Book Review Symposium I: The African Continental Free Trade Area Agreement: Legal and Policy Frameworks (Routledge, 2024)

By:

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1. Introduction

Collins C Ajibo's important book, *The African Continental Free Trade Area Agreement: Legal and Policy Frameworks* (Routledge, 2024), accomplishes an impressive systematization of the AfCFTA and its protocols, offering critical insights into the policy decisions which inform this international law regime. The AfCFTA is transforming international law, and Ajibo discusses with expertise its most salient innovations, including its extensive interlinkage to sustainable development goals and other regimes, along with concrete proposals for its successful implementation.

The AfCFTA forms part of a dense network of treaty regimes and legalities. As Ajibo notes, the literature discusses the proliferation of diverse regional trade agreements in terms of a “spaghetti bowl” phenomenon (pp. 4, 38-39) whereby overlapping commitments and groupings risk reintroducing restrictions and preferences in trade. Overlapping legal orders and standards are of the highest interest for jurisprudence, and, as Ajibo carefully establishes, the practical consequences are decisive in the Global South where many communities are especially vulnerable to economic inequalities and low development dynamics (Chapter 2).

The AfCFTA is a case in point of the combination of two architectures which are best understood as non-dichotomous (Parrochia, 2020): arborescent (hierarchical, vertical, or multilevel) and rhizomatic (hetararchic, horizontal networks without a unifying principle) arrangements. This provides for variable geometry concerning integration and the implementation of positive treaty objectives by Member States (pp. 196-197; cf Gathii, 2011, Chapter 2). Likewise, the AfCFTA provides for the development and coordination of its own legal regime with those of other regional trade agreements, bilateral investment treaties, the African Union, the WTO, and the UN. Ajibo notes that, apart from the AfCFTA’s own framework, “other competing dispute settlement frameworks under AU law are the African Court of Justice and Human Rights (ACJ&HR), regional economic communities (RECs) courts, supranational courts and tribunals that impact AU Member States, dispute settlement for individualised trade and investment agreements and national courts” (p. 215). Hence, its coordination combines multilevel and horizontal dimensions.

This review focuses on the pathways which the AfCFTA provides for its own coordination with other legalities.

2. The AfCFTA and Its Pathways

For the relevant pathways among the AfCFTA and other legal orders we propose a taxonomy of three types of norms: *jurisdiction-regulating rules* (§2.1), *interface doctrines* (§2.2), and *norms at the interfaces* (§2.3).

2.1. Jurisdiction-Regulating Rules in the AfCFTA

Following Shany (2006, pp. 36ff), *jurisdiction-regulating rules* include provisions on *lis pendens, electa una via* ('fork-in-the-road' clauses), and *res judicata* to delimit competences.

In Chapters 12 ('Dispute Settlement Frameworks') and 13 ('Investments') Ajibo takes stock of the jurisdiction-regulating rules within the AfCFTA regime. Insightfully, Ajibo characterizes the arrangement provided by Article 3 of the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes (PRPSD) as *horizontal* (p. 214).

Article 3(4) of the PRPSD establishes a clause resembling *electa una via*, stating that "A State Party which has invoked the rules and procedures of this Protocol with regards to a specific matter, shall not invoke another forum for dispute settlement on the same matter". Ajibo unpacks its implications:

• It disavows some "exclusive jurisdiction to entertain AfCFTA matters" (p. 215) in the AfCFTA bodies. As Ajibo argues, optimally, other institutions would make good on the chance to "adopt a teleological interpretative approach to extend its jurisdiction to AfCFTA matters" (p. 214). One may surmise a purpose of embedding the AfCFTA framework in national forums (and possibly in other international forums, too). Helfer (2014, p. 474) thus posits that, as a dimension of effectiveness, embeddedness asks "whether national judges, legislators, and administrators can be incentivized to serve as the first-line defenders of international law, adopting measures that promote rule compliance and provide remedies for any violations that do occur".

• Ajibo identifies in Article 3(4) of the PRPSD a recognition of "the right of State Parties to choose any other dispute settlement framework" (p. 215) such that, ultimately, it "practically allows State Parties to engage in forum-shopping in dispute settlement" (p. 217). This underscores the pressing need to consistently apply and embed international legal commitments. What we call interface doctrines and norms at the interfaces are central for this task.

Regarding the Protocol on Investment, Ajibo takes stock of how, even though substantial advances are made on advancing a better balance of state and community rights in this regime, other aspects, such as requiring consent and a state-led dispute prevention and grievances management process may "be seeped in bureaucracy, delay and potential denial" (p. 247). Drawing from a

broader context, Ajibo discusses the trends towards a multilateral investment court and how a more flexible approach for all involved parties would be convenient, centrally, around ‘fork-in-the-road’ clauses which might not preclude recourse to different forums of dispute settlement, for example, if a judgment is not rendered within a certain period (p. 248).

2.2. Interface Doctrines in the AfCFTA

Unlike jurisdiction-regulating rules, *interface doctrines* will be understood to include a gamut of standards and principles which do not aim (only) at delimiting jurisdictional remits, but also at integrating the underlying rationales at stake (e.g., from member states, other international regimes), insofar as they are simultaneously applicable.

Subsidiarity is built into the relations among the Regional Economic Communities (RECs) and the AfCFTA. As Ajibo explains, these relations set the AfCFTA apart from other legal frameworks (p. 23). As a legal concept, subsidiarity has a negative and a positive dimension (Endo, 1994, p. 2054). The “negative” dimension limits a “higher” organization in favor of more local entities; the “positive” dimension enables its intervention. Negative subsidiarity is present in the conditional precedence for RECs where they ensure that “deeper integration and liberalization are achieved beyond the AfCFTA” (p. 23). In this case, RECs act as building blocks and sources of best practices (pp. 23-25). This negative dimension is also present regarding states and the *non-derogation principle* concerning compliance with WTO obligations. Ajibo highlights this in the context of TRIPS and the AfCFTA’s Protocol on Intellectual Property Rights (pp. 255-256). And it also appears in principles such as *variable geometry* in Article 5 of the AfCFTA Agreement.

Positive subsidiarity, in turn, directs towards the harmonization and compliance with the AfCFTA as a common framework. Ajibo proposes “to consider the adoption of additional principles such as the doctrines of direct effect and the supremacy of supranational law, referral and preliminary ruling procedure, margin of appreciation doctrine and proportionality doctrine” (p. 25). Similarly, in his analysis of Protocol on Investment (Chapter 13), Ajibo argues that the explicit recognition of a right to regulate is a salutary innovation. However, he notes some limitations stemming from the absence of guidance, for example,

“on the remission doctrine, proportionality doctrine, and margin of appreciation” (p. 242).

Correspondingly, where these *interface doctrines* are left implicit or unclear, practitioners face a challenge: to justify the scope and definitive applicability of those contested norms which come to be placed *at the interfaces*, since “regulatory issues are unapologetically fluid and the borderline between regulatory and non-regulatory matters is easier to demarcate in principle than in practice” (ibid.).

2.3. Norms at the Interfaces in the AfCFTA

Norms at the interfaces, as defined by Flynn (2019 p. xxvii), involve “the norm or the norms around which a concrete case of interaction or potential conflict between legal orders revolve”, independently of whether or not they were meant to address the matter of overlapping legalities.

Many standards in the AfCFTA Agreement can become norms at the interfaces. Deciding on their application/exceptions involves a complex balance among interests protected in domestic and international legal orders. Ajibo succeeds in providing in-depth, interdisciplinary discussions of how such counterposed interests inform and are reflected in the AfCFTA, e.g.: in the non-discrimination principle and its general and specific exceptions under the AfCFTA; in the provisions on non-tariff barriers as well as sanitary and phytosanitary regulations affecting trade; in the AfCFTA’s criteria to determine rules of origin; in the innovations in the investment regime along with its pioneering explicit recognition of the right to regulate and investor obligations; or in the specific configuration of the intellectual property rights framework which recognizes, inter alia, traditional knowledges.

I will focus on general exceptions to the non-discrimination principle as this provides us with critical insights into the foundational legal structure of *norms at the interfaces* across the board.

In Chapter 1 (‘Regional Trade Agreement, the AfCFTA and Multilateralism’), Ajibo analyzes how the AfCFTA fits within the exceptions to the non-discrimination principle in the framework of the WTO and its enabling clauses (esp. at pp. 12-17). In Chapters 3 (‘Non-Discrimination and Market Access’), 4

(‘General Exceptions’), and 5 (‘Specific Exceptions’), Ajibo explains how non-discrimination standards play out in legal reasoning.

Where public policy exceptions are invoked for certain domestic measures, international standards related to the non-discrimination principle become *norms at the interfaces*. The methods to analyze their restrictive nature focally include necessity tests (and proportionality analysis). Ajibo reconstructs them under the heading of “Compliance Tests”, further organized into four sections: “Necessary or Necessity Test”, “Reasonable Alternative Test”, “Weighing and Balancing”, and “Least-Trade-Restrictive Test” (pp. 65-70).

Ajibo demarcates these methods from proportionality analysis (pp. 68-69), as the latter is assessed as more controversial and “intrusive in the regulatory autonomy of State Parties” (p. 69). Instead, Ajibo advocates a more deferential standard inquiring whether a measure at issue is the least-trade-restrictive alternative which is reasonably available (p. 69). Ajibo proposes two different criteria to judge the reasonability of the alternative measures, namely, a *test of particularity* concerned with a case-by-case analysis to apply “the same rules in different ways to different members based on their capacity” (p. 70), and a *test of universality*, whereby “A measure that is objectively reasonable as an alternative will remain so and is applied as such to a member in spite of the member’s lack of capacity to implement such a measure” (ibid.). Whereas the *test of particularity* is presented as “inherently subjective”, it would be “conscious of the development disparities of AfCFTA members” (ibid.). Contrariwise, the test of universality establishes “a level playing field” by securing a non-discriminatory application of rules more uniformly, although at the cost of imposing “undue pressure on most of the AfCFTA members with limited capacity” (ibid.).

Ajibo’s distinction of both tests proves sound and insightful, if also confirmed by theories on proportionality analysis. It corresponds well to the difference between *rule-based* and *ad hoc* balancing (Clérico, 2015; Sieckmann, 2018, pp. 159-161). Additionally, Ajibo’s two tests unearth the interplay of economic (efficiency) and political (equity) imperatives under high-stake disputes. However, both tests might complement each other. In fact, in Chapter 15 (‘Competition Policy’), Ajibo takes stock of the convergence of a closely related doctrinal division in the US and the EU (pp. 270-272), by limiting the category

of prohibited agreements (akin to Ajibo's *test of universality*), and broadening the scope of those which must be assessed by a 'rule of reason' (akin to Ajibo's *test of particularity*), as well as allocating a variable standard of review based on the fit with said categories. This reflects the general structural relation of categorical reasoning with balancing (or proportionality assessments). Relatively stable categories can crystallize in adjudication. Barak (2012, p. 527) thus concludes: "both proportionality and categorization are a part of the legal architecture".

3. Conclusion

The AfCFTA reshapes international law substantively and structurally. The reader of Ajibo's book will gain from a wealth of critical discussions grounded in political economy and an acute awareness of how the AfCFTA Agreement's innovations fit the bigger picture of global and regional development dynamics.

I chose to highlight the issue of the regime's pathways and management of jurisdictional overlaps, whereby its range of pathways —including *jurisdiction-regulating rules*, *interface doctrines*, and *norms at the interfaces*— is tailored for transiting between more arborescent developments and more rhizomatic expansions. However, Ajibo's contribution extends far beyond, encompassing and clarifying areas such as quantitative restrictions and non-tariff barriers, or countervailing measures and trade remedies. Practitioners and policymakers will acquire well-founded recommendations to actualize the transformative potential of the AfCFTA Agreement.

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