International Trade Law Reform in Africa

A Call for Action

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A. The Current Status of International Trade Law in Africa

Africa is a major source of commodities, including oil and gas, but such wealth has not yet led to economic development or to increased living standards.[1] On the contrary, Africa remains underdeveloped while other regions of the world enjoy significant, if not spectacular, success. Between 1970 and 2008, the pro-capita income of African energy-exporting countries has increased by 72%, while that of African least developed countries has decreased by 13%, and that of remaining African countries has increased by 31%; in the same period of time, the increase in pro-capita income for South Asian and East Asian low income countries has been, respectively, 236% and 223%, and that of China a staggering 1,531%.[2]

As a result, Africa's position in the global economy remains marginal and its cross-border exchanges typically take place along the lines of the export of natural resources against the import of manufactured goods fit for markets with limited purchasing power. Thus, African countries remain exposed to the double risk of over-exploitation of non-renewable resources and of commodity dependency, while balanced economic growth based on economic diversification is not pursued effectively.

The status of uniform trade law in the continent reflects these economic patterns. Even fundamental texts have a limited rate of adoption. For instance, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the 'New York Convention') [3] requires that a State court seized of a matter covered by an arbitration agreement must give effect to that agreement; it also requires State courts to recognize and enforce arbitral awards rendered in other States. It is the most widely-adopted treaty in international trade

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1 See, for instance, Louise Greenwood, Are Africa's commodities an economic blessing?, BBC *Africa Business Report*, 22 July 2010: "In terms of natural resources, Africa is the most abundant continent on earth. But rather than a blessing, most of Africa's commodities have proved a burden; allegedly stoking conflict, funding wars and leading to rampant labour market abuse". Available at: <www.bbc.co.uk/news/business-10710488>.

2 UNCTAD, The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs, United Nations, New York and Geneva, 2010, United Nations Publications Sales No. E.10.II.D.5, p. 117, Table 19.

3 United Nations, *Treaty Series*, vol. 330, p. 38.

law and one of the most popular treaties ever. The New York Convention has 146 State parties, 30 of which (out of 54 African States) are African.[4]

The United Nations Convention on Contracts for the International Sale of Goods, 1980 ('CISG')[5] provides uniform rules on the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. The CISG has 77 State parties, of which only eleven are African.[6]

Moreover, African cases relating to the application of these two treaties are rare. Such scarcity of precedents could be due to a number of factors, including limited case-reporting capacity and the preference of commercial operators for informal settlement of disputes. Moreover legal actors may have limited awareness of the existence and application of the two treaties even in those African jurisdictions where they are in force. In any case, an assessment of the application of those texts is particularly difficult.

Capacity deficits increase in proportion to the level of sophistication of the uniform instruments, be them statutory or contractual in nature. The reasons for this situation are complex.

At the time of decolonization, African commercial law, as inherited from the colonial powers, enjoyed a high degree of uniformity throughout the continent since the number of legislative sources was limited. Moreover, African political and economic unity was ardently advocated. Such conditions led to believe that the broad adoption of uniform texts could be imminent. A number of organizations were entrusted with the promotion of legal uniformity, especially in the commercial field, in the framework of the pursuit of economic integration at the continental or at the sub-regional level, or while dealing with specific issues such as intellectual property or insurance.[7]

Unfortunately, independent Africa started suffering soon from political instability and legislative priorities were set in other fields. Moreover, economic and political integration did not take place as fast as predicted. Rather, the continent saw the perpetuation of colonial economic structures in the formal sector, dominated by large government-held companies, often shielded from market competition and placed above ordinary commercial rules and practices, and local branches of multinational groups, typically active in the commodities field and operating within closely-integrated corporate structure. Small and medium-sized enterprises are active mostly in the informal sector. Such economic model does not require a modern commercial law environment since its few formal actors have sufficient economic resources and bargaining power to shape contractual agreements as fit for their needs.

Nevertheless, the promotion of trade law harmonization in Africa has not been totally neglected. On the contrary, an important goal was achieved in 1993,

4 As of 1 November 2011.

5 United Nations, *Treaty Series*, vol. 1489, p. 3.

6 As of 1 November 2011.

7 For details on the evolution of uniform trade law in Africa, and further bibliographical references, L. Castellani, International Trade Law Reform in Africa, 10 *Yearbook of private international law* 2008, pp. 547-563.

when an international organisation, the Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA), was created with the mandate of drafting uniform texts in the commercial field. OHADA texts, once adopted, are automatically enacted in OHADA member States, thus ensuring the highest level of legislative uniformity. However, certain difficulties in the implementation of such texts seem to remain.[8] Accordingly, OHADA has decided to focus its work in the next years on the consolidation of existing texts and the promotion of their application, rather than on the preparation of new ones.[9]

The end of the Cold War period led to further instability in Africa, leading to the collapse of several States. Recurring crisis set again priorities in the African governance and law reform agenda elsewhere. In this context, Africa's major trading and financial partners have promoted legal reform in the fields of good governance and human rights, but not in that of trade. Unlike in other regions of the world, this happened also in the context of multilateral preferential trade agreements.

B. The Contribution of Trade Law Reform to African Economic and Social Development

Several strong and valid arguments illustrate the importance of trade law reform, especially when based on uniform global standards, to promote sustainable economic and social development in Africa.

Recently, that cause has been forcefully advocated in the context of a critique of the existing multilateral aid system.[10] According to that theory, current aid policies provide an incentive for reliance on foreign assistance and offer fertile ground for corruption, thus effectively hindering the development of those efficient market economies needed to achieve sustainable economic development. Modern, fair and efficient commercial law rules are an essential element of a business enabling environment, contributing significantly to good governance and the rule of law.

The establishment of small and medium-sized enterprises need to be encouraged in order to diversify economies and to foster wealth redistribution. Small and medium-sized enterprises constitute the backbone of a modern and balanced economy: they support economic diversification and may therefore significantly help in addressing structural problems affecting developing countries. However, such enterprises have limited financial and human resources, and therefore often suffer from inadequate access to expert legal advice when negotiating contracts.

8 P. Bourel, A propos de l'OHADA: libres opinions sur l'harmonisation du droit des affaires en Afrique, *Recueil Dalloz*, n. 183, 2007, p. 969; A. Foko, Le droit OHADA et les droits nationaux des Etats parties: une complémentarité vieille de plus d'une décennie, *Revue de droit international et de droit comparé*, 2008, p. 476; P. Meyer, Le droit de l'arbitrage dans l'espace OHADA dix ans après l'Acte uniforme, *Revue de l'Arbitrage*, n. 3, 2010, p. 467.

9 Décision n 003/2009/CM/OHADA portant orientation stratégique quinquennale pour l'harmonisation du droit des affaires durant la période allant de l'année 2010 à 2015, article 2.

10 D. Moyo, Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa, Farrar, Straus and Giroux, New York, 2009.

They also carry little influence on the choice of the law applicable to the contract. Therefore, those enterprises may greatly benefit from the adoption of an enabling legislative environment based on modern, predictable and fair texts such as those provided by uniform sources. The CISG provides a meaningful illustration of such interaction.

For instance, the CISG may greatly simplify the choice of the law applicable to the contract. Contracts for sale of goods concluded between parties with their place of business, respectively, in a developed and in a developing country usually do not contain the choice of the domestic law of the latter as applicable law. This may happen for a number of reasons, ranging from the difficulty in accessing that law to the distribution of bargaining power. Hence, the law chosen will be the domestic law of the party located in the developed country or the law of a third State, such as that of the place of arbitration. In both cases, the party located in the developing country is likely to have limited or no prior knowledge of the law chosen. The uniform and neutral nature of the CISG and its ability to balance conflicting interests make its provisions acceptable to all parties, especially when it is already in force in the States where the parties have their places of business and therefore their counsels are already familiar with its provisions.

Advantages may be even greater when the contract does not contain a choice of applicable law, as it may well happen when expert advice is lacking. In that case, the adoption of the CISG by a developing country is likely to trigger its application, thus avoiding the recourse to rules of private international law, an often time-consuming and resource-intensive activity that may lead to different results depending on the forum seized.

Trade law reform is particularly relevant also to mitigate the effects of political instability. Traditionally, financial flows out of Africa are larger than those directed to the continent. This is explained with a reticence to invest in Africa due to political volatility that leads to uncertainty of financial returns, at least in the medium and long term. However, recent conflicts have exposed the danger of operating in an inadequate legal environment also for traders engaged in short term commercial operations. In particular, increasing evidence points at the losses incurred with respect to trade and investment in Libya,[11] a country that, despite its sizeable economy, has not entered in any multilateral trade law treaty yet and where therefore the fate of contracts concluded before regime change may not be immediately clear. A modern commercial law environment may result effective in containing the negative effects of traumatic events, also in light of the fact that new governments seldom denounce multilateral treaties that enjoy broad support from the international community.

In light of the above, it is particularly regrettable that technical cooperation programmes usually do not focus on trade law reform activities, which seem to be

11 For estimates relating to trade and investment with Italy, see M. Cappellini, L'export conta le perdite in Nordafrica, *Il Sole – 24 Ore*, 28 February 2011. For comments on China's position vis-à-vis the Libyan conflict, see the transcript of the "Regular Press Conference of the [Chinese] Ministry of Commerce on March 22, 2011", available at <http://english.mofcom.gov.cn/aarticle/newsrelease/press/201104/20110407480409.html>.

not only promising in terms of measurable economic results, but also beneficial for business both in the donor and in the recipient country. Such projects could be framed as a complement to bilateral and multilateral trade agreements, thus highlighting the enabling nature of trade law reform. Such enabling nature may also assuage any concern relating to possible interference with internal affairs when promoting commercial law reform.

The above arguments make a compelling case for greater involvement of African States in trade law reform,[12] and for greater support of the international donor community for those efforts. The benefits associated to trade law reform are now being highlighted also in contexts of immediate relevance for Africa, such as food security, where reduction of transaction costs, including costs relating to legal uncertainty, may result in the physical survival of many.[13] Such law reform efforts need, of course, full ownership of and support from the concerned States. They also require taking into account continental specificities in order to design operational details and define priorities effectively.

Thus, African efforts in this field need to better coordinate the global, regional and sub-regional levels. The reality of economic exchanges does not always follow legal heritage. For instance, many OHADA member States have strong commercial relations with Ghana and Nigeria, two common law countries that do not participate in OHADA. The adoption of global trade law texts would overcome obstacles arising from the difference in legal traditions. This solution is particularly easy to implement when regional uniform legislation is already inspired by global models.[14]

For instance, the CISG inspired the Acte uniforme relatif au droit commercial général of OHADA, and, in particular, its Book V on sale of goods.[15] Recent revisions of that Act further align it with the CISG. Thus, OHADA countries are already familiar with the substantive provisions of the CISG and should encounter few obstacles in adopting the CISG to regulate extra-OHADA transactions. At the same time, Ghana (an original signatory of the CISG and a party to the Convention on the Limitation Period in Contracts for the International Sale of Goods, 1974[16]) and Nigeria should face no particular difficulty in adopting the CISG, whose compatibility with common law systems has been repeatedly and thoroughly tested.

Moreover, certain trends, such as the rapidly increasing use of electronic communications transmitted with mobile devices, are particularly strong in

12 An extensive list of arguments in favor of trade law reform is provided by E. Laryea, Why Ghana Should Implement Certain International Legal Instruments Relating to International Sale of Goods Transactions, 19 *African Journal of International and Comparative Law* 1, 2011, pp. 1-37.

13 AgCLIR, Ghana: Commercial Legal and Institutional Reform Diagnostic of Ghana's Agriculture Sector – Agenda for Action, November 2008, p. 118 (recommending adoption of the CISG).

14 For further discussion of such coordination issues, see S.K. Date-Bah, The Preliminary Draft OHADA Uniform Act on Contract Law as Seen by a Common Law Lawyer, *Uniform Law Review / Revue de droit uniforme,* 2008, p. 217.

15 G. Kenfack Douajni, La vente commerciale OHADA, *Uniform Law Review / Revue de droit uniforme*, 2003, p. 191, provides a comparative analysis of the CISG vis-à-vis the OHADA Uniform Act on General Commercial Law.

16 United Nations, *Treaty Series*, vol. 1511, p. 3.

Africa. Mobile devices are critical to exchange information in the continent given the scarcity of other information and communication technologies' infrastructures, and their popularity has boomed accordingly. Already in 2008, mobile phones were identified as the most common tool for conducting business for small and medium-sized African enterprises.[17] Their wide availability and relatively modest cost made those devices of great importance also in pursuing other goals such as financial inclusion.

Promoting the use of new technologies entails the adoption of an enabling legislative environment. In particular, the use of mobile devices does not change the nature of the communication exchanged and therefore legal challenges relating to the use of mobile devices should be addressed in the framework of a comprehensive general act on electronic transactions based on widely-accepted sources. Such general acts may be quickly drafted – indeed, it was correctly said that the enactment of such acts has never been as easy as now – on the basis of uniform texts. The recent laws of Ghana,[18] Rwanda[19] and Zambia[20] provide good examples of such legislation based on UNCITRAL texts, including the UNCITRAL Model Law on Electronic Commerce, 1996,[21] the UNCITRAL Model Law on Electronic Signatures, 2001,[22] and the substantive provisions of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005,[23] whose formal adoption as a treaty is however also necessary to facilitate cross-border exchanges.

In spite of the above, the legal status of electronic communications, including those exchanged with the use of mobile devices, still remains unclear in several African jurisdictions due to lack of legislation. In other cases, different approaches, including ad hoc ones, were adopted, not always with fully satisfactory results. It is therefore particularly important to disseminate information as broadly as possible so that those countries that have yet to adopt legislation in this field would receive adequate advice and that those not fully satisfied with the legislation already enacted could conduct an effective review of their laws in light of most modern international standards.

17 UNCTAD Secretariat, Progress Made in the Implementation of the Outcomes of the WSIS, document presented to the 11th Session of the Commission on Science and Technology for Development, Geneva, 26-30 May 2008, p. 3. See also UNCTAD, Information Economy Report 2011: ICTs as an Enabler for Private Sector Development, New York – Geneva 2011, United Nations Publications Sales no. E.11.II.D.6, pp. 18-23.

18 Electronic Transactions Act, 2008 (Act 772).

19 Law Relating to Electronic Messages, Electronic Signatures and Electronic Transactions, No. 18/2010 of 12 May 2010. This law follows the model endorsed by the East African Community and promoted in cooperation with UNCTAD.

20 The Electronic Communications and Transactions Act, Act No. 21 of 2009.

21 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, 1996, with additional article 5bis as adopted in 1998, New York, 1999 (United Nations Publication Sales No. E.99.V.4).

22 UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, 2001, New York, 2002 (United Nations Publication Sales No. E.02.V.8).

23 United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2007 (United Nations Publication Sales No. E.07.V.2) (treaty not yet in force).

Moreover, the same legal principles for electronic communications are increasingly being applied not only to commercial transactions but also to e-government. E-government may have a significant impact on good governance as it touches upon critical sectors of the interaction between private and public sectors, thus facilitating the access of business and citizens to public offices and allowing for monitoring the activity of civil servants. Electronic public procurement systems and electronic single windows for customs operations are two examples of applications with a direct impact both on trade facilitation and on the prevention of corruption. These arguments further stress the importance of an adequate framework for electronic communications, based on widely accepted uniform standards.

C. Policy Considerations

Additional considerations at the policy level suggest that the impact of international trade law reform goes beyond facilitation of cross-border exchanges.

A strong correlation between trade and investment, economic development and the rule of law has been established, proving that those elements tend to be mutually reinforcing. International trade law sits at a critical juncture: it has a direct impact on economic development, as it facilitates economic exchanges in the interest of all parties involved, and at the same time it reflects the general attitude of that legal system towards the rule of law. A strong rule of law is necessary to ensure predictability in trade and investment protection, and, in turn, increased trade and investment in a reliable legal framework may induce a positive spill-over effect on the rule of law outside the commercial sector.

A vivid illustration of that nexus is provided by the impressive economic development of the People's Republic of China, a country that has become of key importance lately for African foreign trade and investment. Indeed, a fundamental early step of the "reform and opening policy" that led to such spectacular economic growth was strong and consistent commitment to trade law reform, starting with the early adoption of the CISG and its use as a source of inspiration for domestic law reform.

China launched that major exercise in the modernization of its trade laws in conjunction with the preparation for its accession to the World Trade Organization, with a view to facilitating its integration in the global economy through increased foreign investment and international trade. On that occasion, China committed to establishing a legal system that would be predictable, uniformly applied and subject only to independent control.[24] The decision was based on consensus among Chinese economists that a market economy based on the rule of law would provide economic stability and efficiency, thus fostering sustainable

24 L. Choukroune, L'internationalisation du droit chinois des affaires, *Revue de Droit des Affaires Internationales / International Business Law Journal* (2003), p. 503. Id., Chine-OMC, L'état de droit par l'ouverture au commerce international?, *Revue de Droit des Affaires Internationales / International Business Law Journal* (2002), p. 655.

economic development.[25] It was also decided that the reform of the Chinese legal system would be inspired by international standards, especially uniform texts.[26] The effects of the reform eventually involved all stakeholders, from law schools to arbitral institutions, and led to a significant increase in the knowledge and use of uniform trade law in China. On a smaller scale, similar considerations may be made for other Asian countries, such as Viet Nam.

Obviously, the adoption of modern uniform trade laws is an important element of economic reform programmes, but not the only one. Other factors, such as clear political guidance and uniform implementation of economic policies, as well as the adoption of principles of market economy and a critical attitude towards protectionism, all combine to determine success. In this context, the predictability of the rule of law remains of key importance to ensure its efficiency and effectiveness in protecting economic rights.

African States often declare their desire to replicate Asian economic success stories. Raising the political profile and priority level of trade law reform based on uniform models would represent a significant step in that direction. Moreover, while African countries are not usually regarded as transition economies, they actually share several features with those economies: a number of them formally embraced socialism, and they all perpetuated the economic structures inherited from colonial times with respect to ownership of land and of natural resources and to State control of the economy. Such similarities between current African economic and legal conditions and those of certain Asian countries before their recent economic development further reinforce the suggestion that African countries could get useful inspiration from Asian experiences.

Other features of the correlation between trade and investment, economic development and the rule of law are specific to the continent. For instance, uniform trade law may facilitate economic exchanges not only at the global but also at the regional level. Regional trade patterns are particularly relevant in Africa not only for economic development but also for political stability, as shared economic interests may represent a strong incentive against conflict and a powerful engine for restarting economies after major unrest and calamities.

D. Conclusions

The above considerations suggest that trade law reform in Africa is not only possible but also particularly beneficial. African States often share a common legislative basis, and regional practices further help in reconciling different legal traditions. Furthermore, they express strong interest in adopting successful models of economic development. Several regional and sub-regional organisations are already active in the field of trade law harmonization and substantial progress may be easily achieved, provided that coordination among them increases, in par-

25 Zhiguang Tong, The Development of China and World Trade, 40 *Journal of World Trade* (2006), p. 129, at p. 132.

26 X.-Y. Li-Kotovtchikine, Pragmatisme juridique et développement économique dans la Chine post-Mao, *Revue internationale de droit comparé*, 2010, 4, pp. 931-952, at p. 945.

ticular, in identifying common goals and avoiding duplication of efforts. For instance, the universal adoption of fundamental texts such as the New York Convention and the CISG could easily become a widely-shared goal.

The international community may play a significant role in supporting such process by better acknowledging the impact of trade law reform on economic development and its contribution to the rule of law. Modern trade law is not only a core element of good governance, but also one that, by enabling economic development, contributes to create the conditions necessary for good governance sustainability.

The international community should also seek closer integration of international trade policies and commercial law reform. It is indeed unfortunate that business opportunities provided by multilateral preferential trade regimes often do not materialize due to lack of capacity in developing countries, including at the legal level. Moreover, in times of increased accountability for both donors and partners in technical assistance projects, cooperation on trade law reform should be encouraged also in light of the fact that the economic benefits stemming from such initiatives are evident and easily outweigh costs.

To sum up, while the current status of international trade law in Africa is not ideal, swift progress in its harmonization and modernization is achievable. Of course, the process should be led first and foremost by local stakeholders – business and governments. This reminds us that firm support and commitment from African States is a necessary condition for any achievement.