

AFRICAN PRACTICE IN INTERNATIONAL ECONOMIC LAW 2021-2022

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In 2021-2022, Africa maintained its fight for relevance in the global trade environment that is characterised by a continued/increased protectionism vis a vis the enormously expanded fragmentation of production across borders, the consequences of COVID-19, the Russia/ Ukraine war, the Fourth Industrial Revolution and the rise of East and South Asia as new economic frontiers. Her strategy continues to be to expand the market access of African countries with each other and with other regions of the world.

Introduction

The journal retains this important tradition of analysing the most significant development in the international economic law field as it affects and reflects the practice of African States. Given the increase of protectionist policies of high-income countries that have called into doubt the continuity of trade agreements with preferential access for African exports, the Continent must take its destiny into its hands by developing and maintaining effective regional integration framework structures. Consequently, the most important developments in the quest to start the full implementation of the AfCFTA are examined in the first instance. Next, the article considers the significance of the recently celebrated 20-year anniversary of the African Union (AU). It re-enforces the importance of a sustained scholarly engagement with the burgeoning *sui generis* AU law as one of the most essential ways to avoid issues of horizontal and vertical fragmentation in the development of African international economic law. Recent global developments like the Russian/Ukraine war, the WTO's new agreement on fisheries subsidies, and COP 27 and how they affect the interests of African countries are also examined. The article concludes with a background consideration of the investor dispute settlement cases in the covered period that has had African States as parties

Status of the African Continental Free Trade Agreement (AfCFTA)

Many analysts agree that the AfCFTA is the most important tool for deepening economic integration in Africa, especially in relation to improving regional value chains (RVC).¹ In 2021-2022, the continent made significant headway in implementing the AfCFTA. The most important are highlighted below.

The Establishment of the AfCFTA Guided Trade Initiative (GTI)

Africa made huge progress in implementing the AfCFTA by inaugurating and operationalising the GTI. Given the largely understandable delay in commencing the operational phase of the AfCFTA (which was supposed to start on 1 January 2021),² the AfCFTA Council of Ministers in July 2022 announced the establishment of the GTI; a solutions-based approach to tackle any inertia against the Agreement's journey of progress.

The GTI is a framework that matchmakes African businesses and products for export and import in select African countries. The objectives of the GTI according to the AfCFTA Secretariat are:

- i. 'to allow commercially meaningful trading under the AfCFTA;
- ii. to test the operational, institutional, legal and trade policy environment under the AfCFTA; and
- iii. to send an important positive message to the African economic operators.³

The GTI signals the formal commencement of trading under the AfCFTA. Eight State Parties – Cameroon, Egypt, Ghana, Kenya, Mauritius, Rwanda, Tanzania and Tunisia (representing the 5 regions of Africa) are now trading under the framework which will cover trade in ceramic tiles, batteries, tea, coffee, processed meat products, corn starch, sugar, pasta, glucose syrup, dried fruits, and sisal fibre. On a positive note, the President of Kenya on 5 October flagged off the first consignment of tea from Kenya to Ghana under the GTI.⁴

1 WORLD BANK GRP, THE AFRICAN CONTINENTAL FREE TRADE AREA ECONOMIC AND DISTRIBUTIONAL EFFECTS (2020), <https://openknowledge.worldbank.org/server/api/core/bitstreams/ef1aa41f-60de-5bd2-a63e-75f2c3ff0f43/content>.

2 The commencement of the AfCFTA was delayed because of the effects of the COVID 19 pandemic.

3 *The AfCFTA Guided Trade Initiative*, AFCFTA (Oct. 7, 2022), <https://au-afcfta.org/2022/09/the-afcfta-guided-trade-initiative/#:~:text=The%20specific%20objectives%20of%20the,to%20the%20African%20economic%20operators>.

4 Shah Rome Khan, *Kenya, Ghana Commence Free Trade under AfCFTA*, DIPLOMATIC INSIGHT (Oct. 5, 2022), https://thediplomaticinsight.com/kenya-ghana-commence-free-trade-under-afcfta/#google_vignette.

Comments on the GTI

Some notable points arise from the establishment of the GTI with respect to describing the distinctive aspects of African States' practice in the area of international economic law. First, the GTI emphasises again the sacred place of flexibility as the most important principle that underpins trade regionalism in Africa. Generally, it is argued in the context of international law, international trade law and international relations, 'flexibility' can only be understood in two distinct ways; first as an institutional choice in contrast with legalisation in relation to how international actors design institutions and how States express their reluctance to limit their sovereignty with more legalised commitments (flexibility as an institutional choice).⁵ Flexibility has also been used to illustrate how various agreements transform or are adaptive to new and unplanned circumstances (contractual flexibility).⁶

With regards contractual flexibility, GTI is an example of variable geometry (a coalition of the willing) which although a prominent feature of African RTAs, remains a standard practice in many other FTAs in the world. In relation to the former, GTI seems to represent an appeal for flexibility/informality rather than legalisation as a more effective approach for pursuing economic integration in Africa. This is of course without prejudice to the fact that its aim is to give effect to the 'very legalised AfCFTA' by testing its operational, institutional, legal, and trade policy environment. Proponents against legalisation in African economic regionalism may therefore refer to it as yet another reason why Africa should eschew legalisation which is 'arguably' Eurocentric and not fitted for African purposes.

By simply matchmaking businesses and products outside the formal structures of an FTA (in a largely effective way), the GTI re-emphasises again that the nature of many African economies means that the justification of economic integration will not conform to the classical (Viner) theories of

5 In IL and IR literature, flexibility is normally used to represent an absence of legalisation in the setup of international institutions. Flexibility in this regard used interchangeably with non-legalisation, less legalisation or lack of formalisation. See generally Kenneth W. Abbott et al., *The Concept of Legalization*, in LEGALIZATION AND WORLD POLITICS 401 (Judith Goldstein et al. eds., 2000); Barbara Koremenos, *Institutionalism and International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991).

6 This flexibility are adaptive or transformative mechanisms in treaty cooperation that allow States to respond to future contingencies and shocks in a way that preserves the existing arrangements previously agreed on. Contractual flexibility also enables international institutions to solve specific cooperation problems by permitting States not to abide by certain commitments so as not to jeopardise the whole agreement. This conception of flexibility was developed by the IR theory on the Rational Design of International Institutions. Examples of contractual flexibility in trade and economic integration agreements include escape clauses, differentiated integration (principle of asymmetry and variable geometry) and constructive ambiguity. Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

integration. Given the economic characteristics of African States, there seems to be a consensus that the focus should be on developing dynamic effects capabilities that support economies of scale and the growth of a strong competitive manufacturing sector.⁷ The argument on whether the best way to do this is through legalised agreements (like the AfCFTA which is largely justified under the classical theories of integration) is plausible and should continue.

Away from the theoretical arguments, the question of how long the GTI will (and should) last remains unclear. There are some indications from the AfCFTA secretariat of plans to continue the interim agreement and expand it to include other countries. Something similar to the initiative is also planned for trade in services. Is it the case that the sooner the GTI gives way and the main deal takes off, the better,⁸ or is the GTI (or some variations of it) at present, the best strategy for progress in light of the very intricate complexities of negotiating a trade deal with 54 countries with different socio-economic realities? The answer probably lies in seeing how the GTI develops in the coming months and if more progress will be made in resolving the challenges that have prevented the full take-off of the AfCFTA.

Conclusion of the AfCFTA Protocol on Investment

In December 2021, African States started the process of negotiating a protocol on investment as part of AfCFTA phase 11 negotiations (which will also include a protocol on competition and intellectual property). The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area draft was concluded in October 2022 and has been adopted at the ministerial level by the AfCFTA Council of Ministers. The final phase which is expected to be ‘ceremonial’ is the review and adoption of the Protocol text by the AU Assembly of Heads of States at its ordinary session scheduled in February 2023.

Although the final draft adopted by the Council of Ministers has not been made public, it seems it is not expected to differ significantly from the draft shared in November 2021 as part of the negotiation process. The objective of the Protocol it is hoped will remain to build a continental legal structure to facilitate and protect intra-African investment whilst fostering sustainable development and preserving State regulatory autonomy taking into account the need to foster harmonisation by building on the framework of the regimes of African States, the regional economic communities and the Pan-African Investment Code. Following adoption by the AU Assembly, the Protocol

⁷ In this regard, the GTI is arguably a step in the right direction.

⁸ Gerhard Erasmus, *The Scope of the AfCFTA is Expanding. What are the Implications?*, TRALAC (Feb. 3, 2023), <https://www.tralac.org/blog/article/15909-the-scope-of-the-afcfta-is-expanding-what-are-the-implications.html#:~:text=Trade%20in%20goods%20and%20in,modern%20trade%20arrangement%20is%20envisaged.>

will enter the stage of ratification in accordance with the constitutional procedure of States. Of course, to access the full benefits of the Protocol, ‘aligning domestic law, implementation of all provisions, and targeted complementary action’ will be crucial.⁹

Resolving the Remaining Issues with the AfCFTA

On a broad level, the success of the AfCFTA will depend on two factors; resolving long-standing political economy issues as it relates to integration and the choice between more restrictive or more liberal rules of origin (RoO).¹⁰ In relation to the latter, continental-wide harmonisation on RoO has been the major factor that has prevented the full commencement of the Agreement for two years now. Even though tariff revenue is a sensitive issue for many African LDCs, it is hoped that 2023 will be the year all issues regarding RoO are resolved. This remains the main agenda for the AfCFTA Secretariat. However, the World Bank in a recent report has warned that the liberalisation of 90 percent of tariff lines (which was what was initially agreed on) may effectively represent just a small value of trade. Given that intra-African trade is already low, States may need to further subject more of their sensitive products to liberalisation since an ‘exclusion of even a small set of tariff lines could effectively exclude a significant share of imports to a country.’¹¹ This may reinforce the position of the AfCFTA pessimists who have argued that the Agreement has been oversold and should by no means be seen as a panacea to Africa’s problems.¹² Part of the claim is that the undue focus on improving intra-African trade is counter-productive. Rather, significantly improving the productive capacities of African States should be the priority since the low level of intra-African trade is just a reflection of low productive capacities.¹³ However, the promise that the AfCFTA presents in accelerating these productive capacities is not mutually exclusive with other solutions that may exist outside the framework of the Agreement.

The African Union (AU) at 20

The AU celebrated its 20-year anniversary in 2022. The umbrella continental organisation was established in July 2002 with ambitions to further entrench Pan-Africanism as the overarching principle on which the development of the continent

9 Dirk Willen te Velde, *Promoting Investment for Africa’s Industrialisation through Economic Integration*, OVERSEAS DEV. INST. (Nov. 18, 2022), <https://odi.org/en/insights/promoting-investment-for-africas-industrialisation-through-economic-integration/>.

10 AFRICA IN THE NEW TRADE ENVIRONMENT: MARKET ACCESS IN TROUBLED TIMES 276 (Souleymane Coulibaly et al. eds., 2022).

11 Id. at 272.

12 Kasirim Nwuke, *I confess, I am an AfCFTA Sceptic*, AFR. REP. (Feb. 15, 2022), <https://www.theafricareport.com/176253/i-confess-i-am-an-afcfta-sceptic/>.

13 Id.

is pursued. Of course, Pan-Africanism has influenced the integrationist dynamics not just politically but also economically, well before African States' accession to international sovereignty in the 1960s and continues to do so currently. The principle was first institutionalised in Africa by the Organisation of African Unity (OAU), the first region-wide indigenous (organisational) attempt at integration. It was evident from the charter of the OAU that African states saw regionalism as not just a means to foster brotherhood, fight colonialism and promote unity transcending ethnic and national differences but also as a means to create and strengthen common institutions for economic cooperation in for instance the transport and communication sectors.¹⁴ Throughout its years, a common thread in the OAU's Declarations¹⁵ was an acknowledgment of economic integration as a necessary condition for concrete independence and development.

In 2002, the AU became the latest expression of the Pan-Africanist spirit. In forming the organisation, African leaders acknowledged the glaring weakness of the OAU but most importantly, sought to make an audacious statement of their willingness to take the political and economic development of the continent very seriously. Consequently, the AU Constitutive Act includes as its objectives 'achieving greater unity and solidarity between African countries and the peoples of Africa; accelerating the political and socio-economic integration of the continent; promoting sustainable development at the economic, social and cultural levels as well as the integration of African economies' among others.¹⁶

Twenty years provide a good opportunity to reflect on how much the organisation has achieved its goals and to suggest the best ways to deal with its challenges. An important symposium has already been done in this regard with very good submissions.¹⁷ However, it is important to crystalize the most important thoughts on the nature and development of the AU that relate more directly to the study and practice of African States in international economic law and to encourage more research in this area.

Firstly, one of the most significant points that arose from the symposium is the acknowledgment and celebration of the important role the AU has played in norm

14 Org. of African Unity [OAU] Charter art. 2, May 25, 1963, 479 U.N.T.S. 39 (entered into force Sept.13, 1963).

15 Org. of African Unity [OAU], *Monrovia Declaration of Commitment of the Heads of State and Government, of the Organization of African Unity on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order*, Sixteenth Ordinary Session, AHG/ST. 3 (XVI) Rev.1 (July 17-20, 1979), https://au.int/sites/default/files/decisions/9526-assembly_en_17_20_july_1979_assembly_heads_state_government_sixteenth_ordinary_session.pdf.

16 See Constitutive Act of the African Union art. 3, July 11, 2000, 2158 U.N.T.S. (entered into force May 26, 2001) [hereinafter AU Constitutive Act].

17 Babatunde Fagbayibo & ArnoldNciko wa Nciko, *Introduction to Symposium: AU @20: Looking Back and Thinking Forward on the Impact of the African Union on Deepening Continental Integration in Africa*, AFRONOMICSLAW (Aug. 1, 2022), <https://www.afronomicslaw.org/index.php/category/analysis/introduction-symposium-au20-looking-back-and-thinking-forward-impact-african>.

generation and the creation of a *sui generis* African Union Law (AU Law) not based on Eurocentric conceptions. AU Law which is used interchangeably with the 'Public Laws of Africa' importantly 'provides a normative framework for the realisation of the political, social and economic objectives of Pan-Africanism.'¹⁸ In a recent book, Olufemi (et al) argues convincingly that whilst AU Law may be useful in adapting existing international law to the African context, they are also 'quite innovative and original as compared to universal international law norms in that they only exist within the public law of Africa as binding rules or principles'¹⁹ Further, it is also argued that more scholarly engagement with this emergent AU legal order is a veritable tool for weaving together various aspects of the integration agenda (including economic integration); the aim being to increase norm coherence that assists in dealing with key challenges African States face.

One of those challenges relates to the age-long problem of ascertaining what constitutes the right approximation of sovereignty to pursue the objectives of political and economic integration; (ie the arguments for and against supranationalism and intergovernmentalism as a tool for African political and economic integration). In this regard, scholars have consistently noted that the non-conferral of supranational authority on the institutions mandated to enforce African treaties is accountable for the widespread non-compliance with the treaty obligations.²⁰ In the coming years that the AfCFTA becomes fully operational, these perennial issues will certainly re-surface.²¹

Moreover, it is important to note that although economic integration in Africa has been implemented through the various regional economic communities (RECs), the AU still provides a critical institutional framework for improving intra-African trade, especially in the context of the AfCFTA. Unlike in the RECs, nothing in the AfCFTA Agreement indicates that the AfCFTA is an international organisation in its own right but only a specialised arm of the AU.²² It is not given any legal personality

18 The quote is from Judge Abdulqawi Ahmed Yusuf, former president of the International Court of Justice. It is lifted from Femi Amao, *Framing AU Law through the Lenses of International Constitutionalization and Federalism*, in THE EMERGENT AFRICAN UNION LAW: CONCEPTUALIZATION, DELIMITATION, AND APPLICATION (Olufemi Amao et al. eds., 2021). For the original work by Judge Yusuf, see ABDULQAWI A. YUSUF, PAN-AFRICANISM AND INTERNATIONAL LAW 185 (2014).

19 Amao, *supra* note 18, at 46.

20 In addition, Article 3(l) of the AU Constitutive Act mandates it to 'coordinate and harmonize the policies between the existing and future Regional Economic Communities [RTAs] for the gradual attainment of the objectives of the Union'. AU Constitutive Act, *supra* note 18, at art. 3(1).

21 Regis Yann Simo, *The (Domestic) Enforcement of AU International Economic Law Instruments: Exploring the Desirability of Direct Effect*, in THE EMERGENT AFRICAN UNION LAW: CONCEPTUALIZATION, DELIMITATION, AND APPLICATION (Olufemi Amao et al. eds., 2021).

22 On this see generally Gerhard Erasmus, *The AfCFTA Institutions: Could the Secretariat hold the key to Implementation?* (Trade L. Ctr. (Tralac), Working Paper No. US19WP01/2019, 2019), <https://www.tralac.org/documents/publications/working-papers/wp2019/2621-us19wp01-erasmus-afcfta-institutions-06022019-fin/file.html>.

and some of the bodies that the AfCFTA Agreement creates (like the Assembly) are also organisations of the AU.²³ In addition, even though the Secretariat enjoys legal personality, Article 13(3) of the AfCFTA Agreement notes that it ‘shall be a functionally autonomous institutional body within the African Union system.’ As noted by Prof Erasmus, ‘the institutional design of the AfCFTA contains indications of creating a structure within the AU system and a proper trade organisation’²⁴ which could lead to some issues in the future. If the fact that the RECs are to be building blocks of the AfCFTA is added to the equation, there is no doubt that there will be a need to ascertain what would be the ‘right’ legal and institutional relationship between the AU, AfCFTA, the RTAs and the States to avoid issues of both horizontal and vertical fragmentation.²⁵

The Russian-Ukraine Conflict in the midst COVID-19 Recovery

On February 24, 2022, the world witnessed a full-fledged invasion of Ukraine by Russia. The war has had enormous implications for the global economy which has just started to recover from the worst pandemic in almost a century. The unprecedented energy price surges and food disruptions (in view of the comparative advantage of Russia and Ukraine) that the conflict has occasioned have had negative reverberations in every corner of the globe contributing to high inflation, food insecurity, and the tightening in global financing conditions. Within just 3 months, the UNDP reported that 71 million fell into poverty and the number is increasing.²⁶ The problem is exacerbated by the fact that an estimated 97 million become extremely poor as a result of the pandemic and the solutions that developing countries have sought have raised their debt to a 50-year high to more than two and half times their revenue.²⁷ In addition, the conflict continues to have geopolitical consequences for global governance between the US, Russia, China, and the EU.

23 Article 1 of the AfCFTA Agreement states that Assembly as used in the Agreements “means the Assembly of Heads of State and Government of the African Union.” See Agreement Establishing the African Continental Free Trade Area art. 1, Mar. 21, 2018 (entered into force May 30, 2019).

24 Erasmus, *supra* note 22, at 19.

25 While vertical fragmentation is concerned with regime or institutional hierarchy, horizontal fragmentation is concerned with rule complexity of public international law norms. Of course, the relationship between vertical and horizontal fragmentation is that the tensions in the former could cause divergence of rules even in the same subject area. See generally Panagiotis Delimatsis, *The Fragmentation of International Trade Law*, 45 J. WORLD TRADE 87 (2011); Joost Pauwelyn, Fragmentation of International Law, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2006); THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE (Thomas Cottier & Panagiotis Delimatsis eds., 2011).

26 *Global cost-of-living Crisis Catalyzed by War in Ukraine Sending Tens of Millions into Poverty, Warns UN Development Programme*, U.N. DEV. PROGRAMME (July 7, 2022), <https://www.undp.org/press-releases/global-cost-living-crisis-catalyzed-war-ukraine-sending-tens-millions-poverty-warns-un-development-programme>.

27 *Id.*; Carolina Sanchez-Paramo et al., *COVID-19 leaves a Legacy of Rising Poverty and Widening Inequality*, WORLD BANK BLOGS (Oct. 7, 2021), <https://blogs.worldbank.org/developmenttalk/covid-19-leaves-legacy-rising-poverty-and-widening-inequality>.

In the context of the devastating effects of COVID 19, analysts have provided some details of the economic impacts of the Ukraine-Russian conflict on Africa;

- i. The African Development Bank notes the conflict has triggered a shortage of 30 million tons of grains in Africa together with a considerable increase in cost. This is because the continent spends \$75 billion on cereal import annually and in 2020, 15 African countries imported over 50 percent of their wheat from Russia or Ukraine.
- ii. The IMF reports that staple food prices in Africa rose almost 24 percent between 2020-2022, the highest rise since the 2008 global financial crisis.
- iii. Supply disruptions of fertilizer imports from Russia, Ukraine, and Belarus has led to a sharp rise in fertilizer costs which have risen 199 percent since May 2020 with prices more than doubling in Kenya, Uganda, and Tanzania in 2022. It is projected that food production will be massively affected in the continent in 2023 especially because most fertilizer producers are banning exports to protect their own farmers.
- iv. The pressure from fluctuations in exchange rates and high commodities prices occasioned by the conflict and post-pandemic recovery led to double digits inflation in 40 percent of African countries. According to the IMF, seven African countries are in debt distress coming up to 2023 and 14 more are at high risk of debt distress. This makes it further impossible to have social protection systems for millions of Africans.²⁸

The geopolitics of the conflict has turned Africa into a battleground for China, the US/EU, and Russia as they seek to further assert their influence in the continent. The Russian foreign minister embarked on an African tour twice in 2022 and had meetings with the governments of Egypt, Ethiopia, Uganda, Congo, Senegal, Cote d'Ivoire, and Ghana since the 'special operation' in Ukraine began in February 2022. Moscow has sought support from Africa to legitimatise its invasion, to counteract the West's blame for the global food prices as a result of the war, and has also promised bilateral investment opportunities for the continent. By contrast, the Ukrainian president in a closed address to the AU in June 2022 described Africa as a hostage of the Russian military operation in his country in relation to the skyrocketing food prices and its

28 For a comprehensive review, see Bitsat Yohannes-Kassahun, *One Year Later: The impact of the Russian conflict with Ukraine on Africa*, AFRICARENEWAL (Feb. 13, 2023), <https://www.un.org/africarenewal/magazine/february-2023/one-year-later-impact-russian-conflict-ukraine-africa>; see also INT'L MONETARY FUND, LIST OF LIC DSAS FOR PRGT-ELIGIBLE COUNTRIES AS OF FEBRUARY 28, 2023, <https://www.imf.org/external/pubs/ft/dsa/dsalist.pdf>; Cedric Okou et al., *Africa Food Prices Are Soaring Amid High Import Reliance*, IMF BLOG (Sept. 27, 2022), <https://www.imf.org/en/Blogs/Articles/2022/09/26/africa-food-prices-are-soaring-amid-high-import-reliance>.

devastating effect on Africa. Both the US secretary of state and the Chinese foreign minister also visited the continent in 2022 as the proxy war over the legitimacy of the conflict and the overall race for superiority in their new 'scramble for Africa' continues.

African nations have largely stayed away from taking sides in the conflict maintaining their long-preferred non-aligned policy to global geopolitical disputes. In March 2022, South Africa, China, and more than a dozen other African countries abstained from voting in UN resolution EN/11 which sought to condemn Russia for its invasion of Ukraine. However, what is not in doubt is that the continued intense rivalry of political and economic influence over Africa by the US and China/Russia emphasise again the continent's increasingly important role in global politics and economy. How they utilize this for their benefit, particularly in relation to negotiating fairer trade and investment deals that champion African interest and mainstream its unique practice remains to be seen.²⁹

In the short term, the overlapping issues of the Russia/Ukraine war, the pandemic, and the resultant surge in food and fuel prices are painful reminders of African States' lack of preparation to manage unexpected shocks in the global economy that can happen almost instantaneously. Policymakers have proposed a package of solutions that are important to alleviate the suffering of millions.³⁰ Interestingly the kickstarting of the AfCFTA remains crucial in this regard.

WTO Agreement on Fisheries Subsidies

After more than 2 decades of negotiations, WTO members finally concluded the WTO Agreement on Fisheries subsidies in June 2022. Given the general decline of the WTO since Doha and the plunge toward economic nationalism and protectionism, the Agreement 'arguably' shows that the organisation still has some signs of life and thus might still be relevant for the global governance of the multilateral trading system. More so, the Agreement which has environmental sustainability as its main objective is the first WTO agreement that focuses on the environment and this is possibly a good response to the crisis of legitimacy that the organisation has earlier suffered in relation to its response to dealing with important non-trade issues.³¹

29 The growing interest in Africa can be used to further the argument for the recalibration of the UN Security Council and to give Africa two permanent states. Moutiou Adjibi Nourou, *The Russia-Ukraine War highlights Africa's Growing Geopolitical Importance*, ECOFIN AGENCY (Oct. 12, 2022), <https://www.ecofinagency.com/public-management/1210-43948-the-russia-ukraine-war-highlights-africa-s-growing-geopolitical-importance>.

30 This includes 're-allocating the \$100 billion IMF Special Drawing Rights to support African countries and restructuring both private and public debt would give these countries the fiscal space to weather the crisis.' For these other measures, see importantly Yohannes-Kassahun, *supra* note 28.

31 Elizabeth Trujillo, *A Dialogical Approach to Trade and Environment*, 16 J. INT'L ECON. L. 535 (2013); Henrik Andersen, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18 J. INT'L ECON. L. 383 (2015).

Particularly for the purposes of this paper, the Fisheries Subsidies Agreement also meets the Sustainable Development Goal 14.6 mandate for the WTO to negotiate disciplines to eliminate subsidies contributing to illegal, unreported, and unregulated (IUU) fishing and overfishing, taking into account *the needs of developing country members*. Consequently, The Agreement generally prohibits 3 types of subsidies; subsidies granted to vessels and operators engaged in illegal, unreported, and unregulated (IUU) fishing or fishing-related activities in support of IUU fishing; subsidies for fishing or fishing-related activities regarding an overfished stock, and subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant regional fisheries management organisation.³²

Fishing has long been a sticking point in Africa's relationship with the West (especially the EU) for a long time. There are currently about 11 Agreements on Fisheries Partnership Agreements between the EU and Africa; seven for tuna and 4 mixed agreements. Seven of these agreements are with countries in West Africa. Given that fishing provides food security for 200 million Africans, African scholars have for decades expressed concerns that the political economy of Euro-African fisheries agreements do 'not augur well for growth and development in Africa, and it is especially not conducive to the sustainable management of Africa's marine resources'³³ because the value negotiated for the agreements are not commensurate with the amount fish species that the EU removes from the continent.³⁴ In addition, European vessels are considerably involved in the practice of IUU fishing whilst receiving fishing subsidies from their respective governments.

The impact of the Agreement will, directly and indirectly, affect Africa when it becomes fully operational.³⁵ Indirectly, foreign vessels that receive subsidies and hence found it profitable to fish in African waters will reduce. Although African States will eventually have to curtail the subsidies to their own industrial fleet,³⁶ it has been argued that the African fishing industry could become significantly 'more profitable regardless

32 See World Trade Organization, Ministerial Decision of 17 June 2022, WTO Agreement on Fisheries Subsidies arts 3-5, WTO Doc. WT/MIN(22)/33, WT/L/1144 (2022), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/33.pdf&Open=True>.

33 Okechukwu C. Iheduru, *The Political Economy of Euro-African Fishing Agreements*, 30 J. DEVELOPING AREAS 63, 64 (1995).

34 Ifesinachi Okafor-Yarwood, *African Countries Must Protect their Fish Stocks from the European Union- here's how*, THE CONVERSATION (Feb. 15, 2022), <https://theconversation.com/african-countries-must-protect-their-fish-stocks-from-the-european-union-heres-how-177095>.

35 Currently only 3 members (out of the 110 required) have submitted their instrument of acceptance of the Agreement.

36 GIOVANNI OCCHIALI, INT'L CTR. FOR TAX & DEV., FISCAL POLICIES FOR THE FISHERIES SECTOR IN SELECTED AFRICAN COUNTRIES: REPORT IN BRIEF 4, <https://ferdi.fr/dl/df-76QUdi7EouVAAtNdr9aR7gb2c/fiscal-policies-for-the-fisheries-sector-in-selected-african-countries.pdf>.

of subsidies level, as many African countries are missing out on potential revenue due to a lack of up-to-date information for their negotiating teams and of regional coordination.³⁷ The AfCFTA arguably can provide such regional coordination. In the interim, four African countries (Angola, Eritrea, Morocco and Nigeria) signed the Food and Agricultural Organisation (FAO) Agreement on Port State Measures (PSMA) in November 2022. The PSMA is the first binding international agreement specifically designed to tackle IUU fishing by preventing port access to foreign vessels that engage or support IUU fishing.³⁸

United Nations Climate Change Conference 2022 (COP 27)

COP 27 (termed the African COP) was held in Sharm el-Sheikh, Egypt from 6-20 November 2022. The conference comes on the heels of the World Meteorological Organisation's (WMO) 2021 State of the Climate in Africa Report (released in September 2022), which shows the rising climate change threats for health, food and water security, and socio-economic development in Africa.³⁹ COP27 has been characterised as a mixed bag featuring 'big wins, and significant losses.'⁴⁰ The key takeaways from the conference include the establishment of a loss & damage fund, a reaffirmation of the commitment to limit global temperature rise to 1.5°C above pre-industrial levels,⁴¹ prioritisation of accountability and transparency in the commitments of business and institutions, commitment to mobilising more financial support to developing countries, and a focus on implementation.⁴²

However, it is considered that the most remarkable achievement of COP27 is the establishment of the loss & damage (L&D) fund.⁴³ The L&D fund is designed to intervene in circumstances of immediate need such as extreme weather events arising from the adverse effects of climate change; and to enable vulnerable developing

37 *Id.* In addition, the full exploitation of all stocks of fish and the limited opportunities for expanding aquaculture in Europe, North America, and East Asia mean that by 2030 only countries in South Asia, the Pacific, and Africa can fill the gap of an additional 60 million tons of fish that the global market will need. See Okiche, *supra* note *.

38 Susan Chacko, *Four African Countries Back Agreement Against Illegal, Unregulated Fishing*, DOWNTOEARTH (Nov. 14, 2022), <https://www.downtoearth.org.in/news/africa/four-african-countries-back-agreement-against-illegal-unregulated-fishing-85952>.

39 WORLD METEOROLOGICAL ORG., STATE OF THE CLIMATE IN AFRICA 2021, WMO-No. 1300 (2022), https://library.wmo.int/doc_num.php?explnum_id=11512.

40 Adebayo Majekolagbe et al., *Roll Out the Drums, or Not: Hits and Misses at COP 27*, AFRONOMICSLAW (Nov. 24, 2022), www.afronomicslaw.org/category/analysis/roll-out-drums-or-not-hits-and-misses-cop-27.

41 To this end, a mitigation work programme was established in COP27, with the objective of expeditiously scaling up mitigation ambitions and implementations.

42 *Five Key Takeaways from COP27*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/conferences/sharm-el-sheikh-climate-change-conference-november-2022/five-key-takeaways-from-cop27> (last visited Apr. 10, 2023).

43 *COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries*, U.N. CLIMATE CHANGE (Nov. 20, 2022), <https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries>.

countries (most of whom are in Africa), to build resilience.⁴⁴ The potential for the L & D fund for Africa if properly constituted and managed could be significant given the particular vulnerability and adverse effects of climate change in the continent. However, the financing mechanisms and frameworks for the L&D fund is unclear at this stage and would remain so until COP28. This is because the responsibility for determining the mechanisms has been assigned to a Transitional Committee who will make recommendations for consideration and adoption by COP28. The first meeting of the Transitional Committee is expected to take place sometime in March 2023.

Some fundamental questions which the Transition Committee would have to tackle include: how the funds will be applied i.e., whether it will compensatory for destroyed assets⁴⁵ or for reconstruction etc? Who will be the contributors, i.e., whether only developed countries, or whether it will be inclusive of large developing economies with major emission contributions such as China, India etc.⁴⁶ It has been suggested that the Bridgetown Initiatives is the best model to follow if the objective is to increase climate finance.⁴⁷ However, there are concerns as to whether developed countries will honour their pledges and contribute to the fund. Other concerns, includes the issues of transparency and accountability of recipient African States in terms of how they utilise the funds for the most vulnerable.

Trends in International Investment Law

International Investment Agreements

What quickly stands out within investment treaty practice in Africa within the period in focus is the interest in Africa by the United Arab Emirates (UAE). This is reflected in the number of Bilateral Investments Treaties (BITs) that have been executed between the UAE and African countries. They include the Mozambique – UAE BIT,⁴⁸ the Cote d'Ivoire-UAE BIT,⁴⁹ and the Democratic Republic of Congo – UAE BIT.⁵⁰

44 The idea behind the L & D fund is for the provision of immediate financial support in the event of loss and damage occasioned by an extreme weather event caused by climate change. See Ruth Kattumuri et al., *Loss and Damage Fund – Size, Design and Agility are Essential*, COMMONWEALTH BLOG (Dec. 5, 2022), <https://thecommonwealth.org/news/blog-loss-and-damage-fund-size-design-and-agility-are-essential>.

45 According to the US Special Envoy on climate change, the L&D fund does not operate as reparations based on responsibility, rather it results from the necessity for developed countries to act in support of developing countries in dealing with the effects of Climate change. See Majekolagbe et al., *supra* note 42.

46 Olivia Serdeczny et al., *2023 will shape the Loss and Damage fund for years to come – have your say now*, CLIMATE ANALYTICS BLOG (Jan. 9, 2023), <https://climateanalytics.org/blog/2023/2023-will-shape-the-loss-and-damage-fund-for-years-to-come-have-your-say-now/>.

47 Majekolagbe et al., *supra* note 42.

48 Mozam.-U.A.E. BIT, Feb. 7, 2022 (not in force).

49 Côte d'Ivoire-U.A.E. BIT, Nov. 24, 2021 (not in force).

50 Dem. Rep. Congo-U.A.E. BIT, Oct. 12, 2021 (not in force) [hereinafter DRC-U.A.E. BIT].

Among African countries, the Democratic Republic of Congo (DRC) has been the most active in executing BITs during the period under review. The DRC has signed BITs with Turkey⁵¹ and the UAE⁵² and has also signed the only inter-African BIT with Rwanda.⁵³ The latter was signed on 26 June 2021 alongside two other bilateral treaties on double taxation and mining concessions.⁵⁴ The text of the DRC-Rwanda BIT (2021) is in French, however, a rudimentary translation of the text reveals that aside from the usual pro-investor, investment protection provisions of BITs, the text seems to include provisions similar to the Morocco-Nigeria BIT (2016), on corporate social responsibilities,⁵⁵ environmental protection;⁵⁶ and liability of investors etc.⁵⁷

Investor-State Dispute Settlement (ISDS)

Between 2021 and 2022, about 9 investment arbitration claims were instituted by and against African countries before the International Centre for the Settlement of Investment Dispute (ICSID) tribunal and other ad hoc investment tribunals. These claims (most are still pending but others have been discontinued) border on alleged adverse host State measures affecting investments in construction, mining and quarrying etc., and arise predominantly from alleged breaches of substantive treatment standards contained in BITs. Egypt remains the African country with the most claims against it,⁵⁸ with about 4 ISDS, of which two have been settled and discontinued.⁵⁹

Despite its criticisms by African and developing countries,⁶⁰ investment treaty-based ISDS, has also been adopted by investors of African nationalities to resolve grievances

51 Dem. Rep. Congo-Turkey BIT, Sept. 7, 2021 (not in force).

52 DRC-U.A.E. BIT, *supra* note 52.

53 Agreement on Investment Promotion and Protection, Dem. Rep. Congo-Rwanda, June 26, 2021 (not in force) [hereinafter DRC-Rwanda BIT].

54 *Rwanda, DR Congo Sign Three Bilateral Agreements*, RWANDA IN SINGAPORE, <https://www.rwandainsingapore.gov.rw/info/info-details/rwanda-dr-congo-sign-three-bilateral-agreements> (last visited Apr. 10, 2023).

55 DRC-Rwanda BIT, at art. 14.

56 *Id.* at arts. 15-16.

57 *Id.* at art. 19.

58 Tsotang Tsiesti & Akinyi J. Eurallayah, *African Practice in International Economic Law: 2020-2021*, 2 AFR. J. INT'L ECON. L. 122, 136 (2021). See also Africa, ISDS PLATFORM (Apr. 2020), <https://www.isds.bilaterals.org/?-africa-263->.

59 *Vicat S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/21/35, Discontinued (2021); *KGL Int'l for Ports, Warehousing, & Transp. K.S.C.C. v. Arab Republic of Egypt*, ICSID Case No. ARB/21/21, Discontinued (2021); *HeidelbergCement AG v. Arab Republic of Egypt*, ICSID Case No. ARB/21/50 (2021); *Bahgat v. Arab Republic of Egypt (II)* (2021).

60 The criticisms of ISDS in relation to developing countries include issues of transparency, duration & costs (as well as third party funding) etc. See U.N. Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), 7-13, U.N. Doc. A/CN.9/930/Rev.1 (Dec. 19, 2017); see also Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53 CASE W. RESV. J. INT'L L. 7 (2021); GABRIELLE KAUFMAN-KOHLER & MICHELE POTESTA, INVESTOR-STATE DISPUTE SETTLEMENT AND NATIONAL COURTS: CURRENT FRAMEWORK AND REFORM OPTIONS (2020).

with other African host States. The first ICSID dispute of 2022 was the intra-African ISDS claim *Suzor and SBEC v Senegal*,⁶¹ which was between Mauritian claimants and Senegal. The nature of the dispute is unclear at the moment and this again reinforces the need to sort out the issue of openness & transparency in investment treaty based ISDS. However, it seems to be in relation to a power plant in the south of Dakar. Furthermore, in *EEPL v Congo*,⁶² another intra-African ISDS case, the claimant (a Mauritian subsidiary of an Australian company), is alleging that the Republic of Congo, undertook unlawful measures against it. The claimant claims that the Republic of Congo expropriated its two iron ore projects, and apparently granted them to a Chinese-linked company operating in the Republic of Congo. This amounted to expropriation and a violation of the FET standard based on the Congo – Mauritius BIT (2010). Given the transparency issues already highlighted, most of the relevant facts are unavailable, however, since Australia has no BIT with the Republic of Congo, this raises the issue of possible treaty shopping through the Congo – Mauritius BIT.⁶³ Finally, another intra-African ISDS dispute instituted within the covered period is *Qalaa & ASEC v Algeria*.⁶⁴ The claimants in this case include an Egyptian private equity fund with a cement focused subsidiary. From the limited available information, their claim seems to have arisen out of alleged unlawful measures carried out by Algeria against the claimant's cement plant projects that resulted in their devaluation and forced sale. Consequently, the claimants contend that Algeria's adverse measures amounted to indirect expropriation and a breach of the FET standard. The claimants are seeking \$900 million in damages for Algeria's alleged breach.⁶⁵

Another ISDS claim against African host States is *Comervi v Morocco*.⁶⁶ Here, the claimant invested in the construction of residential housing in urban developments at the outskirts of Rabat & Tangiers. However, according to the claimant, the investment was truncated owing to Morocco's failure to provide the basic infrastructure for the cities to thrive, and the inability of the claimant to obtain necessary administrative

61 Damien Charlotin, *ICSID Registers Its First 2022 Case, Arising Out of A Power Plant Dispute With Senegal*, INV. ARB. REP. (Jan. 5, 2022), <https://www.iareporter.com/articles/icsid-registers-its-first-2022-case-arising-out-of-a-power-plant-dispute-with-senegal/>. It is instructive to note that this claim was brought a few months after the Paris Court of Appeal affirmed the UNCITRAL award of 243 Million Euros against Senegal in *Aboukhalil v. Senegal* (2015). See Damien Charlotin, *Paris Court of Appeal Upholds Denial of Justice Award Against Senegal, Sees No Bar Against Claims by Dual Nationals in Underlying BIT*, INV. ARB. REP. (Oct. 14, 2021), <https://www.iareporter.com/articles/paris-court-of-appeal-upholds-denial-of-justice-award-against-senegal-sees-no-bar-against-claims-by-dual-nationals-in-underlying-bit/>.

62 *EEPL Holdings v. Congo*, ICSID Case No. ARB/21/53 (2021).

63 Agreement on the Reciprocal Encouragement and Protection of Investments, Congo-Mauritius, Dec. 20, 2010.

64 *Qalaa Holdings v. People's Democratic Republic of Algeria* (2021).

65 Damien Charlotin, *Ad Hoc Treaty-Based Arbitration is Underway Against Algeria, As Egyptian Cement Investors Allege Expropriation*, INV. ARB. REP. (May 18, 2021), <https://www.iareporter.com/articles/ad-hoc-treaty-based-arbitration-is-underway-against-algeria-as-egyptian-cement-investors-allege-expropriation/>.

66 *Comercializadora Mediterránea de Viviendas S.L. v. Kingdom of Morocco*, ICSID Case No. ARB/22/17 (2022).

authorisations because of the internal conflicts between Moroccan officials. Thus, the contention is that the respondent is in breach of FET standards (particularly denial of justice), Full Protection and Security, and Indirect Expropriation. The claimant is claiming damages in the amount of 400 million Euros against Morocco.⁶⁷

In *Bahgat v. Egypt (II)*⁶⁸ the argument by the claimant is that despite the affirmation by the respondents that the investments in the iron and steel projects belonged to the claimant in the final award of *Bahgat v. Egypt (I)*,⁶⁹ the respondent has refused to comply with the assurances it provided to the arbitration tribunal therein. Instead, after the final award the respondent (Egypt) asserted that the investments no longer belonged to the claimant and to this end issued licences to 3rd parties to mine the claimant's concession areas. The claimant also contends that Egypt wilfully disregarded its obligations under international law to pay the damages and claimant's legal costs awarded in the final award of *Bahgat v. Egypt (I)*. According to the respondent, all of these amounted to direct expropriation, a violation of FET and the Transfer of Funds obligation in the Finland-Egypt BIT (2004).

In addition to investment treaty based ISDS claims, arbitration award enforcement proceedings have been brought against African States. For instance, in January 2022, Zhongshan brought an action before the US District Court for the District of Columbia to enforce the sum of about \$70 million awarded against Nigeria in the UNCITRAL investment arbitration case of *Zhongshan Fucheng v. Nigeria*,⁷⁰ where damages were awarded against Nigeria for violation of Zhongshan rights under the China-Nigeria BIT (2001). In response, Nigeria challenged the jurisdiction of the US Court to entertain the enforcement proceedings, however the motion has been dismissed.⁷¹

In conclusion, it is observable and remains demonstrable that the issue of openness & transparency within ISDS still persists thereby continually shrouding investment arbitration claims with a veneer of mystery regardless of the public interest nature of

67 Lisa Bohmer, *Spanish Construction Company Lodges 400 Million Eur Treaty Claim Against Morocco*, INV. ARB. REP. (June 16, 2022), <https://www.iareporter.com/articles/spanish-construction-company-lodges-400-million-eur-treaty-claim-against-morocco/>. See also Comervi v. Morocco, UNCTAD INV. POLY HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1211/comervi-v-morocco>.

68 *Bahgat v. Arab Republic of Egypt (II)*, JUSMUNDI (2021), <https://jsumundi.com/en/document/other/en-mohamed-abdel-raouf-bahgat-v-arab-republic-of-egypt-ii-notice-of-arbitration-friday-13th-august-2021>.

69 *Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award (Dec. 23, 2019).

70 *Zhongshan Fucheng Industrial Investment Co., Ltd. v. Federal Republic of Nigeria*, Final Award (Mar. 26, 2021). For a detailed discussion of this claim, see Jude Thaddeus Uchenna Nnodum, *The Protection of Foreign Investments: The Zhongshan Investment Claim and Lessons for Nigeria*, AFRONOMICSLAW (Sept. 27, 2022), <https://www.afronomicslaw.org/index.php/category/analysis/protection-foreign-investments-zhongshan-investment-claim-and-lessons-nigeria>.

71 *Zhongshan Fucheng Industrial Investment Co., Ltd v Federal Republic of Nigeria*, Case 1:22-cv-00170-BAH (2023).

the issues that are in contention. Interestingly, it is obvious that despite the arguably justifiable criticisms of investment treaty based ISDS, there remains appetite for it within Africa, as can be seen in the recent intra-African ISDS disputes highlighted in this discussion.⁷² Of note is the claim of \$900 million damages against Algeria, by Egyptian investors in *Qalaa & ASEC v Algeria*. Interestingly, Article 10 (1) of the Algeria-Egypt BIT (1997), though in French, loosely translates as a requirement for the parties to settle disputes arising from the interpretation of the BIT, through diplomatic channels. Once again, given the issue of transparency within investment treaty based ISDS, it is unknown if this option was explored. Nevertheless, in the interest of African solidarity it is hoped that the alternative of informal diplomatic exchanges is explored more for the settlement of intra-African disputes, rather than resorting to ISDS.

Conclusion

Building a convergence between African States' interests with each other and with the rest of the world has remained Africa's strategy to expand its market access in the new global trade environment. This strategy won't be going away anytime soon. Regionally, the target next year (and in the short term) will be to commence the full operationalisation of the AfCFTA and to continue to use the enormous potential of the Agreement to engage with the African people and build consensus on how to solve the massive development issues that the continent faces. Globally, Africa must develop a *unified*, clear, and firm strategy for engaging with the global economic powers and should use the massive interest it has received in recent times to re-calibrate some of the economic asymmetries it has suffered and still suffers. Nevertheless, one thing is clear, the theoretical and practical developments in African states' increasingly unique practice in the field of international economic law continue to be exciting and welcoming for the old and new generations of interested African scholars.

72 See Mmiselo Freedom Qumba, *Africa and investor-state dispute settlement: Mixed Reactions, Uncertainties and the Way Forward*, 28 S. AFR. J. INT'L AFFS. 1, (2021).