IEL and the AfCFTA: Beyond Trade Liberalisation, Economic Transformation and Development

By:

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The launch of the Continental Free Trade Area (AfCFTA) by the African Union's Heads of State and Government in Kigali in March 2018 has sparked a new wave of enthusiasm and interest from both academics and practitioners. Given the relative slowness that has characterised the various regional integration initiatives over the last 56 years, (since the creation of the Organisation of African Unity in 1963), several commentators see this continental milestone as an opportunity to correct past mistakes to ensure that this new initiative achieves its ambitious objective. However, beyond this initial enthusiasm and the various expectations generated by this continental initiative, it is also worth noting the complexity of the task assigned to the AfCFTA.

From the outset, it should be recalled here that beyond the great potential represented by this new wave of continental regionalism particularly the promised revolution in continental trade, and for making the first step towards

the creation of a common market of 1.2 billion people, GDP of about US$ 2.2 trillion, economic boost.The AfCFTA also aims to promote the economic development of the participating states. This is apparent in the African Union's Agenda 2063, which provides for actions and measures aimed at boosting the socio-economic transformation of the continent - including through economic integration - in the next 50 years (from 2013). In particular, the goal of integrating the continent was expected to be achieved through the creation of a Continental Free Trade Area, supposed to be the first major step towards the establishment of an African Economic Community, in the 1994 Abuja Treaty.

In light of these considerations, the question we should ask ourselves as legal scholars and practitioners is how to ensure that the AfCFTA achieves its assigned goal while overcoming most of the constraints which undermined previous efforts (including multiple and overlapping memberships, RECs progressing at different pace, insufficient competitiveness, economic transformation, industrialisation and production diversification). An important question to ask would be what specific role law (and by implication, legal scholars) could play in ensuring the success of the AfCFTA.

In the specific context of the AfCFTA, (international economic) law is supposed to focus on producing rules designed to promote trade liberalisation by eliminating any constraints that are likely to prevent the flow of capital across the continent and to restrict the growth of business activities well as their expansion across national borders.

Why are we pursuing trade liberalisation?

International trade is believed to play a crucial role in the development process of a country, as it allows it to increase its wealth and income through exports to larger markets and to buy goods that are needed in their domestic markets through imports. Following this logic, countries will predictably specialise in goods that they can produce more efficiently and by using fewer resources – thereby using their local industries at their greatest advantage. And, in turn, these countries will import goods from countries that can supply them at a cheaper price. Some scholars even consider that this could promote economic transformation and diversification of exports in the countries concerned.

However, a great majority of African economies still depend on the production of a few primary commodities and a significant import of manufactured goods. In the few cases where it has happened, industrialisation has been very slow. This situation is therefore likely to benefit African economic powerhouses such as South Africa, Kenya, Egypt or Nigeria, and to affect infant industries in countries that are less economically advanced, often not able to cope with foreign competition. As a consequence, rather than promoting the transformation of these countries' economies, trade liberalisation runs the risk of increasing their dependence on export of primary commodities, as they would be unable to promote the growth of their national industries.

Thus, by focusing solely on the promotion of trade liberalisation in the context of the AfCFTA, international economic law (IEL) risks failing in its primary mission of promoting BOTH intra-African trade and the economic development of African countries.

Beyond trade liberalisation: economic transformation and industrialisation

Beyond international and cross-border business transactions, which involve the elimination of tariff and non-tariff barriers to trade, IEL should also focus on rules regulating other economic activities such as the production and distribution of goods. In other words, beyond trade liberalisation, IEL should be seen as a means to develop new comparative advantages in activities and sectors that they consider more likely to increase their international competitiveness and, thereby, promote their long-term developmental goals.

This approach involves the adoption of adequate regulatory frameworks and the appropriate allocation of resources to specific sectors and areas, taking into account both the internal resources of the concerned regions/countries and the opportunities and risks provided by international trade. This is achieved through the adoption of particular regulatory and institutional mechanisms, which are expected to influence the interaction between opportunity cost and product and country characteristics.

A perfect example of this kind of regulatory mechanisms is the East African Community's Industrialisation Policy 2012-2032, which provides for various

legal rules particularly aimed at promoting the development of regional value chains, strengthening national and regional industrial capabilities, enhancing the region's competitiveness and developing supporting infrastructure along selected economic corridors. Through this Regional Industrialisation Policy, the EAC Treaty has provided its Member States with key legal instruments allowing them to use the regional process to promote economic integration while also enhancing their production capacity.

The ideal settings in which this aspect of IEL could be harnessed and this type of activities developed are the various African regional economic communities (RECs). The reliance on RECs as building blocks to achieve continent-wide economic integration constitutes one of the distinctive features of the Abuja Treaty, a forerunner of the AfCFTA. This approach is intended to provide some degree of manageability that is expected in order to accommodate sub-regional particularities with a view to gradually develop a continental Common Market. The eight African Union's RECsand their corresponding legal regimes can be used to create a dynamic comparative advantage at the sub-regional level, in order to promote economic transformation and industrialisation in their Member States, while the AfCFTA would serve to promote increased trade between different countries and regions, thus paving the way for the establishment of a continental common market.

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