



SECOND-RATE
CONSUMERS:
PROMOTING ACCESS
TO SAFE MENSTRUAL
PRODUCTS FOR
KENYAN WOMEN
AND GIRLS THROUGH
TRADE POLICY

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REFORM

Table of Contents

I. MENSTRUAL HEALTH MANAGEMENT IN KENYA.....	6
A. DEFINITION OF “SAFE” MENSTRUAL HEALTH PRODUCTS	7
II. THE INTERSECTION OF TRADE, GENDER AND PUBLIC HEALTH	8
A. TRADE AGREEMENTS AND WOMEN’S RIGHT TO HEALTH	8
B. PRODUCT STANDARDS	9
C. COMPARATIVE ANALYSIS OF THE CATEGORIZATION OF MENSTRUAL HYGIENE PRODUCTS IN KENYA, INDIA, THE UNITED STATES AND THE EUROPEAN UNION.....	10
1. <i>Categorization in Kenya: The importance of harmonized standards for menstrual products</i>	<i>10</i>
2. <i>Categorization as medical devices in the United States: Effect of Exemption of Class I Reserved Medical Devices from Premarket Notification Requirements on product safety.....</i>	<i>11</i>
3. <i>Categorization as quasi-drugs in South Korea: How classification of menstrual products as quasi- drugs impacts safety standards.....</i>	<i>12</i>
4. <i>Categorization as Consumer products in the European Union: Analyzing 2014/763/EU: Commission Decision of 24 October 2014 establishing the ecological criteria for the award of the EU Ecolabel for absorbent hygiene products (notified under document C(2014) 7735.....</i>	<i>13</i>
III. ROLE OF REGULATORY BODIES IN CREATING AN ENABLING ENVIRONMENT FOR SUPPLY AND PROMOTION OF SAFE MENSTRUAL PRODUCTS BY LOCAL AND TRANSNATIONAL COMPANIES.	14
A. NATIONAL BODIES.....	14
1. <i>State Department for Gender Affairs</i>	<i>14</i>

2.	<i>Kenya Bureau of Standards (KEBS)</i>	14
3.	<i>The Medicines and Therapeutics Committee (MTC)</i>	14
B.	REGIONAL BODIES	15
1.	<i>East African Standards Committee</i>	15
2.	<i>African Organization for Standardization (ARSO)</i>	17
IV.	FRAMEWORKS AND POLICIES REGULATING MENSTRUAL HEALTH MANAGEMENT IN KENYA	17
A.	TRADE POLICIES AND AGREEMENTS RELEVANT TO MENSTRUAL HEALTH IN KENYA	17
1.	<i>The Agreement on Technical Barriers to Trade (TBT)</i>	18
2.	<i>The African Continental Free Trade Agreement (AfCFTA): The Impact of Trade Liberalization on Women as Consumers of Menstrual Products and Entrepreneurs within the Menstrual Product Market</i> ..	19
3.	<i>The Buenos Aires Joint Declaration on Trade and Women’s Economic Empowerment</i>	19
B.	OTHER POLICIES AND LAWS IMPACTING MENSTRUAL HEALTH POLICIES	20
1.	<i>The Kenya Menstrual Health Management Policy (2019-2030)</i>	20
2.	<i>The Basic Education (Amendment) Act of 2017</i>	20
V.	RECOMMENDATIONS	20
A.	REGIONAL REGULATORY COOPERATION	20
1.	<i>Labeling Regulations [Proposition 65 type of legislation]</i>	21
2.	<i>Trade Liberalization initiatives</i>	22
B.	CLASSIFICATION OF MENSTRUAL PRODUCTS IN THE WHO MODEL LIST OF ESSENTIAL MEDICINES AND MODEL LIST OF ESSENTIAL MEDICINES FOR CHILDREN	22
C.	CONSUMER PROTECTION	24
1.	<i>Improving Access to Information: Borrowing a leaf from the proposed Menstrual Products Right to Know Act of 2019 in the US</i>	24
2.	<i>Instituting Menstrual Health Management legislation</i>	25
3.	<i>Investing in Menstrual Product Research & Development</i>	25

<i>4. Post-market surveillance for manufacturers</i>	26
D. NUANCED WATER, SANITATION AND HYGIENE INTERVENTIONS	26
E. CAPACITY BUILDING IN SEX EDUCATION FORA	27

*Sound signifies event. A noise means something is happening. Let's say there is a mountain out your window. You see the mountain. Your eyes report changes, snowy in the winter, brown in the summer, but mainly just report it's there. It's scenery. But if you **hear** that mountain, then you know it's doing something...[s]peech, the most significant human sound, and the most significant kind of sound, is never just scenery, it's always an event."*¹

To listen, stop talking². Women didn't just now start speaking up on substandard menstrual products³ and their health rights. Menstrual health management interventions have historically not been designed to listen to women. The evolution of menstrual products to date is a clear indication of the stagnation of innovation in menstrual products despite women providing feedback.⁴ Listen to women, our lives depend on it!

Access to safe menstrual products is a big determinant of the health and well-being of women and girls. Policy development on menstrual health management has not been an inclusive space. Often public participation on proposed national legislation is still out-of-reach women and presented in overly technical language, leaving many in the dark on matters directly affecting their wellbeing.

¹ Ursula K. Le Guin, *Telling is Listening*, in *THE WAVE IN THE MIND: TALKS AND ESSAYS ON THE WRITER, THE READER, AND THE IMAGINATION* (2004), <https://www.themarginalian.org/2015/10/21/telling-is-listening-ursula-k-le-guin-communication/>.

² Kimberly Probolus, *Men, You Need to Listen to Women*, *THE NEW YORK TIMES*, Feb. 14, 2020, <https://www.nytimes.com/2020/02/14/opinion/letters/nytimes-letters-women.html>.

³ The term "menstrual products" is used throughout this paper to be all inclusive (e.g., tampons, disposable sanitary pads, reusable sanitary pads, menstrual cups, etc.).

⁴ Feminine Hygiene Products, *SMITHSONIAN INSTITUTION*, <https://www.si.edu/spotlight/health-hygiene-and-beauty/feminine-hygiene-products> (last visited Nov 1, 2021).

The data gaps informing menstrual health management programs are reflected in the outdated menstrual product standardization in Kenya. The categorization of menstrual products impacts testing, safety, material usage, consumer feedback and needs assessment. As a result, the need for better quality menstrual products is not reflected across the Kenyan market, its manufacturing industry and consequently within its trade policies and agreements.

The quality of menstrual products is a factor that dictates a huge chunk of how women and girls navigate their day-to-day lives. Being able to participate in economic activities, employment, education and even sports is greatly influenced by the quality of menstrual products available. It is therefore not surprising that millions of women around the world have their mobility restricted, opportunities reduced, and dreams extinguished due to harmful and poor-quality menstrual products.

In recent years, women at the forefront of menstrual justice initiatives, signaling that menstrual inequality is an issue ripe for action. In 2019, Kenyan women took to Twitter under the hashtag #MyAlwaysExperience to report adverse reactions they experience when using Always™ disposable pads manufactured under the Proctor & Gamble™ Brand.⁵ Within hours of the subject trending, women from all over Africa and the rest of the world shared their menstrual experiences while using Always pads™, which included reports of rashes, itching, boils, burning and vaginal infections. Complications arising from poor quality menstrual pads often don't receive much publicity and affirmative action. The manufacturing industry has not acted on women's needs articulated in consumer feedback and scientific research demonstrating evidence of harm caused by the failure to improve menstrual product standards over the years. Companies producing

⁵ Ciku Kimeria, *The Story of How Kenyan Women Are Bringing P&G to Task Over The Always "Burning Pads" Saga*, QUARTZAFRICA, Feb. 26, 2020, <https://qz.com/africa/1807045/kenyan-women-take-pg-to-task-over-always-burning-pads/>.

menstrual products focus more on the idea of “menstrual etiquette”; rather than ensuring women are having a safe menstrual experience.

Historically, developing countries get the short end of the stick in trade agreements, especially those involving developed countries, thus resulting in less bargaining power on unfair terms. These terms include relaxed regulatory standards on goods exported to/manufactured in developing countries. Most times, these incentives go hand-in-hand with human rights violations. To protect the health of Kenyan women, the Government must ensure access to safe menstrual health products in its trade agreements with its trade partners and manufacturers.

This paper will start off by highlighting the history and current state of Menstrual health management in Kenya and the impact of unsafe of menstrual products on menstruators. Part Two then dives in to demonstrate how the categorization of menstrual products in different jurisdictions across the world impacts their standardization. Thereafter, Part three explores the role of regulatory bodies in creating an enabling environment for supply and promotion of safe menstrual products by local and multinational corporations. Part four analyzes the trade and non-trade frameworks and policies regulating menstrual health management in Kenya. Finally, Part five proposes innovative solutions to realizing access safe menstrual health products for women and girls in Kenya.

I. Menstrual Health Management in Kenya

Menstrual products, by nature of their function, are designed to be used in the vagina or against the vulva to absorb the shedding of the uterine lining. This proximity to the reproductive system increases women’s chances of reproductive tract infections and diseases, some that are life

threatening. An average of 800 million women are menstruating at any point in time, and this goes on for an average of 35 to 40 years of their lifetime.⁶ Sixty-five percent of women living in Kenyan urban areas prefer using disposable sanitary pads, with 46% of their counterparts preferring disposable sanitary pads in rural areas.⁷

With emerging research and technology geared towards helping women identify signs of vulvovaginal infections when using sanitary products, there is still an urgent need to ensure women have access to menstrual products that are fit-for-purpose and free from toxins.⁸

A. Definition of “safe” menstrual health products

In humans, menstruation is symbolized by the cyclical shedding of the uterine wall due to pregnancy not being established. Shedding of the uterine wall is characterized by bleeding.⁹ During this time, women, trans and non-binary people menstruate for a period between two and seven days.¹⁰ While in this state, menstruators need to use feminine hygiene products such as sanitary napkins, menstrual cups, tampons, and others, to manage the blood loss. To ensure safe use of menstrual products, users are advised to change them regularly. Failure to do so may result in Toxic Shock Syndrome, an infection caused by bacteria when they enter the user’s bloodstream and could become fatal.¹¹

⁶ OFFICE ON WOMEN'S HEALTH IN THE OFFICE OF THE ASSISTANT SECRETARY FOR HEALTH AT THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle#:~:text=On%20average%2C%20women%20get%20a,40%20years%20of%20their%20life.&text=Most%20women%20have%20regular%20periods,period%20may%20not%20come%20regularly>.

⁷ MINISTRY OF HEALTH, MENSTRUAL HYGIENE MANAGEMENT POLICY 2019-2030, (2020) <https://www.health.go.ke/wp-content/uploads/2020/05/MHM-Policy-11-May-2020.pdf>.

⁸ Prabhu, A. et al., *Knitting thread devices: Detecting Candida albicans using napkins and tampons*, 6 ACS Omega , 12667 (2021). <https://pubs.acs.org/doi/10.1021/acsomega.1c00806>.

⁹ Alexandra Alvergne, Vedrana Höggqvist Tabor, *Is Female Health Cyclical? Evolutionary Perspectives on Menstruation*, 33 TRENDS IN ECOL. & EVOL., 399 (2018).

¹⁰ Marlene Fried & Susan Yanow, *Abortion Rights and Reproductive Justice*, PRO CHOICE PUB. EDUC. PROJECT (Last visited Mar 5, 2022).

¹¹ Toxic Shock Syndrome, J. HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/toxic-shock-syndrome-tss>.

Despite there being more technological advances and innovation in manufacturing, menstrual hygiene products have for the most part remained untouched by change. Menstrual justice initiatives have indeed contributed to a number of changes to menstrual products, such as: labelling requirements, discreet packaging and sizing accommodations, but the basic design of the disposable sanitary pad has remained relatively the same since its creation towards the end of the 19th century.¹²

II. The intersection of Trade, Gender and Public Health

A. Trade Agreements and Women’s Right to Health

The Addis Ababa Action Agenda of 2015 calls for the promotion of women’s rights within global trade through ex-ante and ex-post gender impact assessments.¹³ The impact of trade policies on gender inequality across different sectors, such as manufacturing, is dependent on country-specific economic climates, levels of trade liberalization and women’s public participation in policymaking.¹⁴

Changes in the price and quality of imported products disproportionately affects women due to their historically lower remuneration in comparison to their male counterparts. In Kenya, women are 30% less likely to have access to the same opportunities as men. With many women, especially in Sub-Saharan Africa and Asia, having little to no influence the in making of household

¹² Megan Cummings, *The Evolution of Menstrual Products*, MYMED (Feb 25, 2022, 10:17 AM), <https://mymed.com/health-wellness/interesting-health-info/the-evolution-of-menstrual-products>.

¹³ Addis Ababa Action Plan on Transformative Financing for Gender Equality and Women’s Empowerment, <https://www.oecd.org/dac/gender-development/Action%20Plan%20on%20Financing%20Gender%20Equality.pdf>

¹⁴ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, ASSESSING THE IMPACT OF TRADE AGREEMENTS ON GENDER EQUALITY: CANADA-EU COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT 7(2020). https://unctad.org/system/files/official-document/UNWomen_2020d1_en.pdf.

decisions on the spending of their personal earned income, this puts them at the mercy of patriarchal norms.¹⁵

B. Product Standards

Product standards clearly specify the characteristics of a product, which include, but are not limited to: design, material, production process, safety, among others. States create public standards, however sometimes they concede some powers to non-state actors to create private standards, which may be incorporated into laws or regulations. Developing countries are often recipients of standards and not initiators. This is attributable to their limited capacity to adhere to public regulatory standards set by countries with higher income levels.

The WTO Technical Barrier to Trade (TBT) Agreement aims to ensure that technical regulations, standards and conformity assessment procedures are non-discriminatory and do not constitute barriers to trade¹⁶. It recognizes that technical regulations and standards may be adopted to protect human health or safety and the environment. However, the Agreement does not only cover standards and technical regulations, but it also addresses Regulatory standards are often known as Non-Tariff Measures (NTMs), which can either be used to serve public interest or discriminate against imported products vis-à-vis domestic like products.

The lack of involvement by African countries in international standardization processes is attributable to lack of financial resources, technical expertise, and experience in negotiating processes during consensus building. To this effect, the Committee on principles for the development of international standards agreed upon six principles with a view to guiding members

¹⁵ Esteban Ortiz-Ospina, Max Roser, *Economic Inequality by Gender*, OUR WORLD IN DATA, <https://ourworldindata.org/economic-inequality-by-gender>

¹⁶ WORLD TRADE ORGANIZATION, TECHNICAL BARRIERS TO TRADE, https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

in the development of international standards.¹⁷ Among these was a guideline calling upon members to be cognizant of the constraints faced by developing countries in effectively participating in standards development.

C. Comparative analysis of the categorization of menstrual hygiene products in Kenya, India, the United States and the European Union

The first step to ensuring the safety of menstrual products is in their categorization. For decades, disposable pads and tampons were the norm in menstrual health management. However, in recent years menstruators begun considering the implication of disposable menstrual products on public health and environmental sustainability.¹⁸ This led to the creation of alternatives which include reusable menstrual products such as menstrual cups/disks, period panties, reusable sanitary pads and disposable pads/tampons made with organic materials such as cotton and bamboo.¹⁹

1. Categorization in Kenya: The importance of harmonized standards for menstrual products

In Kenya, the Kenya Bureau of Standards regulates menstrual hygiene products²⁰. However, despite there being specific regulatory standards for reusable pads²¹, disposable pads are regulated under disposable maternity pads. Menstrual products are not treated as medical devices in Kenya, rather as consumer products. This classification impacts the level of safety assessment and scrutiny that goes into manufacturing menstrual products.

¹⁷ World Trade Organization, Principles to Govern the Development of International Standards, guides and recommendations, https://www.wto.org/french/tratop_f/tbt_f/principles_standards_tbt_f.htm

¹⁸ Period Products: What Are The Options?, INTERNATIONAL PLANNED PARENTHOOD FEDERATION, <https://www.ippf.org/blogs/period-products-what-are-options>

¹⁹ TMR, *Anti-microbial and Stain-free Design of Period Panties (Menstrual Underwear) to Inundate Market Growth*, PR NEWSWIRE, 18 June, 2019.

²⁰ DKS 2881- Disposable Maternity Pads- Specification, https://members.wto.org/crnattachments/2021/TBT/KEN/21_0985_00_e.pdf

²¹ Textiles—Reusable Sanitary Towels—Specification, FKDS 2925:2021 (February 2022), Available at: https://members.wto.org/crnattachments/2022/TBT/KEN/22_1549_00_e.pdf

Medical devices are designed and manufactured to meet strict healthcare industry requirements, whereas consumer products have fluctuating standards depending on the standards imposed, which are non-binding on manufacturers. Brands have no incentive to spend more funds on high quality raw materials if they can reach a larger market with cheaper products made from cheaper, and often less safe, raw materials.

Further, with the gradual diversification of menstrual products on offer, menstruators are exploring the use of largely unregulated products such as menstrual cups and period pads. With large organizations like The Cup Foundation running menstrual health management initiatives across Kenya and impacting the lives of over 15,000 school going girls, other organizations will follow in their footsteps to run similar initiatives.²² It is crucial the Kenyan government coordinates menstrual health management initiatives to ensure there are standard guidelines for new emerging menstrual products. As of 2022, there are still no guidelines regulating the manufacturing of tampons, menstrual cups, and feminine hygiene products in Kenya.

2. Categorization as medical devices in the United States: Effect of Exemption of Class I Reserved Medical Devices from Premarket Notification Requirements on product safety

In the US, menstrual products are classified as medical devices under the Federal Food, Drug and Cosmetic Act (FD&C Act). Feminine hygiene products which are then further divided into three categories: class I, class II and class III depending on regulatory requirements. Unscented menstrual products fall under class I medical devices. Scented or deodorized menstrual pads fall under class I or class II medical devices. Scented or deodorized menstrual tampons, unscented

²² The Cup, <https://www.thecup.org/>

menstrual tampons and menstrual cups fall under class II medical devices. Class III devices require premarket approval.

Ninety days before a product hits the market for sale, any party seeking to market a class I, II and III medical devices in the United States which does not need a Premarket Approval application, must submit a 510(k) premarket submission²³ to the Food and Drug Administration (FDA). The purpose of the 510(k) is to demonstrate to the FDA's medical devices advisory committee the safety and effectiveness of the devices. In the submission application, the manufacturers compare the medical device to one or more similar devices known as predicates, which must not be in violation of the FD&C Act.²⁴

3. Categorization as quasi-drugs in South Korea: How classification of menstrual products as quasi-drugs impacts safety standards

Korea's Ministry of Food and Drug²⁵ Safety (MFDS) classified sanitary pads as quasi-drugs through the Pharmaceutical Affairs Act. According to the Ministry, a quasi-drug is defined as products used for the purpose of treating, alleviating, or preventing human and animal illnesses. This item category also includes menstrual tampons.

In 2017, Korea faced a sanitary pad crisis which resulted in the finding of volatile organic compounds in menstrual products. Korean women filed a class action lawsuit against a South Korean firm after local consumers and civic groups found toxins in menstrual products. The MFDS

²³ UNITED STATES FOOD AND DRUG ADMINISTRATION, MENSTRUAL TAMPONS AND PADS: INFORMATION FOR PREMARKET NOTIFICATION SUBMISSIONS (510(K)S)- GUIDANCE FOR INDUSTRY AND FDA STAFF (2005) <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/menstrual-tampons-and-pads-information-premarket-notification-submissions-510ks-guidance-industry>.

²⁴UNITED STATES FOOD AND DRUG ADMINISTRATION, PREMARKET NOTIFICATION 510(K), <https://www.fda.gov/medical-devices/premarket-submissions-selecting-and-preparing-correct-submission/premarket-notification-510k>.

²⁵MINISTRY OF FOOD AND DRUG SAFETY, REPUBLIC OF KOREA https://www.mfds.go.kr/eng/wpge/m_25/de0110151001.do.

launched a Safety Verification Commission for sanitary pads which evaluated 85 volatile organic compounds in 900 types of sanitary pads from both domestic manufacturers and imported.²⁶

4. Categorization as Consumer products in the European Union: Analyzing 2014/763/EU: Commission Decision of 24 October 2014 establishing the ecological criteria for the award of the EU Ecolabel for absorbent hygiene products (notified under document C(2014) 7735

The European Commission (EC) and the European Chemical Agency (ECHA) are tasked with the duty to establish, enforce and amend policies for hygiene products within the European Union. Feminine hygiene products in particular are managed based on the directive for general product safety²⁷, Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulations²⁸ and regulations regarding ecolabels²⁹ and ecolabels for absorbent hygiene products.

Because absorbent hygiene products fall under the management of the general product safety directive, the use of fragrances is not regulated, despite it being regulated in cosmetics and toys. This is because the toy and cosmetic industry have specific regulation restricting the use of certain fragrances and clearly communicates to consumers in the event these fragrances are present in products.³⁰

²⁶ Sunny Lee, *South Korea to risk assess hundreds of sanitary pads*, CHEMICAL WATCH , <https://chemicalwatch.com/58514/south-korea-to-risk-assess-hundreds-of-sanitary-pads>.

²⁷ Directive 2001/95/EC

²⁸ Regulation EEC No 1907/2006

²⁹ Regulation EC No 66/2010

³⁰ Commission Decision 2014/763/EU

III. Role of regulatory bodies in creating an enabling environment for supply and promotion of safe menstrual products by local and transnational companies.

A. National bodies

1. State Department for Gender Affairs

The State Department of Gender Affairs falls under the Ministry of Public Service, Youth and Gender within the Kenyan Government. The mandate of the Department involves promoting gender policy, running special programmes for women empowerment, promoting gender mainstreaming within various ministries and government agencies, domesticating international treaties and conventions on gender and conducting programmes on Gender Based Violence.

2. Kenya Bureau of Standards (KEBS)

The Kenya Bureau of Standards is the government agency mandated under the Standards Act³¹ to oversee the development of standards and quality control for locally made products and promote the harmonization of regional standards, measurements, and conformity assessments. The agency operates the National Enquiry Point in support of the WTO TBT Agreement.

3. The Medicines and Therapeutics Committee (MTC)

The first National Medicines and Therapeutics Committee was established after the formulation of the Kenya National Drug Policy in 1994. The Kenya Health Policy 2014-2030, the Kenya Health Sector Strategic Plan 2018-2023 and the Sessional Paper No.4 of 2012 on the National Pharmaceutical Policy provide for the establishment of Medicines and Therapeutics

³¹ Chapter 496, Laws of Kenya

Committees in health facilities for the purposes of promoting appropriate use of medicines and other health products.

In 2020, the Ministry of Health issued Guidelines for the Establishment and Operationalization of Medicines and Therapeutics Committees. The Medicines and Therapeutics Committee (MTC) is responsible for overseeing policies and procedures related to all aspects of medicines and Health Products and Technologies (HPT). It evaluates the clinical use of medicines and formulates policies for the management of medicines and other health products and technologies. The scope of HPT within the guidelines is reliant on the WHO's EML.

B. Regional bodies

1. East African Standards Committee

The East African Community established the East African Standards Committee to harmonize the governing of product and service requirements through the development of the East African Standards (EAS). Regional standards within the African region have the potential to change the regulatory landscape faster than international standards. EAS are developed through technical committees made up of representatives from stakeholders such as government, private sector, civil society, among others.

Upon the formulation of EAS, they are circulated to National Standards bodies within the East African region for discussion, comments, and finalization. Technical Committee EASC/TC 061 on Textiles, Textile products and Accessories developed a Draft EAS for reusable sanitary towels³² in 2019 and disposable sanitary towels in 2008.³³

³² East African Standard DEAS 96-2: 2019, Sanitary Towels—Specification—Part 2: Reusable, https://members.wto.org/crattachments/2019/TBT/RWA/19_1455_00_e.pdf

³³ East African Standard EAS 96:2008, Sanitary Towels—Specification, <https://law.resource.org/pub/eac/ibr/eas.96.2009.html>

The EAS for reusable sanitary towels, as shown in Box A, emphasized on the safety of users through requirements on the materials used in the towels.

Box A: Provisions on safety of materials used in the manufacturing of reusable sanitary towels

“5.2 Materials

The materials used in the manufacture of reusable sanitary towels shall not harm the skin in contact, all outer layers of the product should be fit for direct contact with the skin...

5.2.1 Top sheet (the layer which contacts skin)

Shall be of material that helps absorption and shall have no harmful effect. The material used for the top layer should be soft to the touch and should not shed any fibers when rubbed dry or wet.”

Source: East African Standard, Reusable Sanitary Towels, Article 5.2

However, this language is missing in the EAS for disposable sanitary towels which only addresses the absorbency of filler covering and water resistance of the protective barrier, as shown in Box B.

Box B: Vague provisions on the safety of disposable sanitary towels

“5.2 Materials

5.2.1 Absorbent Filler

The absorbent filler shall be free from any water-soluble coloring matter when tested in accordance with Annex A...

5.2.2 Covering

The absorbent filler covering shall be made of good quality fabric with sufficient porosity to permit the assembled towel to meet the absorbency requirement.

Source: East African Standard, Disposable Sanitary Towels, Article 5.2

2. African Organization for Standardization (ARSO)

Trade liberalization requires the standardization of products and services in line with WTO requirements and regulations on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) measures. For supplier to participate in trade regionally and internationally, they are required to adhere to standards within the global value chains. Non-compliance translates to loss of access to key international markets and a reduction in global market share.

In Africa, despite the proliferation of multiple National Bureaus of Standards, there lacks a harmonization of procedures through trade. The African Organization for Standardization (ARSO) was set up in 1977 by the Organization of African Unity, now known as the African Union and the United Nations Economic Commission for Africa (UNECA).³⁴

IV. Frameworks and policies regulating menstrual health management in Kenya

A. Trade policies and agreements relevant to menstrual health in Kenya

Kenya is currently within its fifth trade regime since attaining independence. Under the guidance of the National Trade Policy and Vision 2030, Kenya is a party to several regional and bilateral trade agreements.³⁵ The Ministry of Industrialization, Trade and Enterprise Development is the principal agency mandated to formulate and implement trade policy.³⁶

³⁴ African Organisation for Standardisation, <https://archive.unescwa.org/african-organisation-standardisation>

³⁵ Socrates K., Davis Mwanja, *On the Economic Thought of Trade Practices and Policies in Kenya*, 77 Estudios Economicos (2020), Available at: <https://www.redalyc.org/journal/5723/572367823009/html/>

³⁶ MINISTRY OF INDUSTRIALIZATION, TRADE AND ENTERPRISE DEVELOPMENT, <https://www.industrialization.go.ke>

1. The Agreement on Technical Barriers to Trade (TBT)

The Agreement on Technical Barriers to Trade (hereinafter referred to as the TBT Agreement) covers non-tariff barriers to trade such as labelling regulations and product standards. Technical regulations set out specific parameters a product should meet before sale, such as function, product performance and design. These regulations sometimes include production processes that went into the making of the product and labelling and marking guidelines. Standards, on the other hand, refer to guidelines issued by a certified body on the characteristics of a product.³⁷ Standards are voluntary, while technical regulations are mandatory.

Despite it being a state's decision on whether or not to allow the sale of certain products within their territories if they have not met certain standards, Article 2.1 of the TBT Agreement on national treatment necessitates states to treat products originating from other territories no less favorably to like products originating in their own territory. This means that, if Kenya is to impose any technical regulations or standards against menstrual products imported, the same standards must be met by locally produced menstrual products.³⁸

Further, if Kenya is to impose menstrual product labelling requirements, they must not be more trade restrictive than necessary to fulfil the objectives of consumer protection. The requirements must also achieve a level of consumer information similar to locally produced menstrual products. Failure to meet any of these measures would result in a violation of Article 2.2 of the TBT Agreement.³⁹

³⁷ Simon Lester, *Technical Regulations vs. Standards*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (May 16, 2022), <https://worldtradelaw.typepad.com/ielpblog/2012/01/more-on-technical-regulations-vs-standards.html>

³⁸ AB Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (adopted April 24, 2012)

³⁹ Panel Report, *US—Tuna II*, WT/DS381/RW

2. The African Continental Free Trade Agreement (AfCFTA): The Impact of Trade Liberalization on Women as Consumers of Menstrual Products and Entrepreneurs within the Menstrual Product Market

The African Continental Free Trade Agreement isn't like any other FTA, it incrementally posits to focus on its commitments in matters such as sustainable and inclusive development, gender equality and food security.⁴⁰ Trade liberalization reduces tariff and non-tariff barriers to trade between countries and trading partners. The AfCFTA replaces the Association of African Trade Promotion Organizations' mandated under the former disbanded Organization of African Unity. Under the African Union, the AfCFTA is built on Africa's regional economic communities by creating a single liberalized market.⁴¹

3. The Buenos Aires Joint Declaration on Trade and Women's Economic Empowerment

In 2017, 118 WTO members agreed on reporting the progress of the implementation of the Joint Declaration on Trade and Women's Economic Empowerment. Among the objectives was: (a) sharing experiences relating to policies and programs encouraging women's public participation in national and international trade through WTO information exchanges and voluntary reporting during WTO trade policy review processes; (b) sharing best practices for conducting gender-based analysis of trade policies and monitoring their effects, and (c) sharing methods and procedures for the collection of gender-disaggregated data and the analysis of gender-focused statistics related to trade.⁴²

⁴⁰ Kuhlmann Katrin, Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development*, 51 GEORGETOWN JOURNAL OF INTERNATIONAL LAW (2020)

⁴¹ AfCFTA SECRETARIAT, THE FUTURES REPORT: MAKING THE AfCFTA WORK, 2020. Available at: https://au.int/sites/default/files/documents/39689-doc-ss_afcftafuturereport.pdf

⁴² WTO, Interim Report Following The Buenos Aires Joint Declaration on Trade and Women's Economic Empowerment, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1095R1.pdf&Open=True>

B. Other Policies and Laws impacting Menstrual Health policies

1. The Kenya Menstrual Health Management Policy (2019-2030)

Despite the large role the Ministry of Industrialization and Trade plays in regulating the manufacturing sector, the policy document limits the Ministry's role to building local capacity for production of MHM products.⁴³

2. The Basic Education (Amendment) Act of 2017

The Basic Education Act 14 of 2013 was passed to implement Article 53 of the Constitution of Kenya through the promotion of access to free and compulsory education for all children in Kenya. In 2017, Parliament amended the Basic Education Act to expand the scope of the government's responsibility to include providing free, sufficient, and quality sanitary towels to girls registered in public basic education institutions. Further, the government is also tasked with the duty to provide safe and environmentally sound menstrual waste management.⁴⁴

V. Recommendations

A. Regional Regulatory Cooperation

The International Organization for Standardization (ISO) is a non-governmental organization made up of national standard bodies from over 150 countries worldwide. The ISO promotes the development of standardization so as facilitate trade in goods and services and promote cooperation in intellectual, scientific, technological and economic activity.⁴⁵ In 2021, the

⁴³ Ministry of Health, Menstrual Hygiene Management Policy

⁴⁴ Kenya Gazette Supplement No. 97 (Acts No.17), The Basic Education (Amendment) Act, 2017, Available here: <http://ilo.org/dyn/natlex/docs/ELECTRONIC/109340/135604/F1650423890/KEN109340.pdf>

⁴⁵ Development of ANSI and USNC/IEC Policy and Technical Positions to ISO and IEC, <https://share.ansi.org/shared%20documents/News%20and%20Publications/Links%20Within%20Stories/ANSI%20%20USNC%20Position%20Development.pdf>

ISO Committee on Consumer Policy (ISO COPOLCO), submitted a proposal⁴⁶ for a new ISO technical committee on menstrual products. The proposal aimed to focus on developing a general requirement standard focusing on the general safety, performance and health requirements from the user’s perspective. A refreshing take from the usual manufacturer centered perspective that currently informs the design of menstrual products. The technical committee has since then been formed,⁴⁷ with the American National Standards Institute (ANSI) now recruiting U.S. Administrating Organizations and U.S. Technical Advisory Group members to participate.⁴⁸

1. Labeling Regulations [Proposition 65 type of legislation]

In 2019, as shown in Box C, the state of New York became the first state in the US to amend menstrual product labelling requirement to include disclosure of intentionally added substances present in menstrual products.⁴⁹

Box C: Provision on menstrual product ingredient disclosure requirements in the state of New York

“2. No later than eighteen months after this section shall have become a law, each package or box containing menstrual products sold in this state shall contain a plain and conspicuous printed list of all ingredients which shall be listed in order of predominance. Such list shall either be printed on the package or affixed thereto.”

Source: §399-AAAA, Menstrual Product Labeling, A.B. A164B, 2019

⁴⁶ Proposal for a new field activity, The International Organization for Standardization, [https://share.ansi.org/Shared%20Documents/News%20and%20Publications/Links%20Within%20Stories/ISO%20TSP%20302%20\(Menstrual%20products\).pdf](https://share.ansi.org/Shared%20Documents/News%20and%20Publications/Links%20Within%20Stories/ISO%20TSP%20302%20(Menstrual%20products).pdf)

⁴⁷ Technical Committees, ISO/TC 338, <https://www.iso.org/committee/8933440.html>

⁴⁸ Calling U.S. Stakeholders To Get Involved: New ISO Committee On Menstrual Products, https://www.ansi.org/news/standards-news/all-news/2022/02/2-28-22-calling-us-stakeholders-to-get-involved-new-iso-committee-on-menstrual-products#.YkC1P5rMJ_Q (Last visited Mar. 27, 2022)

⁴⁹ A.B. A164B, 2019-2020 Regular Sessions (2019), Available here: <https://www.nysenate.gov/legislation/bills/2019/A164>

2. Trade Liberalization initiatives

a) Decentralized Manufacturing

The rise of global value chains (GVCs) has increased knowledge and technology transfers, a key factor that should empower women to participate in the value chains that directly impact their well-being within the manufacturing industry. Multinational corporations with production sites in developing countries tend to employ women in low skill roles that deny them to opportunity to influence menstrual product consumption patterns.

b) Tariff Free trade in menstrual products

Despite Kenya not imposing VAT on sanitary pads and tampons, this is not the case for other menstrual products such as menstrual cups. However, these tariffs do not only affect access to products, but also women's participation in trade. High tariffs on materials used in menstrual product production lock women out of participating in the menstrual product market. Trade finance vehicles specially structured to support local production would support women seeking to compete in the market.

B. Classification of menstrual products in the WHO Model List of Essential Medicines and Model List of Essential Medicines for Children

The World Health Organization defines essential medicines as those that satisfy the priority health care needs of a population. The Expert Committee on Selection and Use of Essential Medicines updates the list every two years. Within the 22nd list issued in September 2021, Section

22 lists medicines for reproductive health and perinatal care as essential medicines.⁵⁰ Among these are, oral hormonal contraceptives, injectable hormonal contraceptives, intrauterine devices, barrier methods such as condoms and diaphragms, implantable contraceptives, and intravaginal contraceptives. The section also contains uterotonics, these are medicines used to induce contractions/labor and reduce postpartum bleeding, among them, mifepristone, and misoprostol, which are used for medical abortions.

Despite the breadth and specificity of the Essential Medicines List (EML) expanding over time, it fails to highlight the health risks that occur as a result of sub-standard/low access to safe menstrual products for women and girls as a specific and unique part of the general population. Because MHM isn't ordinarily defined as a public health issue, the bulk of policy defines menstruation as associated with pregnancy and a disorder.⁵¹ This is partly attributed to the fact that historically MHM has been perceived to be a 'personal issue' to be handled at the individual level.⁵² The WHO leaving out menstrual supplies in the EML further perpetrates these health gender biases. Some low- and middle-income countries have developed their own National Essential Medicines Lists in line with their disease and treatment priorities. The Ministry of Health in Kenya followed suit and came up with the Kenya Essential Medicines List (KEML).⁵³

When the Coronavirus Aid, Relief and Economic Securities (CARES) Act was signed in 2020, it listed menstrual products as eligible items to be covered by Health Savings Accounts (HSAs) and Flexible Spending Accounts (FSAs). The Act would cover menstrual products for

⁵⁰ World Health Organization Model List of Essential Medicines—22nd List, 2021, Geneva: World Health Organization; 2021 (WHO/MHP/HPS/EML/2021.02). <https://www.who.int/publications/i/item/WHO-MHP-HPS-EML-2021.02> (Last visited Apr 2, 2022)

⁵¹ Grosz, E., *Volatile Bodies: Toward a Corporeal Feminism*, BLOOMINGTON: INDIANA UNIVERSITY PRESS (1994)

⁵² Sommer et al., Comfortably, Safely, and Without Shame: Defining Menstrual Hygiene Management as a Public Health Issue, 105 *American Journal of Public Health* 1304 (July 2015)

⁵³ Kenya Essential Medicines List 2019, Ministry of Health, <https://www.health.go.ke/wp-content/uploads/2020/03/Kenya-Essential-Medicines-List-2019.pdf>

reimbursement from these two accounts. The Act essentially recognizes the purchase of menstrual care products such as tampons, pads, liners, cups, sponges and other similar products, as medical expenses⁵⁴.

C. Consumer Protection

Consumer protection involves assuring consumer to rights to information, education, safe products, protection of their economic interests, sustainable consumption, dispute resolution and non-discrimination.⁵⁵ The United Nations Guidelines for Consumer Protection (UNGCP) lay out the principles for setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress mechanisms.⁵⁶

1. Improving Access to Information: Borrowing a leaf from the proposed Menstrual Products Right to Know Act of 2019 in the US

The Menstrual Products Right to Know Act of 2019 sought to amend the Federal Food, Drug, and Cosmetic Act in the US to treat certain menstrual products as misbranded if their labelling omitted any ingredient or component of the product, and for other purposes.⁵⁷ Despite the bill not receiving votes in Congress, it reiterated the need for consumers to know what is contained in the menstrual products they use.

In Kenya, the Consumer Protection Act of 2012 provides guidance on consumer protection and prevents unfair trade practices in consumer transactions.⁵⁸

⁵⁴ *IRS Outlines Changes to Health Care Spending Available Under CARES Act*, IRS, <https://www.irs.gov/newsroom/irs-outlines-changes-to-health-care-spending-available-under-cares-act>

⁵⁵ UNCTAD, *Consumer Protection Can Contribute to a Gender-Equal World*, 8 Feb 2022

⁵⁶ UNCTAD, *United Nations Guidelines for Consumer Protection*

⁵⁷ H.R. 2268 (116th): *Menstrual Products Right To Know Act of 2019*
<https://www.govtrack.us/congress/bills/116/hr2268>

⁵⁸ *Laws of Kenya, The Consumer Protection Act*, Available here:
<http://www.parliament.go.ke/sites/default/files/2017-05/ConsumerProtectionActNo46of2012.pdf>

2. Instituting Menstrual Health Management legislation

In 2021, Ms. Meng introduced the Menstrual Equity for All Act in Congress. The bill seeks to increase the availability and affordability of menstrual products for persons with limited access, such as: students at elementary, secondary schools and institutions of higher education, incarcerated persons and detainees, homeless individuals, employees, coverage under Medicaid and provision of menstrual products in Federal buildings.⁵⁹

3. Investing in Menstrual Product Research & Development

From reusable tampon applicators,⁶⁰ diagnostic menstrual cups that predict women's health through menstrual effluent⁶¹ to reengineered tampons to fit women's needs,⁶² innovative advances within the menstrual product market are few and far between. Instead, major players in the industry have focused on profiting from period stigma by selling discretion. 'Quieter' pad wrappers, 'thinner' pads, 'scented' pads, very little thought and effort going into enhancing the safety of menstrual products.⁶³ However, the reality is that these innovative products are less likely to be available to menstruators in low- and middle-income countries (LMIC).

With more women embracing body positivity, a shift in market structure to promote dignity in menstrual product development is needed. Although there are multitudes of projects addressing the prohibitive prices of menstrual products and tackling their environmental biodegradability, product safety is still a key concern.⁶⁴

⁵⁹ Menstrual Equity for All Act of 2021, H.R.3614, 117th Cong. (2021-2022). Available at: <https://www.congress.gov/bill/117th-congress/house-bill/3614/text?r=7&s=1>

⁶⁰ WE ARE DAME, <https://wearedame.co/collections/reusable-applicator> (Last visited May 9, 2022)

⁶¹ LOONCUP, www.looncup.com (Last visited May 9, 2022)

⁶² SEQUEL, <https://www.trysequel.com> (Last visited May 9, 2022)

⁶³ Katie J.M. Baker, *Pretend You've Never Had a Period with Tampax's New 'Radiant' Line*, <https://jezebel.com/pretend-youve-never-had-a-period-with-tampaxs-new-radia-486238272>

⁶⁴ Bill & Melinda Gates Foundation, *Innovation in Material Science for a Transformative Menstrual Health and Hygiene Product (Round 25)*, Global Grand Challenges (2020),

4. Post-market surveillance for manufacturers

Post Market Surveillance (PMS) is a culmination of processes that monitor the performance of a medical device. These processes generate information on the use of the device to aid in the identification of usage problems. PMS helps manufacturers characterize product safety issues and the requirements of PMS are directly proportional to the risk associated with the device based on its intended use.⁶⁵

The type of menstrual material used has been shown to be indicative of the menstrual needs of a population. Studies conducted in 11 countries across Africa and Asia showed that the prevalence of menstrual pad use is often misrepresented and misinterpreted as women's menstrual needs being met. When in fact, the use of menstrual pads is not an accurate indicator of access to sufficient MHM material.⁶⁶ Financially disadvantaged, women living in rural areas and those with lower literacy levels are likely to be assumed to have their menstrual needs met if menstrual pad usage is used as an indicator of efficient MHM, thus having their actual MHM needs overlooked.⁶⁷

D. Nuanced Water, Sanitation and Hygiene interventions

Evaluating the status and reach of MHM programming within a humanitarian emergency helps in identifying areas of MHM program improvement in future interventions. In determining whether WASH services are already underway, then we can respond with the right tools. The

<https://gcgh.grandchallenges.org/challenge/innovations-materials-science-transformative-menstrual-health-and-hygiene-product-round>

⁶⁵ Ibim Tariah, Rebecca Pine, *Effective Post-Market Surveillance: Understanding and Conducting Vigilance and Post-Market Clinical Follow-up*, BSI GROUP, <https://www.bsigroup.com/meddev/LocalFiles/en-US/Whitepapers/WP-Post-market-surveillance.pdf>

⁶⁶ Annie D. Smith, Alfred Muli, Kellogg J. Schwab, Julie Hennegan, *National Monitoring for Menstrual Health and Hygiene: Is the Type of Menstrual Material Used Indicative of Needs Across 10 Countries?*, 17 INT J. ENVIRON. RES. PUBLIC HEALTH 2020

⁶⁷ Ibid.

Menstrual Hygiene Management Rapid Assessment Tool (M-RAT) developed by the International Rescue Committee and Columbia University.⁶⁸

Further, the incorporation of WASH in School (WiS) programmes that take into account menstrual product supply, access to MHM information and provision of infrastructural facilities is needed. With different stakeholders, such as government, NGOs, donors, the private sector and communities finding ways to address the MHM issues, these interventions often create gaps that leave many underserved.

E. Capacity building in Sex Education Fora

Dominant discourses of menstruation portray menstruation as a hygiene crisis, an unpleasant experience and shameful secret that needs to remain hidden. The teaching of MHM relies heavily on material produced by menstrual product brands. Menstrual product manufacturers use advertisements to exploit the symptoms and realities of MHM, in a way marketing their products to be the ideal way of meeting societal expectations of what it means for women to appear ‘acceptable’ and ‘presentable’ when menstruating.⁶⁹ It is through these advertisements that girls and young women have their first interaction with menstrual education. These advertisements impart knowledge, albeit misleading, they prompt discourse on cleanliness and secrecy whilst expanding their consumer base.

Our understanding of how the female body is perceived and MHM is factored into campaigns for menstrual products, stereotypes furthered in educational settings, conversations within our circles, which then informs our truths. P&G has long provided MHM trainings in Kenya

⁶⁸ Clatworthy, D., Schmitt, M.L., Gruer, C., Sommer, M, *Monitoring Menstrual Hygiene Management Programming in Emergencies: A Rapid Assessment Tool (M-RAT) (First edit)*. N.Y.: INT’L RESC. COMM. COLUM. UNIV., (2020).

⁶⁹ S. Agnew, S. Sandretto, *A Case For Critical Literacy Analysis of the Advertising Texts of Menstruation: Responding to Missed Opportunities*, 28 GENDER AND EDUCATION 510-526, <http://dx.doi.org/10.1080/09540253.2015.1114073>.

in partnership with the Ministry of Health, dubbed the “Always Keeping Girls in School” program⁷⁰. These menarche guidance lessons are paired up with introduction to their sanitary products. Because alternative information was hard to come by, the P&G trainings and MHM pamphlets were for the most part the reference material.

Educators can leverage their learners’ interests sparked by advertisements in magazines or social media, to recreate dominant discourse. This can be done through exploring why text, video or images portraying menstruation are constructed in a certain way, how this construction plays into stereotypes, and consequently the possibility of reconstructing the narrative.⁷¹ In encouraging young women and girls to critique and have multiple perspectives, we can empower women to resist discourses they deem unacceptable, which is exactly what the #MyAlwaysExperience was, women repositioning themselves for change.

⁷⁰ Proctor & Gamble, Always Keeping Girls in School, Available at: <https://always.com/en-us/about-us/keeping-girls-in-school>.

⁷¹ Ibid.