Book Review II of The African Continental Free Trade Area Agreement: The Development of a Rules-Based Trading Order

By:

Konstantinos D. Magliveras

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In June 1991, the OAU took a huge leap forward by adopting the Treaty establishing the African Economic Community (AEC), which, had it been operationalized, would have joined the European Economic Community / European Union as prime examples of REIOs (regional economic integration organizations). The AEC was part of a larger grand project culminating in merging the OAU and the AEC into a single regional international organization (OAU Resolution AHG/Res. 190 (XXVI)). However, the AEC Treaty was never implemented as envisaged, the various milestones were not met and the whole project faltered. It might have been possible to revive it when the AU Constitutive Act was concluded but its relevant provision (Article 33) did nothing of the sort. Presently, the situation is rather perplexed because the AEC Treaty is still in force for all AU Member States bar five, a venerable AU organ is

in reality an AEC organ (the Pan-African Parliament), and in 2018 an important Protocol for Africa's integration was adopted as part of the AEC Treaty (Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment).

And while the prospect of pan-continental economic and trade cooperation remained rather elusive, a lot of good work was being done at the sub-regional African level by the so-called RECs (Regional Economic Communities). This was actually the plan under Article 28 of the AEC Treaty: Member States would strengthen existing RECs and create new ones, where needed, to bring about the AEC's gradual establishment, RECs being understood as its building blocks. And there was a significant development in July 2024: three RECs moved from sub-regional to trans-regional cooperation when the COMESA-EAC-SADC Tripartite Free Trade Area (TFTA) Agreement, following a protracted ratification period, came into force.

But, at a continental level, it was only in 2013 that free trade was declared as a specific goal in the 50th Anniversary Solemn Declaration and in the ensuing Agenda 2063: The Africa We Want. The latter document committed African countries to 'fast-track the establishment of the Continental Free Trade Area by 2017'. In the event, the Agreement Establishing the African Continental Free Trade Area (AfCFTA) was signed in March 2018 and entered into force a year later. The AfCFTA, which aims at setting up a single market for goods and services 'from Cairo to Cape Town', is the subject of the eloquent monograph written by Professor Kufuor. The author, a well-known scholar on African legal affairs, has published extensively, inter alia, on world trade, on (the problems of) African integration and on RECs. Therefore, he is eminently qualified to write about the pan-African 'Trading Order'.

Even though the AfCFTA Agreement has still not been signed/ratified by eight AU Member States, its diligent and prompt implementation coupled with the avoidance of (deliberate) violations, should bring about the desired free trade area and all the positive results that FTAs have on the maturity and development of national economies, on lifting the standards of living of the population, on removing threats to peace and security, on promoting democratic ideals, the rule of law and good governance, etc. The conclusion of the AfCFTA Agreement was accompanied by three other legal instruments: the

Protocol on Trade in Goods, the Protocol on Trade in Services, and the Protocol on Rules and Procedures on the Settlement of Disputes (DSM). The author skillfully navigates the reader through the maze of these instruments' provisions. He also analyzes the AfCFTA institutional architecture, which comprises the AU Assembly of Heads of State and Government as well as purposely created organs, namely the Council of [Trade] Ministers, the Committee of Senior Trade Officials, and the Secretariat, described in the AfCFTA Agreement as a 'functionally autonomous institutional body within the [AU] system with an independent legal personality'.

The author makes the original and interesting proposal to have the AfCFTA system reinforced by allowing what he calls 'sub-state or sub-national units of government', namely cities, regions and provinces, to participate in the AfCFTA governance and policymaking. And he devotes Chapter 6 ('Sub-National Governments and the AfCFTA') to explain it. According to the author, there is a trend in international law to enable such actors to participate in international decision-making and to become useful partners. And he cites as historical example, among others, the rather forgotten Hansa / Hanseatic League, a constellation of some 200 cities located principally in North Europe and Scandinavia, which was active from the 13th to the 16th century AD. However, it should be noted that the Hansa cities were invariably self-standing market towns, which shared common goals, had similar challenges to address and employed commonly agreed measures. Perhaps the Congress of Local and Regional Authorities, which operates in the framework of the Council of Europe, is more appropriate to be used as an example.

The author devotes a separate chapter (Chapter 7) to the AfCFTA system that was devised for the settlement of disputes, and rightly so. He observes the many similarities between this system, which is founded on the aforementioned DSM Protocol, and the disputes' settlement model, which has been introduced and applied by the World Trade Organization (WTO). While he correctly writes that '[t]here is nothing inherently wrong in the transplantation of dispute systems such as the WTO model', this reviewer would like to bring in another dimension, this being the most unfortunate story of the African Court of Justice (ACJ), the AU's judicial organ envisaged in Article 17 of the Constitutive Act. Despite the fact that the ACJ Protocol entered into force in February 2009, until today the AU has not operationalized it seemingly because of its merger with

the African Court on Human and Peoples' Rights. Arguably, the latter is a dying project considering that the 2008 Merger Protocol between the two Courts is not near to coming into force.

It is submitted that, had the ACJ been in operation, the DSM Protocol might not have been necessary, since a compromissory clause in the AfCFTA Agreement would have been enough to endow the ACJ with the necessary jurisdiction to rule on disputes among contracting parties pertaining to their rights and obligations under the Agreement. And, if necessary, the ACJ Rules of Court could have been adjusted to cater for this head of jurisdiction. Notwithstanding this argument, one could counter-argue that, as far as the AfCTA Agreemnt is concerned, AU Member States did not want the rigidity of a proper judicial organ and the legally binding nature of its decisions. Indeed, as the author maintains, "[t]he AfCFTA-DSM … has avoided signalling that its decisions are legal decisions. The AfCFTA-DSB will hand down recommendations geared towards the settlement of disputes".

The author has placed considerable importance on history to discuss the AfCFTA project, because, in his words, "Africa has a long and rich history of trading relations [where] the trading order functioned effectively". He draws inspiration from the New Institutional Economics School. Moreover, as mentioned above, he is adamant on the benefits of involving civic and other actors at the various decision-making venues of the AfCFTA project. It follows that the author has not produced a monograph where the primary consideration is to explain, in more or less legal language, the provisions and the procedures of the AfCFTA Agreement and attached Protocols. On the contrary, his aim appears to be to explain the goal of creating a FTA across the African continent by placing due emphasis on the historical, economic, and social aspects of this endeavour. The importance of going beyond a mere legal treatise also explains the impressive in substance and in length bibliography that author has used (pp. 203 – 231). For these reasons, the present monograph should appeal to a very large readership coming from different disciplines.

What the present monograph does not cover adequately are the so-called 'Phase II AfCFTA Protocols' that were adopted in February 2023, namely the Protocol on Competition Policy, the Protocol on Intellectual Property Rights, and

the Protocol on Investment. Perhaps they were adopted when the manuscript had been almost completed. Having said that, an overview of these three instruments is given in the Conclusions (pp. 188 et seq.). Assuming that these Phase II Protocols enter into force, one wonders how easy it will be for contracting parties not only to amend their domestic legislation to harmonize it with their provisions but also to introduce and to regulate new notions and concepts (to mention only one, corporate social responsibility). The whole exercise will no doubt prove to be a huge one. The catchwords will be 'technical assistance' and 'capacity building' but who is going to provide them in such a mass is rather unclear.

A final point. During the last few years, the argument has been advanced that an AU legal system, an AU law so to speak, has emerged. In a nutshell, this legal system comprises the rules, the norms and the procedures contained in the Constitutive Act, in the various treaties and conventions adopted under the OAU/AU auspices as well as in the decisions of the principal OAU/AU organs. It follows that the AfCFTA instruments should be considered as part of AU law and, therefore, their application and interpretation should take place within the framework of the AU legal system.

In conclusion, Professor Kufuor has written a very interesting and well argued book, which analyzes the endeavour for a pan-African free trade area from an interdisciplinary perspective. Students, researchers, policymakers, and whoever is interested in African affairs and the regulation of inter-state trade and economic relations will find the book to be an invaluable source of information and original thinking.

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