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Introduction to the Inaugural Issue of the African Journal of International Economic Law

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Introduction to the Inaugural Issue of

The African Journal of International Economic Law (AfJIEL)

by James Thuo GATHII & Olabisi D. AKINKUGBE

Introduction to the Inaugural Issue of the African Journal of International Economic Law

James ThuoGathii and Olabisi D. Akinkugbe
Co-Editors in Chief

Welcome to the inaugural issue of the African Journal of International Economic Law(AfJIEL). Our goal is to fill a gap in journals covering international economic law relating to Africa and the Global South. This first issue fulfills our promise to launch the AfJIEL as announced at the 2019 African International Economic Law Network conference in Nairobi.

We thank our terrific group of authors who worked over the year and a half on the articles in this inaugural issue. Thanks too to the Editorial Board and the Advisory Board members for their support. We have put together the AfJIEL while continuing to nurture the burgeoning Afronomicslaw.org blog. The fact that contributors to Afronomics law provided a continuous flow of excellent content on international economic law in Africa and the Global South was a major inspiration for this new journal.

The AfJIEL will be freely available. This is made possible by the support of Sheria Publishing House – a publishing house committed to providing high quality, affordable and accessible materials on African and Third World scholarship and practice. Our goal in making the AfJIEL free and open access is at least twofold. First, to demonstrate that the voluntary efforts of a team of editors can produce a journal that fills a major gap in the production and publication of important scholarly and policy materials. Second, to inspire and engage with our audience particularly in under-resourced academic and policy environments in the geographical Third World in general, and in Africa in particular. Without this kind of a journal, a lot of the content that our authors have put together could very well be behind a publisher's paywall. The AfJIEL is one small effort in trying to break down such paywalls that limit access to the kind of contextually relevant scholarship and policy analysis this Journal is committed to publishing.

The articles in this issue cover a broad range of International Economic Law, (IEL) subjects. These include competition law in Africa and the Caribbean; tax law and justice; the gendered nature of trade regimes;making intellectual property law

and policy relevant for Africa; international investment law and efforts to reform it in Africa and beyond,and how best to think about African trade law regimes against a backdrop of development. The journal also has a section on the Contemporary Practice of African International Economic Law and, a detailed case review of the jurisprudence of the East African Court of Justice, (EACJ), and the OHADA Common Court of Justice and Arbitration in international economic law cases.

The first article co-authored by Clair Gammage and Mariam Momodu is titled, "The Economic Empowerment of Women in Africa: Regional Approaches to Gender Sensitive Trade Policies." Clair and Mariam examine the gendered and gendering nature of trade law and policy in Africa's regional trade regimes. By centering women in their inquiry, they comprehensively probe the legal texts of Africa's trade regimes as well as the policy commitments made within these regimes. While acknowledging the data gaps and invisibility of women in trade and policy, they note the silence surrounding women informal cross-border traders in these regimes. Yet they also uncover what they call progressive gender-sensitive trade strategies such as the East African Community's Simplified Trade Regime and the Non-Tariff Barrier Reporting, Monitoring and Eliminating Mechanismin the Tripartite Free Trade Agreement between the Common Market for Eastern and Southern Africa, (COMESA), the East African Community, (EAC), and the Southern African Development Community, (SADC). They advocate for intersectional and multidimensional understandings about how women's experiences may converge and diverge in the context of trade policy. They propose that legally binding commitments and 'soft' law approaches ought to be adopted at the pan-African level to build on the progress made by some of the regional economic communities. They also see value in Africa following innovations to center women in trade from the global level.

The second article co-authored by Tim Büthe and Vellah Kedogo Kigwiru is titled, "The Spread of Competition Law and Policy in Africa." In this original and important article, Tim and Vellah explore the extent to which competition law has fulfilled its promises of ensuring that the benefits of a market economy are widely shared; how it encourages and safeguards market competition by making anti-competitive agreements and conduct illegal; and how it constrains economic power by punishing its abuse and regulating mergers and acquisitions to reduce the risk of monopoly and oligopoly. Complete with meticulously gathered evidence, including compelling graphics, Tim and Vellah take stock of the status of competition

laws and agencies in Africa at the national and regional level. The article not only brings the reader up to date on the status on competition law and institutions in Africa, but also reviews the literature in the field. That is not all. This article alsovery helpfully sets out a research agenda for better understanding the reality, promise and limitations of competition law in Africa. This research agenda, they argue, would best incorporate political analysis along with legal and economic analysis.

The third article in the volume by Taimoon Stewart, is titled "Competition Regimes in the Caribbean Community and Sub-Saharan Africa: A Comparison." Taimoon's compelling analysis compares and contrasts competition regimes in Africa and the Caribbean Community. It does so with a view to persuading the reader not to take the existing market structures in both regions as a given. To make this case, she uses a historical and political-economy approach to show how today's market failures that competition law seeks to address were created under colonial rule. For Taimoon, diversifying and transforming these economies to accord to the promises of competition law means having to confront the continuing legacy of European expansion and imperialism that defined the markets in both regions. In her view, forging transformational competition strategies and regimes in these regimes must therefore address rather than ignore these legacies.

The fourth article in the volume by Fernando C. Saldivar, SJ, is titled "Africa in the Economy of Francesco: Rethinking the Ethics of the International Financial Order at the Intersection of Tax Justice and Catholic Social Teaching." Foregrounding Pope Francis' framework for radically rethinking the ethics of the international financial order, otherwise known as the Economy of Francesco, Fernando explores the intersection of tax justice and Catholic social teaching. From this vantage point of the legal and ethical principles upon which the Economy of Francesco is based, he proposes strategies for policy and advocacy to reduce tax avoidance strategies used by multinational corporations in haven jurisdictions. This interdisciplinary approach, he argues, is consistent with the efforts of those working to eliminate poverty in Africa. Fernando's innovative and compelling article shows how progressive conversations in IEL can be broadened and enriched through an interdisciplinary approach that leverages ethics and Catholic social teaching.

The fifth article titled, "Investment Law and Treaty Reform in Africa: Fragments and Fragmentation,"Ndanga Kamau reviews how African states have proceeded with foreign investment law and treaty reform since at least 2016. Kamau does so

by highlighting examples of reforms at the domestic, sub-regional, regional and global levels. She argues these reforms do not cohere around one approach and as such there is no distinctly African approach exemplified in these fragmented efforts. She notes that this may be because of the diversity of interests within, and between African states. Ndanga's essay discusses the reform efforts occurring at different levels – domestic, sub-regional and regional while also noting those in other regions and at the international level. Her article includes a brief review of the Pan African Investment Code, (PAIC), that may very well form the basis of the African Continental Free Trade Agreement negotiations on investment. Ndanga welcomes the increased participation of African states in investment law reform but argues that African states can best advance their collective pan-African interest in harmony rather than disunity.

The sixth article by Titilayo Adebola is titled, "Mapping Africa's Complex Regimes: Towards an African Centred AfCFTA Intellectual Property, (IP), Protocol."In this article, Titilayo comprehensively maps and analyses the fragmented intellectual property (IP) architecture in Africa in light of the pending AfCFTA IP Protocol. Titilayo argues that the AfCFTA IP Protocol presents a timely, albeit arduous, opportunity for Africa to reconstruct its broken IP architecture by aligning the conflicting sub-regional IP regimes with the development-oriented aspirations that animate the African Union's IP agenda. She argues Africa needs IP systems suited to its contexts, conditions and that pursues its collective interests. As such, she argues that given the significance of Africa's agricultural resources, traditional knowledge and cultural legacies, the AfCFTA IP Protocol negotiators ought to prioritise geographical indications, plant variety protection, traditional knowledge and traditional cultural expressions, which embody Africa's innovative and creative strengths. She argues that while the African Union (AU) has policy frameworks on these subjects, there are variations in the sub-regional organisations' uptake patterns. She shows that while sub-regional organisations are increasingly embracing the Continental Strategy for Geographical Indications in Africa, no sub-regional organisation has introduced a plant variety protection system styled on the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2000. Moreover, the sub-regional regimes adopt distinct governance structures. The Organisation Africaine de la Propriété Intellectuelle (OAPI) operates a uniform system, whereas the African Regional Intellectual Property Organisation (ARIPO) operates a flexible system. The AU's ambitious attempt to resolve the policy incoherence and inconsistency through the Pan African Intellectual Property

Organisation (PAIPO) - a single Pan-African IP organisation to harmonise IP and stimulate social and economic development in Africa - is therefore inchoate. Ultimately, she suggests that the AfCFTA IP Protocol negotiators must construct homegrown African centred IP systems that radically reimagine the normative configurations of IP.

The seventh article by Olabisi D. Akinkugbe, "Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)," seeks to close the gap between law and development scholarship, on the one hand, and that on developmental regionalism, on the other. First, he argues that developmental regionalism as it applies to Africa has theoretical and conceptual limitations and that it does not pay sufficient attention to law. For this reason, Olabisi argues that developmental regionalism has to be retooled to address these shortcomings so that it can be more responsive to the multidimensional character of African RTAs. While making the case for cross-pollination between this more robust notion of developmental regionalism and law and development, Olabisi argues that one advantage would be to overcome dominant theoretical frameworks that privilege globalizing legal analysis that dominate analysis of trade agreements. For Olabisi, therefore, African RTAs are 'flexible legal regimes' that promote the selective implementation of priorities.

The eighth item in this first issue of AfJIEL is what we hope will be a regular feature – African Practice in International Economic Law 2017-2019. Written by AfJIEL editors Amaka Vanni and Tsotang Tsietsi, this section provides updates on some of the most significant developments in Africa's IEL. This section includes analysis of the AfCFTA, the China-Mauritius FTA, the Kenya-US FTA negotiations and considerations related to Nigeria's recent border closure, among other developments.

The last item in this issue is yet another contribution that we hope will become a regular feature of the AfJIEL – a case note. This issue's case note was written by Harrison Otieno Mbori on international economic law disputes before Africa's international courts. Making the case for a 'thick description' analysis, Harrison engages in an extended and very welcome analysis of two very important cases. The first is the East African Court of Justice's First Instance Division 2019 decision, British American Tobacco (BAT) v Attorney General of Uganda, (hereinafter the BAT case). The second is the OHADA Common Court of Justice and Arbitration, (CCJA) case, GETMA International v The Republic of Guinea. Harrison's indepth analysis of these cases shows the importance of going beyond doctrinal analysis. He does that by showing the significance of these cases in a broader context. For example,

the BAT case is the first purely international trade and commercial case in the EACJ's docket since its first decision in 2006. Yet, as a case involving tobacco, it is hardly the first case brought by tobacco companies seeking to eliminate national tobacco regulations. Harrison's analysis guides the reader on this journey that connects many seemingly distinctive but ultimately inter-connected threads. For example, the BAT case before the EACJ is part of a broader tobacco company litigation strategy in several other cases at the national level in the East African Community, but also beyond. With regard to the GETMA case, Harrison connects it to related cases involving the same parties in the International Center for the Settlement of Investment Disputes, (ICSID), as well as to enforcement proceedings in the United States Federal courts.

We hope the readers agree that the authors of these articles offer a tremendously rich analysis. We could not have asked for a better set of inaugural articles. We promise to work harder to make the AfJIEL even better in future issues. We hope you will also support the future editions of the AfJIEL by submitting high quality and original articles. In the meantime, kindly help us disseminate this inaugural issue as widely as possible.