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

By:

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While much has been written about the African Continental Free Trade Area (AfCFTA), very few studies address the social, political and cultural implications of this new regional bloc from the perspective of international economic law. In this respect, Professor Kufuor's book pushes disciplinary boundaries and presents an original account of how markets have been constituted, expanded and reformulated across Africa. Kufuor draws on a range of theoretical lenses from international political economy, jurisprudence, history, sociology and economics to critically evaluate what institutional shifts will be required at different levels of governance if the aim of pan-African unification through a rules-based order is to materialise.

A core concept underpinning the book is Edward Blyden's idea of pan-Africanism and African unification, which envisages "a role for private organisations bringing Africans together under the umbrella of a single state."[1] In this book, Kufuor centres the analysis on the role(s) that the nation state, private actors and civil society stakeholders can play in the implementation of the continent's new economic constitution established under AfCFTA. The book covers considerable ground and addresses issues including trade liberalisation, institutional governance, the role of sub-national governments and the need for robust decision-making in dispute settlement mechanisms. In this review, I shall limit my focus to three interrelated themes that are weaved across the book: first, the turn to legalisation in Africa's market integration; second, the importance of legalisation for the establishment of strong continental institutions; and third, the need for multi-stakeholder deliberation and participatory spaces for inclusive decision-making.

A core claim of this text is that the AfCFTA is the most appropriate framework through which the goal of continental unification through trade or economic integration can be achieved. It applies established scholarship about the 'neoliberal turn' in international trade law, which has been characterised by increasing levels of 'legalisation' and 'technocratisation' in trade agreements, to demonstrate the paradigmatic shift taking place across Africa as trade agreements move away from power-based towards rules-based systems of governance. Kufuor recognises that the success of the AfCFTA hinges on its commitment to legalisation and a rules-based system from which state obligations and duties arise. The AfCFTA, as a framework agreement/treaty to which other protocols can attach, allows for the extension of rights and obligations of its members over time.

Kufuor takes great care to tell this story about legalisation in the context of colonialism and highlights the notable shifts that have taken place throughout history. He argues that the absence of regional courts across Africa is evidence of rule-scepticism by African states and in Chapter 1 shows how, as a result, regional integration in Africa has become the "privately owned venture" of political elites. The book charts Africa's colonial past and its significance of shaping not only the ways in which African states seek to integrate into the global economy but also the attitudes of African governments to the project of economic liberalism. Protectionism has persisted long since the process of

colonisation was dismantled and he attributes the failure of market integration to unravelling of European rule. Kufuor submits that the “unfettered power of post-colonial African leaders put durable and meaningful economic integration beyond the reach of popular accountability.”[2] In short, a rules-based system is imperative to unlocking the economic potential of the continent.

In Chapter 3, the legal and market-based principles underpinning the AfCFTA are presented: variable geometry; special and differential treatment; transparency and disclosure; preservation of the acquis; MFN and national treatment; reciprocity; and, substantial liberalisation. The analysis of the way that trade principles are embedded through the Framework Agreement and Protocols provides important context for Kufuor’s arguments about legalisation and institutionalism. It follows that the rules-based transformation taking place across Africa must include fully-functioning dispute settlement mechanisms for resolving textual indeterminacy that arises in respect of interpreting regional treaty rules. This is especially important given how the overlapping commitments between the RECs and AfCFTA could intensify the existing problems of incoherence and indeterminacy of trade rules across Africa.

This book presents legalisation as a precursor for institutionalism and the optimal institutional conditions for pan-African market integration is discussed at length. Indeed, the analysis of governance structures is a real strength of this book. In Chapter 3, Kufuor outlines the relationship between legalisation and institutionalism. He explores the idea of the AfCFTA as a ‘member-driven organisation’ and notes that this is potentially problematic because “a member-driven organisation presumes an organisation disconnected from the base of its members – their citizens, traders, etc. all of whom seek to benefit from open markets and thus, should, arguably have the right to engage in the organisation.”[3] Kufuor recognises that the success of AfCFTA hinges on the impact and significance of its governance structures. He describes the institutions as “fulfil[ling] the sociological role of the AfCFTA as the glue that will help hold the individuals together”[4] and by working in tandem with the rules-based system, the institutions and organs of AfCFTA are “essential to prevent abuse”[5] of the system by elites.

While a variety of theoretical perspectives are integrated throughout the book, an original contribution to the scholarship comes in the framing of AfCFTA as an

ordoliberal regime. At present, there are significant transaction costs associated with intra-African trade. To minimise transaction costs and to optimise market integration, the AfCFTA needs a strong governance regime. By emphasising the importance of state intervention for securing the liberal project, the rules-based approach of the AfCFTA will set an economic constitution for the continent through which its socio-economic-political order can emerge. Kufuor notes the concerns that some states, like Nigeria, have raised about the effectiveness of AfCFTA to resolve existing and prevent the emergence of new anti-competitive practices on the continent. While market integration is often seen as a key driver for development, Nigeria has raised concerns that AfCFTA could result in so-called “screwdriver plants” (foreign firms based in other countries) dumping their goods on the Nigerian market.[6]

In this respect, legalisation plays a key role in resolving some of the tensions that will inevitably arise in the quest for continental unity. With a focus on some of the more active RECs like ECOWAS and EAC, Kufuor illustrates how conflicts arise between the norms and obligations set out in national and regional laws notwithstanding the existence of treaties that stipulate the hierarchy of those norms. In part, the issues arise because political elites have chosen to assign their “dirty work decisions”[7] to supranational organisations and this, in turn, further distances citizens from decision-making. Kufuor demonstrates the close connections between transaction costs associated with market integration and the institutions that govern the economic space.

These ideas are built on in Chapter 4 where the issue of protectionism on the continent is analysed and in Chapter 5, which sets out the institutional framework established under the AfCFTA. It is the Council that appears to have considerable decision-making power in respect of many areas of AfCFTA governance. Although trade ministers have preference, the Council’s membership is open to ministers from all sectors. As a consequence, there is real potential for the Council to embed discursive practices that facilitate deliberation on all aspects of the AfCFTA: political, economic, social and cultural. Kufuor demonstrates how this reinforces an ordoliberal framework since the Council “serves as a venue where members articulate and defend their national interests.”[8]

Another AfCFTA organ that has the potential to advocate for both national and continental interests is the Committee of Senior Trade Officials (CTSO), which is intended to operate like a specialised committee with a role in developing and implementing policy. With reference to SADC's National Committees (SNCs), Kufuor illustrates how the CTSO could be operationalised to act as a forum for stakeholders from the private sector and civil society.[9]

A refreshingly interesting question posed by this book is the role that sub-national governments and cities might play in the wider national, regional and continental spaces. While a significant amount of scholarship has focused on governance in the RECs, the role that national institutions play in contributing to and undermining the regional agenda(s) is often overlooked altogether. Chapter 6 offers a thoughtful account of why SNGs and cities should be brought into the deliberative space for shaping the future of AfCFTA governance, implementation and compliance. Kufuor proposes that paradiplomacy will be increasingly important for the success of AfCFTA as it serves as a constructive tool to facilitate the opening up of markets.[10] The African continent is no stranger to paradiplomacy, with examples of this working in the contexts of Nigeria, South Africa and Ethiopia. Given the significance of SNGs and cities to the development of Africa, it seems peculiar that AfCFTA drafters have failed to incorporate them into the framework.

Notwithstanding the importance of the liberal economic institutional framework constituted through a rules-based regime, Kufuor sees "a vibrant civil society"[11] as essential to support the opening up of markets and securing compliance with the obligations and duties of states under AfCFTA. A central theme running across this book is the 'civic republican deficit' across African states and Kufuor advocates for more deliberative forms of civic participation. He argues that the ways in which civil participation in aspects of political, social and economic governance have been suppressed by the actions of elites has facilitated market integration as a mode of private venture ownership. In part, this phenomenon has arisen from the failure of domestic institutions to shore up regional and international agreements (Chapter 2). As a result, market integration creates spaces of inclusion and exclusion, of presence and absence.

In this book, Kufuor is rallying for a break from the current political milieu toward deliberative models of civic participation embedded at the national, regional and continental levels. Transparency – understood as meaning both a tool for gathering information and as compliance with regime commitments[12] – is an AfCFTA principle that must be respected if a truly deliberative space is to be created. Furthermore, the AfCFTA principle of consensus in decision-making is described by Kufuor as a an “African social value”[13] which “at the inter-state level seems to reflect the faith in traditional life and governance before the arrival of the Europeans and the socio-political changes colonial rule brought to the continent.”[14] While the focus of the analysis is predominantly economic, there is no doubt that the space for deliberation on the social and environmental dimensions of sustainable development will become ever more important as the implementation of AfCFTA gathers pace.

Chapter 7 concludes the substantive analysis of the book with an exploration of the two-tier dispute settlement mechanism to be established under the AfCFTA. There is an underlying assumption that the AfCFTA model, which is largely rooted in WTO disciplines will somehow offer greater certainty and security to traders through its rules-based model than the regimes of the regional economic communities (RECs). In light of the ongoing challenges facing the WTO two-tier system, we shall have to wait and see whether the optimism surrounding AfCFTA’s dispute settlement mechanism as a rules-based mechanism for resolving disputes is overstated.

To conclude, this book is a goldmine of ideas - many of which will serve as the basis for further research across the disciplines. So interesting is the analysis that the reader is left wanting more. As Africa continues to play a fundamental role in the global economy, it is important that the social and environmental dimensions of AfCFTA governance in the trade context are not side-lined. The AfCFTA offers an opportunity for African states to implement interventions that open markets in a way that foregrounds sustainable development. It will be interesting to see how this area develops, especially in relation to the expansion of disciplines, the role of institutions and the space for deliberation through a multi-stakeholder approach. To move away from the notion of market integration as a ‘privately owned venture’ towards a more collective and discursive type of decision-making will require a paradigmatic shift in attitudes at the national and regional levels. This book gives insights to policymakers

about how that goal can be realised.

Footnotes

[1] Chapter 5, 147

[2] Chapter 2, page 46

[3] Chapter 3, page 58

[4] Chapter 5, 147

[5] Chapter 5, 135

[6] Chapter 4, 119

[7] Chapter 4, page 117

[8] Chapter 5, 138

[9] Chapter 5, 139

[10] Chapter 6, 157

[11] Chapter 4, page 121

[12] Chapter 3, page 72

[13] Chapter 3, page 86

[14] Chapter 3, page 90

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