African Practice in International Economic Law: 2017–2019

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This section provides updates and context into some of the significant developments in Africa's participation in IEL. In particular, it provides background discussions on the recently signed Agreement Establishing the African Continental Free Trade (AfCFTA), the China-Mauritius FTA, the Kenya-US FTA Negotiations, recent participation of African countries in the WTO Dispute Settlement Body and what this means for WTO jurisprudence. The section concludes by providing considerations on Nigeria's border closure and the 2020 World Investment Report. Despite the challenges faced by the continent, these activities not only reflect an increased interest in the broad subject of trade and investment liberalisation in Africa, but also a growing involvement of African States in IEL governance.

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Introduction

Several significant developments occurred in the field of trade law within the last two years. This section on African Practice in International Economic Law provides a broad overview of some of these developments highlighting how they have changed the trade landscape within the continent and what this signifies for rule-based multilateralism both at regional and global level.

I. THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA)

The Agreement Establishing the African Continental Free Trade Area (AfCFTA)[1] was signed at the 10th Extraordinary Summit of the AU Assembly on March 21, 2018 in Kigali, Rwanda and entered into force on May 30, 2019. The AfCFTA, a by-product of the 1994 Abuja Treaty,[2] aims to create a 'single market for goods, services, free movement of persons and capital, and liberalised market for goods and services in order to deepen the economic integration of the African continent.'[3] The AfCFTA is part of a wider plan for continental integration, which is seen by many within and outside the continent as an important development framework. The AfCFTA will cover a market of 1.2 billion people and a gross domestic product (GDP) of $2.5 trillion, across the 55-member States of the African Union,[4] making it the largest trade Agreement since the creation of the World Trade Organization (WTO).[5]

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1 *See* African Union, Agreement Establishing the Continental Free Trade Area (adopted Mar. 21, 2018) [hereinafter AfCFTA Treaty], *available at* https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf; Regis Y. Simo, *Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility*, 23 J. Int'l Econ. L. 65–95 (2020).

2 *See* Organization of African Unity, Treaty Establishing the African Economic Community (June 3, 1991) [hereinafter Abuja Treaty], https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf.

3 *Id. art. 3.*

4 Collins C. Ajibo, *African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects*, 53 J. World Trade 871–94 (2019). *See* also Third World Network–Africa Publication, AfCFTA Phase 1 Negotiations: Issues and Challenges for Eastern Africa, at 2 (2019), http://twnafrica.org/wp/2017/wp-content/uploads/2019/10/AfCFTA-Phase-1.pdf.

5 Kingsley Ighobor, *Africa Set for a Massive Free Trade Area,* UN Africa Renewal (Aug. – Nov. 2018), https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-

Structured in two phases, Phase I negotiations which have been concluded focused on a single continental market for goods and services with a Protocol on Rules and Procedures on the Settlement of Disputes. The Agreement contains nine annexes related to: rules of origin, customs cooperation and mutual administrative assistance, trade facilitation, non-tariff barriers, technical barriers to trade, sanitary and phytosanitary measures, transit, and trade remedies. However, exceptions of Annex 1 on Schedules for Tariff Concessions, Schedules of Specific Commitments for Trade in Services, an Appendix on the AfCFTA Rules of Origin remain outstanding. Harmonising rules of origin across the various regional economic communities (RECs) has proven quite divisive among members. This is because certain countries prefer the use of product-specific rules 'where countries tailor the design of the rules in relation to a particular sector of economic interest on one hand, and general rules of origin that normally apply to all sectors, irrespective of product.'[6] Phase II negotiations focusing on competition, investment and intellectual property (IP) were scheduled to start in 2020 but has been suspended as a result of the global health pandemic caused by COVID-19. South Africa's Wamkele Mene is the inaugural Secretary General of the AfCFTA and his appointment is for four years.

The AfCFTA comes at a time when global trade is facing both structural and political challenges, such as the stalemate at the WTO dispute settlement body and the China-US trade war. Therefore, it is not surprising that analysis of the impact of the AfCFTA project that the Agreement will positively impact trade and international economic activities on the continent on three main fronts. First, it will boost intra-regional trade and development. Businesses within the continent currently face high tariffs. Currently, intra-continental tariffs stands at 6.1 per cent[7] making Africa one of the most unfavourable

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area; *African Continental Free Trade Area: Questions & Answers,* African Union, UNECA & African Trade Policy Centre (2018), https://www.uneca.org/publications/african-continental-free-trade-area-questions-answers. *See also David Luke, Making the Case for the African Continental Free Trade Area, Afronomics* law.org (Jan. 15, 2019), https://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/.

6 *African Leaders Launch Continental Free Trade Area*, International Centre for Trade and Sustainable Development (2020), https://www.ictsd.org/bridges-news/bridges/news/african-leaders-launch-continental-free-trade-area. *See also* The African Continental Free Trade Area: A Tralac Guide 5 (6th ed. 2019).

7 African Continental Free Trade Area: Questions & Answers, African Union, UNECA & African Trade Policy Centre (2018), https://www.uneca.org/sites/default/files/PublicationFiles/qa_cfta_en_230418.pdf [hereinafter AfCFTA Q&A]. According to the

climates for business. Further, only 10 to 12 percent of African trade is between African countries compared to 40 percent of trade between North American countries, and 63 percent of European trade.[8] The AfCFTA, it is hoped, will reduce and eventually eliminate tariffs and non-tariff barriers (NTBs) between African states, which will boost trade between member states, make it easier for African businesses to trade within the continent, and foster healthy competition in many sectors within the continent. In fact, the Economic Commission for Africa (ECA) estimates that the AfCFTA has the potential both to boost intra-African trade by 52.3 per cent by eliminating import duties, and to double this trade if non-tariff barriers are also reduced.[9] Outside of trade, many analysts believe the Agreement will also improve the quality of infrastructure and industrialization, including transportation and electricity as well as to facilitate the goals of intra-African trade liberalization.[10]

Second, the creation of the WTO globally expanded international trade and investment in services. According to the United Nations Conference on Trade and Development (UNCTAD), in 2019 trade in services exports accounted for 7 per cent of world GDP at US$6.0 trillion, even though Africa services exports amounted to less than 3 per cent of GDP.[11] Meanwhile, in 2014, manufactured products represented 14.8 percent of African exports to the rest of the world, compared with 41.9 percent of intra-African exports.[12] Therefore, it is not surprising that one of the key arguments in favour of, and benefit of the AfCFTA, is export diversification. It is projected that the AfCFTA will promote trade diversification that will produce sustainable growth, particularly the type of trade that moves away from unreliable extractive industries and commodities towards finished and value-added products, thereby creating African-led development and industrialization. Furthermore, it is hoped that liberalisation in services, if implemented as proposed in the AfCFTA, will promote sectoral

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AfCFTA Negotiation Modalities, tariffs on non-sensitive products will be eliminated after five years (non-LDCs) or 10 years (LDCs). Tariffs on sensitive products will be eliminated after 10 years (non-LDCs) or 13 years (LDCs). *See* Third World Network–Africa Publication, *supra* note 4, at 16.

8 James Thuo Gathii, *Agreement Establishing The African Continental Free Trade Area*, 58 Int'l Legal Materials 1028–83 (2019).

9 AfCFTA Q&A, *supra* note 7.

10 Gathii, *supra* note 8*, at* 1028.

11 United Nations Conference on Trade and Development (UNCTAD), 2019 e-Handbook on Statistics (2019), https://stats.unctad.org/handbook/Services/Total.html#figure1.

12 *African Leaders, supra* note 6.

and industrial growth and foster a coherence in continent-wide policy based on transparent, inclusive and integrated single services market in Africa.[13]

Finally, the creation of the Dispute Settlement Mechanism within the AfCFTA framework provides for the rules and procedures for the settlement of disputes in a transparent and predictable way consistent with the provisions of the AfCFTA.[14] The Settlement of Dispute Protocol, akin to the WTO Dispute Settlement Body (DSB), will help in building jurisprudence and expertise on trade dispute settlement within Africa. This is crucial as many African States are reluctant to engage with the WTO DSB. Importantly, the AfCFTA provides for different options for dispute settlement such as arbitration, conciliation, good office and mediation.[15] Thus, it is only after parties fail to resolve their disagreement using one of the dispute settlement options will a formal panel under the AfCFTA DSM be established. The provision of other means of dispute settlement, commentators believe, offers a 'genuine way forward to forge an engaged dispute resolution that is relevant for integration.'[16]

Of course, there are worries that many African countries are unprepared to implement their AfCFTA commitments as the Agreement goes into full effect. The Nigerian-Benin border closure, for instance, underscores this concern.[17] However, this singular act raises questions about the willingness of countries to comply with the AfCFTA. Other commentators such as Franklin Obeng-Odoom, opines that as a result of its 'exclusive focus on continental Africa, disinterest in systemic redistribution, and encouragement of the private appropriation of socially created land rents prevents AfCFTA from achieving

13 Preamble of the AfCFTA Treaty's Protocol on Trade in Services [hereinafter Services Protocol], *available at AfCFTA Treaty, supra note* 1*, at* 31.

14 *See also* James Thuo Gathii*, Introduction to the Symposium on Dispute Settlement in the African Continental Free Trade Agreement,* Afronomicslaw.org (2019), https://www.afronomicslaw.org/2019/04/08/introduction-to-the-symposium-on-dispute-settlement-in-the-african-continental-free-trade-agreement/.

15 AfCFTA Treaty's Protocol on Rules and Procedures on Settlement of Disputes [hereinafter Settlement of Dispute Protocol], *available at* AfCFTA Treaty, *supra* note 1, at 59 (Article 8).

16 Olabisi D. Akinkugbe, *What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution,* Afronomicslaw.org (Apr. 9, 2019), https://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/.

17 Landry Signé & Colette van der Ven, *Nigeria's Benin border closure is an early warning sign for the African free trade deal*, Quartz Africa (2019), https://qz.com/africa/1741064/nigerias-benin-border-closure-is-a-warning-for-afcfta-trade-deal/.

its goals.'[18] This is because the AfCFTA has failed to take seriously the problem of inequality between Members as well as soaring nativism and protectionism around the world. As a result, the Agreement risks deepening the continent-wide poverty and inequality. Despite these challenges, Africa is better-off with free trade than otherwise and the success of the AfCFTA will depend on political will of its Members, technical capacity, and appropriate use of availability of existing resources to redress the anomalies already present in the Continent.

II. CHINA-MAURITIUS FREE TRADE AGREEMENT

On October 17, 2019, the Republic of Mauritius and the People's Republic of China signed a Free Trade Agreement (FTA). The negotiations were officially launched in December 2017 and formally concluded on September 2, 2018 after four rounds of intensive negotiations. The Agreement comprises 17 Chapters covering trade in goods, sanitary and phytosanitary measures, technical barriers to trade, competition, intellectual property, E-commerce, trade in services, investment and economic cooperation.[19] The FTA also contains Annexes on rules of origin, market access for goods schedule for Mauritius and China.

The China-Mauritius FTA is part of a larger move by China to further integrate into the global economy in general and to expand its trade relations with Africa in particular. Another objective of the FTA is to further expand bilateral trade and investment interactions between the two countries, proffer new ideas on a China-Africa comprehensive strategic partnership and elevate China-Africa economic and trade cooperation. The China-Mauritius agreement is the first free trade agreement between China and an African country.[20]

III. MOROCCO — DEFINITIVE ANTI-DUMPING MEASURES ON SCHOOL EXERCISE BOOKS FROM TUNISIA21

Tunisia, on 21 February 2019, requested the Dispute Settlement Body (DSB) to establish a panel to examine anti-dumping duties imposed by Morocco

18 Franklin Obeng-Odoom, *The African Continental Free Trade Area*, 79 Am. J. Econ. & Soc. 167 (2020).

19 *China and Mauritius Sign Free Trade Agreement,* China FTA Network (2019), http://fta.mofcom.gov.cn/enarticle/chinamauritiusen/enmauritius/201910/41658_1.html.

20 *Id.*

21 DS578: Morocco — Definitive Anti-Dumping Measures on School Exercise Books from Tunisia (Dispute Settlement Body, World Trade Organization 2020).

on imports of school exercise books. The measure at issue was the definitive anti-dumping measure imposed on imports of school exercise books from Tunisia. According to Tunisia, these measures were inconsistent with a number of provisions under the WTO's Anti-Dumping Agreement[22] and the General Agreement on Tariffs and Trade (GATT) 1994.[23] More specifically, Tunisia questioned the evidence of dumping, injury or a causal link of dumping and the calculation of an artificially high normal price of school exercise books. According to Tunisia, Morocco had failed to comply with its obligations under the Anti-Dumping Agreement by failing to disclose the analysis of injury suffered by the domestic industry and details of the findings and conclusions reached, which led to the imposition of the measure at issue. On the basis of these and other reasons, Tunisia requested that the DSB establish a panel to examine this matter.

The Morocco-Anti Dumping case establishes both a precedent and an opportunity. First, it is a precedent in that it is the first WTO dispute involving two African countries as a complainant and as respondent, even though this is the second time that Morocco is involved in a dispute proceeding at the WTO. Second, it is an opportunity for African countries, which are generally reluctant to litigate international trade matters, to both build their technical expertise and to contribute to the growing body of WTO jurisprudence. Unfortunately, by taking this dispute to the WTO, Tunisia missed an opportunity to establish an intra-REC trade dispute record.[24] In analysing the consultation, Regis Semo notes that by filing in the WTO, these countries lost an opportunity to litigate the issue in an African international trade court despite Morocco and Tunisia being parties to the Arab Mediterranean Free Trade Agreement (AMFTA), the Pan-Arab Free Trade Area and the Arab Maghreb Union. Nevertheless, it a welcomed improvement that African states are participating in the DSB, thereby contributing to the WTO jurisprudence.

22 Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 4.1, 5.2, 5.3, 5.8, 5.10, 6.5, 6.5.1, 6.8, 9, 11, 12.2, 12.2.2, 18.1 and paragraphs 1, 3, 5, and 6 of Annex II of the Anti-Dumping Agreement.

23 General Agreement on Tariffs and Trade 1994 [hereinafter GATT], Articles II:1(a), II:1(b), VI:1 and VI:6(a).

24 Regis Y. Simo, *The Tunisia/Morocco Scuffle at the WTO: A Missed Opportunity to Establish a Record of Regional Interstate Trade Disputes or a Chance to Contribute to Shaping WTO Jurisprudence?*, Afronomicslaw.org (2020), https://www.afronomicslaw.org/2019/04/03/the-tunisia-morocco-scuffle-at-the-wto-a-missed-opportunity-to-establish-a-record-of-regional-interstate-trade-disputes-or-a-chance-to-contribute-to-shaping-wto-jurisprudence/#.

IV. THE UNITED STATES AND KENYA TO NEGOTIATE A FREE TRADE AGREEMENT

In December 2018, the White House announced its strategy for future relations with Africa.[25] This included an expressed desire to increase trade links between the two. However, the fruits of this commitment have been a bit hit and miss. On the one hand there were positive steps such as the renewal of the African Growth and Opportunities Act (AGOA). On June 28, 2019 the Office of the U.S. Trade Representative (USTR) announced the initiation of the annual review of the eligibility of sub-Saharan African countries to receive the benefits of AGOA.[26] As a result of this exercise, 38 countries are currently eligible for AGOA benefits.[27] However, in stark contrast, in February 2020, the Trump administration introduced travel bans for nationals of four African countries: Eritrea, Nigeria, Sudan and Tanzania. This policy will hinder trade in services and investment flows. In the midst of these events came the announcement that the US and Kenya would negotiate a trade deal. This followed a meeting between the two leaders – President Donald Trump and President Uhuru Kenyatta – on February 6, 2020. Subsequent to that meeting (on March 17, 2020) the US Congress was notified of the intention of the two governments to pursue trade negotiations.[28] The Kenyan cabinet had already approved the launch of formal negotiations on a free trade agreement on January 30, 2020.[29]

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25 *President Donald J. Trump's Africa Strategy Advances Prosperity, Security, and Stability*, The White House (Dec. 13, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-africa-strategy-advances-prosperity-security-stability/.

26 Office of the United States Trade Representative, *Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act,* 84 Fed. Reg. 31135 (June 28, 2019), https://agoa.info/images/documents/15602/federal-regsiter-agoa2019-13905.pdf. The AGOA Implementation Subcommittee of the Trade Policy Staff Committee develops recommendations for the President on AGOA country eligibility. The Subcommittee requests comments and conducts a public hearing on this matter before making the recommendations.

27 *African Growth and Opportunity Act (AGOA)*, Office of the United States Trade Representative https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa.

28 *President Trump Announces Intent to Negotiate Trade Agreement with Kenya*, Office of the United States Trade Representative (Feb. 6, 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/president-trump-announces-intent-negotiate-trade-agreement-kenya. Luke Anami, *US Cranks Up Trade Deal with Kenya,* The East African (Mar. 24, 2020), https://www.theeastafrican.co.ke/business/US-cranks-up-trade-deal-with-Kenya/2560-5499796-139up1q/index.html.

29 *Cabinet Approves Start of Free Trade Talks with the US*, The Standard (Jan. 31, 2020), https://www.standardmedia.co.ke/article/2001358611/cabinet-meeting-okays-kenya-us-free-trade-talks.

The expressed goals of the trade deal have been enunciated as follows:

- To form part of a broader agenda to pursue reciprocal and mutually beneficial agreements between the United States and individual sub-Saharan African countries. The agreement is to be a model for future engagements.
- To build on the objectives of AGOA.
- To contribute to African regional integration.[30]

There are concerns that Kenya may not benefit from a free trade agreement with the United States in light of the fact that it exports mostly low-value goods to the US, while the US exports high value goods to Kenya. Furthermore, the trade deal is likely to include provisions that may be easier for the US to comply with, than for lesser-developed Kenya. For example, the US favours provisions on the facilitation of trade, which would require the implementation of trade processing automation and the use of e-commerce in trade. Kenya may struggle to implement these reforms due to the heavy financial implications involved.

There are also concerns that the agreement, if negotiated, could actually undermine regional integration efforts, particularly with regard to its compatibility with the East African Community (EAC) treaties and the African Continental Free Trade Agreement (AfCFTA).[31] In relation to the former, the protocol on the establishment of the East African Community Common Market (2009) has article 37 which concerns the coordination of external trade relations. The article requires that members adopt a common negotiating position with third parties. Kenya seems to be ignoring this provision by going at negotiations with the United States alone, without the other members of the EAC. The ethos of the AfCFTA, on the other hand, is that members are to concentrate on boosting intra-African trade and are discouraged from entering into bilateral trade deals with third parties. There is concern that the potential US – Kenya accord could have the effect of increasing barriers to

30 Office of the United States Trade Representative, *United States-Kenya Negotiations: Summary of Specific Negotiating Objectives* (May 2020), https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf.

31 *See, e.g.*, Jack Caporal, *Going Solo: What is the Significant of a U.S.-Kenya Free Trade Agreement?*, CSIS (Mar. 18, 2020), https://www.csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement.

intra-African trade and therefore undermining regional integration efforts. For example, it is expected that the agreement will include rules of origin to ensure that only the products of the parties to the agreement benefit from the trade preferences, and excluding goods from other nations from benefiting from the arrangement. However, despite these concerns, Kenya is keen to have the agreement because it believes that it will lead to greater investment inflows of investors who will be seeking to gain access to the US market. Furthermore, Kenya is anxious to secure a deal ahead of the expiry of AGOA in 2025.

Kenya would not be the first African country to strike a bilateral trade deal with the United States.[32] In August 2018, the US and Morocco entered into an agreement on the import of US poultry and poultry products into Morocco. This was despite Morocco being a member of the Arab Maghreb Union[33] as well as the Community of Sahel – Saharan States (CEN – SAD) at the time.[34] However, the US – Morocco agreement is far less comprehensive than the proposed US – Kenya deal, as it is a subject – specific agreement. Being so narrow, it did not, for example, even require congressional approval like the Kenya – US deal will. Furthermore, Morocco is yet to ratify the AfCFTA so it can be argued that it is not bound by its stance which discourages agreements with third parties. Conversely, Kenya ratified the AfCFTA on May 10, 2018 and is therefore bound to heed its commitments thereunder.[35]

V. NEGOTIATIONS TO RENEW THE COTONOU AGREEMENT

The Cotonou Agreement was entered into in the year 2000 between the European Union (EU) and African Caribbean and Pacific (ACP) countries as a successor to the Lomé Agreement of 1975. The intention was to replace the former non-reciprocal arrangement with a reciprocal one and to be the basis for the formation of Economic Partnership Agreements (EPAs) between the two parties.[36] The agreement was set to expire on February 29, 2020, unless

32 Lucas B. Terna, *Is Morocco Africa's Leading Free Trade Bastion?*, Afronomicslaw.org (Mar. 20, 2019), https://www.afronomicslaw.org/2019/03/20/is-morocco-africas-leading-free-trade-bastion/.

33 Established in 1989 with 4 other members: Algeria, Libya, Mauritania and Tunisia.

34 Established in 1998 with 29 members.

35 *Status of AfCFTA Ratification,* TRALAC (last updated May 6, 2020), https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html.

36 There are currently 79 African Caribbean and Pacific countries. 48 of these are sub-Saharan African countries.

renewed. Negotiations on its renewal were initiated on September 28, 2018.[37] The original agreement had focused on development cooperation, trade and political dialogue. Now, new global concerns have arisen, such as climate change and the fight against terrorism. The shifting of interests mandated a re-evaluation of the framework agreement to reflect modern challenges, realities and aspirations.

The only progress that has been made so far in the negotiations is the adoption of negotiating mandates by the two sides. The EU Council adopted the mandate on June 22, 2018 while the ACP countries adopted theirs on May 30, 2018 at an ACP Council of Ministers.[38] Secondly, there is a broad agreement about the structure of the agreement – the key chapters. A novel (yet controversial) aspect is that, in addition to the general framework agreement, there are to be three separate agreements for each of the ACP regions. This is to take account of the differences in interests of the countries in the three regions.

The expiry of the Cotonou Agreement had to be postponed to December 2020 owing to delays in the conclusion of the negotiations. There is still a lot of ground to be covered in the negotiations and it is unclear whether the extended deadline will be met. This is more particularly so on account of the COVID-19 outbreak which has generally led to a slowdown in all activities across the globe, and forced all governments to turn their attention to dealing with the health pandemic in their various countries. The parties are yet to consolidate the proposals on the provisions, to agree on the institutional structure and on the modalities of cooperation, as well as to set the final provisions.

Some trepidation has been expressed regarding the Cotonou Agreement. For one, trade agreements between unequal partners are always challenging to construct in a manner that will end in an outcome that is viewed as being fair to all sides. Secondly, the diversity of the ACP group (and even of the African states themselves as a group) presents challenges to agreeing on mutual interests. For example, there have even been divisions among African governments over the adoption of the EPAs. Only 14 states have so far accepted interim-EPAs with the European Union. Many African states have feared

37 *Cotonou Agreement,* European Council, https://www.consilium.europa.eu/en/policies/cotonou-agreement/

38 ACP Negotiating Mandate for a Post-Cotonou Partnership Agreement with the European Union, ACP/00/011/188 (adopted May 30, 2018), http://www.acp.int/sites/acpsec.waw.be/files/acpdoc/public-documents/ACP0001118_%20ACP_Negotiating_Mandate_EN.pdf.

that liberalising trade with Europe will result in the loss of customs revenue, which is an important contributor to government revenue. Further, it is feared that it may harm African producers whose products may struggle to compete with European imports. It is not the African side alone which has had challenges that have stalled the integration process. The European side has also faced institutional battles that have under-mined their efficacy in these negotiations. Indeed, broadly speaking, it has been a difficult time for integration in general, given events such as the trade wars and Brexit.

A former Nigerian trade minister remarked that "if 30 years of nonreciprocal free market access into the EU did not improve the economic situation of the ACP, how can a reciprocal trading arrangement achieve anything better?"[39] This question is a valid one, yet not one to be used as a basis for a decision to completely throw out the initiative. Instead, it should be a question that drives the impetus to find solutions to improve the effectiveness of the framework.

VI. GENERAL TRADE AND INVESTMENT POLICIES/COMPLAINTS

Madagascar, Morocco and South Africa Launch Safeguard Investigation at the WTO

On January 7, 2019, Madagascar notified the WTO's Committee on Safeguards that on December 31, 2018, it had decided to initiate a safeguard investigation on detergent powder.[40] A safeguard is a trade policy measure that is applied to 'protect domestic industries from competition with imports causing or threatening to cause serious injury to them.'[41] When a country initiates a safeguard investigation, it seeks to determine whether increased imports of a product are causing, or threatening to cause, serious injury to a domestic

39 Aliyu Modibo Umar, former Nigerian Minister of Trade. *See* Kingsley Ighobor*, Trade Between Two Unequal Partners,* Africa Renewal (Aug. 2014), https://www.un.org/africarenewal/magazine/august-2014/trade-between-two-unequal-partners.

40 *Madagascar – Notification Under Article 12.1 (A) Of The Agreement On Safeguards On Initiation Of An Investigation And The Reasons For It*, WTO/ G/SG/N/6/MDG/3 (Jan. 9, 2019). Madagascar also initiated safeguard notifications with respect to pasta and oils. The safeguard on pasta was notified on July 22, 2019 having been initiated on July 18, 2019. On oil (lubricating oil, and on vegetable oils and margarines), the country notified the Safeguard Committee on August 27, 2019 having been initiated on August 14, 2019. Madagascar levied additional duties on the products for a month, and then withdrew them in September, pending further investigations.

41 Yong-Shik Lee, *The Agreement on Safeguards, in* The World Trade Organization: Legal, Economic and Political Analysis 749–98, 749 (2005).

industry. The WTO Agreement on Safeguards[42] can be applied to any category of imported products and, together with Article XIX of the General Agreement on Tariffs and Trade (1994), it sets out the general terms pursuant to which WTO members may apply safeguard measures.

Generally, under WTO law trade, members cannot exceed the quotas and tariffs contained in their schedules of concessions. However, members can be allowed to bypass this rule where increased imports are causing or threatening to cause serious injury to a domestic industry. Thus, safeguard measures protect domestic industries over a short period of time from sudden and acute problems caused by import competition.

Madagascar claimed that its domestic detergent powder industry had provided evidence showing that imports of detergent powder had increased at a rate of 254% both in absolute terms and relative to domestic production during the period 2013–2017. This rise in imports, they claimed, had adverse consequences on domestic producers of detergent powder, in particular regarding levels of production, market share, capacity utilization and sales, and had caused their losses to accumulate. The compound effect was an imminent collapse of domestic production. Therefore, they argued that the application of a safeguard measure would enable the domestic industry to have time to make necessary adjustments in terms of the competition that it faced from imported detergent powder.

Similarly, on March 4, 2019, South Africa notified the Committee on Safeguards of the initiation of a safeguard investigation into the surge of imports of threaded fasteners of iron or steel.[43] The application, lodged by the South African Iron and Steel Institute (SAISI) on behalf of the South African Fasteners Manufacturers' Association (SAFMA) and its members, claimed that the product was being imported into the Southern African Customs Union (SACU) market in such increasing quantities that it was causing serious injury to the SACU industry.[44] As a result, producers were experiencing serious injury in the form of a decline in sales volumes, market share, gross profit, net profit

42 *Agreement on Safeguards,* Marrakesh Agreement Establishing the World Trade Organization, Annex 1A: Multilateral Agreements on Trade in Goods (1994) [hereinafter SA].

43 *South Africa – Notification Under Article 12.1(A) Of The Agreement On Safeguards On Initiation Of An Investigation And The Reasons For It*, WTO/ G/SG/N/6/ZAF/7/ (Mar. 4, 2019).

44 South Africa is in the Southern African Customs Union along with Botswana, eSwatini, Lesotho and Namibia. The countries adopt a common external trade policy.

and low capacity utilisation for the period from July 1, 2014 to June 30, 2018. On this basis, the SACU industry was suffering serious injury which could be causally linked to the surge in the volumes of imports of the subject products.

Morocco also notified the Committee on Safeguard of the initiation of a safeguard concerning imports of hot-rolled sheets.[45] According to Morocco, imports of hot-rolled sheets rose by 54% during the 2014–2018 review period, and by 31% in 2018 in relation to 2017. This, it argued, had caused serious injury to the domestic hot-rolled sheet industry, resulting in the fall in sales volume, output, productivity and production capacity utilization, and a decline in financial performance. The investigation was initiated by the Ministry of Industry, Investment, Trade and Digital Economy following a petition submitted by the company Maghreb Steel, on behalf of the domestic hot-rolled sheet industry. The Committee on Safeguard was notified on May 29, 2019.

Nigeria Closes Border with Neighbours

In August 2019, Nigeria closed its border with Benin, Niger and Cameroon, effectively banning all trade—import and export—with these countries. Of the three neighbouring countries, the Benin-Nigeria border is a major trading route for the sub-region because of the volume of goods that pass through it, as well as the direct access to Lagos, Nigeria's main economic and commercial hub. Though border closures are not unusual among African countries, for instance, during the height of the Ebola outbreak, Rwanda briefly closed the border with the Democratic Republic of the Congo and since the global lockdown caused by the COVID-19 pandemic, other countries have closed their borders.[46] However, this was the first time that a country had done so for trade-related reasons.

The primary objective of the border closure was to curb the smuggling of illicit goods as well other legal products, particularly poultry, in order to strengthen Nigeria's agricultural sector. Further, the Nigerian government believed that smuggling, via the land routes of its neighbours, negatively affected the payment of custom duties. As a result, the border closure was intended as a means to

45 *Morocco – Notification Under Article 12.1(A) Of The Agreement On Safeguards On Initiation Of An Investigation And The Reasons For It,* WTO/ G/SG/N/6/Mar/11 (May 29, 2019).

46 Tom Wills, *Coronavirus in Africa: How deadly could COVID-19 become?,* Deutsche Welle (DW) (Apr. 24, 2020), https://www.dw.com/en/coronavirus-in-africa-how-deadly-could-covid-19-become/a-53230519.

restore customs revenue through Nigeria's ports. According to Nigeria, the border closure was as a result of the high volume of goods smuggled, particularly agricultural products from Benin. The World Bank, for instance, estimates that about 80% of all imports into the port of Cotonou, Benin's commercial capital, are destined for Nigeria.[47] Meanwhile, in 2013, when Nigeria set a tariff on rice imports at 70%, Benin reduced its tariff on rice imports from 35% to 7% the following year.[48] This made it easier for smugglers (and even legitimate importers) to import rice into Benin at low cost and then traffic it into Nigeria to sell at a much higher profit margin – a process known as entrepôt trade.[49]

The negative impact of the border closure has been severe on small-and-medium sized enterprises (SMEs) in the informal sector, particularly given the COVID-19 pandemic. Many small and medium size businesses who depend on the trade route between Nigeria and Benin are the hardest hit because of the closure. These businesses, as a result of crumbling ports and expensive customs duties, history and weak border enforcement, have come to rely on the ease of the movement of goods along the Nigeria-Benin route. According to the Brookings Institute, the informal sector throughout West Africa, and particularly in Benin, represents approximately 50 percent of GDP (70 percent in Benin, in fact) and 90 percent of employment.[50] However, since the border closed many of these SMEs have experienced a fall in sales of up to 70 per cent.[51] Thus, even though the aim of the border closure was to reduce smuggling, it also disrupted the businesses of many traders who transacted legitimate cross-border trade. As a result, the domestic implication for this disruption in the informal sector was an increase in the number of people falling below the poverty line.

47 Signé & van der Ven note, *supra* note 17. *See also* Woubet Kassa & Albert Zeufack, *Nigeria's border closure: a road block or a speed bump on the road to a successful AfCFTA?,* World Bank Blogs (2020), https://blogs.worldbank.org/africacan/nigerias-border-closure-road-block-or-speed-bump-road-successful-afcfta.

48 *Id.*

49 Kassa & Zeufack, *supra note 47. See also Stephen Golub, Ahmadou Aly Mbaye & Christina Golubski, The Effects of Nigeria's Closed Borders on Informal Trade with Benin,* Brookings Blog (2019), https://www.brookings.edu/blog/africa-in-focus/2019/10/29/the-effects-of-nigerias-closed-borders-on-informal-trade-with-benin/.

50 Stephen Golub, Ahmadou Aly Mbaye & Christina Golubski, *The Effects of Nigeria's Closed Borders on Informal Trade with Benin,* Brookings Blog (2019), https://www.brookings.edu/blog/africa-in-focus/2019/10/29/the-effects-of-nigerias-closed-borders-on-informal-trade-with-benin/.

51 Neil Munshi, *Nigerian Border Closures Cut Smuggling but Drive Up Prices,* Financial Times (2019), https://www.ft.com/content/ce7abd04-0d10-11ea-bb52-34c8d9dc6d84.

Another side effect of the closure was the rise in food prices and food scarcity. The border shutdown pushed up prices, notably of rice and livestock, thus fuelling rapid inflation. This hit consumers hard in a country where the majority of household budgets are spent on food. For instance, the price of food increased by 11.2% in September of 2019, after falling to a 3 1/2-year low in the preceding month.[52] With Nigeria having the highest number of people living in poverty between the two countries, inflation and food scarcity will likely exacerbate the situation.[53]

Beyond these short-term effects, however, the more fundamental question remains whether the closure will help curb smuggling and increase local production. While the shutdown might lessen smuggling in the interim, it will not help to address its root causes, which includes, but not limited to, price differentials between Nigeria and its neighbours, the high demand for goods as a result low levels of domestic production, porous borders, corruption and incoherent customs policies. Until Nigeria tackles these issues, border closures will remain an inefficient policy tool.

2020 World Investment Report

The 2020 World Investment Report by the United Nations Conference on Trade and Development (UNCTAD) indicates that global foreign direct investment will fall significantly as a result of the COVID-19 pandemic. According to the report, global FDI flows are forecast to decrease by up to 40 per cent in 2020 from their 2019 value of $1.54 trillion to below $1 trillion.[54] For Africa, the report is grim. The COVID-19 crisis has arrived at a time when FDI was already in decline, with the continent having experienced a 10% drop in inflows in 2019 to $45 billion.[55] The impacts of the pandemic as well as low prices of commodities, especially oil will further exacerbate the FDI decline. In particular, FDI is forecasted to further fall by 25 to 40 per cent in 2020,

52 National Bureau of Statistics. *See Nigeria Inflation Rate at 3-Month High of 11.2%,* Trading Economics (Oct. 15, 2019), https://tradingeconomics.com/articles/10152019105702.htm.

53 Olabisi D. Akinkugbe, *What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution,* Afronomicslaw.org (Apr. 9, 2019), https://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/.

54 United Nations Conference on Trade and Development, World Investment Report 2020 (2020), https://unctad.org/en/PublicationsLibrary/wir2020_overview_en.pdf.

55 *Id. at 9.*

and sectors such as aviation, hospitality, tourism and leisure, will be most affected.[56] Additionally, the lockdown measures will slow investment projects while multinational corporations will reconsider new projects due to prospects of global recession. National governments, as a result of the economic and financial fall out of the pandemic, will place new restrictions on investments.

CONCLUSION

Despite the grim WTO report, there is hope for the recovery of investment flows to the continent in the medium to long run. The entry into force of the agreement establishing the AfCFTA, which provides deepening regional integration, could mitigate the extent of the investment decline as well as help initiate a stabilization and recovery in the aftermath of the pandemic. Furthermore, increasing economic ties to the continent by major global economies such as the UK-Kenya FTA and the new Cotonou Agreement, promoting investment in infrastructure, public–private partnerships, and industrial development could help the continent recover in 2021 and beyond.

56 *Id.*