



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

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**SECOND-RATE CONSUMERS: PROMOTING ACCESS TO SAFE MENSTRUAL
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REFORM

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Topic sentence: To protect the health of Kenyan women, the Government must ensure access to safe menstrual health products in its trade agreements with its partners and manufacturers.

*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

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).

presented in overly technical language, leaving many in the dark on matters directly affecting their wellbeing.

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

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/>.

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 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

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).

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

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

B. History of Menstrual Hygiene management in Kenya

1. Unhygienic menstrual products

The definition of “hygienic” alludes to cleanliness and unlikely to cause disease.¹³ Going by this definition, it is presumed that all menstrual products should be hygienic and safe for use. Studies have related the safety of MHM practices to directly proportional to the prevalence of gynecological disease.¹⁴ The two ways of ascertaining a product's hygiene and safety is through: (a) user trials and (b) laboratory tests.

According to the Edana Guidelines, menstrual products hygiene indicators include tests related to performance such as absorbency, adhesion, wetback, etc., and tests unrelated to product

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

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 Definition of hygienic, Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press

¹⁴ Torondel, B., Sinha, S., Mohanty, J.R. et al., *Association between unhygienic menstrual management practices and prevalence of lower reproductive tract infections: a hospital-based cross-sectional study in Odisha, India*, 18 BMC INFECT DIS, 473 (2018). <https://doi.org/10.1186/s12879-018-3384-2> .

performance such as legislation and testing.¹⁵ In several studies conducted, menstrual product companies allege to have conducted extensive testing on their products to ascertain the VOC composition, which was thereafter declared to be of low health risk to human health.¹⁶ However, this does not mean use of these products does not have health impacts on users.

One study found that menstrual pads had the highest hazard ratios (HRs) due to the presence of chemical compounds that cause irritation to skin, eyes, respiratory tract and the central nervous system. While cancer risks (CRs) were higher in feminine hygiene washes, sprays and powders due to inhalation of harmful toxins found in chemical compounds used to manufacture these products.¹⁷

2. Social exclusion

In many cultures around the world, the very normal biological function of menstruation is perceived as unclean. Similar to the purchase of sex toys & condoms, menstrual products are perceived as taboo, which then transforms their consumption into something requiring demanding of negotiation and adjustment of boundaries.¹⁸

In Kenya¹⁹, women and girls from the Luo community in Nyanza are not allowed to sleep in their parent's home and are discontinued from carrying out certain household tasks such as doing the dishes to promote "cleanliness" in the home. While in Northern Kenya, an area inhabited by pastoralist communities, menstruating women are not allowed near livestock, forbidden from

¹⁵ EDANA GUIDELINES FOR THE TESTING OF FEMININE HYGIENE PRODUCTS, AT 11 (2018) (EBOOK), <https://www.edana.org/docs/default-source/international-standards/femcare-testing-guidelines-final.pdf>

¹⁶ Nan Lin et al., *Volatile organic compounds in feminine hygiene products sold in the US market: A survey of products and health risks*, 44 ENV'T INT'L, 2020, <https://www.sciencedirect.com/science/article/pii/S0160412020303494> .

¹⁷ Id.

¹⁸ Meenakshi N., *Taboo in Consumption: Social structure, gender and sustainable menstrual products*, 44 INTERNATIONAL JOURNAL OF CONSUMER STUDIES 243, 257 (2020).

¹⁹ S. McMahon et al., *The Girl with Her Period Is The One To Hang Her Head. Reflections On Menstrual Management Among Schoolgirls In Rural Kenya*, 11 BIOMED. CTR. 1, 10 (2011).

eating meat and drinking milk and going against these rules is believed to bring calamity such as infertility and death of livestock to the community.²⁰

Discriminatory practices such as menstrual seclusion, where women and girls are forced to isolate from their communities and are restricted from participating in everyday life, only precludes them for sexual abuse and exploitation²¹

3. Taboo and stigma

Women's menstrual experiences are not homogenous. Women and girls have been socialized to correlate their menstrual experiences with their sexuality. Reference to women in relation to their reproductive functionality: premenstrual, menstruating, pregnant, in labor, lactating, perimenopausal and menopausal, influences the social and self-identity of women.²²

The objectification theory offers a framework to understand women's lived experiences living within a culture that sexually objectifies the female anatomy. Studies have shown that the more women internalize a sexually objectifying standard on their bodies whereby they engage in chronic surveillance of their appearance and experience body shame, the more they appear to hold negative attitudes towards their bodies' menstrual functions.²³ This also leads to menstruators internalizing an objectifying observer's perspective on their own bodies as a way of controlling their treatment in society; an effect of self-objectification.

Women living with HIV face double the stigma when it comes to menstrual health management. First comes the difficulties accessing safe and affordable products, then comes the

²⁰ VPRO Metropolis, *Menstruation in Kenya*, YOUTUBE (March 5, 2022).

²¹ Shruti Ganapatye, *Beed Women Demand Justice for Lost Wombs*, MUMBAI MIRROR (March 27, 2022).

²² Joan C. Chrisler, 'Teaching Taboo Topics: Menstruation, Menopause, and the Psychology of Women', 37 PSYCHOL. OF WOMEN Q. 128, 132 (2013). <https://journals.sagepub.com/doi/10.1177/0361684312471326>.

²³ Tomi-Ann Roberts, *Female Trouble: The Menstrual Self-Evaluation Scale and Women's Self-Objectification*, 28 PSYCHOL. OF WOMEN Q. 22, 26 (2004). https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1471-6402.2004.00119.x?casa_token=JdA9Fe1vursAAAAA:tMdb00MT9qxc5WcjoIR6uHw1FgBBIAGd3cVRwyoUzp_kFh15Pt1e03reSyrzCWoogmGDrPCHZna0sHw.

stigma that comes with a HIV diagnosis. Misconceptions regarding transmission see women living HIV locked out from receiving inclusive sexual and reproductive health information tailored to their specific personal and health needs.

Knowledge gaps on the workings of the menstruation process encourage stigma against women and girls, sometimes leading to tragic outcomes. In 2019, a 14-year-old schoolgirl took her life after being bullied by a teacher in school for soiling her school uniform when menstruating.²⁴

4. “Sex for Pads” within low-income communities

Despite Kenya being a visionary and being the first country to repeal Value Added Tax on sanitary pads and tampons, the price of menstrual products remains a prohibitive factor in ensuring improved access.²⁵ A packet of disposable sanitary pads costs anywhere between \$0.50 and \$4. Approximately 18 million Kenyans live below the international poverty line and survive on \$1.90 a day, 65% being women and girls unable to afford to sanitary pads, the perfect recipe for period poverty.^{26 27}

Cycles of poverty erode women’s safety nets within their communities. Period poverty goes beyond the economics of being unable to afford menstrual products, it permeates into women’s inherent dignity and ability to participate in day-to-day life. A study conducted in Western Kenya shows that unpartnered, uneducated women living in poverty reliant on their

²⁴ AFRICA HEALTH ORGANIZATION, GIRLS AND PERIOD SHAMING <https://aho.org/health-topics/girls-and-period-shaming/>.

²⁵ Vicky Hallett, *What Kenya can Teach the U.S about Menstrual Pads*, NPR, May 10, 2016. <https://www.npr.org/sections/goatsandsoda/2016/05/10/476741805/what-kenya-can-teach-the-u-s-about-menstrual-pads>.

²⁶ World Bank, *Poverty & Equity Brief: Sub-Saharan Africa, Kenya* (April 2020) https://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_KEN.pdf.

²⁷ CAROLINE QUIJADA, THE STRENGTHENING HEALTH OUTCOMES THROUGH THE PRIVATE SECTOR PROJECT (SHOPS), AFRI-CAN TRUST: EMPOWERING WOMEN AND GIRLS THROUGH AFFORDABLE SANITARY PADS (FEBRUARY 2015) <https://www.hanshep.org/member-area/programmes/hanshep-health-enterprise-fund/afri-can-trust-grantee-profile.pdf>.

families for sustenance were more likely to engage in transactional sex for pads due to their financial vulnerability, while 10% of girls below the age of 15 were likely to engage in sex to obtain the money to buy pads.²⁸

5. Public Participation of women in policymaking in Kenya

Public participation involves giving communities that may be affected by policy, the chance to participate and make their voices heard in policy making processes, either through formal or informal channels.²⁹ Articles 19 and 25 of the International Covenant on Civil and Political Rights (ICCPR) assert freedom of expression and the right to participate in public affairs.³⁰ Further, the United Nations Human Rights Committee's General Comment No. 25 advocates for States to take measures ensuring citizens can exercise their right to public participation.³¹

The use of Twitter by Kenyan women, to discuss civic and political issues has arisen out of the consistent failure by the government in ensuring gender mainstreaming in traditional public participation fora. Community organizing through social media has helped women identify human rights violations and advocate for themselves and provide a platform for multiple generations of activists who can project the voices of women unable to directly participate due to the digital divide.

²⁸ Phillips-Howard, Penelope A et al., "Menstrual Needs and Associations with Sexual and Reproductive Risks in Rural Kenyan Females: A Cross-Sectional Behavioral Survey Linked with HIV Prevalence." , 24 J. WOMEN'S HEALTH (2015). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4624246/>.

²⁹ Lee TP., Sun TW.M., *Public Participation in Global Encyclopedia of Public Administration, Public Policy and Governance*, SPRINGER CHAM.

³⁰ A Commentary on the International Covenant on Civil and Political Rights, The UN Human Rights Committee's Monitoring of ICCPR Rights 692, 728 (2020).

³¹ Office of the U.N. High Commissioner for Human Rights (OHCHR), International Covenant on Civil and Political Rights, General Comment No.25, adopted July 12, 1996, para 1.

C. Current State of Menstrual Health Management in Kenya

1. Current interventions improving Menstrual Health Management in Kenya

a) Promotion of Menstrual Health Management Education

Educational apps such as *Hedhi Help* (loosely translated to mean Menstrual Help in Swahili), target girls in rural areas, provide information on the menstrual cycle and puberty in a bid to dispel the shame associated with menses.³² The app provides a period tracker, discussion forum and a MHM education modules using a storybook approach to educate on the process of menstruation and best practices on hygiene. Due to the app's ability to function without an internet connection, this MHM solution bridges the digital divide to reach a wider audience and empower more girls in MHM.³³

Further, organizations like Femme International use a multi-pronged approach to improve MHM in schools and communities. In their *Twaweza* Program, MHM education and product distribution go hand-in-hand. Communities are involved in conversations on the harmful nature of menstrual taboos, women and girls are empowered to embrace bodily autonomy and Femme kits containing reusable menstrual cups or pads and feminine hygiene products are distributed.³⁴

b) Distribution of Menstrual products to low-income communities

As part of the Government of Kenya's COVID-19 social protection response, the Ministry of Youth and Gender Affairs committed to supplying dignity packs that include sanitary towels to

³² A. Bebla et al., "*HedhiHelp – A Health Education App for Girls in Rural Kenya*," IEEE GLOBAL HUMANITARIAN TECHNOLOGY CONFERENCE (GHTC), 1, 10 (2018), <https://ieeexplore.ieee.org/abstract/document/8601643/references#references> .

³³ Sarah Pagnani, et al., *Hedhi Help*, Computer Science and Engineering, Santa Clara University, 2020 [Online] https://scholarcommons.scu.edu/cseng_senior/108/ .

³⁴ FEMME INTERNATIONAL, <https://femmeinternational.org/our-research/twaweza-program/>.

women living in slums.³⁵ To fill access gaps, social enterprises funded by innovation funds create solutions catered to LMICs. The Health Enterprise Fund funded by USAID and DFID backed Afri-Can Trust, a non-profit distributing reusable sanitary pads made from cloth within school in Kenya.³⁶

c) Development of the Kenya Menstrual Health Management Policy of 2019-2030

The Kenya Menstrual Health Management policy is the first step in the formation of cross-sectoral alliances to combat menstrual inequity. The policy focuses on three main issue areas: access to information, access to menstrual products and safe menstrual waste management. Policy objective 3 specifically mentions plans on facilitating the development of standards applicable to menstrual health products.³⁷

2. Factors undermining Menstrual Health Management in Kenya

a) Price

In 2004, Kenya repealed its Value Added Tax on tampons and sanitary pads. Nine years later, the East African Legislative Assembly passed a resolution requiring partner states to improve access to and the affordability of sanitary pads through the abolishment of the taxes on sanitary pads.³⁸ However, despite the expectation that the removal of taxes on these products would affect the price of sanitary pads, this did not occur. For a non-competitive menstrual product market like

³⁵ The Data Futures Platform, *COVID-19 Global Gender Response Tracker*, THE UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP) <https://data.undp.org/gendertracker/>

³⁶ USAID, A SIMPLE HEALTH INNOVATION HELPS TO KEEP KENYAN GIRLS IN SCHOOL, <https://www.usaid.gov/global-health/health-areas/family-planning/news-and-updates/simple-health-innovation-helps-keep-kenyan>

³⁷ MINISTRY OF HEALTH, REPUBLIC OF KENYA, MENSTRUAL HYGIENE MANAGEMENT POLICY, <https://www.health.go.ke/wp-content/uploads/2020/05/MHM-Policy-11-May-2020.pdf>

³⁸ East African Legislative Assembly, Motion for a Resolution of the Assembly to Provide Sanitary Facilities and Protection for Girls in the East African Community Region, (2013), <https://www.eala.org/uploads/protection%20for%20girls0001.pdf>

Kenya, the product manufacturers dominating the market such as Always™, have no incentive to drop their prices. The government is unable to intervene in price regulation through capping because sanitary products are not public goods. This dilemma has prompted countries like Tanzania to contemplate reinstated VAT on sanitary products.³⁹

b) Inadequate Water and Sanitation Facilities

Kenya is water scarce; meaning its demand exceeds supply and currently available water resources exceed sustainable limits.⁴⁰ As climate change affects the volumes of water bodies and levels of rainfall annually, scarcity manifests as physical shortages or inaccessibility due to irregular or non-existent supply attributable to lack of adequate infrastructure.⁴¹ Nairobi alone is home to over 200 informal settlements and 4.5 million people; water shutdowns are not uncommon.

Informal settlements go unserved by piped water and sanitation service due to their presence in unplanned areas or by nature of them arising out of grabbed government or private land.⁴² Twenty-eight percent of informal settlement households have access to piped water, in comparison to 78% of Nairobi residents. While sixty-eight percent of settlement inhabitants rely on shared public taps and public toilets, which are often, located far from their homes.⁴³ Only 24% of residents in Nairobi's informal settlements have access to a toilet at the household level. These

³⁹ The Citizen, *Tanzania Budget Imposes New Taxes on Wigs, Sanitary Towels*, THE EAST AFRICAN, June 14, 2019, Available at: <https://www.theeastafrican.co.ke/business/Tanzania-Budget-taxes-on-wigs-sanitary-towels/2560-5156976-7ly1dsz/index.html>.

⁴⁰ Faith Mulwa et al., *Water Scarcity in Kenya: Current Status, Challenges and Future Solutions*, 8 OPEN ACCESS LIBR. J. (2021). Available at: https://www.researchgate.net/publication/348593680_Water_Scarcity_in_Kenya_Current_Status_Challenges_and_Future_Solutions#pdf.

⁴¹ UN WATER, <https://www.unwater.org/water-facts/scarcity/>

⁴² PATRICK NDUATI, LILIAN OTIEGO, CHARLOTTE NDAKORERWA, *INNOVATION IN SCALING UP ACCESS TO WATER AND SANITATION SERVICES IN KENYA: BRIEFING NOTE TO SUPPORT INNOVATION IN CALING UP ACCESS OF WATER AND SANITATION SERVICES TO URBAN LOW-INCOME AREAS*, (JUNE 2015). AVAILABLE AT: <https://www.wsp.org/sites/wsp/files/publications/WSP-Innovation-in-Scaling-up-Water-Sanitation-Services-Kenya.pdf>.

⁴³ AMNESTY INT'L, *WOMEN'S LACK OF SAFETY AND ACCESS TO ESSENTIAL SERVICES, INSECURITY AND INDIGNITY: WOMEN'S EXPERIENCES IN THE SLUMS OF NAIROBI, KENYA* (2010).

toilets are also not free to access and require payment, sometimes amounting to 3 to 7% of a family's income and have specified opening and closing times. The scarcity of essential services only works to further exacerbate women's vulnerability to violence. Women living in informal settlements travel long distances to access toilets and other sanitation facilities.

Further, water supply is provided by informal providers who charge a premium many households struggle to afford.⁴⁴ When clean water sources become hard to come by, women are disproportionately affected by the water stress that ensues. Sustainable Development Goal 6 on clean water and Sanitation goes hand in hand with SDG 5: Gender equality. Access to WASH services influences the risk of adverse reproductive health outcomes.⁴⁵

Conducive WASH conditions meeting menstrual hygiene management standards include the presence of privacy, places to wash and/or dry reusable sanitary materials, proper menstrual product disposal facilities and access to flowing clean water and soap to wash up. The lack of sufficient WASH facilities in schools was shown to have a direct correlation to school attendance for girls.⁴⁶

c) Covid-19 pandemic

When the Covid-19 pandemic hit, school closures interrupted a primary source of menstrual products for girls.⁴⁷ The cessation of movement as one of the containment measures during the pandemic also affected manufacturing businesses, only allowing essential businesses to operate unrestricted. This led to supply chain disruptions, which significantly impeded access to

⁴⁴ Sarpong B., Schwatz K. & Margreet Z., *From Rowdy Cartels to Organized Ones? The Transfer of Power in Urban Water Supply in Kenya*, 31 THE EUROPEAN JOURNAL OF DEVELOPMENT RESEARCH 1246 (2019).

⁴⁵ Farwa Amer, *Introducing Women & Water Security: Women's role in shaping a water-secure future*, THE STIMSON CENTER. <https://www.stimson.org/2021/introducing-women-water-security/>.

⁴⁶ Kelly T. Alexander et al., *Water, Sanitation and Hygiene conditions in Kenyan Rural Schools: Are schools meeting the needs of menstruating girls?*, 6 WATER 1453, 1466 (2014).

⁴⁷ Period Poverty in a Pandemic: Harnessing Law to Achieve Menstrual Equity, Washington University Law Review 1580.

menstrual products and led to shortages. As a response to the shortages, retailers hiked the prices of items further plunging menstruators into period poverty.

The circumstances in which women and girls now receive information on reproductive health, more specifically menstrual health, has completely shifted. With the Covid-19 pandemic, comes the responsibility to factor in a new set of challenges.⁴⁸ These include even more limited access to menstrual products, restriction of movement and even less dissemination of menstrual education. Covid-19 emergency response interventions should be tailored to adapt to the menstrual management needs of women and girls.⁴⁹

d) Inclusivity

Women living with disabilities, who make up a fifth of the world's population, are faced with compounded inequalities, such as discrimination, and face barriers accessing assistive devices to allow them to participate in day-to-day life activities when menstruating.⁵⁰ Visually impaired menstruators are unable to maintain optimum hygiene levels during menstruation, wheelchair accessibility to washrooms presents a challenge when trying to change menstrual products and the design of menstrual products does not accommodate the physical limitations of persons living with disabilities who have to spend long hours sitting or encounter difficulties ensuring their menstrual pads stay in place.⁵¹

⁴⁸ Rachel Fisher Ingraham, Bonita B. Sharma, and Karen Joe, *Menstrual Health During COVID-19: How Water, Sanitation, and Hygiene Can Improve Equity*, HARVARD MEDICAL SCHOOL CENTER FOR PRIMARY CARE, <http://info.primarycare.hms.harvard.edu/review/menstrual-health-hygiene>.

⁴⁹ What Covid-19 means for menstrual health and hygiene (illustration), in *Periods Don't Stop for Pandemics*, WASH UNITED (28 May, 2020), <https://menstrualhygieneday.org/wp-content/uploads/2020/05/mhday2020-covid19-and-periods-logo.pdf>.

⁵⁰ U.N General Assembly, Seventy-second session: Item 73(b) of the provisional agenda- Sexual and reproductive health and rights of girls and young women with disabilities (Jul. 14, 2017), <https://www.aucd.org/docs/ncbddd/webinar/AUCD%20Presentation%20%206-16.pdf>.

⁵¹ Acheampong Enoch, Alberta Nadutey, Barbara Fosua Afful, Reindolf Anokye, *Menstrual Hygiene Management: Challenges and Coping Strategies for Adolescents with Disabilities in the Kumasi Metro of Ghana*, DISABILITY, CBR & INCLUSIVE DEV. 87, 88 (2020). https://www.researchgate.net/publication/345724056_Menstrual_Hygiene_Management_Challenges_and_Coping_Strategies_for_Adolescents_with_Disabilities_in_the_Kumasi_Metro_of_Ghana.

A common misleading stereotype is that women and girls with disabilities are asexual, thus initiatives providing sexual and reproductive information entirely disregard them. PWDs are perceived as being unable of managing their menses thus resulting in coercive interventions by caregivers, medical staff and the court.⁵² Menstrual management information can be tailored to the severity of the disability and the type of support being provided by care givers.⁵³ Organizations like This-Ability Trust work to promote access to health information for menstruators living with disabilities in Kenya.⁵⁴

Further, the United Nations Convention on the Rights of Persons with Disabilities, to which Kenya is a signatory, states that state parties are to ensure persons with disabilities have access to information in accessible formats and technologies cognizant of the varying kinds of disabilities.

e) Inadequate MHM within humanitarian assistance

Kenya hosts over half a million refugees and asylum seekers from Somalia, South Sudan, the DRC and Ethiopia at its Dadaab and Kakuma refugee camps, with 76% being women and children.⁵⁵ Due to the sheer capacity of these camps and cost implications, pit latrines are the most common form of sanitation facilities available.⁵⁶ Female refugees are at a greater risk of contracting infections from sharing hygiene facilities with hundreds of people where access to sanitary pads, water and soap to clean themselves and wash reusable menstrual pads and privacy

⁵² Prianka Nair, Menstruation: An Ableist Narrative, 41 Columbia Journal of Gender and Law, 183 (

⁵³ Tracy, Jane et al., "Menstrual issues for women with intellectual disability." 39 AUSTRALIAN PRESCRIBER 54, 57 (2016) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4917628/>.

⁵⁴ Friends of UNFPA, *Empowering Kenyan Women and girls with disabilities in managing menstrual health*, <https://www.friendsofunfpa.org/empowering-kenyan-women-and-girls-with-disabilities-in-managing-menstrual-health/>.

⁵⁵ ACAPS, Kenya Refugee Situation (Feb. 26, 2022, 2:34PM), <https://www.acaps.org/country/kenya/crisis/refugee-situation>.

⁵⁶ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM (APRIL 2006).

is very limited, if available at all.⁵⁷ In addition, the humanitarian expenditures on Menstrual Health Management is highly unpredictable and dependent on a number of factors, thus making consistent availability of menstrual products unpredictable.

f) Pushback against Sex education

Stigma is also transmitted through educational materials or lack thereof and through silence and communication taboos.⁵⁸ Targeted timely and appropriate information on the biological and psychosocial aspects of menstruation is needed to dispel tensions that underpin menstrual health management. Menstruation is shrouded in silence and secrecy, such that young women needing information on how to manage menstruation in a hygienic manner are lacking. The women in close proximity to these young girls lack the physiological knowledge to impart relevant information. This is because they have very little priori information themselves and can only pass on what they know.

Information programs in schools are few and far between. In the event they are available, they are masked in dangerous misogynistic rhetoric that further perpetuate shame. Religious leaders and other organizations pushed back against Comprehensive Sexual Education being taught in Kenyan schools, claiming that it promoted promiscuity and high-risk sexual behaviors.⁵⁹ In a study conducted by UNESCO and UNFPA, Kenya's sexual education curriculum was found to be prescriptive and used fear tactics. It also emphasized on abstinence, lacked important basic

⁵⁷ Calderon-Villarreal A., Schwitzer R. & Kayser G., *Social and Geographic Inequalities In Water, Sanitation And Hygiene Access In 21 Refugee Camps And Settlements In Bangladesh, Kenya, Uganda, South Sudan And Zimbabwe*, 21 INTERNATIONAL JOURNAL FOR EQUITY IN HEALTH 1,18 (2022).

⁵⁸ Ingrid Johnston-Robledo, Margaret L. Stubbs, *Positioning Periods: Menstruation in Social Context: An introduction to a Special Issue*, 68 SEX ROLES 1, 2 (2013).

⁵⁹ Verah Okeyo, 'Dangerous Proposal': Campaigners in Kenya Condemn Sex Education Plan, THE GUARDIAN, Feb 2018, Available at: <https://www.theguardian.com/global-development/2018/feb/05/dangerous-proposal-campaigners-kenya-condemn-sex-education-plan>.

information on sexual health, had a weak focus on gender and human rights topics and instead focused on biology and avoided SRHR topics.⁶⁰

Social media has allowed the public to bring discourse on menstruation body politics to a wider audience. The personal is political.⁶¹ The push for acceptance and understanding through consumption of campaigns and personalization of politics, such as the free bleeding activism, photography such as Rupi Kaur's challenging of Instagram's community guidelines informed by patriarchal structures and Kenya's #MyAlwaysExperience online protest prompt us to discuss the consequences of menstrual stigma within highly personalized spaces and how we document our experiences of political issues.^{62 63 64}

D. Impact of unsafe menstrual products on the health of women and girls

1. Infections and reproductive diseases

The adoption of the Sustainable Development Goals in 2015 built upon the Millennium Development goals by focusing more on inequalities. Universal access to sexual and reproductive health falls within the purview of the 2030 Agenda and is further emphasized in target 3.1 within Sustainable Development Goal 3 focusing on good health and wellbeing. In 2019, women made up approximately 7% of the prison population in Kenya.⁶⁵ Despite Kenya having several pieces of legislation speaking to the rights of persons deprived of liberty, they still fail to sufficiently protect the right to health for incarcerated persons, more so, women.

⁶⁰ ESTELLE M. SIDZE ET AL., FROM PAPER TO PRACTICE: SEXUALITY EDUCATION POLICIES AND THEIR IMPLEMENTATION IN KENYA (2017).

⁶¹ Carol Hanisch, Notes from The Second Year: Women's Liberation.

⁶² Mallika Rao, *About That Period That Broke The Internet*, THE HUFFINGTON POST (Dec 6, 2017).

⁶³ Madame Gandhi, <https://www.madamegandhi.com>.

⁶⁴ Jacqueline Gaybor, *Everyday (online) Body Politics of Menstruation*, FEMINIST MEDIA STUDIES (2020) , DOI: 10.1080/14680777.2020.1847157.

⁶⁵ WORLD PRISON BRIEF DATA, <https://www.prisonstudies.org/country/kenya>.

The Prison Act,⁶⁶ the Borstal Institutions Act and the Persons Deprived of Liberty Act⁶⁷ all provide the framework for which prisons and prisoners are governed and yet none categorically cater to the provision of MHM supplies. Many prisoners rely on visits from relatives so as to have access to an array of items, including menstrual products and clean underwear. Women who have no one to bring them these products resort to using makeshift pads from mattress cuttings, rags, manipulating pads to form makeshift tampons and other unsafe practices. Civil prisoners, or those awaiting convictions, are allowed to maintain themselves and purchase necessities which may not be shared with other convicted persons.⁶⁸

2. *Compromised Psychosocial wellbeing*

Menstrual suppression, also known as amenorrhea, occurs when a menstruator uses contraceptives such as the pill, implants, IUDs and injectables for the sole purpose of pausing menstrual bleeding.⁶⁹ Unmet menstrual health needs in the form of the availability space used by women to manage their menstruation and access to menstrual products, greatly influences menstrual suppression practices.⁷⁰ In a study conducted in Burkina Faso and Uganda, amenorrhea acceptability was higher in women in the lowest wealth quantile who often undergo the most hardship in managing menstruation.⁷¹

⁶⁶ Cap 90, Laws of Kenya

⁶⁷ Act No.23 of 2014

⁶⁸ Article 35(1) and (2), The Prisons' Act

⁶⁹ Hubacher D et al., *Menstrual Pattern Changes From Levonorgestrel Subdermal Implants and DMPA: Systematic review and Evidence Based Comparisons*, 80 CONTRACEPTION 113, 118 (2002).

⁷⁰ Amelia C.L. Mackenzie, Siân L. Curtis et al., *Women's Perspectives on Contraceptive-Induced Amenorrhea in Burkina Faso and Uganda*, 46 INTERNATIONAL PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 247, 262 (2020).

⁷¹ *Ibid*, 250

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.⁷² 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.⁷³

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 in the making of household decisions on the spending of their personal earned income, this puts them at the mercy of patriarchal norms.⁷⁴

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

⁷² 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>

⁷³ 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.

⁷⁴ Esteban Ortiz-Ospina, Max Roser, *Economic Inequality by Gender*, OUR WORLD IN DATA, <https://ourworldindata.org/economic-inequality-by-gender>

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 trade⁷⁵. 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 in the development of international standards.⁷⁶ 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

⁷⁵ WORLD TRADE ORGANIZATION, TECHNICAL BARRIERS TO TRADE, https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

⁷⁶ 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

on public health and environmental sustainability.⁷⁷ 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.⁷⁸

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

In Kenya, the Kenya Bureau of Standards regulates menstrual hygiene products⁷⁹. However, despite there being specific regulatory standards for reusable pads⁸⁰, 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.

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

⁷⁷ Period Products: What Are The Options?, INTERNATIONAL PLANNED PARENTHOOD FEDERATION, <https://www.ippf.org/blogs/period-products-what-are-options>

⁷⁸ TMR, *Anti-microbial and Stain-free Design of Period Panties (Menstrual Underwear) to Inundate Market Growth*, PR NEWSWIRE, 18 June, 2019.

⁷⁹ DKS 2881- Disposable Maternity Pads- Specification, https://members.wto.org/crnattachments/2021/TBT/KEN/21_0985_00_e.pdf

⁸⁰ 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

follow in their footsteps to run similar initiatives.⁸¹ 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 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 submission⁸² 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

⁸¹ The Cup, <https://www.thecup.org/>

⁸² 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>.

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.⁸³

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 Drug⁸⁴ 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 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.⁸⁵

⁸³UNITED 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>.

⁸⁴MINISTRY OF FOOD AND DRUG SAFETY, REPUBLIC OF KOREA https://www.mfds.go.kr/eng/wpge/m_25/de0110151001.do.

⁸⁵ 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>.

**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 safety⁸⁶, Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulations⁸⁷ and regulations regarding ecolabels⁸⁸ 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.⁸⁹

⁸⁶ Directive 2001/95/EC

⁸⁷ Regulation EEC No 1907/2006

⁸⁸ Regulation EC No 66/2010

⁸⁹ 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 Act⁹⁰ 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

⁹⁰ 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 towels⁹¹ in 2019 and disposable sanitary towels in 2008.⁹²

⁹¹ 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

⁹² 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.

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).⁹³

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.⁹⁴ The Ministry of Industrialization, Trade and Enterprise Development is the principal agency mandated to formulate and implement trade policy.⁹⁵

⁹³ African Organisation for Standardisation, <https://archive.unescwa.org/african-organisation-standardisation>

⁹⁴ 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/>

⁹⁵ 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.⁹⁶ 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.⁹⁷

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.⁹⁸

⁹⁶ 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>

⁹⁷ AB Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (adopted April 24, 2012)

⁹⁸ 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.⁹⁹ 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.¹⁰⁰

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.¹⁰¹

⁹⁹ 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)

¹⁰⁰ AfCFTA SECRETARIAT, THE FUTURES REPORT: MAKING THE AfCFTA WORK, 2020. Available at: https://au.int/sites/default/files/documents/39689-doc-ss_afcftafuturereport.pdf

¹⁰¹ 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.¹⁰²

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.¹⁰³

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.¹⁰⁴ In 2021,

¹⁰² Ministry of Health, Menstrual Hygiene Management Policy

¹⁰³ 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>

¹⁰⁴ 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>

the ISO Committee on Consumer Policy (ISO COPOLCO), submitted a proposal¹⁰⁵ 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,¹⁰⁶ with the American National Standards Institute (ANSI) now recruiting U.S. Administrating Organizations and U.S. Technical Advisory Group members to participate.¹⁰⁷

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.¹⁰⁸

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

¹⁰⁵ 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)

¹⁰⁶ Technical Committees, ISO/TC 338, <https://www.iso.org/committee/8933440.html>

¹⁰⁷ 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)

¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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).¹¹²

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

¹⁰⁹ 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)

¹¹⁰ Grosz, E., *Volatile Bodies: Toward a Corporeal Feminism*, BLOOMINGTON: INDIANA UNIVERSITY PRESS (1994)
¹¹¹ 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)

¹¹² 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 expenses¹¹³.

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.¹¹⁴ 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.¹¹⁵

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.¹¹⁶ 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.¹¹⁷

¹¹³ *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>

¹¹⁴ UNCTAD, *Consumer Protection Can Contribute to a Gender-Equal World*, 8 Feb 2022

¹¹⁵ UNCTAD, *United Nations Guidelines for Consumer Protection*

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

¹¹⁷ *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.¹¹⁸

3. Investing in Menstrual Product Research & Development

From reusable tampon applicators,¹¹⁹ diagnostic menstrual cups that predict women's health through menstrual effluent¹²⁰ to reengineered tampons to fit women's needs,¹²¹ 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.¹²² 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.¹²³

¹¹⁸ 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>

¹¹⁹ WE ARE DAME, <https://wearedame.co/collections/reusable-applicator> (Last visited May 9, 2022)

¹²⁰ LOONCUP, www.looncup.com (Last visited May 9, 2022)

¹²¹ SEQUEL, <https://www.trysequel.com> (Last visited May 9, 2022)

¹²² 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>

¹²³ 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.¹²⁴

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.¹²⁵ 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.¹²⁶

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>

¹²⁴ 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>

¹²⁵ 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

¹²⁶ Ibid.

Menstrual Hygiene Management Rapid Assessment Tool (M-RAT) developed by the International Rescue Committee and Columbia University.¹²⁷

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.¹²⁸ 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

¹²⁷ 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).

¹²⁸ 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” program¹²⁹. 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.¹³⁰ 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.

¹²⁹ Proctor & Gamble, Always Keeping Girls in School, Available at: <https://always.com/en-us/about-us/keeping-girls-in-school>.

¹³⁰ Ibid.