Reflections on Day 2 of the AfIELN Biennial Conference: Covid-19 and International Economic Law: Africa's Experiences and Responses

By:

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I. Public Health and Intellectual Property

> "Our ability to transcend rigid intellectual property laws to create a moment of global solidarity is a litmus test for law and our own humanity."

Professor Tomasz Milej, after launching day two of the conference with the provocative statement above, handed over to Professor Suresh Nanwani, who

chaired a thought-provoking panel on legal responses to the intellectual property dimensions of the Covid-19 Pandemic.

Pragyan Deep Agrawal and Shreyansh Singh from India's Centre for World Trade Organisation (WTO) Studies spoke on test data exclusivity; David Tilt, a Doctoral Candidate at Central European University, spoke on the limits of compulsory licensing as a solution for vaccine apartheid; Dr. Caroline Mwaura, a lecturer at Kenyatta University School of Law, discussed the possibility that stakeholder collaboration holds for solving the IP dilemma; and Atish Rameshchandra Shah and Pooja Mahendra Karia, from the Universities of Strathclyde and Cape Town, respectively, discussed legal responses to the upsurge in telemedicine during the Pandemic.

Together, the papers cautioned against approaching this moment of crisis as a singular issue, with a singular solution. Solidarity must spread far deeper and wider. For example, David Tilt explained that compulsory licensing is a legal mechanism that allows states to compel industry actors to break their patents and allow for the generic production of a good. While progressive developments at WTO negotiations have meant that countries can issue a compulsory license in times of crisis and export the goods produced abroad, doing so against the wishes of the patent holder risks souring relationships with the patentholder that could have catastrophic effects on the supply of essential goods. In the case of the Covid-19 vaccine, a country pursuing compulsory licensing must consider the likelihood of patentholders retaliating and removing other lifesaving products from that country's market. As this example illustrates, public solidarity can only go so far when private companies wield disproportionate power over medicine access.

The same limits to recent demonstrations of solidarity are evident in the regime of test data exclusivity. Test data exclusivity, Pragyan Deep Agrawal and Shreyansh Singh explained, refers to the protection of clinical trial data that must be submitted to a regulatory agency to prove that a new drug is safe. Even when a patent is waived, the new manufacturer of a drug often has to wait years for the test data exclusivity period to lapse, after which it can use the existing data for the approval of its generic medicine. While the United States has come out to support the TRIPS waiver for the Covid-19 Vaccine, the United States and the European Union are also major proponents for test data

exclusivity in the free trade agreements they enter into. Once again, we see that last-minute, case-specific shows of solidarity cannot, alone, disrupt systems built on profit and exclusion.

II. Sovereign Debt, Tax and Finance

The Covid-19 Pandemic has caused not only a health crisis in Africa but also a financial and economic crisis. African countries were clearly not ready for a pandemic of this nature and the apparent effects and costs it has caused. Some African countries, such as South Africa, even resorted to acquiring loans from the International Monetary Fund (IMF) to mitigate against the economic impact of the Pandemic. This begs the question, what if the African countries were ready? What if they had funds readily available to help in times of crisis or catastrophe, such as the Covid-19 Pandemic?

Two proposals to this end were offered in the panel on 'Sovereign Debt, Tax and Finance' chaired by Dr Ohio Omiunu. Ms Marie-Louise Aren, a Doctoral Candidate at the University of Pretoria, gave an insightful presentation on *Indirect Taxation of the Digital Economy in Africa as a Covid-19 Economic Recovery Strategy*. In it, she reflected on the growth of Africa's digital economy, one of the only sectors to continue growing despite Covid-19 disruptions, and how a digital transactions tax may allow African states to better deal with the impacts of the Pandemic.

Walter Sisulu University, Associate Professor Dr Dunia Zongwe's presentation focused on the importance of African countries forming and contributing towards a budget insurance fund to deal with catastrophes such as the current Pandemic. Zongwe argued that a catastrophe fund would afford African countries a comparative advantage because it would have a multiplier effect—where the initial injection of money is likely to stimulate economic activity in excess of the initial investment. He further stated that currently, in Africa, only about 2 percent of people have received a full dose of a Covid-19 vaccine and that for Africa to gain herd immunity, at least 70 percent of the population needs to be fully vaccinated. In addition, around forty-eight Sub-Saharan African Countries need 12.5 billion USD to assist with dealing with the Pandemic. While the justification for a fund is clear to the authors, the current crisis of vaccine access also suggests that a short-term injection of economic

resources will not, alone, bring a solution to the political problem of dealing with catastrophes: the asymmetrical power relationship between developed countries and developing and least developing countries, especially African countries.

Zongwe posed the thought-provoking question if the justification for catastrophe budget insurance is so clear, ‘why don’t African countries sign up for it?’. He stated that there is a lack of imagination and that African countries think it is not feasible. This begs the question, ‘is it feasible?’ He stated that a pandemic like Covid-19 is both systemic and global and that both these features render pandemics of this nature easier to insure against. Furthermore, people insure against just about anything nowadays. While feasible, governments nevertheless fail to consider catastrophe insurance because a catastrophe, by nature, has a low probability of occurring, and governments assume they simply will not occur. On that basis, they act irrationally and inefficiently when a catastrophe does occur.

The catastrophe insurance proposal is compelling and warrants further consideration. There will be a need to legally define a catastrophe, deal with additional power imbalances between countries, and offer special and differential treatment to deserving countries.

Both presentations emphasised the need for African states to think creatively and proactively about revenue collection in unprecedented times.

III. Roundtable: Career Paths in International Economic Law

Law is a very versatile field, which often leads to confusion about what career path to follow. International Economic Law is an area of law that is very broad. The paths into International Economic Law study and practice can seem especially opaque for African students and early-career practitioners because the discipline is not often discussed and pursued from the continent.

The roundtable brought together experts in the field who, through their challenges and re-routings, managed to build formidable careers worthy of emulation. The roundtable was chaired by Patricia Ouma, a PhD candidate at Leiden University, and the speakers were Elizabeth Oger-Gross (Partner at

White & Case, Paris), Caroline Ncube (Professor at the University of Cape Town), Shingi Masanzu (Senior Legal Counsel at the World Bank) and Babatunde Ajibade (Partner at SPA Ajibade & Co, Lagos). The chair asked the Speakers several questions, which will be discussed below

What has your career path been like?

While Professor Ncube followed a relatively direct path into academia, with only two short stints at a firm before and after her Master's in Law (LLM), other panellists took varied paths to reach their current position.

Ms Masanzu was forced to make an unexpected change early on into her career: While she was certain that she wanted to practice public interest law, she realised upon completing her Bachelor of Laws in South Africa that she would not be able to practice law there as she was not a citizen or permanent resident. She pursued an LLM at New York University instead and later worked at a law firm and then the World Bank. She is currently drawing on her experience at the World Bank as she writes her PhD: 'It's about stumbling into opportunities. Showing up and stumbling into them.'

Dr Ajibade stated that he pursued his studies all the way to PhD level, even though he had no interest in academia. He took over his family law firm and expanded on his father's vision to grow the firm.

All the above experiences demonstrated that career paths would look different, but being adaptable and being able to seize every opportunity are the keys to a successful career in International Economic Law.

What are the challenges to accessing these career spaces?

Professor Ncube stated that in her personal experience, a major challenge is exposure to the field. She had no exposure to IEL subjects until Master's level. The second challenge is earning qualifications, which are especially important for a career in academia. Successfully applying to an LLM program and acquiring funding is a challenge. Once one finds one's niche, the challenge becomes starting and establishing oneself in a career path and finding a job in one's desired career path.

Ms Oger-Gross stated that, as she was moving up the ranks of the law firm, above her, there were only men at Partner level. This made it hard for her, a mother of two, to imagine herself occupying that role. Perhaps because of this, she hesitated to advocate for recognition as a Partner and assumed that if she was deserving, it would be noticed and she would be promoted. Now, a Partner herself, she recognises that she ought to have made it clear that she was both ready and capable to serve as a Partner. She encourages women in her firm to do so. This brings to mind a conversation Dr Ngozi Okonjo-Iweala had with the former Prime Minister of Australia, Julia Gillard, wherein they both described being made to feel guilty for having career ambitions and oftentimes being asked how they balance their careers and their family responsibilities, a question that their male counterparts are never asked.

Ms Masanzu stated that when one desires to work for an international organisation, often times the challenges are not knowing what the entry points are for international organisations, the various contract types, visa considerations, how to get one's foot in the door, and if it's possible to move from one department to another. She advised that challenges are inevitable in any career path and it is important to roll with the punches and to be adaptable. In addition, she said it's important to keep eyes open for opportunities: 'When one door closes, it is probably the door we are not meant to walk into'.

What If someone wants to switch careers?

While Professor Ncube switched from legal practice to academia early on in her career, she has nevertheless found it possible to contribute to policy and practice in other ways, such as through consulting and joining advisory groups.

Ms Masanzu expanded on the point of versatility, stating that it is important to acquire skills that can be translated to other paths. She cited her personal experience that when she joined the World Bank, she had easily transferable skills that she had gained at a law firm, which made it an easy transition. She advised that when seeking to join a new organisation, one should ask oneself what transferable skills are needed for the new role and what one needs to do at present to acquire those skills. There are many different paths within the legal field that converge—of paramount importance is to always look for gaps in

the legal field and be ready to offer solutions.

What is the role of mentorship and different opportunities of mentorship?

Professor Ncube stated that mentorship takes different forms, and one should take mentors one finds them. Citing from her personal experience, she said she has had many mentors for specific tasks or purposes. She suggested that requesting task-specific advice is less daunting for the mentor and is more likely to receive a positive response than a formal request for mentorship. However, she stressed that it is also great to have a long-term mentor who is able to help one navigate one's chosen career path(s).

Ms Masanzu stressed the point that one shouldn't just limit oneself to one mentor. Drawing on Carla Harris' TED Talk, she explains the distinct need for a sponsor, a coach and a mentor.

All speakers converged on the importance of remaining open-minded to the everyday, informal ways that one can benefit from the mentorship of others.

IV. The Role of Private Creditors in African Sovereign Debt

African countries' sovereign debt levels were high already before the Covid-19 Pandemic. The crisis is adding to spending needs—as African countries seek to mitigate the health and economic effects of the Pandemic while at the same time their fiscal revenues are falling due to lower economic activity. Professor Olabisi Akinkugbe chaired a Roundtable on *The Role of Private Creditors in African Sovereign Debt*; the Speakers were Professor James Gathii (Loyola University Chicago School of Law) and Dr Magalie Masamba (Post Doctorate Fellow at Boston University Global Development Policy Center and the University of Pretoria's Centre for Human Rights).

Dr Masamaba said that that African countries' debt levels increased significantly after 2014. She said that at the moment, the main issue of discussion surrounding debt sovereignty, what she termed the 'the big elephant in the room', is 'what do we do about restructuring the privately held debt?'

She further posed the following as issues to ponder:

- If there is a need for an international framework on debt restructuring, how do we get the multilateral players to buy into the international framework?
- How do we deal with the different creditors? How do we get the private creditors to the table and motivate them?
- When things go wrong, how do we restructure?

Professor Gathii expanded on Dr Masamaba's presentation and emphasised the need for a legal framework to deal with private creditors. He gave an example of when Zambia defaulted in 2014 and sought creditor consent for restructuring its debt. Creditors insisted that in exchange for consent to the restructuring, Zambia should disclose Chinese concessions in Zambia. Zambia refused. The creditors' and bond holders' refusal to modify, waive or defer for six months is an example of the power of the bond holders and creditors.

It is apparent that the issue of private creditors in relation to African sovereign debt is a ticking timing bomb in Africa. Africa, though rich in minerals, has slow economic growth and a serious debt problem. There is thus a need for a harmonised legal framework that deals with the issue of sovereign debt, set a limit on debt levels, and outlines how debt restructuring should occur.

Africa cannot afford to wait for the active buy-in of other multilateral players in order to develop this legal framework; Africa needs to drive this initiative. In addition, both players—being African countries and private creditors—must take responsibility to avoid reckless lending. This can also be addressed in a much-needed comprehensive legal framework.

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