

# AFRICAN JOURNAL OF INTERNATIONAL ECONOMIC LAW

*Volume 2 | Fall 2021*

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# AFRICAN JOURNAL OF INTERNATIONAL ECONOMIC LAW

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# African Practice in International Economic Law: 2020–2021

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***Tsotang Tsietsi*<sup>1\*</sup> & *Akinyi J. Eurallayah*<sup>\*\*</sup>**

In this second instalment of the section on African Practice in International Law we continue with our exposition of some of the most significant developments in international economic law on the African continent. From regional trade matters, such as the launching of trade under the African Continental Free Trade Agreement, to investment dispute resolution involving African governments, as well as urgent imperatives surrounding intellectual property law. The section updates readers on some of the issues that were captured in the last issue, and which are ongoing. It, further, gives an overview of significant milestones for Africa over the past twelve months.

## **INTRODUCTION**

Significant developments have occurred in the practice of international economic law (IEL) on the African continent within the last year (2020 – 2021). Some of these involve intra-African relations, while others pertain to relations between Africa and external public and private actors. This section begins by providing updates on the United States (US) – Kenya Free Trade Agreement that had been at the negotiation stage in 2020.<sup>1</sup> It questions what the new United States administration might mean for the negotiations. The Covid epidemic continues to rage on across the globe. While the developed nations have taken great strides in implementing measures to protect their residents, developing countries – such as those in Africa – are lagging behind in containing the effects of the pandemic. That is why there have been growing calls for a waiver of intellectual property protection. We discuss the proposals and counter-proposals related to this paramount issue. African trade and investment disputes are further areas where we note important conflicts that have arisen and how some of them have been resolved and efforts to reform international dispute settlement in the interests of African States. Finally, we end on a triumphant note by taking stock of encouraging milestones that have been reached by Africa and Africans during the covered period.

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## I. UPDATE ON THE UNITED STATES – KENYA FREE TRADE AGREEMENT

The negotiations on the United States (US) – Kenya free trade agreement (FTA) have not resumed in 2021. The Covid epidemic rages on and both nations have been consumed with plans and strategies to vaccinate their populations and to restore their bruised economies. This has put other initiatives, such as the negotiation of free trade arrangements, on the backburner for a while. Another impediment to the resumption of the negotiations was the expiration of the Trade Promotion Authority (TPA) in July 2021.<sup>2</sup> This now means that US President Biden will need to seek Congressional approval for its renewal for the negotiations to be resumed. As there is this moment of pause, before the possible reignition of negotiations, it is prudent to reflect on the possible implications of this potential agreement, given that the new US Presidency may signal a change in US - Africa trade relations.

To begin with, there have been many positive changes in the US's foreign policy towards Africa since the Biden presidency. For example, the lifting of travel bans from some African countries,<sup>3</sup> the raising of African refugee quotas, and the assignment of a special envoy to the horn of African in support of peace and security in that region.<sup>4</sup> But these are largely political matters. As far as economic matters are concerned, the fruits might not be as sweet. Under the Trump administration, the United States Trade Representative, Robert Lighthizer, made it clear that the intention of the United States was that the Kenya – US free trade agreement would “serve as a model for additional agreements across Africa.”<sup>5</sup> With the Africa Growth and Opportunities Act (AGOA) set to expire in 2025,<sup>6</sup> this will necessitate the establishment of new ways of governing trading relationships between the US and Africa. African nations could, therefore, find themselves having to enter into similar reciprocal free trade agreements with the United States, as that being negotiated with Kenya. In essence, the US - Kenya FTA could be setting the trend for what these agreements could look like. That is,

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2 This was a time-limited authority that was given to the executive by Congress to negotiate and to implement certain reciprocal trade agreements. See CONG. RSCH. SERV., IF10038, IN FOCUS: TRADE PROMOTION AUTHORITY (last updated Dec. 14, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF10038> (last visited Dec. 17, 2021).

3 See Joseph R. Biden Jr., Proclamation on Ending Discriminatory Bans on Entry to The United States (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/> (last visited Dec. 17, 2021). This has been to the benefit of nationals of, for example, Libya, Somalia, Eritrea, Nigeria, Sudan, and Tanzania.

4 See *US Envoy for Horn of Africa visits Egypt*, EGYPT TODAY (May 4, 2021), <https://www.egypttoday.com/Article/1/102572/US-Envoy-for-Horn-of-Africa-visits-Egypt> (last visited Dec. 17, 2021).

5 See Press Release, U.S. Trade Representative (USTR), President Trump Announces Intent to Negotiate Trade Agreement with Kenya (Feb. 6, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/president-trump-announces-intent-negotiate-trade-agreement-kenya> (last visited Dec. 17, 2021).

6 Trade Preferences Extension Act extended it to September 30, 2025. See Trade Preferences Extension Act of 2015, H.R. 1295, 114th Cong. § 103(a) (2015).

7 The United States has FTAs with twenty countries. These are: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru and Singapore.

comprehensive and reciprocal by nature. The US has entered into such agreements with other nations.<sup>7</sup> African countries tend to struggle with implementation capacity, and this may be exacerbated by this new form of engagement with the US.<sup>8</sup>

It is not yet apparent what the Biden administration will mean for US relations with Kenya. However, President Biden has given the American people assurances that American foreign policy remains, first and foremost, self-interested in its intentions.

*When we invest in economic development of countries, we create new markets for our products and reduce the likelihood of instability, violence, and mass migrations.<sup>9</sup>*

Therefore, if the negotiations towards the conclusion of the free trade agreement do continue, it will be because the US views it as being in its own best interests. There were already concerns that the agreement would possibly be skewed in favour of the more developed nation, in terms of the general thrust of its provisions, and that this may not necessarily be in the interests of a developing state, such as Kenya. Kenya is interested in, for example, promoting foreign direct investment, expanding market access for its goods, and securing technical assistance. The United States is more interested in, for example, the protection of intellectual property, subsidies and digital trade.<sup>10</sup> It may be difficult for the smaller nation to obtain wins in its priority areas in the face of the asymmetries in the parties' negotiating capacities.

Therefore, what could be a possible solution to these potential threats? The type of FTA that is being negotiated between the US and Kenya is likely to be the new norm for US trading relations in general.<sup>11</sup> The original AGOA legislation had expressed that non-reciprocity in US trade relations with Africa would be a temporary benefit and that, eventually, the policy would be to enter into reciprocal arrangements "...including the possibility of establishing free trade areas that serve the interests of both the United States and the countries of sub-Saharan Africa."<sup>12</sup> Therefore, FTAs, such as the one that was being negotiated between the US and Kenya, seem inevitable. However, it may not be inevitable that they, necessarily, be bilateral. African countries could come together and insist on a bilateral agreement between the continent, on the

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8 See Emmanuel Nnadozie et al., *Domestic Resource Mobilization in Africa: State, Capacity Imperatives and Policy Actions*, 3 AFR. J. MGMT. 184-212 (2017).

9 See Remarks by President Biden on America's Place in the World (Feb. 4, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/> (last visited Dec. 17, 2021).

10 US objectives for the negotiations were announced by the USTR. See USTR, United States - Kenya Negotiations: Summary of Specific Negotiating Objectives (May 22, 2020), [https://ustr.gov/sites/default/files/Summary\\_of\\_U.S.-Kenya\\_Negotiating\\_Objectives.pdf](https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf) (last visited Dec. 17, 2021). The Kenya objectives were announced by the Kenyan Ministry of Industrialisation, Trade and Enterprise Development. See Proposed Kenya - United States of America Free Trade Agreement: Negotiation Principles, Objectives and Scope (June 22, 2020), <https://www.tralac.org/documents/resources/external-relations/us-agoa/3787-proposed-kenya-us-fta-agreement-negotiating-principles-objectives-and-scope-22-june-2020/file.html> (last visited June 23, 2021).

11 Even the North American Free Trade Agreement was replaced by the United States-Mexico-Canada Agreement (USMCA) of 2020.

12 African Growth and Opportunity Act, H.R. 434, 106th Cong. § 103(4) (2000).

one hand, and the US on the other. A broad-based FTA may be more in the interests of the African states, than succumbing to a divide and conquer approach. If this were to happen, it could even alleviate the power disparities and deficits in implementation capacity and further cement trade policy cohesion on the continent.

It is not unusual for several African countries to negotiate collectively with the United States. In 2003 the US and the Southern African Customs Union (SACU)<sup>13</sup> launched negotiations to conclude a reciprocal FTA.<sup>14</sup> The negotiations ultimately proved unsuccessful and were discontinued. However, that they began and took off for some time proves the point that the proposal for a unified approach is a realistic one. The US also signed Trade and Investment Framework Agreements (TIFA) with the EAC in 2008<sup>15</sup> and with the Common Market for Eastern and Southern Africa (COMESA) in 2001.<sup>16</sup> This shows that it would not be the first time that the US negotiates with a grouping of African countries, rather than one-on-one with a single African nation. There is evidence that the United States' policy towards Africa seems to be softening in this new era of the Biden administration. Africa can capitalise on this by proposing that FTAs be negotiated and concluded with the US as a bloc. This could ultimately support the African regional integration agenda and align with the spirit of unity that is encapsulated in the AfCFTA.

## II. INTELLECTUAL PROPERTY WAIVER FOR COVID VACCINES

In a communication dated 2 October 2020, South Africa and India proposed that Members of the World Trade Organization (WTO) should:

‘...work together to ensure that intellectual property [IP] rights such as patents, industrial designs, copyright and protection of undisclosed information do not create barriers to the timely access to affordable medical products including vaccines and medicines or to scaling-up of research, development, manufacturing and supply of medical products essential to combat COVID-19’.<sup>17</sup>

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13 The members of the Southern African Customs Union (SACU) are: Botswana, Eswatini, Lesotho, Namibia and South Africa. See *What is SACU?*, SACU, <https://www.sacu.int> (last visited Dec. 17, 2021).

14 From the onset, this US-SACU accord raised fears within SACU because the demands put forward by the USA especially as they relate to investments and intellectual property on drugs and seeds were extremely radical for the SACU region. See generally *US-SACU*, BILATERALS.ORG (last updated May 2012), <https://www.bilaterals.org/?-us-sacu-> (last visited Aug. 16, 2021).

15 See Trade and Investment Framework Agreement between the East African Community and the United States, available at USTR (last visited Dec. 17, 2021), [https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset\\_upload\\_file413\\_15020.pdf](https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file413_15020.pdf).

16 See Agreement Between the Government of the United States of America and the Common Market for Eastern and Southern Africa Concerning the Development of Trade and Investment Relations, available at [https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset\\_upload\\_file367\\_7725.pdf](https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file367_7725.pdf) (last visited Aug. 16, 2021).

17 See Communication from India and South Africa, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, ¶ 3, WTO Doc. IP/C/W/669 (Oct. 2, 2020) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:IP/C/W669.pdf&Open=True> (last visited Dec. 17, 2021).

The two countries, together with other supporters who have joined the call for the IP waiver, have raised concerns on the development of new diagnostics, therapeutics and vaccines for COVID-19 and ‘how these will be made available promptly, in sufficient quantities and at an affordable price to meet the global demand.’<sup>18</sup> The pro-IP waiver battalion argues that IP rights hinder and continue to hinder the timely accessibility to affordable medical products to the patients, and that many developing countries continue to face institutional and legal challenges when using flexibilities available in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) due to the requirements of Article 31*bis* and the cumbersome and highly protracted import and export processes for the pharmaceutical products.<sup>19</sup> They therefore called upon the Council for TRIPs Agreement to recommend to the General Council a waiver that should continue until widespread vaccination is in place globally, and the majority of the world’s population has developed immunity.<sup>20</sup> In sum, the IP waiver is intended to help meet the increasingly urgent global demand for vaccines, treatments and other pharmaceutical products to fight the pandemic by taking away any potential IP barriers.

On the other hand, this proposal has been termed ‘radical one’ by some stakeholders in the pharmaceutical industry as well as nations like the United Kingdom, Japan, Norway, Switzerland, and the European Union.<sup>21</sup> Instead, these high-income countries are advocating for and pledging to share more of their vaccines with the developing countries and to provide more funding to charitable vaccine-provision schemes like COVAX.<sup>22</sup> Surprisingly, even some of the Hollywood’s film-industry lobbyists and renowned philanthropists have equally rejected the proposal deeming it too broad in scope and extremely harmful for performers.<sup>23</sup> However, in a surprising and welcome turn of events, the United States reversed its earlier stance on the waiver and joined the likes of Russia and China in supporting the waiver.<sup>24</sup> The significance of the US support for the waiver cannot be ignored. The country is the world’s largest pharmaceutical market.

With these competing interests at play, this section provides a brief analysis on the impact of the COVID-19 vaccines IP waiver and what it means to Africa.

## Arguments for the COVID-19 Vaccine IP Waiver

Pursuant to Article IX 3 and 4 of the Marrakesh Agreement Establishing the WTO, under exceptional circumstances, a WTO Member can request a waiver from certain obligations established under the WTO Agreements. The waiver should contain a justification based on the exceptional circumstances, the conditions and the time when the waiver terminate.

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18 *Id.*

19 *Id.* ¶ 10.

20 *Id.* ¶ 13.

21 See Ellen ‘t Hoen, *The Arguments Against Sharing COVID-19 Intellectual Property Don’t Add Up*, BARRON’S (May 3, 2021), <https://www.barrons.com/articles/the-arguments-against-sharing-covid-19-intellectual-property-dont-add-up-51620056595> (last visited Dec. 17, 2021).

22 See *A patent waiver on COVID vaccines is right and fair*, NATURE (May 25, 2021), <https://www.nature.com/articles/d41586-021-01242-1> (last visited Dec. 17, 2021).

23 *Id.*

24 See Ambassador Katherine Tai (@AmbassadorTai), TWITTER (May 5, 2021, 2:10 PM), <https://twitter.com/AmbassadorTai/status/1390021205974003720> (last visited Dec. 17, 2021).

Waivers longer than one year are reviewed by the Ministerial Conference annually until their termination. The waiver debate revolves around the technical interpretations of the TRIPS Agreement. In their proposal, India and South Africa argue that ‘an effective response to the COVID-19 pandemic requires rapid access to affordable medical products including diagnostic kits, medical masks, other personal protective equipment and ventilators, as well as vaccines and medicines for the prevention and treatment of patients in dire need.’ Médecins Sans Frontières (MSF) added that treatment providers and governments have faced IP barriers over drugs, masks, ventilator valves and reagents for testing kits.<sup>25</sup> Supporters of the waiver argue that enforcing the waiver would negate the barriers to the timely access to affordable medical equipment and products, as well as enhance manufacturing, supply of essential medical products, research and development.<sup>26</sup> The waiver request covers four key intellectual property rights namely copyright and related rights,<sup>27</sup> industrial designs,<sup>28</sup> patents,<sup>29</sup> and protection of undisclosed information related to prevention, containment or treatment of COVID-19.<sup>30</sup> To them, the waiver should continue until widespread vaccination is in place globally, and the majority of the world’s population has developed immunity. Granted, WTO Members would review annually until it is terminated.

The waiver impasse is emblematic of how the Global North, where major pharmaceutical companies are located, has used international law and governing institutions to continue the marginalization and domination of the Third World by monopolizing vaccine manufacturing and supplies.<sup>31</sup> The biggest problem is that the manufacturing, research and development on the COVID-19 vaccine is highly concentrated in a small group of middle to high income countries in the Global North.<sup>32</sup> Adversely, the companies manufacturing these vaccines have sold the vaccines to their own governments and to those in other high-income countries. According to the pharmaceutical industry, the expected vaccine doses to be manufactured by the end of 2021 stands at about 10 billion doses.<sup>33</sup> However, according to the IMF, this is unlikely to happen and the production is expected to be about 6 billion doses by the end of 2021.<sup>34</sup> The impact of this shortfall is that more people in the low-income countries, who happen to be in the Third World, will have to wait longer for their initial doses.

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25 See Briefing Document, Médecins Sans Frontières Access Campaign, India and South Africa proposal for WTO waiver from intellectual property protections for COVID-19-related medical technologies (last updated Nov. 18, 2020), [https://msfaccess.org/sites/default/files/2020-11/COVID\\_Brief\\_WTO\\_WaiverProposal\\_ENG\\_v2\\_18Nov2020.pdf](https://msfaccess.org/sites/default/files/2020-11/COVID_Brief_WTO_WaiverProposal_ENG_v2_18Nov2020.pdf) (last visited Dec. 17, 2021).

26 See Hannah Balfour, *Waiving COVID-19 vaccine intellectual property rights*, EUR. PHARMACEUTICAL REV. (June 11, 2021), <https://www.europeanpharmaceuticalreview.com/article/156412/waiving-covid-19-vaccine-intellectual-property-rights/> (last visited Dec. 17, 2021).

27 See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) pt. II, § 1, Apr. 15, 1994, as amended Jan. 23, 2017, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

28 *Id.* § 4.

29 *Id.* § 5.

30 *Id.* § 7.

31 For a general discussion on how international law entrenches the interests of the First World over those of the Third World, see James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 37 (Jeffrey Dunoff & Mark Pollack eds., 2019), available at SSRN, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3304767](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304767).

32 See NATURE, *supra* note 22.

Interestingly, several European countries have pledged support to low and middle-income countries by promising to share their vaccines. The European Commission equally proposed to clarify and simplify the existing compulsory licensing procedures.<sup>35</sup> However, these measures do not address the systemic problem in most low and middle-income countries that support the IP waiver. Those supporting the waiver do so because they want the right to manufacture their own vaccines to meet their local demand devoid of legal suits from patent holders. For example, in Africa, less than 2% of the total population is fully vaccinated. This is due to, *inter alia*, the Continent importing almost 99% of its vaccines, and because African countries lack the pre-order purchasing power as compared to their high-income counterparts in the Global North.<sup>36</sup> As a result of the import challenges by the Continent, the African Union has put in place a plan to have 60% of Africa's vaccines are manufactured in Africa by 2040.<sup>37</sup> This will be achievable if the waiver is granted.

Further, granted, the waiver will allow WTO Members the discretion to neither grant nor enforce patents and other IP rights related to all COVID-19 medical products and accompanying services such as drugs, diagnostics, personal protective equipment for the duration of the pandemic.<sup>38</sup> This will provide countries with the policy space essential for the collaboration in research and development, increasing manufacturing and supplies of COVID-19 products.

## Arguments Against the COVID-19 Vaccine Waiver

There is a chorus of naysayers that offer a plethora of reasons against the waiver. According to a position statement issued by Max Planck Institute for Innovation and Competition, a COVID-19 IP waiver will not scale up vaccine manufacturing and distribution since the holds up in the vaccine manufacturing and distribution are as a result of shortage of raw materials, insufficient production capacity and highly complex manufacturing process.<sup>39</sup> Therefore, no amount of waiver would solve these factual issues. Secondly, that IP rights form the foundation for collaborations and contracts, in that voluntary patent licences are usually accompanied by a contractual transfer of the know-how necessary to exploit a licensed technology.<sup>40</sup> Further, that a waiver of IP rights will not waive the regulatory

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33 See *COVID-19 Vaccine Industry Cautions Immediate Action Needed to Remove Manufacturing Supply Barriers to Meet Production Targets and Keep on Course to Equitable and Fair Access to COVID-19 Vaccines*, INT'L FED'N PHARMACEUTICAL MFRS. & ASS'NS (Apr. 23, 2021), <https://www.ifpma.org/resource-centre/covid-19-vaccine-industry-cautions-immediate-action-needed-to-remove-manufacturing-supply-barriers-to-meet-production-targets-and-keep-on-course-to-equitable-and-fair-access-to-covid-19-vaccines/>.

34 See Ruchir Agarwal & Gita Gopinath, *A Proposal to End the COVID-19 Pandemic*, IMF Doc. SDN/2021/004 (May 2021), <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/05/19/A-Proposal-to-End-the-COVID-19-Pandemic-460263>.

35 See NATURE, *supra* note 22.

36 *Id.*

37 *Id.*

38 See Médecins Sans Frontières Access Campaign, *supra* note 25.

39 See Reto M. Hilty et al., *COVID-19 and the Role of Intellectual Property: Position Statement of the Max Planck Institute for Innovation and Competition of 7 May 2021* (Max Planck Inst. Innovation & Competition, Rsch. Paper No. 21-13, 2021), available at SSRN, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3841549](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841549) (last visited Dec. 17, 2021).

requirements for vaccine authorisation since any entity intending to place a medicinal product for human use on the market – whether an originator, generic or biosimilar product – needs to obtain marketing authorisation from drug authorities. Vaccines are biological medicinal products.<sup>41</sup> Therefore, rather than speeding up vaccine supply, a waiver would likely cause a delay, if the current patent holders cease cooperating and/or supplying self-produced vaccines. To them, even if they succeed in manufacturing these vaccines, quality cannot be assured.<sup>42</sup>

Another argument raised against the waiver is that a waiver of COVID-19 vaccine IP rights might not result in a substantially lower price for biosimilar versions compared to the currently supplied products.<sup>43</sup> Moreover, the TRIPS Agreement contains enough flexibilities such as Articles 30, 31 and 31*bis* to prevent negative effects of patents. In addition, a comprehensive waiver of IP rights will likely have a detrimental effect on incentives for drug innovation. For example, given the fast mutation of the coronavirus, a comprehensive waiver of IP protection could leave the society vulnerable to such emerging variants of Covid-19 if the current IP holders/vaccine developers abandoned research efforts as a result of such a waiver.<sup>44</sup> Finally, that the scope of the waiver is not clear enough.<sup>45</sup> South Africa and India argue for the waiver of IP ‘in relation to prevention, containment or treatment of Covid-19’. To the opponents, the clause ‘in relation to’ can be interpreted extremely broadly as to encompass any remotely related subject matter.<sup>46</sup> Finally, they argue that global governance could provide better support to developing countries through global equitable access to Covid-19 vaccines.<sup>47</sup>

## The Way Forward

The path ahead seems murky. With the major pharmaceutical industries vehemently opposing the waiver, the WTO still has a long way to go in the negotiations. In the fortunate event the WTO Members agree on the waiver, it remains bleak on how long it will take for the vaccine production to ramp up. However, this may not be the problem now. The bigger impediment lies on bringing every country on board. As to the impact the waiver will have on Africa, I would compare the current stalemate to the one that existed almost two decades ago. About twenty years ago, due to patent monopolies, the annual price per person for the triple cocktail of HIV treatment drugs was over USD

40 See Stephen Ezell, *Ten Reasons Why a COVID-19 TRIPS IP Waiver is Unwarranted*, INFO. TECH. & INNOVATION FOUND. (Apr. 9, 2021), <https://itif.org/publications/2021/04/09/ten-reasons-why-covid-19-trips-ip-waiver-unwarranted> (last visited Dec. 17, 2021).

41 See European Medicines Agency procedural advice for users of the centralised procedure for similar biological medicinal products applications, at 5, EMA/940451/2011 (Aug. 19, 2019); *Biosimilar and Interchangeable Products*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/biosimilars/biosimilar-and-interchangeable-products> (last visited Dec. 17, 2021).

42 See 't Hoen, *supra* note 21.

43 See Ezell, *supra* note 40.

44 See Hilty et al., *supra* note 39.

45 *Id.*

46 *Id.*

47 *Id.*

48 See Médecins Sans Frontières Access Campaign, *supra* note 25.

10,000.<sup>48</sup> However, thanks to the access-to-medicines movements that comprised several stakeholders in Africa and beyond, the price of antiretroviral drugs plummeted by 99% over the next decade, enabling more people more access to the drugs.

This situation compares to the current COVID-19 pandemic. Granted, the COVID-19 vaccine waiver could be a much-needed wave of access to COVID-19 medical products and technologies. However, this alone will not be effective, but it will ease the complex global IP and export rules, thereby giving the WTO Members the breathing space to collaborate on transfer of technology and exports without the fear of WTO sanctions. In addition, more finances should be allocated to WHO-backed initiatives that ensure widespread access to vaccines such as COVAX.<sup>49</sup> The naysayers have a point when they argue that the IP waiver is not sufficient. Vaccine production is a highly complex process requiring not only access to patents but also state of the art technology, updated knowledge and other resources such as finances. Closing the knowledge asymmetry requires intentional proactive transfer of technology. The WHO appreciated this fact a year ago when it created the COVID-19 Technology Access Pool (C-TAP), and invited all vaccine manufacturers to collaborate to meet the huge global demand for the vaccine. However, little has been done to achieve this. From an idealistic perspective, rejecting both the C-TAP pool and the COVID-19 vaccine waiver proposal is not a feasible option. Something must give.

### III. ETHIOPIA AND EGYPT'S DISPUTE REGARDING THE GRAND ETHIOPIAN RENAISSANCE DAM (GERD)

In April 2011, Ethiopia launched plans to construct what would be the largest hydroelectric power plant in Africa.<sup>50</sup> This was the Grand Ethiopian Renaissance Dam (GERD), which is located in the Benishangul-Gumuz Region of Ethiopia. The dam is being constructed on the Nile River. Although 85% of the Nile River flows in Ethiopia, eight other countries depend on its water for their own use.<sup>51</sup> Ethiopia has lauded the potential benefits of the project for these neighbouring states. For example, it proposes that the dam would lead to the removal of silt and sedimentation, which would increase the availability of irrigable land. Secondly, that the regulation of the flow of the water in the Nile river would guarantee a steady water supply and curb threats of flooding. Ethiopia's neighbours are not sold on these touted benefits. Egypt, for one, has expressed fears that the existence of the dam will have dire environmental and socio-economic impacts on its land and on its people,<sup>52</sup> as well as on the region as a whole.<sup>53</sup> Ethiopia has responded by justifying its stance by arguing that it has long

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49 See Miriam Berger, *What it means for the U.S. to back waivers on coronavirus vaccine patents*, WASHINGTON POST (May 6, 2021), <https://www.washingtonpost.com/world/2021/05/06/coronavirus-vaccine-patent-waiver-biden-wto/> (last visited Dec. 17, 2021).

50 See *Grand Ethiopian Renaissance Dam, Benishangul-Gumuz*, WATER TECH., <https://www.water-technology.net/projects/grand-ethiopian-renaissance-dam-africa/> (last visited Dec. 17, 2021).

51 Reuters Staff, *Factbox: The Nile River: treaties, facts and figures*, REUTERS WORLD NEWS, (July 8, 2011) <https://www.reuters.com/article/us-sudan-nile-fb-idUSTRE76742R20110709>.

been excluded from arrangements regarding Nile water-sharing,<sup>54</sup> and that it is taking matters into its own hands.

In 2020, some notable external actors offered to mediate the dispute between Ethiopia and her neighbours. In the first two months of 2020, the United States of America sponsored a mediation process, wherein it was originally set to participate as an observer.<sup>55</sup> Five meetings were held between November 2019 and February 2020. A final meeting was due to take place in Washington, DC however there were Ethiopian allegations of the USA's lack of neutrality in the mediation. As a result, Ethiopia refused to continue with the mediation process. The State subsequently also rejected the proposal of negotiations that were to be facilitated by the European Union (EU).<sup>56</sup> It did, however, agree to an African Union (AU)-led mediation process. This began in July 2020 and centred on the physical aspects of water sharing. The negotiations continued in October and November 2020 however, they failed to yield a mutually satisfactory compromise on the operation and filling of the dam. The latest efforts to resolve the dispute took place in a meeting in Kinshasa on April 6, 2021. Therein, Congolese President Félix Tshisekedi, in his role as the new Chairman of the African Union, was unable to mediate a successful resolution to the dispute.

The current position with the dispute over the Grand Ethiopian Renaissance Dam project is that there is no date which has yet been set for the resumption of talks. Ethiopia has announced its intentions to continue to fill the reservoir. This has resulted in an ultimatum being issued by Egypt and Sudan for Ethiopia to desist with such plans or else they will have no choice but to resort to the use of force to protect their interests/historical rights over the waterway. This crisis underscores some key threats to regional integration in Africa. Firstly, historical conflicts can cause modern rivalries. Ethiopia has been historically excluded from arrangements that were concluded on the sharing of the resources of the Nile river. Left alone to brew over time, historical conflicts have a tendency to reach a crisis point. This threatens the prospects of regional peace and security and, therefore, regional integration and prosperity. Secondly, external actors may further fuel African conflicts. This is because there are often fears and/or allegations, from the disputants, regarding the partiality or

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52 People Displacement, Biodiversity Impacts Water Share Reduction (The decreased amount of water supply will directly affect the agriculture sector in Egypt and all its related activities from food production to employing large numbers of people since agriculture alone consumes 80% of the Nile's fresh water). See Hagar ElBarbary, *Hydro-conflicts in the Nile Basin: An Analysis of the Grand Renaissance Dam (GERD) Project*, MASTER'S THESIS IN PEACE, MEDIATION AND CONFLICT RES. DEV. PSYCH., 16, 21 (Spring 2021), [https://www.doria.fi/bitstream/handle/10024/181097/elBarbary\\_hagar.pdf?sequence=2&isAllowed=y](https://www.doria.fi/bitstream/handle/10024/181097/elBarbary_hagar.pdf?sequence=2&isAllowed=y).

53 See Tamim Heikal, *Ethiopia/Egypt: GERD fight sucks in global actors* (May 10, 2021), <https://www.theafricareport.com/86360/ethiopia-egypt-gerd-fight-sucks-in-global-actors/>.

54 For e.g., under a 1959 water allocation agreement, 1959 Egypt-Sudan Nile treaty Egypt's share of water amounts to 55.5 billion cubic metres (bcm), while Sudan's is 18.5 bcm, corresponding to about 90% of the river's annual flow.

55 Joint Statement from 15 January 2020 indicate, the discussion and debates under the US and the World Bank facilitation have been about the filling and operation of the dam under different hydrological conditions

56 Margaret Bersheer, *Egypt, Sudan seek UN help to resolve mega dam dispute with Ethiopia*, VOA (July 9, 2021), <https://www.voanews.com/africa/egypt-sudan-seek-un-help-resolve-mega-dam-dispute-ethiopia>.

self-interest of the mediators. The lack of trust in the processes stall progress in reaching a solution and can, ultimately, deepen the rift between the disputants. Lastly, the risk of political conflicts may spreading beyond the initial actors and region. Disputes may start between two States but, with time, other states may choose sides and the dispute can grow in its participants, scope and intensity.

This ongoing conflict relating to the GERD highlights the need for the peaceful settlement of disputes for the sake of regional integration and sustainable development. Conflicts over African resources have spilled over into armed conflicts.<sup>57</sup> Projects such as the GERD are vital for boosting investment, trade and development on the continent. However, in the absence of cooperation, such vital infrastructure can end up causing negative outcomes, instead of positive ones. The question is: how do we ensure peaceful resolution of disputes and the mutually beneficial exploitation of African resources? Our advice is that African disputes should be resolved through cooperative continental strategies. For example, through the efforts of the AU the parties can be assisted to reconcile their divergent positions. Such a process should be given support and time to lead to such an amicable resolution. This would be in line with the AfCFTA's mantra of "African solutions to African problems." External actors may be conflicted when it comes to participating in African disputes.<sup>58</sup> Therefore, they should, as much as possible, not be relied upon to guide conflicting parties towards a settlement. This can be seen with, for example, the United States' involvement not building confidence in the dispute resolution process. African alternative dispute resolution (ADR) mechanisms may offer effective solutions to African conflicts.

Lastly, where conflicting States are parties to regional arrangements, the regional economic community (REC) could intervene to compel them to abide by any commitments that their conflict might be breaching under the regional instruments. For example, in this instance, Egypt and Ethiopia are both members of the Common Market for Eastern and Southern Africa (COMESA). The founding agreement has provisions that are relevant to the dispute regarding the GERD. For example, Parties pledge to "promote joint development in all fields of economic activity"<sup>59</sup> and to "co-operate in the development and management of natural resources, energy and environment."<sup>60</sup> Therefore, Ethiopia and her neighbours should adopt a collaborative

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57 Sylvester Bongani Maphosa, *Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa*, POLY BRIEF AFRICA INST. OF S. AFR. 74 (2012), <https://media.africaportal.org/documents/No.-74.-Natural-Resources-and-Conflict..pdf>

58 See generally MAKANE MOISE MBENGUE, *African Perspectives on Inter-State Litigation*, in LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS, (Natalie Klein, ed., Cambridge Univ. Press, 2014). Exposing the subtle dislike African countries have towards external actors, Mbengue narrates that in 1960, Ethiopia and Liberia, initiated contentious proceedings against South Africa at the International Court of Justice, thereby being the first time African countries were invoking the jurisdiction of the International Court of Justice on contentious proceedings. However, what prompted a cautious attitude and a subtly hostile reaction of African states to international adjudication was a feeling of dismay after the 1962 and 1966 ICJ judgement in the Ethiopia and Liberia cases which exposed the inability of international actors to defend the peculiar interests of African states.

59 Treaty Establishing the Common Market for Eastern and Southern Africa Art. 3(b)

60 *Id.* at 4.6(h)

approach to all economic endeavours. Article 106, in particular, recognises the importance of a secure supply of energy for development. It enjoins members to cooperate in the development and rational management of energy resources.<sup>61</sup> Lastly, article 163 recognises that:

regional peace and security are pre-requisites to social and economic development and vital to the achievement of [the] regional economic integration objectives of the Common Market. In this regard, the Member States agree to foster and maintain an atmosphere that is conducive to peace and security through co-operation and consultations on issues pertaining to peace and security of the Member States with a view to preventing, better managing and resolving inter-State or intra-State conflicts.

This vindicates the argument made in this section: that international economic law has a role to play in the peaceful settlement of disputes. Such settlement is vitally important because the absence of peace will sabotage efforts to build an Africa that is united and prosperous. The commitments that are found in instruments of the RECs should guide disputing parties in their planning, launching and operation of projects. This is so that such conflicts do not impede the good progress that Africa is making towards sustainable development.

#### IV. Trends in African Investor-State Dispute Settlement

This section presents an overview of the developments in investor-state dispute settlement (ISDS) in Africa between 2020 and 2021. Although Africa has been a prominent participant in ISDS, there has been a lot of criticism levelled against the nature and consequences of its participation. These include concerns about, for example, the seat of arbitration, the costs of the proceedings, and the lack of representation of African arbitrators, to mention a few.<sup>62</sup> The question remains: what trends can be seen in ISDS over the covered year and have there been any initiatives undertaken to reform the system to make it fairer to African parties? This article will predominantly rely on disputes before the International Centre for the Settlement of Investment Disputes (ICSID) for illustrative purposes. This is because it is a popular forum for African ISDS.

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61 Articles 122 and 123 are also relevant. They provide that members of the REC ought to cooperate and “take concerted measures to foster co-operation in the joint and efficient management and sustainable utilisation of natural resources within the Common Market.” This would include the sustainable utilisation of the Nile waters.

62 Akinkugbe, Olabisi D., *Africanization and the Reform of International Investment Law*, 53 CASE. W. RES. J. INT’L L. 7 (June 8, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3766357](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766357); Andrew Mizner, *PAW2020: The future of ISDS in Africa*, AFRICA LAW AND BUSINESS (July 7 2020), <https://iclg.com/alb/13832-paw2020-the-future-of-isds-in-africa>.

## Arbitrations Initiated

Altogether nine (9) arbitrations involving African States were initiated between 2020 and 2021. In all nine cases, the African state was the respondent. This aligns with the arguments that have been made that African States are more likely to participate in ISDS as respondents rather than as complainants. This trend has continued. The States that were involved include regional hegemon, such as Egypt and Nigeria, but they also include smaller and poorer States, such as Mozambique.<sup>63</sup> The States that appeared the most often are Egypt<sup>64</sup> and Tanzania.<sup>65</sup> The newly-initiated cases involved mining and quarrying (for example, of oil, gas and metal ore) and services (such as finance, insurance, environmental construction and transportation).

In terms of disputes that have been judged to finality, there were fifteen (15) such cases. Similar to the above, in all 15 of those cases, the respondent was an African State. Settled disputes related to: agriculture and forestry (for example, cotton) environmental (for example, waste management), manufacturing, mining and quarrying (for example, of oil and metal ore) and services (such as finance, real estate, and information and communication technology). Out of the 15 disputes, four (4) were discontinued – three on the basis of ICSID Arbitration Rule 43(1), where the Tribunal issues an order taking note of the discontinuance of the proceeding.<sup>66</sup> In four (4) other cases, ICSID tribunals held in favour of the claimant investor.<sup>67</sup> On six (6) occasions, tribunals held in favour of the African respondents. In one of the latter cases the claimant sought an annulment of the proceedings but failed to secure such.<sup>68</sup> There was one case where the tribunal held neither for the claimant nor for the respondent. This was the case of *Cementos La Union v Egypt*. The Spanish investor brought a claim based on the alleged overpricing of operating licences for cement manufacturing and an allegedly unusual system for the granting of such licences through tenders. The tribunal found that the government was indeed liable, but the award did not decide in favour of either party and, thus, no damages were awarded.<sup>69</sup>

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63 The other States that have been involved in ISDS before ICSID are: Cameroon, Tanzania, Libya, and Algeria.

64 *Gesenu v. Egypt* (an Italian investor v. Egypt) & *Qatar Airways v. Egypt* (a Qatari firm v. Egypt).

65 *Nachingwea et al., v. Tanzania* (an entity from the United Kingdom v. Tanzania) & *Winshear v. Tanzania* (a Canadian investor v. Tanzania).

67 This was the case in *Petroceltic Holdings Limited and Petroceltic Resources Limited v. Egypt* (the investor is from the UK), *SAUR & STEREAU v. Algeria* (French investor) & *Dagher v. Sudan* (the investors are from Jordan and Lebanon). *Ampal American et al., v. Egypt* (was also discontinued, but there is no information on the basis for the discontinuation. The dispute was initiated by investors from the United States and Germany.).

67 In two of those cases, the defeated State party requested a judicial review of the judgement by a national court. In one of those cases (*Etrak v. Libya*) the judgement was upheld. In the other case (*Sorelec v. Libya*) the judgement was set aside.

68 *Orascom v. Algeria*. The investor – a national of Luxembourg, had complained of an alleged campaign of interference and harassment by the government against a local telecommunications company in which they had invested. This included including tax reassessments and an attempted forced sale of part of the company to Algeria.

69 *Cementos La Union v. Egypt Cementos La Union S.A. & Aridos Jativa S.L.U v. Arab Republic of Egypt* (ICSID Case No. ARB/13/29). Munia El Harti Alonso, *Award without Damages Rendered on Behalf of Egypt in Cementos la Union*, AFRNOMICSLAW (December 3, 2020), <https://www.afrnomicslaw.org/2020/12/03/award-without-damages-rendered-against-egypt-in-cementos-la-union>.

With respect to ISDS awards, one of the critical concerns is the cost of awards. This can be significant in value, especially for poor African developing and least developed states.<sup>70</sup> Another concern is the lack of transparency of awards. In the above cases, only the damages that were awarded in four (4) cases have been made public. In all these cases, the awards were in favour of the investor.<sup>71</sup> The fact remains that, even now, African ISDS continues to claim millions from African governments. This poses a significant threat to African countries' abilities to invest in, and implement, their socio-economic obligations, such as the provision of education, healthcare, infrastructure etc., to their citizens. Interestingly, this is not an exclusively African concern. Other developing and emerging states such as Ecuador, Nicaragua, India, Indonesia and Venezuela have equally raised these concerns.<sup>72</sup>

It is imperative to note that these disputes stem from numerous Bilateral Investment Treaties (BITs) which African countries have signed with developed nations.<sup>73</sup> Some African scholars have voiced their concerns over the inability of African BITs to increase foreign direct investment (FDI) inflows into Africa.<sup>74</sup> To them, BITs are not instruments that inform investor decisions, but rather, tools that are used by multinational companies against developing and least developed countries.<sup>75</sup> Thus, several attempts have been made to reform the ISDS system to make it fairer to African parties.<sup>76</sup> These efforts exist at the national, bilateral, sub-regional and continental level, either through intra-African BITs or regional investment protocols which seek to address their 'subordinate' position in ISDS<sup>77</sup>. For example, at a regional level, given the COVID-19 surge that exposed the specific challenges and situations unique to Africa that may arise during virtual hearings, the African Arbitration Academy developed a bespoke Protocol on Virtual Hearings in Africa.<sup>78</sup>

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69 For example, the case of *Frazer Solar GmbH v. The Kingdom of Lesotho* which was an adhoc arbitration that was initiated by a German claimant against Lesotho on July 30, 2019 with the seat of arbitration being Johannesburg, South Africa, and the applicable rules being AoA (Southern Africa) Arbitration Rules 2018. The State did not participate in the arbitration. An award, to the tune EUR 50 million, was granted in favour of the claimant on January 28, 2021. *Frazer Solar v. Lesotho*, Jus Mundi, <https://jusmundi.com/en/document/decision/en-frazer-solar-gmbh-v-the-kingdom-of-lesotho-arbitration-award-tuesday-28th-january-2020>(last visited Aug. 15, 2021).

71 *Sorelect v. Libya* (USD 555,800,000, however, this was set aside on review by the Paris Court of Appeal), *Etrak v Libya* (USD 21,900,000), *Strabag v. Libya* (USD 84,000,000) & *De Sutter et al., v. Madagascar* (USD 7,000,000).

72 Hankins-Evans, *supra* note 2; see also *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, UNCTAD IIA ISSUE NOTE 2 (Dec. 2010) [https://unctad.org/system/files/official-document/webdiaeia20106\\_en.pdf](https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf).

73 Anna Hankins-Evans, *The Africanization of international investment disputes – from past to present*, VERFASSUNGSBLOG (July 23, 2020), <https://verfassungsblog.de/the-africanization-of-international-investment-disputes-from-past-to-present/>; see also B.S. Chimni, *Customary International Law: a Third World Perspective*, THE AM. SOC. OF INT'L L. (2018), [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DEDB6DB43A3B5A613B68FDBE56E20A20/S000293001800012Xa.pdf/customary\\_international\\_law\\_a\\_third\\_world\\_perspective.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DEDB6DB43A3B5A613B68FDBE56E20A20/S000293001800012Xa.pdf/customary_international_law_a_third_world_perspective.pdf) (accessed 12 August 2021); Kanad Bagchi, *A bit of resistance: a response to Prof. Prabhash Ranjan's plea for embedded liberalism*, VÖLKERRECHTSBLOG (Jan. 26, 2018), <https://voelkerrechtsblog.org/a-bit-of-resistance/> (accessed 12 August 2021); Velimir Živković, *Of BITs and pieces, resistance and simplification*, VÖLKERRECHTSBLOG, (Feb. 1, 2019) <https://voelkerrechtsblog.org/of-bits-and-pieces-resistance-and-simplification/>.

73 *Stop the unfair investor-state dispute settlement against Africa*, BILATERALS.ORG, <https://www.bilaterals.org/?stop-the-unfair-investor-state>.

74 *Id.*

## V. The New World Trade Organization's Director General

A monumental development for Africa has been the appointment of a woman and an African to the helm of the World Trade Organisation. This occurred pursuant to Articles VI.2: 2 and IX.1 of the WTO Agreement. The former provides that “the Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.” The latter provides that “the WTO shall continue the practice of decision-making by consensus followed under GATT 1947.” In December of 2002, the General Council adopted procedures for the appointment of Directors Generals.<sup>79</sup> In application of these procedures, by 8 July 2020, eight candidates had been nominated by their governments for the position of the Director General of the World Trade Organization.<sup>80</sup> A series of confidential consultations began on 7 September 2020 until 28 October 2020. Following these, on 15 February 2021, Dr Okonjo-Iweala of Nigeria emerged as the candidate who had won the consensus of the General Council to be appointed as the seventh Director-General of the organization.

As DG, Dr. Okonjo-Iweala is the Chief Administrative Officer of the WTO. However, while an encouraging example that confidence has been placed on a female and African to manage the organization, her role in the organization is limited and she is not in a position to achieve much for African interests through her role. This is because WTO policy decisions are not made by the DG but by the member states, either through the Ministerial Conference or the General Council. Thus, the role of Dr. Okonjo-Iweala is mainly advisory in nature. However, through her diplomacy she can advocate for issues that she has spoken passionately about throughout her career and during the process of her vetting for the position. These include: fair trade, environmental sustainability, human welfare, gender,<sup>81</sup> health<sup>82</sup> and global development.<sup>83</sup>

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75 See generally, Won Kidane, *The China-Africa Factor in The Contemporary ICSID Legitimacy Debate*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY (2014)<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1866&context=jil>.

77 Makane Moïse Mbengue & Stefanie Schacherer, *Evolution Of International Investment Agreements In Africa: Features And Challenges Of Investment Law*, “AFRICANIZATION” HANDBOOK INT’L INV. L. & POL’Y 2 (2019)

78 See generally *The African Arbitration Academy Protocol on Virtual Hearings in Africa* (April 2020), Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf (africaarbitrationacademy.org) (last visited August 12, 2021).

79 WORLD TRADE ORGANIZATION, WT/L/509, January 20, 2003.

80 Jesús Seade Kuri (Mexico), Ngozi Okonjo-Iweala (Nigeria), Abdel-Hamid Mamdouh (Egypt), Tudor Ulianovschi (Moldova), Ms Yoo Myung-hee (Republic of Korea), Amina C. Mohamed (Kenya), Mohammad Maziad Al-Tuwaijri (Kingdom of Saudi Arabia) & Dr Liam Fox (United Kingdom). [https://www.wto.org/english/news\\_e/news20\\_e/dgssel\\_17jul20\\_e.htm](https://www.wto.org/english/news_e/news20_e/dgssel_17jul20_e.htm), accessed July 12, 2021.

81 For example, as seen by her book, *Women and Leadership: Real Lives, Real Lessons with Julia Gillard*, MIT PRESS (Feb. 2, 2021).

82 She loaned her voice to a letter in the wake of COVID-19. See e.g., Erik Berglof & Jeremy Farrar, *The COVID-19 Pandemic – a letter to G20 Leaders*, Vox E.U. CEPR (Mar. 26, 2020), <https://voxeu.org/article/covid-19-pandemic-letter-g20-leaders>.

83 See, for example, her speech inaugural speech upon taking office on March 1, 2021. [https://www.wto.org/english/news\\_e/spno\\_e/spno1\\_e.htm](https://www.wto.org/english/news_e/spno_e/spno1_e.htm). (Last visited Aug. 13, 2021).

## VI. The Commencement of Trading under the African Continental Free Trade Agreement

*“Today, as Africans, we are witnessing the beginning of a new chapter in terms of trade and investment relations of the African continent.”<sup>84</sup>*

This sentiment was uttered by the Secretary-General of the African Continental Free Trade Area, H.E. Wamkele Mene, on the occasion of the official launch of trading under the African Continental Free Trade Agreement (AfCFTA) on the 1<sup>st</sup> of January 2021. Trading under the AfCFTA was originally scheduled to begin in July 2020. However, because of the corona virus pandemic the launch was postponed. An Extraordinary Summit of the Assembly of the African Union (AU) was held on December 5, 2020. In that meeting, the Assembly decided that trading under the AfCFTA would officially begin on January 1, 2021.<sup>85</sup> What did this date mean for African trade and integration? It didn't mean that, as of January 1<sup>st</sup> all goods across all fifty-four participating African nations would now flow free of any restrictions. What it did mean was that trading under the AfCFTA had started for those countries who had finalised their tariff schedules and were ready to begin trading. These are, for example, the regional hegemons: South Africa, Ghana, Egypt and Kenya. Why are some countries not ready to begin trading under the AfCFTA? There are a several factors that have contributed to the inability of many African states beginning to trade under the AfCFTA.

The first is the fact that the AfCFTA is massive in scope and demanding in its commitments. The negotiations that led to its finalisation took place at record speed. Phase I of the negotiations was launched in 2015<sup>86</sup> and was concluded in 2018.<sup>87</sup> The agreement entered into force in 2019. For fifty-four sovereign nations to agree on such an expansive agreement in such a short period of time was unconventional. It took roughly the same amount of time for just eight nations to conclude on the Southern African Development Coordinating Conference (SADCC) Memorandum of Understanding,<sup>88</sup> and it took almost twice that amount of time for only three states

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84 *Statement by the Secretary-General of the AfCFTA Secretariat, H.E. Wamkele Mene, at the 13<sup>th</sup> Extraordinary Session of the Assembly of Heads of State & Government on AfCFTA*, AfCFTA SECRETARIAT (Jan. 1, 2021), <https://afcfta.au.int/en/news/speeches/2020-12-05/statement-he-wamkele-mene-13th-assembly-hosg>.

85 *Thirteenth extraordinary session on the AfCFTA: The Assembly of the Union Adopts Decision on Start of Trading*, AfCFTA SECRETARIAT (Dec. 5, 2020), <https://afcfta.au.int/en/news/press-releases/2020-12-05/afcfta-assembly-union-adopts-decision-start-trading>.

86 June 15, 2015 in South Africa. African Union Assembly Decision, Assembly/AU/Dec. 569 (XXV).

87 Phase I encompasses: trade in goods (including customs cooperation, trade facilitation, and transit trade), trade in services and a dispute settlement mechanism. Phase II of the agreement will cover investment, intellectual property rights, and competition policy (Article 7 of the AfCFTA- rendezvous clause).

88 *History and Treaty*, SADC, <https://www.sadc.int/about-sadc/overview/history-and-treaty/>. (last visited June 24, 2021).

89 The East African Community was originally active from 1967 until 1977 when it collapsed. In 1986 a working group was established to identify potential areas for future negotiations. In 1991, the Ministers of Foreign Affairs of Tanzania, Kenya and Uganda met to agree on a program for the re-activation of the Community. The first round of talks towards this end began in 1993, and a new EAC agreement was signed on November 30, 1999. The agreement entered into force on July 7, 2000.

to negotiate the reactivation of the East African Community (EAC).<sup>89</sup> It would appear that there was great incongruence between the level of ambition during negotiations and the starting point at which most African nations were, in terms of their preparedness to implement commitments. Four years may not have been adequate time for all parties to 'get their houses in order.' Implementation would have required a series of preparatory domestic actions. For example, a member state would have had to conduct proper stakeholder consultations to sensitise and receive buy-in from all concerned institutions and other contingents. Stakeholders need to fully understand what will be involved in implementation so that they can contribute to its success. Impact assessment studies would be needed to highlight preparedness deficits and to anticipate the possible effects of the treaty. It is only by understanding the magnitude of what is involved in implementation that governments could strategize and set timelines for needed actions.

As it stands many States lack the necessary regulatory frameworks to implement the agreement (for example, policies and laws on trade dispute resolution, or on the procedures applicable to trade). They have not yet established competent domestic institutional arrangements (for example, border agencies that are capacitated to apply rules of origin, trade remedies, standards etc. that are required under the agreement. This includes training officials to implement the new trading rules. Long-standing domestic weaknesses have not been rectified. These include: the high costs of trade, the poor quality of trade infrastructure, the lack of trade finance, high levels of illicit trade, the failure to sensitise local traders on how to take advantage of trade preferences and the absence of robust bilateral and regional coordinating channels. These continue to challenge successful trading under this new agreement.

Secondly, the agreement has, so far, only been ratified by thirty-seven out of the fifty-four state parties.<sup>90</sup> Ratification is required for a State to be bound by an international agreement. The failure of all states to have ratified the agreement delays implementation because it prevents cohesion of readiness to trade. Thirdly, despite Phase I of the negotiations having been officially concluded, many aspects are yet to be completely finalised. For example, only forty State parties have submitted their tariff offers under the protocol for trade in goods.<sup>91</sup> Some services tariff schedules remain outstanding. In terms of rules of origin, they currently only cover approximately 81% of tariff lines. While these important issues are outstanding, trade in goods cannot begin in full force. There can only be limited trade that occurs under the tabled tariff offers and where rules of origin have been finalised. June 2021 had been given as the

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90 Status of AfCFTA ratification as of June 23, 2021. In chronological order these are: Ghana, Kenya, Rwanda, Niger, Chad, Eswatini, Guinea, Côte d'Ivoire, Mali, Namibia, South Africa, Congo, Rep., Djibouti, Mauritania, Uganda, Senegal, Togo, Egypt, Ethiopia, Gambia, Sahrawi Arab Democratic Rep., Sierra Leone, Zimbabwe, Burkina Faso, São Tomé & Príncipe, Equatorial Guinea, Gabon, Mauritius, Central African Rep., Angola, Lesotho, Tunisia, Cameroon, Nigeria, Malawi, Zambia, and Algeria. See *Infographics Status of AfCFTA Ratification*, TRADE LAW CENTRE (TRALAC) (Oct. 4, 2021), <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>.

91 Tariff schedules have been submitted by the individual nations of Malawi, Mauritius, and São Tomé and Príncipe and CEMAC, EAC, ECOWAS and SACU.

deadline to complete the tariff negotiations and the rules of origin. However, this has not been achieved. It remains to be seen when these milestones will be achieved.

Finally, the role of the corona virus epidemic cannot be under-played in explaining delays in the preparedness of States to begin trading under the AfCFTA. The epidemic necessitated States to shift their focus from preparing to begin trade to implementing measures of containment. Delays were also experienced with the establishment of the AfCFTA Secretariat. His Excellency Mr. Wamkele Mene was appointed as the Secretary General of the Secretariat in March 2020, but the Secretariat was only opened five months later, in August 2020.<sup>92</sup> The Secretariat is responsible for, *inter alia*, overseeing the implementation of the AfCFTA. Thus, delays in its establishment delayed a facet of implementation support that the State parties ought to have received in order to meet the deadline for the launch of trading.<sup>93</sup> Phase II of the AfCFTA negotiations had been scheduled to be launched in July/August, 2021. It remains to be seen whether this deadline will be met. This second phase will concentrate on the adoption of protocols on investment, competition and intellectual property rights.<sup>94</sup> In the same way that the agreement and the protocols that were adopted in phase I of the negotiations are collectively binding on the States that have ratified the AfCFTA, Article 8 of the agreement explains that the Phase II protocols will also, “upon adoption, form an integral part” of the agreement, and “shall form part of the single undertaking.”<sup>95</sup>

Regardless of what happens with Phase II this year, there is much to be positive about regarding the launch of trading under the AfCFTA. Firstly, it is a huge development because, for the first time, the African State parties are actively thinking differently and more seriously about trade liberalisation and harmonisation. The countries don't have much experience with the new ambitious reforms that they are eyeing. This is why it will take time for them to implement them. However, we see many States (such as Nigeria, Kenya and Ethiopia) already beginning to take measures which they had not undertaken before their participation in the AfCFTA. Ethiopia had never signed any African trade agreement, except for a very limited one with Eritrea and Djibouti. However, it has taken a bold step and ratified the AfCFTA. As a result, Chambers of Commerce in Ethiopia are strategizing on how to tap into regional markets. The government is also keen to form partnerships to build its implementation capacity. These encouraging actions can be attributed to the launch of trading under the AfCFTA.

Secondly, we can be optimistic that the challenges will be overcome because the States are working together, bilaterally and regionally, to overcome them. This is also due to the fact that there is mutuality in the stumbling blocks that are being

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92 African Union, *Newly sworn-in AfCFTA Secretary General, Wamkele Mene, undertakes to serve Africa with resolute determination* (April 18, 2020), <https://au.int/en/pressreleases/20200418/newly-sworn-afcfta-secretary-general-wamkele-mene-undertakes-serve-africa>.

93 As it stands, the Secretariat is still in the process of filling many of its posts.

94 AfCFTA Agreement Art. VII.

95 As with the Phase I protocols, the new protocols will also enter into force after twenty-two States have ratified them. AfCFTA Agreement Art. XXIII.

experienced by the members, for example, the absence of capable institutions to implement trade remedies. Such reforms are critical for the success of the agreement. State parties are considering pooling their resources together to run a regional trade remedies institution. There is further scope for cooperation and collaboration in with regards to regional digital and physical connectivity, implementing standards, trade surveillance to identify and react to illicit trade etc. In addition to the members' apparent commitment to the AfCFTA trading regime, there is firm support for implementation from bodies such as the United Nations Economic Commission for Africa (UNECA),<sup>96</sup> AfreximBank,<sup>97</sup> the United Nations Conference for Trade and Development (UNCTAD), the United Nations Development Programme (UNDP) and the World Bank.<sup>98</sup> This support will bolster the States' implementation will and capacity. Finally, in December 2020, the African Union (AU), the European Union (EU) and the International Trade Centre (ITC) launched a trade intelligence tool called the African Trade Observatory (ITO). This enables firms to research on market access conditions across Africa, including trade data and information on importers and exporters across the continent.<sup>99</sup> This will assist firms to exploit trading opportunities under the AfCFTA. Therefore, in conclusion, even though trading has technically started, it will still take some time for it to visibly take off and for its impacts to be seen and experienced. However, without doubt, January 1, 2021 signified a momentous new era in the history of African regional integration and the States are poised to capitalise on this extremely important initiative.

## Conclusion

This contribution has highlighted some issues that could potentially cause disruptions to regional trade and integration on the continent. These are: the dispute surrounding the

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96 For example, UNECA supported the Democratic Republic of Congo to conduct a validation exercise for a strategy to implement the AfCFTA. <https://www.uneca.org/stories/eca-supports-drc-to-organize-workshop-to-validate-its-national-afcfta-implementation>, accessed June 24, 2021. So far, only eleven parties, including Regional Economic Communities (RECs), have validated their AfCFTA implementation strategies; *see also* Jake Luke, *On Implementing the AfCFTA in 2021*, TRADE FOR DEV. NEWS (Mar. 26, 2021) <https://trade4devnews.enhancedif.org/en/op-ed/implementing-afcfta-2021> (“The strategies aim at complementing the broader development framework of each country or region, especially in relation to trade and industrialization policies. Some are already implementing their AfCFTA strategies and have a National Committee in place to ensure proper coordination of implementation, policy coherence and effective domestication of the agreement.”).

97 The Bank supported the development of an Adjustment Facility Pan-African Payments and Settlement Platform to enable African companies to clear and settle intra-African trade transactions in their local currencies.

98 The World Bank's Regional Integration Cooperation Assistance Strategy (RICAS 2021 – 2023). This provides for support for regional connectivity (of transport, energy and digital infrastructure), trade promotion, market integration through trade facilitation, technical assistance and support to regional value chains and integration of financial markets. *See Supporting Africa's Recovery and Transformation: Regional Integration and Cooperation Assistance Strategy - Update for the Period FY21–FY23*, THE WORLD BANK (Dec. 7, 2020), <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/249911623450779120/supporting-africa-s-recovery-and-transformation-regional-integration-and-cooperation-assistance-strategy-update-for-the-period-fy21-fy23>.

99 *African Trade Observatory*, AFRICAN UNION, <https://ato.africa/en> (last visited June 24, 2021).

100 *Id.*

GERD and the US- Kenya proposed FTA. We have proposed some measures that could be considered in both instances. The fact that less than 2% of the Africa population is fully vaccinated has prompted our discussion on the importance of the IP waiver for Covid vaccines. The continent lacks purchasing power and faces import challenges in accessing vaccines. The African Union has put in place a plan to have 60% of Africa's vaccines being manufactured in Africa by 2040.<sup>100</sup> This will be achievable if the waiver is granted. Further, the waiver will provide countries with the policy space that is essential for collaboration in research and development, increasing manufacturing and supplies of COVID-19 products.

From the discussion on ISDS, it is evident that African countries have played a significant role in its development over the past year. Over the years ICSID has had several proposals for its reform. However, it is not predictable whether these reforms will materialize and lead to tangible benefits for African countries. The continued participation of African States in ISDS is to be anticipated. It remains to be seen how the attitude of African countries towards *international* ISDS will evolve. Finally, the continent celebrated the assumption of an African as CEO of the World Trade Organization. Further cause for celebration came with the long-awaited chapter in the development of the practice of international economic law on the African continent: the launch of trading under the AfCFTA. However, it must be understood that the launch of trading under the AfCFTA did not signify an event, but rather a process that was only just beginning. African nations are poised to address the remaining outstanding factors that need to be concluded before the fullness of the benefits of free trade can be experienced across the continent.