The Treaty Establishing the African Economic Community and the Agreement establishing the African Continental Free Trade Area: Some Relational Aspects and Concerns

By:

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The Treaty establishing the African Economic Community (AEC Treaty) entered into force in May 1994, three years after its adoption in June 1991. Moreover as early as 1968, the Organisation of African Unity (OAU) leaders had concluded that economic integration was “a pre-requisite for the realisation of the objectives of the OAU”. Subsequent OAU resolutions, declarations and plans of action in that regard culminated into the AEC Treaty. While the Charter of the OAU was viewed as a more politically-oriented instrument, the AEC Treaty was, arguably, its economic development goal-driven supplement.

The objectives of the AEC Treaty may be summarised as follows: the promotion

of economic, social and cultural development and integration in African economies; the development of a framework for self-reliant development fully utilising the continent's human and material resources; to raise the standard of living of African peoples through cooperation in all fields, and fostering of close and peaceful relations among member states. Furthermore, the AEC aims to strengthen, harmonise and coordinate existing and future regional economic communities (RECs) through which, and through successive stages of integration, the AEC would gradually be established. The outlined stages of integration include, *inter alia*, establishment of a free trade area *at the level of each REC* (emphasis mine) (see also AEC Treaty, article 6 (c)); adoption of a common trade policy against third states; and establishment of a common external tariff; a common market; a Pan-African economic and monetary union; a single African Central Bank and a single African currency. It was anticipated that the various stages would be implemented within a period of 40 years (article 6 (5)). A time-frame that has proven to be pretty ambitious.

While the establishment of a free trade area is categorically provided for as one of precursor stages to the AEC, it is appears to have been envisioned as being established primarily at the regional level (article 2 (d)), and not necessarily at the continental level. This was very much in line with the strategy to build the AEC through the RECs. The AEC Treaty did not get into the modalities of the establishment of the prospective free trade area, neither did it mention a further protocol in that regard. Whether this omission was deliberate, is subject to speculation, but perhaps it may have been based on the belief that RECs would be the drivers of free trade areas as opposed to a focused continental framework or mechanism.

In May 2018, the African Union Summit adopted the Agreement establishing the African Continental Free Trade Area (AfCFTA). A year later, in May 2019, the agreement entered into force. Most recently at the 12thExtraordinary African Union Summit held in July 2019, its operational phase was launched. While the AfCFTA claims to be in line with the objectives and principles of the AEC Treaty, it is an instrument developed under the auspices of the African Union and its strategic vision for Africa, Agenda 2063. The AfCFTA, compared to the AEC Treaty, is more trade-oriented, laying out more elaborate rules on trade among member states. Its main objectives are: the creation of a single and liberalised

market for goods and services; to contribute to the movement of capital and persons; and also to lay the foundation of the continental customs union (AfCTA, article 3). Yet, just like the AEC Treaty, its objectives tend to stretch beyond mere trade enhancement and a free market attainment. Additionally, the AfCFTA aims to promote inclusive socio-economic development; gender equality; structural transformation; economic competitiveness; industrial and agricultural development; and food security, among others. Its scope covers trade, investment, intellectual property and competition policy (article 6). The AfCFTA has been touted as a game changer with the potential to boost inter-African trade and the continent's economic growth and development. It would unlock Africa's yet-to-be-fully-exploited economic power.

Adopting the strategy of the AEC Treaty, the AfCFTA likewise, utilises the RECs as building blocks. In fact it categorically states so (AfCFTA, preamble and article 5 (b)). Yet, in terms of the institutional implementing and oversight mechanisms, there is a stark difference in key aspects. The AEC Treaty more or less adopted the organs of the AU wholesale, for its implementation, administration and oversight; a move that has been criticised as weakening and subsuming the AEC. While the AfCFTA maintains the Assembly of the Heads of States of the AU as its highest decision-making body, it takes on a more trimmed organisational structure comprised of the council of ministers; the committee of senior trade officials; and the secretariat, which in the interim is the AU Commission, but is bound to change at a later stage (article 13).

The AfCFTA allocates no role to the AU Parliament or to the continental judicial body, which are both organs of the AEC. In fact, with regard to dispute settlement, the AfCFTA establishes a dispute settlement body, more modelled to that of the World Trade Organisation, with its own appellate procedures that do not leave room for judicial involvement by the continental court (AfCFTA, article 20 and the Protocol on Dispute Settlement). This is not only a departure from the arrangement within some RECs with established courts to settle REC disputes, but it also is a possible cause of conflict with the AEC Treaty which apportions to the African Court the function of resolving disputes arising under the treaty.

In respect to the role of RECs, their best practices are to be adopted by the

AfCFTA (article 5 (l)). The AfCFTA recognises that some RECs have attained higher levels of integration which should be maintained. However, should a conflict arise between a REC and the AfCFTA, the provisions of the latter shall prevail except where expressly provided for in the AfCFTA (article 19). Despite the seemingly prominent role assigned to RECs, just like is the case under the AEC Treaty, RECs are not parties to the AfCFTA. Neither is their involvement in the decision-making clearly streamlined. RECs are only represented on the committee of senior trade officials, but only in *an advisory capacity* (emphasis mine) (article 12 (5)). As building blocks, shouldn't the involvement of RECs in decision-making be more prominent? Unless of course it is assumed that the council of ministers comprises the same ministers that constitute a parallel body in the respective RECs, and that they shall accordingly coordinate all the activities.

The relationship between the AU, including the AEC, and the RECs is governed by the 2008 Protocol on relations between the AU and the RECs, which replaced an earlier one of 1998. The legal status of this protocol, though mentioned on the AU website as one of the governing documents, seems to be unclear. But more to the point, whether or not this protocol also extends to the relationship between RECs and the AfCFTA, was not considered worthy of mention in the AfCFTA. Therefore, notwithstanding any progress that has been made an attaining some of the objectives of the AEC, with regard to the legal, operational and functional relationships between the AEC, the AfCFTA and the RECs, the current catalogue of existing instruments does not appear to attempt any streamlining of the relationships nor provide any clarity.

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