Fourth African International Economic Law Network Biennial Conference Symposium: Introduction

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In July 2019, the African International Economic Law Network (AfIELN), held its Fourth Biennial Conference under the theme “Africa and International Economic Law in the 21st Century” at the Strathmore University Law School (Nairobi, Kenya). This symposium contains some of the papers presented at this conference in their abridged forms. Before introducing the authors’ views on this Conference’s broader theme, we provide the important context under which the Conference took place.

The AfIELN Fourth Biennial Conference came at a time when the African Union

Members had just launched the operational phase of the African Continental Free Trade Area (AfCFTA), whose Agreement was signed in March 2018 and entered into force in May 2019. The main objective of the AfCFTA is to create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent. It also seeks to resolve the challenges of multiple and overlapping memberships that have hindered regional integration projects in Africa. The signing of the AfCFTA succeeded the efforts to modernise African investment regimes that culminated in the adoption of the Pan-African Investment Code (PAIC) in 2016. More than 80 papers spread across 20 panels were presented at the Conference. These papers not only engaged with the issues raised by these treaties and codes, but also other aspects of African international economic law, including, but not limited to, the external dimension of African countries trade policies and WTO issues.

The nine (9) contributors to this symposium address the place of Africa's voice in international economic governance within the Conference theme. The first post of the symposium by Professor Dunia Zongwe reflects on the ambitious African Union's (AU) project to establish a Continental Customs Union (CCU), of which the AfCFTA is a first step. Titled "Three Painful Lessons that African Union Should Learn From the Southern African Customs Union, (SACU)", the author questions the necessity for AU to establish a customs union against the backdrop of the drawbacks registered in the SACU, the oldest functioning customs union in the world. One of Prof. Zongwe's arguments is that the difference in economic development of the AU countries, and eventually of the CCU will act against the smaller ones (in terms of economic size) and thus delay their industrialization. While also holding that a customs of this sort tends to divert trade, he contends that the projected CCU needs customization to avoid the dangers mentioned.

The second contribution is by Dr Abiodun Osuntogun and titled "The Emergence of AFCFTA Treaty Regime, International Trade Architecture and New International Economic Order in Africa: Same Problem, Different Actors". Dr Osuntogun traces the evolution of the regional integration since the creation of the Organization of the the African Unity (OAU) up to the establishment of the AfCFTA and argues that although the actors may have changed over the years,

the problems that ought to have been addressed are still very present. These include, among others, issues of protectionism of domestic small markets from losing out of competition from stronger players such as multinationals.

While the first phase of the AfCFTA is complete and the operational phase launched, the second phase of negotiations is underway and will tackle issues of competition policies, investment and intellectual property (IP). Two authors devote their respective contributions to competition law and policy. Professor Jonathan Klaaren's contribution titled "Increasing the Benefits, Reducing the Costs: Adding Competitiveness to the Theory and Practice of Free Trade Agreements and Regional Integration in Africa", takes note of the spread of competition regimes in African countries and regional economic communities and the way they have accelerated in the last two decades. This has also been driven by a growing culture of competition enforcement, which should, according to Prof. Klaaren, inspire the AfCFTA competition policy. As Africa is engaged on the path of deep integration, he favours a competition policy for Africa that is consistent with developmental integration. He also argues that it should have regard to enforcement institutions while being flexible enough to take into account overlapping domestic and regional competition regimes.

The other competition policy perspective is submitted by Vellah Kigwiru, whose piece is titled "The African Continental Free Trade Area (AfCFTA) Competition Policy: Model, Dispute Resolution Mechanism, Institutional Framework and AfCFTA Relationship with Existing Regional Competition Regimes". Taking note that AfCFTA is not the first free trade agreement (FTA) to contemplate the regulation of competition, Kigwiru explores how the analogous provisions in other FTAs could serve as a "laboratory of experimentation" for AfCFTA competition. She then focuses on specific aspects of her experimentation, namely the model to be adopted, the dispute resolution mechanism, the institutional framework and the relational issues between the AfCFTA competition policy and existing African regional competition regimes.

Concerning intellectual property negotiations, Juliet Ogbodo first deplores the "low priority accorded to IP by African countries" before acknowledging that this attitude, in the AfCFTA context, is not strictly speaking a bad strategy considering the "the dismal outcomes of IP regimes across the continent". In

her contribution “AfCFTA Phase II: Towards active participation of ECOWAS in the Intellectual Property Rights Negotiations”, Ogbodo then explores ways to address the fragmentation of IP regulations at regional level against the backdrop of Article 5(b) of the AfCFTA which intends to rely on African Regional Economic Communities (RECs) as building blocs.

Next to competition policy and IP that form part of the AfCFTA Phase II negotiations, there is investment. One can anticipate that the negotiations of the Investment Protocol are at an advanced stage, particularly against the backdrop of the PAIC concluded in 2016 but which ended up as a non-binding instrument. While the PAIC is naturally a compass for AfFCTA investment protocol, the following authors tackle salient issues that African investment regimes should address in their investment reforms. In her piece titled “International Investment Agreements (IIAs) and Sustainable Development: Are the African Reform Approaches a Possible Way Out of the Global IIA Crisis?”, Professor Gudrun Zagel asks whether African international investment reforms grounded in sustainable development should lead the global agenda in a particular context of IIA backlash that has occurred outside Africa? Taking stock of the shift by African states “from the protection of foreign investment to the promotion of sustainable foreign investment”, Prof. Zagel is of the view that this reform is not without its own drawbacks and challenges that should be overcome. She believes that Africa’s potential influence on the worldwide IIA reforms can be jeopardised because they do not constitute binding treaty law. In addition, the current instruments have not yet been enforced through investor-state dispute settlement. This feature is hopefully going to be corrected by the AfCFTA Investment Protocol.

Deepening the investment contributions, Professor Emmanuel Laryea proposes that reforms of African investment regimes to allow individuals that are victims of investment activities access to international arbitration against investors. Titled “Why African Countries should enable Host State Citizen-Investor Arbitration, and How they Can Do It”, Prof. Laryea argues that holding investors more accountable would necessitate granting access to individuals in international arbitration “as an alternate forum to litigation in domestic courts against an investor”. Nevertheless, for such a proposition to succeed, certain legal and systemic issues would need to be addressed. These include,

according to the author, securing investors' consent to arbitrate and establishing the legal basis of such claims.

Linked to the issue of investment is the regulation of the conduct of companies abroad. This issue mainly concerns the extraterritorial regulation of business activities. Titled "Transnational Supply-Chain Regulation – Between the Fight against Corporate Impunity and the Risk of Interference in States' Regulatory Sovereignty", Simon Burger's contribution argues that transnational supply-chain (TNSC) Regulation is an effective tool for improving the human rights and environmental performance of businesses, even though the risk of interfering with third States' regulatory sovereignty is also very high. This risk is even more accentuated for countries that are not home states of large multinational, and which will end up being subject of TNSC regulation imposed by foreign (companies' home states) legislators without the possibility to reciprocate.

The last contribution discusses development issues facing Nigeria and challenges for the realisation of that right. Kingsley Onu on his part elaborates on the UN Declaration on Right to Development and whether/how, it should be enforced in the Nigerian context. His contribution titled "Legal Status of the Right to Development in Nigeria" notes the UN instrument's legal status as a non-binding instrument before acknowledging that this constitutional right is enforceable in Nigerian courts particularly through the domestication of that right via the African Charter on Human and Peoples' Rights.

The papers in this symposium offer different perspectives of African international economic law (IEL) and contribute to the ongoing debate around the contextualisation (aka "Africanization") of these tools to address Africa's development challenges. They are timely and thought-provoking. These papers are representative of the broad range of topics that were presented at the Conference. We hope they contribute to discussions about how Africa can confront and deal with the challenges of international economic law in the 21st century. Finally, this Symposium is first of a series of the publications that are forthcoming from the presentations at Fourth AfIELN Biennial Conference. We look forward to sharing the updates on the other publications with you soon.

Contributors

Jonathan Klaaren: Increasing the Benefits, Reducing the Costs: Adding Competitiveness to the Theory and Practice of Free Trade Agreements and Regional Integration in Africa

Vellah Kigwiru: The AfCFTA Competition Policy: Model, Dispute Resolution Mechanism, Institutional Framework and AfCFTA Relationship with Existing Regional Competition Regimes

Juliet Ogbodo: AfCFTA Phase II: Towards active participation of ECOWAS in the Intellectual Property Rights Negotiations

Gudrun Zagel: International Investment Agreements (IIAs) and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?

Emmanuel Laryea: Why African Countries should enable Host State Citizen-Investor Arbitration, and How they Can Do It

Simon Burger: Transnational Supply-Chain Regulation – Between the Fight against Corporate Impunity and the Risk of Interference in States' Regulatory Sovereignty

Kingsley Onu: The Legal Status of the Right to Development in Nigeria

Dunia Zongwe: Three Painful Lessons the African Union Should Learn from the Southern African Customs Union

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