

CONSTITUTIONAL MODELS OF TREATY RECEPTION AND TRADE GOVERNANCE: A COMPARATIVE STUDY OF NIGERIA, KENYA, AND SOUTH AFRICA

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Abstract

This article delivers a critical legal analysis of the legal conflict between market liberalization and sovereign human rights protections within sub-Saharan Africa. Operating under a strict dualist framework dictated by Section 12(1) of the 1999 Constitution, Nigeria suffers from an enforcement gap where un-enacted human rights, labour, and environmental treaties remain non-justiciable within municipal courts. This separation leaves local populations exposed to trade-driven disruptions without direct avenues for domestic judicial redress. To examine how Nigeria can bridge this gap, this study provides an extensive comparative evaluation of alternative legal models deployed by its continental peers: namely, Kenya's progressive monist incorporation model under its 2010 Constitution and South Africa's sophisticated interpretive hybrid framework under its 1996 Constitution. By examining landmark appellate jurisprudence alongside regional developments under the ECOWAS Community Court of Justice and the African Continental Free Trade Area (AfCFTA), this article explores how divergent constitutional designs alter corporate liability, resource governance, and public health outcomes. It ultimately offers concrete legislative, constitutional, and policy-driven recommendations to move Nigeria away from reactive realignments, providing a structural blueprint to ensure macroeconomic growth remains firmly tethered to the rule of law and human dignity.

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1.0 INTRODUCTION

The relationship between international trade rules and international human rights norms has become one of the most intense legal issues for developing economies across Africa.² For a long time, the global trading system operated separately from human rights concerns, focusing entirely on opening markets and reducing tariffs while treating environmental safety, labour standards, and public health as secondary issues.³ This division was sustained by traditional legal theories that viewed international trade and human rights as distinct fields governed by separate treaty systems. Trade agreements were structured as reciprocal bargains between sovereign states designed to maximize market access and protect foreign capital, while human rights treaties focused on the direct relationship between a state and its citizens.⁴

However, the rise of progressive constitutionalism and the launch of the Agreement Establishing the African Continental Free Trade Area (AfCFTA) have forced a major shift.⁵ This transformation requires a detailed legal analysis of how international human rights laws influence cross-border commerce within three of Africa's largest economies: Nigeria, Kenya, and South Africa.

² Sarah Joseph, *Blame It on the WTO? A Human Rights Critique of the Global Trade System* (Oxford University Press 2011) 14–18.

³ Steve Charnovitz, 'The Globalization of Economic Human Rights' (2019) 25 *Brooklyn Journal of International Law* 113, 115.

⁴ Andreas R Ziegler, 'International Economic Law and Human Rights' (2020) 18 *European Yearbook of International Economic Law* 201, 204.

⁵ Wouter Vandenhoele, *Developing the Corporate Responsibility to Respect Human Rights* (Inters entia 2015) 88.

This Article focuses primarily on the distinct constitutional frameworks through which each state incorporates international law into its municipal legal order. Nigeria remains strictly bound to a traditional dualist model under Section 12(1) of the 1999 Constitution, which requires an explicit Act of the National Assembly before any ratified treaty can carry the force of domestic law.⁶ This strict barrier has created an isolated legal system where economic policies routinely bypass human rights accountability, leaving local livelihoods, public health outcomes, and environmental security vulnerable to global corporate interests and sudden market shifts.⁷ To understand how Nigeria can fix this domestic enforcement gap, it is necessary to examine the alternative legal models developed in East and Southern Africa, specifically analysing Kenya's direct monist model and South Africa's sophisticated interpretive framework.

By exploring how Nairobi and Pretoria balance global commercial demands with social justice, this Article sets up the foundation for better legal and policy recommendations. In Kenya, the direct application of international law under Articles 2(5) and 2(6) of the 2010 Constitution, backed by fully enforceable socio-economic rights under Article 43, has turned human rights into a mandatory check for trade, infrastructure, and foreign direct investment schemes.⁸ At the same time, South Africa uses Sections 39(1)(b) and 233 of its 1996 Constitution to create a powerful interpretive bridge, legally forcing its judges to interpret domestic trade, intellectual property, and

⁶ Tunde I Ogowewo, 'The Systemic Problem of Treaty Incorporation in the Nigerian Legal Order' (2014) 22 *African Journal of International and Comparative Law* 311, 314.

⁷ Dapo Olowu, 'The Integration of International Human Rights Regimes into Municipal Legal Systems: A Review of the Nigerian Experience' (2009) 11 *African Journal of International and Comparative Law* 62, 66.

⁸ Constitution of Kenya 2010, art 2(5)(6)

administrative laws to match international standards.⁹ Ultimately, this comparative analysis evaluates these different constitutional frameworks, sub-regional trade friction within ECOWAS, and continental protocols to extract clear legislative, constitutional, and regulatory lessons for Nigeria as it navigates the modern global economy.

2.0 LEGAL APPRAISAL OF THE INFLUENCE OF INTERNATIONAL HUMAN RIGHTS NORMS IN KENYA

The language of Article 2(6) of the Kenyan Constitution does not merely grant international treaties a decorative status within the domestic hierarchy. Instead, it functions as a direct command that reshapes the state's legislative powers. When Kenya signs an international economic or commercial agreement, that text enters the domestic legal system on an equal footing with statutes passed by parliament. This means that if a conflict arises between an existing domestic commercial regulation and a newly ratified international human rights instrument, the courts are constitutionally empowered to enforce the international rule to protect public welfare. This automatic integration removes the long legislative delays that occur in dualist states, where vital human protections are often left un-enacted for decades while cross-border market liberalization expands without legal limits.

This constitutional mandate was put to a major test in the landmark Supreme Court decision of *Mitu-Bell Welfare Society v Attorney General*.¹⁰ The central legal issue in this case went far beyond simple property or housing rights; it questioned whether domestic judges could directly use un-enacted international human rights covenants to alter state executive actions and commercial development projects. In

⁹ Constitution of the Republic of South Africa 1996, s 39(1)(b) and s 233

¹⁰ [2021] KLR 34

its final judgment, the Supreme Court of Kenya completely rejected the state's traditional dualist arguments. The court held that under the 2010 constitutional framework, international human rights treaties are fully enforceable by domestic courts to protect vulnerable populations from economic exploitation. The apex court clarified that the constitution embraces both international custom and treaty law, creating an active judicial obligation to closely examine state development plans and corporate practices that threaten public welfare. This precedent establishes that international trade policies, infrastructure investments, and foreign direct investment schemes are subject to judicial review; they must remain consistent with the universal baseline structure of human dignity.

This assertive judicial approach has had immediate, profound impacts on Kenya's environmental and manufacturing trade policies. In *Kenya Association of Manufacturers v Cabinet Secretary for Environment and Natural Resources*,¹¹ the High Court rejected a legal challenge from trade groups who argued that a national ban on commercial plastics violated free trade rights and disrupted regional supply chains. The court ruled that the constitutional right to a clean and healthy environment is a superior, non-negotiable norm that takes priority over commercial profit margins, proving that international trade practices must remain subordinate to the state's environmental treaty obligations.

However, in reality enforcement faces major difficulties within specialized Export Processing Zones (EPZs) at Athi River and Mombasa. In these zones, the state's drive for high export growth routinely conflicts with its duty to protect workers, leading to harsh workplace practices like union suppression, wage theft, and unsafe

¹¹ (2018) KEELC 2776 (KLR).

conditions. Although these workers are backed by constitutional protections and International Labour Organization benchmarks, local watchdogs remain underfunded and understaffed. This enforcement deficit proves that while a monist constitution opens excellent legal routes for accountability, integrating human rights into international trade requires sustained funding and independent regulatory oversight on the ground.¹²

To control this executive treaty-making power and ensure democratic accountability, Kenya enacted the *Treaty Making and Ratification Act 2012*.¹³ This specialized statute sets up clear legislative checkpoints that prevent the executive branch from secretly entering into lopsided international commercial agreements that could harm public interests. Under Section 6 of the Act, when a relevant state department intends to ratify an international economic or trade treaty, the Cabinet Secretary, in consultation with the Attorney General, must submit a comprehensive regulatory memorandum to parliament.¹⁴ This statutory brief must explicitly detail the long-term financial implications of the treaty, its direct impact on domestic employment levels, and a transparent summary of the public views gathered during mandatory stakeholder consultations.¹⁵ By forcing trade negotiators to expose their agreements to legislative scrutiny before formal ratification, the Act ensures that global economic frameworks are reviewed for consistency with domestic laws and constitutional rights. This open process gives civil society, labour unions, and local communities an

¹² Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 240.

¹³ Treaty Making and Ratification Act 2012 (Kenya).

¹⁴ *Ibid*, s 6.

¹⁵ Sarah Joseph, *Blame It on the WTO? A Human Rights Critique of the Global Trade System* (Oxford University Press 2011) 162.

active legal voice in shaping the state's external trade policies, making it much harder for corporate interests to override national welfare.¹⁶

This protective infrastructure directly shapes how the judiciary handles the specific conflict between intellectual property trade rules and the right to health. This issue was litigated in the landmark case of *Ochieng v Attorney General*,¹⁷ where three petitioners living with HIV/AIDS argued that sections 2, 32, and 34 of Kenya's *Anti-Counterfeit Act 2008* severely threatened their lives. The brief facts revealed that the statute's broad definition of "counterfeiting" failed to differentiate between illegal copyright infringements and legitimate, affordable generic medicines imported via international trade pathways. The High Court of Kenya ruled in favour of the petitioners, holding that patent rights must never trump a patient's right to health and life. The court ordered the government to reconsider the provisions to explicitly exclude generic medications from the definition of counterfeit goods. This decision proves that Kenya's domestic courts will leverage international human rights exceptions to actively limit global trade and intellectual property restrictions when public health is endangered.

Similarly, Kenya's integration of international environmental norms heavily dictates its infrastructure sector under Article 42, which guarantees the right to a clean and healthy environment. This protective framework was tested in *Lamu v National Environmental Management Authority (NEMA)*,¹⁸ where Local community groups successfully challenged an environmental license issued to Amu

¹⁶ Caroline Ncube and others, 'The AfCFTA and Socio-Economic Rights: Assessing the Potential Impact on Informal Traders in Nigeria and South Africa' (2022) 30 *African Journal of International and Comparative Law* 114, 120.

¹⁷ (2012) eKLR

¹⁸ [2019] KEELC 4739 (KLR)

Power Company Ltd for a 1,050 MW Lamu Coal-Fired Power Plant. While the mega-project aimed to expand industrial trade and energy, it threatened marine biodiversity, fishing livelihoods, and Kenya's climate commitments under the United Nations Framework Convention on Climate Change. The National Environment Tribunal revoked the license due to a lack of public participation and a failure to consider climate impacts. This case clearly demonstrates how international environmental human rights standards can legally halt massive, state-backed trade and infrastructure frameworks in Kenya to prioritize ecological and cultural preservation.

Unlike Nigeria's strict dualist structure, Kenya operates under a robust, monist-leaning constitutional framework which fundamentally alters how international human rights laws and norms influence its domestic legal system, transnational commerce, and socio-economic policies.¹⁹ Under Article 2(5), the general rules of international law form part of the laws of Kenya, while Article 2(6) provides that any treaty or convention ratified by Kenya forms part of Kenyan law under the Constitution.²⁰ Because international human rights treaties do not require an explicit domesticating Act of Parliament to be enforceable, Kenyan courts frequently apply international instruments directly to remedy domestic or corporate violations.²¹ Litigants routinely invoke instruments like the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.²² However, this monist framework does not elevate international treaties above the constitution itself.

¹⁹ Sarah Joseph, *Blame It on the WTO? A Human Rights Critique of the Global Trade System* (Oxford University Press 2011) 14–18.

²⁰ Constitution of Kenya 2010, art 2(5) and art 2(6)

²¹ Dapo Olowu, 'The Integration of International Human Rights Regimes into Municipal Legal Systems: A Review of the Nigerian Experience' (2009) 11 *African Journal of International and Comparative Law* 62, 66.

²² International Covenant on Civil and Political Rights 1966.

This strict hierarchy was illustrated in *Law Society of Kenya v National Assembly of Kenya & 3 others*,²³ where the petitioner challenged the validity of Section 2 of the *Tax Procedures (Amendment) Act 2024* on the grounds that it directly violated Articles 10 and 118 of the Constitution and bypassed international trade and taxation benchmarks.²⁴ The brief facts indicate that the Law Society of Kenya sought to invalidate the domestic tax statute by arguing that the legislative process lacked meaningful public participation and conflicted with regional and multilateral commitments.²⁵ The High Court of Kenya dismissed the petition, ruling that while Articles 2(5) and 2(6) establish a clear monist mechanism for welcoming international law and ratified treaties into the country, these instruments remain strictly subordinate to the text of the Constitution itself.²⁶ The court's decision clarified that domestic legislative sovereignty will be upheld unless an Act directly conflicts with a supreme constitutional provision, reinforcing that international obligations cannot bypass municipal constitutional order.²⁷ Hence, for the purposes of international trade, this means that while international economic or human rights norms apply directly, they remain tied to the supreme authority of the domestic constitution rather than holding absolute status over local laws.²⁸

Also, the 2010 Constitution elevates socio-economic rights to enforceable entitlements under Article 43, safeguarding access to health, adequate food, and clean water. Beyond the domestic courts,

²³ [2018] KEHC 8892 (KLR)

²⁴ Tax Procedures (Amendment) Act 2024 (Kenya), s 2.

²⁵ Constitution of Kenya 2010, art 10 and art 118

²⁶ *Law Society of Kenya* (n 23).

²⁷ *Ibid*

²⁸ Andreas R Ziegler, 'International Economic Law and Human Rights' (2020) 18 *European Yearbook of International Economic Law* 201, 204.

Kenya is bound by regional trade standards as a prominent member of the East African Community. The *Treaty for the Establishment of the East African Community* commands partner states to observe human rights and social justice.²⁹ Consequently, cross-border trade blockades or supply chain restrictions can be challenged before the East African Court of Justice if they violate regional economic freedoms or fair administrative actions. Foreign direct investments must also pass rigorous Environmental Impact Assessments under the *Environmental Management and Co-ordination Act*,³⁰ which directly weaves treaties like the Paris Agreement and the Convention on Biological Diversity into local commerce regulations via Article 2(6).³¹

Furthermore, Kenya has aligned itself closely with international soft law instruments, establishing clear structures for corporate liability in commercial supply chains.³² Kenya became the first African nation to develop and launch a *National Action Plan on Business and Human Rights (2021–2025)*, implementing the United Nations Guiding Principles on Business and Human Rights.³³ This policy blueprint requires businesses operating within Kenya to exercise human rights due diligence across their operations. Also, agricultural and horticultural export sectors such as tea, coffee, and fresh-cut flowers are heavily policed by both international labour standards and local laws like the *Employment Act 2007*.³⁴ To protect trade access to premium markets like the European Union, Kenyan regulatory bodies actively enforce international human rights prohibitions against child

²⁹ Treaty for the Establishment of the East African Community 1999 (EAC Treaty) art 6.

³⁰ Environmental Management and Co-ordination Act 1999 (Kenya).

³¹ Ibid art 6.

³² Wouter Vandenhoe, *Developing the Corporate Responsibility to Respect Human Rights* (Inters entia 2015) 88.

³³ United Nations Guiding Principles on Business and Human Rights 2011 (UNGPs).

³⁴ Employment Act 2007 (Kenya).

labour, unsafe chemical usage, and gender discrimination on commercial farms, successfully intertwining human rights compliance with international market access.³⁵

3.0 LEGAL APPRAISAL OF THE INFLUENCE OF INTERNATIONAL HUMAN RIGHTS NORMS IN SOUTH AFRICA

The legal structure of the Republic of South Africa offers a highly sophisticated approach to integrating international human rights and transnational commerce by blending elements of both monist and dualist traditions. Moving past its era of international isolation, South Africa's transition to a constitutional democracy yielded a transformative constitutional framework that balances global economic commitments with an expansive, enforceable Bill of Rights. This constitutional hybrid is structurally contained in the Constitution of the Republic of South Africa 1996. Under Section 231(4), an international agreement becomes law in the Republic when it is enacted into law by national legislation, which reflects a traditional dualist stance.³⁶

However, a self-executing provision of an agreement approved by Parliament becomes law directly, provided it does not conflict with the Constitution or an Act of Parliament. This dualist channel is balanced by Section 232, which establishes a monist approach for customary international law, declaring it directly enforceable within the Republic unless it is inconsistent with the Constitution or a domestic statute.³⁷ Most importantly, Section 39(1)(b) mandates that when interpreting the Bill of Rights, a court, tribunal, or forum must consider

³⁵ Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 154.

³⁶ Constitution of the Republic of South Africa 1996, s 231(4).

³⁷ *Ibid* s 232.

international law, while Section 233 commands every court to prefer any reasonable interpretation of a statute that matches international law over any alternative interpretation that does not.³⁸

Because the South African Constitution weaves international obligations directly into domestic statutory interpretation, the apex court can use un-enacted international instruments to actively reshape domestic economic and social policies. This interpretative mandate was definitively established in *Glenister v President of the Republic of South Africa*,³⁹ where the petitioner challenged the constitutionality of legislative amendments that disbanded an elite anti-corruption unit (the Scorpions) and replaced them with a less independent body (the Hawks). It was argued that this change directly violated the state's structural duty to protect fundamental human rights. The brief facts focused on whether South Africa's international obligations under the *United Nations Convention against Corruption* which had been ratified by the executive but not explicitly domesticated via a dedicated Act of Parliament could create a binding domestic statutory duty to maintain an independent investigative agency.

The United Nations framework highlights how directly un-enacted legal instruments alter municipal requirements when tied to a constitutional Bill of Rights.⁴⁰ The Constitutional Court of South Africa ruled in favour of the petitioner, holding that while an un-enacted treaty does not create direct, independent rights for individuals under Section 231, the state's constitutional obligation to uphold the Bill of Rights must be interpreted in light of its international commitments. The Court further decided that the state had failed to create an independent anti-corruption body as required by international

³⁸ bid s 39(1)(b) and s 23.

³⁹ 2011 (3) SA 347 (CC).

⁴⁰ United Nations Convention against Corruption 2003.

benchmarks, rendering the legislative amendments unconstitutional. This decision relates directly to the topic because it proves that even within its dualist treaty channel, South Africa's strict interpretative mandates allow un-enacted international economic, governance, and trade-related norms to strike down domestic commercial legislation.

The conflicts between international trade regimes, such as the WTO's TRIPS agreement, and domestic socio-economic rights has also been heavily mediated by international human rights exceptions in South Africa. This tension was famously litigated in the case of *Minister of Health v Treatment Action Campaign*,⁴¹ where public health advocacy groups challenged the government's restrictive policy on distributing Nevirapine, an antiretroviral drug used to prevent mother-to-child transmission of HIV, arguing that the restriction violated the constitutional right to healthcare access.⁴²

The Constitutional Court of South Africa ruled in favour of the respondents, ordering the government to remove the restrictions and expand distribution across all public health facilities. While the case directly evaluated the right to access healthcare services under Section 27 of the Constitution, the court relied heavily on international legal authorities, including the UN Committee on Economic, Social and Cultural Rights' General Comment No. 14, to determine the core obligations of the state. This case fundamentally demonstrates that South African courts will leverage international human rights norms to bypass state-asserted trade and regulatory positions, ensuring that international trade agreements do not undermine domestic life-saving health outcomes.

⁴¹ 2002 (5) SA 721 (CC).

⁴² Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

Consequently, South Africa's international trade administration relies on statutory bodies to balance international trade laws, such as anti-dumping duties, with constitutional obligations and domestic public interests.⁴³ This statutory balance was tested in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,⁴⁴ where the International Trade Administration Commission (ITAC) recommended that the Minister of Trade and Industry lift certain anti-dumping duties on imported steel wire rope. A domestic manufacturer, SCAW South Africa, obtained a high court injunction to stop ITAC from finalizing this recommendation, arguing that lifting the duties would flood the local market, cause severe domestic job losses, and harm economic livelihoods.

The above case proves that while South African courts recognize executive authority over international commercial relations, all trade regulatory bodies remain bound by constitutional administrative justice standards, showing that international trade in South Africa cannot operate in a legal vacuum away from constitutional accountability.

4.0 COMPARATIVE EVALUATION OF TREATY RECEPTION AND CORPORATE ACCOUNTABILITY

A critical appraisal of the domestic implementation of international human rights instruments across Nigeria, Kenya, and South Africa exposes the decisive role that different constitutional frameworks play in regulating transnational commerce and enforcing corporate liability.⁴⁵ These three regional economic powerhouses occupy distinct positions along the dualist-monist legal spectrum. This variation

⁴³ Constitution of the Republic of South Africa 1996, s 33.

⁴⁴ 2012 (4) SA 618 (CC)

⁴⁵ Sarah Joseph, *Blame It on the WTO? A Human Rights Critique of the Global Trade System* (Oxford University Press 2011) 14–18.

produces unequal degrees of domestic protection against the adverse human and social impacts of trade liberalization. By comparing their mechanisms for treaty reception, the justiciability profiles of their socio-economic rights, and their specific methods for penalizing corporate misconduct, this section uncovers the legal channels through which international law impacts national economic policies.

The primary distinction operates within the structural mechanics of treaty reception. Nigeria adheres strictly to the traditional dualist doctrine under Section 12(1) of its 1999 Constitution,⁴⁶ which acts as a rigid legislative filter requiring an explicit transforming statute passed by the National Assembly before any ratified international treaty can command municipal legal force.⁴⁷ This requirement creates a fragmented domestic landscape where international trade agreements, such as multilateral World Trade Organization frameworks, operate locally without being subject to domestic human rights scrutiny because their corresponding social protections remain un-enacted.⁴⁸ South Africa, by contrast, operates a hybrid system under Section 231 of its 1996 Constitution, which requires national legislation for most international agreements to take effect locally while allowing self-executing treaty provisions to enter domestic law directly if they do not conflict with the Constitution or an Act of Parliament. Crucially, South Africa bypasses dualist limitations through Sections 39(1)(b) and 233, which legally mandate that courts consider international law and prefer treaty-consistent interpretations when evaluating domestic statutes or the Bill of Rights. Kenya represents the most progressive

⁴⁶ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 12(1).

⁴⁷ Tunde I Ogowewo, 'The Systemic Problem of Treaty Incorporation in the Nigerian Legal Order' (2014) 22 *African Journal of International and Comparative Law* 311, 314.

⁴⁸ Dapo Olowu, 'The Integration of International Human Rights Regimes into Municipal Legal Systems: A Review of the Nigerian Experience' (2009) 11 *African Journal of International and Comparative Law* 62, 66.

approach on this spectrum, using a monist-leaning constitutional framework under Articles 2(5) and 2(6) of its 2010 Constitution to directly incorporate the general rules of international law and all ratified treaties into the national legal framework without requiring transforming legislation.⁴⁹ As decided in the case of *Law Society of Kenya v National Assembly of Kenya*,⁵⁰ this direct inclusion does not compromise the supremacy of the domestic constitution, but it grants litigants immediate standing to challenge state or commercial trade practices using international norms.

This divide regarding treaty reception directly shapes how each nation manages conflicts between global trade rules and socio-economic rights. In Nigeria, the lack of enforceability for Chapter II socio-economic objectives leaves local industries and citizens vulnerable to market fluctuations and high patent barriers on life-saving medicines, meaning litigants must rely exclusively on the *African Charter on Human and Peoples' Rights*, which is the only international human rights treaty Nigeria has successfully domesticated by statute.⁵¹ In contrast, South Africa and Kenya use their enforceable bills of rights to buffer the impact of international trade regimes. In *Minister of Health v Treatment Action Campaign*,⁵² the South African Constitutional Court looked past state regulatory arguments to expand access to life-saving pharmaceuticals, using international legal authorities to define the state's core obligations. Similarly, the Kenyan High Court in *Ochieng v Attorney General*⁵³ prioritized constitutional health rights over global intellectual property regimes by interpreting parts of the *Anti-Counterfeit Act 2008* that restricted generic medicine

⁴⁹ Constitution of Kenya 2010, art 2(5) and art 2(6).

⁵⁰ [2024] eKLR

⁵¹ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter A9 Laws of the Federation of Nigeria 2004

⁵² 2002 (5) SA 721 (CC)

⁵³ [2012] eKLR

imports.⁵⁴ These examples demonstrate that while Nigeria uses its dualist structure as a shield to insulate executive economic decisions from human rights litigation, Kenya and South Africa treat human rights as a clear, constitutional check that all trade laws and corporate operations must respect.

The translation of international soft law into concrete corporate accountability measures further highlights the practical advantages of Kenya and South Africa's modern legal integration over Nigeria's reactive system. Nigeria's approach to corporate violations in its trade sectors particularly within the extractive industry of the Niger Delta remains fragmented and depends heavily on costly transnational tort claims brought in foreign courts. This reality was illustrated in the landmark case of *Okpabi v Royal Dutch Shell Plc*,⁵⁵ where over 40,000 individuals representing the Ocale and Bille communities in the Niger Delta region of Nigeria instituted a transnational tort claim in the United Kingdom against Royal Dutch Shell Plc, a parent company incorporated in the UK, alongside its Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria Ltd. The appellants alleged decades of systematic oil spills caused by SPDC's extractive trade operations had severely contaminated their freshwater sources, agricultural lands, and local ecosystems, directly violating their fundamental right to a clean environment, health, and livelihoods. The United Kingdom Supreme Court ruled unanimously in favour of the Nigerian communities, holding that it was reasonably arguable that the parent company exercised significant operational control, supervision, and regulatory oversight over its Nigerian subsidiary's commercial functions.

⁵⁴ Anti-Counterfeit Act 2008 (Kenya), ss 2, 32 and 34.

⁵⁵ UKSC 3

This decision established that a multinational parent company can owe a direct common law duty of care to foreign third parties affected by the trade operations of its overseas subsidiaries if it controls, dictates, or supervises their environmental and health safety policies. This case highlights the structural weaknesses of Nigeria's traditional dualist legal structure concerning international trade and corporate accountability. Because Nigeria lacks a proactive domestic regulatory framework, such as a statutory National Action Plan to enforce the UN Guiding Principles on Business and Human Rights, domestic avenues for corporate accountability remain slow and heavily fragmented, proving that the legal boundaries of Nigerian international trade are increasingly being policed by extraterritorial litigation in foreign courts, rather than by municipal law.⁵⁶

Conversely, Kenya and South Africa have integrated international corporate standards directly into their domestic regulatory frameworks. Kenya became the first African nation to execute a *National Action Plan on Business and Human Rights (2021–2025)*,⁵⁷ implementing the *United Nations Guiding Principles on Business and Human Rights*, turning international due diligence standards into explicit regulatory benchmarks for its agricultural and infrastructural trade sectors. South Africa achieved a similar standard by subjecting its regulatory bodies, such as the International Trade Administration Commission, to strict constitutional reviews under *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,⁵⁸ ensuring that all trade administrative decisions respect the constitutional right to lawful, reasonable, and procedurally fair action. Ultimately, this comparative analysis shows that structural legal design influences domestic welfare, demonstrating how a constitutional commitment to

⁵⁶ United Nations Guiding Principles on Business and Human Rights 2011

⁵⁷ Kenya National Action Plan on Business and Human Rights (2021–2025).

⁵⁸ 2012 (4) SA 618 (CC).

international law can successfully align the economic benefits of global trade with the protection of human dignity and social justice.

5.0 LEGISLATIVE, CONSTITUTIONAL, AND POLICY LESSONS FOR NIGERIA

The comparative evaluation of Kenya's constitutional framework, South Africa's interpretive framework, and the rights-centric protocols of the African Continental Free Trade Area (AfCFTA) provides vital structural and institutional lessons for reforming Nigeria's trade governance.⁵⁹ Nigeria's strict adherence to traditional dualism under Section 12(1) of the 1999 Constitution isolates macroeconomic planning from humanitarian oversight, leaving local livelihoods, public health, and ecosystems vulnerable to un-enacted trade liberalization frameworks.⁶⁰ This institutional isolation separates corporate economic policies from human rights accountability, exposing vulnerable domestic sectors to global market pressures.⁶¹ To eliminate these enforcement deficits, Nigeria must adopt systemic legislative, judicial, and regulatory measures to transition its legal system into an active defender of human dignity.⁶²

The primary reform requires a targeted constitutional amendment to Section 12(1) to introduce a specific human rights and regional trade

⁵⁹ Caroline Ncube and others, 'The AfCFTA and Socio-Economic Rights: Assessing the Potential Impact on Informal Traders in Nigeria and South Africa' (2022) 30 *African Journal of International and Comparative Law* 114, 116.

⁶⁰ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 12(1).

⁶¹ Dapo Olowu, 'The Integration of International Human Rights Regimes into Municipal Legal Systems: A Review of the Nigerian Experience' (2009) 11 *African Journal of International and Comparative Law* 62, 66.

⁶² Olabisi D Akinkugbe, 'The African Continental Free Trade Area: A New Frontier for Human Rights Protection?' (2021) 24 *Journal of International Economic Law* 451, 464.

carve-out clause.⁶³ Rather than adopting complete monism, this mechanism would allow multilateral agreements focusing on fundamental liberties, public health, and continental integration specifically the AfCFTA to take direct municipal effect upon Senate confirmation. Wielding Kenya's Article 2(5) and 2(6) model as a guide demonstrates that direct treaty reception converts international law into a domestic protective shield without eroding state sovereignty.⁶⁴ This structural update would effectively eliminate the extensive legislative delays that frequently keep vital international socio-economic safeguards non-actionable, granting citizens immediate standing to challenge adverse commercial policies in municipal superior courts.⁶⁵

Concurrently, the AfCFTA protocols reveal that modern continental integration can no longer operate in isolation from human rights obligations. While traditional multilateral trade regimes sidelined non-trade concerns, the AfCFTA framework explicitly binds member states to progressive social baselines, regional food security, and gender alignment.⁶⁶

Nigeria's strict dualist framework blocks these continental expectations. While the AfCFTA Protocol on Trade in Goods removes hidden protectionist barriers through strict health and technical standards, it simultaneously restricts a state's regulatory power to shield domestic markets from sudden import surges. Because Chapter II socio-economic goals are non-justiciable under Nigerian law, local traders and agricultural groups lack a legal forum to challenge trade

⁶³ Tunde I Ogowewo, 'The Systemic Problem of Treaty Incorporation in the Nigerian Legal Order' (2014) 22 *African Journal of International and Comparative Law* 311, 314.

⁶⁴ Olowu (n 59) 68.

⁶⁵ Constitution of Kenya 2010, art 2(5) and art 2(6).

⁶⁶ Agreement Establishing the African Continental Free Trade Area

disruptions. To fix this friction, the National Assembly must abandon its passive approach to treaty management and actively use the AfCFTA framework to reform its domestic commercial laws.⁶⁷

To bridge this specific implementation gap, the Nigeria National Assembly must enact a comprehensive AfCFTA (Socio-Economic Implementation) Act. This statute should systematically weave the non-discrimination and fair-competition protections found in the AfCFTA Protocols on Trade in Goods and Women and Youth in Trade into the operating mandates of domestic border authorities, such as the Nigeria Customs Service.⁶⁸ Replicating the statutory alignment found in Kenya's Article 27 and Article 43 frameworks will prevent arbitrary border closures and institutional corruption from undermining international trade commitments or exploiting vulnerable cross-border merchants. By formalizing these regional obligations within a dedicated domestic statute, Nigeria can protect the socio-economic rights of informal cross-border traders, who are overwhelmingly women and youth, ensuring they have an actionable statutory claim if their livelihoods are threatened by border-post abuses.

Furthermore, the domestic legal order must reform its restrictive approach to judicial review over economic policies, driven by the non-justiciability of Chapter II socio-economic objectives. The National Assembly should amend Section 12 to explicitly command municipal judges to utilize un-enacted human rights treaties and International Labour Organization conventions as primary interpretive guides whenever a trade policy threatens public welfare. Emulating South Africa's Section 39(1)(b) and Section 233⁶⁹ directives would allow the

⁶⁷ Ncube and others (n 57) 121.

⁶⁸ Sarah Joseph, *Blame It on the WTO? A Human Rights Critique of the Global Trade System* (Oxford University Press 2011) 142.

⁶⁹ Constitution of the Republic of South Africa 1996, s 39(1)(b) and s 233

judiciary to adopt an active interpretative posture, leveraging international exceptions to read down domestic trade or intellectual property laws such as the *Merchandise Marks Act* whenever their literal application blocks access to affordable, life-saving generic medicines.⁷⁰

Consequently, policy re-alignments require Nigeria to abandon its fragmented, external approach to corporate accountability and establish an internal regulatory framework.⁷¹ The history of environmental degradation in the Niger Delta reveals a problematic reliance on expensive, extraterritorial tort litigation in foreign fora to penalize multinational misconduct.⁷² Nigeria must emulate Kenya's progressive approach and immediately execute a statutory National Action Plan on Business and Human Rights that formally turns the abstract moral criteria of the *UN Guiding Principles* (UNGPs) into legally binding due diligence standards for transnational corporate actors.⁷³ This policing mechanism embeds human rights compliance within transnational commercial structures, ensuring economic growth remains permanently tethered to the rule of law and human dignity.

6.0 CONCLUSION

This comparative legal analysis has demonstrated that a state's internal constitutional design dictates the level of protection its citizens enjoy against the pressures of global trade liberalization. Nigeria's continued reliance on a traditional dualist model under Section 12(1) of the 1999 Constitution has insulated economic planning from human rights oversight, creating an enforcement gap that leaves local communities,

⁷⁰ Merchandise Marks Act Chapter M7 Laws of the Federation of Nigeria 2004.

⁷¹ Radu Mares, *Developing the Corporate Responsibility to Respect Human Rights* (Inters entia 2015) 88.

⁷² *Okpabi v Royal Dutch Shell Plc* UKSC 3.

⁷³ Kenya National Action Plan on Business and Human Rights (2021–2025)

ecological assets, and public health frameworks exposed to unregulated transnational corporate actions. Conversely, the advanced legal frameworks utilized by Kenya and South Africa offer functional pathways to overcome these gaps. Kenya's progressive monist reception under its 2010 Constitution demonstrates how the direct enforcement of ratified covenants turns international standards into an active domestic tool for socio-economic justice, while South Africa's hybrid interpretive model proves that statutory frameworks can be interpreted to align with global humanitarian standards without disrupting legislative sovereignty.

As continental integration deepens under the AfCFTA, the traditional separation between macroeconomic expansion and human rights compliance is no longer sustainable. For Nigeria to transform from a passive observer of global trade dynamics into an active defender of human dignity, it must structurally update its legal and institutional framework. Implementing a targeted constitutional exception to Section 12(1) for regional trade and human rights treaties, enacting an *AfCFTA (Socio-Economic Implementation) Act*, mandating pre-negotiation Human Rights Impact Assessments, and dismantling the isolation between economic planners and rights watchdogs represents the path forward. By adopting these lessons from Nairobi and Pretoria, Nigeria can successfully establish a balanced legal environment where commercial integration and the enforcement of human rights advance together, ensuring that economic growth remains permanently anchored to the rule of law and human dignity.