Brussels: European Union; the EU's. 2011 Joint Communication on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach; the 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy (Council of the European Union 2012), the 2015–2019 Action Plan on Human Rights and Democracy; the Better Regulation Guidelines of the EU (European Commission 2017), and the 2015 EU strategy on Trade for All (European Commission 2015c). *See also* L. Bartels *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements* (EU Policy Department DG External Policies, 2014), <https://publications.europa.eu/en/publication-detail/-/publication/a18bbb27-b5b7-4d1d-97e6-58b1161348ee/language-en/format-PDF> (accessed 3 July 2019); and, L. Bartels, *Human Rights and Sustainability Development Obligations in the EU's Free Trade Agreements*, 40 *Legal Issues of Econ. Integration* 297 (2013).

⁸⁸ Materials on both ongoing assessments and completed impact assessments are contained at: http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm (accessed 5 Nov. 2019).

⁸⁹ B. E. Bonanomi, *Measuring Human Rights Impacts of Trade Agreements – Ideas for Improving the Methodology: Comparing the European Union's Sustainability Impact Assessment Practice and Methodology with Human Rights Impact Assessment Methodology*, 9 *J. Human Rts. Prac.* 481–503, 485 (2017).

In furtherance of the checks and monitoring systems on how responsible corporate behaviours must be carried out throughout the global value chain system, the EU published the text of a Conflict Minerals' Regulation (2017/821)⁹⁰ to be applicable across the EU from 1 January 2021. The regulation aims to help stem the trade in four minerals – tin, tantalum, tungsten and gold – (otherwise referred to as the '3TG') which are minerals are particularly selected because they sometimes finance armed conflict, or have been established to be subject of illegal mining or mining using forced labour. The regulation requires that affected EU importers of the respective minerals (the 3TG, whether these are in the form of mineral ores, concentrates or processed metals), need to comply with, and report on, supply chain due diligence obligations if the minerals originate (even potentially) from conflict-affected and high-risk areas. This process should ensure sustainable sourcing for more than 95% of all EU imports of the minerals, as will be covered by due diligence provisions as of 1 January 2021. Although it directly applies only to EU-established importers of the targeted minerals, companies from outside the EU will also be impacted as EU-companies will need to make sure that:

- (1) The import meet international responsible sourcing standards, set by the OECD;
- (2) Global and EU smelters and refiners of 3TG source responsibly;
- (3) The link between conflict and the illegal exploitation of minerals is broken; and
- (4) An end is put to the exploitation and abuse of local communities, including mine workers, and support local development.

Generally however, despite all these initiatives at the EU – in light of developments at other intergovernmental dialogues on CSR, particularly considering the level of progress already achieved within the CSR framework of the 2011 UNGPs,⁹¹ together with the Guidelines for Multinational Enterprises by the Organisation for Economic Cooperation and Development (OECD Guidelines)⁹² – there is definitely room for

⁹⁰ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN> (accessed 5 Nov. 2019).

⁹¹ *Supra* n. 43.

⁹² Organization for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011); OECD, Declaration on International Investment and Multinational Enterprises (1979), Cmnd. 6525 cited in Hadden (1977), *supra* n. 11, at 511. The OECD Guidelines is an overarching cooperative agreement amongst adhering states and sets out principles of globally acceptable behaviour for transnational business actors in the social and environmental sphere (such as abstaining from any improper local politics, or bribery and corruption) with a view to facilitating transnational business. Under the Guidelines, MNEs should fully take into account established policies in the countries in which they operate, and consider the views of other stakeholders, and in this regard, should strive for sustainable development, encourage employment creation in the local community where they operate, uphold good governance principles, engage in stakeholder management and develop self-regulatory policies to foster

further improvement on the EU CSR policy framework. For instance, where a Member State finds an EU importer has not complied with the EU Conflict Minerals Regulation, what happens? It is said to order such firm to address the problem within a given deadline and follow up to make sure it does so. How exactly this may be enforced to the letter remains unclear. Further, reviewing the SIAs together with human rights impact assessments⁹³ (HRIAs) of trade activities – which are structured evaluations designed to ensure that states' trade policies (pending and ongoing trade agreements) obey their pre-existing human rights obligations and consider social and environmental – and despite commissioning a few SIAs and the general commitment of Member States to human rights protection,⁹⁴ the EU is reported to not have performed as well as envisioned,⁹⁵ and may still be considered a distance from the pole of excellence to which it aspires. Besides, the EU hardly foresees significant changes to (draft) agreements based on the results of impact assessments and instead, if possible harms are identified, the EU handbook largely recommends responding with the so-called flanking measures, or 'mitigation and enhancement measures', such as aid for trade or provision of technical assistance.⁹⁶ The European Commission also acknowledged the UNGPs as 'the authoritative policy framework for addressing corporate social responsibility'⁹⁷ and the EU is playing a leading role in the promotion of the UNGPs internationally, by integrating the importance of responsible supply chain management into its own policy framework.⁹⁸

good relations with stakeholders and ensure they, their supply chain, contractors and sub-contractors comply with the Guidelines.

⁹³ As required for instance, under the United Nations, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements. Report of the Special Rapporteur on the Right to Food*, Olivier de Schutter (19 Dec. 2011) A/HRC/19/59/Add.5. http://www.srfood.org/images/stories/pdf/officialreports/20120306_hria_en.pdf (accessed 5 Nov. 2019); see also Principles 13 and 14 of the UNGPs.

⁹⁴ Bonanomi (2017), *supra* n. 89, at 484; also see Arts 2, 3, 6 and 21 of the 2012 Consolidated Version of the Treaty on European Union. 26 Oct. 2012. Official Journal of the European Union, C326/1.

⁹⁵ B. Bonanomi & A. Lannen, *Shaping EU Trade Agreements to Support Human Rights* (CDE Policy Brief, No. 6. Bern, Switzerland, 2015), footnote 5 and surrounding texts.

⁹⁶ *Ibid.* Cf. in contrast see the SIAs of the EU–African Caribbean Pacific (ACP) Economic Partnership Agreements (EPAs), which proposed amendments to the drafted agreements, suggesting the classification of some agricultural products as sensitive and adjusting the rules of origin (SIAs of the EU–ACP EPAs 2007: 3d and 4th recommendation) cited in Bonanomi, *supra* n. 89, at 487.

⁹⁷ European Commission, *Working Document on Implementing the UN Guiding Principles on Business and Human Rights: State of Play* (2015) cited in GRI and CSR Europe, *supra* n. 85 at 32.

⁹⁸ The EU regime may further be criticized as only playing catch up as opposed to being a front-runner or a global pole of excellence for CSR contrary to the assertions of the European Parliament notwithstanding the 2014 directive which has largely provided a common CSR framework within Europe for business to remain globally competitive.

4.1 CSR AND THE WTO AGREEMENTS

It should be clarified from the onset that the WTO has no explicit mandate to promote global CSR. Basically, the WTO is committed to the promotion of free trade through the obligation not to treat foreign products less favourable than ‘like products’ of national origin (National Treatment),⁹⁹ or less favourable than ‘like products’ originating from other countries (Most Favoured Nation Treatment),¹⁰⁰ and prohibition of unnecessary restrictions to trade¹⁰¹ and finally, the requirement to base product regulation, labels and standards on international standards.¹⁰²

Notwithstanding the foregoing, and in order to understand in what context CSR issues may be conceptualized in the WTO, it is important to understand the meanings of ‘Technical Regulation’ and ‘Standard’ within the WTO legal framework. *Technical Regulation* means a:

document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.¹⁰³

A *Standard* on the other hand is a:

document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.¹⁰⁴

As a result of CSR regulatory implications on internationally traded products, their market access and competitive opportunities, some scholars are of the view that CSR is in conflict with WTO agreements and laws.¹⁰⁵ This means that certain technical regulations and requirements, or standards imposed by certain states in global trade (towards ensuring globally traded goods and services throughout a value chain system, have been responsibly produced or provided without violation of CSR and its values) are considered an undue restriction to freely trade in such goods and

⁹⁹ Art. III of the General Agreement on Tariffs and Trade (GATT), 30 Oct. 1947, United Nations, Treaty Series, vol. 55.

¹⁰⁰ *Ibid.*, at Art. I.

¹⁰¹ *Ibid.*, at Art. XI.

¹⁰² Art. 2.4 and Art. 2.5 of the Agreement on Technical Barriers to Trade (TBT). The TBT framework is said to constitute an avenue to achieving international harmonization of technical regulations including marking and labelling standards through the recognition of international standards. *See also* Art. XX, GATT.

¹⁰³ Annex 1 1, TBT.

¹⁰⁴ Annex I 2, TBT.

¹⁰⁵ In the sense of, particularly, Art. XI GATT, which prohibits unnecessary restrictions to trade.

services. Accordingly, research has shown that many developing countries in Africa, and other parts of the world, contend that CSR considerations (standards and labelling requirements or labour standards of many developed economies) amount to discrimination of their goods or services which may not have been so produced or provided with due attention to CSR, and therefore insist that any rejection of such goods and services on the basis of CSR standards is a disguised protectionist practice.¹⁰⁶

According to Carola Glinski, the heart of the debate about whether CSR standards or values are WTO-laws compatible or not appears underpinned by the question: is the WTO designed for negative rights of states not to be discriminated against by differentiating products on the basis of national origin or is the framework designed for general positive rights of states to market access which can only be denied for certain codified or accepted reasons?¹⁰⁷

Despite the contrary viewpoint highlighted above, having underscored the meaning and values of CSR in section 2 of this article, this article submits that CSR could actually constitute the basis for international standards on which national regulations can be based. In other words, states could leverage the internationally accepted standards of CSR (for instance, in relation to the SDGs) as a basis of regional integration of states with commonly acceptable CSR technical regulations and legal standards¹⁰⁸ and ensuring such national regulations meet international standards as permissible, under Articles 2.4 and 2.5 of the Agreement on Technical Barriers to Trade (TBT). It is also important to reiterate the argument that CSR and adoption of CSR values constitute an avenue to embed responsible behaviour in corporations driving globalization within the WTO Member States and failure to recognize CSR in this light may jeopardize the legitimacy of the WTO itself.¹⁰⁹

Further, it is useful to discuss CSR within the context of Article XX of GATT which protects the policy space for legitimate regulatory measures under the WTO

¹⁰⁶ See generally, C. Glinski, *CSR and the Law of the WTO – The Impact of Tuna Dolphin II and EC–Seal Products*, 1 Nordic J. Com. L. 121, at 125 (2017); see also M. Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, 38 J. World Trade 69, at 72 (2004), who refers, among others, to a study of the WTO Committee on Trade and Environment on discriminatory effects of environmental labelling; also see C. Vidal-Léon, *Corporate Social Responsibility, Human Rights and the World Trade Organisation*, 16 J. Int'l Econ. L. 893, at 899 et seq. (2013), who refers to several studies on the effects of CSR codes of conduct on international trade. M. Du, *Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organisation*, 50 J. World Trade 675, at 694 et seq. (2016).

¹⁰⁷ Glinski, *supra* n. 106, at 126 citing R. Howse & D. Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 Eur. J. Int'l L. 249, at 269 et seq. (2000); see also S. Charnovitz, *The Law of Environmental ‘PPMs’ in the WTO: Debunking the Myth of Illegality*, 27 Yale J. Int'l L. 59 (2002).

¹⁰⁸ J. Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in *Taming Globalization: Frontiers of Governance* 93 (D. Held & M. Koenig-Archibugi eds, Cambridge University Press 2003).

¹⁰⁹ S. Bernstein & E. Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. Int'l Econ. L. 575 (2008).

legal framework. With it, Article III: 4 may not be considered violated in relation to national treatment of foreign goods less favourably than like products of national origin, if justifiable under Article XX as a measure necessary to pursue legitimate policy objectives¹¹⁰ such as (a) protecting public morals, (b) protecting human, animal or plant life or health, and (g) conserving exhaustive natural resources.¹¹¹ It is particularly useful to reproduce the plain language used in the Appellate Body report in *US – Shrimp* case as follows:

In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that protection and preservation of the environment is of no significance to the Members of the WTO. Clearly it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment.¹¹²

This section had aimed at showing that the principles and values of CSR together with meeting SDGs are not anti-free trade *per se* (even though they may provide justification for WTO Members to discriminate between CSR-compliant goods or not) and may not necessarily constitute disguised discriminatory or protectionist measures to restrict free trade, if all sides to the trade in goods and services trade demonstrate genuine commitments to CSR. The above quotation and arguments canvassed and conclusions reached by the panels and Appellate Body reports in the disputes of the US-Gasoline case of 1996 (*United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2; the EC-Seal Products case of 2014 (*EC – Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R); and the EC-Sardines case of 2002 (*European Communities – Trade Description of Sardines*, WT/DS231/AB/R), amongst others all have shown the nexus between CSR and trade facilitation discourse and the usefulness (though subject of abuse when arbitrarily or unilaterally enforced by large economies in dealing with developing countries) of CSR standards in economic globalization discourse. The Appellate Body quotation similarly confirms that there is nothing intrinsically incompatible between CSR standards as may

¹¹⁰ Especially where not used as a disguised restriction on international trade in an arbitrary and unjustifiable discriminatory manner. See *US-Shrimp-Turtle* case (*United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 1998) at para. 185 and 186.

¹¹¹ Gliniski, *supra* n. 106 at footnotes 53–55 and accompanying texts. See also *US-Gasoline* case (*United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2, 1996); *US-Shrimp-Turtle* (1998), *supra* n. 110; the *EC-Seal Products* case (*EC-Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R, 2014); and *EC-Sardines* case (*European Communities-Trade Description of Sardines*, WT/DS231/AB/R, 2002), amongst others.

¹¹² *US-Shrimp-Turtle* (1998), *supra* n. 110, paras 185 and 186.

genuinely designed and be properly applied within the policy space of WTO Member States toward safeguarding social values.

From the above analysis, and regardless of any criticism levied against the EU about the adequacies or otherwise of its CSR policy framework, it is clear that the EU has evolved from being a customs union with limited labour mobility rights through exhortative modes of policy development to providing useful policy directives and framework on CSR amongst other regional social policies.¹¹³ Therefore, instead of policy makers paying half-hearted attention to the principles of CSR and sustainable development in the course of regional integration in Africa, (especially within the AfCFTA regime), there is the need to realize the potentials of using corporate responsibility for trade facilitation and, at the same time, ensuring responsible corporate behaviours underpin such facilitated trade and enhance the overall sustainable development strategy on the continent. This approach will ensure that Africa is not left behind in the attainment of the SDGs, as the full objectives of the AfCFTA are being realized. In concluding this part, it is important for policy makers and African leaders now to see CSR, just as the Canadian Government, as a concept that will make businesses in Africa more innovative, productive, and competitive.¹¹⁴ But yet, why and how should CSR be mainstreamed into the AfCFTA, or in what manner should the policy makers proceed in designing a CSR policy direction which is suitable for the African milieu?

5 MAINSTREAMING CSR INTO AfCFTA

The starting point appears to be that there is a need for understanding of the benefits behind a CSR policy framework in the free trade area of Africa. No doubt, a few lessons can be learnt from recorded successes at the EU level. Africa must realize that, as one of the realities of economic globalization, it is not too far from the truth that 'no one is in charge.'¹¹⁵ It is unlikely that other continents will integrate to fix Africa's problems for Africa when they have their own challenges to deal with. Who, how and what will constitute the countervailing powers in Africa to the powerful corporations and businesses driving globalization if not CSR or using the instrumentality of CSR? Even if lessons will be learnt from other continents, Africa needs to make efforts and design a suitable framework to fix its system.¹¹⁶

¹¹³ Yeates, *supra* n. 14, at 2 & 3.

¹¹⁴ Please see <http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/home> (accessed 5 Nov. 2019); see also the statement credited to the former Australian's Minister for Superannuation and Corporate Law (Senator Nick Sherry) in Horrigan, *supra* n. 26, at 13.

¹¹⁵ Thomas Friedman, *The Lexus and the Olive Tree* 112 (1999) cited by Backer, *supra* n. 10, at 506.

¹¹⁶ In this regard, Morten Boas et al., noted: 'One thing, which at least seems to be obvious, is that actors in the South should think very carefully about the fruitfulness of following the blueprint of the European Union or other regional schemes from the North. If regional organization is to play a real role in the

One mistake Africa must not make, however, is indicating any signs of antipathy towards implementing CSR or considering its core values as being ‘western’ ideas targeted at further impoverishing Africa.¹¹⁷ The fact that there is mention of the SDGs within the present framework of the AfCFTA shows some comfort that there is no such antagonism. Therefore, the economic pressures of trade liberalization in Africa must be properly managed as the usual fear¹¹⁸ of losing out on free trade and foreign investments for incorporating otherwise-thought alien ideas should be jettisoned.¹¹⁹

Therefore, there is a need for African leaders and policy makers in Africa to break away from any antipathic notion of it being a western concept or the concern that CSR principles constitute trade barriers. In this regard, African countries should consolidate on the incorporation of the CSR values in already signed investment agreements between Brazil and Angola, Malawi, Ethiopia and recently with Morocco as earlier shown. Further, while efforts at integration in many developing economies, especially in Africa, have not been yielding expected results,¹²⁰ it is perhaps signal that Africa did things a little differently. Africa cannot afford to play the ostrich any longer as the dangers of corporate-driven globalization of trade are real and must be tackled head-on.

5.1 INTERNATIONAL *V.* DOMESTIC ADOPTION OF CSR POLICIES

A debate might ensue about the implementation of CSR policies at national domestic levels of individual respective states in Africa or whether answers should be sought at international law or intergovernmental level. One important factor to consider in contributing to the debate will be the cross-border nature of social, environmental and economic challenges arising from economic globalization and interdependence. This will suggest that collective actions on regional, bi-regional and cross-regional scale are warranted to

economies of the South it has to be embedded into the real life context of these economies’ (Morten Boås, Marianne H. Marchand & Timothy M. Shaw, *The Weave-World: Regionalism in the South in the New Millennium*, 20(5) *Third World Quarterly* 1061, 1025 (1999)).

¹¹⁷ Idemudia, *supra* n. 7, at 422.

¹¹⁸ J. Zerk, *Extraterritorial Jurisdiction: Lessons for Business and Human Rights Sphere from Six Regulatory Areas* 88 (Corporate Social Responsibility Initiative Working Paper No. 59 Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010) citing A. Giles, *SOX: What does It Mean for UK Companies?* quoting the Chairman of UK telecommunications firm BT.

¹¹⁹ H. Steiner, P. Alston & R. Goodman, *International Human Rights Law in Context: Law Politics Morals* 1388 (3d ed., Oxford University Press 2007).

¹²⁰ In fact, to some commentators, economic globalization has created a situation whereby Africa and developing countries might be paying for the successes of corporations domiciled in developed countries. L. Enneking, *Foreign Direct Liability and Beyond* 22 & 23 (Eleven International Publishing 2012); see also J. Dine, *Companies, International Trade and Human Rights* 3 & 44 (Cambridge University Press 2005).

tackle such challenges.¹²¹ The reality is that domestic laws cannot effectively address cross border issues arising from economic integration no matter how widely applied, even where such laws have extraterritorial enforcement.¹²² One can only imagine at the time of the Ebola crisis in Africa, could the efforts of one country have tackled such a challenge? One should also imagine if there had been in place a common African policy framework and guidelines for a national response to such crises; no doubt, in managing the crisis, such policy guideline would not only directly tackle the problem of Ebola wherever the case might be reported in any part of Africa, but would also go a long way in curbing its spread across the continent. On the basis of this, regional integration and international cooperative initiatives therefore seem to be the way to go, at least in the present circumstance. Moreover, notwithstanding the challenge¹²³ at the international law realm, to achieve a global consensus and thus legally binding CSR regulatory and enforcement regime – owing to a number of issues¹²⁴ such as national interests' considerations, the sovereign equality of states doctrine¹²⁵ and the fear of over-regulation¹²⁶ – Jennifer Zerk explained that international collaborative initiatives still support new regulatory opportunities that have great potential to improve the welfare of people and communities affected by multinational activities, particularly in less developed countries.¹²⁷

¹²¹ See generally, Yeates, *supra* n. 14.

¹²² For instance, the US Alien Tort Claims Act (ATCA), codified at 28 USC § 1350 which is otherwise thought to be effective across borders in extraterritorial application has been seriously undermined in recent times. In *Bowoto v. Chevron* [F. Supp. 2d 1229 (N.D. Cal. 2004)] for instance which began in 1999, the US court applied the doctrine of *forum non conveniens* and declined jurisdiction under the ATCA having found that there existed a better and more adequate forum to determine the case outside the jurisdiction of the United States of America. See also the recent judgment of The Supreme Court of the United Kingdom in *Vedanta Resources Plc and another v. Lungowe and others* [2019] UKSC 20 <http://supremecourt.uk/decided-cases/index.html> (accessed 5 Nov. 2019).

¹²³ For instance, earlier CSR regulatory attempts by the United Nations with the aim of producing an international legally binding treaty through the instrumentality of the Draft Code of the UN Commission on Transactional Corporations and the UN Sub-Commission on the Protection and Promotion of Human Rights' Norms both resulted in a failure to agree on a unified approach to CSR standards and ultimately the two projects collapsed, although for different reasons. The Draft code was said to have collapsed for political reasons as developing countries played the card of their fledging sovereignty while the UN Sub-Commission Norms were said to have proposed a regulatory regime contrary to international law. For better details, see MacLeod, *supra* n. 9, Ch. 3.

¹²⁴ Because of the interplay of these issues, some of the earlier regulatory attempts at the international law level were reportedly turned into 'a forum for a shouting match'. See S. J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 4(10) Am. U. J. Int'l L. & POL'Y 1275, at 1276 (1995).

¹²⁵ Charter of the United Nations, Art. 2(1).

¹²⁶ Zerk, *supra* n. 118, at 67 and 68.

¹²⁷ J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* 2 (Cambridge University Press 2006).

Even while an immediately enforceable harmonized CSR policy and regulatory framework cannot be entrenched across Africa at this stage, there are nonetheless reasons why Africa should pay requisite attention to CSR at the intergovernmental level towards achieving same in the long run. Before such reasons are highlighted, it is useful to note that while this article is not suggesting that all of Africa's economic and development problems will be solved by mainstreaming some shared CSR and SD values in the AfCFTA framework, however, any CSR and sustainable development strategy of the African integration initiative should certainly not be counter-productive to achieving the SDGs. Therefore, towards ensuring that AfCFTA is actually part of the solution and does not contribute to Africa's economic woes, a Protocol on Rules and Procedures towards an Overall Sustainable Development Strategy is proposed. Using the window available in Article 8 (3)¹²⁸ of the AfCFTA agreement, this article proposes the negotiation and signing of such protocol on the implementation of a harmonized CSR framework, not promoted as corporate charity or ad hoc community development projects expected from the multinational enterprises operating in African states, but as a regulatory concept to be embedded by Member States within their respective business communities and, with which businesses can be accountable and responsible for, or better manage the risks associated with the economic, social, and environmental impacts of their operations. With the protocol, discussions around, for instance, addressing CSR greenwash, double standards operations, finalizing SIAs, and maintaining value chain supply discipline for multinational enterprises operating in Africa can be had such as with the earlier discussed EU conflict minerals' regulation. This CSR strategy aligns with CSR international regulatory initiatives and dialogues such as the UNGC, the UNGPs, the OECD Guidelines, and will promote the attainment of the SDGs in Africa. The drafting of the protocol will entail the constitution of a drafting committee¹²⁹ by the AfCFTA secretariat who will undertake a proper legal

¹²⁸ Art. 8 (3) of AfCFTA opens the opportunity for a protocol on CSR implementation. Such protocol fits within and aligns with the stated (though in passing) objectives of the AfCFTA for overall sustainable development.

¹²⁹ The framework may proceed from the relatively simple matters such as proper CSR conception in Africa and showing its key values with which corporations driven by and driving regional trade and integration in Africa are expected to imbibe in their operations wholly. It may thereafter move into more complex issues of addressing shared CSR regulatory and enforcement mechanisms through effective legal harmonization and integration. The protocol must however in the minimum work on a development strategy which though incorporates relevant lessons from the global North, but adopts proper comparative analysis and legal transplantation, making such development agenda not only fit for Africa but also aligns with international standards. Areas of Member States' laws that constitute obstacles to economic integration will be thoroughly investigated, and relevant proposals made for legal harmonization. The need for harmonization of laws was long adumbrated in the study that led to the establishment of the United Nations Commission on International Trade Law (UNCITRAL) which referred to difficulties faced by parties engaging in international commercial transactions as a result of the multiplicity of and divergences in national laws. See Report of the UN Secretary General on International Trade Law, I UNCITRAL yearbook (1968–1970) 18, 19 et seq.; see also the

harmonization of the CSR and sustainability framework within the Member States through effective legal integration exercise. Legal harmonization will address the different Member States' current CSR regulatory strategies within their respective municipal laws, if any, or even as differently approached while negotiating investment treaties or finalizing private contracts with multinational enterprises operating in Africa.¹³⁰ Such diversity of laws or plurality in legal approaches must be embraced but again, with proper integration undertaken towards the harmonization as opposed to unification of the relevant respective laws. The protocol would provide an implementation framework which will serve as a model template for Member States, providing necessary guides and directives for CSR implementation within their domestic jurisdictions. It will therefore provide a platform for regular release of soft law¹³¹ guiding directives for implementation to fit local legislations within respective Member States. This will foster a comprehensive harmonized approach to be articulated at a regional level which Member States can also draw upon in whole or in part, even in negotiating investment treaties with other countries outside Africa or private contracts with multinational enterprises. By way of further clarification on legal transposition at national domestic level, target dates will be set at the regional level for Member States to implement any CSR and SD directives made pursuant to an agreed upon protocol to enable incorporation of such CSR and SD requirements within the domestic laws of Member States, where they are not already there. Once incorporated within the municipal laws of Member States, they may therefore be enforced through domestic courts. For the avoidance of doubt, the proposed protocol cannot be, nor does it have to be, one overarching document

¹³⁰ 'Progressive development of the law of international trade: Report of the Secretary-General' Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item, docs.A/6396, Add.1. While the CSR legislative and regulatory framework in Nigeria for instance focuses on promoting transparency and environmental accountability within the extractive industry, and occasioned the passage of laws such as: the 2007 Nigerian Minerals and Mining Act; the 2007 Nigeria Extractive Industries Transparency Initiative (NEITI) Act; the proposed 2018 Petroleum Host and Impacted Communities Development Trust Bill, the corporate citizenship framework and strategy in South Africa is slightly differently focused. As a result of the imbalances in the South Africa society occasioned by the apartheid policy of the government of the Republic of South Africa pre-1995, its CSR framework is geared towards social and economic transformation of the majority black population, and occasioning enactments such as: the 1998 Employment Equity Act No. 55; the Skills Development Act No. 97 of 1998; the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000; the Broad-Based Black Economic Empowerment Act No. 53 of 2003; among others. See other implementation strategies as given with the example of the 2018 investment treaty between Ethiopia and Brazil with robust CSR implementation clauses.

¹³¹ In terms of policy making and regulation, there is very high potential for CSR principles expressed initially in terms of voluntary non-binding soft law to harden into hard law, to which mandatory enforcement may be warranted. For detailed description of soft laws, see generally, Amodu, *supra* n. 23, at 5; also generally, T. McInemey, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 Cornell Int'l L. J. 171 (2007); and F. C. Olah, *MNC Liability for International Human Rights Violations Under the Alien Tort Claims Act: A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding & Abetting Liability Under the Act*, 25 Q. L. R. 751 (2007).

addressing all aspects of CSR or settling all matters bordering on sustainable development once and for all. CSR is constantly evolving, so will there be need for regular releases of directives made pursuant to the agreed upon protocol towards adjusting to changes. Further to the assertions of Jennifer Zerk above, it is anticipated that issuing policy guidelines and directives in piecemeal will ensure there is sufficient time and resources to obtain the buy-in of key stakeholders before thereafter moving towards more complex issues over time.

Now, a few reasons why the above mainstreaming proposal is important in the regionalism discourse in Africa:

- (1) Mainstreaming CSR and sustainable development into the AfCFTA discourse will clarify and sustain a CSR policy direction within the AfCFTA agreement, and ensure that the single market trade liberalization objective within Africa is appreciated as a means towards achieving overall social responsible economic growth and sustainable development across Africa.
- (2) Just like the impact of the CSR provisions in the EU free trade agreements, properly mainstreaming CSR into the AfCFTA discourse would be very useful in checking certain claims brought by investors against African states before an investment tribunal. The logic is that the tribunal will consider the CSR obligations of such investor in the trade agreements as inspired by the shared CSR regulatory model made pursuant to the AfCFTA framework, and where such investor has violated such CSR provisions, the investor would not enjoy the investment protection obligations on the African state or, at least, such investor's rights would be somewhat reduced (probably by reducing the damages available to it as a remedy).¹³²
- (3) A regional level framework will help to create greater awareness in the area about the values of CSR and economic globalization discourse. Research has shown that many developing countries especially from Africa, still restrictively conceive CSR as simply corporate charity and community development projects.¹³³ A harmonized CSR policy

¹³² E. van der Zee, *Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?*, 40 *Legal Issues of Econ. Integration* 33, 59 (2013); A. Bonfanti, *Applying Corporate Social Responsibility to Foreign Investments: Failures and Prospects*, in *Foreign Investment, International Law and Common Concern* 246 (T. Treves et al. eds, Routledge 2014); Laurence Dubin, *Corporate Social Responsibility Clauses in Investment Treaties* (IISD Investment Treaty News 2018), <https://www.iisd.org/itn/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/> (accessed 5 Nov. 2019).

¹³³ Cheruiyot & Onsando, *supra* n. 22, at 424 and 425; Raynard & Forstater, *supra* n. 17 citing Centre for Social Markets, *First World Report on Corporate Social Responsibility (CSR)*: Internet consultation of Stakeholders 2001; J. Mukthar & S. Pavithran, *Corporate Social Responsibility in Birla Group of*

framework at the level of the AU mainstreamed into AfCFTA will definitely drive awareness of the core values of the concept within the region.

- (4) An AfCFTA framework without a robust CSR policy properly implemented across the African region will likely aggravate the challenges of jurisdictional arbitrage and forum shopping whereby companies will move around different countries in Africa scouting for favourable jurisdictions and states with weak CSR regulatory framework to invest.¹³⁴
- (5) Those challenges which CSR and the values of sustainable development are supposed to address are usually cross-border in nature. In such instances, narrowly implemented and disjointed individual domestic law approaches to them may not be very effective.
- (6) Mainstreaming CSR discourse in the AfCFTA will definitely galvanize support¹³⁵ for regionally defined CSR values and standards and therefore foster ownership of these standards by other actors in the region. The drafting committee to be constituted should be composed of Africans, from Africa but with requisite comparative law skills towards a proper legal harmonization and integration. This will equally foster pooling of resources (regionally) and improve social protection policies across the region.
- (7) Adopting the proposed Protocol on Rules and Procedures towards an Overall Sustainable Development Strategy will ensure the AfCFTA goes beyond just mentioning of the SDGs and actually legislating policies

Companies (conference proceedings, ISSN 2048–0806, 12th International Conference on Corporate Social Responsibility, Niteroi and Rio de Janeiro, Brazil, June 2013); see also K. A. Ollong, *Corporate Social Responsibility and Community Development in Cameroon* (conference proceedings, ISSN 2048–0806, 12th International Conference on Corporate Social Responsibility, Niteroi and Rio de Janeiro, Brazil, June 2013). There are many newspaper columns such as these contained below where companies in Nigeria, for instance, pride themselves as ‘good corporate citizens’ and displaying their CSR conception and practices but as confined to corporate donations and at its best, community development projects: ‘Cosgrove Gets NITP, COREN Commendation for CSR,’ *Thisday*, 2 Apr. 2019; R. Akingbolu, *CSR as a Launchpad for Development* (*Thisday*, 25 Oct. 2018); FSDH Merchant Bank Limited, *Corporate Social Responsibility (CSR) Activities in 2015*, *The Guardian* (19 Jan. 2016); K. Agary, *Is CSR Worth the Trouble for Companies?*, (1) *Punch* (26 July 2015); Cf: The 2018 Nigerian Code of Corporate Governance, issued by the Financial Reporting Council of Nigeria, effective Jan., 2019 and replacing the National Code of Corporate Governance 2016; and N. Oyewole & O. Azeez, *Business School Netherlands (BSN) Nigeria Introduces, 3 CSR Initiatives* (23 Dec. 2015), *Daily Trust* demonstrating a good grasp of the CSR concept beyond mere tokenism. Also, South Africa is one of the developing economies where this conceptual problem appears not to exist. CSR and sustainability issues are discussed at an advanced level, devoid of the restrictive corporate charity conception. See Institute of Directors in Southern Africa, *King IV Report on Governance for South Africa 2016*, replacing the *King III Report on Corporate Governance for South Africa 2009* and W. Visser, *Corporate Citizenship: Is South Africa World Class?*, *The Corporate Citizen* 1–6 (2005).

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Fauchald & Stigen, *supra* n. 12, at 1028 & 1057.
Zerk, *supra* n. 118, at 70 & 71.

toward achieving the core CSR values and the SDGs and through these collaborative efforts, no single African nation will truly be left behind in attaining the goals as the continent liberalizes in trade. AfCFTA may draw lessons from existing efforts in the AU towards mainstreaming the SDGs in other sectors and programmes.

- (8) It is rather obvious that because of the huge economic potentials in Africa and population size, AfCFTA, as the world's largest free trade area will always attract further trade liberalization discussions and arrangements with the rest of the world. The question then is, will Africa join the global economy to develop internationally accepted CSR standards and thereby facilitate its own trade in goods and services from Africa or would it rather continue the antipathy to CSR standards as undue or disguised protectionist practices of the developed economies?

A CSR framework in the regional integration discussion will equally have significant implications on market access argument for goods originating from Africa. The protocol together with any guiding directives released pursuant thereto will provide common basis for African national legislations to prescribe internationally acceptable technical regulations and standards within the ambits of Article XX of the GATT and Articles 2.4 and 2.5 of the TBT.

The role of relevant development agencies such as the African Union Development Agency (AUDA) (formerly the New Partnership for Africa's Development Agency, NEPAD) as they work towards building 'an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena' cannot be overemphasized.¹³⁶ The AU is very suited to channel relevant resources towards the implementation of the recommendations in this article. Relevant conversations must therefore start and/or if already started, consolidated towards properly mainstreaming CSR and the SDGs in the AfCFTA framework as proposed in this article.

6 CONCLUSION

This article has examined economic globalization and corporate-driven (and driving) trade liberalization discourse from the prism of CSR and sustainable development. It interrogated the concept of CSR and found that achieving the integrated and indivisible targets of the SDGs constitutes one of the core values of CSR. The article appraised the AfCFTA and decried the seeming focus on trade liberalization and economic industrialization with little attention paid to CSR and overall sustainable development strategy in the trade agreement framework within Africa. Towards disabusing minds about CSR principles constituting trade barriers, the article

¹³⁶ See <https://www.nepad.org/who-we-are/about-us> (accessed 5 Nov. 2019).

examined CSR integration approaches within the European Union (EU) together with CSR measures within the legal framework of the WTO, finding that there is nothing intrinsically incompatible between CSR values and sustainable development on the one hand, and the WTO laws and trade principles on the other. Drawing important lessons from CSR adoption at the most successful regional integration arrangement in the world, the EU, the article sets an agenda for systemic mainstreaming of CSR into the largest, cross-regional free trade arrangement in the world, AfCFTA. This article does not intend in any way to discredit (and has not done so) the commendable efforts which have gone into the AfCFTA so far. This article is intended to show that there is room to do more. As a precaution, Africa need not undertake a wholesale adoption of the EU CSR approach. That would simply be a bad legal transplantation process. CSR principles have never been about one size fits all. While the EU framework will serve as an encouragement for other regional integrations, Africa needs to properly transplant the useful principles within the EU framework to fit the socio-legal, economic and environmental milieu of Africa. Finally, by the contributions in this article, Africa should now abandon any debates about the usefulness or otherwise of CSR to trade liberation in Africa or Africa's target to develop sustainably. While this article has not suggested CSR has all the answers to all developmental challenges or solutions to all corporate-related human rights abuses in Africa, the author nonetheless has no doubt in his mind that the 'Africa we want' – where domestic businesses behave responsibly, where multinational enterprises find double standard operations in Africa (as compared to practices in developed societies) no longer efficient, and where the global competitiveness of businesses, goods and services from Africa is greatly enhanced – is not going to happen magically or overnight. It will take conscious action such as deliberate efforts to properly mainstream CSR discourse in Africa's economic integration plans. The process for the recommended harmonized CSR agenda and policy framework in Africa must begin now so no one will really be left behind in the attainment of the universally accepted SDGs.