

Africa Forum: side event to UNCITRAL's 54th session, 30 June 2021

Permanent Representatives from African States shared their thoughts on areas of commercial law with particular resonance in the region, such as digitization of the economy and the establishment of an harmonized legal framework for a fair and efficient settlement of international investment disputes, and the critical importance of transparency, accountability and good governance in the commercial law framework.

Note: This meeting was recorded and the recording will be made available at the UNCITRAL website www.uncitral.un.org and on UNCITRAL's YouTube page here: <https://www.youtube.com/watch?v=KEtCcFkwMeg&t=8s>.

Opening remarks: H.E. Mr. Philbert Abaka JOHNSON, Permanent Representative of Ghana to the United Nations (Vienna), and Chairman of UNCITRAL as of 28 June 2021

His Excellency highlighted that the Africa Forum had been convened to explore ways to strengthen the engagement of African countries in the legislative work of UNCITRAL and to provide yet another opportunity for African countries to take deliberate steps to ensure that their interest and peculiar circumstances are taken on board.

As regards African States and UNCITRAL, his Excellency noted the increasing participation of African States in UNCITRAL Working Groups, notably in Working Group III: Investor-State Dispute Settlement (ISDS) Reform. He recalled that ISDS reform was of major importance in Africa, whose countries had been hit by Investor-State arbitration, and noted the importance of ensuring that reforms in UNCITRAL be reflected in a coherent manner in the negotiation of the African Continental Free Trade Area Agreement (AfCFTA) Investment Protocol, where the dispute settlement system was still completely open.

On future work in UNCITRAL, his Excellency emphasized that the digital revolution was an incredible opportunity for African countries, and there was a need for African States to develop legal infrastructure to allow them to benefit from digital transformation and to address the challenge of the digital economy. MSMEs and particularly micro-businesses, many of which were family owned or run by women entrepreneurs, formed the basis of the economy, he added, and they had been hit hard from the consequences of the COVID pandemic. His Excellency stated that States could not overlook these matters in Africa if they aspired to develop.

His Excellency expressed the fervent hope that the outcome of the deliberations would include a viable mechanism to ensure and enhance participation of African countries and their citizens in UNCITRAL's work and to preserve their interests. Calling for participation in UNCITRAL's Working Groups and an increase in awareness-raising and promotion of understanding of UNCITRAL texts through education and practice. He concluded by saying: "We cannot be left behind in this enterprise that hinges on our very survival"

Opening remarks: The Secretary of UNCITRAL, Ms Anna Joubin-Bret.

The Secretary welcomed the participants to the Africa Forum which, she underscored, offered an important opportunity to discuss regional priorities and needs, and highlighted the importance of raising those priorities and needs in UNCITRAL's work.

Opening remarks: H.E. Ms. Teodolinda Rosa Rodrigues COELHO, Permanent Representative of Angola to the United Nations (Vienna), Chair of the African Group as of 28 June 2021

Her Excellency acknowledged the UNCITRAL secretariat for convening the Africa Forum aimed at engaging with African countries on matters of international trade and investment. She also noted that the forum would generate ideas on how to best to develop, implement and sustain a strategy for capacity development in Africa and to reinforce the involvement of African countries in UNCITRAL's legislative work.

Her Excellency added that the organization of the Africa Forum was timely given the recent entry into force of AfCFTA, and as the negotiation of its Investment Protocol calls for close monitoring of topics being discussed in UNCITRAL. She explained that governments in the region had put into place various policies and measures to improve their investment climate for the private sector, along with incentives and guarantees for investors. At the same time, governments sought to foster the local economy through the imposition of business requirements, which set goals for investors including on job creation, level of wages, capacity building, protection of the environment, and the transfer of know how.

Her Excellency highlighted that it was crucial that African family businesses, start-ups and MSMEs did not miss out on the opportunity provided by digitalization of the economy in a region where connectivity was still a challenge. She noted that Governments' responsibility were to provide an enabling and secure framework for international transactions in the digital economy. Therefore, she called on UNCITRAL to continue to develop legislative tools that would enable African States to enact legislation to protect their traders and to enable them to provide products and services anywhere, to enable them to innovate and embark on e-transactions safely and to settle their disputes in an effective way.

For that to happen, her Excellency stated that the region needed to enhance the legal framework for the facilitation of international trade and investment. She recalled that such an enterprise would not be sufficiently achieved without enhancing the capacity of African States on the laws that govern international economic transactions and investments. So doing would help to secure an adequate contribution in Africa to the harmonization and modernization of the law, which was being outpaced by practice in areas such as electronic commerce, secured international payment and transactions, investment agreements, and investor-State disputes, among others.

Her Excellency recalled that African States supported UNCITRAL work on ISDS reform (Working Group III) from the outset (e.g. active participation, submissions of substantive inputs and proposals). She added that main concerns raised by African countries were the level of damages (that had a significantly negative impact on public finance) and the cost and duration of proceedings. In this regard, her Excellency stressed the importance that this reform stream would be given full consideration in developing appropriate solutions.

In concluding, Her Excellency recalled the importance of the work of UNCITRAL on e-commerce and digital economy as a response to the impact of the COVID pandemic (e.g. sell and buy online via desktops, notebooks and even smartphones).

H.E. Mrs. Faouzia MEBARKI, Permanent Representative of Algeria to the United Nations (Vienna)

Her Excellency noted that the organization of the forum was in itself a recognition of the importance for Africa of UNCITRAL's work and mandate, adding that the Africa Forum offered a venue to express and share opinions, perspectives and expectations on the work of UNCITRAL, and demonstrated that the issues discussed at UNCITRAL and its Working Groups could provide answers to challenges confronting the region.

Her Excellency continued that many issues discussed at UNCITRAL also raised challenges for Algeria, including the digitalization of the economy and ISDS reform.

Her Excellency stated that Algeria supported the work of UNCITRAL in the digitalization of the economy, and encouraged UNCITRAL to continue its efforts in the establishment of a legal framework, which would help in particular the developing countries to establish a solid base and enable them to modernize their economy. In this context, she added that Algeria considered digitalization as an essential way of building and promoting a strong and competitive economy, especially under the current circumstances of the COVID pandemic.

Her Excellency noted that Algeria attached great importance to the outcome of ISDS reform in UNCITRAL. Developing countries, she said, and above all African countries, were among those suffering the most from this issue. This explained why the establishment of a transparent, inclusive and fair legal framework to settle dispute was one of Algeria's priorities. By way of example, her Excellency said that the development of a code of conduct would help to solve issues of independency and impartiality of adjudicators. Algeria noted with satisfaction the progress made in advancing this project, and her Excellency noted that, since the beginning of the process, Algeria had actively participated in and was committed to achieving the objective of this reform.

H.E. Mr. Azzeddine FARHANE, Permanent Representative of Morocco to the United Nations (Vienna)

His Excellency emphasized the twin concepts of Africa a unified market and of trade as the key for long-term development and sustainable growth in Africa, through job creation and income generation. He noted that AfCFTA had been signed to increase trade, but that the COVID-19 pandemic had delayed its implementation.

His Excellency highlighted that the main challenges faced in the trade context were to strengthen the capability of the national customs authorities, to digitize the African trade, to enhance exports and to attract more domestic, government and foreign direct investment in the continent. Thus, his Excellency emphasized that UNCITRAL, as the core legal body of UN in international trade law, played a key role in increasing coordination and cooperation on legal activities to promote the rule of law at the national and international levels. The mandate of UNCITRAL on trade dispute resolution, secured transactions, insolvency law, ecommerce, public private partnerships, public procurement, contract law, and MSME were all highly relevant issues for Africa. His Excellency noted that, by simplifying the establishment and

incorporation of MSMEs, by facilitating access to secured credit, trade dispute settlement and by providing simplified insolvency regime, significant benefits could accrue.

His Excellency stated that Morocco was of the belief that UNCITRAL might also explore new ways to incorporate new technologies into the methods of work of the Commission and its Working Groups to enhance active participation, including more involvement of African countries. His Excellency added that Morocco was very active in UNCITRAL Working Groups, and particularly in Working Group III. He noted that Morocco had made several submissions to Working Group III, in which the country shared experiences in the development of the Morocco Bilateral Investment Treaty template. His Excellency stated that Morocco considered that ISDS reform should be comprehensive and should take into account concerns raised by various States in order to achieve a fair and equitable system for all countries and particularly for developing countries.

His Excellency concluded by highlighting Morocco's belief that now was a good time to contribute to create dynamic synergies and interaction between UNCITRAL and WTO. He noted the World Trade Organization (WTO) dispute system and said that interaction between UNCITRAL and WTO would contribute to the stability of the global economy and would help to avoid overlapping in the resolution of trade disputes.

Mr. Sanibé FAHO, Counsellor, Permanent Mission of Burkina Faso to the United Nations (Vienna)

Mr. Faho stated that Burkina Faso was a long-standing user of UNCITRAL texts and participation in its work, which contributed to building an open and integrate economy into the world in Burkina Faso. For example, in 1987 Burkina Faso became a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and in 1989 Burkina Faso acceded to the United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules"). Mr. Counsellor explained that Burkina Faso was a member of the Organization for the Harmonization of Business Law in Africa (OHADA) and enacted the UNCITRAL Model Law on Cross-Border Insolvency within the Uniform Act on the organization of collective procedures for the discharge of liabilities and the UNCITRAL Model Law on International Commercial Mediation within the Uniform Act on Mediation.

Mr. Faho added that Burkina Faso was also an active participation in UNCITRAL Working Group III (ISDS reform) and had made submissions relating to procedural costs and to damages. Mr. Counsellor stated that for Burkina Faso not only were arbitral proceedings costly, but the amounts paid in compensation were also high. Thus, it was essential that Working Group III engaged in identifying the best option for reducing the cost of compensation. In addition, he referred to the recent webinar organized by Burkina Faso and the UNCITRAL secretariat on transparency standards in investor-State dispute settlement (ISDS), which sought to raise awareness of UNCITRAL's work on reforming ISDS, including UNCITRAL existing texts on transparency. He remarked that this activity was very important for Burkina Faso in including the perspective of those negotiating international investment agreements and therefore offering an opportunity for developing countries to be heard.

Mr. Faho concluded by saying that Burkina Faso was suffering from the effects of the COVID pandemic, partially because the economy in Burkina Faso remained dominated by commodities. Thus, it was necessary to continue to expand the service sector. Burkina Faso

looked forward to additional tools to support the emergence of new small business that would help them in this task.

H.E. Stella Mokaya ORINA, Deputy Permanent Representative of Kenya to the United Nations (Vienna)

Her Excellency commended the UNCITRAL secretariat for organizing the Africa Forum with the objective of discussing commercial law to facilitate sustainable development from an African perspective, which was a topic of interest for Kenya and the continent.

Her Excellency stated that Kenya was committed to this process however Africa had a complex reality with many challenges. Some of those challenges involved the lack of a unified approach to the reform of international investment law in Africa. For example, there were many interests to balance in the continent with many actors involved. Thus, there was a critical need to take a coherent approach on dealing with the ISDS reform.

Her Excellency briefly referred to the situation in Kenya, a country that had concluded many Bilateral Investment Treaties (BITs) to attract foreign direct investment. She noted the general need to undertake a cost-benefit analysis to establish a) co-relations between the BITs and FDI flows and b) balance in the BITs substance provisions on ISDS. She called on UNCITRAL's assistance on these issues.

Her Excellency stated that a review process could be undertaken on the BITs inherited from the colonial period. Most of these BITs raised implementation issues due to the way they were drafted. In that context, capacity building and support would be essential to minimize or contain those challenges. Countries like South Africa and Argentina had recently reviewed their investment policies to protect themselves from international arbitration (e.g. institutionalizing the right to regulate). Other African countries could learn valuable lessons from them.

Her Excellency reiterated the need to safeguard African investment interests and incentivise a critical capacity in Africa in ISDs. She called on a) increasing the number of learning opportunities for Africans in UNCITRAL, b) offering courses in drafting on topics such as national enforcement of foreign awards and its alignment with UNCITRAL tools. She highlighted that many African countries required support from UNCITRAL.

On ISDS she briefly stated that the cost of proceedings and the problem of access to justice were critical issues in Africa. She added that those critical issues raised the question of whether national and foreign investors should have the same rights. There was a perception that foreign investors were more protected (e.g. allegations in the press of pyramid schemes by investors collecting money in host countries and disappearing afterwards). She also referred to the AfCFTA and how its chapter on dispute resolution would work with other ISDS mechanisms included in regional agreements (e.g. EAC, SADC, COMESA, ECOWAS) and in the AfCFTA Investment Protocol vis a vis the UNCITRAL Rules

In conclusion, her Excellency highlighted that on the area of digital landing, Africa was behind with regulations (e.g. fintech, mobile transactions) and concluded by recalling how UNCITRAL could assist African States in this regard. Finally, she expressed the hope that the Africa Forum could result in actionable deliverables to carry forward and assist the African countries to catch up with the rest of the world.

Mr. Emmanuel Ikechukwu NWEKE, Counselor, Permanent Mission of Nigeria to the United Nations (Vienna)

Mr. Nweke commended the UNCITRAL Secretariat for organizing the Africa Forum and added that having a regular engagement like this would help to address some of the gaps and challenges in Africa through the activity of UNCITRAL, while improving their participation.

Mr. Nweke added that Africa had so much to benefit from UNCITRAL. Thus, he called for an active engagement in the work of UNCITRAL and its Working Groups. Particularly, Working Group I on MSMEs, especially now that discussion would be focused on access to secured credit, which was a pressing issue on the continent and Working Group III on ISDS reform. It was important that as discussions progressed, they focused on issues that mattered most to States and not just mere focus on the investor in order to ensure a transparent, inclusive and fair environment for ISDS for all parties involved.

Ms. Romi BRAMMER, Office of the Chief State Law Advisor (IL), Department of International Relations and Cooperation DIRCO), Government of South Africa

Ms. Brammer stated that the Government of the Republic of South Africa regarded the work of UNCITRAL highly. For example, South Africa had been a party of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1976 and has enacted UNCITRAL texts on international commercial arbitration, e-commerce, and cross-border insolvency. South Africa was also pleased to actively participate in the work of UNCITRAL, which included contributing the discussions on Working Group III on ISDS reform.

Ms. Brammer added that on Working Group III South Africa was of the view that it was necessary to dedicate sufficient time to consider a broad range of issues, including other options to dispute settlement. There was a need for an alternative to the traditional ISDS in the form of a more modern and structured dispute settlement process, one that was better adapted to investment disputes involving sustainable development and public policy issues, including a wide range of stakeholders and interests. Reforming the ISDS regime was one aspect of a wide context of problems that the international investment regime was facing.

From South African 's perspective, COVID-19 brought to light a number of areas, which should be prioritized, such as digitalization and digital transformation. Digitalization was regarded as a powerful tool for implementing Africa's Agenda 2063 and the United Nations 2030 Agenda for Sustainable Development. She expressed the hope that it would also contribute to facilitating trade within Africa and globally. In this context, she noted that the report by UNCITRAL secretariat on exploratory work on the impact of COVID on international trade law, which noted that some measures taken by States in response to the pandemic could be supported through proposals to work on legal issues in the digital economy as well as digital payments, and deserved closer examination.

Ms. Tatiana Eddie RAZAFINDRAVAO, Deputy Permanent Representative of Madagascar to the United Nations (Vienna)¹

Ms. Razafindravao expressed that Madagascar had made considerable efforts in established a harmonized national legal framework to ensure transparency and good governance while monitoring and coordinating the commercial sector in Madagascar. The objective of the Malagasy government was to establish an environment conducive to local producers, national consumers and exporter in the trade, industry and craft sector.

Ms. Razafindravao highlighted that Covid-19 pandemic required the adoption of national health emergency measures, which resulted in a country lockdown. Despite that, the Malagasy Government through the Ministry of Industry, Trade and Handicrafts (MICA) initiated several reforms at the national level in the trade, industry and craft sector. Those reforms aimed to a) design and implement strategies for the promotion and revitalization of industry, commerce and crafts, b) ensure State and private sector partnership through public-private dialogue, c) support the competitiveness and development of small and medium enterprises (SMEs) in compliance with standards and quality, d) promote exports, e) establish a favorable business climate, f) promote entrepreneurship and innovation, g) professionalize the craft industry and h) provide decision-making support elements for industrial, commercial and craft policy.

Ms. Razafindravao provided some examples of those reforms. First, the deployment of trade commissioners and controllers throughout the island to monitor and coordinate the commercial sector in Madagascar. She added that their played an important role on the market as they ensured the protection of consumers against illegal goods. They also coordinated the supply of goods (e.g. necessities) on the internal market. The commissioners and controllers were responsible primarily for investigating commercial infractions, adopting and enforcing the laws that regulate the domestic market, maintaining fair competition among businesses, and protecting the country's reputation vis-à-vis international trade groups.

Second, Madagascar started accession to international trade mechanisms for food-related issues, such as the Codex Alimentarius. That process aimed to ensure international standards in the production and consumption of food. Thus, it guaranteed that Malagasy farmers and producers met the demands of safe foodstuffs for national consumers, while expanding their access to the external market.

Third and not least, Madagascar implemented the Presidential Program “One district, one factory” (ODOF) to promote local productivity. To revitalize national trade and promote local consumption the Ministry of Trade, the Madagascar Industries Union and UNIDO were helping to create industrial units (e.g. 42 units were created in 2020).

Ms. Emily MBURU-NDORIA, Director, Directorate of Trade in Services, Investment, Intellectual Property Rights and Digital Trade, the AfCFTA Secretariat

The Director started by updating the operationalization status of the AfCFTA and underscoring the importance of implementing the AfCFTA towards the creation of a unified single market in Africa to boost intra-African trade and to strengthen Africa's voice and participation in global trade. The Director added that AfCFTA State Parties were currently finalizing

¹Summary based on written statement delivered on 07/07/2021

negotiations on outstanding issues such as tariff schedules of concession, rules of origin and schedule of commitment for services.

The Director commended the UNCITRAL secretariat for organizing the Africa Forum, a unique opportunity to hear African representatives' opinions, perspectives and expectations on topics such as cross-border trade, investment and the work of UNCITRAL. In this context, the Director added that the work of UNCITRAL would be instrumental while the AfCFTA was developing the Protocols on Investment and Digital Trade.

The Director remarked that the AfCFTA Agreement already includes a Protocol dealing with dispute settlement (State-State). Thus, critical issues on that topic included a) how the Protocol on Investment protocol would handle disputes within the already established AfCFTA mechanism for dispute settlement and b) the relationship between the AfCFTA Protocol on Investment and the provisions in African regional agreements such as COMESA and ECOWAS.

The Director concluded that the AfCFTA Secretariat would be pleased to collaborate with UNCITRAL as UNCITRAL texts would be useful the development of AfCFTA Protocols on Digital Trade and Investment.

Other participants in the Forum included:

Mr. Usama ELEYAN Counsellor, Permanent Mission of Libya to the United Nations (Vienna)

Mr. Yvan JEAN LOUIS, Senior State Counsel, Attorney General's Office, Government of Mauritius

Ms. Sevelina K. ASHIPALA, First Secretary, Permanent Mission of Namibia to the United Nations (Vienna)

Mrs. Safa Mohamed Sekainy AHMED, Charge d' Affaires a.i; Permanent Mission of Sudan to the United Nations (Vienna)

Mr. Elsadig Mohamed A.E.M. AHMED, Second Secretary, Permanent Mission of Sudan to the United Nations (Vienna)

H.E. Ms. Maimuna Kibenga TARISHI, Ambassador, Permanent Mission of Tanzania to the United Nations (Vienna)

Mr. Tanyaradzwa MANHOMBO, Counsellor, Permanent Mission of the Republic of Zimbabwe to the United Nations (Vienna).

In closing the Forum, **the Moderator, Ms. Caroline Nicholas, Head, Technical Assistance Section and Senior Legal Officer at the UNCITRAL secretariat**, recalled that a major driver in establishing UNCITRAL was to ensure that the voices of developing countries were heard in the reform of international trade law, and that the forum had provided an opportunity to do so. On behalf of the UNCITRAL Secretariat, Ms. Nicholas thanked the participants for

their open and constructive comments and added that the UNCITRAL secretariat had heard many important issues raised, which would be taken on board in UNCITRAL's ongoing work. In concluding, she added that providing technical assistance and capacity-building support to African States, and supporting their participation in its Working Groups would be priorities for the Secretariat in the coming period ², and that UNCITRAL's strength as a collaborative forum would be carried through in delivering that assistance at both a national and regional level.

²The UNCITRAL Secretariat is implementing a one-year project (from 1 January 2021 to 31 December 2021) of the German Federal Ministry for Economic Cooperation and Development (BMZ), with a particular emphasis on the promotion of the UNCITRAL Transparency Standards in African States. Further information can be found in document [A/CN.9/1058](#) para 21.