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THE BLUE ECONOMY COMES TO GREEN CREEK

*By Ursula Ramsey**

ABSTRACT

Oceans, touted as the “next great economic frontier,” are projected to contribute three trillion dollars to the global economy. Beyond their economic potential, oceans provide a host of environmental benefits: oceans supply over half of the planet’s oxygen and contain nearly all of the Earth’s water and biosphere. Especially because the high seas represent one of the few remaining global commons, oceans present a governance challenge. Meeting this challenge is the concept of the blue economy, a form of governance that combines environmental stewardship, economic development, and social equity. This article, in discussing *Mulvihill v. South Carolina Department of Health and Environmental Control*, presents the legal challenges met by an oyster mariculture operation in the tidal waters of Green Creek, applies a blue economy governance framework set out by the United Nations, and argues for the need to connect these small, local projects to international blue economy initiatives.

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I. INTRODUCTION

Oceans, touted as the “next great economic frontier,”¹ are projected to contribute 3 trillion dollars to the global economy by 2030.² Alongside this economic potential are a host of environmental benefits: over 50% of the planet’s oxygen comes from oceans,³ nearly all (97%) of the planet’s water is contained in oceans,⁴ and oceans comprise over 95% of the biosphere⁵—“the parts of Earth where life exists.”⁶ Further, much additional research remains as scientists estimate that over 90% of ocean-dwelling species have not yet been identified.⁷

The oceans, however, provide a governance challenge, especially because over half of the surface area of the Earth’s oceans constitutes the high seas, one of the last remaining global commons.⁸ Management of this global commons requires international cooperation because it exists outside the reach of any nation’s jurisdiction,⁹ and the concept of the blue economy, pulling together economic development, environmental stewardship, and social equity, provides a form of governance.¹⁰ Indeed, blue economy projects exist in the Atlantic waters off the coast of Morocco,¹¹ in the Indian Ocean surrounding the Seychelles,¹² in the Pacific by Tuvalu and Fiji,¹³

¹ UNITED NATIONS, PROMOTION AND STRENGTHENING OF SUSTAINABLE OCEAN-BASED ECONOMIES (2021) [hereinafter UNITED NATIONS, OCEAN-BASED ECONOMIES], <https://sdgs.un.org/publications/promotion-and-strengthening-sustainable-ocean-based-economies-43989>.

² *Id.*

³ See Organisation for Economic Cooperation and Development [OECD], *The Ocean Economy to 2050* at 47 (2025), <https://doi.org/10.1787/a9096fb1-en>; see *5 reasons you should care about our ocean*, UNITED NATIONS (June 21, 2022), <https://www.un.org/en/desa/5-reasons-you-should-care-about-our-ocean>.

⁴ See *Goal 14: Conserve and sustainably use the oceans, seas and marine resources*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/oceans/> (last visited May 19, 2025).

⁵ See *Oceans Contain a Wealth of Biodiversity*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/article/biodiversityforwater-1> (last visited May 12, 2025).

⁶ Kim Rutledge et al., *Biosphere*, NATIONAL GEOGRAPHIC (August 19, 2025), <https://education.nationalgeographic.org/resource/biosphere/>.

⁷ See Camilo Mora et al., *How Many Species Are There on Earth and in the Ocean?*, 9 PLOS BIOLOGY 1, 5 (2011).

⁸ See UNITED NATIONS, BLUE ECONOMY CONCEPT PAPER 2, 4 (2016), <https://www.unep.org/resources/report/blue-economy-concept-paper>; see also UN SYSTEM TASK TEAM ON THE POST-2015 UN DEVELOPMENT AGENDA, GLOBAL GOVERNANCE AND GOVERNANCE OF THE GLOBAL COMMONS IN THE GLOBAL PARTNERSHIP FOR DEVELOPMENT BEYOND 2015 3-5 (2013), https://www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf (explaining the current gaps in global governance and the need for further progress of global governance in global commons).

⁹ See UNITED NATIONS, *supra* note 8, at 8.

¹⁰ Michelle A. Voyer et al., *Shades of Blue: What Do Competing Interpretations of the Blue Economy Mean For Oceans Governance?*, ONLINE FIRST J. OF ENV’T PLAN. & POL’Y, 1, 9 (2018), https://ro.uow.edu.au/articles/journal_contribution/Shades_of_blue_what_do_competing_interpretations_of_the_Blue_Economy_mean_for_oceans_governance_/27731757?file=50489439. See UNITED NATIONS, *supra* note 8, at 3; WORLD WILDLIFE FED’N, PRINCIPLES FOR A SUSTAINABLE BLUE ECONOMY 2 (2015), https://wwf.panda.org/wwf_news/?247477/Principles%2Dfor%2Da%2DSustainable%2DBlue%2DEconomy

¹¹ See Press Release, World Bank Support for the Development of Morocco’s Blue Economy, WORLD BANK GROUP (May 23, 2022), <https://www.worldbank.org/en/news/press-release/2022/05/23/world-bank-support-for-the-development-of-morocco-s-blue-economy#:~:text=Morocco%20is%20setting%20out%20to,the%20inclusiveness%20of%20the%20subsector>.

¹² MARIE-THERESE PURVIS, SEYCHELLES BLUE ECONOMY STRATEGY 7 (2015), http://www.finance.gov.sc/uploads/files/The_Blue_Economy_strategy.pdf.

¹³ See Fabien Gonguet & Junting Zhou, *Size and Resilience of the Blue Economy in Pacific Island Economies* 13 (IMF Working Paper 24/255, 2024).

and in the Canadian Arctic.¹⁴ Joining those far-flung projects is a small oyster farming, or mariculture, operation in Green Creek, a 3.4 mile-long tidal creek whose waters flow into the Stono River and through the Stono Inlet before joining the waters of the Atlantic Ocean just off of the South Carolina coast.¹⁵ Though it now joins these other blue economy initiatives, opposition by neighboring landowners, and to some extent state legislators, once cast doubt as to its future.¹⁶

This article, in discussing *Mulvihill v. South Carolina Department of Health and Environmental Control*, chronicles the challenges to this blue economy project, analyzes the *Mulvihill* decision under a blue economy governance framework set out by the United Nations, and argues for the need to build stronger connections between these small, local projects and international blue economy initiatives. Part I provides an overview of the blue economy, including its history, its industries, and its champions. Part II discusses the origins, economic impact, and potential of the mariculture industry in South Carolina. From there, Part III presents the *Mulvihill* decision, and Part IV analyzes the court's decision in *Mulvihill*, as well as the broader regulatory environment for mariculture in South Carolina, under key blue economy governance components identified by the United Nations.

II. THE BLUE ECONOMY

A. DEFINING THE BLUE ECONOMY

Though the term “blue economy” circulated to a small extent prior to the United Nations Conference on Sustainable Development in Rio de Janeiro in June 2012 (known as Rio+20), it is Rio+20 that is credited with giving birth to the blue economy concept.¹⁷ The notion of a blue economy grew from the notion of a “green economy,” a theme of the conference and from small island developing states querying how this green economy concept applied to them, especially with the backdrop of oceans harmed by overfishing, pollution, and habitat loss.¹⁸ In a blue economy, the ocean's economic development goes hand-in-hand with environmental stewardship.¹⁹

Though the concept grew from Rio+20, at the time, conference attendees understood the term in conflicting ways.²⁰ During the conference, researchers identified four main uses of the term: “(a) oceans as natural capital, (b) oceans as good business, (c) oceans as integral to Pacific

¹⁴ FISHERIES AND OCEANS CANADA, BLUE ECONOMY STRATEGY ENGAGEMENT PAPER 8 (2021), <https://www.dfo-mpo.gc.ca/about-notre-sujet/blue-economy-economie-bleue/engagement-paper-document-mobilisation/part1-eng.html>.

¹⁵ See *Mulvihill v. South Carolina Dep't of Health and Env'tl Control*, 2020 WL 2096567 at 4 (S.C. Admin L. Ct. 2020).

¹⁶ See *id.*

¹⁷ Edward Canuel, *Navigating the Blue Economy*, 45 WM. & MARY ENV'T L. & POL'Y REV. 1, 2 (2020). See UNITED NATIONS, *supra* note 1, at 1. See, e.g., Jennifer J. Silver et al., *Blue Economy and Competing Discourses in International Oceans Governance*, 24 J. OF ENV'T & DEV. 135, 149 (2015). The term's most notable prior use occurred a few months before Rio+20 at the first World Oceans Summit hosted by *The Economist* magazine. Silver, *supra* at 149.

¹⁸ THE ECONOMIST INTELLIGENCE UNIT, THE BLUE ECONOMY: GROWTH, OPPORTUNITY AND A SUSTAINABLE OCEAN ECONOMY 5 (2015), <https://impact.economist.com/perspectives/sustainability/blue-economy>. See UNITED NATIONS, *supra* note 1, at 1; Silver, *supra* note 17, at 149.

¹⁹ See UNITED NATIONS, *supra* note 1, at 3; Voyer, *supra* note 10, at 6-7.

²⁰ Silver, *supra* note 17, at 139.

Small Island Developing States, and (d) oceans as small-scale fisheries livelihoods.”²¹ “Oceans as natural capital” focused on the value of the ecosystem services provided by oceans and the importance of conservation in good governance of ocean resources.²² “Oceans as good business” received strong support from established marine sectors such as fishing and shipping.²³ For their part, Pacific Small Island Developing States viewed their ocean territory as benefiting local communities and sought funding and partnerships to capture more revenue from their waters.²⁴ Meanwhile, the focus of discourse surrounding small-scale fisheries highlighted poverty reduction, tradition and community, and the threat to livelihoods posed by industrial fishing.²⁵ The differing understandings at Rio+20 foreshadow the fact that, even today, no single definition exists for the term blue economy.²⁶

While different countries and international organizations define the term blue economy in different ways, several key definitions warrant familiarity.²⁷ One key definition from the United Nations explains that the blue economy is “a sustainable ocean-based economy [that] has come to signify international interest in the growth of ocean-based economic development in a manner that is both environmentally sustainable and socially equitable.”²⁸ In a briefing paper for the 2015 World Ocean Summit, *The Economist* defined the blue economy as one that “emerges when economic activity is in balance with the long-term capacity of ocean ecosystems to support this activity and remain resilient and healthy.”²⁹ Notably, the latter definition does not mirror the United Nations’ reference to “social equity” when defining the term. A third key definition comes from the World Wildlife Fund, which defines the blue economy as a “marine-based economy that: [p]rovides social and economic benefits for current and future generations ... [; restores], protects and maintains the diversity, productivity, resilience, core functions, and intrinsic value of marine ecosystems ... [; and i]s based on clean technologies, renewable energy, and circular material flows to secure economic and social stability over time ...”³⁰

As these three key definitions show, there is no clear, common understanding of how exactly to define the blue economy.³¹ As another example, the United Nations pointed out that fourteen different countries defined the related but distinct term “ocean economy” in fourteen different ways.³² Some researchers posit, however, that because of the diverse points of view of relevant stakeholders, it would be an impossible task to reconcile all of their individual notions into one all-encompassing definition.³³ If stakeholders cannot articulate a common understanding of the concept, however, then that raises some concern for the ability of stakeholders to develop

²¹ *Id.* at 137.

²² *Id.* at 143, 150.

²³ *Id.* at 145.

²⁴ *See id.* at 146, 150.

²⁵ *Id.* at 148.

²⁶ *See Voyer, supra* note 10, at 32.

²⁷ *See* UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 7.

²⁸ *See* UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 1.

²⁹ THE ECONOMIST INTELLIGENCE UNIT, *supra* note 18, at 7.

³⁰ *See* WORLD WILDLIFE FED’N, *supra* note 10, at 4.

³¹ *See* UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 7.

³² *See Id.* at 4-5.

³³ *See Voyer, supra* note 10, at 29 (describing that a key conflict concerns whether certain industries such as deep seabed mining and oil and gas can be included in the blue economy).

an oceans strategy. As the United Nations explains, “[t]he need for structured international cooperation underpins all aspects of the Blue Economy.”³⁴

B. INDUSTRIES IN THE BLUE ECONOMY

Even though the blue economy can advance without all stakeholders agreeing on a common definition, having a common understanding of the blue economy concept is vital to its success.³⁵ That understanding can develop, for instance, from established best practices or case studies.³⁶

Traditionally, the ocean economy included established industries such as shipping, oil and gas, fishing, tourism, and seabed mining; accordingly, the ocean economy is generally defined as economic activity that relies on the ocean for inputs or that occurs in, on, or around the ocean.³⁷ The evolved blue economy, in contrast, requires more than just a geographic or sourcing connection to the ocean and includes sectors such as aquaculture, marine genetic biotechnology, coastal protection, ecotourism, offshore energy production, and desalination.³⁸ For instance, the Taza National Park, one of Algeria’s most popular tourist destinations, developed the first underwater scuba diving trail in Algeria as part of its efforts to implement a sustainable tourism policy.³⁹ The project promotes profits and jobs from marine ecotourism while providing a venue for environmental education.⁴⁰ In Shida, a coastal Chinese fishing village, a blue economy project prompted the restoration of seagrass beds in the Yellow Sea to promote sea cucumber cultivation.⁴¹ In addition to individual projects, broader strategic initiatives exist at the city level, such as in Barcelona, or on a national level, such as the “Seychelles Blue Economy Strategy.”⁴²

C. MARICULTURE AND THE BLUE ECONOMY

³⁴ UNITED NATIONS, *supra* note 8, at 8.

³⁵ See UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 26.

³⁶ See *id.* at 26.

³⁷ See THE ECONOMIST INTELLIGENCE UNIT, *supra* note 18, at 6; See generally UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 5 (one definition of “ocean economy” is “[t]hat portion of the economy which relies on the ocean as an input to the production process or which, by virtue of geographic location, takes place on or under the ocean.”) (citing J.T. Kildow & A. McIlgorm, *The Importance of Estimating the Contribution of the Oceans to National Economies*, 34 MARINE POL’Y 367, 368 (2020)).

³⁸ See UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 1; THE ECONOMIST INTELLIGENCE UNIT, *supra* note 18, at 5-6; BLUE ECONOMY DEVELOPMENT FRAMEWORK, WORLD BANK GROUP (2016), <https://thedocs.worldbank.org/en/doc/446441473349079068-0010022016/original/AMCOECCBlueEconomyDevelopmentFramework.pdf>.

³⁹ BLUE ECONOMY IN THE MEDITERRANEAN: CASE STUDIES, LESSONS AND PERSPECTIVES, PLAN BLEU 68-69 (2020), https://planbleu.org/wp-content/uploads/2020/09/cahier19_Blue_Economy_EN.pdf; WORLD WILDLIFE FED’N, *Developing Sustainable Tourism in Taza National Park, Algeria*, <https://www.wwfmmi.org/?297295/Developing-sustainable-tourism--in-Taza-National-Park-Algeria> (last visited May 19, 2025).

⁴⁰ See BLUE ECONOMY IN THE MEDITERRANEAN: CASE STUDIES, *supra* note 39, at 69.

⁴¹ See Sulan Chen et al., *Blue Economy: Community Case Studies Addressing the Poverty–Environment Nexus in Ocean and Coastal Management*, 12 SUSTAINABILITY 1, 5-6 (2020).

⁴² Organisation for Economic Cooperation and Development [OECD], *The Ocean Economy to 2050* at 47 (2025), <https://doi.org/10.1787/a9096fb1-en>; see *5 reasons you should care about our ocean*, UNITED NATIONS (June 21, 2022), <https://www.un.org/en/desa/5-reasons-you-should-care-about-our-ocean.>; MARIE-THERESE PURVIS, SEYCHELLES BLUE ECONOMY STRATEGY 4-5 (2015) http://www.finance.gov.sc/uploads/files/The_Blue_Economy_strategy.pdf; *Barcelona Blue Economy*, BARCELONA ACTIVA, <https://www.barcelonactiva.cat/en/blueeconomy> (last visited May 21, 2025).

Mariculture, one of the emerging blue economy sectors at issue in this article, exemplifies a tripartite view of the blue economy: mariculture is friendly to its environment, creates local jobs, and creates “high value commodities for export.”⁴³ As demand for protein increases and food security concerns grow, mariculture (and aquaculture generally) stands poised to help fill the gap.⁴⁴

Unlike traditional fisheries, whose catch has remained static for years, the Food and Agriculture Organization of the United Nations reported in its 2024 *The State of World Fisheries and Aquaculture* report that aquaculture production “increased by 6.6% since 2020, contributing over 57% of aquatic animal products used for direct human consumption.”⁴⁵ In other words, most of the aquatic animals consumed by humans are now farmed rather than caught in wild fisheries.⁴⁶ While finfish production contributed to much of the increase in aquaculture, mollusk production, such as clams, scallops, and oysters, increased by over 15%.⁴⁷ As an example, oyster production increased from just under 6 million tons in 2018 to just over 7 million tons in 2022.⁴⁸ Oyster (and other shellfish) aquaculture directly align with blue economy principles, as it, along with kelp aquaculture, “are two of the least polluting forms of human food production, marine or terrestrial.”⁴⁹

III. THE MARICULTURE INDUSTRY IN SOUTH CAROLINA

As wines reflect their *terroir*, oysters reflect their *merroir*, deriving their specific flavor from the place in which they grow.⁵⁰ The Eastern oyster, which is the only native oyster species to grow along the entire Eastern Seaboard,⁵¹ gets its flavor, in part, from the salinity and strength of the waters flowing around it, the weather conditions of the skies above it, and the nutritional value of the phytoplankton contained in those waters.⁵² While the Eastern oyster typically grows subtidally (meaning that it grows underwater), in South Carolina the Eastern oyster largely grows in the intertidal zone,⁵³ an area that has fluctuating water levels based on the tide.⁵⁴ This is due to the state’s “[v]ery flat coastal topography and relatively large tidal range (five to seven feet).”⁵⁵ As South Carolina has roughly 500,000 acres of salt marsh⁵⁶ and nearly 5,000 acres of oyster beds, a

⁴³ UNITED NATIONS, *supra* note 8, at 6.

⁴⁴ See THE ECONOMIST INTELLIGENCE UNIT, *supra* note 18, at 6, 16.

⁴⁵ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE vii (2024), <https://www.fao.org/publications/fao-flagship-publications/the-state-of-world-fisheries-and-aquaculture/en>.

⁴⁶ See *id.* at xviii.

⁴⁷ See *id.* at xxi.

⁴⁸ See *id.* at 26.

⁴⁹ Robin Kundis Craig, *Promoting “Climate Change Plus” Industries Through the Administrative State: The Case of Marine Aquaculture*, 39 YALE J. ON REG. 479, 490 (2022).

⁵⁰ Michael A. Rice, *Merroir – The Good Flavors of Oysters*, AQUACULTURE MAG., Apr.-May 2019, at 66, <https://web.uri.edu/wp-content/uploads/sites/2042/Merrior-Oyster-taste-2019.pdf>.

⁵¹ *Eastern Oyster*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species/eastern-oyster#:~:text=to%20this%20region,-Habitat,other%2C%20to%20grow%20into%20reefs> (last visited May 21, 2025).

⁵² Rice, *supra* note 50, at 66-67.

⁵³ VICTOR G. BURRELL, JR., SOUTH CAROLINA OYSTER INDUSTRY: A HISTORY 1 (2003).

⁵⁴ *Intertidal*, NATIONAL PARK SERVICE, <https://www.nps.gov/subjects/oceans/intertidal.htm> (last visited May 20, 2025).

⁵⁵ BURRELL, *supra* note 53, at 1.

⁵⁶ *Dynamics of the Salt Marsh*, S. CAROLINA DEP’T OF NAT. RES., <https://www.dnr.sc.gov/marine/pub/seascience/dynamic.html> (last visited May 21, 2025).

classic image of the South Carolina coast is a tidal creek meandering through the marsh grass with beds of oysters lining its edges.⁵⁷ This stands in stark contrast to many of the world's temperate estuaries that have seen the loss of 85% of their oyster reefs.⁵⁸ The oyster industry in South Carolina, however, still has a chance.⁵⁹

A. THE ORIGINS OF THE SOUTH CAROLINA OYSTER INDUSTRY

Tracing the oyster industry in South Carolina requires a trip back to at least 2000 B.C.⁶⁰ Middens, or shell rings, found near South Carolina's tidal creeks reveal that Native Americans used oysters as tools, for food, and for trade.⁶¹ Later, when early European explorers reached the shores of what is now South Carolina, they remarked on the abundance of oysters in the tidal waters.⁶² In fact, Charleston, founded in 1670 as an English settlement and the oldest city in South Carolina, moved in 1680 to its current location, known then as Oyster Point.⁶³ Early settlers saw economic opportunity in those oysters—to gain control over production, they sought grants from the proprietors, the king, and from the state to get access to areas of salt marsh where the oyster beds were located.⁶⁴ These grants could be quite sizable; for instance, one grant issued by South Carolina in 1791 included nearly 17,000 acres.⁶⁵

For an over fifty-year stretch from the late 1800s until the mid-1940s, oysters proved quite profitable and were noted as South Carolina's most valuable fishery.⁶⁶ To prevent overutilization of the oyster beds, in 1891, the state began regulating the oyster beds and authorized the grant of franchises of up to 300 acres for the rights to oyster grounds.⁶⁷ Those franchises came with a responsibility to plant oyster shell or another substrate so as not to deplete the oyster reefs.⁶⁸ While the birth of the blue economy concept would not emerge for over a century, those franchise holders “understood that it was in their best interest to hold shell to cultivate oyster beds. No shell planting eventually meant no new oysters.”⁶⁹ Even today, the current South Carolina Code requires oyster farmers to plant a certain amount of culch per acre farmed.⁷⁰ Another inkling of blue economy concepts comes from 1905, when the South Carolina legislature sent a delegation to the coast to talk with industry members before creating a state fisheries commission.⁷¹ While reports of those meetings indicated that some members of the oyster industry believed the oyster supply to be

⁵⁷ See John H. Tibbets, *Lowcountry Living Shorelines Restoring Carolina's Reefs*, COASTAL HERITAGE, Winter 2013, at 5, <https://www.scseagrant.org/wp-content/uploads/Coastal-Heritage-Winter-2013.pdf>

⁵⁸ See *id.* (citing THE NATURE CONSERVANCY, SHELLFISH REEFS AT RISK 4 (2009)).

⁵⁹ See *id.*

⁶⁰ See BURRELL, *supra* note 53, at 2.

⁶¹ See *id.*; *Exploring South Carolina's Cultural Preserves*, SOUTH CAROLINA DEPARTMENT OF NATURAL RESOURCES, https://www.dnr.sc.gov/news/2020/jul/jul27_Indigenous.php (last visited May 14, 2025).

⁶² See BURRELL, *supra* note 53, at 1.

⁶³ See *History*, CHARLESTON, SC, <https://www.charleston-sc.gov/2010/History> (last visited May 20, 2025). See also Tibbets, *supra* note 57.

⁶⁴ See BURRELL, *supra* note 53, at 3.

⁶⁵ See *id.*

⁶⁶ See *id.* at 1.

⁶⁷ See *id.* at 7.

⁶⁸ See Tibbets, *supra* note 57.

⁶⁹ See Tibbets, *supra* note 57.

⁷⁰ See S.C. CODE ANN. § 50-5-940 (2008).

⁷¹ BURRELL, *supra* note 53, at 10. The early 1900s also saw the industrialization of the oyster industry with at least sixteen canneries operating along the South Carolina coast. Tibbets, *supra* note 57. Because the canneries shucked the oysters on-site, the shells generally remained in-state. *Id.*

“inexhaustible,” reports also indicated that other industry members had already begun warning about the danger pollution posed to the industry.⁷²

In the mid-1930s, oyster production in South Carolina began to decrease thanks to several factors, including the completion of the Intercoastal Waterway and its impacts on water flow, the potential drainage consequences of a Civilian Conservation Corps program that planted pine trees where hardwoods historically grew, and the environmental impacts of paper mills popping up along the estuaries.⁷³ Later, in 1959, Hurricane Gracie hit the coast with peak winds of 140 miles per hour.⁷⁴ Hurricane Gracie consequently caused oyster grounds to be lost due to the impact of silt.⁷⁵ Also, from 1959 into 1960, the state saw heavy rains that impacted river flows and, therefore, the oyster beds.⁷⁶ In 1980, the state placed a moratorium on new leases as it studied the existing system before legislative action in 1985 shifted the state to the permitting system that is used today.⁷⁷ Finally, in 1986, the state’s last remaining oyster cannery, located on Lady’s Island in Beaufort County, closed its doors.⁷⁸

B. MARICULTURE IN SOUTH CAROLINA TODAY

Given the oyster industry’s lengthy history, commercial mariculture is a relatively recent development. However, just as the availability of ice spurred the oyster industry in the late 1800s,⁷⁹ the development of floating oyster cages has spurred the growth of the industry’s most recent iteration.⁸⁰ South Carolina’s tidal creeks have a high silt content, which can be troublesome for oysters because, as filter feeders, high volumes of silt can impact their ability to feed and breathe.⁸¹ Off-bottom oyster cages, however, help to mitigate that concern.⁸²

Obtaining a shellfish mariculture permit in South Carolina today requires approvals from the South Carolina Department of Natural Resources (DNR), the Army Corps of Engineers, and the Department of Health and Environmental Control’s Office of Ocean and Coastal Resource Management (OCRM).⁸³ The process begins by filing a Joint Shellfish Mariculture Application with the DNR.⁸⁴ The DNR initially reviews the application to assess the proposed location and whether the applicant has the necessary experience, personnel, equipment, and other agency

⁷² See BURRELL, *supra* note 53, at 10-11.

⁷³ See *id.* at 22.

⁷⁴ See *Memories of Hurricane Gracie’s Devastation Long Endure*, THE ISLAND PACKET, May 26, 2011, <https://www.islandpacket.com/news/weather/hurricane/article33420924.html>.

⁷⁵ See BURRELL, *supra* note 53, at 40.

⁷⁶ See *id.* at 40.

⁷⁷ See *id.* at 42.

⁷⁸ See Tibbets, *supra* note 57.

⁷⁹ See BURRELL, *supra* note 53, at 6.

⁸⁰ See Joey Holleman, *Tank to Table: How Single Oyster Mariculture Works*, COASTAL HERITAGE MAG., Summer 2018, <https://www.scseagrant.org/how-single-oyster-mariculture-works/>.

⁸¹ See *id.*; *Building Shellfish Reefs*, ECOSHAP, <https://www.ecoshape.org/en/concepts/building-shellfish-reefs/hydrosphere-water-on-or-near-the-earth/> (last visited May 8, 2025).

⁸² See Holleman, *supra* note 80.

⁸³ See Sara Corbett, *Permitting for Oysters*, U.S. ARMY CORPS OF ENGINEERS (Dec. 6, 2017), <https://www.sac.usace.army.mil/Media/News-Stories/Article/1390124/permitting-for-oysters/>.

⁸⁴ See S.C. CODE ANN. § 50-5-905(A) (2008); *Mariculture*, S. CAROLINA DEP’T OF NAT. RES., <https://www.dnr.sc.gov/marine/shellfish/mariculture.html> (last visited May 2, 2025).

approvals (or ability to obtain them) to manage the proposed operation.⁸⁵ When that part of the review is satisfied, the DNR forwards the application to the Army Corps of Engineers and the OCRM for their review.⁸⁶ Once the DNR receives approvals from both, the DNR grants a conditional approval, and the applicant must then publish a public notice “once a week for three consecutive weeks in a newspaper of general circulation in the county of the proposed permit.”⁸⁷ The South Carolina Shellfish Growers Association describes the permitting process as costing roughly between \$8,000 to \$10,000 and taking anywhere from two to twelve months, while the overall process takes roughly two years.⁸⁸

Today, there are eleven floating oyster farms in South Carolina covering 88.9 acres.⁸⁹ South Carolina has granted an additional seven permits covering 67.7 acres for farming oysters using bottom cages.⁹⁰ Beyond that, South Carolina has issued four permits for combined oyster and clam bottom farming in an area covering 510.9 acres.⁹¹ Additionally, the industry is poised for growth with the potential to be a regional leader.⁹² For instance, while there were only 139,178 oysters farmed in 2014, the DNR reported nearly 1.2 million oysters farmed in 2019.⁹³ As another example, “[t]he inflation-adjusted dockside value ... of oyster mariculture in South Carolina has grown from just over \$31,000 in 2012 to just under \$953,000 in 2019.”⁹⁴ In 2023, the industry generated nearly \$1.5 million in dock value.⁹⁵ Looking through a broader lens, “[i]n 2019, South Carolina’s off-bottom oyster mariculture industry contributed over \$8.7 million in output to the state’s economy and supported 130 jobs.”⁹⁶ Beyond the industry’s economic contributions, the state’s mariculture industry also contributes to the health of the state’s tidal creeks and estuaries.⁹⁷ One report estimated that in 2019, the industry’s oysters filtered over 14 billion gallons of water.⁹⁸

C. THE SOCIAL CARRYING CAPACITY OF SOUTH CAROLINA’S MARICULTURE INDUSTRY

⁸⁵ See S.C. CODE ANN. §§ 50-5-910(A), 925 (2008); *Applicant Process for Multi-Agency Shellfish Mariculture Permitting*, S.C. DEP’T OF NAT. RES., <https://www.dnr.sc.gov/marine/shellfish/pdf/flowchart-2021.pdf> (last visited May 21, 2025).

⁸⁶ See *About Us: The Permitting Process*, S. CAROLINA SHELLFISH GROWERS ASS’N, <https://scshellfishgrowers.org/about/> (last visited May 6, 2025); *Applicant Process for Multi-Agency Shellfish Mariculture Permitting*, *supra* note 88.

⁸⁷ S.C. CODE ANN. § 50-5-925 (2025).

⁸⁸ See *About Us: The Permitting Process*, *supra* note 86.

⁸⁹ See *Mariculture*, *supra* note 84.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See Matt Gorstein, *Assessing South Carolina’s Ocean Economy*, S.C. SEA GRANT CONSORTIUM, at 28-29, <https://www.scseagrant.org/wp-content/uploads/Assessing-South-Carolinas-Ocean-Economy-2020.pdf>.

⁹³ See S.C. Sea Grant Consortium, *The Economic Contribution of Oyster Mariculture in South Carolina*, <https://www.scseagrant.org/wp-content/uploads/Economic-Contribution-of-Oyster-Mariculture-SC.pdf>.

⁹⁴ Gorstein, *supra* note 92, at 28.

⁹⁵ See Stephanie Barna, *A Briny Business: Learn About the Historic Ebbs and Flows of the Local Oyster Industry*, CHARLESTON MAG. (Feb. 2025),

https://charlestonmag.com/features/a_briny_business_learn_about_the_historic_ebbs_and_flows_of_the_local_oyster_industry.

⁹⁶ THE ECONOMIC CONTRIBUTION OF OYSTER MARICULTURE IN SOUTH CAROLINA, *supra* note 95 (including direct, indirect and induced impacts).

⁹⁷ *Id.*

⁹⁸ See *id.*

Those promising numbers, however, do not mean that the industry is without its challenges. A major challenge comes from what is known as “social carrying capacity.”⁹⁹ Because oyster farming occurs in public waters, social carrying capacity considers “the public’s capacity to accept oyster farming” as it relates to the farm’s size, location, and arrangement, as well as overlap with other uses of the area.¹⁰⁰ A study conducted by Cribbs et al. examined social acceptance by stakeholders in coastal Beaufort County and coastal Charleston County and revealed that respondents were most concerned about navigational safety, oyster cages coming unmoored, non-resident ownership of oyster farms, and general loss of access to the public waterways.¹⁰¹ While study participants indicated “moderate support for shellfish aquaculture,” support increased with the distance between developed areas and the farm locations and decreased based on farm size and the addition of farm infrastructure.¹⁰² One key takeaway from the study was its finding that 87.3% of respondents indicated “little to no knowledge about oyster farming,” making the lack of knowledge a key hurdle.¹⁰³ Because the study “suggests that an informed [South Carolina] public is, on average, supportive of oyster mariculture,” the study’s authors highlight the need for public education about mariculture.¹⁰⁴

Similarly, a study by Laura Jodice and William Norman surveying public opinions on aquaculture in coastal areas of South Carolina and Florida likewise found that the public could benefit from more education opportunities on the topic.¹⁰⁵ The study revealed that 50% of tourists and, even more surprisingly, 37% of residents did not know about the presence of marine farming operations in those locations.¹⁰⁶ Just as Cribbs et al. recommended education, Jodice and Norman recommended methods by which the public could become more familiar with, and educated on, mariculture operations, such as farm tours, and including more detailed information on restaurant menus.¹⁰⁷ The need for a better informed public is also evident for those within the industry.¹⁰⁸

The concept of social carrying capacity for oyster farms extends to activities in the state legislature. Even though new regulations in 2017 allowed for year-round oyster farming and contributed to the growth of the infant industry, a member of the South Carolina Senate proposed a bill in 2021 that would prohibit the DNR from issuing permits allowing out-of-season harvests by oyster farms.¹⁰⁹ The senator explained that she filed the bill in response to complaints she received regarding floating oyster cages.¹¹⁰ While she praised the oyster industry, she expressed

⁹⁹ See Gorstein, *supra* note 92, at 29.

¹⁰⁰ See *id.*; Tyler W. Cribbs et al., *Social Carrying Capacity of Oyster Mariculture on Coast of South Carolina: Understanding Stakeholders Perceptions and Thresholds for Oyster Mariculture Development*, MARINE POL’Y, Oct. 2024, at 2.

¹⁰¹ Cribbs et al., *supra* note 100, at 1, 8.

¹⁰² *Id.* at 3, 9, 11.

¹⁰³ *Id.* at 10.

¹⁰⁴ *Id.* at 1, 13.

¹⁰⁵ See PERCEPTIONS OF MARINE AQUACULTURE IN COASTAL TOURIST DESTINATIONS IN THE US SOUTHEASTERN REGION 2, 8 (Laura W. Jodice & William C. Norman, eds., 2015).

¹⁰⁶ See *id.* at 7.

¹⁰⁷ See *id.* at 8.

¹⁰⁸ See Glenn Smith, *Shell Game: Conflict, Secrecy Cloud Battle Over SC Oyster Farming Permit*, POST & COURIER (May 9, 2021), https://www.postandcourier.com/uncovered/shell-game-conflict-secrecy-cloud-battle-over-sc-oyster-farming-permit/article_f7919a3e-97c3-11eb-8282-eb15352bf9aa.html.

¹⁰⁹ See S.B. 629, 2021-2022 Gen. Assemb., 124th Sess. (S.C. 2021).

¹¹⁰ See Paola Tristan Arruda, *SC Bill Could Stop Permits for Oyster Summer Harvest*, WCSC (Mar. 30, 2021), <https://www.live5news.com/2021/03/30/sc-bill-could-stop-permits-oyster-summer-harvest/>.

concern that oyster farms received permits to operate in areas with high boat traffic and other “waters that are not appropriate.”¹¹¹ That bill never made it out of committee.¹¹²

IV. MULVIHILL V. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Courts have also seen tests on the limits of social carrying capacity for oyster farms.¹¹³ In *Mulvihill v. South Carolina Department of Health and Environmental Control*, the South Carolina Administrative Law Court considered a challenge brought by neighboring property owners against the South Carolina Department of Health and Environmental Control (DHEC) and its Office of Ocean and Coastal Resource Management’s decision to grant a permit to Charleston Mooring and Marine, LLC, to install 330 floating oyster cages in Green Creek.¹¹⁴ To situate the case geographically, the Stono River meets the Atlantic Ocean just outside of Charleston, South Carolina.¹¹⁵ If one were to travel up the Stono River away from the Stono Inlet, Green Creek would soon emerge to the east.¹¹⁶ The length of Green Creek is just shy of three and a half miles, and aside from a sandbar in its bend, “has significant depth ... for much of its length.”¹¹⁷ In traveling through Green Creek, one would pass Pumpkin Island, Cusabo Island, and Green Island, all three of which are privately owned.¹¹⁸ Because Green Creek is calmer than the Stono River, neighboring property owners and members of the public alike recognize the creek as a good spot for recreational activities, such as boating, fishing, waterskiing, and kayaking.¹¹⁹

Importantly, Green Creek is also a good spot for oystering. Charleston Mooring, the respondent in *Mulvihill*, already obtained a permit to commercially harvest wild oysters in portions of the Stono River and Green Creek.¹²⁰ In addition to its permit to harvest wild oysters, Charleston Mooring also had a permit from DHEC authorizing the installation of ninety-six bottom cages in the Stono River.¹²¹ To produce an oyster from seed, oyster farmers can grow oysters using bottom cages, which the farmer places at the bottom of a waterway, or floating cages, which are located closer to the water’s surface.¹²² Of the two methods, floating cages produce oysters more efficiently and consistently.¹²³ The facts of this case describe Charleston Mooring seeking an additional permit to install 330 of these floating cages in Green Creek.¹²⁴ While the petitioners did not challenge any of the aforementioned permits for wild oyster harvesting or for oyster farming in the Stono River, the landowners along Green Creek brought a challenge to this latest permit for floating

¹¹¹ *Id.*

¹¹² See S.B. 629, 2021-2022 Gen. Assemb., 124th Sess. (S.C. 2021).

¹¹³ See Final Order and Decision, *Mulvihill v. S.C. Dep’t of Health and Env’t Control*, No. 18-ALJ-07-0127-CC (S.C. Admin. L. Ct. 2020).

¹¹⁴ See *id.* at 1-2.

¹¹⁵ *Id.* at 3 n.7.

¹¹⁶ See Stono River, GOOGLE MAPS, <http://www.maps.google.com> (last visited Sep. 18, 2025).

¹¹⁷ Final Order and Decision, at 4, *Mulvihill*.

¹¹⁸ See *id.* at 6. While there is a house located on each Pumpkin Island, Green Island, and Cusabo Island, the islands are not accessible by vehicle; instead, the property owners access their property via boat, sometimes via Green Creek. *Id.* A dock extends from both Pumpkin Island and Green Island into Green Creek. *Id.* at 5.

¹¹⁹ Final Order and Decision, at 5, *Mulvihill*.

¹²⁰ See *id.* at 3. That culture lease permit is identified as C-198 and is not at issue in this case. *Id.*; *id.* at 3, n.5.

¹²¹ See *id.* at 3. This permit is identified at M198-A and is not at issue in this case. *Id.* at 3, n. 9.

¹²² See *id.* at 3; *id.* at 3 n.5.

¹²³ See *id.* at 3.

¹²⁴ See *id.* at 3-4.

oyster cages, which DHEC granted on January 31, 2018.¹²⁵ Though permitted, Charleston Mooring waited to install the floating cages pending the outcome of the court proceedings initiated by the neighboring landowners.¹²⁶

On April 11, 2018, the owners of Green Island, Cusabo Island, and Pumpkin Island filed a Request for Contested Case Hearing with the South Carolina Administrative Law Court.¹²⁷ On January 17, 2019, the court scheduled a hearing on the merits for May 14, 2019.¹²⁸ The petitioners filed a motion for continuance on April 23, 2019.¹²⁹ On May 2, 2019, the court denied the motion after a telephone hearing, and the hearing on the merits took place May 14-16, 2019.¹³⁰ On April 20, 2020, the court issued its final order and decision granting the permit and adding a special condition.¹³¹

Before the court were two issues.¹³² First, the court had to determine whether DHEC properly considered the ten general considerations set out in section 48-39-150 of the South Carolina Code of Laws when deciding to grant the permit.¹³³ Second, the court had to determine whether the permit was consistent with the mariculture project standards set out in Section 30-12(O) of the South Carolina Code of Regulations.¹³⁴ To make those determinations, the court reviewed the matter *de novo* and applied a preponderance of the evidence standard.¹³⁵ The landowners, as the party contesting DHEC's decision to grant the permit, carried the burden of proof.¹³⁶

A. SECTION 48-39-150'S TEN GENERAL CONSIDERATIONS

A permit from DHEC is required to use the state's critical areas, such as its beaches, coastal waters, and tidelands.¹³⁷ In determining whether to grant or deny a permit application, DHEC must abide by the State of South Carolina's expressed policy for its coastal areas, which strives to balance economic and social interests with protecting the coast's "[i]mportant ecological, cultural, natural, geological[,] and scenic characteristics."¹³⁸ To that end, Section 48-39-150(A) sets forth ten general considerations to guide DHEC's determination as to whether to grant or deny a permit.¹³⁹ The landowners argued that DHEC failed to properly evaluate all ten considerations and that the proposed oyster farm would also violate several of them.¹⁴⁰ The first consideration, "[t]he extent to which the activity requires a waterfront location or is economically enhanced by its

¹²⁵ See *id.* at 7, 3 n.5. The challenged permit is designated M198-B. *Id.* at 4 n.10.

¹²⁶ See *id.* at 8.

¹²⁷ See *id.* at 6.

¹²⁸ Order on Motion to Lift Stay at 2, *Mulvihill v. S.C. Dep't of Health and Env't Control and Charleston Moorings and Marine, L.L.C.*, No. 18-ALJ-07-0127-CC, (S.C. Admin. L. Ct. 2019).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Final Order and Decision at 1-2, *Mulvihill*, No. 18-ALJ-07-0127-CC.

¹³² See *id.* at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 24.

¹³⁶ See *id.* at 24-25.

¹³⁷ See S.C. CODE ANN. § 48-39-10(J) (2025); *id.* § 48-39-130(A).

¹³⁸ *Id.* § 48-39-20(E); see *id.* § 48-39-30; *id.* § 48-39-150(A).

¹³⁹ *Id.* § 48-39-150(A).

¹⁴⁰ See Final Order and Decision at 31, *Mulvihill*, No. 18-ALJ-07-0127-CC.

proximity to the water,” was not at issue and not addressed by the court.¹⁴¹ Likewise, the court did not address the seventh consideration, “[t]he extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.”¹⁴² The court addressed the other eight considerations in turn.¹⁴³

Because the first consideration was not at issue, the court began with the second consideration, which queries, “[t]he extent to which the activity would harmfully obstruct the natural flow of navigable water.”¹⁴⁴ While one landowner made general assertions as to the impacts that the oyster farm would have on water flow, an expert witness testifying on Charleston Mooring’s behalf countered that assertion by explaining that the oysters depended on the natural flow of water for their nutrition, and consequently, in his experience, floating cages did not negatively impact water flow.¹⁴⁵ The court agreed that the oyster cages would not negatively impact water flow.¹⁴⁶

Next, the third consideration required DHEC to analyze “[t]he extent to which the applicant’s completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area, including but not limited to water and oxygen supply.”¹⁴⁷ The court determined that DHEC properly analyzed the proposed oyster farm’s impact on natural resources.¹⁴⁸ The landowners’ main argument centered on a statement by one of the landowners regarding the presence of wild oysters in proposed Growout Area 2; however, the landowners failed to connect how the proposed oyster farm would impact the presence of wild oysters in that area (and failed to link the presence of an oyster farm with the destruction of wild oyster beds).¹⁴⁹ Charleston Mooring’s oyster mariculture expert, Frank Roberts, in contrast, explained the contributions of oysters to the ecosystem, such that Green Creek would offer an improved habitat.¹⁵⁰ Especially given the general and special conditions associated with the permit, the court found that wildlife and marine life would be appropriately protected and that this third consideration received due consideration by DHEC.¹⁵¹

From there, the fourth consideration concerned “[t]he extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.”¹⁵² While the landowners did not argue that the proposed oyster farm would contribute to stagnant water, the landowners did express concern, albeit without providing evidence, regarding erosion and shoaling.¹⁵³ Though some erosion was already present in Growout Areas 2 and 3, DHEC’s Manager of the Critical Area Permitting Program explained that oyster cages could help prevent further erosion by serving as a

¹⁴¹ *Id.* at 31-42; S.C. CODE ANN. § 48-39-150(A)(1) (2008).

¹⁴² S.C. CODE ANN. § 48-39-150(A)(7); *see* Final Order and Decision at 31-42, *Mulvihill*, No. 18-ALJ-07-0127-CC.

¹⁴³ *See* Final Order and Decision at 31-42, *Mulvihill*, No. 18-ALJ-07-0127-CC.

¹⁴⁴ S.C. CODE ANN. § 48-39-150(A)(2); *see* Final Order and Decision at 19-26, *Mulvihill*, No. 18-ALJ-07-0127-CC.

¹⁴⁵ *See* Final Order and Decision at 19-26, *Mulvihill*, No. 18-ALJ-07-0127-CC.

¹⁴⁶ *See id.*

¹⁴⁷ S.C. CODE ANN. § 48-39-150(A)(3) (2008).

¹⁴⁸ Final Order and Decision at 32, *Mulvihill*, No. 18-ALJ-07-0127-CC.

¹⁴⁹ *Id.* at 16-17, 32.

¹⁵⁰ *Id.* at 17.

¹⁵¹ *Id.* at 32.

¹⁵² S.C. CODE ANN. § 48-39-150(A)(4) (2008).

¹⁵³ Final Order and Decision at 17, 32, *Mulvihill*, No. 18-ALJ-07-0127-CC.

wave-break and that, in five years, DHEC had observed no problem with erosion at other oyster farms.¹⁵⁴ Accordingly, the court found that DHEC gave this fourth consideration its due.¹⁵⁵

The fifth consideration concerned “[t]he extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.”¹⁵⁶ While the statute’s text seemed clear to the court that any use *at all* by the public would not require denial of the permit, it seemed less clear to the court how much curtailment of public use would be tolerated under the statute.¹⁵⁷ For help, the court turned to Regulation 30-12(O)(4).¹⁵⁸ That regulation clarifies that the backstop to issuing a permit would be if “the proposed activity would unreasonably conflict with existing public uses; the proposed activity would unreasonably interfere with navigation; or the proposed activity would be otherwise inconsistent with the Coastal Zone Management Program”; the statute, however, stops short of defining the meaning of “unreasonably.”¹⁵⁹ In a deposition, DHEC’s Manager of the Critical Area Permitting Program Blair Williams was asked, “[i]s that your position today as to how to define reasonable and unreasonable, the fact that something’s not taking away a use or severely restricting a use?”¹⁶⁰ To the question, Williams responded in the affirmative, explaining that, “if that use can still continue then I would say there’s still reasonable use of that creek.”¹⁶¹ While the court deferred to DHEC’s interpretation of the regulation, the court explained that this did not necessarily mean that the court would also defer to the same result.¹⁶² Instead, the court proceeded to conduct its own determination as to whether the proposed oyster farm would either take away entirely or severely restrict the public’s ability to use the creek.¹⁶³

In terms of the proposed oyster farm’s impact on navigation, the court heard from one landowner who testified that he would no longer use Green Creek to access his property.¹⁶⁴ However, the court pointed out that the landowner could still access his island via nearby Robbins Creek if he chose not to travel through Green Creek.¹⁶⁵ The court also heard from Walter Phlegar, an expert in coastal engineering proffered by the landowners.¹⁶⁶ The expert highlighted inaccuracies in the diagrams of Green Creek that Charleston Mooring provided to DHEC as part of its permit application; in his opinion, the project’s actual impacts on navigation (as well as recreation) were difficult for DHEC to assess accurately.¹⁶⁷ On the other hand, DHEC’s Manager of the Critical Area Permitting Program, Blair Williams, maintained that Green Creek would still be navigable by boats after installation of the oyster cages.¹⁶⁸ Further, Charleston Mooring’s expert witness, Frank Roberts, explained that just as the oyster farmers used their boat to access the cages,

¹⁵⁴ *Id.* at 32-33, 18.

¹⁵⁵ *Id.* at 32-33.

¹⁵⁶ S.C. CODE ANN. § 48-39-150(A)(5) (2008).

¹⁵⁷ Final Order and Decision at 33, *Mulvihill*, No. 18-ALJ-07-0127-CC.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 33-34 (citing S.C. CODE ANN. REGS. 30-12(O)(4) (2011)).

¹⁶⁰ *Id.* at 34.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 35.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 9.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 35.

fishers and shrimpers could also navigate through the farm.¹⁶⁹ Ultimately, the court found “as a matter of law that Petitioners have not proven that the permitted activity [would] ‘unreasonably interfere with navigation.’”¹⁷⁰

In terms of the proposed oyster farm’s impact on public use—the heart of the landowners’ objection—the court found that, without a doubt, the oyster farm would affect the public’s (including the landowners’) use of Green Creek.¹⁷¹ For instance, one landowner testified that his family and their guests would, among other activities, waterski in the creek; however, the placement of the oyster cages would curtail that activity in that section of the creek.¹⁷² In their testimony, two other landowners echoed those same concerns regarding the safety of waterskiing in Growout Areas 2 and 3.¹⁷³ The landowners bolstered their position with expert testimony regarding the potential for the cages to move with the tides, and thus cut even more into the available creek space.¹⁷⁴ Charleston Mooring’s expert acknowledged that the cages could move as the tide changed, but countered that this “arcing” would last for only a few minutes and site selection could help mitigate its impacts.¹⁷⁵ After hearing testimony, the court concluded: “[w]hile the evidence does not sufficiently establish the public’s existing recreational activities of fishing, shrimping, jet skiing, kayaking, and recreational boating will be affected by the installation of the OysterGro cages, Petitioners have demonstrated the likelihood that recreational activities such as waterskiing, tubing, and wake surfing in the areas of Green Creek bounded by Growout areas 2 and 3 will be negatively affected by the installation of the cages for Charleston Mooring’s mariculture operation.”¹⁷⁶

DHEC did not necessarily disagree with this assessment.¹⁷⁷ In its view, however, because other parts of Green Creek still allowed the public to waterski and participate in other activities, this did not amount to a severe restriction overall.¹⁷⁸ The court found the regulation unhelpful in interpreting whether the restriction should be viewed from an entire Creek perspective or more narrowly from a permitted area perspective and ultimately deferred to DHEC’s interpretation, especially as the regulation contained language referencing the “coastal zone.”¹⁷⁹

The sixth consideration requires DHEC to consider “[t]he extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina’s coastal zone.”¹⁸⁰ Here, the landowners did not offer any

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 36.

¹⁷⁴ *See id.* at 10.

¹⁷⁵ *See id.* The court considered the evidence on both sides speculative, but ultimately held that the landowners bore the burden of proof. *Id.* at 16.

¹⁷⁶ *Id.* at 37.

¹⁷⁷ *See id.* at 38.

¹⁷⁸ *Id.* at 37-38.

¹⁷⁹ *Id.* at 39 (citing the regulation).

¹⁸⁰ S.C. CODE ANN. § 48-39-150(A)(6) (2008).

specifics.¹⁸¹ However, the court explained that the general and special conditions built into the permit appropriately protected archaeological sites and rare or endangered species.¹⁸²

Because the seventh consideration was not at issue, the court moved to the eighth consideration which required DHEC to determine “[t]he extent of any adverse environmental impact which cannot be avoided by reasonable safeguards,”¹⁸³ and to the ninth consideration which required DHEC to assess “[t]he extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.”¹⁸⁴ In its decision, the court found that the landowners did not prove that the oyster farm would have an adverse environmental impact.¹⁸⁵ For instance, one landowner raised concerns about flocks of birds that could cause odors, while another landowner expressed concerns about animal waste build-up in the creek; however, the court found that evidence did not support these concerns.¹⁸⁶ Still, the court found that DHEC built safeguards into the Permit that would work to prevent any possible adverse environmental impact that might occur.¹⁸⁷

Finally, the tenth consideration required DHEC to consider “[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners.”¹⁸⁸ Regarding property values, the landowners offered their opinions that their property values would decrease if the oyster farm were allowed; however, no landowner presented “an appraisal or market analysis to” back up their opinion.¹⁸⁹ The court, therefore, held that the landowners failed to show that the proposed oyster farm would negatively affect their property values.¹⁹⁰

As for the proposed oyster farm’s impacts on their enjoyment of their property, the court, likewise, held that the landowners would not suffer a negative impact sufficient to deny the Permit.¹⁹¹ For instance, the evidence showed that the landowners would still be able to access their docks and the waterway.¹⁹² Furthermore, the landowners did not establish the likelihood of any visual impediments.¹⁹³ While one landowner expressed concern about noise from supposed daily generator use by the oyster farm, the owner of the proposed farm testified that the farm would not use a generator at all, and instead would use a car battery-powered oyster tumbler roughly every six weeks.¹⁹⁴ The court also considered two other landowners’ concerns regarding their ability to use Green Creek for recreational purposes, such as shrimping, waterskiing, and wake surfing, before determining that those same recreational activities could occur in other parts of Green

¹⁸¹ *Mulvihill*, No. 18-AJL-07-0127-CC (SC Admin. Court June 11, 2020) Final Order and Decision) <https://www.scalc.net/search.aspx>.

¹⁸² *Id.* at 39-40.

¹⁸³ S.C. CODE ANN. § 48-39-150(A)(8) (2008).

¹⁸⁴ S.C. CODE ANN. § 48-39-150(A)(9) (2008).

¹⁸⁵ *Mulvihill*, No. 18-AJL-07-0127-CC (SC Admin. Court June 11, 2020) Final Order and Decision) <https://www.scalc.net/search.aspx>.

¹⁸⁶ *Id.* at 19, 19 n.41, 40.

¹⁸⁷ *Id.* at 20, 40.

¹⁸⁸ S.C. CODE ANN. § 48-39-150(A)(10) (2008).

¹⁸⁹ Final Order and Decision at 22, 41, *Mulvihill*, No. 18-ALJ-07-0127-CC.

¹⁹⁰ *Id.* at 41.

¹⁹¹ *Id.*

¹⁹² *Id.* at 22.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 23.

Creek.¹⁹⁵ All in all, the court determined that DHEC properly considered the oyster farm's impacts on the neighboring landowners' enjoyment of the property which was not cause to deny the Permit.¹⁹⁶

B. SECTION 30-12(O)'S MARICULTURE PROJECT STANDARDS

Next, the court turned to the second legal issue: whether the Permit was consistent with the mariculture project standards set out in Section 30-12(O) of the South Carolina Code of Regulations.¹⁹⁷ In Section 30-12(O)(3), the regulations set forth specific standards for commercial mariculture operations, such as a standard for how closely located mariculture operations can be to nearby docks, a standard that requires a mariculture operation to submit an operations plan along with its permit application, a standard establishing that structures associated with the mariculture operation remain as visually unobtrusive as possible (while still satisfying Coast Guard requirements for navigational markers), and a standard that mariculture operations agree to certain Best Management Practices.¹⁹⁸ Section 30-12(O)(4) sets forth an additional requirement:

If a proposed mariculture activity complies with the standards stated in this regulation, a permit shall be issued unless [DHEC] concludes that the activity is inconsistent with the basic state policies contained in Section 48-39-30, or that the activity is contrary to the public interest in that the proposed activity would unreasonably conflict with existing public uses; the proposed activity would unreasonably interfere with navigation; or the proposed activity would be otherwise inconsistent with the Coastal Zone Management Program."¹⁹⁹

Although the South Carolina Legislature set forth several more specific state policies in Section 48-39-30, the basic purpose "is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the [s]tate."²⁰⁰

The court first addressed the landowners' argument that Charleston Mooring's permit application did not satisfy the regulatory standard, as it did not contain the required operations plan.²⁰¹ The purpose behind the standard, the court surmised, was that the operations plan would be available to share with the public as part of the public notice regarding the proposed mariculture operation.²⁰² Here, the court acknowledged that the permit application did not contain an operations plan as an addendum, even though other documents referenced an operations plan and contained many components of an operations plan.²⁰³ The court also acknowledged that DHEC failed to comply with the regulation's requirement that it provide written confirmation of its receipt of a completed and properly formatted operations plan.²⁰⁴ Still, the court did not find this lack of

¹⁹⁵ *Id.* at 23, 23, n.48.

¹⁹⁶ *Id.* at 22.

¹⁹⁷ *Id.* at 2, 42.

¹⁹⁸ S.C. CODE ANN. REGS. 30-12(O)(3)(a)-(d) (2011).

¹⁹⁹ Final Order and Decision at 42, *Mulvihill*, No. 18-ALJ-07-0127-CC; S.C. CODE ANN. REGS. 30-12(O)(4) (2011).

²⁰⁰ S.C. CODE ANN. § 48-39-30(A) (2008).

²⁰¹ Final Order and Decision at 42, *Mulvihill*, No. 18-ALJ-07-0127-CC.

²⁰² *Id.* at 42-43; 43 n.64.

²⁰³ *Id.* at 42.

²⁰⁴ *Id.* at 43.

compliance enough for it to deny the permit, especially as one Special Condition requires an operations plan to remain in place and to undergo periodic updating.²⁰⁵

Next, the court considered whether the floating oyster cages satisfied the regulatory requirement that they “‘be designed to be unobtrusive visually.’”²⁰⁶ Though the landowners did not challenge specifically Charleston Mooring’s compliance with this standard, one of the landowners “‘testified that the cages will pose a hazard to recreational users of Green Creek who are unaware of their presence.’”²⁰⁷ In response, the court noted one Special Condition that required that the cages and floats bear appropriate markings and another Special Condition that required Charleston Mooring to respond (and potentially remove the cages) if the cages impacted navigation or public access.²⁰⁸

From there, the court raised on its own accord that the permit lacks any requirement that Charleston Mooring adopt Best Management Practices.²⁰⁹ Accordingly, the court directed DHEC to require this as a Special Condition.²¹⁰

Finally, the court addressed the landowners’ argument that it should deny the proposed oyster farm permit under Regulation 30-12(O)(4).²¹¹ The court, working through the regulation, concluded that the oyster farm would neither unreasonably interfere with navigation nor existing public use of Green Creek.²¹² This only left for the court’s consideration whether permitting the oyster farm would comply with Section 48-39-30’s requirement that the project provide some public benefit.²¹³ While acknowledging the private, economic benefit that would flow to Charleston Mooring, the court cited the water filtration service provided by oysters that would result in cleaner water for the public and cited the farm’s supply of fresh oysters to the local community as an additional public benefit; therefore, the court found the state’s policy satisfied.²¹⁴

C. ORDER ON MOTION FOR RECONSIDERATION

Just a few weeks after the court issued its Final Order and Decision, the landowners filed with the court a Motion for Reconsideration.²¹⁵ As background, pursuant to Rule 29(D) of the South Carolina Rules of Procedure for the Administrative Law Court, “[a]ny party may move for reconsideration of a final decision of an administrative law judge in a contested case.”²¹⁶ If a party wishes to appeal a case to the South Carolina Court of Appeals, that party must first file a motion

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citing S.C. CODE ANN. REGS. 30-12(O)(3)(c) (2011)).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 44.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 45.

²¹⁴ *Id.* at 46.

²¹⁵ Order on Motion for Reconsideration at 1-2, *Mulvihill v. South Carolina Dep’t of Health and Env’tl Env’t Control*, No. 18-ALJ-07-0127-CC (S.C. Admin Law Ct. filed June 11, 2020).

²¹⁶ Rules of Procedure for the Administrative Law Court: SCALC Rule 29(D), <https://www.scalc.net/Rules%20documents/Rules%202025/25%20Official%20ALC%20Rules.pdf>.

for reconsideration.²¹⁷ While the administrative law judge's decision remains in effect even if a motion for reconsideration is filed, the timeline for filing an appeal is tolled while the court considers the motion.²¹⁸ Rule 29(D) of the Rules of Procedure for the Administrative Law Court requires that the party filing the motion for reconsideration "state with particularity the points supposed to have been overlooked or misapprehended by the court."²¹⁹ In this case, the landowners identified five reasons for which the court should grant relief.²²⁰

The landowners first argued that the court committed legal error in excusing both Charleston Mooring and DHEC from following regulatory requirements.²²¹ The regulatory requirements at issue were Charleston Mooring's failure to submit an operations plan with its permit application and DHEC's failure to confirm in writing that the operations plan was complete and had received DHEC's approval.²²² Though, in its Final Order and Decision, the court found that DHEC had fallen short of complying with the regulation's requirement that it approved in writing that the operations plan was complete and in the proper format.²²³ Here, upon reconsideration, the court found that DHEC actually complied with the regulation.²²⁴ Noting that nothing in the landowners' argument or in the regulation itself specified the exact format of the required written confirmation, a statement by DHEC that "[t]he applicant submitted an operations plan and is approved as part of this permit" proved, upon a second look, good enough to satisfy this requirement.²²⁵

Turning to the landowners' argument regarding Charleston Mooring's failure to attach a complete operations plan, the court acknowledged its statement in its final order that the patched-together operations plan did not address a key component set out in the regulation regarding potential conflict with co-users born of the project.²²⁶ In reviewing its final order, however, the court revised its earlier conclusion and found that Charleston Mooring did address this regulatory component in some measure, albeit incompletely.²²⁷ For instance, one component of Charleston Mooring's application noted that it would locate the oyster cages on Green Creek's shallower sides (allowing for navigation through deeper waters) and another component noted Charleston Mooring's intent to use husbandry practices to enhance and grow Green Creek's wild oyster beds.²²⁸ Though failing to address all recreational uses, the court could no longer say that

²¹⁷ SCALC Rule 29 note to Rule 29(D) Motion for Reconsideration.

²¹⁸ *Id.*

²¹⁹ *See supra* note 219.

²²⁰ Order on Motion for Reconsideration, *supra* note 218, at 3.

²²¹ Order on Motion for Reconsideration, *supra* note 218, at 4.

²²² Order on Motion for Reconsideration, *supra* note 218, at 4. The landowners also argued that the maps provided by Charleston Mooring as part of its application contained inaccuracies that could mask the true impact of the project on Green Creek. Order on Motion for Reconsideration, *supra* note 218, at 8, 8 n.9. While acknowledging the maps' inaccuracies as true, the Court found the regulation satisfied (especially as related to one purpose of the regulation which was to provide public notice) and that this did not warrant a renewed public notice. Order on Motion for Reconsideration, *supra* note 218, at 8–9.

²²³ Final Order and Decision at 27, *Mulvihill*, No. 18-ALJ-07-0127-CC (April 20, 2020). *Mulvihill*, No. 18-ALJ-07-0127-CC (SC ALC April 20, 2020) (Final Order and Decision).

²²⁴ Order on Motion for Reconsideration at 5, *Mulvihill*, No. 18-ALJ-07-0127-CC (June 11, 2020). *Mulvihill*, No. 18-ALJ-07-0127-CC (SC ALC June 11, 2020) (Order on Motion for Reconsideration).

²²⁵ *Id.*

²²⁶ *Id.* at 5–6.

²²⁷ *Id.*

²²⁸ *Id.* at 6.

Charleston Mooring failed entirely to address this regulatory component.²²⁹ And, perhaps most importantly, the purpose behind this regulation—of providing notice to nearby landowners and other interested parties—achieved satisfaction.²³⁰ Evidence of this included written objections to the project received by DHEC and objections to the project aired at a public hearing regarding the proposed oyster farm: DHEC and the court heard the voices of those who opposed the project.²³¹

Second, the landowners argued that the court erred in its final order and decision in deferring to DHEC's position as to what constitutes "unreasonably conflict[ing] with existing public uses."²³² The risk to waterskiing in the creek loomed large in the landowners' minds.²³³ In DHEC's view, while waterskiing could not occur in Growout Areas 2 and 3, water-skiers could still use other areas of Green Creek.²³⁴ In their motion, the landowners estimated—somewhat questionably, in the court's view—that they and others would lose nearly two-thirds of the Creek for waterskiing and related uses because of the oyster farm's placement near the mid-section of Green Creek.²³⁵ Upon reconsideration, the court reached the same conclusion that the oyster farm would impact recreational uses of the creek, such as waterskiing, but not unreasonably so; this conclusion further supported the court's reaffirmance of its prior conclusion, as the court had to weigh any potential losses against any public benefits gained from the project.²³⁶

Third, the landowners argued that the court erred in deferring to DHEC's method of measuring Green Creek.²³⁷ The court explained that DHEC measured the creek from marsh grass on one side to marsh grass on the other side, a method supported by regulation and entitled to deference.²³⁸ Thus, the court declined to change its earlier ruling in this regard.²³⁹

Fourth, the landowners argued that the court relied too heavily on special conditions attached to the permit to try to correct deficiencies in the permitting process.²⁴⁰ The court did not buy that argument.²⁴¹ Instead, the court made clear that Special Condition 8, which required Charleston Mooring to remove or reconfigure its equipment if that equipment impacted navigation, recreation, or water quality, functioned as a backstop given that Charleston Mooring had not yet installed the equipment in the creek.²⁴² The landowners' additional argument regarding the perceived ineffectiveness of DHEC's enforcement process gained no traction with the court either.²⁴³

²²⁹ *Id.* at 5, n.6.

²³⁰ *Id.* at 7.

²³¹ *Id.*

²³² *Id.* at 10-11 (citing S.C. CODE ANN. REGS. 30-12(O)(4) (2011)).

²³³ *Id.* at 12.

²³⁴ *Id.* at 11, n.12.

²³⁵ *Id.* at 12, 12 n.14.

²³⁶ *Id.* at 11.

²³⁷ *Id.* at 13.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 13-14, 13 n.17.

²⁴³ *Id.* at 14.

Fifth, the court rejected the landowners' final argument that the court should have considered their Exhibit 9, a draft of a document creating guidelines for South Carolina DNR to evaluate permits, even though it was drafted by another agency and not adopted by DHEC.²⁴⁴ Likewise, the court found no error in its decision to exclude as irrelevant testimony regarding the owner of Charleston Mooring's statements to the Army Corps of Engineers.²⁴⁵

Having reconsidered its Final Order and Decision, the court offered no relief to the landowners and determined that its previous Order should remain in place with the updates from this Order on Motion for Reconsideration regarding the court's reconsideration of the appropriateness of DHEC's written confirmation of the operations plan and the court's reconsideration of the completeness of Charleston Mooring's operations plan.²⁴⁶ Accordingly, the court ordered DHEC to issue the permit to Charleston Mooring and denied the landowners' Motion.²⁴⁷

V. ANALYSIS

The global commons, "traditionally defined as those parts of the planet that fall outside national jurisdictions and to which all nations have access,"²⁴⁸ include the atmosphere, outer space, the polar regions, and, as relevant here, the high seas.²⁴⁹ While in the past, access to the global commons' resources proved difficult, now, the race is on to access and attempt to exploit and control these resources.²⁵⁰ Thus, in response, this calls for good governance.²⁵¹ As it relates to the oceans, the blue economy principles provide a form of governance.²⁵² To that end, the United Nations has established five blue economy governance components: "blue economies are inclusive of all stakeholders; blue economies pioneer new pilot projects and replicate successful ones; blue economies further public participation and advocacy; blue economies are responsible to national needs and aspirations; and blue economies are based on solid science, including natural, social and economic sciences."²⁵³ Using those blue economy governance components as a guide, this section evaluates specifically the court's decision in *Mulvihill* and evaluates generally the South Carolina mariculture permitting framework to determine whether the decision and framework sync with blue economy principles.

The first component establishes that "blue economies are inclusive of all stakeholders"²⁵⁴ The World Wildlife Fund, in its *Principles for a Sustainable Blue Economy*, echoes this notion in highlighting the importance of "active and effective stakeholder engagement and

²⁴⁴ *Id.* at 15.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 16.

²⁴⁷ *Id.*

²⁴⁸ UN SYSTEM TASK TEAM ON THE POST-2015 UN DEVELOPMENT AGENDA, *supra* note 8, at 5.

²⁴⁹ *Id.*; *The Scramble for the Global Commons in the Next Security Era*, NATO, Feb. 2, 2024, <https://www.act.nato.int/article/the-scramble-for-the-global-commons-in-the-next-security-era/>.

²⁵⁰ UN SYSTEM TASK TEAM ON THE POST-2015 UN DEVELOPMENT AGENDA, *supra* note 8, at 6; NATO, *supra* note 252.

²⁵¹ UN SYSTEM TASK TEAM ON THE POST-2015 UN DEVELOPMENT AGENDA, *supra* note 8, at 5.

²⁵² Voyer, *supra* note 10, at 4.

²⁵³ UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 25.

²⁵⁴ *Id.*

participation.”²⁵⁵ As potential stakeholders, the United Nations includes the private sector, community members, nonprofits, indigenous peoples, and small-scale fishers.²⁵⁶ In South Carolina, the governance scheme for mariculture operations, such as the one described in *Mulvihill*, requires a permit from DHEC.²⁵⁷ The South Carolina Code requires, as part of the initial permit application, a list of neighboring landowners.²⁵⁸ From there, DHEC notifies those adjoining landowners, as well as “interested agencies, . . . local government units in which the land is located and other interested persons,” all of whom have the opportunity to provide written comments.²⁵⁹ In addition, DHEC requires publication of a public notice in a state or local newspaper.²⁶⁰ Furthermore, at its discretion or at the request of at least twenty county residents, DHEC will hold public hearings regarding permit applications.²⁶¹ In a similar vein, after it conditionally approves a mariculture permit, the South Carolina DNR requires the publication of a public notice once a week for three weeks in a locally-circulating newspaper.²⁶² Then, as described in the South Carolina Code, the permitting process is designed to alert stakeholders (either directly or via public notice) to new mariculture projects and to provide them with an opportunity to voice their opinions on the project, either as a written comment or as part of a public hearing. In terms of the process, this would seem to comply with the first component of inclusivity.

Mulvihill provides a glimpse into the process as applied. In this case, the petitioners’ argument centered on the lack of compliance by the proposed oyster farm with the requirement that it provide an operations plan.²⁶³ In finding, upon reconsideration, that the oyster farm satisfied this requirement,²⁶⁴ the court explained that part of the spirit of this requirement was “to give the public adequate notice of potential issues so that persons may be afforded due process and the right to interpose objections.”²⁶⁵ Here, the court noted that the petitioners and others submitted written objections, attended a public hearing on the permit, and voiced objections at that public hearing.²⁶⁶ For its part, the court also evaluated whether DHEC properly analyzed how the permit would impact recreation, existing use, and navigation at Green Creek, as well as the permit’s impact on neighboring landowners and on environmental interests.²⁶⁷ In application, *Mulvihill* would seem to show that regulators and reviewing courts allow stakeholders the right to voice their opinions and to have those opinions considered as part of the process.

The second principle is that “blue economies pioneer new pilot projects and replicate successful ones”²⁶⁸ As discussed previously, the Food and Agriculture Organization of the

²⁵⁵ WORLD WILDLIFE FED’N, *supra* note 10, at 4.

²⁵⁶ UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at vi.

²⁵⁷ Final Order and Decision at 28, *Mulvihill v. S.C. Dep’t of Health and Env’tl Control*, No. 18-ALJ-07-0127-CC (S.C. Admin L. Ct. Apr. 20, 2020).

²⁵⁸ S.C. CODE ANN. § 48-39-140(B)(5) (2014) (providing that, alternatively, the permit application may provide a sworn affidavit that the names are unavailable despite due diligence).

²⁵⁹ S.C. CODE ANN. § 48-39-140(C) (2024).

²⁶⁰ *Id.*

²⁶¹ *Id.*; S.C. CODE ANN. § 48-39-150 (B) (2024).

²⁶² S.C. CODE ANN. § 50-5-925 (2024).

²⁶³ Order on Motion for Reconsideration at 7, *Mulvihill v. S.C. Dep’t of Health and Env’t Control*, No. 18-ALJ-07-0127-CC (S.C. Admin L. Ct. June 11, 2020).

²⁶⁴ *Id.* at 16.

²⁶⁵ *Id.* at 7.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 8, 12, 16.

²⁶⁸ UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 25.

United Nations reported in its 2024 *The State of World Fisheries and Aquaculture* report that mollusk production increased by over 15% from 2020 to 2024 worldwide.²⁶⁹ Along the Eastern Seaboard of the United States, oyster aquaculture has experienced a boom over the past decade.²⁷⁰ In South Carolina's neighbor to the north, the oyster mariculture industry "has become the most important component of the shellfish sector in the state," with an economic impact in 2022 of over 14 million dollars and the provision of 283 jobs.²⁷¹ Of course, every state is a little different in terms of its regulatory environment, investment, and the nuances of its waters; however, this demonstrates that the South Carolina oyster mariculture industry is not without company.²⁷²

The third component establishes that "blue economies further public participation and advocacy"²⁷³ The World Wildlife Fund's *Principles for a Sustainable Blue Economy* adds that key to this is transparency and open communication with stakeholders, including the general public.²⁷⁴ The results of Cribbs et al.'s study, however, suggest that there is work to do in educating the general public of South Carolina about the mariculture industry.²⁷⁵ As discussed previously, the study revealed that over 87% of respondents indicated "little to no knowledge about oyster farming," even though just over one-fourth of survey respondents stated that they "own[ed] land within view of a coastal waterway"; over 44% of survey respondents reported engaging in fishing or shrimping; close to 60% engaged in recreational boating; and 10% engaged in oyster harvesting themselves.²⁷⁶ Similarly, Jodice and Norman's report shows that education must start with alerting people to the industry's presence, as well as its work.²⁷⁷

A significant threat to South Carolina's mariculture industry has come from legislators who appear unfriendly to the industry.²⁷⁸ For instance, a current member of the legislature questioned the statutory price of five to ten dollars per acre for an oyster lease, stating that "[y]ou are depriving people of public waters that they own. And you are ceding that for a pittance."²⁷⁹ Although this article does not weigh-in on the appropriate price per acre for an oyster lease, this example shows that, perhaps, there is an opportunity for education about the industry's benefits.²⁸⁰ While a 500 acre bottom lease nets the state only \$2,500 and a surface lease nets the state between \$5,000 to

²⁶⁹ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *supra* note 48, at xxi.

²⁷⁰ Palmer Hilton et al., *Looking to the Future of Oyster Aquaculture in North Carolina*, LEGAL TIDES (2016), https://ncseagrant.ncsu.edu/ncseagrant_docs/coastallaw/LT/l_t_autumn_2016.pdf.

²⁷¹ ERIC EDWARDS, N.C. STATE DEPARTMENT OF AGRICULTURAL AND RESOURCE ECONOMICS, THE ECONOMIC IMPACT OF NORTH CAROLINA'S OYSTER MARICULTURE INDUSTRY (2023), <https://repository.library.noaa.gov/view/noaa/67613>.

²⁷² Palmer Hilton et al., *supra* note 273.

²⁷³ UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 25.

²⁷⁴ WORLD WILDLIFE FEDERATION, *supra* note 12, at 4.

²⁷⁵ TYLER W. CRIBBS ET AL., *supra* note 100, at 10.

²⁷⁶ *Id.* at 7, 10.

²⁷⁷ JODICE & NORMAN, *supra* note 105, at 7.

²⁷⁸ See, e.g., S. 0629, Sess. 124 (S.C. 2021); Katie Hill, *Cage Fights: Oyster Farming User Conflicts and Regulatory Responses in Three Southeastern States*, 32 N.Y.U. ENVTL. L.J. 207, 233-35 (2024); Glenn Smith, *Uncovered: Conflict, Secrecy Cloud Oyster Permit Battle*, THE TIMES AND DEMOCRAT (May 9, 2021), https://thetandd.com/news/government-and-politics/article_e260ff98-31c3-5cea-9c50-e7c32978547f.html?mode=nowapp [<https://perma.cc/EWS6-9X8A>].

²⁷⁹ S.C. CODE ANN. § 50-5-935 (2025); Smith, *supra* note 278.

²⁸⁰ See Hunt Revell, *Saltwater Ecology and Economics on the Half-Shell: Comparing Georgia's New Oyster Law to Its Southeastern Neighbors*, 12 ARIZ. J. ENVTL. L. & POL'Y 323, 372 (2022) (providing a chart comparing certain states' oyster lease or permit fees).

\$10,000, those lease profits only show part of the picture.²⁸¹ Data for 2019, as discussed, reveals that the industry supported 130 jobs, contributed over \$8.7 million to the state's economy, and, thanks to the oysters, filtered over fourteen billion gallons of water.²⁸² Those numbers show the real contribution. And, if the industry could endeavor to arm legislators with those numbers, then, perhaps, the legislative environment might become a bit more friendly: an industry's nine million dollar contribution to the state's blue economy hits the ear a bit differently than an industry that "threatens to push the public out of prized fishing holes and duck blinds."²⁸³

The fourth principle is that "blue economies are responsive to national needs and aspirations."²⁸⁴ A growing demand for food exists worldwide.²⁸⁵ Meanwhile, both in the United States and around the world, harvests from wild fisheries and shellfish grounds are declining.²⁸⁶ In the United States, more than 70% of seafood is imported, causing the national seafood trade deficit to stand at \$17 billion.²⁸⁷ Mariculture, then, has the potential to step into this protein gap.²⁸⁸ The South Carolina Code of Regulations acknowledges this need by explaining in its policy on regulations under the Coastal Zone Management Act that

[m]ariculture activity is increasing in the coastal waters of the [s]tate and it can be expected to grow considerably in the coming years. Overall mariculture activities have the potential to increase food supplies and provide employment and with proper management can be a compatible activity for the coastal critical areas.²⁸⁹

In *Mulvihill*, the court specifically found that the proposed oyster farm "operation will increase the supply of oysters in the local area."²⁹⁰ Beyond increasing supply, this policy makes good economic sense, as South Carolina only produces 20% of mariculture oysters consumed in South Carolina.²⁹¹ In fact, the court in *Mulvihill* acknowledged this unmet demand in its Final Order and Decision in stating that "[t]he single oyster is coveted by restaurants and other seafood purveyors and has historically been imported from out-of-state oyster farming operations."²⁹² That unmet demand for local mariculture oysters could have a \$3.5 million impact, in addition to related economic benefits.²⁹³ A better understanding of the state and national seafood gap could, perhaps, encourage support of the mariculture industry.

²⁸¹ S.C. CODE ANN. § 50-5-900 (2025); § 50-5-935.

²⁸² THE ECONOMIC CONTRIBUTION OF OYSTER MARICULTURE IN SOUTH CAROLINA, SOUTH CAROLINA SEA GRANT CONSORTIUM, <https://www.scseagrant.org/wp-content/uploads/Economic-Contribution-of-Oyster-Mariculture-SC.pdf> [<https://perma.cc/T42H-38C6>].

²⁸³ Smith, *supra* note 278.

²⁸⁴ UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 25.

²⁸⁵ Christopher Costello et al., *The Future of Food from the Sea*, 588 NATURE 95, 95 (2020).

²⁸⁶ SOUTH CAROLINA SEA GRANT CONSORTIUM, THE ECONOMIC IMPACT OF BUYING LOCAL 6, <https://www.scseagrant.org/wp-content/uploads/Benefits-of-Increased-Shellfish-Mariculture-Production.pdf> [<https://perma.cc/GUT7-8B45>].

²⁸⁷ NOAA FISHERIES, *U.S. Aquaculture*, <https://www.fisheries.noaa.gov/national/aquaculture/us-aquaculture> (last visited May 15, 2025).

²⁸⁸ SOUTH CAROLINA SEA GRANT CONSORTIUM, *supra* note 286, at 6.

²⁸⁹ S.C. CODE ANN. REGS. 30-12(O)(2) (2025).

²⁹⁰ *Mulvihill v. South Carolina Dep't of Health and Env'tl Control*, No. 18-ALJ-07-0127-CC (S.C. Admin L. Ct. Apr. 20, 2020) (Final Order and Decision at 32).

²⁹¹ SOUTH CAROLINA SEA GRANT CONSORTIUM, *supra* note 289, at 10.

²⁹² *Mulvihill*, No. 18-ALJ-07-0127-CC (Final Order and Decision at 3).

²⁹³ SOUTH CAROLINA SEA GRANT CONSORTIUM, *supra* note 286, at 12.

The fifth governance component establishes that “blue economies are based on solid science, including natural, social and economic sciences.”²⁹⁴ Thus, in addition to the more commonly considered economic and ecosystem impacts, the social impacts, such as “... food and nutrition security, livelihoods and social justice,” must also factor into a project’s development.²⁹⁵ The South Carolina Code of Regulations seems to lift a page out of this playbook, as it sets out that “... mariculture activities have the potential to increase food supplies and provide employment and with proper management can be a compatible activity for the coastal critical areas.”²⁹⁶ In that same vein, South Carolina’s Coastal Tidelands and Wetlands Act declares the state’s policy “is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the state.”²⁹⁷

In applying those regulations and statutes to the facts of the *Mulvihill* case, the court’s Final Order and Decision repeatedly turns from impassioned arguments to science. For instance, when the petitioners argued that DHEC did not properly consider the project’s environmental impacts, the court turned to science and noted that “the [p]etitioners produced no competent evidence to support their assertions.”²⁹⁸ Petitioners testified about a supposed high-level of pollution due to bird and other animal waste at the site; in response, the court noted expert testimony about the environmental benefits of oyster farming gained from twenty years of observation.²⁹⁹ When petitioners argued that DHEC failed to consider properly the project’s impact on erosion, the court noted that they produced no evidence; in contrast, DHEC officials offered testimony to the court about the oyster cages’ function as a wave-break that dissipates wave energy and how, in over five years, DHEC had not observed evidence of erosion caused by other oyster farms in the state.³⁰⁰ Further, when petitioners argued that DHEC failed to consider the project’s impact on natural resources, the only support for their argument was the presence of wild oysters in the area of the proposed oyster farm.³⁰¹ In response, the court heard expert testimony about the ecosystem benefits provided by oyster mariculture, including benefits to water quality, larvae to improve wild oyster populations, and providing habitats for small fishes and crustaceans.³⁰² Thus, in *Mulvihill*, the court filtered out scientifically based arguments to advance the stated policy of the state.

VI. CONCLUSION

In June 2025, France and Costa Rica co-hosted the third United Nations Ocean Conference in Nice, France.³⁰³ The Conference’s theme, “[a]ccelerating action and mobilizing all actors to conserve and sustainably use the ocean,” reflects the urgency of the “global emergency” facing the

²⁹⁴ UNITED NATIONS, OCEAN-BASED ECONOMIES, *supra* note 1, at 25.

²⁹⁵ *Id.*

²⁹⁶ S.C. CODE ANN. REGS. 30-12(O)(2) (2025).

²⁹⁷ S.C. CODE ANN. § 48-39-30(A) (2025).

²⁹⁸ Final Order and Decision at 19, *Mulvihill v. South Carolina Dep’t of Health and Env’t Control*, No. 18-ALJ-07-0127-CC (S.C. Admin L. Ct. Apr. 20, 2020).

²⁹⁹ *Id.* at 19, 19 n.41, 19 n.42.

³⁰⁰ *Id.* at 17-18.

³⁰¹ *Id.* at 16.

³⁰² *Id.* at 17.

³⁰³ *Goal of the Month – Goal 14: Life Below Water*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/goal-of-the-month-june-2025> (last visited July 3, 2025).

ocean.³⁰⁴ The Conference adopted a declaration that acknowledged the challenge and expressed hope for the future that sustainable ocean-based economies offer.³⁰⁵ While one oyster farm on one tidal creek in one state in one country may seem but a drop in a 352 quintillion gallon bucket, the Ocean Conference's call for urgent action does not excuse small projects.³⁰⁶ With a commitment to good governance, these blue economy projects can help shape the future of one of the last global commons.³⁰⁷

³⁰⁴ *Id.*; United Nations Draft Declaration on Our Ocean, Our Future: United for Urgent Action at 2, U.N. Doc. A/CONF.230/2025/14 (2025) [hereinafter Draft Declaration].

³⁰⁵ Draft Declaration at 2, 5.

³⁰⁶ *How Much Water is in the Ocean?*, NOAA, <https://oceanservice.noaa.gov/facts/oceanwater.html> (last visited July 3, 2025).

³⁰⁷ UNITED NATIONS, *supra* note 8, at 2, 4; UN SYSTEM TASK TEAM ON THE POST-2015 UN DEVELOPMENT AGENDA, GLOBAL GOVERNANCE AND GOVERNANCE OF THE GLOBAL COMMONS IN THE GLOBAL PARTNERSHIP FOR DEVELOPMENT BEYOND 2015 3 (2013), https://www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf

NAVIGATING THE SEAS OF HISTORY IN INTERNATIONAL LAW

By Valentina Vadi[†]

*“The sea is history.”*¹

ABSTRACT

Inquiries into questions of time, history, and international law have recently come to the fore. So far, however, many studies have only examined developments in international law from a temporally and thematically fragmented, brief, and narrow perspective. Due to international law’s growing normative and institutional fragmentation and emphasis on specific crises, episodes, and events, many analyses focus on transient trends and particular facets of international law. This study suggests an alternative to these constrained viewpoints: a thorough, multilayered, and broad perspective to questions of international law, drawing on Fernand Braudel’s tripartite theory of time.

Braudel’s theory of time provides valuable insights into the temporal analysis of international law and demonstrates the value of exploring international law using diverse temporalities. Braudel imagined history as a three-layered sea. The first type of history, *geographical time*, is almost immovable and timeless—it focuses on the interaction between humanity and the environment, and it corresponds to the deep seabed. The second type of history, *social history*, is structural and focuses on social groups—it is comparable to marine currents, which travel across time and space beneath the sea’s surface. The third type of history, known as history of events (*histoire événementielle*) or *individual history*, focuses on people, military campaigns, and political events—such time is comparable to the sea’s surface and the waves’ constant, relentless motion. In Braudel’s view, to understand social phenomena, historians should constantly move from the ocean’s surface to the deep seabed, and again from the ocean floor to the water’s surface.

This study examines the promises and potential pitfalls of transplanting Fernand Braudel’s tridimensional vision of time and his wide temporal perspective from the field of history to international law. My argument is that adopting Braudel’s multilayered temporal approach and weaving together different temporalities and scales can help international lawyers step out of the comfort zone of their specialized subfields, thereby

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¹ Derek Walcott, *The Sea is History*, in *SELECTED POEMS* 137 (Edward Baugh ed. 2007).

overcoming the fragmentation of international law and gaining a broader perspective. Adopting this multilayered approach can also help them see solutions to seemingly intractable problems. The article then examines contemporary litigation where a long-term perspective can help resolve international disputes.

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I. INTRODUCTION

Inquiries into questions of time, history, and international law have recently come to the fore.² So far, however, many studies have examined developments in international law from a fragmented, brief, and narrow temporal and thematic perspective, focusing on particular facets of international law, specific decades, transient trends, and results.³ The narrow thematic perspective may be due to the growing fragmentation of international law and the overspecialization of experts.⁴ The narrow temporal perspective reflects international law's emphasis on specific crises, episodes, and events.⁵ In sum, the narrow perspective on the study of international law is narrow in the sense of both the topics and the periods that it examines.⁶ Instead, a broad temporal perspective inevitably blurs the contemporary segmentation of international law into subfields, as these divisions have a recent pedigree.⁷ It also requires interdisciplinary tools, thus expanding the thematic scope of investigation.⁸

As an alternative to temporally narrow perspectives, this article proposes a different approach: a comprehensive and multilayered temporal perspective to the study of international law, drawing on the eminent historian Fernand Braudel (1902-1985) and his tripartite theory of

² See, e.g., Christian Tomuschat, *The Relevance of Time in International Law*, 41 POL. Y.B. INT'L L., 9–20, 9 (2021) (noting that “Law is grounded in time and is constantly shaped by historical circumstances.”). See Sivan Shlomo Agon & Michal Saliternik, *Just About Time: International Law's Temporalities and Our Moment in History*, 118 AM. J. INT'L L., 751–772, 751 (2024) (arguing that “international law is entangled with time in various and multifaceted ways. International law does not simply exist in time, having its own past, present, and future. Rather, like law generally, international law is constantly being shaped, organized, and reconstructed by time, while also creating, embedding, and perpetuating temporal standards and understandings.”). See generally THE TIMES AND TEMPORALITIES OF INTERNATIONAL HUMAN RIGHTS LAW (Kathryn McNeilly & Ben Warwick eds., 2022); INTERNATIONAL LAW AND TIME (Klara Polackova Van der Ploeg, Luca Pasquet & León Castellanos-Jankiewicz eds., 2022). For the parallel argument that time is grounded in law, see Geoff Gordon, *Engaging an Infrastructure of Time Production with International Law*, 9 LOND. REV. INT'L L. 319, 319 (2021) (exploring “international legal entanglements with the infrastructure of a particular measure of time, namely Coordinated Universal Time (or UTC). UTC comprises the globally definitive measure of seconds, minutes and hours working in lockstep around the world. Other time scales notwithstanding, UTC represents a hegemonic time scale, produced and maintained by international law through international administration with social, political, material and technical dimensions.”).

³ See Section 3 below.

⁴ See Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, at 10, U.N. Doc. A/CN.4/L.702 (2007) (noting that “What once appeared to be governed by “general international law” has become the field of operation for such specialist systems as “trade law,” “human rights law,” “environmental law,” the “law of the sea,” . . . and even such exotic and highly specialized knowledge as “investment law” or “international refugee law,” etc., each possessing its own principles and institutions.”).

⁵ See Hillary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 387–388 (2002) (examining how “international lawyers tend to focus on crises for the development of international law.”); INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS, vii–viii (Michael Reisman & Andrew Willard eds., 1988) (proposing that crises should become the “basic epistemic unit of international law.”). See also Ntina Tzouvala, *International Law as a Discipline in Crisis*, 79 AUSTL. J. INT'L AFF. 71, 71 (2025) (suggesting that “international law moves from being a discipline of crisis into being a discipline in crisis.”).

⁶ See *supra* note 4; *supra* note 5.

⁷ See Koskeniemi, *supra* note 4.

⁸ Interdisciplinary approaches to international law integrate perspectives and methods from fields, such as international relations, economics, history, sociology, philosophy, and science to provide a more comprehensive understanding and better solutions for complex global challenges. This approach moves beyond traditional, text-focused legal analysis to examine the underlying social, economic, and political factors that shape international legal norms and outcomes. See generally INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS—THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2013) (exploring the contributions of interdisciplinary approaches to the understanding of international law).

time.⁹ Braudel's theory of time provides vital insights into the temporal analysis of international law and demonstrates the utility of researching international law through diverse temporalities.¹⁰

Braudel imagined history as a three-layered sea.¹¹ The first type of history, geographical time, is almost immovable and timeless, focusing on the interaction between humanity and the environment.¹² This type of history corresponds to the deep seabed, and all changes in this layer of history are continuous, slow, and irresistible.¹³ The second type of history, social history, focuses on social groups and is characterized by subtle yet detectable rhythms.¹⁴ It is comparable to marine currents, which travel across time and space beneath the sea's surface. The third type of history, known as history of events (*histoire événementielle*) or individual history, focuses on people, military campaigns, and political events.¹⁵ Such a time is comparable to the sea's surface and the waves' constant, relentless motion.¹⁶ Therefore, in Braudel's view, to understand social phenomena, historians should constantly move from the ocean's surface to the deep seabed and, again, from the ocean floor to the water surface.¹⁷

⁹ See CAROLE K. FINK, *Fernand Braudel*, ENCYC. BRITANNICA (Aug. 20, 2025), <https://www.britannica.com/biography/Fernand-Braudel> ("Braudel was a French historian and author of several major works that traversed borders and centuries and introduced a new conception of historical time. As leader of the post-World War II *Annales* school, Braudel became one of the most important historians of the 20th century."); William H. McNeill, *Fernand Braudel, Historian*, 73 J. MOD. HIST. 133, 133 (2001) (highlighting that Braudel served as the editor of an influential journal entitled *Annales* and that "a vigorous group of young historians gathered around him to form a distinctive 'Annales School.'"). On the *Annales* School, see e.g. John R. Hall, *The Time of History and the History of Times*, 19 HIST. & THEORY 113, 114 (1980) ("*Annales* scholars like Lucien Febvre, Marc Bloch, and Fernand Braudel have been instrumental in setting the problematic and the methodologies of a revolution in historiography [T]hey rejected narrow political history which focuses solely on the narration of events, and looked instead to histories of culture, to economic history, and to social history.").

¹⁰ See generally FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP THE SECOND* (Siân Reynolds trans., 2d ed.1972) (1966).

¹¹ See Lucian Staiano-Daniels, *That Sea Is History: Water Metaphors in Modern European Historiography*, J. HIST. IDEAS BLOG (October 6, 2021), <https://www.jhiblog.org/2021/10/06/that-sea-is-history-water-metaphors-in-modern-european-historiography/> ("Braudel also conceived of history as a sea with several layers. In *The Mediterranean World*, he asserted that the deepest layer, 'whose passage is almost imperceptible,' was 'that of man in his relationship to his environment, a history in which all change is slow, a history of constant repetition, ever-recurring cycles.' The second, 'on a different layer from the first,' had 'slow but perceptible rhythms'; this was 'social history, the history of groups and groupings.' Part of *The Mediterranean World* investigated how 'these swelling currents' affected Mediterranean life in general. The third layer, finally, was at the surface of the sea: 'history not on the level of man, but of individual men . . . the history of events: surface disturbances, crests of foam that the waves of history carry on their strong backs.'").

¹² See Melvin M. Knight, *Review: The Geohistory of Fernand Braudel*, 10 J. ECON. HIST. 212, 212 (1950) (noting that Part I of Braudel's *The Mediterranean World* is dedicated to the geographic time).

¹³ See Kent Puckett, *Narrative Theory's Longue Durée*, in *THE CAMBRIDGE COMPANION TO NARRATIVE THEORY* (Matthew Garrett ed., 2018) 13, 13 (noting that for Braudel "the *longue durée* . . . exceeded the historian's traditional focus on the short span and the singular event.").

¹⁴ See Knight, *supra* note 12, at 212 (noting that Part II of Braudel's *The Mediterranean World* is dedicated to social development).

¹⁵ See Knight, *supra* note 12, at 212 (noting that Part III of Braudel's *The Mediterranean World* is dedicated to individual history); see also Ian Buchanan, *Braudel, Fernand*, in *A DICTIONARY OF CRITICAL THEORY* (Ian Buchanan ed., 2010) 214, 215 (noting that "Braudel's approach to history entailed a paradox: he took great pains to situate individuals . . . in their historical context, only to demonstrate their relative unimportance when compared to the deeper historical patterns of society and geography.").

¹⁶ For Braudel, the history of events deals only with brief and ephemeral moments, which he described as "surface disturbances, crests of foam that the tides of history carry on their strong backs." See FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP THE SECOND* 27 (Siân Reynolds trans. 1966) (1972).

¹⁷ See Valentina Vadi, *Il Mare Come Storia: Diritto Internazionale, Tempo e Storia*, 30 ARS INTERPRETANDI 125, 125-40 (2025) (It.).

Braudel emphasized the value of looking over long periods, prioritizing long-term history over short-term and medium-term historical research.¹⁸

This study investigates whether it is possible to transplant such a tripartite vision of time from the field of history to the sphere of international law. It proceeds as follows. After this brief introduction, Section II delves into Braudel's tridimensional view of time and his plea for interdisciplinary collaboration in the social sciences. Section III hypothesizes whether it may be possible to transplant Braudel's theory of time from the historical field to international law to shed light on how international law evolves. Section IV investigates contemporary case studies and how Braudel's theory can help international lawyers address contemporary legal problems. Section V evaluates the benefits and drawbacks of using Braudel's tripartite vision of time in international law.

The essay concludes that the three types of history Braudel described are complementary since they weave together different temporalities and scales. International lawyers can step out of their comfort zone by adopting a broad, interdisciplinary, and long-term perspective to studying international law. Such a perspective "makes it possible to consider the interrelated operation of legal practices and concepts before they were fragmented into separate fields."¹⁹ It also enables them to spot and explain long-term patterns and trends. They can also better understand international law, examine old problems from new angles and perspectives, and find solutions to those issues.

II. TIME IN HISTORY: FRAMING BRAUDEL'S TRIPARTITE VISION OF TIME

A brilliant scholar and one of the most important historians of the 20th century, Braudel, developed his pivotal tripartite vision of time under dramatic circumstances. Captured by the Germans in 1940, he spent the following five years as a prisoner of war in Mainz and later in Lübeck.²⁰ In prison, Braudel wrote his masterpiece, *The Mediterranean*, analyzing the history of the Mediterranean region, transcending traditional historical narratives by examining the interplay of geographical, social, economic, and political forces over long periods, rather than focusing solely on individual events or rulers.²¹ He focused on the Mediterranean Sea—that stretches from the Atlantic Ocean on the west to Asia on the east and separates Europe from

¹⁸ See Olivia Harris, *Braudel: Historical Time and the Horror of Discontinuity* 57 HIST. WORKSHOP J. 161, 162 (2004) (highlighting that "The vision of long-term continuities is the cornerstone of [Braudel's] philosophy of history, and his own craft as a historian. The *longue durée* [long duration] has for him an exceptional value. It is usually contrasted with event-based history . . . (*histoire événementielle*), that privileges a short time span, proportionate to individuals, to daily life However, the *longue durée* can also be understood as an alternative to a history that privileges crisis and sudden breaks.").

¹⁹ Anne Orford, *Theorizing Free Trade*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 701, 710 (Anne Orford & Florian Hoffmann eds., 2016).

²⁰ Compare Anne-Marie Pathé & Fabien Theophilakis, *Prisoners of War in the Twentieth Century—A Problematic at the Crossroad of Histories and Disciplines*, in WARTIME CAPTIVITY IN THE 20TH CENTURY: ARCHIVES, STORIES, MEMORIES 1, 5 (Anne-Marie Pathé & Fabien Theophilakis eds., Berghahn Books 2016) (noting that "as a prisoner at Mainz and Lübeck from 1940 to 1945," Braudel famously wrote "a preliminary version of his book *The Mediterranean*."), with REINHART KOSELLECK, *SEDIMENTS OF TIME: ON POSSIBLE HISTORIES* 238-49 (Sean Franzel & Stefan-Ludwig Hoffmann eds., 2018) (writing that the events and experiences of the concentration camps "fill the memory of those affected by them, they form their memories, flow into their bodies like a mass of lava—immovable and inscribed").

²¹ See Peter Burke, *The Annales in Global Context*, 35 INT'L REV. SOC. HIST. 421, 424, 430 (1990) (discussing how "Braudel's own masterpiece, *The Mediterranean* (1949), [is] commonly considered the single most important and innovative historical study of the century"; highlighting that "the fundamental achievement of the *Annales* group was to break the monopoly . . . of political history and to allow economic, social, and cultural history a place in the sun").

Africa—because of its central role in the history of Western civilization.²² Defended as a doctoral thesis at the Sorbonne University in 1947 and published in 1949, *The Mediterranean* established his international reputation.²³

As a prisoner of war, Braudel “discovered in his dreams of the Mediterranean a means of shutting down the soul-destroying news that filtered through the wire fence.”²⁴ He wrote without access to libraries or archives, scribbling his thoughts in endless school notebooks smuggled out to another historian, Lucien Febvre (1878-1956), a founder of the *Annales* school.²⁵ Relying on his prodigious memory and loading his work with poetic flavor, Braudel expressed his love for and joy in the bright light of the Mediterranean and invited readers to bring their memories to add color to his book, immersing them in shared emotions.²⁶ More fundamentally, Braudel introduced his path-breaking view of historical time by using the sea as the ideal metaphor for history.²⁷

Braudel conceived history as a sea with three layers.²⁸ The first layer, known as geographical time, is almost immovable and timeless and is concerned with how people and the environment interact.²⁹ It is comparable to the deep seabed. All changes in this layer of

²² See Molly Green, *The Mediterranean Sea*, in OCEANIC HISTORIES 134, 134 (David Armitage, Alison Bashford & Sujit Sivasundaram eds., 2017) (noting that the Mediterranean Sea is “the birthplace of Greco-Roman . . . civilisation” offering “abundant written and archaeological record” and constituting “a frontier but one that is routinely crossed”); David Abulafia, *Mediterranean History*, in THE OXFORD HANDBOOK OF WORLD HISTORY 493, 493 (Jerry H. Bentley ed., 2012) (suggesting that “the study of Mediterranean history encapsulates many important aspects of world history: it involves the investigation of connections between societies separated by extensive physical space, focusing on commercial networks, the building of empires, and the movement of peoples”). On the importance of oceanic histories, see generally Sujit Sivasundaram, *The Global and the Earthy—Taking the Planet Seriously as a Global Historian*, in RETHINKING GLOBAL HISTORY 115 (Stefanie Gänger & Jürgen Osterhammel eds., 2024) (noting that “oceanic history . . . has had an increasingly visible place in . . . global history today. After all, oceans necessarily cross areas, regions, and nations” and stressing that some trace “the lineage of the sub-discipline . . . to the *Annales* school and the formative influence of Fernand Braudel”).

²³ See FERNAND BRAUDEL, LA MÉDITERRANÉE ET LE MONDE MÉDITERRANÉEN À L'ÉPOQUE DE PHILIPPE II (1949). In this article, reference will be made to FERNAND BRAUDEL, THE MEDITERRANEAN and the MEDITERRANEAN WORLD IN THE AGE OF PHILIP THE SECOND (Sian Reynolds trans., 1972) (1966).

²⁴ Alexander Lee, *Portrait of the Author as a Historian: Fernand Braudel*, 66 HIST. TODAY 1, 6 (2016).

²⁵ See *id.* at 6–7.

²⁶ See Lucette Valensi, *The Problem of Unbelief in Braudel's Mediterranean*, in BRAUDEL REVISITED: THE MEDITERRANEAN WORLD 1600–1800 17–34 (Gabriel Piterberg, Teofilo Ruiz & Geoffrey Symcox eds., 2010).

²⁷ The metaphor remains current. See, e.g., Prasenjit Duara, *Oceans as the Paradigms of History*, 38 THEORY, CULTURE & SOC'Y, Dec. 2021, at 143 (exploring parallels between oceanic flows and historical time); Charlotte Lerg, *Figuratively Speaking: Why Metaphors Matter in Talking About the Work Historians Do (Part I)*, THEORY HIST. WORK (October 4, 2022), <https://doi.org/10.58079/pcxs> (arguing that it is through metaphors that we can truly grasp the world and that figurative language enables us to communicate a fuller and more profound understanding of the world); Lilian Kroth, *The Ocean in the Court: Navigating Metaphors of Sea and Law*, 30 ANGELAKI: J. THEORETICAL HUMANS., Feb. 2025, at 66 (arguing that “metaphors do not present a mere supplement or embellishment, but a constitutive and often under-acknowledged element of legal discourse”); David Armitage, *World History as Oceanic History: Beyond Braudel*, 15 HIST. REV. 341, 341 (2019) (noting that “until recently, most historians shared a prejudice in favour of the history of land, territory and their human inhabitants. Yet two-thirds of the world's surface is water and much of human history has been conducted on its shores, around its seas, and across its oceans . . . [and proposing] reimagining the history of the world through its oceans and seas and examin[ing] the multiple genealogies of oceanic history”). See generally Surabhi Ranganathan, *Decolonization and International Law: Putting the Ocean on the Map*, 23 J. HIST. INT'L L. 161-83 (2020); David J. Bederman, *The Sea*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 359, 359-738 (Bardo Fassbender & Anne Peters eds., 2012).

²⁸ See BRAUDEL, THE MEDITERRANEAN, *supra* note 10 (the whole discussion of the tripartite framework of history appears in the preface to the first edition of the work).

²⁹ Braudel's ambition was to explore the relationship between human beings and their environment: “a history in which all change is slow, a history of constant repetition, ever-recurring cycles.” See BRAUDEL, THE MEDITERRANEAN, *supra* note 10, at 20 (also introducing “an almost timeless history”). Compare BRAUDEL, THE MEDITERRANEAN, *supra* note 10, at pt. I; with Peter B. Campbell, *The Sea as a Hyperobject: Moving Beyond*

history are continuous, gradual, and irresistible.³⁰ The second tempo, the cyclical or social time, is faster than the first but slower than the third temporality.³¹ It focuses on social structures, economic cycles, and civilizations.³² This layer resembles the marine currents that flow beneath the sea's surface and traverse distance and time.³³ Such history creates a singular tapestry by weaving together the threads of social groups' vicissitudes, empires' rise and fall, and civilizations' development. It displays slow yet noticeable rhythms. Finally, the third layer, the history of events (*histoire événementielle*) or individual history, focuses on people, military skirmishes, and political events.³⁴ Such a time is comparable to the sea's surface and the waves' constant, relentless motion. This layer is characterized by "brief, rapid, nervous fluctuations."³⁵ In Braudel's view, individuals are only "frail cockleshells" cast on moving waters, minute threads in the "immense pattern" of unfolding history.³⁶

For Braudel, the three temporalities are not separate. Instead, they overlap and engage in a temporal dialogue.³⁷ To understand human experience, historians must constantly move from the sea surface to the deep seabed and back. They must move between short and long-term perspectives because short-term events (like a specific battle) must be understood within the broader context of longer historical patterns, while they illuminate and give meaning to such long-term trends. In other words, historians should contextualize the turbulent political and military events on the surface of history within the deep currents of social and geographical structures. Braudel emphasized that focusing only on fleeting events provides a superficial understanding of the past. In parallel, only focusing on long-term patterns can lead historians to write historical theories rather than histories. Instead, he advocated for a comprehensive history that examines the three levels of time. By moving between these levels, historians can understand the interaction between fleeting events and the enduring structures that shape them.³⁸

Maritime Cultural Landscapes, (2020) 8 J. E. MEDITERRANEAN ARCHAEOLOGY & HERITAGE STUD. 207, 207-225 (2020) (arguing that the sea is "a hyperobject. In this approach, the sea is not a landscape or facilitator of human activity but an entity of vast geographical and temporal scale that possesses agency").

³⁰ See JO GULDI & DAVID ARMITAGE, *THE HISTORY MANIFESTO* (2013) at 16 (noting that "[f]or Braudel, the *longue durée* was one among a hierarchy of intersecting but not exclusive temporalities that structured all human history. He had classically described these time-scales in the Preface to his masterwork, *La Méditerranée et le Monde méditerranéen à l'époque de Philippe II* (1949) . . . : an almost unmoving one (*une histoire quasi-immobile*) of humans in their physical environment; a gently paced (*lentement rythmée*) story of states, societies, and civilisations; and a more traditional history of events (*l'histoire événementielle*), those 'brief, rapid, nervous oscillations'").

³¹ Compare FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II*, VOL. 1, at 20-21 (Siân Reynolds trans., 1st ed. 1996); with REINHART KOSELLECK, *SEDIMENTS OF TIME: ON POSSIBLE HISTORIES*, 158-74 (Sean Franzel & Stefan-Ludwig Hoffman eds., 2018) (reflecting on the multiple temporalities of history or layers or strata of time (*Zeitschichten*)) and Justus Grebe, *Time in History*, HYPOTHESES: THEORY OF HISTORY AT WORK (Jan. 18, 2023) <https://doi.org/10.58079/pcwp> (summarizing this tripartite model and noting that "Fast events occur on an upper level, while slower change unfolds in the middle level. At the lower end of the model flow, the slow processes that can only be made visible over the *longue durée*.").

³² See BRAUDEL, *THE MEDITERRANEAN*, *supra* note 10, at 20-21.

³³ See BRAUDEL, *THE MEDITERRANEAN*, *supra* note 31, at 20-21 (describing the forces of "economic systems, states, societies, civilizations" as "swelling currents.").

³⁴ See BRAUDEL, *THE MEDITERRANEAN*, *supra* note 10, at 21 (describing this third layer of history as "A history of brief, rapid, nervous fluctuations, by definition ultra-sensitive . . . But as such it is the most exciting of all, the richest in human interest, and also the most dangerous. We must learn to distrust this history with its still burning passions, as it was felt, described, and lived by contemporaries whose lives were as short and as short-sighted as ours. It has the dimensions of their anger, dreams, or illusions.").

³⁵ See BRAUDEL, *THE MEDITERRANEAN*, *supra* note 10, at 21.

³⁶ See BRAUDEL, *THE MEDITERRANEAN*, *supra* note 10, at 21.

³⁷ See MHAER AKHTIAR, *L'ÉPISTEMOLOGIE DE L'HISTOIRE CHEZ FERNAND BRAUDEL* [THE EPISTEMOLOGY OF HISTORY IN FERNAND BRAUDEL] 12 (2022) (Fr.).

³⁸ Compare, with Puckett, *supra* note 13, at 14 (explaining that "different and seemingly opposed aspects of the same events can be revealed when we consider those events from different narrative perspectives.").

The vision of long-term continuities is “the cornerstone of Braudel’s philosophy of history.”³⁹ Braudel stressed the value of looking back over long periods of time (the so-called *longue-durée*), thus prioritizing long-term history over short- and medium-term historical research.⁴⁰ His desire for the long horizon was connected to his war experience; he elaborated the tripartite notion of time as “the only existential response to the tragic times” he was living.⁴¹ The tripartite theory of time provided a method for the historian to escape “the terrorism of events,” enabling him to make sense of the trauma that lies at the surface of history against the backdrop of deep history.⁴² To overcome the anguish of war, he contextualized this historical event into a broader historical frame.⁴³

Braudel’s breakthrough was not the delineation of multiple temporalities of history.⁴⁴ His predecessors had certainly already used different temporal scales of analysis.⁴⁵ The paradigm change was the combination of such temporalities.⁴⁶ Braudel “did not mathematically replace a shortsighted history with a long-range one.”⁴⁷ He “did not suggest replacing one timescale with another.”⁴⁸ Instead, he highlighted the necessity of ordering these different forms of time.⁴⁹ To study the human experience, historians should first use ultra-wide telescopes, then telescopes and microscopes.⁵⁰

Braudel chose not to provide exact definitions of the three timescales, but applied these temporalities in his masterpiece’s structure.⁵¹ Braudel’s *Mediterranean*, a 600,000-word work, is divided into three parts, each dealing with a different timescale.⁵² The first part of the book is devoted to geographical time.⁵³ It examines the almost timeless realities of land, climate, agriculture, trade, and transportation as the deep factors of Mediterranean history.⁵⁴ The second part of the book explores social time and collective destinies.⁵⁵ It examines the structuring of societies, the acquisition and dissemination of knowledge and beliefs, and wealth production and distribution as the organizing structures of social time. The third part of the book focuses on great figures and diplomatic, military, and political events.⁵⁶

³⁹ Olivia Harris, *Braudel: Historical Time and the Horror of Discontinuity*, HIST. WORKSHOP J. 161, 162 (2004).

⁴⁰ See Fernand Braudel, *History and the Social Sciences: The Longue Durée*, 32 REV. (FERNAND BRAUDEL CTR.) 171, 195–96 (2009).

⁴¹ FERNAND BRAUDEL, STORIA MISURA DEL MONDO [History of Measuring the World] 16 (1998) (It.).

⁴² AREA TEÓRICO METODÓLOGICA FAC. HUMANIDADES UNMDP, *Fernand Braudel y la historia* (YouTube, Oct. 14, 2018) at 10:15–13:41, <https://www.youtube.com/watch?v=8A9SrXoCtDs>.

⁴³ See generally Fernand Braudel, *Personal Testimony*, 44 J. MOD. HIST. 448, 448–67 (1972).

⁴⁴ See Stephen W. Sawyer, *Time After Time: Narratives of the Longue Durée in the Anthropocene*, TRANSATLANTICA ¶ 8, ¶ 16 (2015).

⁴⁵ See generally *id.* at ¶ 9, ¶ 16.

⁴⁶ See M. BENAITEAU, *A Proposito della Lunga Durata*, in FERNAND BRAUDEL: IL MESTIERE DI UNO STORICO, 83 (Bianca Arcangeli & Giovanni Muto eds., 1988). See also Sawyer, *Time After Time*, *supra* note 44, at ¶ 18 (arguing that “Braudel’s breakthrough then was to develop a methodology that allowed for the intersection of multiple time scales in response to a specific historical problem . . . So instead of replacing the short with the long, or simply calling for a new commitment to the *longue durée*, he attempted to ameliorate working conceptions of time within history.”).

⁴⁷ See Sawyer, *Time After Time*, *supra* note 44, at ¶ 17.

⁴⁸ See Sawyer, *Time After Time*, *supra* note 44, at ¶ 17.

⁴⁹ See Sawyer, *Time After Time*, *supra* note 44, at ¶¶ 17–18.

⁵⁰ See generally Sawyer, *Time After Time*, *supra* note 44, at ¶ 17.

⁵¹ Cheng-Chung Lai, *Braudel’s Concepts and Methodology Reconsidered*, 5 EUR. LEGACY 65, 67–86 (2000).

⁵² See *id.* at 67.

⁵³ See BRAUDEL, THE MEDITERRANEAN, *supra* note 10, at 23.

⁵⁴ See generally BRAUDEL, THE MEDITERRANEAN, *supra* note 10, at 23.

⁵⁵ See BRAUDEL, THE MEDITERRANEAN, *supra* note 10, at Part II.

⁵⁶ See BRAUDEL, THE MEDITERRANEAN, *supra* note 10, at Part III.

Braudel's approach represented a watershed in historical studies, as it did not just focus on domestic historical events but also on transnational geographical data, legal and economic structures, and collective mindsets.⁵⁷ His cosmopolitanism was uncommon for his generation: after studying at the Sorbonne University in France, Braudel taught for nine years at secondary schools in Algeria (1923-1932), where he fell in love with the Mediterranean Sea.⁵⁸ After lecturing at the University of São Paulo in Brazil (1935-1937), he joined the École Pratique des Hautes Études in Paris in 1937 and was elected Professor at the Collège de France (1950-1972).⁵⁹ Due to his cosmopolitan background, Braudel adopted an international research agenda.⁶⁰ While historians of the Mediterranean Sea focused on domestic histories, inspired by competing nationalist agendas, Braudel adopted international and interdisciplinary approaches to understanding the depths of history.⁶¹

Getting off the beaten track and away from a purely historicist vision, Braudel also argued for a rapprochement between history and law for mutually beneficial reasons.⁶² From an international law perspective, three reasons seem to confirm the validity of Braudel's intuition. First, international law "has a history and can be examined from a historical perspective."⁶³ Second, international law uses temporal tools to function.⁶⁴ Elements of time appear in legal norms, legal instruments, and legal arguments in international law.⁶⁵ Third,

⁵⁷ See AKHTIAR, *supra* note 37, at 9.

⁵⁸ See Paule Braudel, *Les Origines Intellectuelles de Fernand Braudel: Un Témoignage* [*The Intellectual Origins of Fernand Braudel: A Testimony*], 47 ANNS.: HIST., SCIS. SOCS., 237, 241 (1992) (Fr.).

⁵⁹ See Richard Mowery Andrews, *The Mediterranean*, N.Y. TIMES, May 18, 1975 (noting that "Born in 1902 in a village of the Northeastern French plain, Braudel is a native of the enduring zone of confrontation and exchange between Latin and Germanic civilizations . . . As a professor in 'lycées' in Algeria during the final period of unchallenged French dominion over the Maghreb, Braudel discovered the Mediterranean and accomplished the primary research for his study . . . [He spent] two years (1935-37) . . . teaching at the University of Sao Paulo in Brazil . . . Yet the book was actually written in a stupendous effort of recall and concentration, without notes or documents, during almost five years of confinement in Germany behind the wire of a Wehrmacht prisoner-of-war camp. The labor of this sustained existential meditation served Braudel as a refuge from the cascade of events inundating himself and his generation.").

⁶⁰ See ŞEVKET PAMUK, *Braudel's Eastern Mediterranean Revisited* in BRAUDEL REVISITED: THE MEDITERRANEAN WORLD, 1600-1800, at 99-126 (Gabriel Piterberg, Teofilo F. Ruiz & Geoffrey Symcox eds., 2010).

⁶¹ See ANDREA CICLA, *Braudel-La storia è l'insieme delle scienze umane (1975)* [*History is the Sum of the Human Science*] at 2:33-3:07 (YouTube, Apr. 17, 2022), <https://www.youtube.com/watch?v=0cE658Ld9z4>.

⁶² See Richard E. Lee, *Lessons of the Longue Durée: The Legacy of Fernand Braudel*, 69 HIST. CRÍTICA 69, 75-77 (2018).

⁶³ Henry Jones & Aoife O'Donoghue, *History and Self-Reflection in the Teaching of International Law*, 10 LOND. REV. INT'L L. 71, 77 (2022). See also Natasha Wheatley, *Law and the Time of Angels: International Law's Method Wars and the Affective Life of Disciplines*, 60 HIST. & THEORY 311 (2021) (discussing "recent method wars in international legal scholarship . . . on the problem of law in time.").

⁶⁴ See Eliana Cusato, *Against Temporal Abstractions: The Battle for Colonial and Climate Reparations in International Law*, 21 INT'L J.L. CONTEXT 281, 281-299 (2025) (exploring the operation and politics of time in international law).

⁶⁵ See, e.g. Yoshifumi Tanka, *Reflections on Time Elements in the International Law of the Environment*, 73 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HJIL] 140 (2013) (discussing elements of time in relation to international environmental law); THE TIME AND TEMPORALITIES OF INTERNATIONAL HUMAN RIGHTS LAW (Kathryn McNeilly & Ben Warwick eds., 2022) (discussing elements of time in relation to international human rights law). See Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 INT'L & COMPAR. L. Q. 501, 501-20 (1997); Christian Djeflal, *International Law and Time: A Reflection of the Temporal Attitudes of International Lawyers Through Three Paradigms*, 45 NETH. Y.B. INT'L L. 93 (2014); BETWEEN PRAGMATISM AND PREDICTABILITY: TEMPORARINESS IN INTERNATIONAL LAW 93, 93-119 (Mónika Ambrus & Ramses A. Wessel, eds. 2015) (exploring how international law is situated in time); Zhenni Li, *International Intertemporal Law*, 48 CAL. W. INT'L L. J. 341, 342-43 (2018) (highlighting that "the system of international law is all about the subjects, events, and disputes occurring within a certain period of time" and defining "intertemporal law . . . as the temporal application of law or the conflict of law in respect of time."); Klara Polackova Van der Ploeg & Luca Pasquet, *The Multifaceted Notion of Time in International Law*, 101 INT'L L. & TIME - NARRATIVES & TECHS. 1, 1-24 (2022); TIME AND INTERNATIONAL ADJUDICATION: THE

history is part of international law. For instance, Matthew Craven argues: “To make an argument about the history of international law is to make an international legal argument.”⁶⁶

As international relations grow increasingly dynamic, volatile, and unpredictable, is there a case for international lawyers to adopt a comprehensive and multilayered approach to their field? Can Braudel’s three-dimensional view of time be successfully transplanted into the legal domain? The next section investigates whether this research method can apply to international law.

III. TIME IN LAW: INTERNATIONAL LAW AS FERTILE SOIL FOR TRANSPLANTS

After briefly illustrating the state of the art, this section investigates whether adopting a three-dimensional view of time can benefit international law.⁶⁷ Many studies thematically focus on specific field developments temporally adopting short- or mid-term perspectives.⁶⁸ Thematically, narrow perspectives are common due to the growing institutional and normative fragmentation of international law and the specialization of international law experts.⁶⁹ Temporally, short-term perspectives focus on events and are often limited to hours, days, months, and years, whereas mid-term analyses focus on decades-long patterns and outcomes. International lawyers often focus on specific episodes or incidents while seeking insights into grand themes of international law. They have looked into specific cases,⁷⁰ material items,⁷¹ the lives and works of individuals,⁷² institutional developments,⁷³ and military history events.⁷⁴ Scholars have also focused on the history of specific trials and arbitrations.⁷⁵ Such perspectives

TEMPORAL FACTOR IN PROCEEDINGS BEFORE INTERNATIONAL COURTS AND TRIBUNALS (Andrea Gattini & Marco Dimetto eds., 2024) (exploring how concepts, rules, and pressures of time shape the conduct and outcomes of proceedings across international adjudicative bodies); Sean D. Murphy, *Temporal Issues Relating to BIT Dispute Resolution*, ICSID REV.: FOREIGN INV. L. J., Winter/Spring 2022, at 51, 51-84 (discussing temporal issues in investor-state dispute settlement).

⁶⁶ See MATT CRAVEN, *Introduction: International Law and Its Histories*, in TIME, HISTORY AND INTERNATIONAL LAW 1, 6 (Matt Craven, Malgosia Fitzmaurice, & Maria Vogiatzi eds., 2007).

⁶⁷ See, ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY (2021); IGNACIO DE LA RASILLA, INTERNATIONAL LAW AND HISTORY: MODERN INTERFACES (2021); VALENTINA VADI, *International Law and its Histories: Methodological Risks and Opportunities* 58 HARV. INT’L L. J. 311 (2017).

⁶⁸ See DAVID ARMITAGE & JO GULDI, THE HISTORY MANIFESTO (2013) (arguing that thinking across long time scales slowly disappeared in the 1970s–2000s due to the emergence of microhistories).

⁶⁹ See, e.g., Robert. Schütze, *From the “Closed” to the “Open” Commercial State: A Very Brief History of International Economic Law* 19 J. HIST. INT’L L. 495 (2017); Tullio Treves, *Historical Development of the Law of the Sea*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA (Donald Rothwell et al., eds., 2015); HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW (Morten Bergsmo, Cheah Wui Ling & Yi Ping eds., 2014).

⁷⁰ See, e.g., GIORGIO FABIO COLOMBO, JUSTICE AND INTERNATIONAL LAW IN MEIJI JAPAN—THE MARÍA LUZ INCIDENT AND THE DAWN OF MODERNITY (2023); JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012).

⁷¹ See Jessie Hohmann, *Material Pasts and Futures: International Law’s Objects*, 7 LOND. REV. INT’L L. 283 (2019); INTERNATIONAL LAW’S OBJECTS (Jessie Hohmann & Daniel Joyce eds., 2018); VALENTINA VADI, *Power, Law, and Images: International Law and Material Culture*, 45 SYRACUSE J. INT’L L. 215 (2018); LUIS ESLAVA, *The Materiality of International Law: Violence, History and Joe Sacco’s The Great War*, 5 LOND. REV. INT’L L. 49 (2017).

⁷² See TIRZA MEYER, ELISABETH MANN BORGESSE AND THE LAW OF THE SEA (2022); VALENTINA VADI, WAR AND PEACE: ALBERICO GENTILI AND THE EARLY MODERN LAW OF NATIONS (2020).

⁷³ See ANTONIO R. PARRA, THE HISTORY OF ICSID (2017); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L. J. 550 (2008).

⁷⁴ See Eyal Benvenisti & Doreen Lustig, *Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874*, 31 EUR. J. INT’L L. 127 (2020).

⁷⁵ See Xiaohang Chen, *Deciphering l’Esprit d’Internationalité: The 1872 Alabama Arbitration and the Pacifist Antithesis of Modern International Law Profession*, 37 LEIDEN J. INT’L L. 323, 323-338 (2024).

reflect international lawyers' recurrent focus on specific crises, incidents, and events.⁷⁶ Crises capture international lawyers' imagination and often monopolize their attention.⁷⁷ Nonetheless, other scholars have used longer time scales. While some scholars have focused on the geological and geographical features of international law,⁷⁸ others have adopted an extended lens to examine the historical evolution of international law using long time scales across centuries and millennia.⁷⁹

Some prominent historians argue for a wider use of the *longue durée* in history, stating that some social phenomena require large-scale investigation and temporal breadth.⁸⁰ Broad histories can dispel myths and overturn false laws.⁸¹ Other studies have called for a more extensive use of microhistories to illuminate the contribution of marginalized communities or actors to the making of international law.⁸²

Adopting Braudel's tripartite theory of time differs from and improves the dual narrow/broad and short/long-term dichotomies that currently characterize international legal scholarship. Braudel's theory of time includes three layers: individual time, social time, and geographical time.⁸³ The first sort of history supports and even legitimizes international lawyers' traditional focus on crises. The second form of history enables genealogical and doctrinal inquiries into the evolution of given legal concepts across space and time. The third type of history, the *longue durée*, urges international lawyers to adopt a long view to examine given legal phenomena. In Braudel's view, individual time, social time, and geological time are complementary, not mutually exclusive.⁸⁴ These are not separate, isolated concepts but different layers of historical reality, each with its own rhythms and durations, that intersect and influence one another in any historical inquiry.

The simultaneous combination of different temporalities is more than the sum of its parts. By adopting Braudel's tripartite vision of time, international lawyers can comprehend both the grand picture and the small details, examine old problems from novel angles, and

⁷⁶ See FLEUR E. JOHNS, RICHARD JOYCE, & SUNDHYA PAHUJA, *EVENTS: THE FORCE OF INTERNATIONAL LAW*, at 2-17 (2011).

⁷⁷ See CRISIS NARRATIVES IN INTERNATIONAL LAW (Makane Moïse Mbengue & Jean d'Aspremont eds., 2022); HOW INTERNATIONAL LAW WORKS IN TIMES OF CRISIS (George Ulrich & Ineta Ziemele eds., 2019); JAMES CRAWFORD, *Reflections on Crises and International Law*, in HOW INTERNATIONAL LAW WORKS IN TIMES OF CRISIS 10, 10-18 (George Ulrich & Ineta Ziemele eds., 2019).

⁷⁸ See Tayyab Mahmud, *Geography and International Law: Towards a Postcolonial Mapping*, 5 SANTA CLARA J. INT'L L. 525 (2007); GAIL LYTHGOE, *THE REBIRTH OF TERRITORY* (2024); SOFIA STOLK, *Critical Legal Geography, Spatial Cognition, and International Law*, in INTERNATIONAL LEGAL THEORY AND THE COGNITIVE TURN 240 (Anne van Aaken & Moshe Hirsch eds., 2025) (investigating how space can shape our perception, understanding, and appreciation of international law and injustice). See also Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, 25 EUR. J. INT'L L. 9 (2014); Nikolas M. Rajkovic, *The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis*, 31 LEIDEN J. INT'L L. 267 (2018).

⁷⁹ See generally MARTTI KOSKENNIEMI, *TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 1300-1870* (2021). See also DAVID J. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (2009).

⁸⁰ See David Armitage, *What's the Big Idea? Intellectual History and the Longue Durée*, 38 HIST. EUR. IDEAS 493 (2012); David Armitage & Jo Guldi, *The Return of the Long Durée: An Anglo-American Perspective*, 70 ANNS.: HIST., SCIE. SOCS. 219 (2015).

⁸¹ See generally JOHN POTTS, *IDEAS IN TIME: THE LONGUE DURÉE IN INTELLECTUAL HISTORY* (2019).

⁸² See Valentina Vadi, *The Power of Scale: International Law and Microhistories*, 46 DENV. J. INT'L L. & POL'Y (2018) (arguing for a broad use of microhistories in international legal history). See also Valentina Vadi, *Perspective and Scale in the Architecture of International Legal History*, 30 EUR. J. INT'L L. (2019) (arguing that micro- and macro-histories can complement each other).

⁸³ BRAUDEL, *THE MEDITERRANEAN*, *supra* note 10, at 20-21.

⁸⁴ Guldi and Armitage, *supra* note 30, at 16.

discover new solutions to the same. Moreover, the three temporalities are part and parcel of international law; by taking a comprehensive, multilayered, and broad approach, international lawyers can more effectively recognize and even redress historical injustices. The adoption of a broad, interdisciplinary focus reveals patterns that would be undetectable by using one or the other competing approach. It can decolonize international law by “disordering it” and endorsing multiple temporalities, histories, and perspectives.⁸⁵ By adopting multiple timescales, not only can international lawyers see the deep history of their field, but they can also understand the present and map the future of international law, opening debates about alternatives to the current global order. By analyzing these different temporalities, international lawyers can move beyond superficial event-focused narratives to understand the deep, underlying structures and persistent forces that truly shape international law.

IV. LAW IN TIME: TIME TO JETTISON *TERRA NULLIUS*

This section illustrates how Braudel’s tripartite vision of time can apply in practice by investigating contemporary forms of neocolonialism. Neocolonialism refers to the practice by which industrialized countries control developing countries through indirect methods, like economic policies and cultural influence, rather than through direct military or political rule.⁸⁶ This creates new forms of dependency and perpetuates global inequality long after formal colonialism has ended.⁸⁷ Such neocolonial practices pose significant obstacles to sustainable development and self-determination.⁸⁸ Despite the firm codification of the right to self-determination,⁸⁹ the decolonization process is far from being complete.⁹⁰ In fact, although condemned in theory, contemporary permutations of colonialism persist in practice.

During the colonial period, which occurred from the fifteenth century to the twentieth century, the “sovereignty doctrine expel[led] the non-European world from its realm, and then ... legitimise[d] the imperialism that resulted in the incorporation of the non-European world into the system of international law.”⁹¹ Colonial powers attempted to legitimize the conquest of other continents by using the argument of *terra nullius*. The term *terra nullius*, which means “territory without an owner” refers to a space that is “empty, unclaimed, devoid of inhabitants, or belonging to no one.”⁹² This concept was used in the early modern period as a pretext for affirming property and sovereignty over newly discovered lands. According to this practice, territories could be occupied if they did not already belong to another sovereign state, regardless

⁸⁵ See Michelle Staggs Kelsall, *Disordering International Law*, 33 EUR. J. INT’L L. 729 (2022).

⁸⁶ See generally Lena Salaymeh, *Demystifying the Neo-colonialism of International Law*, CRITICAL LEGAL THINKING (Dec. 19, 2023), <https://criticallegalthinking.com/2023/12/19/demystifying-the-neo-colonialism-of-international-law/> (arguing that “[c]olonialism is not a subject of the past, to be studied as a lesson for the present. Instead, it is part of our everyday reality. While colonizers of preceding centuries did not hide their colonialism, today’s neo-colonial states ... mystify their colonialism. The twentieth-century period that is described erroneously as ‘decolonization’ was not a shift from colonial to ‘post-colonial’ states, but rather a shift from colonialism to neo-colonialism.”)

⁸⁷ Obikwelu Ifeanyi John, Gérard-Marie Messina & Odumegwu Andy Chukwuemeka, *The Effects of Neocolonialism on Africa’s Development*, 4 No. 2 PANAFRICAN J. GOVERNANCE & DEV. 3, 3 (2023) (arguing that the African continent “continues to face economic dependence, corruption, and stunted development due to neocolonial exploitation.”).

⁸⁸ *Id.*

⁸⁹ International Covenant on Civil and Political Rights (ICCPR), art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1967); International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 1, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) (entered into force Jan. 3, 1976).

⁹⁰ Valentina Vadi, *The African Renaissance and International Investment Law*, THE AFRICAN RENAISSANCE: WHAT ROLE FOR INTERNATIONAL INVESTMENT LAW? (forthcoming 2026).

⁹¹ Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD QUARTERLY 739, 741 (2006).

⁹² See Tamar Herzog, *How Did the Commons Become Terra Nullius? Contextualizing Colonial Debates and Asking About their Consequences*, 3 QUADERNI STORICI 607, 607 (2021).

of whether they were inhabited by people whose community was not recognized as a state.⁹³ *Terra nullius* was thus a legal fiction; even though newly discovered lands were inhabited by Indigenous peoples, colonies were established regardless.⁹⁴ Therefore, the concept of *terra nullius* became a legal weapon and a principle of violence.⁹⁵ Colonial powers articulated arguments of *terra nullius* and granted territorial concessions over land they did not own, despite fierce Indigenous opposition. Colonial rule disregarded Indigenous sovereignty and conflated the private occupation of territory with the public acquisition of sovereignty. In this way, colonists acquired ownership of land while remaining subjects of their native country.⁹⁶ Various European powers “almost entirely disregard[ed] the right of the native inhabitants of these regions”⁹⁷ and “treat[ed] them, in essence, as legally irrelevant.”⁹⁸

Since then, several decisions of international and municipal courts have consistently rejected the *terra nullius* concept in the twentieth century.⁹⁹ The 1945 United Nations Charter affirmed the right of all peoples to self-determination.¹⁰⁰ The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples held that colonialism should cease swiftly and upheld the right of every people to self-determination, that is, to “freely determine their political status and freely pursue their economic, social and cultural development.”¹⁰¹ The right to self-determination also features in the 1966 Covenants.¹⁰² Several cases brought before the International Court of Justice indicate a trend toward the justiciability of this right.¹⁰³ The right

⁹³ See Robert Jennings & Arthur Watts, *Oppenheim’s International Law, Vol. I, Peace* 687 (OUP 1982).

⁹⁴ See Paul Havemann, *Denial, Modernity and Exclusion: Indigenous Placelessness in Australia* 5 MAQUARIE L. J. 57, 57 (2005) (“[T]he legal fiction that Australia was *terra nullius* (land of no one) justified the territorial acquisition of this continent and expropriation of Australia’s Indigenous people, denied their personhood, culture and governance systems.”); See also Julien Hardy, *Thinking the Other: From Terra Australis Incognita to Terra Nullius*, 56 TERRAE INCOGNITAE—J. SOC’Y FOR THE HIST. OF DISCOVERIES 226, 226 (Highlighting that, historically, “As the scientific exploration of distant lands progressively gave way to political and economic interests, the transition from geographical othering to racial othering in the representation of Indigenous Australians turned *Terra Australis Incognita* into *terra nullius*.”).

⁹⁵ Colin Perrin, U.N.S. Wales & Bernhard Ripperger, *In the Wake of Terra Nullius?*, 4 L. TEXT CULTURE, 227 (1998).

⁹⁶ VALENTINA VADI, *WAR AND PEACE: ALBERICO GENTILI AND THE EARLY MODERN LAW OF NATIONS* (2020).

⁹⁷ Steven Wheatley, *Conceptualizing the Authority of the Sovereign State over Indigenous Peoples*, 27 LEIDEN J. INT’L LAW 371, 380 (2014).

⁹⁸ Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141, 1153 (2008).

⁹⁹ International law has discarded the concept of *terra nullius* since the 1975 Western Sahara Opinion of the ICJ. In this case, the court held that because the inhabitants of Western Sahara were socially and politically organized at the time of Spanish colonization in 1884, the land was not *terra nullius*. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16). At the domestic level, see, e.g., *Mabo v Queensland* [No. 2] (1992) 175 CLR 1 (Austl.) (finding that the continent was not *terra nullius* at the time of settlement.)

¹⁰⁰ U.N. Charter art. 1; U.N. Charter art. 55.

¹⁰¹ G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960), <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-granting-independence-colonial-countries-and-peoples>.

¹⁰² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

¹⁰³ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa), Advisory Opinion, 1971 I.C.J. 16, ¶¶ 52–3; *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 54–65; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 88; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶¶ 144 ff.; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 24 July 2024, ¶¶ 230 ff.

to self-determination is a composite entitlement linked to both civil and political, as well as economic, social, and cultural rights.¹⁰⁴

While former colonies gradually achieved their political independence, economic and cultural decolonization remains a work in progress.¹⁰⁵ During and after decolonization, many newly independent states struggled to establish independent economies and continued to be subject to other, less overt, forms of external control, like resource exploitation.¹⁰⁶ In some cases, not only did decolonization fail to bring about the anticipated transition from colonial to post-colonial nations, but it also entailed a shift from colonialism to neocolonialism, extending prior forms of subjugation.¹⁰⁷ Contemporary articulations of the *terra nullius* concept keep resurfacing in the ongoing race for natural and cultural resources.¹⁰⁸

To illustrate the contemporary pervasiveness of *terra nullius*, this section examines three paradigmatic case studies. By stressing emptiness rather than fullness, these narratives advance neocolonial projects and overlook the violence and injustice that accompany the appropriation of others' land.¹⁰⁹ The section argues that only by adopting a temporally composite and aware approach can international lawyers dismantle the old colonial logic.

The first case study concerns the implicit use of *terra nullius* assumptions over the use of natural resources in contemporary Africa.¹¹⁰ The Namibian government is planning to build new infrastructure for a major green hydrogen project proposed by a German company.¹¹¹ However, the proposed port expansion to support the transportation of green hydrogen may affect the historical site of Shark Island.¹¹² In fact, Shark Island—today a peninsula located in the harbor of Lüderitz in Southern Namibia—is a national heritage site. It hosted a concentration camp from 1905 to 1908 during German colonial rule over the then-German Southwest Africa.¹¹³ Reportedly, thousands of Namibians who died in the concentration camp lie at the bottom of the ocean floor.¹¹⁴

¹⁰⁴ See ANTONIO CASSESE, *Self-Determination of Peoples: A Legal Reappraisal* 1 (Cambridge Univ. Press 1995) (arguing that the right to self-determination is “boldly radical and deeply subversive” and “perfectly reflects the cyclical oscillation between positivism and natural law.”).

¹⁰⁵ Valentina Vadi, *The African Renaissance and International Cultural Heritage Law*, 31 INT’L J. CULT. PROP. 397-426 (2024).

¹⁰⁶ See, e.g., Bekeh Utietiang Ukelina (ed), *Who Owns Africa?: Neocolonialism, Investment, and the New Scramble* (Cambridge Univ. Press 2022) (addressing the role of foreign actors in Africa).

¹⁰⁷ See also Anne Peters, Stefan Hobe & Eva-Maria Kieninger (eds) *Koloniale Kontinuitäten im Internationalen Recht, Proceedings of the German Society of International Law* (2024).

¹⁰⁸ JASKIRAN DHILLON, *Indigenous Resurgence, Decolonization, and Movements for Environmental Justice, in* INDIGENOUS RESURGENCE—DECOLONIALIZATION AND MOVEMENTS FOR ENVIRONMENTAL JUSTICE (2022) (highlighting “the histories of resistance of frontline Indigenous communities, many of whom have been fighting against the environmental violence of colonialism since the onset of occupation”).

¹⁰⁹ Tamar Herzog, *How Did the Commons Become Terra Nullius?*, QUADERNI STORICI 607, 617 (2021).

¹¹⁰ Charles Geisler, *New Terra Nullius Narratives and the Gentrification of Africa’s Empty Lands*, 18 J. WORLDS SYS. RES. 15, 17 (2012) (noting that the narrative of *terra nullius* has proven “resilient in both its *de jure* and *de facto* forms”).

¹¹¹ Johanna Tunn, Franziska Müller, Jesko Hennig, Jenny Simon & Tobias Kalt, *The German Scramble for Green Hydrogen in Namibia: Colonial Legacies Revisited?* 118 POL. GEOGRAPHY 1, 1 (2025) (noting that “Namibia is opening its doors to foreign money, corporations, and technical assistance to establish itself as a ‘green hydrogen superpower’”).

¹¹² *Id.* at 5 (noting that “recent developments that would extend onto Shark Island, which was the site of a German concentration camp”).

¹¹³ Harriet Marsden, *Namibia Grapples with Legacy of Genocide on Shark Island*, THE WEEK UK (May 14, 2024), <https://theweek.com/history/namibia-grapples-with-legacy-of-genocide-on-shark-island>.

¹¹⁴ FORENSIC ARCHITECTURE, GERMAN COLONIAL GENOCIDE IN NAMIBIA: SHARK ISLAND 9, 51 (2024), <https://forensic-architecture.org/investigation/shark-island> (reporting that written sources and oral history both suggest that a significant number of bodies were not even buried but thrown directly into the sea. The waters around the island are thus very likely to be the resting place for many of the camp’s victims. Other victims were buried on land.).

Critical scholars thus question whether the push for green energy perpetuates colonial injustices, framing this and similar projects as climate or green colonialism.¹¹⁵ While these projects propose to foster cooperation, “they also continue to dispossess communities from their lands and waters” and risk erasing environmental and cultural heritage.¹¹⁶ Using climate narratives to justify the use or acquisition of land against local aspirations risks increasing “climate coloniality,” “with those affected the most but contributing the least ... sometimes also facing an additional burden from actions directed toward mitigation and adaptation that ... further worsen their situation.”¹¹⁷ “[L]ocals view the plan as a new form of colonization, where African resources are extracted for the benefit of European markets.”¹¹⁸ Descendants of the deceased reportedly highlighted that:

Shark Island epitomizes a landscape and a history of immeasurable human suffering. It must be recognized as a place of world heritage, evidence of the cruel and methodical denial of the human dignity of the Nama and Ovaherero people during Germany’s first genocide. Any further interference with this landscape is a continued and calculated denial of our humanity.¹¹⁹

Far away up north, in 2023, environmental activist, Greta Thunberg, and other climate campaigners joined a demonstration led by the Saami community, an Indigenous group whose traditional lands stretch across Norway, Sweden, Finland, and Western Russia.¹²⁰ Historically exposed to forced assimilation and discrimination, “over the years, the Saami have achieved increased cultural recognition within Norwegian society....”¹²¹ The protest aimed to pressure the Norwegian government to take down wind farms in the Fosen Peninsula.¹²² The farms lie on land that the Saami use for reindeer herding.¹²³ This activity is a significant feature of their lifestyle and subsistence economy.¹²⁴ Reportedly, the reindeer are frightened by the noise and sight of the turbines, “leaving the lands unsuitable for grazing” and jeopardizing the fate of the Saami.¹²⁵

¹¹⁵ Irus Braverman, *Frontier Ecologies: Israel’s Settler Colonialism in the Jawlan-Golan*, 111 POL. GEOGRAPHY 1, 3 (2024).

¹¹⁶ Rosanna Carver & Natache Ilonga, *Namibia’s Shark Island: Europe’s Push for Green Hydrogen Risks Compromising Sites of Colonial Genocide*, *The Conversation* (Feb. 17 2025, at 7:39 ET) <https://theconversation.com/namibias-shark-island-europes-push-for-green-hydrogen-risks-compromising-sites-of-colonial-genocide-239549>.

¹¹⁷ Braverman, *supra* note 115, at 9.

¹¹⁸ Marsden, *supra* note 113. *See also* Tunn et al., *supra* note 111, at 8 (noting that “These developments are entrenched in patterns of exploitation and appropriation that prioritise profit and growth for the sake of environment and people and represent a longue durée of (neo)colonial violence.”)

¹¹⁹ Jemima Buekes, *Investigation Reveals Threats to Shark Island*, *NAMIBIAN SUN* (Mar. 7, 2024), <https://www.namibiansun.com/local-news/investigation-reveals-threats-to-shark-island2024-07-03>.

¹²⁰ *See* Laura Paddinson, *Greta Thunberg has Joined a Protest Against Wind Farms. Here’s Why*, *CNN* (Mar. 2, 2023, at 12:27 ET), <https://www.cnn.com/2023/03/01/europe/greta-thunberg-wind-farm-norway-sami-climate-intl> (“It may seem strange to see Greta Thunberg protesting against wind turbines, but this week the Swedish climate activist has joined Indigenous and environmental groups in Norway to do just that ... protest[ing] against two windfarms built on Sámi reindeer grazing grounds.”)

¹²¹ Lilja Mósedóttir, *Energy (In)justice in the Green Energy Transition. The Case of Fosen Wind Farms in Norway*, 77 *TECH. IN SOC’Y* (2024).

¹²² Paddinson, *supra* note 120.

¹²³ Paddinson, *supra* note 120.

¹²⁴ *See* Johanna Lindqvist, *Reindeer Herding: A Traditional Indigenous Livelihood*, 6 *MACQUARIE J. INT’L & COMPAR. ENV’T L.* 83, 83-84 (2009) (considering the “[p]rotection of reindeer herding as an indigenous livelihood ... [to be] at the intersection of human rights, indigenous rights and environmental protection ...”).

¹²⁵ Ciara Nugent, *Why Greta Thunberg and Other Climate Activists Are Protesting Wind Farms in Norway*, *TIME*, (Feb. 28, 2023, at 15:15 ET) <https://time.com/6259144/greta-thunberg-norway-protests-climate-activists/>.

In October 2021, the Norwegian Supreme Court (*Høyesterett*) held that the concession between the Norwegian Government and Danish companies breached the Saami's cultural rights under Article 27 of the 1966 United Nations International Covenant on Civil and Political Rights (ICCPR)¹²⁶ and was therefore void. For the Court, "[T]he right to culture encompasses both the right to benefit economically from reindeer husbandry and the right to preserve its cultural aspects."¹²⁷ Accordingly, the Saami people have a cultural right to reindeer husbandry under Article 27 of the ICCPR that climate interests cannot overcome.¹²⁸ The court highlighted that the minority rights of Indigenous peoples would be of limited value if they could be superseded to pursue the majority's public interests.¹²⁹ Moreover, the court noted that wind farms could be installed in other areas without breaching Indigenous peoples' rights.¹³⁰

However, the Norwegian Supreme Court did not require the removal of the turbines owned by Norwegian, German, and Danish energy companies. Reportedly, in November 2021, the energy companies were "ready to bring forward compensation claims against the state . . . for losses inflicted by invalid license decisions."¹³¹ Supposedly, such compensation would have included the construction costs (*damnum emergens*) and the loss of profits and future income (*lucrum cessans*). After the protests, the national mediator facilitated a settlement agreement between the Saami herders and the operators of the wind farms.¹³² While the agreement did not require the removal of the turbines, the Saami obtained access to alternative pastures, monetary compensation, and veto power over future licenses in the region.¹³³

Critical scholars highlight that "Saami authorities, organizations and right-holders . . . argue that nonconsensual encroachments by so-called 'green' industries on Saami reindeer herding lands is a form of 'green colonialism.'"¹³⁴ While the "Saami and other Indigenous peoples' land-use practices leave small ecological and climate footprints," their lands "are among the most exposed to climate change."¹³⁵ Moreover, "the Nordic states' commitment to the international climate change agenda legitimates industries that perpetuate colonial discourses and a continued dispossession of ancestral Saami reindeer herding lands and practices."¹³⁶

The third case study concerns underwater cultural heritage in the Americas. As technological advances have facilitated the recovery of underwater cultural heritage, more court cases have centered on the question of who owns such heritage.¹³⁷ Salvors, private commercial actors looking for the recovery and sale of underwater treasures, have long sought after Spanish

¹²⁶ *Statnett SF v. Sør-Fosen site*, Noregs Høgsterett [Supreme Court], Case No. 20-143891SIV-HRET, HR-2021-1975-S, ¶ 153, at 28 (2021) (Nor.) translated in Univ. Az. James E. Rogers Col. L. Indigenous Peoples L & Pol'y (2021). See International Covenant on Civil and Political Rights art. 27, opened for signature Dec. 19 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 (entered into force Mar. 23, 1979).

¹²⁷ Lilja Mósesdóttir, *Energy (In)justice in the Green Energy Transition. The Case of Fosen Wind Farms in Norway*, TECH. SOC'Y, June 2024, at 9. See *Statnett SF*, HR-2021-1975-S at ¶ 134.

¹²⁸ *Statnett SF v. Sør-Fosen site*, *supra* note 126, at 23.

¹²⁹ *Id.* at 23.

¹³⁰ *Id.* at 25.

¹³¹ Mósesdóttir, *supra* note 121, at 7.

¹³² *Id.* at 6.

¹³³ *Id.*, at 6.

¹³⁴ Eva Maria Fjellheim, "You Can Kill Us with Dialogue:" *Critical Perspectives on Wind Energy Development in a Nordic-Saami Green Colonial Context*, 24 HUM. RTS. REV. 25, 26 (2023).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Valentina S. Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, 42 VAND. J. TRANSNAT'L L. 853 (2009).

shipwrecks due to their valuable cargoes containing gold and silver coins.¹³⁸ Under international law, warships are immune from state jurisdiction, and their sinking does not generally change this.¹³⁹ However, former colonies request the return of colonial heritage, asserting their status as countries of origin and contending that the return would advance decolonization and promote cultural self-determination.¹⁴⁰ In certain cases, recovered shipwrecks contain colonial heritage, as they sank when transporting artifacts from the former colonies to the former mainland. Should traditional notions of state immunity be prioritized over the cultural salience of undersea heritage?

In a recent arbitration under the United States-Colombia Trade Promotion Agreement, the claim focuses on the wreck of the *San José*, a Spanish galleon that sank in 1708, a few miles off the Port of Cartagena in Colombia.¹⁴¹ Laden with gold, silver, and emeralds, the shipwreck contains a treasure worth \$20 billion.¹⁴² In the pending arbitration, a United States company, Sea Search Armada, contends that it discovered the wreck first in 1981, and handed over its coordinates to the Colombian government under the understanding that it would receive half the ship's treasure under domestic law.¹⁴³ However, in 2020, the Colombian Ministry of Culture declared the *San José* "an asset of national cultural interest," thus depriving the claimant of its rights to 50% of its discovery.¹⁴⁴ For the company, Colombia unlawfully expropriated its rights to half the galleon's contents when it declared the wreck an asset of national cultural interest.¹⁴⁵ The respondent state contends that not only did the company fail to locate the wreck, but also that it cannot claim historical monuments, like the *San José* galleon, as treasures for economic gain.

In parallel, Spain has claimed ownership of the wreck and its immunity from the jurisdiction of other countries.¹⁴⁶ Therefore, Spain applied for leave to intervene as a non-disputing party to the ongoing investor-state arbitration, contending that the tribunal lacked jurisdiction.¹⁴⁷ Nonetheless, the arbitral tribunal rejected Spain's request to dismiss the case on jurisdictional grounds.¹⁴⁸ While it praised Spain's desire to "defend its interests . . . [to] advance . . . the common historical knowledge between Spain and Colombia and . . . the preservation . . . of . . . the subaquatic cultural heritage for the benefit of humanity," it was "not persuaded that this arbitration [wa]s the appropriate forum in which to address Spain's various claims."¹⁴⁹

¹³⁸ See Valentina S. Vadi, *War, Memory and Culture: The Uncertain Legal Status of Historic Sunken Warships under International Law*, 37 TUL. MAR. L.J. 333 (2013).

¹³⁹ See VALENTINA VADI & HILDEGARD E.G.S. SCHNEIDER, *Art, Cultural Heritage and the Market: Ethical and Legal Issues in ART, CULTURAL HERITAGE, AND THE MARKET* 221 (Valentina Vadi & Hildegard E.G.S. Schneider eds., 1st ed. 2014).

¹⁴⁰ See Valentina Vadi, *The African Renaissance and International Cultural Heritage Law*, 31 INT'L J. CULTURAL PROP. 397, 400-05 (2024).

¹⁴¹ See *International Economic Law and Indigenous Cultures*, in THE ROUTLEDGE HANDBOOK ON INTERNATIONAL ECONOMIC LAW (Valentina Vadi & David Collins eds., 1st ed. 2026).

¹⁴² See Amy Guthrie, *Colombia Attempts to Toss Case Over \$20 Billion in Sunken Treasure*, ALM (December 14, 2023, at 16:59 ET), <https://www-law-com.eu1.proxy.openathens.net/international-edition/2023/12/14/colombia-attempts-to-toss-case-over-20-billion-in-sunken-treasure/> [<https://perma.cc/VU9G-SBTB>].

¹⁴³ See *Sea Search Armada LLC v. Republic of Colombia*, PCA Case No 2023-37, Claimant's Response to Respondent's Preliminary Objections Pursuant to Article 10.20.5 of the TPA, ¶ 19, <https://www.italaw.com/sites/default/files/case-documents/180438.pdf> [<https://perma.cc/A775-HRPU>].

¹⁴⁴ *Id.* at ¶ 391.

¹⁴⁵ *Id.* at ¶ 103.

¹⁴⁶ See *Sea Search-Armada, LLC (USA) v. The Republic of Colombia*, PCA Case No. 2023-37, Decision on the Application by the Kingdom of Spain for Leave to Intervene as Non-Disputing Party, ¶¶ 7, 8 (December 2023).

¹⁴⁷ *Id.* at ¶ 11.

¹⁴⁸ *Id.* at ¶¶ 37-8.

¹⁴⁹ *Id.* at ¶ 33.

Bolivia's Indigenous peoples have also advanced claims to the shipwreck and its cargo.¹⁵⁰ The Chicha and Killaka peoples base their claim to the *San José*'s cargo on the forced labor their ancestors endured in extracting its riches, while the Qhara Qhara assert ownership of the archaeological artifacts based on their historical sovereignty over the land.¹⁵¹ The royal archives revealed that many of the minerals that the galleon carried came from the Potosí mines in their territory.¹⁵² Accordingly, Indigenous peoples called for considering the galleon and its contents common heritage to be preserved in a museum.¹⁵³ They argued that, "extracting important fragments from th[e early modern] era from the bottom of the ocean is like discovering an island, and on that island live our memories and the objects that the work of our ancestors created."¹⁵⁴

Courts have generally regarded the ship and its cargo as one entity for legal purposes, thus considering maritime powers' wrecks as Western cultural heritage, rather than a multicultural mix.¹⁵⁵ In the meantime, another maritime operator, Maritime Archaeology Consultants Limited, has also filed a claim against Colombia at the International Center for the Settlement of Investment Disputes.¹⁵⁶ At the time of this writing, it remains unclear whether this claim also relates to the *San José* shipwreck.

Adopting a long-term perspective, the wreck presents not just the fortuitous retrieval of ancient wealth, but also a time capsule.¹⁵⁷ Laden with vast quantities of gold and silver, the ship was transporting wealth mined by enslaved Indigenous workers in the Andes to Spain.¹⁵⁸ After conquering the Inca Empire, the Spaniards ruthlessly exploited its natural resources and established a forced labor system, called *mita*, drafting Indigenous people with disastrous effects that are still felt today.¹⁵⁹ The wreck thus epitomizes the colonial plunder, the disregard for Indigenous sovereignty, and the consideration of Indigenous land as *terra nullius*. The *San José* reveals long-forgotten colonial histories marred by economic exploitation, social marginalization, and cultural erosion. It also constitutes a legal microcosm, where Indigenous peoples strive to get their inherent rights fully recognized, respected, and fulfilled. The recovery of the cargo originating from the Potosí and lying in the maritime depths off Colombia's coast reveals colonial injustice long submerged by the tides of history.

How do these cases reconnect with Braudel's tripartite theory of time? These cases could not be more diverse. They tell different stories, with various actors, claims, domestic and international courts and tribunals. They also relate to distinct continents. Each case can be examined from multiple perspectives and for different purposes.

¹⁵⁰ See Luke Taylor, *Bolivian Indigenous Groups Assert Claim to Treasure of Holy Grail of Shipwrecks*, THE GUARDIAN, (March 29, 2024), <https://www.theguardian.com/environment/2024/mar/29/bolivia-shipwreck-colombia-treasure>.

¹⁵¹ *Id.* at 145 ("While the Chicha, and Killaka lay claim to the San José ... [because] ... their ancestors were forced to dig up ... [the silver, gold, and emeralds,] ... the Qhara Qhara lay claim to the archaeological treasures through their rights to the land.").

¹⁵² *See id.*

¹⁵³ *See* Taylor, *supra* note 150.

¹⁵⁴ *See* Taylor, *supra* note 150.

¹⁵⁵ *See* Vadi, *supra* note 138, at 356.

¹⁵⁶ Mar. Archaeology Consultants Switz. AG v. Republic of Colom., ICSID Case No. ARB/25/4 (2025).

¹⁵⁷ Vadi, *supra* note 137, at 857-858.

¹⁵⁸ Ann Coates, *The Sunken Treasure of the San José Shipwreck is Contested—but Its Real Riches Go Beyond Coins and Jewels*, THE CONVERSATION (March 14, 2024, at 1:19 p.m. EDT), <https://theconversation.com/the-sunken-treasure-of-the-san-jose-shipwreck-is-contested-but-its-real-riches-go-beyond-coins-and-jewels-225305>.

¹⁵⁹ *See* Amber Crossman Cheng, *All in the Same Boat? Indigenous Property Rights in Underwater Cultural Heritage*, 32 HOUSTON J. INT'L L. 695, 702-3 (2010).

However, the cases also share some common features. First, they confirm that the sea is history. As a sanctuary, it materially conserves the remains of our fellow human beings. It also preserves the historical evidence of our troubled history. Second, they show that the past is not a bygone era, but it can reverberate in the present and the future. While political decolonization has almost been achieved, much remains to be done about economic, social, and cultural decolonization. Third, by adopting a tripartite vision of time, it is possible to identify the double jeopardy some people endure. The contemporary exploitation of their natural and cultural resources risks perpetuating the practice of *terra nullius* and historical injustice by “creat[ing] space for the tangible expansion of the [settlers’] world while simultaneously erasing or minimizing the existence of other [Indigenous] worlds.”¹⁶⁰ The extraction of others’ natural and cultural resources without their consent can constitute a form of neocolonialism.¹⁶¹

This brief overview of contemporary reverberations of *terra nullius* is to be neither comprehensive nor definitive. On the contrary, it is an experimental endeavor to assess the potential transferability of Braudel’s tripartite vision of time from history to international law. Adopting a tripartite vision of time can help international lawyers see things in perspective. While they must apply international law, adopting a broad perspective can enable them to reach better decisions in conformity with principles of justice and international law.

V. THE PROMISES AND PITFALLS OF TRANSPLANTING BRAUDEL’S TRIPARTITE VISION OF TIME TO INTERNATIONAL LAW

This section highlights the promises and pitfalls of applying Braudel’s tripartite vision of time to the terrain of international law. First, the simultaneous adoption of multiple overlapping temporal frameworks can help international lawyers understand social phenomena, diagnose their causes, and find the legal tools to tackle them. History weaves itself into the soul of international law.¹⁶² Thus, it makes sense for international lawyers to broaden the temporal perspective and explore the history of international law.¹⁶³ In fact, historical awareness can influence international lawmakers and adjudicators by shaping judgments of what represents a just resolution of international conflicts and disputes. In parallel, international institutions can offer a counterpoint to neocolonial narratives and become arenas for international cooperation. International law can be leveraged in various ways: within and beyond the courtroom, from the diplomatic to the judicial, to bring justice to the oppressed.¹⁶⁴ While international law cannot change the past, it can open pathways towards transformation.”¹⁶⁵

Second, the study of complex legal issues may benefit greatly from the adoption of interdisciplinary approaches. No legal issue is a “walled garden” (*hortus conclusus*), and

¹⁶⁰ MARISOL DE LA CADENA & MARIO BLASER, *Introduction: Pluriverse—Proposals for a World of Many Worlds*, A WORLD OF MANY WORLDS 3 (Marisol de la Cadena & Mario Blaser eds. 2018).

¹⁶¹ See Eduardo Faleiro, *Colonialism, Neo-Colonialism, And Beyond*, 16 WORLD AFF. 12, 12–17 (2012).

¹⁶² See Valentina Vadi, *International Law and its Histories: Methodological Risks and Opportunities*, 58(2) HARV. INT’L L. J. 311, 321 (2017) (noting that “a turf war has erupted between historians and lawyers on what kind of history of international law we could and/or should have. Far from being a merely theoretical debate, with little or any practical impact, this is a struggle for the soul of international legal history, and arguably international law itself, that has transformed the field into a battlefield. It is not only about the methods, form, and procedure, but also about the substance, aims, and objectives of international legal history. Such a clash is ‘a struggle for interpretive power,’ with the resulting ability to impose a hegemonic discourse and domesticate ‘divergent narrative visions.’ The outcome of this debate is important because, far from simply determining the form of legal research, it will likely influence the types of questions and investigations of the same.”)

¹⁶³ See Braudel, *supra* note 40, at 201.

¹⁶⁴ Souheir Edelbi, *Leveraging Law*, 12 LOND. REV. INT’L L. 261, 261 (2024).

¹⁶⁵ Carsten Stahn, *Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?*, 33 LEIDEN J. INT’L L. 823, 827 (2020).

interdisciplinarity can open new horizons.¹⁶⁶ By expanding the temporal scope and conceptual horizon of their legal imaginaries, international lawyers can better grasp the multidimensional character of given conflicts or disputes. They may become familiar with Indigenous histories, cosmologies, and alternative ways of interpreting time and space. While they are due to interpret and apply international law, they can help build a more inclusive world order by acknowledging multiple histories and perspectives.

Third, adopting the tripartite vision of time enables international lawyers to see things in perspective, become aware of the whole story, and see how different threads are woven together into a single tapestry. There is a growing awareness of international law's invisible frames. These insights can help international law devise better solutions to ongoing challenges such as decolonization.¹⁶⁷ Applying multiple temporal perspectives to international law could help international law's struggle for change and fuel its regenerative force.

Adopting Braudel's tripartite vision of time could also have some drawbacks. First, it constitutes a complex historical and narrative method because it combines multiple timescales. A temporally multilayered study of international law takes time. International legal historians must not only have a firm understanding of international law but also devote time to research in archives and libraries scattered across different countries. Adopting Braudel's tripartite theory of time can seem "a disturbance or complication."¹⁶⁸ In fact, not only does it require "a change in style and attitude," but it can be difficult.¹⁶⁹ However, it offers a methodological framework for investigating temporally complex social phenomena.¹⁷⁰ It can enhance international lawyers' understanding of their field and empower them to address complex legal issues.

Second, one could question whether focusing on three temporalities favors history over international law. Braudel prioritized history as the predominant frame of analysis over other social sciences. However, with a few modifications, the tripartite theory of time can apply to international law. International lawyers can prioritize international law as their primary analytical framework. They can focus on legal concepts, instruments, methods, institutions, and processes. Interdisciplinary approaches require expertise in processing data from various fields while maintaining the research's focus on a given field. In our case, the compass for direction-finding in research is international law. Just as Braudel did not ask historians to become lawyers,¹⁷¹ this essay does not call international lawyers to become historians. While Braudel regarded history as paramount and other social sciences as auxiliary and subaltern, this study conceptualizes international law as the main unifying analytical framework and other fields of study as complementary.

Third, critics may contend that embracing a tripartite vision of time can threaten the structure of international law. As is well known, the intertemporal law principle (*tempus regit actum*) serves the field's need for stability and predictability.¹⁷² International rules only apply in the present and do not go back in time; international courts apply the law in force when the

¹⁶⁶ Braudel, *supra* note 10, at 20-22.

¹⁶⁷ See Cait Storr, *The War Rages On: Expanding Concepts of Decolonization in International Law*, 31 EUR. J. INT'L. L. 1493 (Jochen von Bernstorff & Philipp Dann eds., 2019). See also Sundhya Pahuja, *DECOLONISING INTERNATIONAL LAW* (Cambridge Univ. Press 2011).

¹⁶⁸ Braudel, *supra* note 40, at 176.

¹⁶⁹ Braudel, *supra* note 40, at 181.

¹⁷⁰ Braudel, *supra* note 40, at 181.

¹⁷¹ See ANDREA CIRLA, *Braudel-La storia è l'insieme delle scienze umane* (1975), at 3:08-3:23 (YouTube, April 17, 2022), <https://www.youtube.com/watch?v=0cE658Ld9z4> (on file with SOUTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND BUSINESS).

¹⁷² See generally *Islands of Palmas Arbitration* (Netherlands v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

disputed facts happened. A claim may not be made after the statutory limitations period unless the law provides for imprescriptible rights. A claim may be dismissed if the defense is raised that the claim is time-barred. However, international law is not weakened by a deep knowledge of its past. On the contrary, a thorough understanding of its histories can strengthen its emancipatory potential. For instance, in a recent advisory opinion on *The Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*,¹⁷³ although the ICJ had limited temporal jurisdiction as it had to assess measures adopted by Israel since 1967, it held that it could consider “facts predating the occupation, to the extent that this is necessary for the proper discharge of its judicial function.”¹⁷⁴ It thus briefly mentioned how Palestine had been part of the Ottoman Empire and then entrusted as a mandate to the United Kingdom by the League of Nations.¹⁷⁵

Fourth, some could contend that if one takes a long view, the past never ends, and closure is never achieved. Digging into the past could open a Pandora’s Box. As a result, claims could be filed for millennia-old perceived wrongs. If taken to extremes, the long-term perspective would result in an endless string of claims, engulf courts, and ultimately prevent peaceful international relations. Battles over historical context arise when different parties assert their interpretations, often criticizing others’ contextualization.¹⁷⁶ They propose particular temporal horizons. For instance, in the Israel/Palestine conflict, the Israelis focus on ancient Jewish history and the present state of Israel. At the same time, Palestinians emphasize the Arab and Ottoman history and contemporary demographic realities.¹⁷⁷ By combining the long-term perspective with short- and medium-term views, the tripartite framework enhances our understanding of international law. This awareness of history does not change international law but can deepen our understanding and facilitate its application.

Finally, one can argue that Braudel’s tripartite vision of time is inherently conservative because it emphasizes a long-term perspective, which might suggest determinism. Yet, for Braudel, such a long-term perspective must be combined with short- and medium-term perspectives. Studying the evolution of international law comprehensively can reveal the fallacy of colonial doctrines such as *terra nullius* and strengthen Indigenous peoples’ legal claims. In conclusion, adopting a comprehensive approach to international law does not imply its immutability, determinism, or celebration. On the contrary, cognizance of its history improves its critical assessment and international lawyers’ ability to interpret and apply international law.

VI. CONCLUSION

Braudel’s tripartite vision of time was a breakthrough in historiography. The eminent historian posited that time has multiple layers and moves at different speeds, which he defined as geographical, social, and individual. He argued that a sound social science methodology requires adopting multiple timescales and interdisciplinary approaches. While he used all three temporal perspectives to investigate the history of the Mediterranean Sea, he favored the long-

¹⁷³ I.C.J., *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, July 19, 2024.

¹⁷⁴ *Id.* at ¶ 27.

¹⁷⁵ *Id.* at ¶ 51. On the I.C.J.’s approach to time, see also D.M. Scott, “Time and Temporality before the ICJ in the Advisory Opinion on Obligations of States in respect of Climate Change”, *EJIL: Talk!*, Feb. 14, 2024.

¹⁷⁶ Z. Miller, *Times of Violence, Times of Justice*, 12 LOND. REV. OF INT’L L. 249, 250 (2024).

¹⁷⁷ J. Jensehaugen, *Terra Morata: The West Bank in Menachem Begin’s Worldview*, 5 CONTEMP. LEVANT 54–63, 54–55 (2020).

term perspective over shorter, narrower, and frantic visions of time. The long-term perspective (*longue durée*) constituted the unifying element that ordered various temporal perspectives.

Braudel's tripartite theory of time and the *longue durée* perspective can offer important insights into international law. This study examined Braudel's theory of time and applied it to international law, using contemporary reverberations of the *terra nullius* doctrine as case studies. It then explored the promises and pitfalls of adopting Braudel's tripartite vision of time as a useful analytical lens to gain new and deeper understandings of international law.

International law can benefit from applying Braudel's three-dimensional view of time. Such theory offers an analytical lens to investigate and comprehend international law through its multiple temporalities since it conceptualizes time as existing simultaneously as an instant, a duration, and a trajectory. By adopting a tripartite vision of time, international lawyers can see things in perspective and help settle international conflicts or disputes "in conformity with the principles of justice and international law."¹⁷⁸

¹⁷⁸ U.N. Charter art. 1, adopted 26 June 1945, entered into force 24 October 1945, 892 UNTS 119, available at <https://treaties.un.org/> (affirming that "The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;...").

Biar Lambat Asal Selamat: The Slow But Safe Twenty-Five Year Recalibration of Personal Bankruptcy in Malaysia

*By Jason J. Kilborn**

ABSTRACT

A popular Malay proverb advises, “[L]et it be slow, as long as it is safe” (*biar lambat asal[kan] selamat*),¹ combining the sentiments of two similar English proverbs: “haste makes waste,” and “slow and steady wins the race.” These principles certainly seem to have guided Malaysian lawmakers in the quarter-century, multistage development of the most important element of modern bankruptcy law: the discharge. Adopted in 1967,² Malaysian bankruptcy law has long included a very limited debt discharge, but as it left more and more economically debilitated debtors in perpetual bankruptcy limbo, policymakers became dissatisfied with leaving a huge and growing mass of debtors to languish.³ In 1998, they began taking a series of hesitant steps to alleviate the flow of cases into and, more importantly, accelerate the exit of cases out of the bankruptcy system.⁴ This process culminated just under twenty-five years later in the adoption of a fairly modern statutory discharge, effective in October 2023.⁵ A year and a half of empirical data now reveal the important but limited effects of this process of entry and exit recalibration, particularly the complementary discharge aspects, in the Malaysian bankruptcy regime.

The halting series of legislative and regulatory changes and consequent empirical results in Malaysia from 1999 to 2025 are enlightening as to the purpose and (in)effectiveness of various “safe” approaches to reducing the incidence of personal bankruptcy and expanding discharge relief. This article reveals those lessons. It also reveals the motivations for the revolution in Malaysian bankruptcy policy, with a closer look at the nuanced role of Islam and individual religious conviction in a modern democratic majority-Muslim state.

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¹ *Biar Lambat Asalkan Selamat* [Even If It’s Slow, As Long as It’s Safe], MAKSUD PERIBAHASA: KAMUS PERIBAHASA & SIMPULAN BAHASA MELAYU [Meaning of Proverbs: Malay Proverbs & Idioms Dictionary], <https://maksudperibahasa.com/biar-lambat-asalkan-selamat/> (last visited Nov. 7, 2025) (Indon.); John Chang, *What is the meaning of this Malay line “Biar lambat asalkan selamat”?*, QUORA, <https://qr.ae/pAIDF4> (last visited Nov. 7, 2025). See generally Koes Plus, *Murry’s Group–Biar Lambat Asal Selamat (1977)*, YOUTUBE (Jul. 16, 2020), www.youtube.com/watch?v=Z3kX1Jun75o; *Biar Lambat Asal Selamat*, MUSIXMATCH, www.musixmatch.com/lyrics/Koes-Plus/Biar-Lambat-Asal-Selamat (2019).

² See Insolvency Act 1967 (Act 360), (Malay.) [hereinafter Insolvency Act 1967]. Originally called the Bankruptcy Act 1967, the law’s name was changed (along with several key provisions, as discussed below), effective October 6, 2017. Bankruptcy (Amendment) Act 2017 (Act A1534), (Malay.).

³ See *infra* notes 143-149 and accompanying text.

⁴ Bankruptcy (Amendment) Act 1998 (Act A1035), (Malay.).

⁵ Insolvency (Amendment) Act 2023 (Act A1695), (Malay.).

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I. THE PURPOSE AND FUNCTION OF BANKRUPTCY: MALAYSIAN ANACHRONISM

In much of the world today, bankruptcy law operates mostly like a hospital, offering the relief of debt forgiveness (discharge) to individuals who have acted honestly but fallen into unfortunate circumstances where the burden of rising debt has become too great to reasonably bear.⁶ This relief is granted for many reasons, most having nothing to do with sympathy for financially distressed debtors and their families, but rather with the many benefits that flow to society (including creditors) from unburdening and reactivating debtors' productivity and avoiding the waste and burden to society associated with pursuing distressed debtors interminably.⁷ This is a relatively recent shift in viewpoint about the proper function and operation of bankruptcy law, however, beginning in earnest only around the 1980s and gaining momentum in the early 2000s as legislatures primarily in America and Europe modified their bankruptcy laws to serve these goals.⁸

Not so in Malaysia. The Malaysian Bankruptcy Law of 1967 originally adopted virtually verbatim the provisions of the English Bankruptcy Act of 1914 and assigned a decidedly different function to bankruptcy.⁹ More prison than hospital, bankruptcy on this model is designed not to provide relief to struggling debtors, but instead to offer a collection device for creditors to cajole payment from their recalcitrant debtors and punish debtors who fail to repay their debts, whatever the reason.¹⁰ Even today, all but a small handful of bankruptcy petitions in Malaysia are presented not by debtors seeking relief from debt, but by creditors seeking to inflict a punitive bankruptcy process on their defaulting debtors.¹¹

And the punishment for adjudicated "bankrupts" is severe indeed. Once the court has confirmed the debtor is in default on the petitioning creditor's requisite minimum amount of debt¹² and is therefore declared a bankrupt,¹³ all power over the now-bankrupt's present and future

⁶ See, e.g., A GUIDE TO CONSUMER INSOLVENCY PROCEEDINGS IN EUROPE (Thomas Kadner Graziano, Juris Bojārs & Veronika Sajadova eds., 2019).

⁷ See World Bank GRP. [WBG], *Report on the Treatment of the Insolvency of Natural Persons* at 20-40, Report No. ACS6818 (2013), <https://openknowledge.worldbank.org/handle/10986/17606>; World Bank Grp. [WBG], *Saving Entrepreneurs, Saving Enterprises: Proposals on the Treatment of MSME Insolvency* at 1-3 (2018), <https://openknowledge.worldbank.org/handle/10986/30474> ("the liberal discharge is the primary and indispensable instrument for achieving" the goals of personal insolvency law).

⁸ See *Saving Entrepreneurs*, *supra* note 7 at 9-11; Jason J. Kilborn, *Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010*, in DEVENTER: KLUWER: LAW OF BUSINESS AND FINANCE 1, 1-44 (Sebastian Kortmann & Dennis Faber, eds., 11th ed. 2011).

⁹ Ruzita Azmi & Siti Nur Samawati Ahmad, *Discharge and pre-rehabilitation under bankruptcy law and Islamic law: a boon or a bane?*, 45 COMMW. L. BULL. 189, 203-04 (2019).

¹⁰ Jason Kilborn & Adrian Walters, *Involuntary Bankruptcy As Debt Collection: Multi-Jurisdictional Lessons in Choosing the Right Tool for the Job*, 87 AM. BANKR. L.J. 123 (2013).

¹¹ The greatest proportion of debtor-filed petitions in history occurred last year, 2024, at 1.64% (124 debtor petitions, versus 7457 creditor petitions). This is vastly greater than the historical average, which is closer to about one-third of a percent (e.g., 2018, with 83 petitions filed by debtors and 16482 filed by creditors). On the sources of this and other data in this article, see *infra* note 28.

¹² See *infra* part III.A.1 for a discussion of the evolution of this minimum amount.

¹³ See Insolvency Act 1967, *supra* note 2 at §§ 3(1)(i), 5(1), 6(2).

property vests in an officer called the Director General of Insolvency (DGI).¹⁴ From that point forward, the bankrupt loses all control over his or her financial life, with bank accounts frozen and the DGI exercising the all-powerful roles of “receiver, manager, administrator and trustee” of all of the bankrupt’s present and future property.¹⁵ Most individual debtors lack hard assets of any significant value, but the DGI more importantly controls a bankrupt’s future income stream(s); that is, a bankrupt is obliged to surrender to the DGI not only all present sources of property value, but also all future income, retaining only a domestic support allowance granted at the discretion of the DGI.¹⁶

Moreover, the DGI’s power over a bankrupt extends beyond direct control of property, as a bankrupt needs the DGI’s permission to maintain most court actions, travel outside Malaysia, carry on or manage any business (whether alone, in partnership, or through a company), or even be employed in a business belonging to the bankrupt’s spouse or relative.¹⁷ These are not absolute prohibitions; reports catalogue several hundred petitions each year presented by bankrupts to the Malaysian Department of Insolvency (MdI) for permission to bring court cases and engage in business (both alone and via relatives), and several thousand petitions per year to leave the country (most often for work).¹⁸ Most (usually above 90%) were granted.¹⁹ With well over 200,000 cases

¹⁴ This office has gone through several iterations and name changes over the years. Established in 1995 after the dissolution of the Ministry of Law, the Legal Affairs Division (*Bahagian Hal Ehwal Undang-Undang* (BHEUU)) of the Prime Minister’s Office (*Jabatan Perdana Menteri*) included a division for dealing with bankruptcy matters, then called the Official Assignee’s Department. In 2003, the Official Assignee’s Department changed its name to the Department of Insolvency Malaysia (*Jabatan Insolvensi Malaysia*), in tandem with the amendments to the Bankruptcy Act 1967 and its redesignation as the Insolvency Act 1967. *See* Insolvency Act 1967, *supra* note 2. Since October 2009, the Department of Insolvency Malaysia has been consistently designated in abbreviation as “MdI” and known in English as the Malaysia Department of Insolvency. *See* MALAY. DEPT’*T* INSOLVENCY, <https://www.mdi.gov.my/> (last visited Nov. 7, 2025). The MdI head, the Director General of Insolvency (*Ketua Pengarah Insolvensi*), is appointed by the Minister in charge of the Legal Affairs Division of the Prime Minister’s Office. *See* Insolvency Act 1967, *supra* note 2, at §§ 70-87; *History*, PRIME MINISTER’S DEPT’: LEGAL AFFS. DIV., <https://www.bheuu.gov.my/en/info-bheuu/sejarah> (last visited Nov. 7, 2025).

¹⁵ *See* Insolvency Act 1967, *supra* note 2, at §§ 8(1), 48(1)(b). Secured creditors are unaffected by this receivership and may exercise whatever right with respect to the collateral securing their debts as the law of secured transactions allows. *See* Insolvency Act 1967, *supra* note 2, at § 8(2). A small modicum of essential property is excluded from the bankruptcy estate for the benefit of the bankrupt, such as tools of the bankrupt’s trade and “the necessary wearing apparel and bedding and other like necessities” up to a prescribed maximum value. Insolvency Act 1967, *supra* note 2, at § 48(1)(a)(ii). Before 2023, the maximum value used to be a mere 5000 ringgits (about \$1,250 USD), but now the maximum is subject to periodic indexing by official order. *See* Insolvency Act 1967, *supra* note 2, at § 8(2).

¹⁶ *See* Insolvency Act 1967, *supra* note 2, at §§ 38(1)(b)-(ba), 57(3), 68(2) (“The [DGI] may make such allowance as he thinks just to the bankrupt out of his property for the support of the bankrupt and his family . . . but the court may reduce any such allowance and limit the time for which it may be made”).

¹⁷ *See* Insolvency Act 1967, *supra* note 2, at §§ 38(1)(a), (c)-(e).

¹⁸ On the sources of this and other bankruptcy data in this article, *see infra* note 28.

¹⁹ Bankrupts also submitted of hundreds of “other” petitions per year for things like withdrawing money from the mandatory saving and retirement plan for Malaysian employees (the Employees’ Provident Fund), withdrawing or retaining some portion of estate funds that would otherwise be surrendered to the DGI for distribution to creditors, and setting up and making withdrawals from

under administration in these years, however, these successful petitions alleviated the lot of only a tiny fraction of all bankrupts laboring under the disabilities imposed by bankruptcy.²⁰

This total domination and infantilization of a hapless bankrupt continues so long as he or she remains a so-called “undischarged bankrupt” (a list of such people being kept by the DGI and made available for public inspection).²¹ The conditions for being “discharged” from these duties and disabilities are discussed below,²² but for the great many non-wealthy bankrupts who have no hope of paying off all of their debts, bankruptcy before the most recent amendment in 2023 (and for some, even today) represents an effective sentence of financial life imprisonment.²³ Indeed, not even death results in a certain discharge. The bankruptcy sentence continues into the grave, as a deceased debtor remains an “undischarged bankrupt” until five years after death has brought an end to the administration of the bankruptcy estate.²⁴

II. A GATHERING BANKRUPTCY CRISIS IN MALAYSIA: BURSTING AT THE SEAMS, FEW EXITS

This sad state of affairs for some became a widespread tragedy for many by the late 1990s when masses of Malaysians saw their finances collapse through no fault of their own in the Asian Financial Crisis of 1997-98.²⁵ Even the best laid plans of responsibly debt-financed consumption and entrepreneurship turned upside down in the face of a sharp recession—the first in recent living memory and “one of the worst economic crises Malaysia has ever faced.”²⁶ Especially worrisome for those carrying what had seemed a manageable level of debt, interest rate increases spiked loan servicing costs by about twenty percent, an unsustainable shock for many, exacerbated by a one-

savings accounts, including a special account to fund the religious mandate to journey to Mecca and Medina on the Muslim *Hajj*. Only about half of these “other” requests were generally granted. *See infra* note 28.

²⁰ On the sources of this and other bankruptcy data in this article, *see infra* note 28.

²¹ *See* Insolvency Act 1967, *supra* note 2, at §§ 39(3), 68(3)-(4) (“Where the bankrupt has died, the Director General of Insolvency *may* make allowance to the bankrupt’s family for their support . . . [and] *may* also make an allowance towards the funeral expenses of a bankrupt.”) (emphasis added).

²² *See infra* parts II.B and III.B.

²³ This is very much like Roman, Swiss, and Islamic bankruptcy, with all excess beyond surplus expropriated for creditors until paid in full (or death). *See* Jason J. Kilborn, *Personal Bankruptcy Reform in Switzerland: Transition from First-Century Cessio to Twenty-First century Discharge*, 34 INT’L INSOLVENCY REV. 48 (2025).

²⁴ Insolvency Act 1967, *supra* note 2, at § 39(3); *see also* Insolvency Act 1967, *supra* note 2, at § 68(3)-(4) (“Where the bankrupt has died, the Director General of Insolvency *may* make an allowance to the bankrupt’s family for their support . . . [and] *may* also make an allowance towards the funeral expenses of a bankrupt.”) (emphasis added)).

²⁵ Amir Zuhadeef Zakaria, *Malaysia vs the 1997 Asian Financial Crisis: How Did the Government Escape the Catastrophe?*, MEDIUM (July 15, 2023), <https://medium.com/@kyrinstitute/malaysia-vs-the-1997-asian-financial-crisis-how-did-the-government-escape-the-catastrophe-b5afae21a115> (noting “the economic downturn had a profound social impact on Malaysian citizens as the unemployment rate rose by 345% with 83,865 individuals unemployed as compared to 18,863 individuals previously.”).

²⁶ Esther Lee, *Cover Story: Lessons from the last Three Major Economic Crises*, THE EDGE MALAYSIA (Apr. 12, 2020, at 11:20 MYT), <https://theedgemalaysia.com/article/cover-story-lessons-last-three-major-economic-crises>; *see also* Ming-Yu Cheng & Sayed Hossain, *Malaysia and the Asian Turmoil*, 1 ASIAN-PAC. L. & POL’Y J. 125, 126, 129-32 (2001) (announcing “the worst crisis Malaysia has experienced since independence” and noting a national economic contraction of 7.5% in 1998).

two punch as “economic contraction, coupled with the increase in inflation rate, had resulted in limited employment and income-earning opportunities.”²⁷

Annual new bankruptcy cases rose from fewer than 5,000 in 1990 to about 6,000 in 1995, then to a record 10,000 in 1999, surpassing 15,000 by 2004 and remaining above that level for most of the next twenty years.²⁸ As more and more struggling debtors were crowded into the system, bankruptcy in Malaysia was like a bathtub with the faucet on full blast and the drain stopper down. As the twenty-first century began, 100,000 individuals poured into the bankruptcy tub, a level that would rise over the next few years to ensnare one in every one hundred adults in Malaysia.²⁹ Things grew far worse from there, as total bankruptcy cases pending in administration ballooned to over 200,000 in 2009 and over 300,000 in 2018.³⁰

Before 2003, there were only two escape routes from this bankruptcy purgatory. The court was the sole gatekeeper to both routes. It could release bankrupts by either annulling their cases

²⁷ Cheng & Hossain, *supra* note 26, at 132.

²⁸ All bankruptcy statistics in this article were compiled and calculated by the author based on years of often inconsistent reports from various sources. The first is Malaysian Department of Insolvency statistical announcements posted on the MdI website, *see* Statistics, MALAY. DEPT’ INSOLVENCY, <https://www.mdi.gov.my/en/statistics/> (last visited Nov. 7, 2025) [hereinafter Statistics]. These reports originally covered from 2018 to present, but the report for 2018 was recently removed (on file with author). The posted report for 2022 covers only the first third of 2023, so figures for 2022 were extrapolated from other data in neighboring years’ reports, along with several snapshots and reported excerpts from the 2022 report located in various places online. *See e.g.*, Images posted by Kewangan Graduan, X, *Statistik Kebankrapan Disember 2022*, (Jan. 28, 2023 at 12:20 MYT), <https://x.com/kewangangraduan/status/1619218850377236480/photo/4> [hereinafter Images posted by Graduan]; Nur Hasliza Mohd Salleh, *More men have gone bankrupt than women over the past 5 years, says minister*, MALAYSIANOW (Feb. 13, 2023, at 23:54 MYT), <https://www.malaysianow.com/my/news/2023/02/14/lelaki-lebih-ramai-bankrap-berbanding-wanita-sejak-5-tahun-lalu-kata-menteri> [<https://perma.cc/A5LC-SGNV>] [hereinafter Nur Hasliza Mohd Salleh]. The second major source is annual reports of the Legal Affairs Division of the Prime Minister’s Office, also posted on the MdI website, covering 2010 (which includes data back to 2006) to 2017. The third source comprises a smattering of other documents containing statistics no longer publicly available elsewhere. *See e.g.*, MALAYSIAN MINISTRY OF FINANCE, ECONOMIC REPORT 2006/07, at 109, <https://www.mof.gov.my/portal/arkib/economy/2007/chapter5.pdf> [hereinafter ECONOMIC REPORT 2006/07] (reporting new bankruptcy cases from 2001 to 2005); Tan Ann-Yew, *Factors of Personal Bankruptcy: A Case Study of Malaysia*, at 2, fig. 1.2 (Sept. 2017) (charting Malaysian Department of Statistics figures for new bankruptcy cases from 1985 to 2015) (unpublished research project submitted in partial fulfillment of the requirement for the degree of Master of Business Administration (Corporate Management), Universiti Tunku Abdul Rahman, Faculty of Business and Finance, Department of Finance) (on file with author) [hereinafter Ann-Yew, *Factors of Personal Bankruptcy*]. Some of these statistical reports contradict themselves and/or other reports, so I have done my best to rely on the most seemingly reliable and consistently reported figures.

²⁹ These figures are not reported directly in any publicly available source, but extrapolation from available new case data and estimates based on Tan Ann-Yew, *Factors of Personal Bankruptcy*, *supra* note 28, produces this reliable estimate. Population data is drawn from the Malaysia Department of Statistics. *See Population Table: Malaysia*, OPEN DOSM, https://open.dosm.gov.my/data-catalogue/population_malaysia [<https://perma.cc/N4CP-PFZG>] (last updated July 31, 2025) (reporting a population of 13,156,000 aged 20 and above on Jan. 1, 2000). Statistics indicate 35,000 additional bankruptcy cases were opened from 2000 through 2002, thus meeting or exceeding the 1:100 ratio. *Id.*

³⁰ For the sources of these statistics, *see supra* note 28.

entirely or discharging them from bankruptcy. Navigating these paths to freedom was neither predictable nor frequent.

A. COURT ANNULMENT OF BANKRUPTCY

Annulment can occur when “a debtor ought not to have been adjudged bankrupt” to begin with or “where it is proved . . . that the debts of the bankrupt are paid in full.”³¹ The bankruptcy order “ought not to have been” entered when, for example, the debt that gave rise to the creditor’s petition was improperly calculated, including by adding improper interest charges, or for other technical defects in the petition.³² Of course, such errors might be quickly corrected and the debtor once more thrust back into bankruptcy on a now-proper petition.

As for the second listed basis, not only might the debt be *actually* paid by friends or relatives once the debtor’s dire predicament is revealed, but a debt is considered paid in full when a surety (guarantor), including a court-approved bond issuer, *agrees* to cover the debt and all related collection costs.³³ An immediately payable (but defaulted) debt might be converted into a series of installments. If the bond issuer agrees, the debt will be serviceable over time even by a struggling debtor. It is thus not altogether surprising that annulment under Section 105 has been a consistent and considerable basis for case termination, at least over the past two decades and likely before then.

No publicly available data reports the reasons for bankruptcy orders being annulled or how the debts might have been paid, but it seems most likely that the second reason—full payoff or guarantee of outstanding debt—predominates. As discussed below, until 2003, a debtor could be pushed into bankruptcy for a debt totaling only 10,000 ringgits (about \$2,500 USD).³⁴ While this may represent a significant burden for some, defaults on small debts like this are likely the result of temporary liquidity crunches rather than structural imbalances between income and debt. Therefore, it is suspected that a substantial number of bankrupts would succeed (eventually) in paying off the debt burden that landed them in bankruptcy, leading to the annulment of the bankruptcy order altogether.

Confirming these expectations, the number of cases annulled can be properly characterized as “substantial,” although it was not a realistic exit strategy for most bankrupts. About 1,100 debtors saw their cases annulled in each of 2006 and 2007, rising to more than 1,500 in 2008 and 2009 and to more than 2,000 from 2011 to 2019. After a COVID pandemic lull of about 1,400 annulments per year in 2020 and 2021, the figure jumped up again above 2,000 in each of the next two years, settling back to just over 1,600 in 2024. Annulments are on track to end 2025 at about

³¹ Insolvency Act 1967, *supra* note 2, at § 105(1). Annulment also applies when the bankrupt is in parallel bankruptcy proceedings in Singapore and “the distribution ought to take place in that country.” Insolvency Act 1967, *supra* note 2, at § 105(1).

³² Ruzita Azmi, Adilah Abd Razak & Siti Nur Samawati Ahmad, *Discharge in bankruptcy: a comparative analysis of law and practice between Malaysia, Singapore and the United Kingdom (UK) – What can we learn?*, 43 COMMW. L. BULL. 203, 215-16 (2017) (citing *Hasnah Che Hasan v. Hong Kong Bank Malaysia Bhd.*, 1 LNS 481 (2009) (annulling bankruptcy order for miscalculated excessive interest), and *Bungsar Hill Holdings Sdn Bhd. v. Dr. Amir Farid Datuk Isahak*, 2 CLJ 809 (2005), (annulling bankruptcy order on basis that debtor was in fact “able to pay his debt”)).

³³ Insolvency Act 1967, *supra* note 2, at § 105(4).

³⁴ See *infra* note 47 for considerations informing currency-value translations.

1,150.³⁵ In sum, a considerable total of over 38,000 bankruptcy cases were annulled from 2006 to 2024, although this represents only just over 10% of the hundreds of thousands of cases remaining under administration throughout this period of nearly two decades.³⁶

B. COURT ORDERED DISCHARGE FROM BANKRUPTCY

The other pathway to freedom from bankruptcy was by a court order of discharge in light of “the bankrupt’s conduct and affairs.”³⁷ Unlike annulment, the conditions for discharge by court order are neither objective nor clear, and they involve a great deal of court discretion as to whether and to what degree to grant such a release.³⁸ The courts have supplemented the ambiguous statutory standard with an even more ambiguous jurisprudential standard: “[P]ublic interest and commercial morality.”³⁹ In one often-cited ruling, the court held “it must be sensitive to the public perception of bankruptcy law” and “society at large must not have the impression that being a bankrupt is not a serious matter.”⁴⁰

When a bankrupt applies for court-ordered discharge, the DGI must prepare a report on “the bankrupt’s conduct and affairs,” most likely concentrating on such things as the reasons for the bankruptcy in the first place, the degree to which the debtor has cooperated with the DGI in revealing asset value and producing income to repay creditors, and the likelihood that the bankrupt’s debts might be paid to a greater extent if the debtor were to remain subject to the DGI’s expropriation of value for a longer period of time.⁴¹ Even if the court is inclined to discharge the bankrupt to some extent, the court has wide discretion to tailor a discharge by suspending it for some set period of time or by subjecting the discharge to conditions (such as a further kind or degree of value to be surrendered to the DGI for distribution among creditors even after the discharge).⁴²

The courts have always been quite reticent to extend the beneficence of discharge to debtors who have not paid their debts in full, and this reticence has grown only more powerful over the

³⁵ On the sources of this data, *see supra* note 28.

³⁶ *See supra* text accompanying note 28.

³⁷ Insolvency Act 1967, *supra* note 2, at § 33.

³⁸ *See Azmi, Abd Razak & Ahmad, supra* note 32, at 210-11.

³⁹ *Azmi, Abd Razak & Ahmad, supra* note 32, at 211-12.

⁴⁰ *Azmi, Abd Razak & Ahmad, supra* note 32, at 211 (citing *Public Bank v. Choong Yew Wah*, 5 CLJ 695 (Ct. App. 2014)).

⁴¹ *Azmi, Abd Razak & Ahmad, supra* note 32, at 211.

⁴² Insolvency Act 1967, *supra* note 2, at § 33(3) (providing court “may” grant discharge to varying degrees). If the bankrupt has committed certain bankruptcy-related offenses, the discharge must be either refused or suspended (perhaps with additional conditions) until the bankrupt has paid at least half of the outstanding debts, and a series of presumptions all but assures that one of these offenses will be established. Insolvency Act, *supra* note 2, at §§ 33(4)-(6), (12). One particular discharge condition is singled out—perhaps to encourage courts to impose it—that the court require the debtor to expose future income and assets to enforcement of a consent judgment for some or all of the debt remaining unpaid upon entry of the discharge order. Insolvency Act 1967, *supra* note 2, at § 33(10). That is, if the debtor ever obtains property or income that could be seized in enforcement of a judgment, that value must be made available to pre-bankruptcy creditors. The Malaysian discharge could thus be made parallel to the ancient Roman debt relief order called *cessio bonorum* and the modern discharge in Swiss personal insolvency proceedings (at least before an impending amendment to that law). *See Kilborn, supra* note 23, at 48.

past two decades.⁴³ The largest number of discharge orders entered in any year on public record is 855 in 2010—a year when just under 225,000 bankruptcy cases were pending under administration.⁴⁴ Even that paltry figure exceeds the next highest number—690 in 2008—by a significant margin, and the numbers fall off quickly thereafter.⁴⁵ Indeed, after 2010, total annual discharge orders exceeded 400 only twice, gradually falling to just 105 in 2019 and bottoming out at only forty three in 2023 and a mere sixteen in all of 2024.⁴⁶ Discharge by court order has always been a longshot, and it became much more so after 2010.

III. SLOW BUT SAFE RECALIBRATION OF BANKRUPTCY VOLUME

This fraught situation spurred Malaysian lawmakers into action. They expressed a desire to return these legions of debilitated bankrupts back into the productive national economy, along with an economic and efficiency imperative to reduce the tremendous burden on bankruptcy administrators to monitor and process this mountain of endless and often low- or no-value cases.⁴⁷ Thus, they embarked on a very slow but safe twenty-five-year journey to reduce the number of bankrupts under administration, in part through the gradual adoption of a more effective and modern bankruptcy discharge procedure.

Lawmakers had little room to maneuver. They obviously could not improve the individual finances of the masses of bankrupts under administration, much less the millions of struggling debtors who might eventually be thrust into bankruptcy. So, they focused on the two aspects of bankruptcy they could control, proceeding along two parallel tracks. First, they narrowed the range of debtors whom creditors could push into bankruptcy, slowly closing the faucet and thus slowing the flow of new bankruptcy cases. Second, at the same time they gradually raised the drain stopper, allowing more pending cases to exit from bankruptcy through increasingly liberal discharge mechanisms. The result was a much more modern bankruptcy system that is now structurally better suited to self-regulation of both reasonable entry and regular exit.

⁴³ See *infra* notes 143-149 and accompanying text..

⁴⁴ See *supra* notes 10-11 and accompanying text.

⁴⁵ Insolvency Act, *supra* note 2, at § 5(1)(a) (multiple creditors can also advance a joint petition, in which case the debts owing to all of them can be aggregated).

⁴⁶ It is not entirely clear that the minimum debt amount had not been raised from a smaller figure, as section 5 was amended in 1976 and 1992, as well, so either of these might have increased an earlier figure to the \$10,000 that was clearly present in the late 1990s. I have not been able to locate either of these early reform laws or a description of their content. Given how closely the 2003 increase tracked inflation from 1967, however, I am relatively confident this was the first such increase, and it is not especially material what the precise number was before 2003 in any case.

⁴⁷ See *US Dollar to Malaysian Ringgit Exchange Rate Chart: Xe Historical Currency Exchange Rates Chart*, XE, <https://www.xe.com/currencycharts/?from=USD&to=MYR&view=10Y> (last visited Oct. 30, 2025) (illustrating the Malaysian ringgit has remained around a fairly stable exchange rate of \$0.25 US for many years). See also Milad Hassandarvish, *Belanjawanku Guide: From Alor Setar to Klang Valley, How Much Do Malaysians Need Monthly To Manage Expenses?*, MALAY MAIL (Dec. 17, 2024), <https://www.malaymail.com/news/malaysia/2024/12/17/belanjawanku-guide-from-alor-setar-to-klang-valley-how-much-do-malaysians-need-monthly-to-manage-expenses/159799> (discussing that a recent analysis of minimum monthly family support budgets reported that a family of four living in the capital-area Klang Valley would need at least 7,440 ringgits per month to support such a household). 10,000 ringgits in today's currency value would constitute the equivalent of about one month and ten days' support for a family of four, at least in the most expensive area of the country.

A. TRACK ONE: SLOWING THE TAP

Three legislative and regulatory innovations reduced the flow of individuals into the bankruptcy system. Lawmakers made it harder for creditors to push debtors into bankruptcy by raising existing barriers and imposing new ones, first in general and then for specific types of debtors. At the same time, financial regulators leveraged their lending industry influence in creating a mediation-diversion program for struggling borrowers. These factors together achieved the goal of returning new bankruptcies to pre-crisis levels.

1. RESTRICTING BANKRUPTCY ELIGIBILITY IN GENERAL – MINIMUM DEBT

Malaysian bankruptcies overwhelmingly result from creditor petitions to push defaulting debtors into bankruptcy.⁴⁸ But not just any default will suffice. To prevent bankruptcy from being abused as a catch-all debt collection mechanism for simple, individual disputes, the debt owed to the petitioning creditor⁴⁹ must be large enough to suggest general default and warrant the cumbersome procedure of bankruptcy.

The threshold was originally 10,000 ringgits,⁵⁰ currently about \$2,500 USD.⁵¹ But between 1967 and 2000, thirty-three years of inflation in Malaysia decreased monetary values by 72%.⁵² Thus, a 10,000-ringgit debt in 2000 would be the 1967 equivalent of only about 2,800 ringgits—about \$700 USD.⁵³ This is hardly the magnitude of debt to warrant the nuclear option of bankruptcy, rather than ordinary individual debt collection, so the Malaysian legislature took the first of many steps to increase the minimum debt underlying a creditor-initiated bankruptcy petition. Effective October 1, 2003, the minimum debt was tripled to 30,000 ringgits, which accounts for most of the intervening years of inflation.⁵⁴

The new minimum debt amount still represented a fairly small sum, only about \$7,500 USD, and this move had no noticeable effect in reducing the flood of cases into bankruptcy. On the contrary, new case initiations increased the year following this revision by over 30% to hit a new record, with approximately 16,000 new cases in each of 2004 and 2005. New cases continued to

⁴⁸ See *Inflation Trends in Malaysia, Inflation Calculator for Malaysia*, WORLDATA.INFO, <https://www.worlddata.info/asia/malaysia/inflation-rates.php> (Oct. 2025).

⁴⁹ See Bankruptcy (Amendment) Act 2003 (Act A1197), § 5(1)(a) (Malay.) (finding that fully accounting for inflation from 1967 would have set the figure at 37,800 ringgits, but given the apparent desire to adopt a round number, and not be too lenient on debtors, the choice of 30,000 makes some logical sense).

⁵⁰ See sources cited *supra* note 28. It is not entirely clear that the minimum debt amount had not been raised from a smaller figure, as section 5 was amended in 1976 and 1992, as well, so either of these might have increased an earlier figure to the 10,000 that was clearly present in the late 1990s. I have not been able to locate either of these early reform laws or a description of their content. Given how closely the 2003 increase tracked inflation from 1967, however, I am relatively confident this was the first such increase, and it is not especially material what the precise number was before 2003 in any case.

⁵¹ The Malaysian ringgit has remained around a stable exchange rate of \$0.25 USD for many years. See *infra* Part III.A.2.

⁵² See *supra* note 48.

⁵³ See *supra* note 48.

⁵⁴ From 1967 to 2017, inflation in Malaysia would have increased the cost of a 10,000 ringgit item to just over 52,000 ringgits. See Inflation calculator, *supra* note 48.

flood into the system each year, as a series of record-smashing years beginning in 2009 culminated in an all-time record 22,351 new cases registered in 2014.⁵⁵ While that staggering figure would never be reached again, the number of new cases would not drop below the 2003 pre-revision level until 2019, after legislative intervention in 2017, described immediately below, changed the bankruptcy-eligibility rules more radically.

Another minor aspect of those 2017 changes is discussed further below, but the primary reform was a revisitation of the minimum debt.⁵⁶ Effective October 6, 2017, creditors could push debtors into bankruptcy only for debts amounting to at least 50,000 ringgits.⁵⁷ This increase finally accounted almost fully for the cumulative effect of inflation since 1967⁵⁸ and made the minimum debt a more serious hurdle, about \$12,500 USD, at a time when the cognate minimum debt for creditors to initiate “involuntary” bankruptcy in the United States was a similar \$15,775 USD.⁵⁹ Nonetheless, even this change seems to have had at best a muted effect on case filings, as new cases fell by less than 10% in the following year. That relatively minor fluctuation might have been the result of either other legislative changes (discussed below) or perhaps changes in the overall economic environment in Malaysia. Curiously, among all the other data reported on new bankruptcy cases, debt level ranges (either of the debts that supported creditors’ petitions or of total debt burdens) are not reported, so we cannot see, for example, if low-debt cases were pursued before but disappeared after any given increase in the creditor-petition debt minimum.⁶⁰

Finally, effective October 23, 2020, along with many other measures to combat the economic devastation of restrictions and shutdowns caused by the COVID-19 pandemic, the minimum debt for bankruptcy was raised yet again to its present level, 100,000 ringgits.⁶¹ This is a serious hurdle, equivalent to \$25,000 USD, which one might have expected to cause a major pullback in case initiations. A notable downturn in new cases had already begun the previous year, however, when for the first time, case openings in 2019 finally fell below the 2003 level, at just over 12,000. And when COVID-19 hit the following spring, the bottom fell out. Creditors were prevented from reaching the courts for much of the year, a fact that likely alone was responsible for slashing the rate of new case openings to the lowest level since the late 1990s (only 8,351 in 2020). From 2020 forward, new cases have remained well below 10,000 each year, averaging only about 5,750 per year from 2021 through 2024, and on track to barely exceed that level for 2025.⁶²

⁵⁵ 11 U.S.C. § 303(b) (2017); Notice of Judicial Conf. of United States, 81 Fed. Reg. 8748 (Feb. 22, 2016).

⁵⁶ A new data table was added to statistical reports beginning July 2021 seeming to indicate ranges of debts underlying new petitions in each year, broken into bands corresponding to the various thresholds before the 2017 and 2020 reforms (i.e., 30,000-50,000 ringgits, 50-100,000, and beyond). It was of course too late by this point to gauge the earlier prevalence of low-debt cases, and from 2021 through 2024, 11% of new cases reported a debt below 100,000, which should not be possible considering the increase to 100,000 minimum in 2020. *See sources cited supra* note 28.

⁵⁷ Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Amendment) Act 2021 (2020) (Malay.). The increase was made permanent, effective the very next day, Sept. 1, 2021, by Insolvency (Amendment) Act 2020, Act A1624 (2021) (Malay.).

⁵⁸ *See supra* note 54.

⁵⁹ *See* Bankruptcy (Amendment) Act 2003 (Act A1197), § 2 (Malay.).

⁶⁰ *See id.*

⁶¹ *See supra* text following note 50.

⁶² *See* Bankruptcy (Amendment) Act 2017 (Act A1534), § 5(3) (Malay.).

It is of course difficult to untangle the effect of the 100,000-ringgit minimum debt hike (and other legislative restrictions on creditor-initiated bankruptcy, discussed below) from the global disruptions wrought by COVID-19 on all social activity in 2020 and beyond. But it is remarkable that the pace of new case registrations has not accelerated back to recent historical levels as COVID-19 restrictions have eased. The past five years have charted new bankruptcy case figures at a depressed level not seen since the late 1980s and mid-1990s. The spigot seems to have been successfully reset to a historically moderate flow.

2. RESTRICTING BANKRUPTCY ELIGIBILITY IN PARTICULAR – (SOCIAL) GUARANTORS

The 2003 amendment introduced a new concept, “social guarantor,” meaning someone who has promised to pay someone else’s debt (offering a so-called personal guarantee) out of the goodness of their heart (that is, not for profit) to support one of three enumerated non-business purposes: an education or research loan, a vehicle loan, or a home loan.⁶³ Such people were presumably regarded as not only blameless in the event the principal obligor (the direct borrower) defaulted on the loan, exposing the guarantor to unsustainable liability, but worthy of special protection for having done such a selfless act of community support (even if one suspects many if not most such guarantees were made for relatives).

In 2003, lawmakers limited creditors’ ability to push a “social guarantor” into bankruptcy by requiring such a petitioning creditor to show “that he has exhausted all avenues to recover debts owed to him by the debtor.”⁶⁴ The provision is somewhat ambiguous as to whom it references as “the debtor,” but it seems fairly clear from context that the purpose here is to require the creditor to pursue the original borrower to the bitter end, rather than hastily relying on recourse to the guarantor to recover the defaulted principal debt.

As noted above, the 2003 amendments, including the protection for social guarantors, effected no reduction in new bankruptcy cases.⁶⁵ Undaunted, lawmakers returned to this issue when they amended the law again in 2017. This time, they outright prohibited the filing of any bankruptcy petition against a “social guarantor,” and they extended the previous “exhausted all modes of execution” restriction to any bankruptcy petition against *any* sort of guarantor, including a for-profit business guarantor.⁶⁶ This time, the law was amplified to explicitly remind both courts and creditors that ordinary means of debt collection (e.g., wage garnishment and asset seizures) are available and must be pursued to the fullest against the principal obligor before seeking the overwhelming force of a bankruptcy petition against a secondarily liable guarantor.⁶⁷

It seems highly unlikely that the 2017 guarantor reforms had any material effect on overall case initiations. The contemporaneous substantial increase in the minimum debt to support a bankruptcy petition was followed by only a mild 10% reduction in new cases in 2018.⁶⁸ Moreover,

⁶³ Bankruptcy (Amendment) Act 2003, Act A1197 (amending § 2).

⁶⁴ Insolvency Act 1967, *supra* note 2, at § 5(3).

⁶⁵ *See supra* text accompanying note 55.

⁶⁶ Bankruptcy (Amendment) Act 2017, Act A1534 (amending § 5(3) and adding subsections (4)-(7)).

⁶⁷ Insolvency Act 1967, *supra* note 2, at § 5(3)(b) (requiring leave of court), (4) (requiring exhaustion), (6) (outlining modes of execution). On the proper role of ordinary debt collection versus bankruptcy, *see* Kilborn & Walters, *supra* note 10.

⁶⁸ *See supra* text following note 55.

only a small percentage of cases involved guarantors before 2017. Statistical reports ascribe a single “reason” or “cause” (*sebab*) to each of that year’s new bankruptcies—most likely the basis of the creditor’s debt who filed each bankruptcy petition (as any given bankruptcy has many “causes”).⁶⁹ From 2008 to 2017, social and business guarantees were identified as the basis for only a small percentage of each year’s new bankruptcy cases—averaging about 5.5% for social guarantees and 3.5% for business guarantees. After the 2017 reform, as one would expect, social guarantees gradually disappeared as a basis, although not immediately—they remained the reported cause of 3.3% of cases in 2018, quickly declining to a handful and then zero over the next two years. Business guarantees, in contrast, remained the cause of 3.8% of cases in 2018—an *increase* over 2017—and a stable 3% or more of new cases on average from 2020 to 2024.⁷⁰

The non-social guarantor restrictions thus appear to have had no impact on case filings and openings. The prohibition of social guarantor bankruptcies might account for at most a 2% decline in new cases in 2018, and even here the causal connection is unclear at best. While protecting guarantors is a commendable and interesting experiment in bankruptcy policy, the evidence is not compelling that this experiment was a significant success.

3. DIVERSION TO BANKRUPTCY ALTERNATIVE – AKPK AND DEBT MANAGEMENT PLANS

The Central Bank (*Bank Negara Malaysia*), not the legislature, undertook a more interesting and successful experiment, in part with an intent to divert cases away from the bankruptcy system to a gentler, compromise-oriented solution. In 2006, the Central Bank established a governmental agency to provide credit advice to struggling borrowers and broker compromise arrangements with lenders regulated by the Central Bank.⁷¹ That agency is generally known by its Malay abbreviation, AKPK (*Agensi Kaunseling dan Pengurusan Kredit - Credit Counseling and Management Agency*).⁷²

While the AKPK provides financial counseling and education, its marquee activity is establishing debt management programs (DMPs) in which struggling borrowers strike compromise arrangements with their lenders to make their debt burdens more manageable. The terms of these DMPs are not publicly announced, but the clear intimation in AKPK’s standard references to “rescheduling and restructuring” is that lenders rarely asked (much less agree) to forgive any of

⁶⁹ A separate statistical table reports on the “cause/reason for failure to pay debts,” based on interviews with select debtors, also listing only a single cause for each case. For a cautionary discussion of the problems with statistical identification of the “causes” of personal bankruptcy, see José M. Garrido, Jason J. Kilborn & Anjum Rosha, *Personal Insolvency and Data Collection Systems*, 28-29 (IMF Working Paper, Paper No. 2025/124, 2025), <https://www.imf.org/en/Publications/WP/Issues/2025/06/20/Personal-Insolvency-and-Data-Collection-Systems-567848>.

⁷⁰ On the sources of this data, see *supra* note 28.

⁷¹ Sahara Hashim & Ili Syazana, Consumer and Market Conduct Department, Cent. Bank Malay., AKPK – Advancing Prudent Financial Behaviour 1, 5 (2018), <https://www.bnm.gov.my/documents/20124/826852/FSPSR+BA5+-+Advancing+Prudent+Financial+Behaviour.pdf>.

⁷² See *id.*

the principal amount owed;⁷³ rather, the AKPK proposes that lenders reduce interest rates and extend repayment periods to ease borrowers' monthly debt burdens and make the debt serviceable, ultimately to be paid in full.⁷⁴

While reducing bankruptcy filings was not a stated goal of the AKPK's DMP program, it would have that effect if lenders could be convinced to accept proposed compromise DMPs. AKPK reports have repeatedly asserted that many of its DMP clients were on the verge of bankruptcy, and at least some were able to be diverted to an agreed DMP instead: 20% of DMP clients through 2018 (that is, over 40,000 individuals), and 10% of 11,076 individuals (that is, about 1,100 successful diversions) referred by financial institutions in 2023 alone.⁷⁵

Only a relatively small segment of debtors engaging AKPK for assistance are enrolled in a DMP, however, and only a small fraction of these have succeeded in paying off their debt. A 2018 report notes that 29% of the 683,169 individuals who had engaged AKPK by that point had been enrolled in DMPs, carrying a total debt load of 21.7 billion ringgits, for an average of about 108,000 ringgits per client (about \$28,000 USD). Over the twelve years of AKPK's work with DMPs to that point, only a small number of clients had managed to retire their debts—8% of DMP participants, or 15,439 debtors.⁷⁶ Another 64,000 debtors had abandoned their DMPs as either no longer necessary or not sustainable, and about 120,000 remained in what must be a long process of repaying their loans.⁷⁷ Moreover, not all lenders were encompassed by AKPK's efforts, as the original focus was only on Central Bank-regulated lenders. After 2014, a gradually increasing number of prominent non-bank financial institutions were brought on board, allowing DMPs to

⁷³ See *id.* (reporting only three options for DMPs: withdrawn, actively making payments, or “fully settled the loans”); AKPK BIENNIAL REPORT 2023/2024 36, (AKPK, 2025), https://www.akpk.org.my/sites/default/files/2025-04/AKPK_BIENNIAL-REPORT_23-24.pdf (reporting on April 2024 “Golden Solace” initiative, where elderly borrowers and those facing significant personal challenges who have paid 90% of their original debt “are eligible to settle the remainder, with financial institutions encouraged to close accounts entirely,” suggesting partial loan forgiveness is rare and subject to lender discretion); Ruzita Azmi, Adilah Abd Razak & Siti Nur Samawati Ahmad, *Debt Management Programme (DMP) in Malaysia, the United Kingdom (UK) and Singapore: What Can We Learn?*, 97 MAN IN INDIA 421, 426 (2020) (citing AKPK explaining intent of DMP “to help lower the debtors’ total loan repayment instalments to a manageable level of their net monthly income . . . to meet daily expenses”); MTI Golden Group, *Understanding AKPK: A Comprehensive Guide to AKPK Malaysia*, MTI GOLDEN GRP. (May 16, 2024), <https://mti-golden.com.my/understanding-akpk-a-comprehensive-guide-to-akpk-malaysia/> (cautioning that AKPK offers “no debt reduction,” but rather “focuses on restructuring payments rather than reducing the total amount owed”).

⁷⁴ This is a very common approach in developing credit counseling systems around the world. For a discussion of a parallel model in which the French national bank set up a system for persuading creditors to agree to payment plans granting minor concessions to overindebted consumers, see generally Jason J. Kilborn, *La Responsabilisation de l'Economie: What the United States Can Learn from the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619, 635-48 (2005).

⁷⁵ Hashim & Syazana, *supra* note 71, at 2; AKPK BIENNIAL REPORT, *supra* note 73, at 36. In 2022, the Central Bank at AKPK's behest reportedly mandated regulated financial institutions to give borrowers 30 calendar days to seek assistance from AKPK before issuing a bankruptcy notice (the prelude to a bankruptcy petition). AKPK, ANNUAL REPORT 2022, 46 (AKPK, 2023), <https://www.akpk.org.my/sites/default/files/2024-02/Annual%20Report%202022.pdf>.

⁷⁶ Hashim & Syazana, *supra* note 71, at 1-2. Actually, the precise figure is 7.6%; that is, 15,439 success stories among 201,116 all-time DMP clients to March 2018.

⁷⁷ Hashim & Syazana, *supra* note 71, at 1-2.

offer more comprehensive solutions, but given that the program was spearheaded by the Central Bank rather than the legislature, the scope of AKPK's influence has always been somewhat limited.⁷⁸

Whatever its limitations, the AKPK's DMP program has helped an impressive number of people, many of whom thus avoided bankruptcy, at least temporarily. Annual reports indicate that about 42,000 debtors per year were enrolled in DMPs from 2018 to 2024, bringing the total to nearly 500,000 debtors over the past eighteen years.⁷⁹ These plans returned nearly two billion ringgits to creditors in 2024 alone—a testament to the power of leaving people in their natural environment to pursue regular employment or business and servicing their debt without the intervention of the DGI and bankruptcy. One must suspect that lenders have learned over the years that they are better off referring people to AKPK for a DMP that will produce much more regular and reliable repayment, reducing lenders' readiness to push debtors into bankruptcy and perhaps explaining in part the continuing low level of new bankruptcy case openings from 2020 to the present.

That being said, AKPK's efforts have definite limits. Those already in bankruptcy cannot use the DMP program to escape, and the program is simply unsuited for debtors who are not able to pay their debts in full, with mild concessions that their lenders will accept. This is a laudable way of supporting debtors in dealing with mild financial distress that can be managed with a bit of sage advice, an extension of time to pay, or a reduction in accruing interest and penalties. But there will always be debtors—likely a substantial number of them—whose reasonably achievable income simply does not suffice to service the debt loads carried by many individuals today. As noted above, fewer than 10% of DMPs successfully retired from 2006 to 2018, and four times this many debtors abandoned their DMPs over the same period.⁸⁰ A press release from August 2020 offered updated figures that confirm the trend: 324,815 all-time DMP enrollments and “more than 28,000 . . . fully settled their debt,” which again accounts for fewer than 10% of DMPs (about the same 8% reported in 2018).⁸¹ Moreover, that same release reported that the total debt retired amounted to 1.28 billion ringgits, which spread among some 28,000 participants works out to only about 45,000 ringgits per DMP, or \$11,000 USD, not an especially weighty burden.⁸²

Experience in other countries, including countries whose central banks set up repayment negotiation programs very much like the AKPK, strongly suggests counseling and DMPs might work for some mildly indebted people but will be insufficient for a sizeable contingent of more heavily encumbered debtors who need at least some significant degree of debt forgiveness to escape from bankruptcy.⁸³ Achieving that objective was the focus of the second track the Malaysian

⁷⁸ Hashim & Syazana, *supra* note 71, at 5.

⁷⁹ AKPK's annual reports from 2018 to 2024 are available on its website at <https://www.akpk.org.my/publications>.

⁸⁰ See *supra* notes 76-77 and accompanying text.

⁸¹ *Transfer of the Small Debt Resolution Scheme to Agensi Kaunseling dan Pengurusan Kredit (AKPK)*, BANK NEGARA MALAYSIA (Aug. 14, 2020), <https://www.bnm.gov.my/-/transfer-of-the-small-debt-resolution-scheme-to-agensi-kaunseling-dan-pengurusan-kredit-akpk->.

⁸² *Id.*

⁸³ See Kilborn, *supra* note 74, at 649-50 (describing inadequacy of payment-plan based relief in early years of French consumer insolvency system).

legislature pursued in its quest to reduce the bankrupt population between 1998 and 2023, as recounted in the next section.

B. TRACK TWO: DRAINING THE TUB

The second parallel reform track was eventually much more successful and brought Malaysian bankruptcy law much closer in line with international norms. This track also evolved in three phases that were introduced gradually over twenty-five years to achieve real, lasting modernizing reform.

1. INTRODUCTORY PHASE ONE, 1998, 2003: A NEW ADMINISTRATIVE RELIEF OPTION

The first very hesitant steps to begin reducing the enormous backlog of deactivated people languishing as undischarged bankrupts started very early with a pair of related reforms in 1998 and 2003. Given the slow pace of the courts in releasing debtors from perpetual bankruptcy, lawmakers empowered the bankruptcy administrator to do so.⁸⁴ In 1998, the legislature added new landmark provisions to the Bankruptcy Act by vesting the head of the insolvency department (today, the Director General of Insolvency (DGI))⁸⁵ with the discretionary authority to issue certificates discharging any bankrupt.⁸⁶ Who better to judge whether a particular bankrupt had sufficiently cooperated, contributed adequately to creditors, and deserved release? After all, discharge by court order required a report from the administrator as well,⁸⁷ so why not eliminate the cumbersome second step of court confirmation of routine discharge decisions?⁸⁸

The bankrupt must have spent at least five years in bankruptcy purgatory before a discharge certificate might be issued,⁸⁹ and creditors are explicitly invited to object, though with limited effect.⁹⁰ At first, the administrator was required to notify creditors of the reasoning behind any decision to issue a discharge certificate, implicitly inviting creditors to challenge these reasons.⁹¹ However, in the 2003 reform law, this requirement was removed;⁹² the DGI now needs only to notify creditors of “his intention to issue the certificate,” to which creditor objections with stated

⁸⁴ See *supra* parts II.A. and II.B.

⁸⁵ On the history of the Department of Insolvency and its Director General, see *History, supra* note 14.

⁸⁶ See Bankruptcy (Amendment) Act 1998 (Act A1035) (effective Jan. 1, 1999, adding a new § 33A); S. Chandra Mohan, *Balancing Competing Interests in Bankruptcy: Discharge by Certificate of the Official Assignee in Singapore*, 20 SING. ACAD. L.J. 464, 490 (2008) (Sing.) (noting adoption of parallel procedure in Malaysia in 1998).

⁸⁷ See *supra* part II.B.

⁸⁸ This is reminiscent of a landmark reform in Swedish personal insolvency law in 2007, removing a final step of court confirmation of an administrative decision to grant debt relief. See Jason J. Kilborn, *Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?*, 80 AM. BANKR. L.J. 435, 460 (2007).

⁸⁹ Insolvency Act 1967, *supra* note 2, at § 33A(2).

⁹⁰ See Insolvency Act 1967, *supra* note 2, at § 33B. See also Mohan, *supra* note 86, at 490 (noting an initial “large number of . . . challenges in court by creditors”).

⁹¹ See Azmi, Abd Razak & Ahmad, *supra* note 32, at 214.

⁹² See Azmi, Abd Razak & Ahmad, *supra* note 32, at 214. See also Bankruptcy (Amendment) Act 2003, Act A1197 (effective Oct. 1, 2003) (amending §§ 33A-33B).

grounds must be lodged within three weeks, to be resolved by the DGI.⁹³ Dissatisfied creditors may pursue their opposition with the court, but at most, this might result in an order delaying the issuance of the certificate for no more than two years.⁹⁴

Creditors have lodged quite shocking objections to discharge certificates over the years. In one case, for example, the DGI proposed to release a fifty-eight-year-old bankrupt whose case had been administered for over ten years, but the creditor, who owed less than 10,000 ringgits (about \$2,500 USD), objected. The DGI and court both dismissed this opposition and allowed the discharge, as “it would serve no purpose to further prolong [the] bankruptcy.”⁹⁵ This type of obstinacy has been common in other personal bankruptcy systems where administrators have been empowered to discharge debtors.⁹⁶ The Malaysian law was amended in 2017 and again in 2023 to prohibit objections in certain cases, relieving the DGI and courts of the burden of formally rejecting such pointless and pitiless obstruction.⁹⁷

The DGI embraced this new power quite hesitantly—again, *slow but safe!* The first few years saw virtually no action on DGI discharge certificates until well into the 2000s, with the annual total exceeding 1,000 only in 2007 and exceeding the number of court annulments for the first time only in 2008 (1,631 versus 1,535). This barely made a dent in the mass of cases under administration, which had doubled in under a decade, standing at about 200,000 by 2008, most of which had been pending for longer than five years.⁹⁸

The DGI finally began to exercise its newfound discharge authority in 2009 after it launched its so-called Dormant Case Closure Project, “aim[ing] to dispose of dormant cases that no longer bring any benefit if they continue to be administered.”⁹⁹ This began a slow but steady increase in discharge certificates, jumping above 3,000 from 2009 to 2010, still a drop in the bucket as the flow of new cases ramped up in 2010 in the wake of the Global Financial Crisis of 2008 to 2009.¹⁰⁰ As an average of about 19,000 new cases per year poured in from 2010 to 2012, the DGI ramped up its issuance of discharge certificates in the immediately following years, from about 8,500 in 2011 to just over 14,500 in 2012, and just under 16,400 in 2013.¹⁰¹ The DGI was

⁹³ Insolvency Act 1967, *supra* note 2, at § 33B(1)-(2).

⁹⁴ Insolvency Act 1967, *supra* note 2, at § 33B(4)-(6).

⁹⁵ Azmi, Abd Razak & Ahmad, *supra* note 32, at 215 (discussing *Re Rajangam Marimuthu Mudalliar; Ex P Parkash Singh Wasawa Singh*, [2010] 3 CLJ 858; [2009] 1 LNS 1043).

⁹⁶ See Kilborn, *supra* note 88, at 460.

⁹⁷ In 2017, the law was amended to prohibit creditor objection to discharge of social guarantors, persons with disabilities, deceased bankrupts, and persons suffering from a certified “serious illness.” Insolvency Act 1967, *supra* note 2, at § 33B(2A)(a)–(d). This list was expanded in 2023 to include bankrupts with a certified “mental disorder” and those older than 70 who are “incapable of contributing to the administration of [their] estate.” Insolvency Act 1967, *supra* note 2, at § 33B(2A)(e)–(f).

⁹⁸ On the sources of this data, see *supra* note 28.

⁹⁹ Bahagian Hal Ehwal Undang-Undang [Legal Affairs Division], *Laporan Tahunan 2010 [Annual Report 2010]*, at 98, https://www.mdi.gov.my/wp-content/uploads/2025/04/BHEUU_2010_Laporan_Tahunan.pdf (Malay.).

¹⁰⁰ See Harun Alp, Selim Elekdag & Subir Lall, *An Assessment of Malaysian Monetary Policy during the Global Financial Crisis of 2008-09* 5 (4-6 (Int'l Monetary Fund, Working Paper WP/12/35, 2012) <https://www.imf.org/external/pubs/ft/wp/2012/wp1235.pdf> (noting “Malaysia was one of the most adversely affected Asian economies,” with a Malaysian real GDP contraction of about 3%).

¹⁰¹ On the sources of this data, see *supra* note 28.

walking on quicksand by this point, however, while record numbers of new cases flooded into the system, around 22,000 in each of 2013 and 2014.¹⁰²

At this same time, the courts effectively ceded their role in the discharge process, conferring only a few hundred discharges per year from 2011 to 2022, eventually falling to forty-three in 2023 and a mere sixteen in 2024.¹⁰³ The courts abandoned the bankruptcy discharge business and decided that it should focus on dispute resolution and undoing (annulling) the legal effects of bankruptcy orders it put in place.¹⁰⁴ The courts have effectively deferred to the DGI to take up its newly assigned responsibility for the largely ministerial, administrative task of processing discretionary discharge requests.

This sensible division of labor and expertise is precisely what has emerged. DGI stepped into the void and fully took the reins on discharge, ramping up its issuance of certificates notably from 2011 to 2014, as described above. Inexplicably, despite the flood of new cases in 2013 and 2014, the DGI backed off in the following three years, reducing discharge certificates by one-half to one-third in 2015, 2016, and 2017—perhaps in anticipation of its next big legislative reform push.¹⁰⁵

2. INTERMEDIATE PHASE TWO, 2017: LEANING TOWARD AUTOMATIC RELIEF

The watershed reform of 2017 introduced a radical new concept into Malaysian bankruptcy law: automatic discharge.¹⁰⁶ This was a bold move for the time, given the degree to which bankruptcy release had relied so heavily on the exercise of court judgment and DGI discretion up to that point. But radical change was necessary to make any serious progress on reducing the burgeoning bankrupt population.

The 2017 version of automatic discharge turned out to be not nearly radical enough, but it laid the foundation for a more muscular version to come. It introduced the novel, key language absent before that point: “A bankrupt *shall be discharged* from bankruptcy ... on the expiration of three years from the date of the submission of the statement of affairs.”¹⁰⁷ That “shall” revolutionized the Malaysian approach to discharge from bankruptcy—no more relying on a system actor to make an affirmative (heavily discretionary) decision. Instead, the discharge would occur “automatically” at a certain point in time.¹⁰⁸ The scare quotes are necessary here, however, because this new discharge is not in fact so automatic. First, creditors are again invited to object upon receiving notice that this automatic discharge is imminent.¹⁰⁹ But objections are limited to

¹⁰² See sources cited *supra* note 28.

¹⁰³ See sources cited *supra* note 28.

¹⁰⁴ See *supra* part II.A.

¹⁰⁵ See Azmi, Abd Razak & Ahmad, *supra* note 32, at 216 (noting that the MdI spearheaded the 2017 amendments after tabling a proposal in 2015).

¹⁰⁶ Bankruptcy (Amendment) Act 2017 (Act A1534), § 33C (Malay.) (introducing § 33C) (effective Oct. 6, 2017).

¹⁰⁷ *Id.* § 33C(1) (emphasis added).

¹⁰⁸ See *id.*

¹⁰⁹ See *id.* § 33C(3)-(4).

asserting that the debtor has committed one of a very limited list of offenses, and even a sustained objection can only delay the entry of the automatic discharge for two years.¹¹⁰ So far so good.

The real problem with the 2017 version of the “automatic” discharge was a prerequisite that the bankrupt had achieved a certain “amount of target contribution of his provable debt.”¹¹¹ That is, the bankrupt must have ceded to the DGI sufficient value to cover at least a minimum percentage of his or her total debt in order to have earned this “automatic” discharge.¹¹² The DGI exercises tremendous discretion in determining the amount of the “target contribution,” taking into account a statutory list of factors relating to the bankrupt’s financial situation (income and family support expenses), but the first and most important in 2017 was the bankrupt’s total debt load and an appropriate “target” portion of it that must be repaid.¹¹³ The Department of Insolvency had originally proposed that the target contribution be pegged by statute at 50% of the bankrupt’s debt load.¹¹⁴

Given the precarious finances of adjudicated bankrupts, it is unsurprising that not a single bankrupt managed to earn an automatic discharge under the 2017 version of that concept “due to the difficulty in complying with the terms of paying the target contribution of their provable debt.”¹¹⁵ One wonders if the DGI had applied its proposed 50% dividend standard *sub-silentio* even though it did not appear explicitly in the final law. Minimum dividend requirements have been shown to be an insurmountable hurdle in multiple personal bankruptcy discharge procedures in Europe in the preceding decades, and consequently, such provisions have been mostly abandoned in Europe.¹¹⁶ Malaysian lawmakers had not learned that lesson yet, but they would learn quickly.

While the target contribution roadblock hindered any progress toward automatic discharge, the overall problem situation of overpopulation in bankruptcy had deteriorated markedly. By the end of 2018, the bankruptcy tub brimmed with an all-time record high of more than 300,000 ongoing cases, more than 200,000 of which had been pending for longer than five years.¹¹⁷

Fortunately, beginning that same post-reform year with the automatic discharge all but inoperable, the DGI again stepped up by supercharging its process of granting discretionary

¹¹⁰ See *id.* § 33C(3)-(8).

¹¹¹ *Id.* § 33C(1)(a).

¹¹² See *id.* § 33C(1)(a)(i).

¹¹³ See *id.* § 33C(2).

¹¹⁴ Azmi, Abd Razak & Ahmad, *supra* note 32, at 215.

¹¹⁵ Izzul Ikram & Hailey Chung, *No successful case of automatic discharge under Insolvency Act, says Azalina*, THE EDGE MALAYSIA (May 23, 2023, 8:48 PM), <https://theedgemalaysia.com/node/668203> (quoting the Prime Minister’s Department Law and Institutional Reforms Minister Azalina Othman speaking before the legislature while introducing a 2023 amendment bill).

¹¹⁶ See Jason J. Kilborn, *The Rise and Fall of Fear of Abuse in Consumer Bankruptcy: Most Recent Comparative Evidence from Europe and Beyond*, 96 TEX. L. REV. 1327, 1334-44 (2018). In the UK, somewhat similarly to Malaysia, the bankruptcy administrator has discretion to require bankrupts to pay over surplus income to earn a discharge, but such payments have been either agreed or required in only about 17% of cases over the past ten years—83% of bankrupts having no available income to offer creditors. THE INSOLVENCY SERVICE, *Individual Insolvency Statistics: June 2024*, https://assets.publishing.service.gov.uk/media/66993e7449b9c0597fdaff6/Data Tables in Excel_xls_x_Format - Individual Insolvency Statistics June 2024.xlsx (tables 1a & 5).

¹¹⁷ See sources cited *supra* note 28.

discharge certificates.¹¹⁸ The DGI more than quadrupled the number of certificates issued, discharging more than 24,000 bankrupts in each of 2018 and 2019.¹¹⁹ The unforeseen event disrupted everything. The natural disaster of COVID-19 struck in March 2020, preventing creditors from reaching the courts and, likely for that reason alone, slashing the rate of new case openings to the lowest level since the late 1990s.¹²⁰ Nonetheless, the DGI marched on, continuing its more liberal policy of granting discretionary discharges during and after COVID-19, issuing a total of nearly 40,000 discharges from 2020 through 2022.¹²¹ The DGI's efforts notwithstanding, the number of cases under administration for longer than five years reached its all-time high in 2021, with still over 228,000 cases.¹²²

3. FINAL PHASE THREE, 2023: AUTOMATIC DISCHARGE AT LAST

Finally, in 2023, the DGI and the legislature worked in tandem to implement a durable solution to this problem, refining their earlier efforts on a permanent framework for reducing the enormous backlog of long-pending bankruptcy cases. The DGI took the initiative in March 2023, launching its “second chance” policy of wholesale write-offs via discharge certificates for long-pending low-debt cases (below 50,000 ringgits).¹²³ Pursuing this policy, DGI ramped up its issuance of certificates of discharge from 650 in January and 1,510 in February to 3,800 in March, fluctuating between 3,000 and 7,000 per month through the end of 2023.¹²⁴ This flurry of administrative action reduced the bankrupt population by a total of more than 50,000 in 2023 alone, by far the largest mass-discharge in Malaysian history.¹²⁵

On the legislative side, on October 6, 2023, a new and improved “automatic” discharge went into effect and applied retroactively to long-pending cases.¹²⁶ The scare quotes are still warranted, but less so than before the 2023 reform. The legislature introduced a small but key modification fixing the problem with the “target contribution” that bankrupts have to produce to earn their “automatic” discharge.¹²⁷ That amount is now no longer calculated in terms of a portion

¹¹⁸ See Malaysia Department of Insolvency Bankruptcy Statistics 2019-2022, *supra* note 28; see also Mohd Salleh, *supra* note 28.

¹¹⁹ See Malaysia Department of Insolvency Bankruptcy Statistics 2019-2022, *supra* note 28; see also Mohd Salleh, *supra* note 28.

¹²⁰ See Malaysia Department of Insolvency Bankruptcy Statistics 2019-2022, *supra* note 28; see generally Tan Ann-Yew, *supra* note 28 (research on specific reasons for low number in the 1990s).

¹²¹ See Malaysia Department of Insolvency Bankruptcy Statistics 2019-2022, *supra* note 28; see also Mohd Salleh, *supra* note 28.

¹²² See Malaysia Department of Insolvency Bankruptcy Statistics 2019-2022, *supra* note 28; see also Mohd Salleh, *supra* note 28.

¹²³ Marianne Loh & Megan Phang Yuet Yee, *Discharge of Bankruptcy Under Small-Scale Debts*, SHOOK LIN & BOK (Mar. 7, 2023), <https://shooklin.com.my/legal-update/discharge-of-bankruptcy-under-small-scale-debts/>

¹²⁴ See Malaysia Department of Insolvency Bankruptcy Statistics 2023, *supra* note 28 at 12.

¹²⁵ See sources cited *supra* note 28.

¹²⁶ Insolvency (Amendment) Act 2023 (Act A1695), §§ 9 & 16 (Malay.) (amending the Insolvency Act 1967 (Act 360), § 33c) (effective Oct. 6, 2023).

¹²⁷ *Id.* Another, largely symbolic, revision emphasized the bankrupt's duties to cooperate with the DGI in surrendering asset value for creditors. If at the three-year mark for automatic discharge, the DGI concludes the bankrupt has failed to fulfill all duties as part of the bankruptcy process, the DGI can suspend the automatic discharge for up to two years. The automatic discharge then becomes

of the bankrupt's debt load, but rather a "sum of money . . . for the purposes of administration of the bankrupt's estate, having regard to the financial ability of the bankrupt."¹²⁸ The DGI still enjoys discretion in determining this "sum of money," but the statute explicitly directs that determination be based on the debtor's earning capacity rather than debt load. Echoing this nuanced but crucial shift in focus, the DGI's list of financial conditions to "take into account" was reordered. The bankrupt's debt load, formerly listed first, now appears last among a list of six factors—which now begins with "the current monthly income of the bankrupt."¹²⁹

The process and result of the DGI's determination of the "target contribution" for any given bankrupt remain opaque, but the change in language describing the contribution invites speculation as to a more objective and transparent metric. The statute now explicitly provides that the sum of money is "for the purpose of the administration of the bankrupt's estate," and among the FAQs on bankruptcy on the Mdi's website is one addressing that very issue: In response to a question about how a debtor might self-initiate a bankruptcy case, the Mdi directs that the debtor must deposit 1,500 ringgits with the DGI "to cover the cost of case administration."¹³⁰ This seems to suggest an objective measure of "a sum of money . . . for the purpose of administration of the bankrupt's estate," with 1,500 ringgits (about \$375 USD)¹³¹ as the rather bargain price for the new automatic discharge.¹³² This is probably just a coincidence of wording, and the DGI seems more likely to extract an amount considered reasonable in light of the bankrupt's payment capacity,¹³³ but this

effective upon the expiration of the period of suspension. Insolvency Act 1967 §§ 33C(1)(b), (8A)-(8C) (Malay.). One suspects such suspensions will be quite rare, both because bankrupts seldom fail to cooperate, and because it requires action by the DGI, who faces many other demands for thinly stretched attention.

¹²⁸ Insolvency (Amendment) Act 2023 (Act A1695), § 33C(1)(a)(i) (Malay.).

¹²⁹ Bankruptcy (Amendment) Act 2017 (Act A1534), § 33C(2)(b) (Malay.).

¹³⁰ *Soalan Lazim: Kebankrapan*, JABATAN INSOLVENSIAL MALAYSIA [Malaysia Dep't of Insolvency, *Frequently Asked Questions: Bankruptcy*,] <https://www.mdi.gov.my/soalan-lazim-kebankrapan-1/> (emphasis added).

¹³¹ This price tag is surprisingly similar to the filing fee in the United States for an equivalent bankruptcy case (\$338) and less than half the price for a basic bankruptcy filing in England (£130 for Adjudicator review and £550 for the Official Receiver's minimum administrative fee, for a total of £680—about US\$925). See JOSEPH SPOONER, *THE CASE FOR RELIEF IN AN ECONOMY OF DEBT* 125 (Cambridge Univ. Press 2019).

¹³² The 2023 reform law also reduced administration costs by adopting remote hearings and electronic notices, as well as scrapping the first meeting of creditors, so the cost of administration might well decline in the years to come. See Insolvency (Amendment) Act 2023 (Act A1695), § 15 (Malay.) (amending the Insolvency Act 1967 (Act 360), § 33c) (effective Oct. 6, 2023).

¹³³ Indeed, it seems most likely that the new Malaysian procedure will track the one adopted in Singapore in 2016: The DGI will determine the bankrupt's monthly "surplus" income after reasonable family support expenses, and this single amount will constitute the bankrupt's consistent monthly contribution for creditors, ending three (or five) years later upon "automatic" discharge. See Jason J. Kilborn, *Tightening Up Loose Credit and Loosening Up Tight Bankruptcy In Singapore: An Asian Paradigm For Personal Debt and Insolvency Reform*, 58 TEX. INT'L L. J. 135, 155-56 (2023). It seems as though this approach to calculating a monthly contribution has already been in place for some time, as the Mdi's annual reports from 2010 to 2017 track petitions that bankrupts frequently submit to the DGI requesting various forms of permission or relief. See *supra* text accompanying notes 18-19. One such petition concerns requests for "reducing monthly installments." See *supra* note 28.

individual-capacity tailored approach is destined to produce far superior results for bankrupts seeking standard discharge.

In the year following these landmark regulatory and legislative “second chance” initiatives, the first crop of automatic discharges appeared in the statistics, along with a huge wave of discharges by discretionary DGI certificates.¹³⁴ Along with the very first 5,421 bankrupts earning their automatic discharges in 2024, over 120,000 received DGI discharge certificates.¹³⁵ In a concerted push from February through July 2024, the DGI issued between 14,000 and 19,000 discharge certificates every month.¹³⁶ With a total of 126,811 automatic and discretionary discharges granted, 2024 witnessed, by far, the largest mass release from financial prison in the history of the Malaysian bankruptcy system.¹³⁷

Even after such a landmark year, over 100,000 long-term bankrupts remained under administration, and 2024’s breakneck pace of discharges could not be sustained. Both automatic discharges and DGI discharge certificates had already begun to lag considerably by the latter part of 2024. As of May 2025, DGI discharge certificates are on track to fall back to an annual total of around 20,000, and the monthly trend of automatic discharges suggests a likely annual total of fewer than 250.¹³⁸ Nonetheless, it is heartening to see regulatory and legislative institutions working in parallel to reduce the backlog of long-pending bankruptcy cases by the largest number in history by a large measure—bringing the total number of cases under administration below 125,000 in May 2025 for the first time in decades. Better yet, the number of cases pending for longer than five years finally fell below 100,000 that same month.¹³⁹

This is thus a mixed victory—it is gratifying to see more discretionary releases and especially a more predictable automatic discharge, but neither is entirely regular or predictable. DGI’s exercise of discretion seems largely random in light of wild fluctuations in discharge certificate volumes over the years (e.g., from 12,650 in 2014 to 5,391 the very next year, then from 5,605 in 2017 to 24,154 the following year).¹⁴⁰ More concerning, annual reports reveal rather arbitrary goals set by the DGI for discharge certificates; e.g., 15,000 for 2013¹⁴¹ and 130,000 in the first year after the 2023 reforms.¹⁴² While it is heartening that the price of automatic discharge is

¹³⁴ See sources cited *supra* note 28.

¹³⁵ See sources cited *supra* note 28.

¹³⁶ See sources cited *supra* note 28.

¹³⁷ See sources cited *supra* note 28.

¹³⁸ See sources cited *supra* note 28.

¹³⁹ See sources cited *supra* note 28.

¹⁴⁰ See sources cited *supra* note 28.

¹⁴¹ “MdI has targeted to release 15,000 bankrupts through the KPI Discharge Certificate in 2013 in order to give bankrupts a second chance. In total, 16,394 cases or 109.3 percent have been successfully released as of 2013 and this has exceeded the 100 percent target that had been set.” See MdI, *Laporan Tahunan BHEUU 2013*, *supra* note 28, at 144.

¹⁴² Izzy Laily Hussein, *Amendments to Insolvency Act to be tabled next month*, NEW STRAITS TIMES (Mar. 4, 2024, at 07:16 AM), <https://www.nst.com.my/news/nation/2023/03/885890/amendments-insolvency-act-be-tabled-next-month>; *Insolvency (amendment) Act 2023 Comes Into Force Tomorrow*, BERNAMA (Oct. 5, 2023 03:13 PM), <https://www.bernama.com/en/news.php?id=2231843> (quoting Minister saying “second chance policy aims to discharge up to 130,000 bankrupt individuals within a year after the Act A1695 comes into effect,” which “represents half of the cases being administered by the Insolvency Department”); *142,510 Bankruptcy Cases Given Discharge So Far, Exceeding Initial*

now subjectively measured in terms of each individual bankrupt's actual payment capacity, limited to an amount connected to the administration of each bankrupt's case, it is still unclear how DGI will evaluate bankrupts' family support budgets or calculate the target contribution for any given case, or both.

Lack of transparency and predictability inherently weakens the incentives for bankrupts to strive for discharge and undermines the system's objective to strike a balance between debtor relief and creditor satisfaction. It is decidedly suboptimal for DGI to hide its policy—as it clearly has one—on how to determine reasonable demands for debtors to show good faith efforts to satisfy their obligations in bankruptcy. It will be even worse if it turns out that the DGI policy imposes unrealistically demanding terms of release, a roadblock strongly hinted at by the slow pace of automatic discharges achieved in the first eighteen months.

IV. INDIVIDUAL INFLUENCE AND THE ROLE OF ISLAM IN DEMOCRATIC LAWMAKING

What prompted this monumental reform? The lion's share of progress was made on the DGI side, via discharge certificates, and the 2023-2024 onslaught was most likely a continuation of the approach announced in 2009, meant to reduce the pointless administrative burden of bankruptcy cases involving debtors with insufficient income-generating capacity to produce any material contribution to their creditors.¹⁴³ The 2023-2024 push focused on low-debt cases, below 50,000 ringgits, which the legislature had decided in 2017 no longer warranted enforcement through bankruptcy, anyway.¹⁴⁴ The government explained in connection with the 2023 amendments that many bankrupts “no longer have the means to cooperate and contribute to the bankruptcy administration” and therefore “public interest also needs to be considered as bankruptcy involves public funds that need to be optimized.”¹⁴⁵ The explicit goal was not so much to take pity on struggling bankrupts but rather to “improve the administration and management of the country's bankruptcy system.”¹⁴⁶

In a related vein, the Prime Minister averred that the mass discharge plan was intended to re-energize debilitated bankrupts so they could “contribute to the national economy.”¹⁴⁷ He

Target Of 130,000 Cases – PM Anwar, BERNAMA (July 25, 2024 03:32 PM), <https://www.bernama.com/en/news.php?id=2321683>.

¹⁴³ See Legal Affairs Division, *supra* note 99, at 98 and accompanying text; Azmi, Abd Razak & Ahmad, *supra* note 32, at 217 (quoting government Minister explaining 2016 proposal for automatic discharge on basis that debtors seldom produced further payment beyond five years).

¹⁴⁴ See *supra* part III.A.1.

¹⁴⁵ Bernama, *2 new groups qualify for bankruptcy discharge after amendment to Insolvency Act*, MALAYSIA NOW (May 23, 2023, at 08:18 pm), <https://www.malaysianow.com/news/2023/05/24/2-new-groups-qualify-for-bankruptcy-discharge-after-amendment-to-insolvency-act>.

¹⁴⁶ Hussein, *supra* note 142.

¹⁴⁷ Hussein, *supra* note 142; see also BERNAMA, *supra* note 142 (“The enforcement . . . demonstrated the government's concern to give bankrupt individuals a second chance to live a better life and then contribute to the country's economic development.”); see also Tarrence Tan, *Over 142,000 individuals released from bankruptcy under Second Chance Policy, says PM*, THE STAR, (July 25, 2024, at 01:13 pm), <https://www.thestar.com.my/news/nation/2024/07/25/over-142000-individuals-released-from-bankruptcy-under-second-chance-policy-says-pm> (describing later comments that hint more powerfully at economic reinvigoration, as the Prime Minister suggested an expansion of the Second Chance Policy to bankrupts 40 years of age and younger with no more than 200,000 ringgits of debt).

emphasized that the government's "responsibility is to stimulate the economy and give [bankrupts] opportunities.... [T]o make Malaysia a competitive and developed country."¹⁴⁸ The minister who tabled the 2023 amendments in the legislature asserted that "lengthy periods of bankruptcy not only burden the bankrupt individual but also impact the government, as the individual is unable to fully contribute to the economy's development."¹⁴⁹ In public comments from key government officials, economic efficiency and productivity seem to have been the predominant motivations.

At the same time, a noteworthy element of Islamic religious sentiment is prominent here. Touting his government's "Second Chance Policy" achievement of releasing over 140,000 bankrupts in less than a year, the Prime Minister proclaimed that "this policy is one of the initiatives under the 'Prinsip Rukun Ihsan' (Principle of Compassion)."¹⁵⁰ This mixed English-Malay comment references the policy framework called "Malaysia Madani" (Civilized Malaysia), introduced by the recently appointed Prime Minister in January 2023. The framework is composed of six principles (*prinsip*), each beginning with one of the six letters in the Malay word "*madani*," the final "i" standing for "*ihsan*."¹⁵¹ The Prime Minister uses this word in his comment about the Second Chance Policy in an intriguing way, especially with his addition of the word "*rukun*." *Ihsan* is the Malay word for "care and compassion," as the English translation in the *Madani* framework indicates.¹⁵²

But *ihsan* is originally an Arabic word (later adopted into Malay) that designates a core element of Islamic religious doctrine. The Prime Minister's addition of the word *rukun* to his reference to a government policy principle seems to be a nod to this religious sentiment, as *rukun* is the Malay word for "commandment" or "pillar," suggesting one of the key tenets of Islamic religious faith.¹⁵³ This is not surprising, coming from Prime Minister Anwar Ibrahim, a "moderate Islamist" who began his political career by founding the Muslim Youth Movement of Malaysia while he was a university student.¹⁵⁴ Prime Minister Ibrahim rather transparently invoked a key Islamic doctrine that fit perfectly with his framework's promotion of human compassion and the Second Chance Policy of freeing people from perpetual bankruptcy.

Ihsan in Arabic derives from the root "h-s-n," meaning "good," and the derived form *ihsan* means "doing good."¹⁵⁵ It is "the highest status" of Islam, designating a way of living one's faith that puts it into practice in a way that emphasizes "doing good," especially for other people.¹⁵⁶ It implicates living Muslim faith through action "to care for others and perform good deeds, including

¹⁴⁸ BERNAMA, *supra* note 142.

¹⁴⁹ Ikram & Chung, *supra* note 115; *see also* Azmi & Ahmad, *supra* note 9, at 198 (showing the same minister's similar comments about tabling the 2017 amendments made before the legislature).

¹⁵⁰ BERNAMA, *supra* note 142.

¹⁵¹ Bernama, *What Is Malaysia Madani*, www.bernama.com/en/infographics/index.php?v=10698 (last visited Nov. 7, 2025).

¹⁵² Thameem Ushama, 'Care and Compassion' (*Ihsan*) in Malaysia's MADANI Framework: Some Reflections, IIUM TODAY (Mar. 20, 2024), <https://news.iium.edu.my/?p=178418>.

¹⁵³ Shahbudin Embum, *Understanding the Concept of Malaysia Madani: A Path to Civilisation*, MALAY TODAY (May 16, 2024), <https://malay.today/2024/05/16/understanding-the-concept-of-malaysia-madani-a-path-to-civilisation/>.

¹⁵⁴ Janet Moredock, *Anwar Ibrahim*, BRITANNICA (Oct. 28, 2025), www.britannica.com/biography/Anwar-Ibrahim.

¹⁵⁵ Ushama, *supra* note 152.

¹⁵⁶ Zara Irfan, *Three levels of Faith: Islam, Iman, and Ihsan*, QURAN READING: BLOGS (Mar. 1, 2018), <https://www.quranreading.com/blog/three-levels-of-faith-islam-iman-and-ihsan>.

assisting those who are weak, impoverished, vulnerable, destitute, depressed and disadvantaged.”¹⁵⁷ Prime Minister Ibrahim’s policies seem to have been motivated by this principle. Although obscuring the connection by translating *ihsan* as “care and compassion,” the Prime Minister’s reference was likely clear to his co-religionists, who would understand the profound religious meaning of “doing good” implicated in the final pillar of his Malaysia Madani framework in general, and in the Second Chance Policy for discharging long-suffering bankrupts in particular.

This is a salient and instructive example of democracy.¹⁵⁸ in practice. Neither Islamic law nor doctrine compelled or mandated this bankruptcy discharge policy.¹⁵⁹ While Malaysia is a majority-Muslim nation, and its constitution expressly recognizes Islam as the official state religion,¹⁶⁰ Malaysia is a secular state. As a result, the federal legislature is forbidden from enacting Islamic law, specifically in areas of economic law, such as bankruptcy.¹⁶¹ Nonetheless, the Second Chance Policy and the new discharge law are products of Muslim faith in action. Just as Christian faith motivates many US lawmakers to implement various policies in an emphatically secular state, so too does Muslim faith influence Malaysian lawmakers, not in terms of mandate or compulsion, but in terms of inspiration and implicit influence. This is “Muslim democracy” today, and the 2023 revolution in Malaysian bankruptcy policy is a shining example.

V. CONCLUSION

As the 2023-2024 burst of discharges has relaxed to a slow trickle, a very significant backlog of long-pending bankruptcy cases remains and appears destined to persist. Neighboring Singapore has a personal bankruptcy system quite comparable to the one that finally emerged in 2023 in Malaysia.¹⁶² Comparisons of total bankruptcy cases under the administrations in the two countries reveal both the depth of the problem Malaysian law reformers have tried to solve and how far they remain from a real solution. At the beginning of 2021, Singapore had 2.3 undischarged bankrupts per 1,000 adults aged twenty and older.¹⁶³ At that time, Malaysia had nearly *six times* that rate, with over thirteen undischarged bankrupts per 1,000 adults.¹⁶⁴ After the 2023 reforms and

¹⁵⁷ Ushama, *supra* note 152.

¹⁵⁸ See Anwar Ibrahim, *Universal Values and Muslim Democracy*, 17 J. DEMOCRACY 5, 5-12 (2006).

¹⁵⁹ Indeed, such a policy is likely inconsistent with a conservative traditional view of Islamic law and doctrine on bankruptcy; see Jason J. Kilborn, *Foundations of Forgiveness in Islamic Bankruptcy Law: Sources, Methodology, Diversity*, 85 AM. BANKR. L.J. 323, 325-335 (2011); see also Jason J. Kilborn, *Small Business Bankruptcy Reform In the Arab World: Two Steps Forward, One Step Back*, 36 ARAB L. Q. 122 (2021) (assessing a series of recently adopted bankruptcy laws in the Arab world).

¹⁶⁰ That same Constitution protects freedom of religion and the rights of non-Muslims to practice their faith “in peace and harmony.” FEDERAL CONSTITUTION OF MALAYSIA art. 3(1); see also *id.* art. 160(2) (defining “Malay” as a person who, among other characteristics, “professes the religion of Islam”).

¹⁶¹ Islamic law is a prerogative left to the states, who have no authority to make laws with respect to bankruptcy. *Id.* art. 76(1)-(2).

¹⁶² See Kilborn, *supra* note 133, at 144-56.

¹⁶³ SINGAPORE DEPT. STATS. ET AL., POPULATION IN BRIEF 2021, at 4, 9 (Sept. 2021), (Sing.) <https://www.population.gov.sg/files/media-centre/publications/population-in-brief-2021.pdf> (reporting 5.454 million total population, of which 79.5% aged 20 and older, totaling 4.34 million); Insolvency Office, Min. of Law, *Number of Bankruptcy Applications, Orders Made and Discharges*, at 1 (Jan. 2021) (Sing.) (on file with author) (reporting 10,140 undischarged bankrupts as of January 31, 2021).

¹⁶⁴ Malaysia Dept. Stats., *supra* note 29 (reporting adult population aged 20 and older of 22.1 million as of January 1, 2021); see *supra* note 28 for the sources of bankruptcy statistics.

the explosion of discharges in 2023-2024, Malaysia had significantly reduced its undischarged bankrupt population, but by the end of May 2025, it still stood at just over five per 1,000 adults—still nearly two-and-a-half times the rate in Singapore, which had remained steady at 2.2 per 1,000.¹⁶⁵

Bankruptcy in Malaysia is still very much regarded as a carceral institution rather than one of healing and relief. The AKPK's counseling and debt management programs are a very good start for supporting financially distressed individuals, but the persistent army of long-lingering bankruptcy cases reminds us that some debtors are simply unable to rearrange their finances to pay their debts in full on sustainable terms. Malaysia has very little culture of using bankruptcy to address personal debt problems, even if debt forgiveness (discharge) is the only reasonable solution. Aside from a historically conditioned culture, Malaysia's fundamental challenge in making the final transition of its bankruptcy procedure from prison to hospital is a lack of lawyers or other advisers to encourage and guide debtors in engaging bankruptcy as a responsible pathway to relief. Now that an automatic discharge after three to five years is the standard result of bankruptcy, a culture of embracing the bankruptcy process as a form of relief might develop in the coming years. That would be a good development that authorities should embrace, contrary to the concerns DGI has recently expressed about a rise in debtor-initiated cases.¹⁶⁶

The Malaysian bankruptcy system is now well-structured to avoid abuse, as it is not a pain-free experience—much like a hospital. However, after twenty-five years of achieving a vastly reduced rate of creditors pushing debtors into bankruptcy, the AKPK's efforts to broker compromises to overcome temporary cashflow shortages, and a two-pronged approach to regularly discharging present and future bankrupts, the Malaysian bankruptcy system looks well-calibrated to balance the interests of creditors, debtors, and society in the next twenty-five years.

¹⁶⁵ Nat'l Pop. & Talent Div., *Population Trends*, (Oct. 22, 2025) <https://www.population.gov.sg/our-population/population-trends/overall-population/> (Sing.) (reporting mid-2025 Singapore population of 6.04 million, 80.3% aged 20 and above, largely due to a steep rise in the 65+ population, for a total of 4.85 million adults; Insolvency Office, Ministry of Law, *Number of Bankruptcy Applications, Orders Made and Discharges*, at 1 (Sing.) (2025) (on file with author) (reporting 10,532 undischarged bankrupts as of May 31, 2025); Malaysia Dept. Stats., *supra* note 29 (Malya.) (reporting Malaysia population 20 year of age and older as of January 1, 2024—the latest reporting date—of 23.78 million, so estimating about 24 million by May 2025); *see supra* note 28 for the sources of bankruptcy statistics.

¹⁶⁶ *Insolvency D-G warns Malaysians of rising self-declared bankruptcy cases, up 200pc in 2024*, MALAY MAIL (Mar. 30, 2025, at 11:10 MYT), <https://www.malaymail.com/news/malaysia/2025/03/30/insolvency-d-g-warns-malaysians-of-rising-self-declared-bankruptcy-cases-up-200pc-in-2024/171380>.

Implementation of Uniform Competition Protocol in African States: Best Foot Forward in the Optimization of the AfCFTA

By Ndubuisi Augustine Nwafor

ABSTRACT

Before the emergence of the Protocol to the African Continental Free Trade Area Agreement on Competition (AfCFTA Competition Protocol), there was no unified competition framework to regulate the African Continental Free Trade Area. What existed was a fragmentation of regional competition frameworks created along regional economic ties, characterised by confusing overlaps and multiple memberships. In addition to the fragmented approach, Africa was not represented at the global level when leading competition institutions from other regions made decisions on anticompetitive conduct with worldwide implications. Adopted by the African Union (AU) in 2023, the AfCFTA Competition Protocol challenges the existing situation. It aims to harmonise approaches across Africa, give Africa a voice in the global marketplace, and integrate efforts within what will be the largest single market in the world. Although not yet in force, this essay doctrinally and comparatively examines the provisions of the Competition Protocol against the background of the problems it aims to address, the frameworks of existing regional competition authorities, and scholarly views. It contends that by fostering deliberate collaboration between current regional and national competition authorities, the Protocol will help to establish not just a uniform approach but also equal opportunities for State Parties and businesses across Africa. The goal is to promote competition in the market and eliminate anti-competition practices and cultures.

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I. INTRODUCTION

The emergence of the African Continental Free Trade Area (AfCFTA) heralded a long-awaited innovation in economic trade in Africa.¹ The AfCFTA marked a significant step towards the creation of a single market for goods and services on the African continent.² The primary goal of the agreement is to enhance and facilitate trade among African countries by eliminating or reducing trade barriers such as tariffs and non-tariff barriers.³ The AfCFTA Agreement seeks to deepen economic integration by creating a single market with free movement of goods, services, and people across African borders.⁴ By promoting intra-African trade, the agreement reduces the dependence on external markets and diversifies African economies.⁵ The agreement is also expected to stimulate economic growth, leading to job creation and poverty alleviation as a result of increased trade and investment.⁶ It includes provisions for capacity-building initiatives to help member states, especially smaller economies, fully benefit from the opportunities presented by the AfCFTA.⁷ It also establishes a common legal framework for trade and investment, providing a basis for dispute resolution and promoting a rules-based trading system.⁸ The single market integrating fifty-five states with a population of over 1.4 billion is expected to recoup income of over \$450 billion by 2035, eradicate poverty within the region, and boost intra-African trade 52.3% by 2025.⁹

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¹ After years of negotiation, the African Continental Free Trade Area was officially launched on January 1, 2021. See *Operational Phase of the African Continental Free Trade Area Launched*, AFRICAN UNION (Dec. 4, 2022), <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched>.

² See Sachiko Akaiwa, *The African Continental Free Trade Area: Economic and Distributional Effects*, WORLD BANK GROUP [WBG] (Oct. 14, 2020, at 8:26 PM), <https://thedocs.worldbank.org/en/doc/323591602721619164-0090022020/>.

³ See Lethabo Sithole, *The Role of Trade Facilitation in Addressing Non-Tariff Barriers in the African Continental Free Trade Area*, AFRONOMICS L. (Mar. 28, 2021) <https://www.afronomicslaw.org/category/analysis/role-trade-facilitation-addressing-non-tariff-barriers-african-continental-free>. Sithole argues that non-tariff barriers (NTBs) are a significant obstacle to both intra-African and global trade. Studies indicate that NTBs act more as a barrier to the flow of goods and services compared to customs duties and other charges. For example, in most African RECs, the low levels of intra-regional trade have largely been attributed to NTBs rather than tariffs. Although 85% of traded goods in the Southern African Development Community are already at zero tariffs, the recorded intra-regional trade is low and stands at about 10%. Barriers other than NTBs add both direct and indirect costs, as well as delays in the processes of import and export, hence reducing traders' competitiveness. The implication of such barriers falls more heavily on small- and medium-sized enterprises and developing countries that often do not have the means to resolve these problems. Ultimately, consumers bear the financial consequences of NTBs. See *id.*

⁴ Agreement Establishing the African Continental Free Trade Area art. 4(a)–(b), Mar. 21, 2018, 58 I.L.M 1028 [hereinafter AfCFTA Agreement].

⁵ See Hippolyte Fofack, *The Future of African Trade in the AfCFTA Era*, BROOKINGS (Feb. 23, 2024), <https://www.brookings.edu/articles/the-future-of-african-trade-in-the-afcfta-era/>.

⁶ See generally AfCFTA Agreement, *supra* note 4.

⁷ See AfCFTA Agreement, *supra* note 4, at art. 27, 29.

⁸ See AfCFTA Agreement, *supra* note 4, at art. 5(a), (c) (laying the foundational principles including State Party-driven, and committing to cooperate on investment).

⁹ Willard Mwemba, *The African Continental Free Trade Area Competition Protocol: A Necessity or an Overzealous Endeavour?*, 19 COMPETITION L. INT'L 183, 196 (2023). Fifty-four of the African Union (AU) member states have signed the African Continental Free Trade Area (AfCFTA) Agreement, with Eritrea being the sole country yet to join. Of the signatories, forty-seven have ratified the agreement, marking a major milestone in the pursuit of economic integration across the continent. However, several countries remain outside the ratification process.

Notably, however, the new regional instrument has performed below optimal speed in integrating the African regional trade. Currently, intra-African trade accounts for only 15%¹⁰ of the continent's total trade, compared to 58% in Asia and 67% in Europe.¹¹ Researchers have identified factors such as public obstacles to trade (e.g., tariffs), non-tariff barriers to trade, and anti-competitive conduct by private enterprises that are militating against the performance of the AfCFTA.¹² Additionally, researchers further maintain that lowering tariffs in the African market does not translate into increased intra-regional trade.¹³ Tariff liberalization often gives rise to non-tariff barriers, which are responsible for the stagnation in intra-African trade.¹⁴ In the same vein, when competition rules fail to evolve alongside economic liberalization, the advantages of integration can be undermined by private companies that block market access.¹⁵ Simply relying on market forces during liberalization does not guarantee the desired economic efficiencies or promote sustainable development. Dominant firms may engage in predatory tactics to drive out local competitors or form cartels to manipulate prices and divide markets.¹⁶ Without effective safeguards to prevent such anti-competitive behaviour, firms will lack the motivation to enhance their practices and overall performance.

While many factors may account for the underperformance of the AfCFTA, this article is a pioneering and significant post-adoption of Competition Protocol research which is chiefly concerned with the effect of the lack of uniform competition law in the region and the anti-competitive practices within the market by private entities owing to the lacuna in uniform competition policy.¹⁷ Until the emergence of the AfCFTA protocol on competition policy, regulation of competition within the region was fragmented and dominated by national and regional competition authorities. In the case of the latter, major actors include the Economic Communities of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), and the Southern African Development Community (SADC).¹⁸ This approach

Currently, the non-state parties to the AfCFTA include Benin, Eritrea, Liberia, Libya, Madagascar, Somalia, South Sudan, and Sudan. For various reasons—whether these be political, economic, or institutional—these countries have not been fully committed to the agreement up to this date. The absence of these states from the AfCFTA framework poses a challenge to realizing the full benefits of continent-wide trade liberalization since their involvement is important for completeness in market access and creating a single African economic bloc. To this end, efforts towards encouraging wider participation are unceasing, as the success of the AfCFTA depends on the full engagement of all African states. *See id.*

¹⁰ *See* AFRICAN EXPORT-IMPORT BANK, AFRICAN TRADE REPORT 2024: CLIMATE IMPLICATIONS OF THE AFCFTA IMPLEMENTATION 2 (2024) (stating that intra-African trade “accounted for 15 percent of total African trade in 2023”).

¹¹ Nardos Bekele-Thomas, *AfCFTA: Seizing Opportunities for a Prosperous Africa*, NEWSPUBLICTRUST (May 30, 2023) <https://newspublictrust.com/afcfta-seizing-opportunities-for-a-prosperous-africa>.

¹² *See* Mwemba, *supra* note 9.

¹³ *See* Mwemba, *supra* note 9.

¹⁴ *See* Frederik Stender & Tim Vogel, *Murky Trade Waters: Regional Tariff Commitments and Non-Tariff Measures in Africa*, 32 J. INT'L TRADE & ECON. DEV. 1058 (2022) (arguing that while decreasing tariffs between regional partners reduces the cost of mutual trade, they might also expose competition and make comparative and industrial location advantages binding). *See also* Mwemba, *supra* note 9; Diego Puga & Anthony J. Venables, *Preferential Trading Arrangements and Industrial Location*, 43 J. INT'L ECON. 347 (1997); Anthony J. Venables, *Winners and Losers from Regional Integration Agreements*, 113 ECON. J. 747 (2003).

¹⁵ *See* Kamala Dawar & George Lipimile, *Africa: Harmonising Competition Policy under the AfCFTA*, 2 CONCURRENCES 242 (2020).

¹⁶ *See id.*

¹⁷ *Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy*, arts. 6–7, Feb. 19, 2023, AFRICAN UNION [hereinafter Competition Protocol].

¹⁸ To date, four recognised Regional Economic Communities (RECs) and other regional institutions in Africa have established competition law and policy frameworks, adopting either a cooperative approach or creating supranational

fosters a situation where the competitive activities of multinational entities cutting across two or more regional economic communities (RECs) are not holistically examined and governed. The activities of these RECs in regulating competition within their region will be examined later in this article.

Competition policy is a cornerstone in the architecture of trade agreements like the AfCFTA.¹⁹ The nexus between competition policy and trade agreements is rooted in the acknowledgement that open and competitive markets foster innovation, enhance consumer welfare, and contribute to sustainable economic growth.²⁰ Competition policy ensures that markets operate efficiently by preventing anti-competitive practices such as monopolies, cartels, and abuse of market dominance.²¹ In trade agreements, the incorporation of a competition policy safeguards against distortions that hinder fair competition; this, in turn, ultimately benefits consumers through increased choices, lower prices, and improved product quality.²² Competitive markets stimulate innovation as firms or market participants strive to outperform their rivals.²³ Competition policy in trade agreements encourages a culture of innovation, drives economic development, and positions nations within the global knowledge economy. This is particularly relevant for African countries seeking to diversify and elevate their economies.

institutions. The Southern African Customs Union (SACU) and the Southern African Development Community (SADC) offer platforms where member states can collaborate on cross-border competition cases. Meanwhile, the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Central African Economic and Monetary Community (CEMAC), Economic Community of West African States (ECOWAS), and West African Economic and Monetary Union (WAEMU) have established supranational regional competition institutions, enforcing binding competition laws at the regional level. See Elizabeth Gachuri, *African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol?*, U.N. Doc. UNCTAD/SER.RP/2020/15 (Dec. 2020).

¹⁹ They typically intend to address activities that hinder competition, enhance the capabilities of national competition authorities, and foster collaboration and coordination among these authorities. See generally Veronica Silva, *Competition Policy and Trade Agreements in the Region: Exploring Forums for Cooperation and Convergence* (Dec. 2006), <https://hdl.handle.net/11362/36335>.

²⁰ See U.N. Conference on Trade and Development, *The Role of Competition Policy in Providing a More Equitable Playing Field for Development of Globalizing Markets: A Challenge for Governments and Multilateral Organisations*, in *The Role of Competition Policy for Development in Globalizing World Markets*, 6, U.N. Doc UNCTAD/ITCD/CLP/Misc.14 (June 14-15, 1999).

²¹ See MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 22-29 (2004).

²² See Martha Licetti, Graciela Miralles, & Robert Teh, *Competition Policy*, in *HANDBOOK OF DEEP TRADE AGREEMENTS* 507 (Aaditya Matoo, Nadia Rocha, & Michele Ruta, eds., 2021). According to a writer, effective competition policies can stand out as an effective complement to efforts to reduce governmental trade barriers. Competition can disperse vested interests, making it possible for the opening up of markets to trade and investment. National competition promotes exporters' international competitiveness. Through such processes, greater competition improves productivity and leads to the growth of efficiency and innovative capacities. It also heightens domestic competition because higher contestability of the markets increases new entry and heightens competition by introducing products, services, and investments of other countries. Removing entry barriers and promoting competition in upstream industries reduce some impediments to export performance in downstream industries. Conductive domestic regulation helps and provides incentives for increasing trade flows, while effective application of the laws supports exports better than wider-ranging trade reformism. In industries with high levels of domestic competition, exports tend to increase. See *Competition: How It Affects Price Determination and Consumer Behavior*, FASTERCAPITAL, <https://fastercapital.com/content/Competition--How-it-affects-price-determination-and-consumer-behavior.html> (last updated Apr. 3, 2025).

²³ See MICHAEL E. PORTER, *COMPETITIVE ADVANTAGE OF NATIONS: CREATING AND SUSTAINING SUPERIOR PERFORMANCE* (2008).

Trade agreements such as the AfCFTA often involve the liberalization of markets to facilitate the flow of goods and services.²⁴ For instance, the general objective of the AfCFTA remains to remove barriers among contracting states and parties.²⁵ However, without an effective competition policy, liberalization may lead to market concentration and anti-competitive behaviour since there are still potential risks associated with unchecked economic openness.²⁶ Trade and competition are often seen from different policy perspectives. Traditionally, trade law has concerned itself with public impediments to trade, while antitrust or competition law has addressed private sector restrictions.²⁷ Trade law is, by its very nature, internationally oriented, whereas competition law has traditionally been anchored in national legal systems. While trade policy is mainly directed at the pursuit of international trade with the minimum possible government-imposed barriers, the focus of competition policy lies in dealing with the anti-competitive conduct of businesses that impedes the effective functioning of markets. Neither of these two policies can work in their entirety without the other since one reinforces the effectiveness of the other. Therefore, while trade liberalization is an important element of a single market, it needs to be accompanied by robust competition policies to ensure that the benefits of liberalization are not undermined by certain monopolistic practices or other forms of anti-competitive behaviour.²⁸ Competition law has now become a standard component in bilateral and regional trade agreements due to the potential distortion and negation of the intended outcomes of such agreements when the conduct of private businesses remains unregulated.²⁹

Unfortunately, until recently, there has been no uniform competition policy for the AfCFTA to anchor on since it became operational in the last three years.³⁰ The effect of this, among other factors identified earlier, is that unchecked anti-competitive practices within the market have stifled the growth of the market and, by extension, the essence of the agreement. One such anti-competitive conduct illustrating the need for uniform governance is the investigation and sanction of the Confederation of African Football (CAF) by COMESA.³¹ According to the COMESA Competition Commission (CCC), the lack of an open tender process for the award of the Pay TV broadcast rights for CAF competitions and the unilateral award to BEIN resulted in significant

²⁴See Gerhard Erasmus, *The AfCFTA Objectives and the Furthering of the Interests of Women*, TRALAC BLOG (Jan. 23, 2023), <https://www.tralac.org/blog/article/15883-the-afcfta-objectives-and-the-furthering-of-the-interests-of-women.html>.

²⁵*Id.*

²⁶ This could be the emergence of dominant players who might exploit their market power, or it could be distorted markets where certain firms, due to their size or market position, engage in anti-competitive behaviour.

²⁷ Dawar & Lipimile, *supra* note 15, at 243.

²⁸ The connection between liberalization and competition policy is often reflected in legislative frameworks, for instance, as exemplified by amendments to Canada's Competition Act. See Steven Globerman, *Trade Liberalization and Competitive Behavior: A Note Assessing the Evidence and the Public Policy Implications*, 9 J. POL'Y ANALYSIS & MGMT. 80 (1990).

²⁹ See Melaku Geboye Desta & Naomi Barnes, *Competition Law and Regional Trade Agreements: An Overview*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 239, 245 (Lorand Bartels & Frederico Ortino eds., 2006).

³⁰ See Koffi Aseye Makafui Elitcha, Mie Vedel Joergensen & Nahom Teklewold, *Deepening the AfCFTA: Celebrating the Adoption of New Protocols on Investment, Intellectual Property Rights and Competition Policy*, U.N. ECON. COMM'N FOR AFR. (Mar. 16, 2023), <https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C>.

³¹Bowmans, *Comesa: COMESA Competition Commission Issues Fines for Alleged Anti-Competitive Business Practices*, LEXOLOGY (Jan. 29, 2024) <https://www.lexology.com/library/detail.aspx?g=9ea6ed3b-ec1e-4853-a66e-4972b8ddfc2c>.

prevention, restriction, or distortion of competition within the common market.³² To this effect, the CCC levied a fine of \$300,000 on both CAF and BEIN for the exclusive commercialization of media and marketing rights for African football tournaments.³³

Megamergers like Holcim/Lafarge (cement) and Bayer/Monsanto (seeds, chemicals) also present a case about significant anti-competitive effects, particularly in Africa.³⁴ According to Eleanor Fox, the Holcim/Lafarge merger involved two dominant players in an industry known for cartel activity, with cement being notorious for such practices globally.³⁵ To this end, jurisdictions like the U.S. and European Union (EU) imposed spinoffs and conditions to protect their markets, leaving African nations to deal with the anti-competitive risks independently.³⁶ There were no African competition regulators to collaborate with global regulators from the start. As a direct implication, Africa lacked adequate representation and protection in vetting the merger, which may have led to its prohibition if a collective approach had been taken.³⁷

This situation gives an insight into how, without robust frameworks of governance, some forms of misconduct would have otherwise been perpetrated and left less attended to in areas without sound competition policies like those outside the COMESA region.³⁸ Without effective regulation of competition in such areas, companies or entities would enjoy leeway in anti-competitive practices with no scrutiny or accountability.³⁹ Nevertheless, the present case also illustrates how an entity could be subjected to various, potentially overlapping sanctions where the same conduct has been the subject of different actions by various RECs in Africa.⁴⁰ If the conduct is found to have cross-border effects within the continent, then it could lead to multiple layers of enforcement and penalties, making things more complex for the parties concerned.⁴¹

The conduct investigated herein is by no means uncommon to Eastern and Southern Africa. In the realms of sports governance, the Confederation of African Football (CAF) operates at a continental level regarding soccer regulation. This only brings to the fore that conduct and practices occurring in more than one region can, by operation, fall within the purview of various regulatory bodies, thereby resulting in duplication of procedures unless the matter is centrally managed.⁴²

³² Muzinge Chibomba, *CAF Fined for Breach of Regional Regulations*, COMESA (Jan. 29, 2024), <https://www.comesa.int/caf-fined-for-breach-of-regional-regulations/>.

³³ *Id.*

³⁴ See Eleanor M. Fox, *Competition Law, Developing Countries, and Regional Agreements: Tearing Down Silos and Building Up Scaffold*, AFRONOMICS LAW (Aug. 13, 2021)

<https://www.afronomicslaw.org/category/analysis/competition-law-developing-countries-and-regional-agreements-tearing-down-silos>.

³⁵ Eleanor M. Fox, *A Competition Law for Africa: Vision for AfCFTA*, COMPETITION POL'Y INT'L (Oct. 13, 2022), <https://www.pymnts.com/cpi-posts/a-competition-law-for-africa-vision-for-afcfta/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Vellah Kedogo Kigwiru, *Why, How, and When Do National Competition Agencies Support Supranational Regional Competition Regimes? A Case of the COMESA Competition Regime*, 74 GRUR INT. 226, 227 (2025).

³⁹ *Id.*

⁴⁰ *Concurrent Jurisdictions Debate: What Roles Do the Three Competition Authorities Play in the Kenyan Market?*, E. AFR. CMTY. COMPETITION AUTH. (Oct. 13, 2018), <https://www.eacompetition.org/resources/view/concurrent-jurisdictions-debate-what-roles-do-the-three-competition-authorities-play-in-the-kenyan-market>.

⁴¹ Mwemba, *supra* note 9, at 187.

⁴² Org. for Econ. Coop. & Dev. [OECD], *Global Forum on Competition: Regional Competition Agreements 4*, OECD Doc. DAF/COMP/GF (2018) 17 (Nov. 29, 2018), [https://one.oecd.org/document/DAF/COMP/GF\(2018\)17/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)17/en/pdf).

Indeed, this case points to the need for a more harmonised and uniform approach to governance and competition policy in Africa.⁴³ A consistent regulatory framework would make enforcement easier and would avoid the issue of overlapping penalties and regulatory fragmentation.⁴⁴ The uniformity would facilitate coordination among African markets, ensuring that anti-competitive practices are dealt with effectively and equitably throughout the continent, while promoting fairer competition, greater market integration, and a more cohesive economic environment within the African Union and its regional structures.⁴⁵

The concept of a uniform competition regime is a strategic imperative within the context of regional trade agreements, particularly in the unfolding narrative of AfCFTA.⁴⁶ A uniform competition regime simply refers to the harmonisation of competition policies and regulations across participating nations, presenting a cohesive framework to address anti-competitive practices and promote fair competition.⁴⁷ As illustrated above, this eliminates regulatory fragmentation, providing a clear and consistent framework that facilitates business operations, trade, and investment across borders.⁴⁸ In the case of the AfCFTA, such coherence is fundamental for the successful realization of a single market.⁴⁹

Uniform competition policies easily contribute to creating an even playing field among member states. The EU model presents a direct lesson: competition policy plays a pivotal role in ensuring that businesses can operate within the EU under fair conditions.⁵⁰ Within the EU, the promotion of effective competition has been a basic driving force for economic integration and increased competitiveness of European companies, both in the single market and internationally.⁵¹ The EU has eliminated barriers to cross-border trade and investment by establishing a framework that allows for open and fair competition, giving way to the creation of a more unified and efficient internal market. The EU competition policy prohibits anti-competitive agreements between market operators as well as the creation of cartels that collude to fix prices, tender bids, limit production, or share markets or customers between them.⁵² These conduct violations are met with heavy fines.⁵³

⁴³ See Joshua Mwamulima, Joyce Karanja & Michelle Karimi Kimonye, *Harnessing Africa's Free Trade Agenda - AfCFTA Protocol on Competition*, BOWMANS (Sept. 26, 2023), <https://bowmanslaw.com/insights/harnessing-africas-free-trade-agenda-african-continental-free-trade-agreement-afcfta-protocol-on-competition/>.

⁴⁴ See Organization for Economic Cooperation & Development [OECD], *Global Forum on Competition: Regional Competition Agreements*, 4, OECD Doc. DAF/COMP/GF(2018)17 (Nov. 29, 2018), [https://one.oecd.org/document/DAF/COMP/GF\(2018\)17/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)17/en/pdf).

⁴⁵ Mwemba, *supra* note 9, at 186

⁴⁶ See Zhiyuan Wang, *Designing Competition Clauses in Preferential Trade Agreements*, 22 WORLD TRADE REV. 657 (2023).

⁴⁷ See JUNJI NAKAGAWA, INTERNATIONAL HARMONISATION OF ECONOMIC REGULATION 188-214 (2011).

⁴⁸ See COMESA Competition Commission, COMESA CT. JUST. <https://comesacourt.org/comesa-competition-commission/> (last visited Nov. 24, 2025).

⁴⁹ See Mwemba, *supra* note 9, at 184.

⁵⁰ See PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 1017-18 (7th ed. 2020); see also Eur. Ct. Auditors, *Competition Policy: How to Make It More Effective* (Sept. 12, 2018), https://www.eca.europa.eu/en/publications/BP_COMPETITION.

⁵¹ See *Competition Policy as a Driver of Economic Integration - an EU Perspective*, DELEGATION OF THE EU TO SINGAPORE (Sept. 17, 2025), https://www.eas.europa.eu/delegations/singapore/competition-policy-driver-economic-integration-eu-perspective_en [https://perma.cc/5V7B-LSYV].

⁵² Consolidated Version of the Treaty on the Functioning of the European Union, art. 101(1), July 6, 2016, 2016 O.J. (C 202) 1 [hereinafter TFEU] (prohibiting agreements and concerted practices whose object or effect is the prevention, restriction, or distortion of competition within the internal market).

⁵³ Reports show that the EU Commission has imposed over €30 billion as fines since 1990. See Marcin Szczepański, *EU Competition Policy: Key to a fair Single Market*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Feb. 6, 2014), <https://www.europarl.europa.eu/EPRS/140814REV1-EU-Competition-Policy-FINAL.pdf>.

Similarly, in the context of AfCFTA, a uniform competition regime aligns rules, standards, and enforcement mechanisms. This alignment reduces the potential for unfair competition resulting from variations in regulatory environments present in the region.⁵⁴ Consequently, not only does this foster a more equitable business landscape but it also heightens the appeal of the AfCFTA to investors by providing a consistent and transparent framework for economic activities across participating nations.⁵⁵

Within the African context, there is no literature on the AfCFTA protocol that comprehensively considers its provisions vis-à-vis those of other regional competition regimes while advocating for its uniform adoption across Africa. Related extant literature on the subject considers either the most suitable designs for AfCFTA's operability⁵⁶ or the perks to be derived from the harmonisation of competition policies across the continent without more.⁵⁷ The few works that mention the existing regional instruments merely provide a cursory overview of them without delving into their provisions and have necessitated the clarion call for harmonisation of Africa's competition regimes under the AfCFTA.⁵⁸ Thus, extant literature has dwelt more on the phase two negotiations.

Against this backdrop, this article makes a case (post-adoption of the Protocol) for the implementation and optimization of the AfCFTA Protocol on competition policy as the uniform competition regime for the African market.⁵⁹ It argues that the Protocol provides the solution to the problem created by the lack of uniform competition law in Africa and an avenue to realize the visions the pioneers of AfCFTA for the region.⁶⁰

This article generally provides background on competition policy in Africa.⁶¹ It highlights the lack of a uniform competition law in Africa and the benefits of a uniform competition policy.⁶² Section I presents a general introduction and examines the legal background of the Competition Protocol, the provisions of the Competition Protocol, as well as its potential in realizing the objectives of the AfCFTA within the market.⁶³ Section II examines the agreement establishing the African Continental Free Trade Area and its competition protocol. It goes further by evaluating existing competition policies among select RECs. Section III compares these RECs with the Protocol.⁶⁴ The third section further highlights the shortcomings of fragmented approaches, which

⁵⁴ See *What is the African Continental Free Trade Area (AfCFTA)?*, DEP'T TRADE, INDUS. & COMPETITION (S. Afr.) <https://www.thedtic.gov.za/sectors-and-services-2/1-4-2-trade-and-export/afcfta-2/> [https://perma.cc/8S9U-DEC8] (last visited Oct. 19, 2025).

⁵⁵ See Dirk Willem te Velde, Tom Pegelly & Sherillyn Raga, *Africa's economic integration and prospects for UK investors*, ODI GLOBAL at 1 (July 2022) https://media.odi.org/documents/Briefing_FDI_and_AfCFTA_.pdf.

⁵⁶ Fox, *supra* note 34.

⁵⁷ Mwemba, *supra* note 9, at 183.

⁵⁸ See *Concurrent Jurisdictions Debate: What Roles Do the Three Competition Authorities Play in the Kenyan Market?*, E. AFR. CMTY. COMPETITION AUTH. (Oct. 13, 2018), <https://www.eacompetition.org/resources/view/concurrent-jurisdictions-debate-what-roles-do-the-three-competition-authorities-play-in-the-kenyan-market> [https://perma.cc/XE5R-RWEY].

⁵⁹ See AfCFTA Agreement, *supra* note 4, at art. 3(a).

⁶⁰ See Competition Protocol, *supra* note 17.

⁶¹ See generally Vellah K. Kigwiru, *The Cooperation on Competition Policy under the African Continental Free Trade Area*, 17 MANCHESTER J. INT'L ECON. L., 1 (2020).

⁶² See Reda Cherif et al., *Competition, Competitiveness and Growth in Sub-Saharan Africa* 23-39 (IMF, Working Paper No. 2020/030, 2020) <https://www.elibrary.imf.org/view/journals/001/2020/030/001.2020.issue-030-en.xml>.

⁶³ AfCFTA Agreement, *supra* note 4, at arts. 3, 4(c).

⁶⁴ Lebano Khabo, *An analysis of competition law implementation in the EAC, SADC, and COMESA and the problem of overlapping membership*, 3-15 (2020) (Master's thesis, University of Cape Town) <https://hdl.handle.net/11427/31711>.

do not protect the entire region.⁶⁵ This section further addresses the issue of overlapping and multiple memberships among member states of these RECs, which militates against implementation.⁶⁶ Section IV provides a comparative analysis of the Competition Policy of the Treaty on the Functioning of the European Union (TFEU) and the Protocol to the AfCFTA Agreement on Competition. It determines that the latter derives heavily from the former; nevertheless, meaningful distinctions abound.⁶⁷ For instance, in exemptions granted between the two instruments, the AfCFTA Competition Protocol requires approval by a centralized authority,⁶⁸ whereas in the European system such exemptions apply ipso facto upon the fulfilment of certain criteria.⁶⁹

Although the Competition Protocol has not yet been tested and is not in force, Section V considers some policy recommendations that could enable the Protocol to actualize its objectives. It recommends aligning national competition laws across African states with the provisions of the AfCFTA Protocol on Competition Policy.⁷⁰ Notwithstanding the Protocol's provision that it would override any national law inconsistent with it, aligning national laws with the Protocol will prevent conflicts that could impede its functioning or restrict support.⁷¹ The article concludes in Section VI and argues that the Competition Protocol presents Africa with a unique opportunity to leverage a supranational and much-needed holistic approach to strengthen economic integration and realize the goals of the free trade area.

II. THE AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA AND ITS COMPETITION PROTOCOL

A. The Agreement Establishing the African Continental Free Trade Area (AfCFTA)

The idea of an African free trade area is rooted in the aspirations of the African Union (AU) and its predecessor, the Organization of African Unity (OAU).⁷² Early discussions focused on the need for greater economic cooperation to overcome historical challenges and promote the continent's development.⁷³ The Abuja Treaty, signed in 1991, laid the groundwork for establishing of the African Economic Community (AEC), which was envisioned as a step-by-step process toward African economic integration with the ultimate goal of creating a single market. To actualize the objectives of African economic integration, the AU launched the New Partnership for Africa's Development (NEPAD), an economic development program of the African Union, in 2001.⁷⁴ The NEPAD Action Plan highlighted regional economic communities as building blocks

⁶⁵ See generally Muhabie M. Mengistu, *Multiplicity of African Regional Economic Communities and Overlapping Memberships: A Challenge for African Integration*, 3 INT'L J. ECON. FIN. & MGMT. SCI. (2015).

⁶⁶ *Id.*

⁶⁷ See generally Eleanor M. Fox, *Integrating Africa by Competition and Market Policy*, 30 REV. INDUS. ORG. 305 (2022).

⁶⁸ Competition Protocol, *supra* note 17, at art. 10 (1).

⁶⁹ European Parliament, *Competition Policy*, FACT SHEETS ON THE EUROPEAN UNION, <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy> (last visited Jan. 17, 2025).

⁷⁰ *Competition Policy*, AFR. TRADE FOUND. <https://www.africatrade.foundation.org/competition-policy> (last visited Oct. 19, 2025).

⁷¹ Competition Protocol, *supra* note 17, at art. 19.

⁷² Phumla Williams, *AfCFTA: The dream of our founding fathers coming to life*, S. AFR. GOV'T: GOV'T OP. PIECES (July 19, 2019), <https://www.gov.za/blog/afcfta-dream-our-founding-fathers-coming-life>.

⁷³ *See id.*

⁷⁴ *The New Partnership for Africa's Development (NEPAD)*, AFR. UNION, <https://au.int/en/organs/nepad> (last visited Dec. 30, 2023).

for the eventual establishment of the African Economic Community.⁷⁵ These events laid the background for the negotiation of the free trade agreement.

The African Continental Free Trade Area Agreement (the AfCFTA Agreement) came into effect on May 30, 2019,⁷⁶ following the signatures of fifty-four of the fifty-five African Union members (excluding Eritrea) and provided two categories of objectives.⁷⁷ The general objectives consist of: economic integration, trade liberalization, competition governance, capital and investment flow, establishment of a Continental Customs Union, sustainable development, industrial and agricultural development, and resolution of overlapping and multiple memberships within the market.⁷⁸ Specifically, the agreement conceives seven key objectives as its operational goals: the gradual elimination of tariffs and non-tariff trade barriers in goods; progressive liberalization of trade in services; collaboration on matters related to investment, intellectual property rights and competition policy; cooperation across all trade-related domains; joint efforts in customs affairs and the implementation of measures to facilitate trade; creation of a mechanism for resolving disputes concerning members' rights and obligations; and establishment and maintenance of an institutional framework for overseeing and administering the AfCFTA.⁷⁹ Under the AfCFTA,⁸⁰ State Parties commit to improving economic competitiveness both within Africa and in the global market.⁸¹ In addition, under Article 4(c) of the AfCFTA, State Parties are required to "cooperate on investment, intellectual property rights, and competition policy" to achieve the objectives outlined in Article 3 of the Agreement.⁸²

The AfCFTA emphasizes competition as a central aspect of its framework. Notably, Article 6 of the AfCFTA Agreement outlines the broad scope, encompassing key areas such as trade in goods, trade in services, investment, intellectual property rights, and competition policy.⁸³ This inclusion reinforces the belief that while trade liberalization is an important element of a single market, it needs to be accompanied by robust competition policies to ensure that the benefits of

⁷⁵ AFRICAN UNION/NEPAD, THE AU/NEPAD AFRICAN ACTION PLAN 2010-2015: ADVANCING REGIONAL AND CONTINENTAL INTEGRATION IN AFRICA (Foresight for Development 2009) <https://foresightfordevelopment.org/sobipro/54/612-the-aunepad-african-action-plan-2010-2015-advancing-regional-and-continental-integration-in-africa>.

⁷⁶ This marked the beginning of a new era in African trade, with the agreement poised to create the world's largest free trade area by the number of participating countries. Ajibola F. Dalley, *The African Continental Free Trade Agreement: The Journey Thus Far*, BUSINESS DAY (Mar. 31, 2022), <https://businessday.ng/opinion/article/the-african-continental-free-trade-agreement-the-journey-thus-far/>.

⁷⁷ See Fox, *supra* note 34.

⁷⁸ AfCFTA Agreement, *supra* note 4, at art. 3.

⁷⁹ Lisandro Abrego et al., *The African Continental Free Trade Area: Potential Economic Impact and Challenges* 16, 17, IMF Staff Discussion Note SDN/20/04 (May 2020).

⁸⁰ The Agreement is structured in three tiers: The initial layer is the AfCFTA Agreement, which functions as a foundational framework, while the second layer encompasses protocols addressing Trade in Goods, Trade in Services, Dispute Settlement Rules and Procedures, Investment, Competition Policy, and Intellectual Property Rights (IPRs), with the third layer comprising Annexes, Guidelines, and Schedules associated with the mentioned Protocol. Marumo Nkomo, Jabulani Mthombeni, & Trod Lehong, *The African Continental Free Trade Area: A Significant Role for IP*, WIPO MAG., Dec. 18, 2020, <https://www.wipo.int/web/wipo-magazine/articles/the-african-continental-free-trade-area-a-significant-role-for-ip-41736>.

⁸¹ AfCFTA Agreement, *supra* note 4, at art. 3(f).

⁸² AfCFTA Agreement, *supra* note 4, at art. 4(c).

⁸³ AfCFTA Agreement, *supra* note 4, at art. 6.

liberalization are not undermined by certain monopolistic practices or other forms of anti-competitive behaviour within the continental market.⁸⁴

Article 7 of the AfCFTA Agreement provides the basis for a uniform competition policy in the market.⁸⁵ It acknowledges and reinforces the importance of competition for the realization of a common market.⁸⁶ It also provides that State Parties shall enter negotiations in the following areas: intellectual property rights, investment, and competition policy.⁸⁷ Thus, Article 7 of the AfCFTA Agreement forms the foundation for the negotiation of the Protocol to the Agreement Establishing the African Continental Free Trade Area on Competition Policy.⁸⁸

B. The Protocol to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) on Competition Policy

In the current landscape, competition in Africa faces restrictions due to detrimental business practices and government interventions that hinder healthy competition, which is often exacerbated by the absence of robust competition laws or weak enforcement and limited cross-border cooperation.⁸⁹ The Competition Protocol presents a unique opportunity to overcome such hurdles: by providing a framework for handling cross-border implications and establishing mechanisms for collaboration, the Protocol contributes to building a more integrated regulatory system, fostering the seamless implementation of a uniform competition regime.⁹⁰ As a crucial component of AfCFTA, the Protocol aligns seamlessly to implement a uniform competition regime in African states and becomes a linchpin in the pursuit of a unified regulatory framework that ensures fair competition, market efficiency, and economic transformation.⁹¹ Finally, the Competition Protocol directly addresses the concerns highlighted in earlier sections of this paper regarding anti-competitive practices that could undermine the goals of the AfCFTA.

The policy seeks to harmonise African competition policies and, by extension, facilitate trade liberalization and economic integration across the continent.⁹² The Protocol's application is broad and covers a variety of economic acts carried out by organizations that affect competition in the continental market, excluding issues that are under the purview of national competition authorities.⁹³ By defining and prohibiting practices such as price-fixing cartels, predatory

⁸⁴ See Salome Chapeyama Mdala, *Competition Policy Options for the African Continental Free Trade Area*, SQUARESPACE (Oct. 13, 2022), https://ryan-hawthorne.squarespace.com/s/Mdala_Competition-policy-options-for-the-AfCFTA.pdf.

⁸⁵ AfCFTA Agreement, *supra* note 4, at art. 7(1)(c).

⁸⁶ See AfCFTA Agreement, *supra* note 4, at art. 7.

⁸⁷ See AfCFTA Agreement, *supra* note 4, at art. 7.

⁸⁸ See Competition Protocol, *supra* note 17.

⁸⁹ World Bank Group [WBG], *Breaking Down Barriers: Unlocking Africa's Potential Through Vigorous Competition Policy*, WBG Report No. 106717 (June 1, 2016), <https://documents1.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-WBG-ACF-Report-Printers-Version-21092016.pdf>.

⁹⁰ For example, Article 20 of the Competition Protocol states that the Competition Authorities of the Regional Economic Communities (RECs) will retain their authority, serving as building blocks for the establishment of a unified competition regime across Africa. Additionally, the Council of Ministers will formulate future regulations and procedures to address overlapping jurisdictions.

⁹¹ See Competition Protocol, *supra* note 17, at art. 3; *What is the African Continental Free Trade Area (AfCFTA)?*, *supra* note 54.

⁹² Competition Protocol, *supra* note 17, at art. 3.

⁹³ Competition Protocol, *supra* note 17, art. 3(2); see also *Competition Policy*, *supra* note 70.

behaviours, and market-distorting activities, the Protocol sets the stage for a level playing field within the continental market.⁹⁴

The AU Assembly adopted the Competition in the 36th Ordinary Session in February 2023.⁹⁵ In line with Article 23(2) of the AfCFTA Agreement, the Protocol is expected to come into force thirty days after the 22nd instrument of ratification is deposited by State Parties to the agreement.⁹⁶

The Competition Protocol is divided into five parts of twenty-eight articles. Part I includes Articles 1-4, and consists of definitions, objectives, and the jurisdiction of the Protocol. It limits the jurisdiction of the tripartite relationship between national, regional, and AfCFTA competition authorities.⁹⁷ Article 2 provides the objective, which seeks to create a single competition regime in Africa that would enhance the efficiency of markets and contribute to economic development within the AfCFTA.⁹⁸ It prohibits anti-competitive practices and aims to promote economic integration and sustainable development by aligning competition laws at national, regional, and continental levels.⁹⁹ Article 3 addresses the concern that there is no uniform competition policy regulating anti-competitive activities with continental reach as well as the jurisdictional concerns between regional competition authorities.¹⁰⁰ It also provides that the limit of the application protocol is economic activities conducted by persons or entities that have a substantial impact on competition in the market or behave with a continental scope that substantially affect competition.¹⁰¹ Furthermore, the Competition Protocol shall not apply to matters falling within the respective jurisdiction of the national competition authorities.¹⁰² In addition to Article 3, which precludes the application of the Competition Protocol to matters within the jurisdiction of national competition laws,¹⁰³ Article 4 excludes the application of the Protocol to labour-related issues and collective bargaining agreements on behalf of employees to fix terms and conditions of employment.¹⁰⁴

Part II contains Articles 5-11 and defines and prohibits anti-competitive practices, outlining conduct incompatible with market functioning.¹⁰⁵ Part III, comprising one whole article, deals with the responsibilities of the state members under the regime.¹⁰⁶ Part IV establishes the various institutions under the Protocol and outlines their obligations to investigate and sanction anti-competitive practices.¹⁰⁷ Part V contains the general provisions, which lay out the transition roadmaps, entry into force, amendments, and language of the texts, and provides for the co-existence of the RECs and the AfCFTA Competition Authority, dealing specifically with

⁹⁴ Competition Protocol, *supra* note 17, at art. 9.

⁹⁵ See Competition Protocol, *supra* note 17.

⁹⁶ See AfCFTA Agreement, *supra* note 4, at art. 23(2).

⁹⁷ See Competition Protocol, *supra* note 17, at art. 1-4.

⁹⁸ See Competition Protocol, *supra* note 17, at art. 2.

⁹⁹ See Competition Protocol, *supra* note 17, at art. 2.

¹⁰⁰ See Competition Protocol, *supra* note 17, at art. 3.

¹⁰¹ See Competition Protocol, *supra* note 17, at art. 3.

¹⁰² See Competition Protocol, *supra* note 17, at art. 3.

¹⁰³ See Competition Protocol, *supra* note 17, at art. 4(2).

¹⁰⁴ See Competition Protocol, *supra* note 17, at art. 4(2).

¹⁰⁵ See Competition Protocol, *supra* note 17, at art. 5-11; Koffi A.M. Elitcha, Mie V. Joergensen & Nahom Teklewold, *Deepening the AfCFTA: Celebrating the Adoption of New Protocols on Investment, Intellectual Property Rights and Competition Policy*, UNECA, <https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C> (last visited Jan. 17, 2025).

¹⁰⁶ See Competition Protocol, *supra* note 17, at art. 12.

¹⁰⁷ See Competition Protocol, *supra* note 17, at art. 13-19.

implementation, technical assistance, dispute settlement, and appeals.¹⁰⁸ This article shall examine some key provisions of the Competition Protocol in a bid to foretell their capacities for maintaining a uniform competition policy within the market.

Article 15 of the Competition Protocol envisions a tripartite relationship between the AfCFTA competition authority, the regional competition authorities, and the national competition authorities.¹⁰⁹ This shows that the regional competition authorities shall work in collaboration with the AfCFTA competition authority.¹¹⁰ Emphatically, the Protocol provides that the RECs “shall maintain their jurisdiction as building blocks for an integrated competition regime in Africa.”¹¹¹ Thus, in Article 1, the Competition Protocol implicitly clarifies the jurisdiction of the regional competition frameworks while defining “Conduct with a Continental Dimension,” which limits the jurisdiction of the Protocol.¹¹² According to the Protocol, “Conduct with a Continental Dimension” means any conduct, practice, merger, or agreement that has a significant effect on competition in a market of at least two State Parties that do not share the same jurisdiction of the existing regional economic communities.¹¹³ The combined reading of the provision of Articles 1, 3, 15, and 20 above is to the effect that any conduct that significantly impacts the market of two State Parties that are under the same regional economic community will be governed by the regional competition authority. It then means that the jurisdiction of regional economic authorities is recognised. However, under Article 19, where there is a conflict between the provisions of this Protocol and regional agreements on the competition laws, the provisions of the Protocol shall prevail.¹¹⁴

Furthermore, within these provisions and the foregoing arguments, this author envisages that the possible challenge to the implementation of these provisions is the overlapping and multiple membership of States Parties in the regional economic communities. Mwemba highlights the situation.¹¹⁵ The author opines that the COMESA is the largest REC in Africa in terms of membership, with twenty-one member states. However, many of its members belonged to other communities, such as the EAC and SADC. In the same vein, most members of WAEMU also belong to ECOWAS, leading to a similar overlap in membership.¹¹⁶ Many RECs are not yet fully functioning in terms of competition authorities, except COMESA which has an operational regional competition authority. The issues of sovereignty, political will, shortages of financial and human resources, legal gaps, and a weak competition culture hamper the effective enforcement of competition law within. Such problems are addressed by the Competition Protocol.¹¹⁷ Matters involving states belonging to two or more RECs, where both or all of the RECs could sanction the conduct, are best governed under the Competition Protocol, as doing so addresses the risk of double sanctions and strengthens supranational competition law enforcement.¹¹⁸

The Protocol derives greatly from the EU’s Treaty for the Functioning of the European Union.¹¹⁹ It bans any actions that hinder competition in the market, including agreements or coordinated practices between businesses, decisions by business associations, and abuse of

¹⁰⁸ See Competition Protocol, *supra* note 17, at art. 20-28.

¹⁰⁹ See Competition Protocol, *supra* note 17, at art. 15.

¹¹⁰ See Competition Protocol, *supra* note 17, at art. 15.

¹¹¹ See Competition Protocol, *supra* note 17, at art. 20.

¹¹² Competition Protocol, *supra* note 17, at art. 1.

¹¹³ Competition Protocol, *supra* note 17, at art. 1.

¹¹⁴ Competition Protocol, *supra* note 17, at art. 3(3).

¹¹⁵ See Mwemba, *supra* note 9, at 189.

¹¹⁶ See Mwemba, *supra* note 9, at 189-190.

¹¹⁷ See Competition Protocol, *supra* note 17, at art. 3.

¹¹⁸ Mwamulima, Karanja, & Kimonye, *supra* note 43.

¹¹⁹ See TFEU, *supra* note 52.

dominant market positions.¹²⁰ It also restricts mergers and acquisitions that may harm competition, especially those that create or strengthen dominance and prohibits the abuse of economic dependence and other anti-competitive practices.¹²¹ Articles 6 and 7 of the Protocol prohibit any collusion between competitors or potential competitors, horizontal and vertical, respectively, that involves price fixing, quota restrictions, market allocations, the practice of minimum resale price maintenance, restricting passive sales, etc. However, if a party can demonstrate that an agreement, coordinated practice, or decision results in technological efficiency or other procompetitive benefits that outweigh its negative impact on competition, such actions may be exempted from the Protocol's application.¹²² The provision shall also not apply where undertakings belong to a common undertaking, are under joint control, or where they are otherwise not able to act independently of each other.¹²³ Thus, the policy makes room for extenuating circumstances where parties can show that it is necessary to pursue certain legitimate aims in the public interest and development of the market.

Under the Protocol, State Parties undertake to notify others of their laws, regulations, and amendments, if any, and international commitments related to the Protocol within six months of the entry into force of the Protocol.¹²⁴ Countries with no competition laws or enforcement bodies commit to establishing them once the Competition Protocol takes effect.¹²⁵ Each State Party shall designate a body responsible for the implementation of the Protocol and undertake all actions aimed at harmonising their respective competition laws.¹²⁶ Nevertheless, they shall reserve the right to regulate competition within their respective territories. All competition laws shall be applied in a manner that is transparent, independent, and non-discriminatory.¹²⁷

A cornerstone of the protocol is the establishment of the AfCFTA Competition Authority, which is an autonomous body endowed with the power to administer and enforce the Protocol's provisions.¹²⁸ This authority is tasked with deciding on various undertakings, including the approval of mergers, contributing to a robust regulatory framework, and ensuring fair competition within the continental market.¹²⁹

The AfCFTA Protocol on Competition outlines the establishment of the AfCFTA Competition Tribunal, an autonomous body designed to adjudicate appeals from the decisions of the AfCFTA Competition Authority.¹³⁰ "The rules governing the Tribunal's functioning are to be determined by the Council of Ministers in the future," emphasizing a commitment to evolving and adapting the regulatory framework in alignment with the dynamic needs of the continental market.¹³¹

¹²⁰ See Competition Protocol, *supra* note 17, at art. 5.

¹²¹ See Competition Protocol, *supra* note 17, at art. 5.

¹²² See Competition Protocol, *supra* note 17, at art. 6(2).

¹²³ See Competition Protocol, *supra* note 17, at art. 6(3). Further exemptions contained in art. 8 and are clarified in art. 6 and 7. The Treaty for the functioning of the European Union has similar exceptions. We shall examine these TFEU exemptions later in this essay.

¹²⁴ See Competition Protocol, *supra* note 17, at art. 12(1).

¹²⁵ See Competition Protocol, *supra* note 17, at art. 12(3).

¹²⁶ See Competition Protocol, *supra* note 17, at art. 12.

¹²⁷ See Competition Protocol, *supra* note 17, at art. 12(7).

¹²⁸ Azimamah Jhetam, *Hopes for an Anti-Monopoly Agenda in the AfCFTA Competition Protocol*, AFRONOMICS L. (Nov. 11, 2022), <https://www.afronomicslaw.org/category/analysis/hopes-anti-monopoly-agenda-afcfta-competition-protocol>.

¹²⁹ *Id.*

¹³⁰ See Mwamulima, Karanja, & Kimonye, *supra* note 43.

¹³¹ Elitcha, Joergensen & Teklewold, *supra* note 105.

III. COMPARATIVE STUDY OF EXISTING REGIONAL COMPETITION POLICY LEGAL FRAMEWORKS IN AFRICA AND THE AfCFTA PROTOCOL

Africa, as a continent, retains various regional economic communities. Each community is working toward its unique competition policy framework that will foster efficient markets with free and fair trade and consumer protection.¹³² This research provides an extensive comparative analysis of the competition policies of the eight African RECs about each other within sub-regions and against the AfCFTA Protocol on Competition Policy.¹³³

A. Eastern and Southern Africa Regional Competition Policy

The sub-regions of Eastern and Southern Africa are governed by four RECs: Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Southern African Development Community (SADC), and Southern African Customs Union (SACU). The competition policy of COMESA is generally recognised as the most developed in this sub-region.¹³⁴

In 2004, COMESA adopted the COMESA Competition Regulations and Rules.¹³⁵ In furtherance of Article 55(3) of the Treaty, the enforcement of these regulations is overseen by the COMESA Competition Commission (CCC).¹³⁶ The Mergers and Acquisitions (M&A) Division of the CCC bears responsibility for preventing mergers and acquisitions that could potentially harm competition, using a purportedly “one-stop shop” regime as adopted by the European Union.¹³⁷ This regime aims to provide a cost-effective framework for cross-border M&As without the burden of duplicated filing fees and procedures and to reduce uncertainties and disputes centred on jurisdiction. It offers a centralized enforcement mechanism that focuses on cross-border anti-competitive practices.¹³⁸ This is similar to the EAC, which relies on its Competition Act of 2006 and the EAC Competition Authority (EACA) to enforce competition rules within the Community.¹³⁹

On the other hand, the SADC Protocol on Trade, as well as its Declaration on Regional Cooperation in Competition and Consumer Policies 2009, provide a competition policy for its

¹³² Vellah Kedogo Kigwiru, *The African Continental Free Trade Area Competition Policy: Model, Dispute Resolution Mechanism, Institutional Framework and AfCFTA Relationship with Existing Regional Competition Regimes*, AFRONOMICS L. (Oct. 20, 2019), <https://www.afronomicslaw.org/2019/10/29/the-african-continental-free-trade-area-competition-policy-model-dispute-resolution-mechanism-institutional-framework-and-afcfta-relationship-with-existing-regional-competition-regimes>.

¹³³ Comprehensive Comparative Study on the Applicable Rules of Origin in the Eastern and Southern Africa Region, 9-10, EU WORLD CUSTOMS ORG. (Jan. 2024), https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/origin/resources/wco_comprehensive-comparative-study-on-the-applicable-roo-in-the-easa-region_en_web.pdf?db=web.

¹³⁴ Article 55 of the COMESA Treaty is central to the region’s competition policy framework.

¹³⁵ Michael Rowe & Paul Walter, *COMESA: A Competition Regime for the Common Market for Eastern and Southern Africa*, SLAUGHTER & MAY, <https://www.slaughterandmay.com/media/wsqpwvif/comesa-a-competition-regime-for-the-common-market-for-eastern-and-southern-africa.pdf>.

¹³⁶ The CCC was established in 2013 and its headquarters is in Lilongwe, Malawi. *COMESA Competition Commission*, COMESA Court of Justice, <https://comesacourt.org/comesa-competition-commission/>.

¹³⁷ *Mergers and Acquisitions*, COMESA Competition Commission, <https://comesacompetition.org/mergers-and-acquisitions/> [https://perma.cc/KXM2-LK5Z] (last visited Jan. 17, 2025).

¹³⁸ See Treaty Establishing the Common Market for Eastern and Southern Africa, art. 55(1)-(2), Nov. 5, 1993, 33 I.L.M. 1067.

¹³⁹ The EAC Competition Authority (EACA) is the main body responsible for enforcing competition laws within the EAC. See *EAC Competition Authority*, EAST AFRICAN COMMUNITY COMPETITION AUTHORITY, <https://www.eacompetition.org/> [https://perma.cc/MT2Z-LX4J] (last visited Jan. 17, 2025).

members but no central enforcement body.¹⁴⁰ Thus, reliance is placed on the various member states to apply their domestic frameworks. Similarly, SACU, instead of using a regional authority, tries to push member states toward harmonising their national legislation with competition principles.¹⁴¹ For these two bodies (SADC and SACU), flexibility is achieved, but effective combating of anti-competitive cross-border conduct in the region is sacrificed.¹⁴²

COMESA's strength is that it can handle cross-border anti-competitive practices with its central body and thus serves as a good model for other RECs. For instance, an investigation into possible anti-competitive behaviour by Coca-Cola in the Common Market has been initiated by the CCC.¹⁴³ However, challenges remain, including the absence of national competition laws in some member states, potentially problematic provisions, and resource constraints.¹⁴⁴ Furthermore, the one-stop shop power it purports to have over mergers does not exist in practice because some member states—such as Kenya, Egypt, and Ethiopia—have refused to acknowledge the CCC's power on that front, insisting that entities wishing to engage in cross-border mergers notify the domestic competition authorities as well as the CCC.¹⁴⁵ On its part, the EAC, despite its harmonised framework, has challenges regarding enforcement, given the weak institutional capacity at both regional and national levels.¹⁴⁶ In SADC and SACU, despite similar approaches aimed at promoting harmonisation, the uneven implementation among member states seriously impedes effectiveness.¹⁴⁷

Comparing these frameworks, COMESA's centralized model provides a more robust mechanism for addressing regional competition issues, but the high costs and enforcement challenges associated with it suggest that efficiency needs to be balanced with accessibility.¹⁴⁸ The

¹⁴⁰ See Southern African Development Community, *SADC Declaration on Competition and Consumer Policies 2009*, SADC, <https://www.sadc.int/document/sadc-declaration-competition-and-consumer-policies-2009> [https://perma.cc/EKP7-VQAF] (last visited Jan. 17, 2025); Southern African Development Community, *SADC Competition Policy*, SADC, <https://www.sadc.int/pillars/competition-policy> [https://perma.cc/A7B2-PBRG] (last visited Jan. 17, 2025); see Vellah Kedogo Kigwiru, *Supranational or Cooperative? Rethinking the African Continental Free Trade Area Agreement Competition Protocol Institutional Design*, 12 J. ANTITRUST ENF'T 98 (2024).

¹⁴¹ See *SACU Agreements*, SACU, <https://www.sacu.int/what-we-do/sacu-agreements> [https://perma.cc/MF3R-F87J] (last visited Jan. 17, 2025).

¹⁴² See Nelly Sakata, *Southern African Regional Competition Regimes – Where are we today?*, AFRONOMICS L. (Aug. 23, 2021), <https://www.afronomicslaw.org/category/analysis/southern-african-regional-competition-regimes-where-are-we-today> [https://perma.cc/V637-YLTT] (discussing the reliance on national laws and cooperation in SADC and SACU, leading to limited enforcement capacity against cross-border cartels and mergers).

¹⁴³ See Gerald Andae, *East Africa: COMESA Probes Coca-Cola for Potential Anti-Competitive Practices*, BUS. DAY AFR. (Oct. 16, 2024), <https://allafrica.com/stories/202410160012.html> [https://perma.cc/G4D2-RH9N].

¹⁴⁴ Article 20 of the Regulations permits the CCC to grant an undertaking permission to authority to engage in anti-competitive practices, provided it (the Commission) deems it necessary for public benefits that outweigh the demerits. The absence of a clear-cut definition for these “public benefits” or the criteria and safeguards for their determination and the grant of exemptions makes the provision overly ambiguous and detrimental to the purpose of the Regulations.

¹⁴⁵ See Gomolemo Kekesi, *A Practitioner's Critique: the One-Stop Shop Regime of the COMESA Competition Commission*, UNIV. PRETORIA (Nov. 2018), https://repository.up.ac.za/bitstream/handle/2263/70119/Kekesi_Practitioner_2018.pdf [https://perma.cc/USE9-AW6C].

¹⁴⁶ See *EAC Competition Authority*, *supra* note 139.

¹⁴⁷ See OECD, *Regional Competition Agreements: Benefits and Challenges*, at 23 (2018), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2018\)13/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2018)13/en/pdf) (last visited Oct. 20, 2025).

¹⁴⁸ See Marianne Wagener & Candice Upfold, *Regional Competition Regimes: A Comparative Study of the COMESA Competition Commission and the European Competition Commission*, COMPETITION COMM'N S. AFR., at

EAC's loophole provisions and dependence on the political will of member states for competition enforcement reduce its ability to tackle cross-border issues comprehensively.¹⁴⁹ SADC and SACU are the least cohesive, as they are based on domestic frameworks and thus require deeper regional enforcement mechanisms to make them as effective as COMESA and EAC.¹⁵⁰

Due to these deficiencies, the SADC, COMESA, and EAC established the Tripartite Free Trade Agreement (TFTA). The TFTA intends to foster economic integration between these three major African regional economic communities.¹⁵¹ It addresses the elimination of trade barriers, providing infrastructure, the promotion of industrial development, and a single market for goods, services, and investment.¹⁵² However, due to many challenges, it only truly came into force in 2024, despite being signed in 2015.¹⁵³ It is anticipated to greatly help remedy the fragmentation caused by the existence of several communities within the same subregion and overlapping memberships while advancing the goal of competition regulation.¹⁵⁴

B. West Africa Regional Competition Policy

West Africa's competition policy landscape is dominated by the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union/Union Economique et Monétaire Ouest Africaine (WAEMU/UEMOA—WAEMU, henceforth).¹⁵⁵ ECOWAS' Competition Policy Framework fosters free competition and consumer welfare, while WAEMU's framework, through the WAEMU Commission, has more robust regional enforcement mechanisms.¹⁵⁶ According to the WAEMU Court of Justice, Member State competition authorities lack the power to control and oversee competition as it is the WAEMU Commission's exclusive preserve.¹⁵⁷ The Commission's enforcement process includes investigation, adjudication, sanctions, remedy planning, and implementation to correct anti-competitive practices. WAEMU's

23 (2014), <http://www.compcom.co.za/wp-content/uploads/2014/09/Conference-Paper-M-Wagener-and-C-Upfold.pdf> (last visited Oct. 20, 2025).

¹⁴⁹ Article 13 of the Competition Act stipulates that if a merger is rejected, the affected parties may appeal to the Council, which has the power to approve the merger for overriding public interest. However, what constitutes "overriding public interest" is not defined, leading to ambiguity of interpretation. This lack of strict criteria for the Council's overriding of the Authority's decision on mergers leaves space for misuse, as the entirety of the responsibility to determine what constitutes public interest falls to the discretion of the Council. *See, e.g., EAC Competition Authority, supra* note 139.

¹⁵⁰ *See* Loine H.N. Geingos, *Harmonization of Competition Policy in South Africa: A Study of the SADC and SACU Agreements* 4 (2005) (Master's Thesis, The University of Namibia).

¹⁵¹ *See* Agreement Establishing the Tripartite Free Trade Area among COMESA, EAC, and SADC Preamble & art. 4(c) (June 10, 2015), <https://www.eac.int/documents/category/agreement-establishing-a-tripartite-free-trade-area-among-comesa-eac-and-sadc> (last visited Oct. 20, 2025) [hereinafter TFTA Agreement].

¹⁵² *See id.*, at art. 4.

¹⁵³ *See* Marie M. Stack, Emmanuel B. Amissah, & Martin Bliss, *African Econ Integration and Trade*, 47 *WORLD ECON.* 2122 (2023); *see also Hist. Made as Africa's Tripartite FTA Comes in Force*, *APA NEWS*, <https://apanews.net/history-made-as-africas-tripartite-fta-comes-in-force/> (last visited Jan. 17, 2025).

¹⁵⁴ *See* TFTA Agreement, *supra* note 151, at art. 4(b)-(c).

¹⁵⁵ ECOWAS, *Regional Competition Policy Framework* (2007), https://ecowap.ecowas.int/media/ecowap/related-policy/ECOWAS_Regional_Competition_Policy_Framework_EN.pdf (last visited Oct. 20, 2025).

¹⁵⁶ *See* ECOWAS, *Regional Competition Policy Framework*, art. 3, ECOWAS Doc. No. ECOWAS/RCF/2008, (Jan. 18, 2008); *see also* UEMOA, *Regulation on Anti-Competitive Business Practices*, UEMOA Doc. No. 02/2002/CM/UEMOA (May 23, 2002).

¹⁵⁷ UNCTAD, *Voluntary Peer Review on Competition Law and Policy: West African Economic and Monetary Union (UEMOA), Benin and Senegal – Overview and Key Findings*, UNCTAD/DITC/CLP/2007/1, at 11 (Overview) (2007).

established jurisprudence on competition matters and centralized enforcement contrasts with ECOWAS' broader but less institutionalized approach.¹⁵⁸

WAEMU's centralized model relies on the enforcement and harmonisation of the trade-related competition laws, making sure that the application is uniform throughout its member states.¹⁵⁹ For example, in 2011, when Togo and the airline ASKY reached an arrangement whereby ASKY would locate its headquarters in Lomé in exchange for specific immunities and tax concessions, the Commission ruled that several clauses in the agreement conflicted with competition rules.¹⁶⁰ However, that model, focusing mainly on trade-related competition, is narrower in scope than ECOWAS' framework which ranges from energy and trade to issuing guidelines to member states.¹⁶¹ The wider scope allows ECOWAS to cover more topics, and the Community's diverse membership results in enforcement disparities as it is more challenging to harmonise with legal framework.¹⁶² This comparison underlines the trade-off between WAEMU's focused, enforceable model and the wider but less harmonised framework of ECOWAS. In comparison with the RECs of Eastern and Southern Africa, the strong regional enforcement of WAEMU puts it closer to COMESA,¹⁶³ while the broader, less cohesive framework of ECOWAS shares similarities with aspects of the EAC.¹⁶⁴

¹⁵⁸ Mor Bakhom, *Institutional Coherence and Effectivity of a Regional Competition Policy: The Case of the West African Economic Monetary Union (WAEMU)*, 35 *WORLD COMP.* 165, 172 (2010), https://www.researchgate.net/publication/228148110_Institutional_Coherence_and_Effectivity_of_a_Regional_Competition_Policy_The_Case_of_the_West_African_Economic_and_Monetary_Union_WAEMU (last visited Oct. 20, 2025).

¹⁵⁹ UEMOA, *Regulation on Anti-competitive Business Practices*, Reg. No. 02/2002/CM/UEMOA, art. 88 (May 23, 2002) <https://www.addleshawgoddard.com/globalassets/doing-business-in-africa/africa-documents/uemoa-regulation-on-anti-competitive-business-practices-n-02-2002-cm-uemoa-of-23-may-2002.pdf> (last visited Oct. 20, 2025).

¹⁶⁰ Ado Olivier Angaman, *The Experience of West African Economic and Monetary Union (WAEMU) in the Field of Competition*, *AFRONOMICS L.* (Aug. 8, 2021), <https://www.afronomicslaw.org/category/analysis/experience-west-african-economic-and-monetary-union-waemu-field-competition>.

¹⁶¹ See ECOWAS, *Towards a Revision of the ECOWAS Energy Protocol* (Nov. 28, 2024), <https://www.ecowas.int/towards-a-revision-of-the-ecowas-energy-protocol/> (last visited Jan. 17, 2025); Mombert Hoppe & Francis Aidoo, *Removing Barriers to Trade between Ghana and Nigeria: Strengthening Regional Integration by Implementing ECOWAS Commitments*, *Africa Trade Policy Notes* No. 30, at 10-15 (World Bank Mar. 2012), https://www.researchgate.net/publication/259693167_Removing_Barriers_to_Trade_between_Ghana_and_Nigeria_Strengthening_Regional_Integration_by_Implementing_ECOWAS_Commitments. For instance, ECOWAS drafted guidelines on liberalizing the energy sector, but there were differences in the implementation due to a lack of uniform commitment among member states such as Nigeria. Similarly, trade barriers imposed by Ghana violated ECOWAS trade agreements, but the lack of a centralized enforcement mechanism delayed resolution; *Towards a Revision of the ECOWAS Energy Protocol*, ECOWAS, <https://www.ecowas.int/towards-a-revision-of-the-ecowas-energy-protocol/> (last visited Jan. 17, 2025); Mombert Hoppe & Francis Aidoo, *Removing Barriers to Trade between Ghana and Nigeria: Strengthening Regional Integration by Implementing ECOWAS Commitments*, *WORLD BANK* (2012), https://www.researchgate.net/publication/259693167_Removing_Barriers_to_Trade_between_Ghana_and_Nigeria_Strengthening_Regional_Integration_by_Implementing_ECOWAS_Commitments.

¹⁶² Kenneth C. Okwor, *Legal Institutional Framework for Monetary Integration in West Africa*, 54 *J. WORLD TRADE* 47, 59 (2020).

¹⁶³ See Mor Bakhom, *Regional Integration and Competition Policy in West Africa: Interfacing Regional and Continental Competition Policies*, *AFRONOMICS L.* (Jan. 19, 2024), <https://www.afronomicslaw.org/category/analysis/regional-integration-and-competition-policy-west-africa-interfacing-regional-and> (last visited Oct. 20, 2025).

¹⁶⁴ See *id.*

The core problem facing proper integration of WAEMU is the overlap in membership with ECOWAS. This potentially raises issues of the plurality of decision-making bodies and decisions, legal uncertainties for states and undertakings, and reduced efficiency in the fight against cross-border practices militating against competition.¹⁶⁵ An agreement between the two communities similar to the TFTA would go a long way in fixing this problem.

C. Central Africa Regional Competition Policy

Central Africa's competition policies are governed by the Central African Economic and Monetary Community (CEMAC) and the Economic Community of Central African States (ECCAS). CEMAC's framework¹⁶⁶ includes a centralized regulatory authority (the CEMAC Commission works with the Community Competitiveness Council to implement CEMAC's competition provisions) with nearly comprehensive legal provisions,¹⁶⁷ while ECCAS lacks a dedicated competition authority, relying instead on broader market integration policies.¹⁶⁸

The scope of the supranational regime is limited by the CEMAC competition rules, which, like those of its other African counterparts, are only meant to be applied when anti-competitive practices have an impact on commerce between member nations.¹⁶⁹ However, its merger control provisions are intended to cover all concentration operations within the community, regardless of geographic boundaries (including both domestic and foreign mergers, acquisitions, and joint ventures), provided that those activities, even if they are only domestic, have a community component.¹⁷⁰ Article 59 makes notification compulsory where the transaction has a community dimension, in terms of turnover thresholds above ten billion CFA or market shares exceeding thirty percent in the Common Market, must also fulfil this requirement. The regime allows a "one-stop-shop" for regional merger control but currently excludes only Cameroonian filings due to limited enforcement in other member states.¹⁷¹

While the CEMAC approach is more centralist and thus more effective in addressing anti-competitive practices, the weak enforcement mechanisms and reliance on member states for the implementation of some of its rules weaken its effectiveness.¹⁷² ECCAS, with its limited

¹⁶⁵ Ado Olivier Angaman, *Key Competition and Consumer Protection Priorities for Regional Integration in Africa: The Experience of Regional Organizations in the Field of Competition and Consumer Protection (WAEMU)*, UNCTAD, https://unctad.org/system/files/official-document/ccpb_AFWeb_WAEMU_EXP_COMP_POLICY_%20final-1.pdf (last visited Jan. 17, 2025).

¹⁶⁶ See CEMAC Competition Regulation No. 06/19-UEAC-639-CM-33, July 7, 2019, CEMAC Document No. 06/19-UEAC-639-CM-33 [hereinafter CEMAC Regulation].

¹⁶⁷ Tamara Dini, *Merger notification under the CEMAC Competition Law Regime*, J. AFR. L. (Jan. 18, 2021), <https://bowmanslaw.com/insights/merger-notification-under-the-cemac-competition-law-regime/> (last visited Oct. 20, 2025).

¹⁶⁸ United Nations Economic Commission for Africa, *ECCAS - Trade and Market Integration* (2024), <https://archive.uneca.org/oria/pages/eccas-trade-and-market-integration> (last visited Oct. 20, 2025).

¹⁶⁹ Vellah Kigwiru, *Cross-Border Competition Enforcement in Africa: Developments, Opportunities, Challenges and the Way Forward*, COMPCOM (Sept. 2017), <http://www.compcom.co.za/wp-content/uploads/2017/09/CROSS-BORDER-ENFORCEMENT-IN-AFRICA.pdf> (last visited Oct. 20, 2025).

¹⁷⁰ CEMAC Regulation, *supra* note 166, at 57.

¹⁷¹ UNCTAD *Receives One Million Euros to Strengthen Competition Laws in Central African Countries*, UNCTAD (June 16, 2017), <https://unctad.org/news/unctad-receives-one-million-euros-strengthen-competition-laws-central-african-countries> (last visited Jan. 17, 2025).

¹⁷² See Treaty Establishing the Economic and Monetary Community of Central Africa, Mar. 16, 1994.

institutional framework,¹⁷³ visibly lags behind CEMAC and other RECs in addressing competition issues, highlighting the need for a regional competition authority.

In comparison to its peers, CEMAC thus has the closest proximity with WAEMU and COMESA by way of centralized enforcement but suffers from weaker institutional capacity.¹⁷⁴ The ECCAS's small focus on general trade and integration goals without specific legal instruments means that it is the least effective, highlighting a need for structural reforms internally to develop its regulatory and harmonisation roles.¹⁷⁵

D. Challenges of the Existing RECs: Case for Coexistence with the AfCFTA Protocol on Competition Policy

The AfCFTA Protocol on Competition Policy adopts a unifying framework meant to address the fragmented policies in the area of competition.¹⁷⁶ By emphasizing harmonisation, cross-border cooperation, and capacity building; the framework creates a template through which the REC policies are drawn closer to continental visioning.¹⁷⁷

One major limitation of existing REC frameworks is their wildly varying scope and coverage.¹⁷⁸ For instance, COMESA and CEMAC have relatively comprehensive frameworks that address issues such as abuse of dominance, cartels, and merger controls.¹⁷⁹ However, frameworks like those of the SADC are not as strong; they depend on voluntary cooperation and do not have a central enforcement mechanism.¹⁸⁰ The ECCAS has no standalone policy on competition, but rather focuses more on the integration of trade than market regulation.¹⁸¹ The AfCFTA has its protocol that covers all aspects of the subject,¹⁸² therefore resulting in coherent regulatory policies covering fifty-five Member States.¹⁸³

Other discrepancies in the RECs that lead to uneven implementation relate to enforcement efforts and mechanisms.¹⁸⁴ For instance, while wide investigations were arguably required from

¹⁷³ The Treaty establishing ECCAS provides for the stages of establishing the community with a free trade Custom Union. However, ECCAS does not yet have in place an effective, standalone competition policy framework like other African RECs. *See* Dawar & Lipimile, *supra* note 15.

¹⁷⁴ Prunelle Pouomegne Kamdem & Antem Anthony, *The Role of International Organizations in Promoting Democratic Governance in Central Africa*, ON POLICY AFR. (Sept. 4, 2023) [https://onpolicy.org/the-role-of-international-organizations-in-promoting-democratic-governance-in-central-africa/#:~:text=Finally%2C%20affecting%20sub%2Dregional%20organizations%2C%20CEMAC%20suffers%20from,economic%20development%20and%20regional%20integration%20\(25\)%20](https://onpolicy.org/the-role-of-international-organizations-in-promoting-democratic-governance-in-central-africa/#:~:text=Finally%2C%20affecting%20sub%2Dregional%20organizations%2C%20CEMAC%20suffers%20from,economic%20development%20and%20regional%20integration%20(25)%20).

¹⁷⁵ Meli Tankeu, *Regional Integration in ECCAS: Progress or Continuous Overlap?*, ON POLICY AFR. (Apr. 10, 2023), <https://onpolicy.org/regional-integration-in-eccas-progress-or-continuous-overlap/> (last visited Oct. 20, 2025).

¹⁷⁶ *See* Competition Protocol, *supra* note 17, at art. 2(a), (c), (e).

¹⁷⁷ *See* Competition Protocol, *supra* note 17, at art. 2(a), (c), (e).

¹⁷⁸ *See* Innocent Moyo, *Regional Integration and Challenges of Implementation in Africa: Some Missing Gaps*, in THE PALGRAVE HANDBOOK OF AFRICAN POLITICAL ECONOMY 974, 974 (Samuel O. Oloruntoba and Toyin Falola eds., 2020).

¹⁷⁹ *Id.* at 980-81.

¹⁸⁰ *Id.* at 981.

¹⁸¹ *See* PACCI, *Economic Community of Central African States*, <https://www.pacci.org/economic-community-of-central-african-states-eccas/> (last visited Oct. 20, 2025).

¹⁸² *Competition Policy*, *supra* note 70.

¹⁸³ *What is the African Continental Free Trade Area (AfCFTA)?*, *supra* note 54.

¹⁸⁴ *See* Amponsah Afari Djan, *The Place of Regional Economic Communities (RECs) in the African Continental Free Trade Agreement (AfCFTA) Implementation: A Case Study of the Economic Community of West African States (ECOWAS)*, RESEARCHGATE (July 2021), https://www.researchgate.net/publication/352996882_the_place_of_regional_economic_communities_recs_in_the_a

the whole continent by the very nature of the CAF institution following the debacle, it was only the CCC that investigated and placed sanctions on it.¹⁸⁵ Other RECs have yet to do so either due to resource constraints or limited enforcement power—even if other RECs equipped with supranational powers attempt to impose further sanctions, they run the risk of double jeopardy. On their part, the SADC and SACU decentralized enforcement mechanisms depend greatly on national authorities, so even attempting such is an uphill task. The AfCFTA addresses these gaps through the planned establishment of a centralized Competition Authority responsible for overseeing compliance and presiding over cases with cross-border implications.¹⁸⁶

One of the most important AfCFTA protocol benefits is that the AfCFTA places a strong emphasis on harmonisation. Whereas a few RECs, like EAC, have gone ahead to harmonise national laws with regional rules, most of the frameworks are riddled with a complex web of memberships that overlap and conflicting regulations.¹⁸⁷ Thereby, this fragmentation would make trade across borders somewhat cumbersome and uncertain for companies. AfCFTA's harmonised competition framework eliminates these jurisdictional conflicts, fostering an integrated market that is attractive to investors.¹⁸⁸

While it appears that the AfCFTA Protocol supersedes existing RECs in all instances of conflict in their provisions to the extent of rendering them obsolete,¹⁸⁹ this researcher proposes that they should co-exist and apply alongside each other at different levels. If done right, this would ensure that the AfCFTA Protocol focuses on only the direst cases of anti-competitive behaviour on the continent. Using the doctrine of “Covering the Field,” a legal principle often used to resolve conflicts between laws at different levels of governance (e.g., national vs. regional laws),¹⁹⁰ in the context of the AfCFTA Protocol on Competition Policy and regional competition frameworks (RECs), would provide a structured way to manage the interaction between them and achieve their shared goals of competition regulation within a free trade environment.¹⁹¹

This means that transactions between undertakings of multiple African countries that operate within the same sub-region would be subject to the competition policies of that sub-region's REC.¹⁹² However, once the transaction takes on a multi-sub-regional flavour (that is, between businesses operating in different sub-regions or one with a universal reach within the market), the AfCFTA Protocol takes precedence.¹⁹³

This entails that the AfCFTA Protocol will not fully replace the instruments of RECs but will complement them.¹⁹⁴ In areas where their jurisdictions are applicable, these frameworks shall continue to apply, while the AfCFTA Protocol operates at a higher level for cross-regional

[frican continental free trade agreement afcfta implementation a case study of the economic community of west african states ecowas.](#)

¹⁸⁵ Muzinge Chibomba, *CAF Fined for Breach of Regional Regulations*, COMESA (Jan. 29, 2024), <https://www.comesa.int/caf-fined-for-breach-of-regional-regulations/>.

¹⁸⁶ See AfCFTA Agreement, *supra* note 4, at 13.

¹⁸⁷ Mwemba, *supra* note 9.

¹⁸⁸ See *Deepening the AfCFTA: celebrating the adoption of new protocols*, U.N. ECON. COMM'N FOR AFR. BLOG (Mar. 16, 2023), <https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C>.

¹⁸⁹ According to Article 3(3) of the AfCFTA Protocol, in accordance with Article 19 of the AfCFTA Agreement, the Protocol's provisions will take precedence over regional competition legislation in the event of a conflict.

¹⁹⁰ MARGARET A. YOUNG, *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* (2012).

¹⁹¹ See Mwamulima, Karanja & Kimonye, *supra* note 43.

¹⁹² See Competition Protocol, *supra* note 17, at art. 10.

¹⁹³ Mwamulima, Karanja & Kimonye, *supra* note 43.

¹⁹⁴ Bekele-Thomas, *supra* note 11.

activities.¹⁹⁵ It thus allows for coexistence without conflict of jurisdiction because of its multilayered nature.¹⁹⁶

For optimal operationalisation, there needs to be legal adjustments and institutional coordination. There must, in the first place, be acceptance of the principle of subsidiarity. Concerning local (sub-regional) matters, authority should be vested in instruments within RECs, and for regional ones, AfCFTA takes precedence. Similarly, there should be clear mechanisms for the settlement of disputes between AfCFTA and other communities when a jurisdictional dispute occurs.¹⁹⁷

Having established the proposed limits of the applicability of the AfCFTA Protocol, questions may arise as to how to handle the multiplicity of RECs in the different sub-regions—Eastern and Southern Africa have four, COMESA, EAC, SADC, and SACU, with COMESA applying to two sub-regions.¹⁹⁸ West Africa and Central Africa also have two RECs each. The overlapping memberships may raise issues relating to the uncertainty of applicable instruments for intra-sub-regional business undertakings. For this, the Tripartite Free Trade Agreement (TFTA) between COMESA, EAC and SADC may serve as an answer.¹⁹⁹

For overlapping RECs, a coordinated approach would involve some RECs making concessions. For instance, the broad applicability of COMESA may need to be watered down in favor of the AfCFTA Protocol on matters of applicability across regions.²⁰⁰ Thresholds such as those in the EU can be set as a means of limiting its scope.²⁰¹ Other RECs with weak competition policies will have to strengthen their frameworks toward the AfCFTA Protocol.²⁰² These challenges can, therefore, be overcome by developing cooperation among the RECs and their policies in line with the vision of the AfCFTA,²⁰³ hence guaranteeing a smooth regulatory environment for businesses.

IV. COMPARATIVE ANALYSIS OF THE TFEU COMPETITION POLICY AND THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT

The AfCFTA Protocol on Competition Policy derives heavily from the TFEU. It prohibits the same conduct as the TFEU,²⁰⁴ using almost the same wording and similar provisions.²⁰⁵ The TFEU, particularly articles 101 to 109, establishes a comprehensive competition policy designed to prevent anti-competitive practices that could distort the free flow of goods and services within the European Union (EU).²⁰⁶ The TFEU prohibits cartels and other agreements that restrict

¹⁹⁵ See Competition Protocol, *supra* note 17, at art. 10.

¹⁹⁶ Mwamulima, Karanja & Kimonye, *supra* note 43.

¹⁹⁷ Mwamulima, Karanja & Kimonye, *supra* note 43.

¹⁹⁸ See OECD, REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES – CONTRIBUTIONS FROM SOUTH AFRICA (2018), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2018\)13/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2018)13/en/pdf).

¹⁹⁹ Wilfred A. Mutubwa, *The Comesa-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving the African Economic Community Dream?*, 1 J. COMM'L & MGMT. STUD. 1, 3-4 (2017).

²⁰⁰ Competition Protocol, *supra* note 17, at art. 19.

²⁰¹ Fox, *supra* note 34.

²⁰² Competition Protocol, *supra* note 17, at Preamble, Part I.

²⁰³ *Competition Policy*, *supra* note 70.

²⁰⁴ Competition Protocol, *supra* note 17, at arts. 5, 9.

²⁰⁵ Mohammed Muigai, *Towards a Continental Regulation of Competition in Africa: Aspirational or Inspirational?* (2023), <https://mohammedmuigai.com/towards-a-continental-regulation-of-competition-in-africa-aspirational-or-inspirational/> (last visited Oct. 20, 2025).

²⁰⁶ See European Parliament, *supra* note 69. See also TFEU, *supra* note 52, at art. 101.

competition, abuse of dominant market positions, and state aid that distorts competition.²⁰⁷ These provisions ensure a level playing field for businesses and protect consumers within the single market.²⁰⁸

It is worthy of note that both instruments contain exemptions that may permit conduct that ordinarily would have been caught under the web of the prohibitions but for the exemptions.²⁰⁹ For instance, under Article 101(3) of the TFEU, an agreement or category of agreements between undertakings, a decision or category of decisions by associations of undertakings, or a concerted effort or category of concerted practices, which paragraph 1 would normally prohibit, if they contribute to improving the production or distribution of goods or promote technical or economic progress while ensuring that consumers receive a fair share of the resulting benefits.²¹⁰ It is important to note that such agreements or decisions must not impose restrictions on the undertakings involved that are not essential to achieving these objectives, nor should they enable the undertakings to eliminate competition in a significant portion of the relevant market.²¹¹

The nature of these exemptions is similar to those in the AfCFTA Competition Protocol,²¹² except that the AfCFTA Competition Protocol requires approval by a centralized authority. In the European system, such exemptions apply ipso facto upon the fulfillment of certain criteria.²¹³ The two instruments resort to different approaches because they operate in dissimilar economic environments and phases of regional integration.²¹⁴

Furthermore, while the AfCFTA Competition Protocol incorporates broader exemptions linked to sustainable development, industrial growth, and public benefit,²¹⁵ reflecting its focus on socio-economic development, the TFEU is more focused on efficiency and consumer welfare in a

²⁰⁷ European Commission, *Procedures in Article 102 Investigations*, https://competition-policy.ec.europa.eu/antitrust-and-cartels/procedures/article-102-investigations_en (last visited Jan. 17, 2025).

²⁰⁸ See TFEU, *supra* note 52, at art. 101

²⁰⁹ See *Article 101 TFEU – Competition*, LAWTEACHER.NET (Nov. 30, 2018), <https://www.lawteacher.net/acts/article-101-tfeu.php> (last visited Oct. 20, 2025).

²¹⁰ See TFEU, *supra* note 52, at ¶ 1.

²¹¹ See Richard Stones, *Individual Exemption – Article 101(3) TFEU*, Global Dictionary of Competition Law, City Research Online, <https://openaccess.city.ac.uk/id/eprint/31988/3/Stones%20Concurrences%20Dictionary%20Individual%20Exemption%20-%20Art%20101%283%29%20TFEU.pdf> (last visited Oct. 20, 2025).

²¹² See TFEU, *supra* note 52. Under Article 8, any agreement, decision by associations of undertakings, or concerted practice between undertakings as outlined in Articles 6.2 and 7.4 may be exempted from the provisions of the Protocol for a specified period upon application. The exemption will be granted if the parties involved can demonstrate that it is necessary to pursue certain legitimate goals that are in the public interest and contribute to the development of the market. Eligible agreements or conduct for exemption may include, but are not limited to, cooperation on research and development, joint ventures aimed at economic development, measures to promote sustainable development, growth, transformation, or stability in any industry, actions that foster competitiveness and efficiency gains leading to employment or industrial expansion, and the activities of professional associations focused on developing or enforcing professional standards of competence necessary for public protection. Upon receiving an application for exemption from an undertaking or an association of undertakings, the Authority will decide whether to grant the exemption. The Authority may either grant the exemption, grant it with appropriate conditions, or deny the application for exemption.

²¹³ TFEU, *supra* note 52, at art. 101(3). In order to be eligible for the exemption under Article 101(3), the proposed action of the undertaking(s) has to improve production and distribution or promote technical and economic progress. It also needs to give obvious benefits to consumers by providing better products or lower prices without eliminating competition or imposing undue restrictions on it.

²¹⁴ See Competition Protocol, *supra* note 17, at Preamble, art. 8; TFEU, *supra* note 52.

²¹⁵ See TFEU, *supra* note 52.

highly competitive internal market.²¹⁶ The Volkswagen/Daimler/BMW case exemplifies this, where Daimler worked with Volkswagen Group and BMW to create uniform standards for reduction technologies—Selective Catalytic Reduction (SCR) systems, among others, including AdBlue—to comply with strict European Union vehicle emission laws.²¹⁷ This cooperation made compliance with environmental regulations easier. However, besides decreasing development costs, it had lessened competition because the settlement limited innovation while establishing strict technical specifications for AdBlue tank size. Accordingly, the European Commission fined Volkswagen and BMW €875 million for these anti-competitive practices under Article 101 of the TFEU, whereas Daimler was granted immunity for whistle-blowing or revealing the cartel.²¹⁸ This case made it clear that the parties involved would have been eligible for an exemption under Article 101(3) TFEU had their agreements not completely eliminated competition but merely generated positive efficiencies, enhanced consumer benefits, or contributed to wider environmental aims.²¹⁹

Just as in its European counterpart (the TFEU),²²⁰ abuse of market dominance, economic dependence, and other anti-competitive activities are equally addressed by the Protocol.²²¹ Economic dependence²²² is defined as the result of power imbalances where providers or consumers of particular goods or services are wholly reliant (or nearly so) on particular business organisations with few to no alternatives.²²³ The Protocol dictates that businesses in dominant positions are not allowed to misuse their influence on suppliers or customers in ways that undermine competition. This is because if the gatekeeper or core platform (dominant entity in the relationship) abuses its position concerning a supplier, and if such behaviour impacts the market's structure, competition suffers.

For example, Mobile Telephone Network (MTN) has been accused of abusing its dominant market position to engage in anti-competitive practices, especially in Nigeria.²²⁴ These allegations subsequently prompted investigations from regulatory agencies like the Nigerian Communications Commission (NCC) and the Federal Competition and Consumer Protection Commission (FCCPC),²²⁵ showing how seriously the abuse of market dominance is taken and its severe effect

²¹⁶ See Edith Loozen, *Strict Competition Enforcement and Welfare: A Constitutional Perspective Based on Article 101 TFEU and Sustainability*, 56 COMMON MKT. L. REV. 1265, 1267-70 (2019).

²¹⁷ See Eur. Union, *Summary of Commission Decision of 8 July 2021 Relating to a Proceeding Under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40178 – Car Emissions)*, 64 OFF. J. EUR. UNION 16, 17 (2021).

²¹⁸ See *German Carmakers Fined Over Emissions “Cartel”*, BBC (July 8, 2021), <https://www.bbc.com/news/business-57765113>.

²¹⁹ See Press Release, Eur. Comm'n, *Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars* (July 8, 2021), https://ec.europa.eu/commission/presscorner/detail/da/ip_21_3581.

²²⁰ See *Competition Policy*, *supra* note 70.

²²¹ See EUROPEAN COURT OF AUDITORS, *supra* note 49, at 9.

²²² See generally Thomas De Meese, Jules Stuyck & Laura Van Kruijsdijk, *Acting Against a More Powerful Business Partner: Banning Abuses of Economic Dependence*, AM. BAR ASS'N (Feb. 2021), <https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2021/feb-2021/at-source-feb2021-demeese.pdf>.

²²³ See CDE/WER (Belg.), art. IV. 2/1.

²²⁴ See Olayinka Adigun, *Dominance Dilemma: Market Consolidation and Averting Potential Monopoly in Nigerian Telecoms Sector*, BUS. DAY (Dec. 8, 2023), <https://businessday.ng/uncategorized/article/dominance-dilemma-market-consolidation-and-averting-potential-monopoly-in-nigerian-telecoms-sector/>.

²²⁵ See Ondaje Ijagwu, *FCCPC Floors Mtn: Court Affirms Its Regulatory Authority In The Telecommunications Sector*, FED. COMPETITION AND CONSUMER PROT. COMM'N (FCCPC) (Feb. 9, 2025), <https://fccpc.gov.ng/fccpc-floors-mtn-court-affirms-its-regulatory-authority-in-the-telecommunications-sector/>.

on competition and consumer welfare.²²⁶ If MTN's practices were to affect more than one African region, the AfCFTA Protocol could provide a uniform framework through which the issue can be addressed to foster a competitive telecommunications industry across the continent and protect smaller operators.

Notably, the AfCFTA Protocol omits provisions addressing state aid, unlike the TFEU. According to the latter, public subsidies that create distortions in competition and affect trade between members are prohibited unless justified on wider EU grounds, such as regional development or environmental protection.²²⁷ The AfCFTA Protocol merely imposes on states the responsibility of harmonising national competition laws and notifying the Secretariat of any changes.²²⁸ The AfCFTA approach is less restrictive and reflects the economic realities of the businesses within the continent,²²⁹ most of which depend on state intervention to address developmental challenges. However, the Protocol ought to strike a balance between regulating harmful state aid and allowing necessary support for socio-economic objectives.²³⁰

The institutional framework of the Competition Protocol comprises an AfCFTA Competition Authority as an independent body in charge of investigations and decisions in cases of competition, ensuring enforcement and issuing decisions;²³¹ the Committee on Competition Policy is charged with elaborating regulations, overseeing activities, and promoting cooperation between national and regional organs;²³² and the Tribunal, which is the adjudicatory body for disputes arising under the Protocol.²³³ This is similar to the harmonised enforcement under the TFEU through the centralized authority of the European Commission and judicial review by the European Court of Justice (ECJ), which facilitates consistent enforcement.²³⁴

Nonetheless, most African countries lack strong national competition authorities, and without robust national frameworks, the AfCFTA Competition Authority might struggle to enforce the rules effectively and equally across the continent.²³⁵ Key elements, such as the operational structure of the Tribunal and criteria for merger thresholds, remain underdeveloped (subject to future regulations from the Council of Ministers).²³⁶ Ambiguity in these factors may invite inconsistent enforcement and legal uncertainty.²³⁷ Additionally, the Authority's powers to impose sanctions or make binding decisions, especially in the case of large multinational corporations or state-owned enterprises, remain untested and could face resistance.²³⁸

²²⁶ See *The Impact of the Federal Competition and Consumer Protection Act on Competition Regulation and Consumer Protection in the Nigerian Telecommunications Industry*, ADVOCAT L. PRAC. (Nov. 2021), <https://advocaat-law.com/wp-content/uploads/2021/11/ec17d1c1c0bcb8cdf344776237709037.pdf>.

²²⁷ See TFEU, *supra* note 52, at 91-92.

²²⁸ Competition Protocol, *supra* note 17, at art. 11.

²²⁹ See AfCFTA Agreement, *supra* note 4, at art. 3, 5.

²³⁰ See Kigwiru, *supra* note 61, at 4.

²³¹ See Competition Protocol, *supra* note 17, at arts. 11-12.

²³² See Competition Protocol, *supra* note 17, at art. 15.

²³³ See Mwamulima, Karanja & Kimonye, *supra* note 43; Competition Protocol, *supra* note 17, at arts. 16-17.

²³⁴ See TFEU, *supra* note 52, at 89-91.

²³⁵ Salome Chapeyama Mdala, *Competition Policy Options for the African Continental Free Trade Area* 13, https://ryan-hawthorne.squarespace.com/s/Mdala_Competition-policy-options-for-the-AfCFTA.pdf (last visited Oct. 20, 2025).

²³⁶ Competition Protocol, *supra* note 17, at arts. 10(1)(b), 24(3).

²³⁷ Kigwiru, *supra* note 132.

²³⁸ *Competition Policy*, *supra* note 70.

V. POLICY RECOMMENDATIONS FOR THE IMPLEMENTATION OF A UNIFORM COMPETITION REGIME IN AFRICAN STATES WITHIN THE AFCFTA FRAMEWORK

There must be a definitive alignment of national competition laws across African states with the provisions outlined in the Protocol on Competition Policy.²³⁹ This harmonisation is crucial for creating a unified legal foundation, eliminating inconsistencies, and ensuring a seamless implementation of the competition regime²⁴⁰ because, although the protocol provides that it would override any conflicting national law, aligning national laws with the protocol will save any conflict that would militate against the functioning of the protocol or restrict support.²⁴¹

Furthermore, capacity-building initiatives must be prioritized for competition authorities across African states.²⁴² Accordingly, knowledge exchange and collaboration should be supported properly to enhance the institutional capabilities of these authorities,²⁴³ which in turn will contribute to the effective enforcement and administration of the competition regime.²⁴⁴ Moving beyond national capacity, mechanisms for cross-border collaboration among competition authorities must be established and reinforced.²⁴⁵ This involves encouraging the sharing of information, joint investigations, and coordinated enforcement actions to effectively address anti-competitive practices that transcend national borders, enhancing the efficiency of the competition regime through a collaborative approach.²⁴⁶

Additionally, there should be a transparent and efficient process for the review and approval of mergers,²⁴⁷ as the protocol on competition policy emphasizes the importance of scrutinizing mergers that have cross-border implications. Thus, clear criteria and a set timeline for merger reviews will provide businesses with certainty and streamline the approval process.²⁴⁸ Finally, the establishment of regional centers of excellence focused on competition policy is imperative.²⁴⁹

²³⁹ *Lessons from AfCFTA Readiness Reviews Lesson #1: Aligning National Laws with Continental Ambitions*, TRADE POLICY TRAINING CENTRE IN AFRICA (Sept. 8, 2025), <https://www.trapca.org/lessons-from-afcfta-readiness-reviews-lesson-1-aligning-national-laws-with-continental-ambitions/#:~:text=The%20African%20Continental%20Free%20Trade,By%20contrast%2C%20harmonised%20frameworks%20provide.>

²⁴⁰ Kigwiru, *supra* note 61.

²⁴¹ *Competition Policy*, *supra* note 70.

²⁴² UNCTAD, CAPACITY-BUILDING ON COMPETITION LAW AND POLICY DEVELOPMENT 1 (2008).

²⁴³ Mateusz Błachucki & Sonia Józwiak, *Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights*, 5 Y.B. ANTITRUST & REG. STUD. 137, 137-168 (Jan. 2, 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130849.

²⁴⁴ See Trudi Hartzenberg, *Cooperation on competition in the AfCFTA*, TRALAC: BLOG (May 17, 2019), <https://www.tralac.org/blog/article/14078-cooperation-on-competition-in-the-afcfta.html>.

²⁴⁵ See *International Cooperation in Competition Law Enforcement (an OECD case study)*, ASIA-PACIFIC ECON. COOP., <https://irc.apec.org/international-regulatory-co-operation-in-competition-law-and-chemical-safety/> (last visited Oct. 25, 2025).

²⁴⁶ See Seifeldin Sameh & Nicholas Bremer, *Inter-agency Cooperation Among MENA Competition Authorities*, BREMER: CLIENT UPDATES (June 4, 2025) <https://www.bremerlf.com/resources/inter-agency-cooperation-among-mena-competition-authorities>.

²⁴⁷ See Aashank Dwivedi & Abhishek Mishra, *The Role of Competition Law in Regulating Cross-Border Mergers and Acquisitions in India*, INT'L J. FOR MULTIDISCIPLINARY RSCH., REV. & STUD. 1, 11 (2024) [https://ijmrrs.com/wp-content/uploads/2025/04/The_Role_of_Competition_Law_in_Regulating_Cross-Border_Mergers_and_Acquisitions_in_India1.pdf#:~:text=Abstract.%20Cross%2Dborder%20mergers%20and%20acquisitions%20\(M&A\)%20have,that%20market%20structures%20remain%20fair%20and%20competitive.](https://ijmrrs.com/wp-content/uploads/2025/04/The_Role_of_Competition_Law_in_Regulating_Cross-Border_Mergers_and_Acquisitions_in_India1.pdf#:~:text=Abstract.%20Cross%2Dborder%20mergers%20and%20acquisitions%20(M&A)%20have,that%20market%20structures%20remain%20fair%20and%20competitive.)

²⁴⁸ See *id.* at 8.

²⁴⁹ See Willard Mwemba & Molly Askin, *The Role of Regional Competition Regimes in Supporting International Enforcement Cooperation*, AFRONMICS LAW (Aug. 25, 2021), <https://www.afronmicslaw.org/category/analysis/role-regional-competition-regimes-supporting-international->

These centers can serve as hubs for research, training, and the exchange of best practices among competition authorities, and this regional collaboration will contribute to a harmonised understanding and application of competition principles across the continent.²⁵⁰ Exchange and collaboration to enhance the institutional capabilities of these authorities should be supported properly. This will contribute to the effective enforcement and administration of the competition regime.²⁵¹

VI. CONCLUSION

In exploring economic integration within the AfCFTA, this article embarks on a comprehensive exploration of the imperative to establish a uniform competition regime across African states. The central premise of the research was grounded in the understanding that a harmonised and consistent approach to competition policy is pivotal and the best foot forward for realizing the full potential of the AfCFTA.²⁵² The cornerstone of the paper's exploration revolves around the pressing need for harmonisation.²⁵³ The fragmented nature of competition laws and institutional capacities across Africa, underlined by overlapping membership, emerged as a formidable challenge.²⁵⁴ The research underscores that harmonising national laws, creating a unified legal foundation, and fostering institutional cohesion are paramount in ensuring a seamless and effective implementation of a uniform competition regime.²⁵⁵

AfCFTA Protocol on Competition Policy emerged as a force and catalyst for change within this research framework. The adoption of the protocol represents a pivotal step towards a cohesive regulatory environment.²⁵⁶ The protocol addresses the gaps in anti-competitive practices, establishes clear definitions, and outlines the framework for a robust competition regime.²⁵⁷ The establishment of the AfCFTA Competition Authority and the envisaged Competition Tribunal underlines the commitment to effective enforcement and adjudication.²⁵⁸ The examination of institutional capacities in this article reveals a spectrum of variations, from well-established competition regimes to those facing resource constraints.²⁵⁹ As with the issue of overlapping membership and the problem of a fragmented approach to competition governance within Africa, this author argues that the AfCFTA Competition Protocol provides a clear-cut, all-encompassing supranational competition administration.²⁶⁰ Relying on the RECs and national competition authorities, the AfCFTA competition framework would provide the much-needed holistic

[enforcement#:~:text=The%20COMESA%20RCR%20enables%20international.susceptible%20to%20anti%2Dcompetitive%20behaviour.](#)

²⁵⁰ See *id.*

²⁵¹ See *id.*; *Inter-agency Cooperation Among MENA Competition Authorities*, *supra* note 246.

²⁵² See Kigwiru, *supra* note 132.

²⁵³ See *African Continental Free Trade Area: Legal Challenges and Opportunities for International Corporations*, LEXAFRICA (Mar. 25, 2024) <https://lexafrika.com/2024/03/afcfta-legal-challenges-and-opportunities/>.

²⁵⁴ See *id.*

²⁵⁵ See Collins Chikodili Ajibo & Thoko Kaime, *Rules of Origin, Value Chains and African Development under the African Continental Free Trade Area Agreement*, 69 J. AFR. L. 179, 185-86 (Jan. 20, 2025).

²⁵⁶ See Mwemba, *supra* note 9, at 184.

²⁵⁷ Mwamulima, Karanja & Kimonye, *supra* note 43.

²⁵⁸ See Competition Protocol, *supra* note 17 at arts. 1, 13-15, 24.

²⁵⁹ See Boshoff, *African Continental Free Trade Agreements (AfCFTA): Protocols on Women and Youth in Trade, and Competition*; with Deputy Minister, PARLIAMENTARY MONITORING GRP. (Sept. 3, 2025), <https://pmg.org.za/committee-meeting/41514/>.

²⁶⁰ Vellah Kigwiru, *Supranational or cooperative? Rethinking the African Continental Free Trade Area Agreement Competition Protocol Institutional Design*, RESEARCHGATE (Feb. 8, 2023), https://www.researchgate.net/publication/368277146_Supranational_or_cooperative_Rethinking_the_African_Continental_Free_Trade_Area_Agreement_Competition_Protocol_institutional_design.

approach, strengthen economic integration, and realize the goals of the AfCFTA.²⁶¹ The article advocates for capacity-building initiatives and cross-border collaboration mechanisms. Strengthening institutions and fostering collaboration are deemed essential for overcoming jurisdictional challenges and ensuring a uniform competition regime that transcends national boundaries.

The challenges identified, such as limited cross-border cooperation²⁶² and jurisdictional complexities, present opportunities for improvement. The article underscores the importance of transparent merger-review processes and the creation of regional centres of excellence, among others.²⁶³ By addressing these challenges head-on, African states can transform them into spurs for a more robust and efficient competition regime.²⁶⁴ In conclusion, it is imperative to acknowledge that the journey toward a uniform competition regime is an ongoing process. The policy recommendations put forth are not static; they evolve with the dynamic nature of markets and the ever-changing landscape of international trade and relations.

²⁶¹ See Competition Protocol, *supra* note 17, at art. 20.

²⁶² UNCTAD Secretariat, Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures, U.N. Doc. TD/B/C.I/CLP/44 (Oct. 26, 2025).

²⁶³ See Kamala Dawar & George Lipimile, *Africa: Harmonising Competition Policy Under the AfCFTA*, 2020 CONCURRENTS REV. 242 (2020).

²⁶⁴ See Vellah Kigwiru, *Cross-Border Competition Enforcement in Africa: Developments, Opportunities, Challenges and the Way Forward*, 11 COMP. L., ECON. & POL'Y CONF. 1, 5 (2017).