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Les initiatives d'intégration économiques africaines et les défis de la conduite responsable des entreprises : analyse des clauses sur la responsabilité sociale des entreprises dans les accords régionaux africains de commerce et d'investissements

Jean Bertrand Azapmo

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Résumé de l'article

Laissées à elles-mêmes, les initiatives d'intégration économique, qui visent à promouvoir la croissance par la libéralisation commerciale et économique, ne génèrent pas automatiquement des résultats gagnant-gagnant pour toutes les parties prenantes, ou ne conduisent pas à la croissance économique inclusive et au développement durable des pays participants. Cette situation, qui est due entre autres à d'éventuelles défaillances du marché et à des externalités des activités des entreprises, est devenue de plus en plus préoccupante avec les nombreux scandales de corruption, de violation des droits de l'homme et de dégradation de l'environnement impliquant des entreprises. Comment donc continuer à promouvoir l'intégration économique tout en garantissant des comportements socialement responsables des entreprises dans les sociétés où elles opèrent ? Une approche qui a récemment gagné du terrain est l'institutionnalisation des clauses de responsabilité sociale des entreprises (RSE) dans les accords de commerce et d'investissement. Cet article analyse 10 accords régionaux africains de commerce et d'investissement conclus entre 2000 et 2020 pour déterminer dans quelle mesure ils convergent avec cette tendance à l'institutionnalisation des clauses sur la RSE, et l'approche adoptée dans la réglementation de la RSE. La recherche complète la littérature sur le lien entre le droit international et la RSE dans le contexte africain.

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01. Introduction

1 Left alone, economic integration initiatives, which aim to promote growth through investment and trade liberalization as well as market deregulation, do not automatically generate win-win outcomes for all stakeholders. In this respect, policymakers need to be aware of potential winners and losers across sectors and firms, as well participating countries, with a view to designing appropriate mitigating policies, as rightly observed by scholars like Barrientos, Karingi and Mevel, and Fofack. This situation which is due among others to possible market failures and externalities of corporations' activities, has become a matter of concern, in light of the numerous unethical corporate behaviors including corruption, and human rights and environmental scandals involving corporations operating in Africa. This situation is

further complexed in the African context because the continent remains one of the most underdeveloped regions in the world, and is struggling to meet most Sustainable Development Goals (SDGs) targets, as observed by African Union Commission *et al.*

2 In this context, one of the burning issues is to promote trade and economic integration while ensuring socially responsible corporate behaviors, and in so doing increase corporations' contribution to the sustainable development of societies where they operate. One approach that has recently gained traction is the institutionalization of corporate social responsibility (CSR) clauses in trade and investment agreements, including those aimed at promoting economic integration initiatives.

3 The question that this paper addresses is: to what extent do African economic integration initiatives, particularly in African regional trade and investment agreements (RTIAs), institutionalize CSR to effectively promote socially responsible business conducts in Africa?

4 The research is important for several reasons: whilst corporations were traditionally not considered subjects of international law, it is now admitted that they should assume certain obligations. This is needed to re-balance what Yannaca-Small called "disproportionate advantages" afforded to foreign investors, with corresponding responsibilities. This is even more important because there is no multilateral agreement at the World Trade Organization governing the behavior of corporations and the urgency to develop one as observed by Ly, and Ribeiro.

5 Secondly, the debate on the appropriate regulatory approach to enhance CSR, which is crystallized around the dichotomy between soft and hard law, remains unsettled, considering the weaknesses of the various approaches. In this context, scholars like Okoye, Zhao and Amodu have called for alternative frameworks and approaches to ensure that CSR provisions do not remain what Jarret, Puig, and Ratner have labelled 'decorative features of RTIAs' that do not bite.

6 In the absence of a universally agreed definition of CSR, it will be understood in this paper as a concept according to which corporations undertake formally or informally on their own, through incentives, or by law, to go beyond their fiduciary obligations to integrate ethical, philanthropic, and environmental considerations for the benefit of all stakeholders in societies where they operate.

7 To answer the central question, this paper undertook a critical legal analysis of CSR clauses in RTIAs concluded between 2000 and 2020 by the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC), two Regional Economic Communities (RECs) recognized by the African Union. Considering Africa's current level of economic integration, under which member states retain exclusive power in trade and investment negotiations, the paper also examined CSR provisions in RTIAs concluded by subregional groupings within ECOWAS and SADC. Furthermore, the analysis also covered CSR provisions in RTIAs to which all ECOWAS and SADC member states are signatories. ECOWAS and SADC were chosen because they have some of the most elaborate policies and regulatory framework on CSR in the African context. It is expected that the lessons and best practices identified will inform the development process of future CSR regimes, including at the continental level.

8 This paper draws from Ubuntu, the values-based philosophy of African humanism that underpins modern approaches to CSR in Africa, and the integrative social contract theory of CSR, a variant of the stakeholder theory. In terms of methodology, the study

used the legal document analysis and interpretative approach centered on the analytical framework of legalization. This framework looks at the characteristics that rules established by institutions may or may not possess, defined along three dimensions: obligation, precision, and delegation. Data for this research was drawn from primary and secondary sources of information (legal text, reports, and public information available on the websites of regional organizations studied, as well as relevant international organizations).

9 This study enriches the literature on the nexus between CSR and international law, which is new and limited worldwide. In the African context, most studies are limited to the relationship between domestic law and CSR. The few existing studies that have so far adopted a regional and continental perspective notably, Diawara and Lavallé, and Amodu, did not examine RECs such as ECOWAS where CSR has a level of maturity. In addition, existing studies did not analyse CSR provisions using a detailed and elaborate framework such the framework of legalization.

10 This paper is structured as follows: following the introduction (I) and the overview of the theoretical framework and development of CSR in the African context (II), an analysis of the institutionalization of CSR in RTIAs involving SADC and ECOWAS is provided (III). This is followed by a critical review of provisions with explicit reference to CSR, using an adapted version of the legalization framework, which incorporates among others Ubuntu's key principles and values (IV). The paper concludes with a reflexion on the policy implications of the current regulatory approach and ways to enhance its effectiveness (V) and a conclusion (VI).

02. Theories and evolution of CSR regulation in the African context

11 Carriga and Mele classify CSR theories into four categories: instrumental theories, which include among other the shareholder theory; political theories of which the integrative social contract theory; integrative theories, under which the stakeholder theory falls; and the ethical theory. The shareholder and the stakeholder theories are the two classical theories of CSR.

12 At the heart of the shareholder theory, is the idea of maximising shareholders' value. Friedman, one of the advocates of shareholder theory summarised its essence as follows: 'in a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom.' The shareholder theory has been criticised by scholars like Davis, Freeman and Dmytriyev, on three grounds: first, it takes a narrow approach by focusing of on short-term profit maximisation. Secondly, it does not consider the negative externalities of corporations' activities. Thirdly, it is argued that helping communities should not be considered a departure from the fiduciary responsibility of companies. Recently, Amodu rightly observed that the shareholder theory is morally unfit in a postmodern economy where interdependence is at its zenith and the economic and financial success of shareholders is dependent on that of other stakeholders.

13 The stakeholder theory surfaced as an alternative to the shareholder theory. It is based on the idea that organisations should be managed bearing in mind the interests of their constituents, who are their stakeholders, instead of just the interests of shareholders. Akinsulore summarized the three main arguments advanced in support of the stakeholder theory. First, he argued that a company is not only about shareholders but instead involves a set of interdependent relationships among primary stakeholders. Secondly, the purpose of the firm is not the maximisation of shareholders' value, as argued by the proponents of shareholder theories, but the creation and distribution of value to a plurality of stakeholders. Thirdly, the achievement of the purpose of the firm ultimately depends on the cooperation and support of other stakeholders, whose interests should be taken into consideration.

14 Scholars are divided on the origins and the main theory that underpins CSR in the African context. On the one hand, some view CSR in Africa, just like in many developing countries, mainly under the west prism, because of their colonial past. According to this view, advanced by Chambers and Fig, CSR theories and agenda are largely shaped by the West and have been expanded to the rest of the world through multinational corporations. Corrigan and Adanhounme, two proponents of this view, argued that CSR is a new phenomenon in Africa, transplanted in African countries during colonial times or imported by African governments upon their accession to independence, and driven mainly by multinationals, foreign NGOs, and international organizations.

15 On the other hand, scholars like Visser, Amaeshi *et al.*, and Dartey-Baah and Amponsah-Tawiah, hold the view that, CSR in Africa is informed by the continent's socio-cultural influences and values such as communitarian lifestyles, which are key features of the African philosophy of humanism. In the case of Nigeria for example, Amaeshi *et al.* noted that the kinship-network-based system of business organizations that existed in the country prior to the colonial era is the origin on CSR. Under this system, businesses were first concerned with the interest of their network members. In the same vein, Hamidu, Haraon and Amran observed that 'CSR activities in African countries are influenced by values like "Ubuntu" in South Africa, "Omoluwabi" in Yoruba cultures of South-western Nigeria; "Harambee" in East Africa. Whilst this paper recognizes the influence and relevance of classical theories of CSR in understanding CSR in Africa, it agrees with Visser and Mofuoa that 'the values-based traditional philosophy of African humanism of (Ubuntu) [...] underpins much of the modern, inclusive approaches to CSR on the continent'; and that Ubuntu should be considered the foundational theory for a new CSR narrative in Africa.

16 Ubuntu derives from the expression 'umuntu ngumuntu ngabantu', which in English means 'a human being is a human being because of other human beings'. Mokgoro notes that Ubuntu is a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness, and morality. Ubuntu's principles and values summarized by Taylor include communautarism, humanness and humanity, dignity, and leadership.

17 One classical theory of CSR that resonates well with Ubuntu is the Integrative Social Contract Theory of Donaldson and Dunfee, which is premised on the existence of an implicit social contract between business and societies. The idea of an implicit contract, which implies responsibilities that are not necessarily prescribed in a formal contract, speaks to Ubuntu' principles and values. In effect, Ubuntu's principles are characterised by the fact that they are non-written expectations of the community vis-à-vis each of

its members, such corporations operating within their jurisdiction. Therefore, the ISCT can also help understand CSR in the African context.

18 With respect to the evolution of CSR in Africa, Hamidu, Haraon and Amran identified five periods of CSR development in Africa. The first period, before the 1920s, also dubbed the period of CSR practices, was characterized by the practice of communitarian lifestyle practices. The second phase ran from the 1920s to the 1950s. CSR activities during that period were influenced by the socio-economic needs of the society and the establishment of corporate bodies. During the third period, which stretched from the 1960s to the 1970s, CSR was mainly motivated businesses' concern for their reputation and image. The fourth period from the 1980s to the 1990s, was characterized by the emergence of CSR legislation and regulated CSR practices. Finally, Hamidu, Haraon and Amran observed that the fifth period is the 1990s-2000s also dubbed period of instrumental/strategic CSR.

19 Whilst the work of Hamidu, Haraon and Amran provided a comprehensive overview of the CSR evolutionary process in the African context, it used a business and management approach and did not pay enough attention to the legal developments that took place during the various phases. From a legal perspective, this paper also distinguishes five periods: the first period, before 1885, considered the 'pre-legalization' period, during which CSR was driven by non-written African communitarian values and principles. The second period ran from 1885 to the mid-1950s, and was marked by the transposition of metropolitan laws, such as corporate laws, to the colonies. Many of these laws favored a shareholder and profit maximization approach. The third period between the 1960s and the 1980s was marked by the adoption of early national legislation by African governments to improve CSR practices on the continent. Examples include amendments to the company laws in Nigeria in 1968 and 1969 and adoption of Sullivan Principles in 1977 in South Africa. The fourth period from the 1990s to 2000s, dubbed period of the introduction of modern CSR legislation in Africa, was characterized by the adoption of more elaborate CSR legislations at the national level (one example is the Black Economic Empowerment Act (2000) followed by the Broad-Based Black Economic Empowerment Act of 2003 in South Africa) and the emergence of the first generation of CSR provisions in African RTIAs (art.10 of Annex 1 (Co-operation on Investment) of SADC Protocol on Finance and Investment, 2006). The fifth period from the 2010s onward (consolidation of CSR legislation in Africa). The main traits of this period are: first, the strengthening of CSR regulatory framework at the national level (South Africa moved from the "apply or explain" to the "apply and explain" approach to CSR; Nigeria's Bill on mandatory CSR reintroduced in parliament in 2012 passed the second reading in 2018). Secondly, the emergence of the second generation of CSR provisions in African bilateral, regional, and continental trade and investment agreements (art. 24 of Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement, 2016 and art. 30 (2) of the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement for COMESA Common Investment Area, 2018).

20 To close this section, this paper agrees with Carroll that CSR has had thus far a long and rich history; and that going forward, it is likely going to have a bright future, as capitalism and global competitiveness continue to expand and concerns for sustainability become more prominent. It will therefore be interesting to see the approach that will be taken in future trade and economic integration initiatives such as

the African Continental Free Trade Area (AfCFTA). Having discussed the theory and evolution of CSR in the African context, the paper now turns to the institutionalisation of CSR clauses in African RTIAs.

03. Institutionalization of CSR provisions in African RTIAs: RTIAs involving ECOWAS and SADC

21 This section examines African RTIAs, focusing on those involving ECOWAS and SADC to determine the extent to which they feature provisions with explicit or implicit references to CSR and responsible business conducts. As indicated, the analysis also covered RTIAs concluded by sub-regional groupings within ECOWAS and SADC, as well as RTIAs concluded at the continental level.

22 Beginning with ECOWAS, three RTIAs were reviewed: the ECOWAS Supplementary Act A/Sa.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation Within ECOWAS (hereinafter the ECOWAS Supplementary Act on Investment), 2008; the ECOWAS+(Union Monetaire Ouest Africaine (UEMOA)) and EU Economic Partnership Agreement (EPA), 2014; and the ECOWAS Common Investment Code, 2018.

23 The analysis showed the following, summarized in Table 1: Two of the three RTIAs included provisions with explicit reference to CSR: the ECOWAS Supplementary Act on Investment (art. 16 (2)) and ECOWAS Common Investment Code (art. 34). The ECOWAS+UEMOA and EU EPA did not feature any explicit CSR provisions. The analysis also showed that the three RTIAs included clauses with implicit references to CSR. Such clauses deal with CSR issues such as sustainable development, corruption and unethical practices, and transfer pricing. For example, art. 35 to art. 40 of ECOWAS Common Investment Code deals with corruption and unethical practices, whilst art. 41 to 44 prohibit transfer pricing.

Table 1: institutionalization of CSR in RTIAs involving ECOWAS

RTIAs involving ECOWAS (2000-2020)	ECOWAS Supplementary Act on Investment, 2008	ECOWAS+UEMOA and EU EPA, 2014	ECOWAS Common Investment Code, 2018
Explicit CSR provisions	art. 16 (2)	None	art. 34
Implicit CSR provisions	- art.3 on the objective of the Act (to promote investment that supports sustainable development of the region) - art. 27 (1) (d)host state may undertake cooperative activities to promote sustainable investment	- art. 2(5), art. 3(1) and (2), art. 46(2) and (7), art. 49(1)(a), art. 53(2) and (3), art. 56(1), art. 95(3)(a)(vi), and art. 106(2)(h) on sustainable development	- art. 2, art. 21 to 29 on environment and sustainable development - art. 35 to art. 40 on corruption and unethical practices - art. 41 to 44 on transfer pricing

Source: author

24 With respect to SADC, the paper analysed five RTIAs: SADC Protocol on Finance and Investment, 2006, which was amended in 2016; SADC Model BIT Template, 2012; Agreement establishing the Tripartite Free Trade Area among COMESA, East African Community (EAC) and SADC (Tripartite Agreement), 2015; SADC-EU Economic Partnership Agreement (EPA), 2016; and the SACU+Mozambique and UK Economic Partnership Agreement (EPA), 2019.

25 The findings of the analysis which are in Table 2 showed that of the five RTIAs, three included explicit CSR provisions. These are the SADC Protocol on Finance and Investment (art. 8 of Annex 1 on Co-operation on Investment); the SADC-EU EPA (art.11 (3) (c); and the SACU+Mozambique and UK EPA ((art.11 (3)(c), whose language is word for word identical to that of the SADC-EU EPA Agreement. The findings also showed that four agreements have provisions with implicit references to CSR: for example, art. 16 (1) of SADC Model BIT Template refers to "corporate governance standards" in its art. 16 (1). In addition, the paper found that one agreement, the Tripartite Agreement, 2018, included neither an explicit CSR provision, nor an implicit provision.

Table2: institutionalization of CSR in RTIAs involving SADC

RTIAs involving SADC (2000-2020)	SADC Protocol on Finance (Annex on co-operation on investment), 2006 ; amended in 2016	SADC Model BIT Template, 2012	Tripartite Agreement, 2015	SADC-EU EPA, 2016	SACU+ Mozambique and UK EPA, 2019
Explicit CSR provisions	art. 10 in the 2006 text and art. 8 in the 2016 text		None	art. 11 (3) (c)	art. 11 (3) (c)
Implicit CSR provisions	- art. 11 on development of local capacity through skills transfer - art. 12 on use of resources in a sustainable and environmentally friendly manner - art. 14 on the right to regulate (ensure that investments activities take account of health, safety, or environmental concerns)	- art. 1 on the objective on encouraging and promoting investment that supports sustainable development - art. 16 (1) - art. 20 on the right to regulate (ensure that development is consistent with the goals and objectives of sustainable development)	None	- art. 1 (a) on the objectives of the agreement - Chapter 2 deals with trade and sustainable development (art. 7 is titled: sustainable development and art. 10 focuses on trade and investment favouring sustainable development[1] - art. 9 on the right to regulate and to effectively enforce environmental and labour laws	- art. 1 (a) on the objectives of the agreement - Chapter 2 of deals with trade and sustainable development, (art. 7 deals with sustainable development and art. 10 focuses on trade and investment favouring sustainable development[2] - art. 9 on the right to regulate and to effectively enforce environmental and labour laws

Source: author

26 The research found that of the two RTIAs involving all ECOWAS and SADC Member States concluded between 2000 and 2020 (Pan-African Investment Code (PAIC), 2016, and the AfCFTA Agreement, 2018), only the PAIC included a provision that explicit refer to CSR. In effect, art. 22 of the Code is titled 'corporate social responsibility'. On the contrary, the Agreement Establishing the AfCFTA did not. The analysis showed that the two agreements feature provisions with implicit references to CSR. Hence, art. 3 (e) of the AfCFTA Agreement provides that one its objectives is to 'promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties'. Another example is art. 24 of the PAIC on business ethic and human rights, which outlines several principles to be complied by investors, such as supporting and respecting the protection of internationally recognized human rights, avoid being complicit in human rights abuses, eliminating all forms of forced and compulsory labor, and ensuring equitable sharing of wealth derived from their activities.

Table 3: institutionalization of CSR in RTIAs involving ECOWAS AND SADC Member States

RTIAs involving ECOWAS and SADC (2000-2020)	Pan-African Investment Code, 2016	AfCFTA Agreement, 2018		
		Framework Agreement	Protocol on Trade in Goods	Protocol on Trade in Services
Explicit CSR provisions	art. 22	None	None	None
Implicit CSR provisions	- art. 1 on the objective of the Code to promote sustainable development - art.23 on obligation to respect of local populations' rights in the use of natural resources - art. 24 on business ethic and human rights	- article 3 (e) on the AfCFTA objective promoting and attaining sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties	None	- art. 3 (2) (b) of the Protocol of Trade in Services on the objective of the AfCFTA, to promote sustainable development in accordance with the SDGs[3] - Art. 7 (a) on special consideration to be given to liberalisation of services sectors that will promote critical sectors of growth, social and sustainable economic development.

Source: author

27 In conclusion of this section, three observations can be made: first, the institutionalization of CSR provisions in African RTIAs is a reality. Hence, nine of the 10 RTIAs analysed in this paper (90 percent) included either implicit or explicit CSR provisions. More importantly, five of the RTIAs (50 percent) feature explicit CSR clauses. Only one RTIA did not include explicit or implicit CSR provisions. These findings confirm the results of previous studies, including one by Monteiro, that have concluded that there is a gradual inclusion of CSR provisions in regional trade agreements worldwide.

28 In this sense, this paper argues that African RTIAs converge towards the general trend of institutionalizing CSR provisions.

29 The second observation is that the most elaborate and comprehensive CSR clauses are found in RTIAs concluded among African countries. This is for example the case of art. 22 of the Pan-African Investment Code on CSR, which articulates the dimensions of CSR that corporations should comply with: legal (abide by the laws, regulations, administrative guidelines and policies of the host state), social and economic (contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State). Another example is art. 34 of ECOWAS Common Investment Code which in addition to legal and socio-economic obligations, goes one step further to require investors to abide by certain ethical principles (ensure equitable treatment of all shareholders, including minority and third-party shareholders; active cooperation with stakeholders to create wealth and jobs, timely and accurate disclosure of all materials facts relevant to risks related to environmental liabilities. More importantly, it calls upon investors to adhere to principles and standards of the International Financial Reporting Standards.

30 On the contrary, RTIAs concluded between African countries and non-African trading partners (the EU and UK), are scanty and very weak, as observed in the case of art. 11 (3) (c) of SADC-EU EPA and art. 11 (3) (c) of SACU+Mozambique and UK EPA. These

provisions only referred to CSR in terms of cooperation between state parties, rather than specific CSR obligations that investors should comply with. Even more surprising is the fact that the EPA concluded between ECOWAS-UEMOA and the EU did not even include and explicit reference to CSR; considering that the first trade agreement that featured a CSR clause was the EU-Chile Association Agreement, 2003 (Joint Declaration Concerning Guidelines to Investors).

31 Thirdly, the research found that the institutionalization of CSR provisions in RTIAs examined in the study is still inconsistent and heterogenous. For example, there is no explicit reference to CSR in some of the African RTIAs. This is the case of the AfCFTA Agreement signed in 2018 and the Tripartite Agreement concluded in 2015. Even more surprising is the absence of any implicit reference to CSR in the Tripartite Agreement. This inconsistency has led scholars like Amodu to question the appetite for CSR in Africa's regional integration agenda. Having analysed the institutionalization of CSR in African RTIAs, the next section will assess the regulatory approach adopted in designing CSR provisions in the African context.

04. Analysis of the regulatory approach to in designing CSR provisions in African RTIAs using the enhanced legalization analytical framework

32 This section analyses six explicit CSR provisions of RTIAs examined in the previous section. These are: art. 16 (2) of ECOWAS Supplementary Act on Investment; art. 34 of ECOWAS Common Investment Code; art. 8 of Annex 1 on Co-operation on Investment of the SADC Protocol on Finance and Investment; art. 11 (3) (c) of SADC-EU EPA; art. 11 (3) (c) of SACU+Mozambique and UK EPA; and art. 22 of the PAIC.

33 Before diving into the analysis, a brief discussion of the legalization analytical framework used in this paper is necessary. The concept of legalization was developed by Abbott *et al.* and expanded by Goldstein *et al.* It refers to a particular set of characteristics that rules established by institutions may (or may not) possess and which are defined along three dimensions: obligation (degree to which the rules are obligatory); precision (level of clarity in defining "commitments" and obligation); and delegation (delegation to a third party of some functions to interpret and apply rules, to resolve disputes or to make additional rules).

34 Based on the concept of legalization, Peels *et al*. designed an analytical framework for analysing CSR provisions in trade and investment agreements. Under this framework, the obligation dimension is assessed by looking at the nature of the legal instrument that includes the CSR provision; the location of the provision (preambular text or main text); the substance of CSR clause (drafted in soft or hard language). The second dimension (precision dimension) is concerned with the existence of references to specific CSR legal instruments (principles, standards, and codes) to facilitate the implementation and interpretation of CSR provisions. The delegation dimension is assessed through the existence of a dedicated dispute settlement mechanism in the text of the agreement.

35 Peels et al.'s Framework is instrumental because it provides objective criteria to assess the regulatory approach to through the hard-soft law continuum. Despite this merit, the concept of legalization upon which is built the framework has been criticized by

scholars including Rwengabo, Finnemore and Toope. One of the main criticisms is the narrow conception of law, which focuses mainly on formal law, leaving out the implicit rules and nonstate normative systems operating around explicit normative frameworks. Considering these limitations, this paper argues that in the African context, non-legal norms such as the principles and values of the African philosophy of humanism encapsulated in Ubuntu, the concept that best captures CSR in the continent, should be included in the framework. In addition, private CSR regimes also need to be considered, in order to take into account new forms of CSR governance that exist outside of state laws. Furthermore, this paper proposes to add the participation of non-state actors in the enforcement process as a criterion to assess the effectiveness of the delegation dimension of CSR provisions. Finally, the research proposes to dissociate the implementation from the enforcement, because they are two distinct aspects of the delegation dimension. These adaptations are important because they have the potential to enrich the regulation of CSR and enhance the effectiveness of the enforcement of CSR provisions.

Table 4: Analytical framework for the review of CSR provisions in African regional trade and investment agreements (Adapted from Peels *et al.*'s "legalization")

Obligation dimension			**Precision dimension**	**Delegation dimension**	
Legal nature of the instrument containing CSR provisions	Location of CSR provisions in the legal instrument	Normative content of the CSR provisions	Reference to specific CSR instruments	Enforcement *(existence of an enforcement mechanisms)*	Implementation *(existence of cooperation mechanisms)*
- **Conventions or agreements** - **Side agreement (codes of conduct, recommendations, declarations or guidelines, Memorandum of understanding, Annexes)**	- Preambular text - Main text	- Nature of the clause (positive law/reference to non-state law (values, private CSR regimes) - Language (Soft-law, hard-law and hybrid approach)	- Specific CSR instruments (e.g., ILO MNE Declaration, OECD Guidelines, or UN Guiding Principles - *African standards, codes, principles, and values, including Ubuntu.*	- Legally binding dispute settlement mechanism - Non-legal and soft enforcement mechanisms (consultations) - Admissibility of claims from *non- state actors in the enforcement process*	- National and regional institutions. - Stakeholder engagement (National advisory or consultative committees) - Exchange of information

Source: author

4.1 Obligation dimension of CSR provisions in African RTIAs

36 The obligation dimension relates to the extent to which CSR provisions are obligatory and, therefore, binding on corporations. This paper used three variables to assess the obligation dimension of CSR provisions in RTIAs involving ECOWAS and SADC: the nature of the legal instrument containing CSR provisions; the location of CSR provisions in legal instruments; and the normative content of CSR provisions.

4.2 Nature of legal instruments containing CSR provisions

37 The question here is whether CSR provisions in RTIAs examined are found in legal instruments that have treaty status such as conventions and agreements and are

therefore legally binding, or in soft instruments such as codes of conduct, recommendations, declarations, or guidelines, which are voluntary.

38 Starting with ECOWAS, explicit CSR provisions examined in this paper were found in legal instruments that have treaty status and can therefore be considered as hard law. These are: first, the ECOWAS Supplementary Act on Investment which has treaty status, despite having the name "Supplementary Act". In effect, although the Supplementary Act is a standalone legal instrument, separate from ECOWAS Treaty, it nonetheless has treaty status. Art. 42 (2) of the Act unambiguously states that it 'is annexed to the ECOWAS Treaty of which it is an integral part'. Secondly, the ECOWAS Common Investment Code creates rights and obligations for state parties and investors. In this respect, art. 3 (1) stipulates that the 'Code applies to the rights and obligations of Member States and investors. In addition, the Code provides that its provisions take precedence over any legal instruments under ECOWAS Treaty or any intra-African BIT, investment chapter under any intra-African trade agreement, or regional investment arrangements (art. 64 (1) and (3). Furthermore, para 2 of art. 64 obliges Member States to ensure that all future investment agreements to which they may become Party are fully consistent with the provisions of the Code.

39 With respect to SADC, the three CSR provisions analysed in this paper are all found in legal instruments with treaty status: first the SADC-EU EPA and the SACU+Mozambique and UK EPA, which create reciprocal obligations for member states. Secondly, Annex 1 to the SADC Protocol on Finance and Investment, whose treaty status is provided in art. 23 of the Protocol. In effect, this article stipulates that, annexes developed and adopted for the implementation of the Protocol shall form an integral part of the Protocol.

40 Regarding the PAIC, whilst it creates obligations for both investors and state parties as provided for in art. 2 (2), its legal nature has been disputed. In effect, art. 2 (1) provides that the Code shall merely apply as a guiding instrument to Member States as well as investors. This implies that the PAIC is simply a non-binding template or guidelines. This non-binding nature of the Code and the flexibility granted to member States in regulating investment has led scholars like Hedar to argue, and rightly so, that the PAIC should be stripped of its "code" name. Others like Kane have gone one step further to suggest that it will probably be necessary to rename it as "Pan-African Guiding Principles on Investor-State Relations".

4.3 Location of CSR provisions in African RTIAs

41 This section examines whether CSR provisions are found in the main text or in the preambular section of their legal instrument. This is important for the research because the preambular section of treaties and agreements is merely aspirational; as opposed to provisions in the body of the agreement, which are operative provisions and govern the rights and obligations of parties.

42 Here the analysis showed two things: first, all explicit CSR provisions examined in this research were found in the main text. More specifically, those CSR provisions were found in the chapter on "trade and sustainable development". This is the case with the SADC-EU EPA and the SACU+Mozambique and UK EPA (Chapter 2 on trade and sustainable development). The second place where CSR provisions were included is the chapter or part on "investors' obligations". This is the case with the PAIC (Chapter 4 on investors' obligations); the ECOWAS Supplementary Act on Investment Rules (Chapter

III on obligations and duties of investors and investments); and the ECOWAS Common Investment Code (Chapter 8 on development and social responsibility).

43 The fact that CSR provisions in African RTIAs examined in this paper are found in the chapter on investors' obligations, suggests that African legislators are more concerned about rebalancing the rights and protections granted to investors with commensurable obligations. After the analysis of the location of CSR provisions in African RTIAs, the next variable of the obligation dimension of CSR provisions is their normative.

4.4 Normative content of CSR provisions in African RTIAs

44 Three variables are used to determine the extent to which the normative content of CSR provisions in RTIAs examined leans towards soft law or hard law: the language of CSR provisions and their typology. In addition, this section also assessed the extent to which explicit or implicit CSR provisions include references to other CSR governance regimes such as private CSR regimes.

45 Starting with the language used in drafting CSR clauses. The question here is whether the norm is drafted in a mandatory or voluntary language. Beginning with CSR provisions in RTIAs concluded by ECOWAS, an analysis of art. 16 (2) of ECOWAS Supplementary Act on Investment and the Art. 34 (2) of ECOWAS Common Investment Code) showed that a mixed approach was used. Hence, art. 16 (2) of ECOWAS Supplementary Act on Investment uses a soft language ("should endeavour to apply"); which is conditional and voluntary, rather than mandatory; whilst art. 34 (2) of ECOWAS Common Investment Code combines a mandatory and conditional language. In effect, whereas the provision starts with the mandatory verb "shall", it continues with the qualifier "endeavour", which weakens the original binding language. The provision reads as follows: 'Investors conducting business in the ECOWAS territory *shall endeavour* to promote and engage in corporate social responsibility in accordance with international best practices, taking into account the peculiar development plans and priorities of Member State and in particular the needs of the local communities.'

46 With respect to CSR provisions in RTIAs concluded by SADC, the analysis also showed that there is no homogeneity in the regulatory approach used in various agreements. Hence, on the one hand, art. 8 of the Amended Annex 1 on Co-operation on Investment to the SADC Protocol on Finance and Investment used a mandatory language by stating emphatically that: 'Investors and their investments shall abide by the laws, regulations, administrative guidelines and policies of the Host State for the full life cycle of those investments'. On the other hand, art. 11 (3) (c) of the SADC-EU EPA adopted a voluntary language. It states that 'the Parties may cooperate, inter alia, in the following areas [...] corporate social responsibility and accountability'. This voluntary language is word for word identical to art. 11 (3) (c) of the SACU+Mozambique and UK EPA.

47 With respect to art. 22 of the PAIC, the analysis showed that it is drafted in a mandatory language, by using the verb "shall". In effect art. 22 provides that investors shall abide by the laws and regulations of state parties; ensure that their activities do not conflict with the social and economic development objectives; and contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host state.

48 The second variable used to assess the normative content of CSR provisions is their typology, which is based on Dubin's distinction of direct versus indirect CSR clauses.

This distinction is important because direct CSR clauses tend to be mandatory, unlike indirect CSR clauses, which are not. Starting with CSR provisions in RTIAs concluded by ECOWAS, the analysis showed that they all fall in the categories of direct CSR clauses. This is because these provisions not only directly make references to investors CSR obligations, but more importantly, provide an indication of those obligations. In this respect, art. 16 (1) of ECOWAS Supplementary Act. on Investment lists among the CSR obligations of investors: compliance with all applicable laws and regulations of the host state and obligations in this Supplementary Act, development of plans and priorities of the host State, the Millennium Development Goals; as well as the indicative list of corporate social responsibilities agreed by the member states. Similarly, art. 34 of ECOWAS Common Investment Code lists among other obligations that investors are required to adopt and implement active cooperation with stakeholders in creating wealth and jobs; timely and accurate disclosure of all material facts relevant to risks related to environmental liabilities; and disclosure of information relating to human resource policies.

49 Coming to SADC, the analysis of the three CSR clauses in RTIAs concluded by SADC showed a tendency towards indirect CSR clauses, which relies on the host state to regulate CSR. In effect, art. 8 of Annex 1 to the SADC Protocol on Finance and Investment) provides that investors and their investments shall abide by the laws, regulations, administrative guidelines and policies of the Host State. Hence, this provision does not provide any indication of what CSR obligations are expected from corporations; instead that determination is left with the government of the host state. Art. 11 (3) (c) of the SADC-EU EPA and art. 11 (3) (c) of SACU+Mozambique and UK EPA are even more laxist, because they limit themselves to recognizing the need for the parties to cooperate, share experience on their actions, as well as strengthen dialogue and cooperation in the area of corporate social responsibility.

50 With respect to art. 22 of PAIC on "Corporate Social Responsibility", the analysis showed that it also came under the category of direct CSR clause. This is because it specifically outlines three obligations for investors: abide by the laws, regulations, administrative guidelines, and policies of the host state; align economic objectives with the social and economic development objectives of host states; be sensitive to the objectives of host states; and contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host state. These obligations appear to incorporate the dimensions of responsibilities identified in the three-domain model of CSR proposed by Schwartz and Carroll according to which CSR relates to the economic, legal, and ethical responsibilities of the business.

51 With respect to references to other CSR governance regimes such as private CSR regimes, the research found that none of the explicit or implicit CSR provisions examine contain reference to private CSR regimes such as corporate codes of conducts, despite their rise worldwide and even in Africa, and their capacity to contribute to a reversal of the downward trend in ethical business practices.

52 In conclusion of this section, the analysis language of CSR provisions identified in this research showed that there is a strong inclination towards a sui-generis approach in regulating CSR in African RTIAs. Hence, four out of the six clauses used either a voluntary/conditional or a combination of soft and combination language. This finding corroborates the conclusions of Lin who finds that CSR provisions are increasingly designed using a unique approach dubbed "soft hard-law" approach. This is because

although CSR provisions impose hard obligations on corporations, they turn out to be soft law in nature given their vague behavioural requirements. Ultimately, this paper argues that whether we are in presence of "treaty-soft law" or "soft hard law", CSR provisions create "sui generis" legal obligations, particularly in the case of African RTIAs, where such provisions are included in chapters or sections on investors' obligations. This is an indication that they are intended to be legally binding. This corroborates the point made by Ishikawa that considers CSR in today context only as a series of voluntary commitments which are non-legally binding is no longer tenable.

4.5 Precision dimension of CSR provisions in African RTIAs

53 The precision dimension relates to the level of clarity in defining commitments, which is assessed by looking at references to specific CSR guidelines and principles in CSR provisions. This section examines the extent to which CSR provisions examined in this paper also feature international and or regional guidelines and principles. This variable is also important because soft laws tend to be very broad and laxist with few or no reference to principles guide their interpretation and implementation, unlike hard laws.

54 The most common international CSR guidelines and principles are found in: International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977; Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, 1976 as well as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 2012; Global Sullivan Principles, 1999; Ten Principles of the UN Global Compact, 2005; UN Principles for Responsible Investment, 2006; ISO 26000, 2010; and UN Guiding Principles on Business and Human Rights, 2011. Regional CSR principles and guidelines are articulated in the Durban Declaration on Democracy, Political, Economic and Corporate Governance, 2002; Objectives, Standards, Criteria and Indicators for the African Pear Review Mechanism, 2003; and Monrovia Principles of CSR, 2010.

55 As discussed in the introduction of this section, the analysis will also examine whether CSR provisions in African RTIAs include reference to African values of communautarism, togetherness, inclusiveness, connectedness, sharing, solidarity, dignity, respect, tolerance and understanding, which are embodied in the concept of Ubuntu.

56 Starting with international standards, principles and codes of CSR, the analysis showed that none of the CSR provisions examined in this study explicitly refers to specific international CSR instruments identified above. Whilst the lack of reference to OECD guidelines can be justified by the fact that they are developed by a non-African organization, the absence of references to CSR instruments developed under the aegis of the UN is a curiosity, which raises some concerns, considering that all African countries are, with the exception of the Sahrawi Arab Democratic Republic, members of the UN.

57 Instead, CSR provisions examined in this paper contain at best, broad references to internationally recognized CSR standards and best practices, without naming them. This is the case of art. 34 (2) of the ECOWAS Common Investment Code, which requires investors doing business in the ECOWAS territory to promote and engage in CSR in

accordance with "international best practices". In addition, para 3 of the same art. 34 provides that member States shall adopt or maintain regulatory framework in accordance with internationally recognized standards referred to in this Code. Along the same lines, art. 16 (2) of the ECOWAS Supplementary Act provides that investors should endeavour to apply and achieve the higher-level standards.

58 In some instances, CSR provisions in RTIAs involving ECOWAS and SADC refer to other CSR-related international standards. Hence, art. 16 (1) of ECOWAS Supplementary Act on Investment Rules refers to the obligation for investors to comply with Millennium Development Goals. In the same vein, art. 16 (4) of ECOWAS Supplementary Act calls on investors and investments to 'act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998'. Another example is that of art. 11 (3) (a) of SADC-EU EPA which calls for cooperation among the parties in the area of 'trade aspects of labour or environmental policies in international fora, such as the ILO Decent Work Agenda and MEAs'.

59 With respect to regional codes, standards, principles and guidelines, as well as African values, including Ubuntu, the analysis showed that CSR provisions examined in this research did not explicitly refer to any of the main regional instruments that articulates CSR principles. This is notwithstanding African leaders' commitment in sub-para. (b) of para 4-1 (A) of the *Objectives, Standards, Criteria and Indicators for the APRM,* to promote the adoption of Codes of good business ethics such as the Cadbury and King Codes.

60 Like in the case of international CSR standards, guidelines and principles, the analysis showed that RTIAs examined included instead some broad and vague references to "regional standards". For example, art. 14 (2) of ECOWAS Supplementary Act provides that investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties. Another example is that of art. 15 (3) of ECOWAS Supplementary Act., which refers to "regional accepted standards" of corporate governance practices.

61 The case of RTIAs concluded by SADC is even more striking, as there is no reference at all to any regional standards and principles or codes, despite the progress and advances made by South Africa, in establishing a domestic CSR framework, such as the Sullivan Principles and the King Codes.

62 Coming to references to Ubuntu principles as well as African values, it should be noted that only RTIAs concluded by ECOWAS included references to some of Ubuntu principles as well as broad references to African values. An example is art. 34 of ECOWAS Common Investment Code, which includes specific references to the need to take into account the priorities and needs of local communities, empower local communities, and more important, protect traditional knowledge of local communities to ensure fair and equitable sharing of benefits. Similarly, the Code calls upon investors to respect to the sociocultural objectives and values of ECOWAS. Even though the two provisions did not include all the principles and values of Ubuntu, and that the term "sociocultural objectives and values of ECOWAS" is vague, still these formulations could inspire and serve the basis for the design of CSR provisions in future African RTIAs.

63 The absence to Ubuntu's principles and elements as well as African values in the other RTIAs examined in this paper points to the limited contextualization and Africanization

of CSR provisions in Africa. This needs to be enhanced going forward, to ensure that CSR provisions in African economic integration initiatives speak to African issues, using a frame of reference commonly known to Africans.

64 To conclude on the precision dimension, the absence of explicit references to specific international and regional CSR codes, standards, guidelines, and principles in CSR provisions examined in this paper showed that their implementation, interpretation and enforcement is wide open and not guided by any specific principles or guidelines. This approach resonates more with the voluntary and soft law approach than the mandatory and hard law approach. This is an area that needs to be improved going forward, in order to enhance the effectiveness of CSR provisions in the African context.

4.5 Delegation dimension of CSR provisions in African RTIAs

65 The dimension of delegation focuses on the provision for third-party authorisation to interpret and enforce the rules, resolve disputes arising from their implementation, and make additional rules. This dimension is assessed by examining the types of third-party enforcement mechanisms established under RTIAs featuring CSR provisions and the participation of non-state actors in the enforcement process.

4.5.1 Types of third-party mechanisms for the implementation and enforcement of CSR provisions

66 Mechanisms and institutions for the implementation and enforcement of CSR provisions are discussed separately.

4.5.1.1 Mechanisms and institutions for the implementation of CSR provisions in African RTIAs

67 The analysis showed that all RTIAs analysed in this research have references to institutions for implementation and cooperation. With respect to ECOWAS for example, art. 25(1) and (2) of the ECOWAS Supplementary Act provides for the creation of regional and national structures for the promotion and facilitation of investment. In practice, such regional and national structures will sensitize investors and their investments on the laws, regulations, standards and principles governing investments, including those pertaining to CSR. With respect to the ECOWAS Common Investment Code, art. 59 refers specifically to the ECOWAS Common Investment Market Council, which is tasked to 'identify and establish the relevant mechanisms' in order to assist member states in implementing the provisions of the Code.

68 Concerning the modalities for cooperation, one of the most important one, which will positively impact the effective implementation of CSR provisions, is cooperation in the exchange of information to help the host state implement its obligations.[1] In the case of ECOWAS, art. 28(1) of the ECOWAS Supplementary Act on Investment imposes an obligation of information sharing on the home state. It requires home state to provide to a potential host state any information as is requested and available for the purposes of the host state to meet its obligations and perform its duties in relation to an investor or investment under this Supplementary Act and the host state's domestic law. The obligation contained in art. 28(1) is important because it is not only drafted in

mandatory language, but also, imposes an obligation of celerity on the home country to provide the information requested in a timely manner.

69 With respect to RTIAs concluded by SADC, Annex 1 on Co-operation on Investment of the SADC Protocol on Finance and Investment provides a robust institutional framework for the implementation and cooperation on issues covered under the Protocol. In this respect, art. 17 and 18 of the Protocol institute a Committee of Ministers of Finance and Investment is mandated by art. 21(2) to create sub-committees and institutions deemed necessary for its effective implementation. The SADC-EU EPA too provides an institutional framework to facilitate the implementation of issues covered under the agreement. In this respect, art. 12(4) and (5) calls upon the parties to establish joint institutional arrangements for cooperation in the implementation of the agreement.[2]

70 With respect to modalities of cooperation, RTIAs concluded by SADC also contain provisions on exchange of information, although their language is less stringent than that of art. 28(1) of the ECOWAS Supplementary Act, as it does not impose an obligation of expediency. Art. 21(c) of the Amended Annex 1 to the SADC Protocol on Finance and Investment provides simply that state parties shall ensure that their investment promotion agencies 'increase awareness of their investment incentives, opportunities, legislation, practices, major events affecting investments and other relevant activities through regular exchange of information'. Art. 22 of the same text also tasks the Secretariat to ensure collaboration on investment matters. The approach adopted in the Amended Annex 1 to the SADC Protocol on Finance and Investment is similar to that of article 105(3) of the SADC-EU EPA on exchange of information, which provides that party shall, to the extent legally possible, provide the requested information and reply promptly to any question relating to an actual or proposed measure that might affect trade between the parties.

71 The main difference between the obligation to exchange information in the SADC-EU EPA and in the other RTIAs lies in the requirement laid down by art. 105(1), which pertains to the designation by state parties of 'a coordinator for the exchange of information'. This requirement has the potential to facilitate exchange of information through one officially designated focal point.[3] Having discussed the institutions for the implementation and cooperation aspects of the delegation dimension, the paper now turns to the enforcement aspect.

4.5.1.2 Third-party enforcement mechanisms instituted in African RTIAs

72 The question this paragraph addresses is whether African RTIAs that feature CSR provisions institute a strong third-party enforcement mechanism (e.g., dispute settlement mechanisms including arbitration whether binding or not); a weak enforcement mechanism (government consultations, stakeholders dialogue, or expert panels), or a combination of both? This dimension is useful strong because enforcement mechanisms are often associated with hard law unlike weak enforcement mechanisms.

73 Starting with RTIAs concluded by ECOWAS, the analysis showed a preference towards a combination of weak and strong enforcement mechanisms. Hence, under ECOWAS Supplementary Act., the first step provided for under art. 33 (2) involves an amicable settlement, through mechanisms such as good offices, conciliation, mediation or any other agreed dispute resolution mechanism. It is interesting to note that this first step

is mandatory for both state to state disputes and investors to state disputes. In the event that the dispute is not resolved through mutual discussions, the Act. provides the possibility to resort to arbitration involving domestic courts or machinery for the settlement of investment disputes of member states (art. 33 (6)).

74 In the same vein, art. 53 and 54 of ECOWAS Common Investment Code also include a comprehensive dispute settlement mechanism that combines weak and strong mechanisms for both state to state disputes as well as state- investors and investors-investors disputes: consultations, good offices, mediation, conciliation, or any other agreed dispute resolution mechanisms. This soft enforcement mechanism is followed by arbitration, which should preferably be conducted by national and regional alternative dispute resolution mechanisms. At this point, it is noteworthy that under ECOWAS Common Investment Code, the initial stage of consultations and mediation is mandatory in the case of state-to-state disputes (art. 53 (1)) and optional in the case of investors to state disputes (art. 54 (1)), which is a major difference between the Code and the Supplementary Act.

75 With respect to RTIAs concluded by SADC, the analysis showed a mixed approach: on the one hand, the SADC Protocol on Finance and Investment establishes a comprehensive process combining weak and strong third-party mechanisms to ensure effective enforcement of all matters pertaining to the Protocol, including CSR issues. The soft mechanism is the amicable settlement provided in art. 28 (1) of Annex 1 on Co-operation on Investment, which is achieved through consultations within the ministerial committee or relevant subcommittee established under the Protocol. With respect to the strong enforcement mechanism, which is to be considered after exhaustion of local remedies, it is international arbitration (art. 28 (2) of Annex 1 to the Protocol of SADC on Finance and Investment). This provision gives the parties three options: the SADC Tribunal; the International Centre for the Settlement of Investment Disputes (ICSID); and an international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). In case of disagreement between the parties on any of the three alternative options, art. 28 (3) provides that UNCITRAL arbitration will be the default option.

76 On the other hand, the SADC-EU EPA, and the SACU+Mozambique and UK EPA provide only for a weak third-party mechanism in the form of consultations. In effect, art. 10 (2) of the SADC-EU EPA states that ‘a Party may request, through the Trade and Development Committee, consultations with the other Party regarding any matter arising under this chapter.’ This provision is identical word for word to art. 10 (2) of SACU+Mozambique and UK EPA.The SADC-EU EPA explicitly excludes issues pertaining to CSR from the said mechanism. In effect, art. 6 (3) of the said agreement states that ‘the provisions of this Chapter shall not be subject to the provisions of PART III [dispute avoidance and settlement].’ This provision is also identical to art. 6 (3) of the SACU+Mozambique and UK EPA.

77 With respect to the PAIC, the analysis also showed a preference for a combination of soft and strong enforcement mechanisms. Hence, whether in the case of state-state or investor-state disputes, the PAIC encourage the parties to start with soft implementation mechanism, which is consultations, negotiations, and mediation (art. 41 and 42 (1) (b)). The issue is whether the use of the best endeavor language (are encouraged; and should initially seek) implies that this stage could be omitted by any of

the parties. In the absence of a provision providing a straightforward answer or any court decision on the matter, this paper submits that, starting with the soft enforcement mechanism should be mandatory; however, there should be no obligation to reach a satisfactory resolution. The strong enforcement mechanisms envisaged under the PAIC are arbitration and litigation before an African court (art. 41 (2)) for state-state disputes; and arbitration in the case of investor-state dispute (art. 42 (1) (c) and (d)).

78 This paper observes with concerns that RTIAs between African regions and non-African parties, notably the SADC-EU EPA and the SACU+Mozambique and UK EPA, examined favored weak enforcement mechanisms, notably consultations, which is voluntary and does not lead to legally binding decisions in the event of a dispute. This preference for a soft approach to CSR enforcement is driven by the old approach to trade and investment agreements, which as rightly observed by Monebhurrun, was construed solely through the optic of investment promotion and protection and resulted in a relationship of power imbalance with hyper-protected corporate world on the one hand, and oftentimes, vulnerable communities on the other hand. The preference for arbitration and adjudication in African RTIAs among African states is commendable, although the question as to whether any stakeholders can bring a claim before them is questionable.

4.5.2 Participation of non-state actors in the implementation and enforcement process under third-party mechanisms established under African RTIAs

79 The question here is whether any stakeholders, particularly non-state stakeholders such as individual and local communities affected by unethical and irresponsible business conducts, are offered the possibility to bring claims before third-party enforcement mechanisms established under African RTIAs, or to stand a trial before those mechanisms. This question relates to the locus standi of non-state actors. In effect, under the soft law approach to CSR regulation, CSR is either excluded from the dispute settlement mechanism as in the case of the SADC-EU EPA, and the SACU+Mozambique and UK EPA, or participation in the enforcement process is restricted to state parties. This is in contrast with the hard law approach, under which other stakeholders other than states parties are granted access to the dispute settlement mechanism.

80 Starting with RTIAs concluded by ECOWAS, art. 57 of ECOWAS Common Investment Code, provides for such a possibility. It states that ‘access to the ECOWAS Court of Justice is open to Member States, ECOWAS Institutions, corporate bodies, investors and individuals.’ In other words, stakeholders other than states and investors have locus standi and are thus allowed to bring claims before the ECOWAS Community Court of Justice (ECCJ) on matters related to the ECOWAS Common Investment Code, which include CSR issues as well as other unethical and irresponsible business conducts. This approach is novel approach should be saluted for two reasons: First, art. 57 of the ECOWAS Common Investment Code opens the possibility for individuals, including affected members of the local community to seek remedies against an investor or a company for irresponsible business conducts before a regional court. In this respect, following Ebobrah who rightly argues that just like the ECCJ has established itself as ‘a regional Economic Court with significant competence in human rights, accessible with very little restrictions, to state and non-state actors alike’, this paper argues that the

ECCJ has, through art. 57 of ECOWAS Common Investment Code, a golden opportunity to play an important role in protecting vulnerable local communities against potential irresponsible corporate behaviors and business conducts. This is going to be very important in ensuring that African RTIAs not only promote trade and investment, but also protect all stakeholders, and resulting in win-win outcomes for all.

81 Secondly, by allowing access of the ECCJ to corporate bodies and investors, the ECOWAS legislator has weighed in the debate over whether multinationals are subjects of international law, at least at the regional level. This position was followed by the ECCJ in Dexter Oil v Liberia in 2019, where one of the issues was whether the applicant (a MNC) was a proper person to access the Court. In this Case, the ECCJ recalled that 'the Supplementary Protocol 2005 has made provision for both individual and legal persons, for example corporate bodies to access the court, as well as the circumstances under which they can so do'. Based on that, it ruled that 'Dexter Oil Limited is a corporate body duly registered under the extant law of the Republic of Liberia to operate as a Company with interest in the Oil sector and therefore has a right to bring an action against a community official under this provision'. The admissibility of claims by corporate bodies and investors has a corollary, which is the possibility to stand a trial in case of irresponsible business conducts. In effect, it would be inconceivable that corporate bodies and investors would be granted the right to access the court to advance and protect their interests, without the possibility of also appearing in a court of law to answer about their activities.

82 One question at this stage is whether individuals, investors and corporate bodies would need to exhaust local remedies before accessing the ECOWAS Community Court of Justice, or whether they have direct access to the Court? The answer to this question is provided by the ECCJ which has ruled on the non-applicability of the exhaustion of local remedies principle in the ECOWAS regime. This position was first adopted in Karaou V Niger in 2008 and held in several subsequent decisions. This paper agrees with Ohuruogu that the approach adopted by the ECCJ with respect to non-applicability of the exhaustion of local remedies should be hailed, because it has the potential to help avoid unnecessary procedural complications and roadblocks that may arise from inefficient domestic procedures, which may further aggravate the situations of communities affected by situations of socially irresponsible conducts.

83 With respect to RTIAs concluded by SADC, the analysis showed that a narrow approach currently prevails. In effect, whilst art. 28 (2) (a) of the original Annex 1 of the Protocol on Finance and Investment, 2006, provided for the possibility of disputes between and investor and a state party to be refer to the SADC Tribunal subject to the conditions outlined in para 1 of the same provision, this possibility was scraped from the Amended Annex 1. Art. 26 on the dispute settlement of the Amended Annex 1 no longer refers to disputes between investor and state parties, but simply to disputes between state parties. This means that investors are no longer allowed to bring a case, or stand a trial, before the regional enforcement mechanism. This paper agrees with Hansungule and Swart that the move by the SADC legislator, which was undoubtably motivated by the 'saga' resulting from the Campbell Case, 2007, has regrettably, left not only investors, but also potential affected local communities without a possibility for recourse before a regional tribunal in case of irresponsible corporate behaviors as well other unethical and irresponsible business conducts or even instances of human rights violations.

84 With respect to the SADC-EU EPA as well as the SACU+Mozambique and UK EPA, they contain provisions for the participation of other stakeholders, including the local communities and civil society organizations in some of the phases of the enforcement process. In effect, art. 10 (3) of the SADC-EU EPA provides that dialogue and cooperation by the Parties, through the Trade and Development Committee, may involve other relevant authorities and stakeholders. The reference to "other stakeholders" suggests that civil society organizations as well as affected local communities could also participate in dialogues and consultations on matters pertaining to trade and sustainable development, which include CSR issues. However, this approach is still a minimalist approach for two main reasons: first art. 10 (3) uses the conditional language "may", which suggests that the decision on whether other stakeholders participate in the dialogue or cooperation process is not automatic; but ultimately rests with the parties to the Agreement. The second limitation is that the participation of other stakeholders is limited to dialogue and consultations. It does not include the litigation process before the dispute settlement mechanism instituted under the Agreement, which as discussed in the previous section does not entertain issues pertaining to CSR.

85 Finally, with respect to the PAIC, 2016, concluded by ECOWAS and SADC States, it also adopts a minimalist approach, although it is not as restrictive as the one adopted under the Amended Annex 1 of the SADC Protocol on Finance and Investment. In effect the analysis showed that art. 42 (1) (d) of the PAIC provides for the possibility for investor-state disputes to be brought before an African public or African private alternative dispute resolution center for arbitration. However, it does not envisage the participation of individual and local communities.

86 In sum, the analysis of the participation of non-state stakeholders in the enforcement of CSR provisions under African RTIAs in this paper showed an inclination towards a minimalist and soft approach, except for RTIAs concluded by ECOWAS. In the absence of admissibility of claims from individuals and local communities through direct access to the third-party enforcement mechanism, the only option left is indirect access through their member states, which can be full of uncertainties. In addition, whilst member states may be concerned about attracting investment within their jurisdiction with the view to realize their socio-economic development, they should also have at heart the need to ensure that quality of business activities that takes place ultimately leads to sustainable and inclusive development that does not leave some stakeholders worse off. It does therefore appear that there are numerous policy implications of the current regulatory to CSR, some of which may not be fully understood by the various stakeholders.

05. Policy implications of the current approach to CSR in African RTIAs

87 This section discusses policy implications of the current approach for African governments, corporations and investment doing business in Africa, as well as ordinary African and local communities.

88 With respect to African governments, the institutionalisation of CSR provisions in African RTIAs as a mean to tackle unethical and corporate irresponsible behaviors and

in so doing increase corporations' contribution to sustainable development of countries and communities where they operate, is an explicit recognition that governments alone cannot address the challenges of our time, not even through international trade and investment law; and that, corporations and private governance systems have a role to play , as underscored by Utting and Ribeiro. Considering that Africa has taken the bold step to move towards the establishment of a continental market through the adoption of the AfCFTA Agreement, there would be a need to harmonize the various dimensions of CSR provisions to avoid the current heterogeneity and inconsistency. A uniformed rather than the current fragmented approach would be is critical for the integrity of the future AfCFTA because it will ensure that all investors and companies operating across Africa abide by the same CSR standards, and that they do not take advantage of the weak regulatory approach adopted in some regions. In designing a uniformed CSR regime for Africa, there would be a need to ensure that the values and principles of Ubuntu are well articulated, with a view to ensuring that CSR is indeed anchored on African values and not detached from the African context.

89 In addition, since CSR is first and foremost about corporations, and their relationship with the society in which they do business, African governments should enhance corporations as well as local communities' participation in the design of CSR provisions and the development of principles of ethical and responsible business conducts applicable to business operations. In this respect, African integration organisations have a role to play in establishing inclusive multistakeholder mechanisms to ensure the participation of both the private sector and local communities. In the same vein, the inclusiveness of dispute settlement mechanisms established under African RTIAs should be enhanced to allow for non-state actors participation, particularly all potential affected stakeholders, such as local communities, in the enforcement process. This would contribute to holding corporations accountable for case of unethical and irresponsible business conducts. Furthermore, since CSR is gradually becoming an element of business competitiveness, it would be in the interest of African governments to develop and implement CSR facilitation programmes for their companies, with a view to ensuring that they are competitive in the host states. This is particularly important in the African context, where the majority of companies are SMEs.

90 For investors and companies, the institutionalisation of CSR provisions in African RTIAs marks the beginning of a new era where corporations operating in the African context would be scrutinized against principles and standards of sustainable, ethical, and responsible business behaviors and practices. They would also be required to increase their contribution to the sustainable development of countries and communities where they operate. In this respect, the first implication is that corporations would need to integrate CSR principles and standards in all their level of business organisations (internal principles and policies, processes and structure, activities and outcomes including reporting on CSR). This means moving from approaching CSR purely from a philanthropic to a strategic perspective as observed by Rampersad and Skinner. Whilst this may mean additional costs for some corporations, notably MSMEs, the reality is that CSR is also increasingly becoming an element of business competitiveness as noted by Hawkins, particularly in the era of climate change and sustainable development. Hence, it in the medium and long-term interest of corporations to embrace CSR principles and standards. The second implication is that African corporations should also play a pro-active role in spontaneously designing and implementing private CSR regimes in their sector of activity, and in so doing,

contribute to the design of the new CSR governance regimes. An example of this new approach, which should be emulated by regional and continental private sector organisations and industries, is that of the Ethiopian Chamber of Commerce and Sectoral Associations, which adopted in 2014 a Model Code of Ethics for Ethiopian Businesses. The Code articulates five principles and eight ethical standards, including the need to produce and sell products and services at a fair price; ensure that business operations do not adversely affecting the health and safety of the customers and the quality of environment; and the need to be sensitive to the dignity, culture and religion of stakeholders. By embracing CSR and developing private CSR schemes and initiatives, the African private sector will not only contribute to shaping the CSR agenda in Africa, but also avoid being imposed private CSR standards and principles developed outside the continent by foreign multinationals, which are often perceived to be detached from the African reality.

91 The implication for African local communities and individual citizens is that they should actively participate in the design of CSR principles and standards, and more importantly, be bold enough to bring cases against corporations responsible for unstainable, unethical, and irresponsible behavior within their jurisdiction. In effect, whilst the institutionalization of CSR provisions may give the assurances that corporations will, in principle, comply with a minimum of sustainable, ethical, and responsible business standards as they conduct business in Africa, the weak legal dimensions of the said provisions discussed in Section 4 of this paper means that ordinary Africans and local communities will have to play an active role in ensuring that corporations effectively abide those standards and principles, so that they do not remain simply aspirational.

06. Conclusion

92 The analysis of CSR provisions in African RTIAs, focusing on agreements involving ECOWAS and SADC has showed the following: first there is a growing trend towards the institutionalization of CSR provisions in African RTIAs, even though there is no uniformed approach even among RTIAs concluded by the same region, as observed in the case of the Tripartite Agreement, 2015. Based on this finding, this paper submits that Africa is in unison and converges towards the general upward trend regarding the institutionalization of CSR in trade and investment agreement.

93 The second finding is that the most ambitious and elaborate CSR clauses are found in RTIAs concluded among African countries rather than in those concluded between African regions and non-African partners. This is the case of art. 34 (2) of ECOWAS Common Investment Code and art. 22 of the Pan-African Investment Code. This paper therefore argues that even as Africa has joined the queue in the institutionalization of CSR provisions in RTIAs, it has gradually become standards and norm setter in this area, rather than an importer of norms.

94 Thirdly, with respect to the legal approach used in designing CSR provisions in RTIAs examined in this paper, using the Analytical framework of legalization, the analysis showed that rather than the traditional voluntary and soft law approach, or the mandatory and hard law approach, a sui generis approach appears to be the norm in African RTIAs. Hence, despite the fact all explicit CSR provisions examined in this paper are found in legal instruments that have treaty status (apart from the PAIC) and are

located in operative provisions, the language used is weak and heterogenous across RTIAs. In several instances, a voluntary and condition language or a combination of hard and conditional language are the most preferred approaches. This hybrid and sui generis approach is further amplified by the weak precision dimension of CSR clauses in African RTIAs, which featured limited references to specific international and regional guidelines and principles. Equally, the limited references to African values embodied in the concept of Ubuntu in five of the six CSR provisions examined (apart from ECOWAS Common Investment Code), pointed to the partial "Africanization" of the CSR agenda on the continent, as observed by Akinkugbe, Mbengue and Schacherer. Similarly, the lack of any reference to private CSR governance regimes in RTIAs examined is an indication of the preeminence of a state-centric tendency in regulating CSR in the African context; an approach that is outdated, considering that private CSR regimes have the potential to enrich CSR governance.

95 Interestingly, African RTIAs exhibited some positive innovations, particularly with respect to the delegation dimension of CSR provisions (admissibility of claims from non-state stakeholders before regional courts), which are to be saluted. Although these innovations are currently limited to RTIAs involving ECOWAS only, they are an indication of African countries' resolve to ensuring that African economic integration initiatives tackle situations of irresponsible corporate behaviors and business conducts more effectively. These innovations are also very important going forward, given that the African continental market established through the AfCFTA Agreement is still in the make. The negotiations of future protocols or review of existing ones would benefit from the lessons learnt and best practices from extant African RTIAs, some of which are highlighted in this paper. Future research should therefore examine the extent to which the AfCFTA Protocols on Investment, Competition Policy and Intellectual Rights Agreement concluded in 2023 have taken on board those lessons.

96 Considering the policy implications discussed in this research, this paper argues that an effective CSR regime for Africa should divorce from the current approach, which although unique, is still very inclined toward voluntary and soft law. One option worth considering is a harmonized and integrated approach to CSR anchored on Ubuntu, with the following elements: first, a uniformed or at least harmonized determination of minimum standards of ethical and responsible business conducts guided by Ubuntu's principles and values of inclusiveness, cooperation, social cohesion, sharing, dignity and respect between businesses and local communities. This will help ensure consistency and a common understanding of CSR across the African market, promote fair competition among companies operating in the said market, and in so doing, protect the integrity of that market. This will also help enrich CSR provisions with African values and principles that speaks to the African context, and in so doing enhance the Africanization on African trade and investment laws. The second element is the integration of new forms of CSR governance regimes, such as CSR facilitation and promotion as opposed to the current one sided "CSR mandating", and recognition or endorsement of private CSR governance regimes. CSR facilitation and promotion measures to support businesses, will be important to ensure that African companies can easily comply with sustainable, ethical, and responsible business standards in host state, particularly in an era where CSR principles and standards are increasingly incorporated in market access requirements. The third element is the democratization of the design and enforcement process of CSR standards and principles to allow participation of non-state actors in not only the development of CSR principles, but

more importantly, in the dispute settlement mechanism. The possibility for court claims from local communities and other individual affected by unethical and irresponsible business conducts will certainly exert indirect pressure on corporations, given that they would be concerned about the cost of court litigation or reputational issues associated with potential lawsuits.

97 Ultimately, the institutionalisation of CSR in RTIAs opens a new era of collaboration and cooperation among state governments, companies, and local communities for the development, implementation, and enforcement of CSR principles and standards, with a view to enhancing ethical and responsible business practices. The enhanced and integrated approach to CSR regulation recommended in this paper will certainly contribute to that. It is also hoped that African regional courts will also play their partition in ensuring that what is well articulated in legal provisions are enforced, so that CSR provisions are not merely decorative features of African RTIAs. This will be critical to ensure that African integration initiatives do not leave some stakeholders worse off, but rather, result in win-win outcomes for all. Going forward, the jurisprudence of African courts on corporate business conducts would be an area worth considering for future research.

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NOTES

1. The only exception to this obligation, which is understandable, is that business information deemed confidential which must be protected. Article 28 states that 'Home States shall protect confidential business information in this regard'.
2. See also art. 13 (6) of the SADC-EU EPA.
3. Article 106(1) and (3) and art. 107 of the SACU+Mozambique and UK EPA are identical to art. 105(1) and (3) and art. 106 of the SADC-EU EPA.

ABSTRACTS

Left alone, economic integration initiatives, which aim to promote growth through investment and trade liberalization, do not automatically generate win-win outcomes for all stakeholders, or lead to the inclusive economic growth and sustainable development of participating countries. This situation which is due among others to possible market failures and externalities of corporations' activities, has increasingly become a matter of concern with the numerous corruption scandals; human rights violations and environmental degradation involving corporations observed in a recent past. How therefore to continue promoting economic integration while ensuring socially responsible conducts from businesses in societies where they operate? One approach that has recently gained traction is the institutionalization of corporate social responsibility (CSR) clauses in trade and investment agreements. This paper analyses 10 African regional trade and investment agreements concluded between 2000 and 2020 to determine the extent to which they converge with this trend and the approach adopted in regulating CSR. The research complements the literature on the nexus between international law and CSR in the African context.

RÉSUMÉ
Laissées à elles-mêmes, les initiatives d'intégration économique, qui visent à promouvoir la croissance par la libéralisation commerciale et économique, ne génèrent pas automatiquement des résultats gagnant-gagnant pour toutes les parties prenantes, ou ne conduisent pas à la croissance économique inclusive et au développement durable des pays participants. Cette situation, qui est due entre autres à d'éventuelles défaillances du marché et à des externalités des activités des entreprises, est devenue de plus en plus préoccupante avec les nombreux scandales de corruption, de violation des droits de l'homme et de dégradation de l'environnement impliquant des entreprises. Comment donc continuer à promouvoir l'intégration économique tout en garantissant des comportements socialement responsables des entreprises dans les

sociétés où elles opèrent ? Une approche qui a récemment gagné du terrain est l'institutionnalisation des clauses de responsabilité sociale des entreprises (RSE) dans les accords de commerce et d'investissement. Cet article analyse 10 accords régionaux africains de commerce et d'investissement conclus entre 2000 et 2020 pour déterminer dans quelle mesure ils convergent avec cette tendance à l'institutionnalisation des clauses sur la RSE, et l'approche adoptée dans la réglementation de la RSE. La recherche complète la littérature sur le lien entre le droit international et la RSE dans le contexte africain.

INDEX

Mots-clés: intégration économique, responsabilité sociale des entreprises, accords régionaux de commerce et d'investissement, ZLECAf, CEDEAO, et SADC.
Keywords: economic integration, corporate social responsibility, regional trade and investment agreements, AfCFTA, ECOWAS and SADC

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