

Trade Policy for Resilient, Inclusive, and Sustainable Development in a New International Economic Order

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The global economic order, which has been characterized by multilateral action since 1947, is facing increasing challenges, due both to changing global trade dynamics and the COVID-19 pandemic. In spite of this turbulent time for trade, the world is more connected than ever before, and the pandemic has highlighted the importance of rethinking the structure and substance of international trade law to build resilience and sustainability within and among economies. While a number of critical issues remain on the table – namely dispute settlement reform, improved trade facilitation, strengthened supply chains, investment rules, subsidies disciplines, digital services, trade and environment, labor rights, and gender – many of these are taking on new dimensions in the context of the pandemic. In addition, the current global health crisis is underscoring the need for greener, decarbonized, and more circular economies, along with renewed focus on health and intellectual property (IP) regulation, food security, and better tailored trade policies to address poverty and inequality. In light of these shifting dynamics in the international trade regime, this article highlights the need for an improved model for trade rules and agreements in line with the Sustainable Development Goals (SDGs).

1. Current Challenges: The Need for a New Trade Regime

Changes in the international economic order, along with the COVID-19 pandemic, have brought to the forefront several divergent trends in global trade that will continue to play out over the course of 2020 and beyond. On one hand, many countries are looking inward, and trade-restrictive measures imposed by G-20 governments have reached historically high levels,² a trend that has

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² United Nations Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development 2019*, available at: <https://developmentfinance.un.org/fsdr2019>.

only become more prevalent with the pandemic.³ At the same time, the multilateral trade system is facing serious headwinds, since the negotiation and adjudication functions of the World Trade Organization (WTO) have been impaired by the U.S. Administration's decision to block new Appellate Body judges and could be further impacted with the early change in WTO leadership as its Director General steps down one year ahead of schedule. These changes come at a time when multilateral rules and disciplines are especially needed as countries grapple with the economic, health, and social consequences of the global pandemic.

In spite of challenges at the multilateral level, some promising regional approaches have emerged, including the African Continental Free Trade Area (AfCFTA), which presents a promising new model, in part because it is intentionally development-oriented and includes explicit reference to the SDGs in its objectives.⁴ Once negotiations of all substantive areas are concluded and the agreement is implemented, the AfCFTA will create the largest free trade area in terms of Partner States and has the potential to connect more than 1.2 billion people in a market expected to exceed U.S. \$4 trillion.⁵ While the pandemic has also upset the timeline for the AfCFTA, it has underscored the importance of making progress in specific areas like trade facilitation to help mitigate supply chain disruptions and also highlights the need to push forward with implementation of the AfCFTA in order to build long-term resilience within Africa's markets.⁶

Whether viewed with optimism or skepticism, global trade has become a critical focus of leaders and communities around the world, shining a light on the need for a more predictable, inclusive, and resilient system. While a number of issues can and should be addressed regionally, others will require a multilateral approach. In particular, response to health pandemics, climate change, migration, ocean and biodiversity protection, and inequality will require global cooperation and action.

The current pandemic, coupled with divergent trends in the global economic order, provides a rare opportunity to rethink the role of trade and the way our international trade treaties are designed and implemented. As experts and world leaders respond to the impact of the pandemic on trade and access to essential goods, appeals are mounting to assess trade in a broader context and strengthen resilience of supply chains and the links between trade and development, as called for by the 2030 Agenda for Sustainable Development and United Nations SDGs, and as recently

³ WTO, *WTO Members' Notification on COVID-19*, as of 29 June 2020, available at:

https://www.wto.org/english/tratop_e/covid19_e/notifications_e.htm

⁴ Katrin Kuhlmann and Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Legal Model for Trade and Development*, 51 *Geo. J. Int'l L.* 4 (forthcoming, 2020).

⁵ Landry Signé, *Africa's Big New Free Trade Agreement, Explained*, *The Washington Post*, March 29, 2018, available at: https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/?utm_term=.7ef4d48b47cc.

⁶ Erastus Mwencha and Frank Mutsaers, *Coronavirus, the Pandemic doesn't mean AfCFTA is on Lockdown*, 9 June 2020, available at: <https://www.theafricareport.com/29557/coronavirus-the-pandemic-doesnt-mean-afcfta-is-on-lockdown/>

reiterated by the WTO.⁷ The structure and substance of trade rules must thus be realigned towards sustainable development, inclusivity, and resilience in order to respond to rising inequalities, climate change, and frustrations with trade's unequal impact on development, which will only be exacerbated post-pandemic. We contend that the SDGs uniquely bridge concerns on both sides of the trade divide and offer a framework and roadmap to reassess trade and development.

We propose a new approach to trade focused on the SDGs and built along three pillars: (1) first, the content of trade agreements will need to be better aligned with economic and social development priorities and commitments, such as the SDGs, the Paris Agreement, and the Sendai Framework on disaster risk reduction; (2) second, the trade rulemaking process needs to be made more transparent and participatory, and greater emphasis needs to be placed on how trade rules are implemented to achieve positive impact in practice; and (3) third, given that different countries will continue to face different challenges following the pandemic, trade policy should be differentiated and tailored to address specific needs, given that not every country is at the same stage of development.⁸

2. Alignment of Trade Agreements with Economic and Social Development Priorities

Without question, we are at a crossroads in trade policy that calls for new thinking. When the 17 SDGs were adopted more than five years ago, international trade was meant to play a central role in achieving the goals. Now, current circumstances set the stage for an even stronger link between trade and the SDGs. While polarized, the trade climate provides an opportunity to reassess existing structures and trade agreements, replacing a zero-sum narrative on trade with an SDG-focused approach that will unlock greater benefits from trade for all.

The SDGs and their 169 sub goals and 232 targets could serve as useful benchmarks and indicators for trade agreements, international economic law,⁹ and macroeconomic policies. A new trade model should be designed to harness the rules of trade to advance economic, social, and environmental dimensions in alignment with the SDGs and should be underpinned by business and human rights principles as well as a balanced approach to rule of law.

A new model would need to include developing a comprehensive food security approach for trade agreements in order to deliver on SDG 2 (Zero Hunger). It should also incorporate a meaningful focus on gender in trade agreements, building on the approach in the Canada-Chile, Chile-

⁷ WTO, *Trade Can Make a Vital Contribution to Meeting the Sustainable Development Goals – Azevêdo*, WTO News, 3 October 2018, available at https://www.wto.org/english/news_e/news18_e/sdgs_03oct18_e.htm; WTO, *Mainstreaming Trade to Attain the Sustainable Development Goals*, 2018, available at https://www.wto.org/english/res_e/booksp_e/sdg_e.pdf. World leaders also affirmed their commitment to international trade in SDG targets 17.10-17.12 as well as in Chapter 2D of Addis Ababa Action Agenda.

⁸ UNCTAD, *Forging a Path Beyond Borders: The Global South* (UNCTAD/OSG/2018/1), November 28, 2018.

⁹ Katrin Kuhlmann, *Investment with Sub-Saharan Africa: Recent Trade and New Developments Written Submission Testimony Before the United States International Trade Commission*, July 30, 2019, Investigation No. 332-571.

Uruguay, and Canada-Israel Free Trade Agreements and the General Objectives of the AfCFTA in support of SDG 5 (Gender Equality). Considering the vital role played by intellectual property (IP) in access to medicine and vaccines, TRIPS (Trade-Related Aspects of Intellectual Property Rights) flexibilities could be leveraged to achieve SDG 3 (Health and Well Being) and perhaps enhanced to include medical equipment and devices. Strengthened labor provisions will also be needed in order to advance SDG 8 (Decent Work and Economic Growth).

Environmental considerations need to be more closely linked with trade in a number of respects. Trade agreements should better address overfishing, given the importance of SDG 12 (Responsible Consumption and Production), 13 (Climate Action), and 14 (Life Below Water), and we continue to hope that a multilateral deal on fisheries subsidies is imminent. Greater focus should also be placed on sustainability and the circular economy in support of SDGs 12 and 13.¹⁰ The Agreement on Climate Change, Trade, and Sustainability (ACCTS), which addresses barriers to trade in environmental goods and services,¹¹ phases out fossil fuel subsidies, and encourages promotion and application of voluntary eco-labeling programs and mechanisms,¹² presents an interesting model that is particularly timely as climate and environmental risks are becoming material for a growing number of sectors.

Further, although this list is not exhaustive, business and human rights should be more fully aligned with trade agreements as well, in line with the OECD Responsible Business Conduct standards and UN Guiding Principles on Business and Human Rights. Digital regulation will also be increasingly important, as the pandemic has highlighted, and will contribute to all SDGs, including SDG 9 on Industry, Innovation, and Infrastructure.

Rule of law will play a vital role in furthering the 2030 Agenda for Sustainable Development and advancing SDG 16. While rule of law considerations need to inform international, regional, and national law, action is particularly important at the national and sub-national levels. Protecting individual property rights, guaranteeing fair and credible contract enforcement, and setting and enforcing labour laws would all contribute to social and economic development. Unrest can also have a devastating effect on development; recent analysis suggests that of the various dimensions

¹⁰ Guillermo Valles, *The Circular Economy in International Trade*, UNCTAD (2016), available at: https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1400&Sitemap_x0020_Taxonomy=UNCTAD%20Blogs

¹¹ Environmental goods and services, according to a common definition developed in the 1990s by the Organization for Economic Co-operation and Development (OECD) and Eurostat (the EU's statistical agency), are "activities which produce goods and services to measure, prevent, limit, minimize or correct environmental damages to water, air, and soil as well as problems related to waste, noise and eco-systems". Examples of goods include products related to clean energy generation, such wind turbines, and services include services to monitor cities' water supplies or support solar projects.

¹² Steenbilk, Ronald P. and Susanne Droege, *Time to ACCTS? Five Countries Announce New Initiative on Trade and Climate Change*, International Institute for Sustainable Development, September 25, 2019, available at <https://www.iisd.org/blog/time-accts-five-countries-announce-new-initiative-trade-and-climate-change>.

of the rule of law, the basic control of violence has the strongest correlation to economic growth.¹³ Institutions such as judiciaries and regulatory agencies can play a critical role in longer-term stability.¹⁴ Rule of law also cuts across development dimensions including primary health care and infrastructure and can play a major role in environmental protection and the protection of the rights of indigenous communities. Because each country has its own multi-dimensional social and political reality, it has been difficult to come up with indicators to access progress in terms of rule of law; however, some do exist, including a state's conformity to international law and standards.¹⁵

Of course, deeper analysis in each of these areas is needed, as is investment in new tools to understand the impact and contribution of trade rules and agreements on progress in achieving the SDGs.¹⁶ The former will call for substantial legal and economic research on trade agreement provisions and implementation, and the latter will require innovative approaches and significant data at the regional and global levels.¹⁷

3. Transparent and Participatory Rulemaking Process

In addition to the important global policy-level debates around trade agreements and the WTO, trade is ultimately something that touches individuals and communities. The unequal distribution of trade's benefits has often been cited as one of the most pressing challenges with trade and an impediment to using trade as a tool for inclusive economic development. While trade is often framed in terms of its connection with development at the political level, high-level goals need to be pursued in the context of real impact on individuals and communities.

In many ways, all of the SDGs call for an inclusive model for trade and development. In particular, SDG 10 focuses on Reduced Inequalities, underscoring the importance of inclusivity. Studies show that inequality is driven in large part by the institutions and policies we surround it with.¹⁸ The range of policies and laws related to digital commerce; entrepreneurship; micro, small, and medium-sized enterprises (MSMEs); national policy; and cross-border trade measures, among others, are all instruments that can be used to improve trade's social, economic, and environmental outcomes.¹⁹

¹³ UNDP, *Background Paper: Overview on the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post-2015 Development Agenda*, August 2013, available [here](#).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ United Nations, *The Sustainable Development Goals Report*, New York, 2019, available at: <https://unstats.un.org/sdgs/report/2019/The-Sustainable-Development-Goals-Report-2019.pdf>; Katrin Kuhlmann, *Investment with Sub-Saharan Africa: Recent Trade and New Developments*, Testimony Before the United States International Trade Commission (Written Submission), July 30, 2019, Investigation No. 332-571.

¹⁷ Katrin Kuhlmann, *Investment with Sub-Saharan Africa: Recent Trade and New Developments*, Testimony Before the United States International Trade Commission (Written Submission), July 30, 2019, Investigation No. 332-571.

¹⁸ Max Lawson, *How to Reduce Inequality?*, United Nations Association – UK, 2018, available at: <https://www.sustainablegoals.org.uk/how-to-reduce-inequality/>

¹⁹ See, e.g., Dani Rodrik, *The Global Governance of Trade -- As If Development Really Mattered*, United Nations Development Programme Background Paper, 2001, available at: <http://www.tinyurl.com/lekak8z>.

Although policies, institutions, and rules that govern markets can perhaps have a greater effect on inequality than trade itself, the lack of participatory processes in trade negotiations also presents a significant hurdle. Market rules are made at multiple levels, with international and regional commitments implemented through changes to national and even sub-national law. This can mean that ultimately changing the rules winds up being felt much more at the local level than internationally when all is said and done. Despite this grassroots connection, however, trade policy is often a high-level exercise. Adding to the challenge, in most countries, information on trade policies, economic rules, and negotiations is not easy to access. As a result, many affected stakeholders, including MSMEs, local authorities, workers, and citizens, are de facto excluded from negotiations and related policy decisions. Based on good governance studies,²⁰ keeping so many stakeholders away from the table leads to suboptimal outcomes. It is also not surprising that those negatively affected feel that they have been left with the short end of the deal.

Another difficulty is that the scope of issues under negotiation has become more complex over time, impacting both individuals engaged in the market and governments seeking to make good use of “policy space” within the larger framework of international obligations. A range of non-tariff rules and standards on health and human safety, customs and trade facilitation, and governance of services, the environment, labor, and intellectual property rights tend to have significant economic, social, and environmental development implications. However, even though these rules sometimes impact emerging economies the most, the capacity to fully comply with or shape the rules and standards is often weakest in these economies. Further, data on the impact of specific legal and policy approaches is often lacking, and stakeholders from emerging economies as well as those with the relevant expertise to assess impact are not always invited to the negotiating table.

Supply chains have become more complex as well, with many of the world’s goods traveling through regional and global networks,²¹ highlighting the interconnectivity in the market. However, the myriad regional and international trade (and investment) agreements can make it difficult to navigate global markets – particularly for smaller enterprises – with rules that even conflict at times. Not only are stakeholders calling for a direct hand in shaping the global rules affecting their supply chains, many are calling for better alignment with the SDGs. Supporting efforts to increase transparency in supply chains and build sustainable circular economies aimed at rebalancing

²⁰ UN, *Building Partnerships for Good Governance, The Spirit and the Reality of South-South*, New York, 2000, available [here](#).

²¹ OECD, WTO, and World Bank Group, *Global Value Chains: Challenges, Opportunities, and Implications for Policy*, Report prepared for submission to the G20 Trade Ministers Meeting, July 9, 2014; OECD, WTO, UNCTAD, *Implications of Global Value Chains for Trade, Investment, Development and Jobs*, August 2013, available at https://unctad.org/en/PublicationsLibrary/unctad_oecd_wto_2013d1_en.pdf; and, UNCTAD, *Global Value Chains and Development: Investment and Value Added Trade in the Global Economy* (UNCTAD/DIAE/2013/1) February 27, 2013.

income distribution, maximizing the use of resources, and eliminating waste would be a significant step in aligning trade law and policy with the SDGs.

Finally, even when new trade agreements bring the promise of changing law and policy, implementation of trade agreements remains a challenge.²² Implementation has different dimensions, as work by the New Markets Lab highlights,²³ all of which will impact whether trade can deliver on its development potential. While implementation challenges can arise at any level, they tend to surface locally most often, where application of market rules often does not match the high-level agreements national governments have signed. For example, many women farmers in Africa still struggle to access markets and finance despite trade agreements that promise to expand opportunities in agriculture and related services. This can be a result of how the agreements and the rules they generate are designed, which do not always take women's needs into account, but most often it is due to inconsistent application of the rules day-to-day. Tailoring trade agreements and the legal and regulatory frameworks they establish to actual social, environmental, and economic development considerations and improving effectiveness in practice can help address these "implementation gaps" across the board.

In order to make trade truly work for development, marginalized communities, enterprises of all sizes, and individuals need to have a voice as the rules are developed and negotiations advance. Increased engagement in trade policy will ensure better accountability in international negotiations and within domestic legal systems as well. The SDGs provide an interesting case study for engagement,²⁴ as they were created through an inclusive process that brought together governments, industry, and civil society to determine the world's agenda for sustainable development.²⁵

²² Katrin Kuhlmann, *Reframing Trade and Development: Building Markets through Legal and Regulatory Reform*, E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015, available at: <http://e15initiative.org/publications/reframing-trade-and-development-building-markets-through-legal-and-regulatory-reform/>.

²³ See New Markets Lab, *Dimensions of Policy, Legal, and Regulatory Implementation*, 2019, available at <https://www.newmarketslab.org/about>

²⁴ UN General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²⁵ Chantal Line Carpentier, "How United Nations Reform can Support a Reimagined Democracy," CIVICUS, available at: <https://www.civicus.org/index.php/re-imagining-democracy/overviews/3513-how-united-nations-reform-can-support-a-reimagined-democracy>.

4. Differentiated Approach to Trade Policy

How trade agreements are structured will also be significant. The WTO principle of special and differential treatment (S&D) could be applied strategically to design agreements that are tailored to different circumstances and levels of development, progressively ushering in commitments over time.²⁶ The WTO Agreement on Trade Facilitation is a good example upon which to build, and, over time, new models for S&D could become the norm rather than the exception. Notably, the AfCFTA also incorporates more progressive aspects of S&D, including both differentiation and a development-led approach to the rules of trade themselves.²⁷ Additionally, governments could use Aid for Trade, investment strategy, regulatory review and monitoring, and investment incentives, including through a new generation of investment agreements,²⁸ to reinforce sustainable development.²⁹

In light of the pandemic, how countries apply the rules and exercise flexibilities will be central to both their development and the strength of the global economy overall. This may necessitate a fresh discussion of concepts developing countries have long rallied around, such as "industrial policy" and "technology transfer," perhaps taking into account how countries with productive capacity could better support those with more nascent industries and sectors, including through enhanced South-South cooperation. It will also require examination of public sector financial support and debt relief for emerging economies, discussions which have already begun. Without question, post-COVID, all countries will have to intervene to help rebuild their economies and support businesses of all sizes, and many will struggle to find the resources to do so. Going forward, trade policy will also have to factor in the competitive advantage of firms in more developed economies, especially those in G20 economies, that have received a higher level of financial support through government stimulus packages.

5. Way Forward

Even with the pandemic, important efforts are gaining ground. Countries and NGOs are increasingly pressing for a trade and sustainable development agenda regionally and multilaterally. Trade and sustainable development linkages, including climate change, will be a focus at UNCTAD's 15th Ministerial Conference in Barbados, now slated for the spring of 2021. UNCTAD is actively partnering with diverse stakeholders, ranging from Fair Trade to the International

²⁶ See James Bacchus and Inu Manak, *The Development Dimension: What To Do About Differential Treatment in Trade*, Policy Analysis No. 887, Cato Institute, Washington, D.C., April 13, 2020, <https://doi.org/10.36009/PA.887>.

²⁷ Katrin Kuhlmann and Akinyi Lisa Agutu, *The African Free Trade Area: Toward A New Legal Model for Trade and Development*, 51 *Georgetown Journal of International Law* 4 (2020; publication forthcoming).

²⁸ UNCTAD, Phase 2 of an IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties, IIA Issue Note #2, 2017.

²⁹ United Nations, *17 Partnerships for the Goals*, available at:

<https://www.un.org/sustainabledevelopment/globalpartnerships/>

Institute for Sustainable Development, to make the SDGs operational, and the first UN Trade Forum was held to explore the linkages between trade, climate, and the environment. UNCTAD has also developed the UNCTAD Principles for Responsible Sovereign Lending and Borrowing to deal with rising debt vulnerabilities, while still focusing on the large investments needed to achieve the SDGs.

The New Markets Lab, consistent with its mission of creating a neutral space for improving the design and implementation of legal and regulatory systems in line with social and economic development goals, has launched a global research initiative to evaluate the different areas of law that are covered by the most expansive and inclusive trade agreements, all benchmarked against good practices and the SDGs. This initiative will culminate in a book on trade law and the SDGs in partnership with UNCTAD and others, along with a new digital tool on law and development, both of which could ultimately contribute to a new model trade agreement focused on inclusive and sustainable development.

To put trade back on track, we need to put sustainable development at the heart of the trade regime at every level – multilaterally, regionally, nationally, and locally. As the pandemic has highlighted, the future of trade – and its ability to spur economic and social development worldwide – will depend upon it.

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