The nature of the legal relationship between the three RECs and the envisaged TFTA: A focus on the Dispute Settlement Mechanism.

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Declaration

I declare that this thesis is my own work, that it has not been submitted before for any degree or examination in any other university and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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Dikabelo Gaolaolwe

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Acronyms and Key Words

Choice of law

Choice of forum

Common Market for Eastern and Southern Africa (COMESA)

Dispute Settlement Mechanism (DSM)

East African Community (EAC)

East African Court of Justice (EACJ)

Jurisdiction

North American Free Trade Area (NAFTA)

Overlap of jurisdiction

Regional Economic Communities (RECs)

Regionalism

Southern African Development Community (SADC)

Tripartite Free Trade Area (TFTA)

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CHAPTER ONE

INTRODUCTION

1.1 Purpose of the study

The heads of states and government representatives of the three economic groups in Africa, that is, the Community for Eastern and Southern Africa (COMESA), East African Community (EAC) and the Southern African Development Community (SADC) (collectively hereinafter referred to as the Regional Economic Communities (RECs) have agreed in October 2008 to negotiate a tripartite free trade area (TFTA) which would later lead to a formation of a customs union.[1] The TFTA is expected to cover twenty seven countries in the African continent and affect approximately a population of five hundred and ninety million.[2] The combined Gross Domestic Product is estimated at US 624 billion.[3] This is a good initiative that could increase intra African trade and in turn improve the African economy.

The initiative comes after many years of planning and coordinating the achievement of the ultimate goal of a unified African economic community.[4] It is a response to the African Union's objective of rationalising the existing regional economic communities to ultimately achieve a common market covering the African region. The efforts of the African Union resulted in the adoption of the Treaty

[1] Communique of the tripartite Summit of 22 October 2008.

[2] Hartzenberg T 'Introduction' in *From Cape to Cairo-Making the tripartite free trade area work* (2011) i-iii available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

[3] Africa Research Bulletin 'Continental Developments' *http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6346.2011.03927.x/full* (accessed 18 September 2012). See also 'Africa Free Trade Area talks enter stretch' available at *http://www.trademarksa.org/news/africa-free-trade-area-talks-enter-key-stretch*

[4] Africa Research Bulletin 'Continental Developments' available at *http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6346.2011.03927.x/full* (accessed 18 September 2012).

Establishing the African Economic Community (Abuja Treaty). The Abuja treaty entered into force in 1994 and it provides a framework for the creation of an African Economic Community (AEC) over a period of thirty four years.[5] The Abuja Treaty envisages using the existing regional economic communities as the building blocks of the AEC.[6] The above position is captured in Article 88 (1) of the Abuja Treaty which provides for the establishment of the AEC through coordination, harmonisation and progressive integration of the activities of the regional economic communities.[7] Although the relationship between the AEC and the regional economic communities is not clearly defined, the creation of the TFTA is still a concerted effort to integrate the African continent and the TFTA will, if successfully established and operated make a significant contribution in the work of the African Union to ultimately form the AEC.

The total GDP of the countries that are expected to be part of the TFTA is expected to reach one trillion dollars in 2013.[8] A GDP of that standing has a potential of placing Africa on a pedestal when it comes to trade, business and the world economy. This would be a long awaited outcome as Africa has been an almost non significant player in the international trade and business arena, accounting for less than 2.5 percent of the world trade and a mere 10 percent of intra Africa trade.[9] Compared to other regions like the North America and the Western Europe, trade between African countries is minimal.[10] Regional integration at this level has the potential of providing the much needed stimulus for attracting foreign direct investment from within and outside the envisaged TFTA. Pro-

[5] Oppong R F 'The African Union, African Economic Community and Africa's Rtegional Economic Communities: Untangling a Complex Web' available at *http://www.eprints.lancs.ac.uk/30779/3/AJICL_PAPER-OPPONG.pdf* (accessed 26 August 2013).

[6] Oppong R F 'The African Union, African Economic Community and Africa's Rtegional Economic Communities: Untangling a Complex Web' available at *http://www.eprints.lancs.ac.uk/30779/3/AJICL_PAPER-OPPONG.pdf* (accessed 26 August 2013).

[7] Oppong R F 'The African Union, African Economic Community and Africa's Rtegional Economic Communities: Untangling a Complex Web' available at *http://www.eprints.lancs.ac.uk/30779/3/AJICL_PAPER-OPPONG.pdf* (accessed 26 August 2013).

[8] Africa Research Bulletin 'Continental Developments' available at *http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6346.2011.03927.x/full* (accessed 18 September 2012).

[9] Pearson M 'Trade facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area' available at *http://www.tralac.org/files/2011/09/S11WP112011-Tripartite-Trade-Facilitation-20110921-final.pdf* (accessed 14 May 2013).

[10] North America at about sixty percent and Western Europe at about forty percent, see Pearson M 'Trade facilitation in the COMESA-EAC-SADC Tripartite Free Trade *Area'* available at *http://www.tralac.org/files/2011/09/S11WP112011-Tripartite-Trade-Facilitation-20110921-final.pdf* (accessed 14 May 2013).

competitive effects of regional integration may lead to the reduction of production costs which may result in increased welfare of the society.[11] The benefits of regional integration could be a reality for the African region but there is need for all the countries to realise them. It has been argued that although some weaker countries might be reluctant in the negotiations of the grand free trade area for fear of being overwhelmed in the bigger free trade area, they may benefit in the long run.[12] Some studies have moved a step ahead and attempted to calculate the benefits of entering into this free trade area.[13] The study argues that South Africa and Mozambique may emerge the big winners in the anticipated free trade area whilst Botswana, Lesotho, Namibia and Swaziland may experience losses.[14]

The African leaders, through the summit made a declaration that the tripartite free trade agreement would adopt a developmental approach based on three pillars of industrial development, infrastructure development and market integration.[15] Industrial developmental is expected to address productive capacity constraints while infrastructure development would enhance connectivity between the various territories and reduce the costs of doing business. The general objectives of the TFTA are at Article three of the Draft Agreement establishing the TFTA. They include the creation of a single market with free movement of goods, services and business persons and the resolution of

[11]Trade Law Centre (Tralac) 'Africa rising through regional economic integration' available at *http://www.tralac.org/2013/04/05/africa-rising-through-regional-economic-integration/* (accessed 11 May 2013).
[12]Africa Research Bulletin 'Continental Developments' available at *http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6346.2011.03927.x/full* (accessed 18 September 2012).
[13]Jensen G H and Sandrey R 'The tripartite Free Trade Agreement: A computer analysis of the impacts' available at *http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/N11WP062011_Tripartite_GTAP_20110323.pdf* (accessed 11 May 2013).
[14]Jensen G H and Sandrey R 'The tripartite Free Trade Agreement: A computer analysis of the impacts' available at *http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/N11WP062011_Tripartite_GTAP_20110323.pdf* (accessed 11 May 2013).
[15]E Gerhard 'The Tripartite FTA: Requirements for Effective Dispute Resolution' in *Cape to Cairo- Making the tripartite free trade area work* ch 3 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).
[16]Draft Agreement Establishing the COMESA, EAC and SADC Tripartite Free Trade Revised December 2010.
[17]Trademark Southern Africa 'COMESA,SADC, EAC free trade area talks set to conclude' available at *http://www.trademarksa.org/news/comesa-sadc-eac-free-trade-area-talks-set-conclude* (accessed 11 May 2013).
[18]Annex1-Tripartite Negotiating Principles, Processes and Institutional Framework *Guidelines for negotiating tripartite free trade areaamong the member/partner states of COMESA, EAC and SADC* (2011) 2.

the issue of multiple membership as well as the expedition of regional and continental integration.[16] Article 3 (1) of the draft tripartite free trade agreement also captures the developmental approach adopted by summit as it states the promotion of rapid social and economic development of the region as one of the objectives. The negotiations of the TFTA are divided into two phases. The first phase covers trade in goods and the movement of business persons. These two aspects of trade will be negotiated on parallel tracks. The second phase of the negotiations will be dedicated to trade in services.

The TFTA negotiations are at an early stage and already behind schedule by twelve months.[17] The potential partner states have only agreed on the negotiating principles. Of importance to note from the negotiating principles is that the intention is to build on the work that has already been done in the three RECs but as to how it is not clear at this stage.[18] The draft agreement, which includes fifteen annexes, has already been produced but it should be noted that the negotiations have just been launched and these documents do not have official status.[19]

The creation of the tripartite has been generally enthusiastically welcomed by the African states involved, particularly the African leaders.[20] One of the reasons why the negotiation of the TFTA is a celebrated effort is because it has the potential of resolving the problem of multiple membership that has to some extent adversely affected the implementation and progress within some of the RECs. The TFTA provides a framework for the development of a coherent agenda for regional trade in Africa. This framework could be an opportunity to provide a fresh start and learn from deficiencies of the existing RECs. Be that at is may, a lot of questions are still unanswered, and understandably so as the negotiations have just recently commenced.

[19]Hartzenberg T 'Introduction' in *From Cape to Cairo-Making the tripartite free trade area work* (2011) i-iii available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

[20]African Economic Outlook 'Developments in Regional Integration in Africa' available at *www.africaneconomicoutlook.org* (accessed 17 September 2012).

One pertinent question that may require an answer at the early stage of designing the TFTA is how the envisaged TFTA is going to relate and interact with the existing RECs. The African regional integration has suffered a lot of negative opinions such as this one, 'In Africa however the dilemma concerns weak institutions, poorly defined mandates and vaguely ascribed powers.'[21] Could the TFTA be a start of another institutional hurdle? African regional integration has also been marred by questionable commitment of member states to regional integration. Regional integration has lagged behind in some quarters, for instance, a regional economic community such as SADC has had difficulty in fulfilling the so called deep integration. This integration is meant to go beyond the usual elimination of tariffs to cover competition policy, intellectual property rights, investment and services.[22] It would be interesting to see if there will be any more commitment at the TFTA.

1.2 Problem statement and research questions

Regional trade agreements, especially the TFTA present an opportunity to expand trade and continue to develop the many developing countries through intra African trade. Regionalism is of great importance, especially now at a time when there is not much confidence in the multilateral trading system because of the impasse at the Doha round. It has been argued that one of the reasons why there has been an increase in regionalism is because of the very slow progress in multilateral negotiations.[23] African countries are seeking new opportunities for growth outside the multilateral trade arena through the TFTA. An issue which deserves attention from the legal minds is the multiplication of institutions, particularly those dealing with dispute resolution.

[21]Hartzenberg T 'Regional Integration in Africa' (2011) 18 ERSD-2011-14 World Trade Organisation Staff Working Paper available at *www.wto.org* (accessed 17 September 2012).

[22]Kalenga P 'Regional Integration in SADC: Retreating or forging ahead?' available at *http://www.tralac.org/files/2012/09/D12WP082012-Kalenga-Regional-integration-in-SADC-retreating-or-forging-ahead-20120919.pdf* (accessed 9 May 2013).

[23]Antimiani A and Salvatici L 'Regionalism versus Multilateralism: an Assessment of the European Union Trade Policy' available at *www.ecostat.unical.it* (accessed 25 September 2012).

The three RECs are legal personas which can exercise some power in their regions and in so doing have established institutions that have a clear mandate in relation to disputes that may arise from the relevant agreements.[24] SADC is an exception because it has dissolved its tribunal[25] but it should be noted that there is a dispute settlement mechanism for resolution that may arise from the SADC Trade Protocol.

The RECs have established their own dispute settlement institutions with rules and norms that guide the adjudication of disputes in their regions.[26] The envisaged TFTA will have to possess effective power for it to achieve its goals. It will have to drive its agenda through its own institutions. Against this backdrop, a dispute settlement mechanism is proposed under Article 38 and Annex 13 of Draft TFTA Agreement. Once again, it should be noted that these are not final documents, a lot of input and work will have to go into them before finalisation.

Presented with these possible layers of legal regimes and an unclear relationship between the two regimes, a problem of overlaps, conflicts and competition of jurisdiction may manifest itself. The jurisdiction being referred to is in the sense of choice of law and choice of forum. The two layers may just joyously go on their own in terms of individual peculiarities with highly unpredictable end results. This possible problem presents itself at a time when proliferation of regional trade agreements is under a microscope and legal scholars pointing out possible friction between World Trade Organisation law and regional trade laws, particularly with regards to dispute resolution. It is not clear at this stage how the TFTA is going to relate with the established institutions from the RECs.

[24]Erasmus G 'The Tripartite FTA: Requirements for Effective Dispute Resolution' in *From Cape to Cairo-Making the tripartite free trade area work* (2011) 83-108 108 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

[25]About SADC available at *http://www.sadc. int/about-sadc/sadc-institutions/tribun/* (accessed 11 January 2013).

[26]Erasmus G 'The Tripartite FTA: Requirements for Effective Dispute Resolution' in *From Cape to Cairo-Making the tripartite free trade area work* (2011) 83-108 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

In light of the abovementioned problem, several questions arise and need to be addressed accordingly. They are as follows:

(a) What is the legal nature of these RECs and in particular their dispute settlement mechanisms?

(b) What is the legal nature of the proposed TFTA and its dispute settlement mechanism?

(c) What are the possible implications of having the two layers of trade dispute settlement legal regimes?

(d) What is the experience from other regional agreements such as the North American Trade Agreement (NAFTA)?

(e) What are the possible recommendations, drawing from the NAFTA experience as well as international law doctrines that could assist in the avoidance of possible conflict or overlap in the two trade law regimes? That is, the legal regime at the RECs level and the one at the TFTA level.

1.3 Research hypothesis

The assumption which is investigated in the research is that the creation of the TFTA will cause multiplication of institutions such as the Dispute Settlement Mechanism (DSM) and therefore create overlaps and conflict in jurisdiction within the African region.

1.4 Objectives of the research

The general objective of the study is to explore the possible nature of the legal relationship between the RECs and the TFTA with a focus on the interaction of the dispute settlement mechanism (DSM) of the two regimes. One of the specific objectives of the research paper is to analyse the legal framework of COMESA, EAC and SADC with regards to their institutions that deal with DSM. Another objective is to investigate the legal framework of the TFTA with a focus on its proposed DSM. The study further explores the possible jurisdictional overlap between the RECs and the TFTA as well as its implications and possible solutions.

The study seeks to understand how the North American Free Trade Area (NAFTA), has approached this issue in relation to the interaction between its DSM and the WTO DSM. The last objective is to

formulate recommendations for the design of the TFTA's DSM in order to achieve coherent trade legal systems that can foster regional integration.

1.5 Significance of the study

This study is of great significance in terms of timing or relevance and the issues that will be addressed. African countries are at a time where they could create an effective FTA that would ultimately improve the lives of the African population and even trigger the African programme on continental integration.[27] It is submitted that all this is possible if done right. In order for the TFTA to get it right it will have to have a clear and effective DSM.

That will not be the end of it for the TFTA; its dispute resolution will have to be coherent with that of the RECs for it to be practically effective because the legal regimes at the RECs level will compete one way or the other with that at the TFTA level. SADC had a DSM which has since been dissolved. This dissolution is a clear setback for SADC but could present an opportunity to re-look at it with the TFTA in mind. It is submitted that it is an opportune time to investigate the problem at this stage of the TFTA negotiations.

1.6 Methodology

The research will be desktop based. It will rely on books, articles and studies that have been carried out on the subject. There is a fair amount of literature on the overlap and conflict of jurisdiction in trade law in relation to the WTO and RTAs and international law in general. There is not much literature on the subject with regards to the relationships amongst FTAs. There will be an aspect of comparison as the NAFTA will be discussed and the study will attempt to sieve lessons that could be used in the design of the TFTA DSM.

1.7 Limitations of the study

The study will investigate the possible nature of the legal relationship between the TFTA and the RECs but it will be limited to institutions dealing with dispute resolution. The study could have included the other institutions but there would not be enough time or space to analyse all of them.

[27] Erasmus G and Hartzenberg T 'Introduction' in *The tripartite free trade-towards a new African integration paradigm* (2012) 1-8.

This study will be confined to the jurisdiction which will encompass choice of law and choice of forum. The comparative aspect will be limited to NAFTA's DSM. The NAFTA has been selected as it has been said to be one of the best FTAs.[28]

There is also a fair amount of material that reflects on the overlap and conflict of jurisdiction between NAFTA and the WTO and how the NAFTA has addressed the issues in its provisions dealing with dispute resolution. The other FTAs will not be used as there is not enough literature that demonstrates how they deal with the issue at hand.

1.8 Structure of the study

Chapter one will be a general introduction of the study. It will investigate regionalism in Africa, with an emphasis on the current trends. It will go further to investigate the origins of the TFTA and the motivation thereof.

Chapter two will give an overview of the COMESA and EAC's legal frameworks with a focus on their DSMs. This chapter will investigate how these DSMs operate. This chapter will further give a brief status of the SADC DSM. It will also provide an overview of the proposed DSM under the TFTA. The chapter will finally juxtapose the two and outline possible overlaps and conflicts of the two layers of DSMs.

Chapter three will explore the overlap and conflict of DSMs in relation to choice of law and choice of forum. This chapter will unpack the two concepts and how they may play out in the region with the introduction of the TFTA DSM situation. This chapter will finally discuss the possible impact of this overlap and conflict on the trade agenda of Africa.

Chapter four will bring in the comparative aspect by discussing the DSM under NAFTA as well as outlining lessons that could be learnt from NAFTA. Chapter four will also formulate recommendations for that could be of assistance in the design of the TFTA DSM and those that SADC could take heed of in the review of its DSM. The recommendations will be for the purpose of attaining coherence in the two layers of DSMs.

[28] Zi-yi M 'A study on NAFTA: Establishing a better dispute resolution under CEPA' (2008) 5 US-China Law Review 32.

CHAPTER TWO

DISPUTE SETTLEMENT MECHANISM IN THE COMMON MARKET FOR EARTERN AND SOUTHERN AFRICA, EASTERN AFRICAN COMMUNITY, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY AND THE PROPOSED TRIPARTITE FREE TRADE AREA: AN OVERVIEW

2.1 Introduction

The Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and Southern African Development Community (SADC) are intergovernmental regional economic communities designed for the purpose of creating free trade areas and customs unions.[29] The COMESA origins go as far back as the mid 1960s when the United Nations Economic Commission for Africa convened a meeting for the newly independent countries in the eastern and southern Africa.[30] At that meeting which was held in Lusaka, Zambia it was recommended that an Economic Community of Eastern and Central Africa states be created. Subsequently in the late 1970s a preferential trade area for the eastern and southern Africa was adopted.[31] The preferential trade area/agreement had the ultimate objective of creating an economic community which was subsequently established and now known as COMESA.[32]

[29]E Gerhard and T Hartzenberg '*The Tripartite Free Trade Area- Towards a New African Region Paradigm*?' 1
[30]About COMESA 'History of COMESA' available at *http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117* (accessed 07 January 2013).
[31]About COMESA 'History of COMESA' available at *http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117* (accessed 07 January 2013).
[32]About COMESA 'History of COMESA' available at *http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117* (accessed 07 January 2013).

COMESA was established in November 1993.It has nineteen member states[33] and covers both the eastern and southern part of Africa. COMESA was notified as a preferential agreement in 1994. One of COMESA's objectives is to promote development in all fields of economic activity and the joint adoption of macro-economic policies within the COMESA community. This objective as stated in Article 3 (9) also includes the creation of closer relations among its member states. COMESA also undertakes to contribute towards the establishment progress and realisation of the objectives of the African Economic Community.[34]The assumption is that, by virtue of this objective, COMESA offers commitment or support for the wider African integration such as the TFTA in its founding document.

Under Article 4 of the COMESA treaty, COMESA member states have made an undertaking to establish a customs union, abolish non tariff barriers to trade, establish a common external tariff, and cooperate in customs procedures and activities. Non tariff barriers remain a problem in COMESA and in Africa as a whole because of their contribution to the high cost of doing business which results in limited access to reasonably priced imports from the region.[35] It can be drawn from the abovementioned objective and undertaking that trade liberalisation and integration are important agendas in the COMESA community. Although regional integration has had a lot of challenges in Africa, intra COMESA trade has had some celebratory moments. Trade within COMESA has been reported to have grown from US$3.2 billion in 2000 to US$17.4 billion in 2010.[36] The COMESA member states undertake to adhere to certain principles that are enshrined in the founding treaty.[37] These include the principles of equality and interdependence of member states, solidarity and

[33]Burundi, Comoros, Djibouti, D.R. Congo, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

[34]Treaty for the establishment of COMESA Article 3 (f) available at *http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf* (accessed 07 January 2013).

[35]Tralac 'NTBs contributing to high cost of business-COMESA' available at *http://www.tralac.org/2013/04/12/ntbs-contributing-to-high-cost-of-business-comesa/* (accessed 11 May 2013).

[36]Tralac 'Intra COMESA trade swells' available at *http://www.tralac.org/2013/03/19/intra-comesa-trade-swells/* (accessed 11 May 2013).

[37]Treaty for the establishment of COMESA Article 6 available at *http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf* (accessed 07 January 2013).

collective self reliance and commitment to peaceful settlement of disputes.[38] Article 7 of the COMESA treaty establishes organs that support and facilitate its objectives. The highest policy making organ is the authority, which is composed by heads of states. Other COMESA organs also include among others the council, the court of justice, and the secretariat.

The EAC is established under the EAC treaty which entered into force in July 2000. Its genesis goes as far back as 1977 when the Mediation Agreement for Division of Assets and Liabilities had a provision that permitted the three countries Kenya, Tanzania and Uganda to engage in further cooperation.[39] It was on this basis that a tripartite intergovernmental organisation was formed and subsequently building on the work of the work of the Permanent Tripartite Commission for East African cooperation the three countries signed the treaty for the establishment of the East African Community, which later grew to a five member state organisation. The members of the EAC are the Republic of Kenya, Uganda, Tanzania, Rwanda and Burundi. The EAC established a customs union in 2004 which became operational in 2005. The EAC members signed a protocol for the establishment of the EAC common market in 2009. Article 5 (1) of the EAC treaty provides that the objective of the EAC is to:[40]

> '...develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology...for mutual benefits.'

The crucial element of the abovementioned objective is the desire to widen and deepen cooperation within the EAC community. In order for the EAC community to succeed in this wide and deeper cooperation, the member states undertook in Article 5 (2) of the EAC treaty to establish a customs union, a common market and subsequently a monetary union. Although the establishment of a

[38]Other principles include; non aggression between member states, recognition, promotion and protection of fundamental human rights.

[39]EAC Overview available at *http://www.eac.int/customs/index.php?option=com_content&id=123&Itemid=78* (accessed 7 January 2013).

[40]Treaty for the establishment of EAC available at *http://www.eac.int/www.eac.int/treaty* (accessed 7 January 2013).

monetary union has been approved by the heads of states of the EAC, it has been criticised by some economic experts for various reasons.[41] The experts argue that the monetary union might not be a success because the EAC partner states still depend on foreign aid to sustain their economies.[42] Another reason advanced by the experts is that there is imbalanced growth within the EAC partner states.[43]The undertaking at Article 5 (2) goes further to include the establishment of a political federation in the abovementioned article. Similar to the COMESA treaty, it can be drawn from the EAC treaty that trade liberalisation and integration are at the core of the organisation's business. This theme runs through the objectives of the treaty and is buttressed by the fact that the EAC currently has an operational customs union and a signed protocol for the establishment of a common market. Trade liberalisation, especially through the elimination of non tariff barriers remains an important task as they continue to impede free movement of goods and services within the EAC.[44] It has been reported that some members tend to regress and introduce new non tariff trade barriers

[41]Tralac 'EAC Heads of State want Monetary Union by Nov.' available at *http://www.tralac.org/2013/04/30/eac-heads-of-state-want-monetary-union-by-nov/* (accessed 14 May 2013).

[42]Tralac 'EAC Heads of State want Monetary Union by Nov.' available at *http://www.tralac.org/2013/04/30/eac-heads-of-state-want-monetary-union-by-nov/* (accessed 14 May 2013).

[43]Tralac 'EAC Heads of State want Monetary Union by Nov.' available at *http://www.tralac.org/2013/04/30/eac-heads-of-state-want-monetary-union-by-nov/* (accessed 14 May 2013).

[44]Tralac 'New Trade Barriers emerge in East Africa' available at *http://www.tralac.org/2013/05/01/new-trade-barriers-emerge-in-east-africa/* (accessed 14 May 2013).

instead of eliminating them.[45] Despite some of this setbacks, intra EAC trade grew from $1.617.1 in 2006 to $3,800.7 billion in 2010.[46]

Article 9 of the EAC treaty establishes organs and institutions of the EAC. The EAC has a summit which is composed of the heads of states. Similar to COMESA, the summit is the highest policy making organ. The summit gives general directions to the development and achievement of the objectives of the EAC.[47]Other institutions are the council of ministers, the coordination committee, sectoral committees, the East African Legislative Assembly, the secretariat and the Eastern African Court of Justice, which is a judicial organ of the EAC.

SADC was established in 1992 under Article 2 of the SADC treaty.[48] SADC history goes as far back as 1980 when it was still the Southern African Development Coordination Conference which was focused on national political liberation and reduction of dependence of the then apartheid era South Africa.[49] The Southern African Development Coordination Conference was later transformed to SADC, now with a focus on integration of economic development. Originally, the SADC member states were allocated the responsibility of coordinating various sectors. This was in response to national priorities that could be addressed through regional action.[50] For instance Botswana was responsible for agricultural research, livestock production and animal disease control.[51] This strategy of sector allocations to member states was later abandoned as the member states opted for a centralised approach which would then be coordinated at the SADC Secretariat headquarter in

[45]Tralac 'New Trade Barriers emerge in East Africa' available at *http://www.tralac.org/2013/05/01/new-trade-barriers-emerge-in-east-africa/* (accessed 14 May 2013).
[46]Tralac 'Intra COMESA trade swells' available at *http://www.tralac.org/2013/03/19/intra-comesa-trade-swells/* (accessed 11 May 2013).
[47]Article 11 (1), Treaty for the establishment of EAC available at *http://www.eac.int/www.eac.int/treaty* (accessed 07 January 2013).
[48]'Southern African Development Community: History and present status' available at *http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm* (accessed 14 May 2013).
[49]'History and Treaty' available at *http://www.sadc.int/about-sadc/overview/history-and-treaty/* (accessed 12 January 2013).
[50]'Southern African Development Community: History and present status' available at *http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm* (accessed 14 May 2013).
[51]'Southern African Development Community: History and present status' available at *http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm* (accessed 14 May 2013).

Gaborone, Botswana.[52] SADC has fifteen member states and has over the years since the SADCC days grown from a GDP of US$ 20 billion to US$ 471.1 billion.[53] As at 2012, SADC covered a population of 257.7 million.[54]

Article 5 (1) of the SADC treaty provides one of the objectives of SADC which reads:[55]

> '...to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration.'

Once again the primary focus is on regional integration. Regional integration in this instance is meant to drive the goal of achieving economic growth and development as well as collectively overcoming sharp disparities in the performance of the various economies. Regional integration

[52]'Southern African Development Community: History and present status' available at *http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm* (accessed 14 May 2013).
[53]'History and Treaty' available at *http://www.sadc.int/about-sadc/overview/history-and-treaty/* (accessed 12 January 2013).
[54]'History and Treaty' available at *http://www.sadc.int/about-sadc/overview/history-and-treaty/* (accessed 12 January 2013).
[55]Treaty for the establishment of SADC available at *http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf* (accessed 11 January 2013).

within SADC is based on the principles of balance, equity and mutual benefit as well as peaceful settlement of disputes.[56] In order to achieve the abovementioned goals, member states are allowed to conclude Protocols focusing on various topics related to regional integration.[57] Article 21 (3) of the SADC treaty establishes areas in which cooperation towards integration could be pursued.[58]For instance SADC signed a protocol on trade in 2005, which envisaged the establishment of a free trade area in the SADC region by the year 2008.[59] Currently twelve of the fifteen member states[60] are implementing the protocol. SADC has not yet been able to establish a customs union which was supposed to be established in 2010.[61] Although some SADC member states were unable to complete

[56]Article 4, Treaty for the establishment of SADC available at *http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf* (accessed 11 January 2013).

[57]Article 22, Treaty for the establishment of SADC available at *http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf* (accessed 11 January 2013).

[58]These are; (a) food, security land and agriculture; (b) infrastructure and services, (c) industry, trade, investment and finance; (d) human resources development, science and technology; (e)natural resources and environment; (f) social welfare, information and culture and (g) politics, diplomacy, international relations, peace and security. Article 21 (4) permits additional areas of cooperation.

[59]Kalenga P 'Regional integration in SADC: retreating or forging ahead?' available at *http://www.tralac.org/files/2012/09/D12WP082012-Kalenga-Regional-integration-in-SADC-retreating-or-forging-ahead-20120919.pdf* (accessed 9 May 2013).

[60] Angola, Botswana, D.R. Congo, Lesotho, Madagascar,, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

[61]SADC Integration Milestones available at *http://www.sadc.int/about-sadc/integration-milestones/* (accessed 12 January 2013).

their tariff phase down, generally SADC has made some progress in liberalising trade as most of the member states have reduced and eliminated tariffs and quotas.[62]

SADC member states have declared their commitment and support to regional integration and associate this act with the broader continental integration that has is under the auspices of the Organisation of the African Unity.[63]Article 9 of the SADC treaty establishes the SADC institutions. These include among others, the summit, the council of ministers, the tribunal and the secretariat. Similar to the COMESA and EAC, the summit is the supreme policy making institution.

Regional integration seems to be the goal in COMESA, EAC and SADC. It could be argued that the three RECs have the same goals and aspirations, which is to have deeper integration that will ultimately grow the economy and improve the lives of Africans. The three regional economic communities (RECs) clearly have the same visions. There is considerable overlap between the substantive obligations contained in the RECs. In their quest to achieve regional integration and drive other important agendas, the member states of the RECs have embarked on negotiations of a grand tripartite free trade area (TFTA) intro. The TFTA is expected to integrate about 26 African countries. This integration would in turn increase intra African trade and drive economic growth and development. One of the objectives of the TFTA as stated in Article 4 (1) of the draft TFTA agreement is to eliminate all tariffs and non tariff barriers to trade in goods. Generally, the RECs focus on among other things, the reduction and elimination of trade barriers[64], by ensuring that member states implement trade agreements that have been entered into within the RECs. The competing visions and goals are now expanded by the introduction of the TFTA. The TFTA will attempt to achieve what the RECs have always wanted to achieve but this time around on a bigger scale.

[62]Kalenga P 'Regional integration in SADC: retreating or forging ahead?' available at *http://www.tralac.org/files/2012/09/D12WP082012-Kalenga-Regional-integration-in-SADC-retreating-or-forging-ahead-20120919.pdf* (accessed 9 May 2013).

[63]'A declaration by the heads of state or government of Southern African States' available at *http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf* (accessed 14 May 2013).

[64]Kalenga P 'Making the Tripartite FTA work' in *Cape to Cairo-Making the tripartite free trade area work* ch 1 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

Although the RECs seem to have the same goal, they are not on the same level in terms of integration as the EAC has been noted to be the most advanced as it is already implementing a customs union.[65] COMESA has launched its customs union in June 2009[66], but it is not yet operational while SADC is still negotiating a customs union.[67] The TFTA will be at the level of a free trade area but with aspirations to later establish a single market with free movement of goods and services.

The institutions of the RECs and the proposed TFTA institutions almost mirror each other. Generally the highest institution within the RECs and the TFTA is the summit or the heads of states. Other institutions such as council of ministers exist across the RECs and the TFTA but the one relevant to the discussion is the dispute settlement mechanism. The RECs have systems of judicial safeguards which should be consulted when the law of the REC is challenged. These judicial organs are important as they ensure certainty and predictability in the law of the relevant RECs. They also serve to prevent inconsistent interpretation of the relevant treaties. The certainty, predictability and uniformity of the laws of the RECs are expected to facilitate integration and ultimately lead to an environment that creates a stable economy.

The COMESA court of Justice and the East African Court of Justice (EACJ) are the judicial organs of their respective organisations. They are the pillars of the systems of judicial safeguards in their respective RECs. SADC on the other hand had such a system until the SADC summit de facto suspended it at the 2010 SADC Summit.[68] It should be noted that although the SADC Tribunal has

[65]Shayanowako P 'Towards a COMESA, EAC and SADC Tripartite Free Trade Area' available at *http://www.panafricanglobaltradeconference.com/upload/towards_a_tripartite_free_trade_area_.pdf* (accessed 09 January 2013).

[66]Kalenga P 'Making the Tripartite FTA work' in *Cape to Cairo- Making the tripartite free trade area work* ch 1 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

[67]Kalenga P 'Making the Tripartite FTA work' in *Cape to Cairo-Making the tripartite free trade area work* ch 1 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

been suspended, there is a dispute settlement exclusively for trade issues under the SADC trade protocol. This shall be further discussed in section 2.5 of this chapter. Similarly there is a proposed dispute settlement mechanism in the TFTA.

This chapter discusses the importance of an effective dispute settlement mechanism in the proposed TFTA. It expands to discuss the COMESA court; EACJ and the SADC Tribunal as it were as well as the SADC trade panel. It also gives an overview of the proposed TFTA dispute settlement mechanism. It will further outline possible overlaps of jurisdiction between the dispute settlement mechanism at the RECs level and the TFTA level.

2.2 The need and importance of an effective Dispute Settlement Mechanism in the proposed Tripartite Free Trade Area

It is indeed undisputable that an effective dispute settlement mechanism (DSM) is necessary and important in the implementation of the proposed Tripartite Free Trade Area (TFTA). It has been argued by the writer Gerhard Erasmus that[69],

> "... the success of the Tripartite FTA will to a considerable degree depend on whether a rules-based approach is followed, effective dispute settlement will be possible and remedies are available to the directly affected parties.''

The above statement introduces three elements that are; rules- based approach, effective dispute settlement and availability of remedies. All these elements are equally important in the design of the TFTA but the focus is on the need and importance of an effective dispute settlement mechanism. The assumption is that the TFTA arrangement would first and foremost have to be rules based. It would be rules oriented in the sense that it will have to comply with World Trade Organisation (WTO) rules on notification of the said arrangement. This notification could be under the Article

[68]About SADC available at *http://www.sadc. int/about-sadc/sadc-institutions/tribun/* (accessed 11 January 2013).
[69]E Gerhard 'The Tripartite FTA:Requirements for Effective Dispute Resolution' in *Cape to Cairo-Making the tripartite free trade area work* ch 3 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

XXIV of the General Agreement on Tariffs and Trade or the enabling clause, depending on how the TFTA will be notified. The WTO rules will govern both the internal and external shape or form of the TFTA. A rules based approach is desirable as it is predictable, provides a greater level of certainty and transparency. In order to preserve and secure a rules based arrangement, an effective dispute settlement mechanism is necessary.

One may argue that it is enough for member states to get together, negotiate, sign off trade agreements and probably celebrate such signing off at some official ceremony. The writer argues that the above activities are not adequate for the fulfilment of the objectives of the trade agreements. Trade agreements are not an end in them, there is need for proper implementation to fulfil the interests of partner states and private parties. Differences that arise from the various rights and obligations in trade agreements are inevitable and must be resolved. Where such interests are jeopardised, or differences have arisen, there should be recourse or resolution and recourse can only be meaningful where there is an effective dispute settlement mechanism. This resolution or recourse generally involves adjudication by an independent judicial body with the power to interpret and apply a binding rule.[70] The jurisdiction of such courts has to be respected by those who submit before them. A situation where jurisdiction of an adjudicatory body is not accepted by some member states could result in the collapse of such a body.[71]

It has been argued that for one to achieve an effective dispute settlement mechanism, the founding documents or the legal basis for such DSM should be clear and unambiguous.[72] If the rules and procedures that must be observed by the member states are clear and transparent, members with big economies would not be inclined to controlling the dispute settlement mechanism. The clarity and transparency can discourage a power based system. The kind of disputes that may be heard by the dispute settlement body should be spelt out clearly. It should be clear as to who can bring claims or be called to answer to such claims, how long the resolution of a dispute may take and what remedies

[70] E Gerhard 'Governance, trade and statehood' available at *http://www.tralac.org/files/2013/04/S13WP042013-Erasmus-Governance-trade-and-statehood-in-Africa-20130410final.pdf* (accessed 9 May 2013).
[71] See section 2.5 of chapter two.
[72] E Gerhard 'The Tripartite FTA:Requirements for Effective Dispute Resolution' in *Cape to Cairo- Making the tripartite free trade area work* ch 3 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 7 January 2013).

are available. An effective dispute settlement mechanism will ensure that resolutions are made in a timely manner, therefore obligations enforced in a timely manner where there is non-compliance. It should be noted that a trade agreement such as the anticipated TFTA will serve millions of people who would want to make investment decisions, technological decisions and other decisions related to trade and investment hence predictability and stability of the TFTA DSM is necessary. It is important to carefully design a dispute settlement body that will serve the objectives of the TFTA.

2.3 The Common Market for Eastern and Southern Africa Court

The Common Market for Eastern and Southern Africa (COMESA) Court was established under Article 7 (1) c of the COMESA treaty as one of the COMESA institutions in 1994[73] as a supportive organ for regional integration. Its role is vital to the success of the Common market as it ensures predictability and certainty in the Common market rules.[74] The COMESA court serves countries with different backgrounds of Common Law, Civil Law and Islamic Law across the Eastern and Southern Part of Africa.[75]Under Article 19 of the COMESA treaty, the court is charged with the responsibility of ensuring adherence of the law in the interpretation and application of the treaty. It serves to prevent inconsistent interpretations of the COMESA treaty by the member states. The COMESA court is composed of seven judges who are appointed by the Authority of the Common market.[76] Security of tenure of the president and judges of the COMESA court is guaranteed.[77]

In order to ensure that the mandate of the court is executed diligently, the judges are chosen from among persons of impartiality and independence.[78] They are also required to fulfil conditions for the holding of high judicial office in their countries of domicile or who are jurists of recognised

[73]About COMESA, COMESA Court of Justice available at http://about.comesa.int/index.php?option=com_content&view=article&id=83:comesa-court-of-justice&catid=43:institutions&Itemid=133 (accessed 07 January 2013).

[74] Kayihura D 'Parallel Jurisdiction of courts and tribunals: the COMESA Court of Justice perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 583.

[75] Kayihura D 'Parallel Jurisdiction of courts and tribunals: the COMESA Court of Justice perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 583.

[76]Treaty for the establishment of COMESA Article 20 (1) available at http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed 07 January 2013).

[77] Treaty for the establishment of COMESA Article 21 (1) available at http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed 07 January 2013).

[78]Treaty for the establishment of COMESA Article 20 (2) available at http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed 07 January 2013).

competence.[79] The COMESA court has jurisdiction to hear all trade disputes that arise from the treaty. It is accessible to member states, secretary general, legal and natural persons resident in the member states.[80]This jurisdiction shall be further discussed in section 2.7.1 of this chapter. The independence of the COMESA court is guaranteed through Article 9 (c) of the COMESA treaty which, provides that the Council of Ministers shall give directions to all other subordinate institutions except the COMESA court. This is a very important element as the court is enabled to exercise its function without interference from the Council of Ministers.

2.4 The East African Court of Justice

The East African Court of Justice (EACJ) was established under Article 9 of the EAC treaty in November 2001.[81] The EACJ is conferred with jurisdiction over the interpretation and application of the EAC treaty. It addresses disputes that arise from the EAC treaty.[82] The possible disputes may be those related to the trade agreements entered into between the EAC member states. The EACJ consists of a first instance court and an appellate court.[83] The EAC judges are appointed by the summit. The court is headed by the president and vice president. The president acts as the administrative head of the court as well as of the appellate division, whilst the principal judge is charged with the work of the first instance court.[84] The jurisdiction of the EACJ will be further discussed in section 2.7.1 of this chapter. The EACJ is accessible to the member states of the EAC, the secretary general of the EAC and the legal and natural persons resident in the member states of the EAC. The abovementioned parties can generally bring disputes to the EACJ over failure by member states or institution of the EAC to fulfil treaty obligations.[85]

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[79] Treaty for the establishment of COMESA Article 20 (2) available at *http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf* (accessed 07 January 2013).

[80]Kayihura D 'Parallel Jurisdiction of courts and tribunals: the COMESA Court of Justice perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 583.

[81]Ruhangisa J 'Parallel Jurisdiction of Courts: the EACJ Perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 575.

[82]Ruhangisa J 'Parallel Jurisdiction of Courts: the EACJ Perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 576.

[83]Treaty for the establishment of EAC Article 23 (3) available at *http://www.eac.int/www.eac.int/treaty* (accessed 07 January 2013).

[84]Overview of the EACJ available at *http://www.eacj.org/docs/Overview-of-the-EACJ.pdf* (accessed 09 May 2013).

[85]Treaty for the establishment of EAC Article 30 available at *http://www.eac.int/www.eac.int/treaty* (accessed 07 January 2013).

2.5 Southern African Development Community Tribunal

The Southern African Development Community (SADC) Tribunal was established under Article 9 of the SADC treaty as one of the SADC institutions but its jurisdictional powers, matters of standing and administrative issues are dealt with under a separate protocol.[86]Its role and purpose was to ensure adherence to and the proper interpretation of the provisions of the treaty.[87] The SADC tribunal had jurisdiction over all disputes referred to it in accordance with the treaty.[88] The SADC tribunal could address disputes brought by member states of SADC, natural or legal persons. The SADC tribunal has never heard inter- state cases and disputes concerning regional integration or trade.[89] This is an interesting observation as this does not mean that regional integration has been seamless within SADC.

A decision to suspend the SADC tribunal was made by the 2010 summit and subsequently a resolution was taken by the summit in August 2012 to commence negotiations on a new tribunal. In that resolution, the new tribunal would be accessible to member states only, to the exclusion of legal

[86]Treaty for the establishment of SADC, Article 16 available at *http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf* (accessed 11 January 2013).

[87]Erasmus G 'Another chapter in the SADC Tribunal saga: South African court confirms the Tribunal's costs order' available at *http://www.tralac.org/files/2012/10/S12WP092012-Erasmus-AnotherChapter-TribunalCostsOrder-20121003fin.pdf* (accessed 7 May 2013).

[88]Protocol on the Tribunal in the SADC Article 15 available at *http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf* (accessed 11 January 2013).

[89]About SADC available at *http://www.sadc. int/about-sadc/sadc-institutions/tribun/* (accessed 11 January 2013). See also, 'Outcry over interstate SADC Tribunal' available at *http://www.saflii.org/za/journals/DEREBUS/2012/27.pdf* (accessed 8 February 2013) and 'Silencing a supranational court: The rise and fall of the SADC Tribunal' available at *http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/*

[90]Erasmus G 'Another chapter in the SADC Tribunal saga: South African court confirms the Tribunal's costs order' available at *http://www.tralac.org/files/2012/10/S12WP092012-Erasmus-AnotherChapter-TribunalCostsOrder-20121003fin.pdf* (accessed 7 May 2013).

and natural persons.[90] The brief events that lead to the suspension of the SADC tribunal involve a case where the SADC tribunal found the Zimbabwean land policy to be in violation of the SADC treaty and subsequently Zimbabwe objected to the jurisdiction of the tribunal citing that the protocol on the SADC tribunal was not binding on Zimbabwe since it had not been ratified in accordance with SADC treaty.[91]

As mentioned in section 2.1 of this chapter, the SADC trade protocol provides a dispute settlement for mechanism for trade disputes that may arise from the trade protocol. Annex VI of the SADC trade protocol is largely based on the World Trade Organisation dispute settlement mechanism with a three step[92] mechanism of resolving disputes. Article 1 of Annex VI of the SADC Protocol on Trade provides that: 'the rules and procedures of Annex VI shall apply to the settlement of disputes between Member States concerning their rights and obligations under this Protocol.'[93] The dispute settlement under Article VI is accessible to member states only and its jurisdiction is confined to the rights and obligations under the said protocol. This means that where SADC member states have a trade dispute, the competent forum is under Annex VI of the trade protocol. The SADC tribunal could be in this instance an appellate body where the dispute is not resolved through trade panels.

A panel under Annex VI is composed of three panelists[94] and the panelists are chosen from a roster of panelists maintained by the Sector Coordinating Unit.[95] The panellists are expected to have expertise or experience in international trade or international law.[96]

[91]E Gerhard 'The Tripartite FTA: Requirements for Effective Dispute Resolution' in *Cape to Cairo- Making the tripartite free trade area work* ch 3 available at http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/ (accessed 07 January 2013).

[92]Consultations, good offices, mediation and conciliation and establishment of panels.

[93] Article 1, Annex VI concerning the settlement of disputes between the member states of the Southern African Development Community available *at* http://www.tralac.org/files/2011/11/SADC-Trade-protocol-Annex-VI.pdf (accessed 15 May 2013).

[94]Article 8 (1), Annex VI concerning the settlement of disputes between the member states of the Southern African Development Community available at http://www.tralac.org/files/2011/11/SADC-Trade-protocol-Annex-VI.pdf (accessed 15 May 2013).

[95]Article 6, Annex VI concerning the settlement of disputes between the member states of the Southern African Development Community available at http://www.tralac.org/files/2011/11/SADC-Trade-protocol-Annex-VI.pdf (accessed 15 May 2013).

2.6 Proposed Tripartite Free Trade Area Dispute Settlement Mechanism

It has already been mentioned in this chapter that the TFTA is under negotiations, therefore the TFTA dispute settlement mechanism that will be discussed is still work in progress. The tripartite task force has prepared a draft agreement establishing the TFTA as well as the annexes to the said agreement. These documents date back to 2010 and there has not been a revised draft since then.[97] The importance of dispute settlement cannot be overemphasised and as such, Article 38 of the TFTA agreement as well as annex 13 of the said agreement deal with disputes settlement. Article 38 of the TFTA agreement makes it the responsibility of the member states to make effort to agree on the interpretation and application of the TFTA agreement. It further states that member states shall make effort through consultations to arrive at a mutually satisfactory solution. The dispute settlement under Article 38 is cushioned in a best endeavour language and it creates opportunity for amicable settlement of disputes. Annex 13 of the draft TFTA agreement is mentioned as a last resort in cases where amicable settlement fails. Article 4 (1) of Annex 13 limits the scope of jurisdiction to member states of the TFTA. It only mentions member states as potential parties to a dispute under the TFTA. Unlike in the COMESA court or the EACJ, legal and natural persons resident in the TFTA member states cannot be parties to a dispute at the TFTA. It should also be noted that there is no mention of the applicable law in the TFTA dispute settlement mechanism.

2.7 Jurisdiction of the dispute settlement mechanisms in the Regional Economic Communities and the proposed Tripartite Free Trade Area

It is undeniable that a dispute settlement organ is a standard institutional arrangement within the regional economic communities (RECs) and the proposed Tripartite Free Trade Area (TFTA) as shown in sections 2.3 to 2.6 of this chapter. Member states have deemed it fit to adopt institutional configurations and proceedings for the purpose of resolving disputes. The DSMs are expected to

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[96] Article 7, Annex VI concerning the settlement of disputes between the member states of the Southern African Development Community available at *http://www.tralac.org/files/2011/11/SADC-Trade-protocol-Annex-VI.pdf* (accessed 15 May 2013).

[97] E Gerhard 'The Tripartite FTA: Requirements for Effective Dispute Resolution' in *Cape to Cairo-Making the tripartite free trade area work* ch 3 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 07 January 2013).

introduce to the environment of international trade consequences for how trade relations will be adjudicated.

2.7.1 Jurisdiction of the regional economic communities

The jurisdiction in the dispute settlement mechanisms (DSMs) in the regional economic communities (RECs), particularly the two which are in existence, that is COMESA court and the EACJ have jurisdiction over disputes arising from their respective agreements. The provisions as to the scope of jurisdiction in treaties of the abovementioned RECs are identical. A member state or complainant who wishes to commence proceedings must allege that the other party has violated the relevant agreement/s. Although the SADC Tribunal is not functional at the moment SADC member states have recourse for disputes emanating from the SADC trade protocol at the trade panels established under Annex VI of the trade protocol. Its jurisdiction is limited to the rights and obligations under the SADC trade protocol. It should be noted that there is no provisions in the said treaties that the DSMs under the RECs shall have exclusive jurisdiction, which means that complainants can go to other fora for settlement of disputes that may arise from the treaties of the RECs.

2.7.2 Jurisdiction of the proposed Tripartite Free Trade Area

Jurisdiction under the proposed Tripartite Free Trade Area (TFTA) is not yet clearly defined. This lack of clarity is in relation to the applicable law. Article 3 of Annex 13 of the TFTA agreement provides that the TFTA DSM shall apply to member states in the implementation of the provisions of the agreement. Unlike the COMESA court or the EACJ which makes it clear that their DSMs shall apply in so far as the interpretation of the relevant agreements, the TFTA is silent. Article 19 of the COMESA treaty provides that the COMESA court shall ensure adherence of the community law in the interpretation and application of the treaty. Article 23 of the EAC treaty is substantially identical to Article 19 of the COMESA treaty. The two articles clarify that adherence to the relevant laws shall be in relation to the interpretation and application thereof.

In simple terms, the judicial organs in COMESA and the EAC have to test the actions of member states against the law set in the treaty. Therefore the applicable law is the one in the treaties. The manner in which Article 3 of Annex 13 of the TFTA agreement is crafted does not provide for the

applicable law. It reads, 'This Annex shall apply to Member States in the implementation of the provisions of the Agreement.' It only clarifies a situation in which the TFTA DSM will be used. Similar to the EACJ and the COMESA court, there is no indication that the TFTA shall have exclusive jurisdiction. In fact in the TFTA, the parties' recourse to the WTO DSM is expressly preserved by Article 3 (4) of Annex 13 where a dispute arises between a TFTA member state and a third country.

This non-exclusive jurisdiction could stem from the fact that international tribunals and courts ordinarily operate under the principle of party consent;[98] which simply means that which the parties to a dispute have asked the court to do. This is contrast with domestic law or courts which function in accordance with statutory authority or the constitution. It follows that if parties give an international court or tribunal explicit jurisdiction to settle their matter, the international adjudicating body that is seized with the matter often seems to be obliged to fulfil the parties' mandate. This is the case even where the same proceedings could be commenced in another competent or parallel court. Therefore in the case of the RECs and the TFTA DSMs, the member states can go to either forum.

2.7.3 Possible Jurisdictional Overlap

As discussed in sections 2.2 and 2.3 of this chapter, the DSMs of both the RECs and the TFTA are established under different independent agreements. The RECs and the TFTA have legal personalities of their own and there is no hierarchy between the RECs and the TFTA. This lack of hierarchy trickles down to the DSMs. Hierarchy of courts is a concept that is usually associated with domestic courts. Under domestic law, there could be a magistrate court as the court of first instance, a high court and ultimately an appeals court. The lack of hierarchy between the RECs and the TFTA DSM is not a bizarre scenario as traditionally the authority of international judiciary is limited to its own agreement or treaty.[99] The authority of international tribunals or courts is specific and depends

[98]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 83 available at *http://ssrn.com/abstract=1768742* (accessed 21 September 2012).
[99]Pauwelyn J andSalles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 84 available at *http://ssrn.com/abstract=1768742* (accessed 21 September 2012).

on the treaty it is enforcing.[100] As a result, the RECs and TFTA DSMs are at par. There is no superiority amongst them and it could be said that they are parallel or have parallel jurisdiction.

Jurisdictional overlap or parallel jurisdiction arises where the same dispute or aspects of it can be adjudicated before more than one adjudicating body. Jurisdictional overlap in international trade law is often discussed in relation to regional trade agreements (RTAs) and the WTO. It is said to usually manifest in a situation which has been coined double breach[101], that is where a party to an RTA challenges a measure at the RTA DSM and then the same measure is challenged at the WTO dispute settlement body. This scenario involves a double breach of both the RTA and WTO obligations such that both DSMs have jurisdiction over the same dispute. This will further be discussed in chapter three and four when the comparative aspect is brought with a focus on NAFTA in relation to the WTO as well as other RTAs.

Jurisdictional overlap is not a phenomenon in international trade law only; non trade organisations such as the Court of justice of the African Union[102] and the International Court of Justice have potential jurisdictional overlap with the RECs.

The existence of jurisdictional overlap has received some attention in African regional law discussions.[103] The issue has been discussed from the perspective of regional courts *vis a vis* quasi

[100] Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 84 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).

[101] Marceau G and Wyatt J 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO' (2010) 1 Journal of International Dispute Settlement 69 available at *http://jids.oxfordjournals.org/* (accessed 20 September 2012).

[102]Most of the signatory states in the RECs are members of the WTO, therefore disputes from such member states may be referred to the RECs or the WTO. For the ICJ the same scenario may be applicable.

[103]Ruhangisa J 'Parallel Jurisdiction of Courts: the EACJ Perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 575.

[104]Ruhangisa J 'Parallel Jurisdiction of Courts: the EACJ Perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 575.

[105]Kayihura D 'Parallel Jurisdiction of courts and tribunals: the COMESA Court of Justice perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 586.

[106]Ruhangisa J 'Parallel Jurisdiction of Courts: the EACJ Perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 581.

judicial bodies within the regional economic communities, national courts and other regional courts.[104] It has been argued that parallel jurisdiction exists between the COMESA court and courts of other regional economic communities because of multiple membership.[105]The other regional economic communities (SADC and EAC) have similar jurisdiction, the objectives of integration are identical that of COMESA and the regional integration plan is similar. The above argument has also been advanced from the EACJ perspective.[106] Although there seem to have never been a major conflict between the two legal systems, it is submitted that this is a looming disaster that could jeopardise the unity of international law through multiple, divergent interpretations, particularly in the African region.

Now, with the introduction of the TFTA, which is expected to have about twenty six African countries membership an issue concomitant to the same may be that the TFTA DSM will be an additional DSM, parallel to the existing regional DSMs of the RECs. As a result, disputes that may arise from the RECs may be adjudicated at the TFTA DSM. This parallel jurisdiction is likely to stem from the fact that these will be separate legal systems with identical substantive obligations. It is not provided anywhere that the TFTA necessarily means the cessation of the RECs. The member states will still have to obligations in both the RECs and the TFTA. For instance, a COMESA member state is obliged to abstain from any measures likely to jeopardise the attainment of the objectives of the COMESA common market or the implementation of the treaty.[107] The EAC has a similar provision.[108] The TFTA draft agreement establishes a free trade area in which members will be expected to take measures which will not hamper the implementation of the free trade area.

[107]Treaty for the establishment of COMESA Article 5 (1) C available at *http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf* (accessed 07 January 2013).

[108]Treaty for the establishment of EAC Article 23 (3) available at *http://www.eac.int/www.eac.int/treaty* (accessed 07 January 2013).

The substantive obligations may collide where a member state takes a trade measure that is against the spirit of both the REC and the TFTA as it would stifle implementation of both treaties. For instance, Article 49 of the COMESA treaty and Article 10 of the TFTA draft agreement oblige member states to eliminate non- tariff barriers. This is a substantive obligation that seeks to support trade liberalisation. In this case, if as member state of COMESA, who ultimately joins the TFTA, introduces a non-tariff barrier, both the REC DSM and the TFTA DSM will be competent courts to hear the matter. They will both have jurisdiction over the matter and that matter may be commenced against that state in two parallel courts under two separate legal systems.

Jurisdictional overlap may also arise where a 'legitimate' measure from one system is challenged as an 'offensive' measure in another system. Trade law often offers an opportunity to member states to enforce it provisions and decisions through the use of countermeasures.[109] These countermeasures introduce a new dimension to the issue of jurisdictional overlap and may result in conflicts within the various trade law regimes.[110]Article 34 (4) of the COMESA treaty provides that the court may prescribe sanctions as it shall consider necessary to be imposed against a party who defaults in implementing the decisions of the court. The sanctions are not specified and it follows that they may be in the form of countermeasures to be taken by the complaining party. This will be some form of retaliation made in response to a default in the implementation of the court order. The complaining party would be rightfully enforcing its right under the REC although that measure prima facie would be violating the REC obligations. The EAC does not have a similar provision; it only goes as far as insisting that the partner states should implement court judgements without delay. Unlike the COMESA treaty, Article 38 (3) does not go to an extent of mentioning how non-compliance with court orders shall be dealt with.

[109]Marceau G and Wyatt J 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO' (2010) 1 Journal of International Dispute Settlement 73 available at *http://jids.oxfordjournals.org/* (accessed 20 September 2012).

[110]Marceau G and Wyatt J 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO' (2010) 1 Journal of International Dispute Settlement 73 available at *http://jids.oxfordjournals.org/* (accessed 20 September 2012).

Be that as it may, a member state that would have been the offending member state at the REC level or system may still challenge that countermeasure at the TFTA DSM. Thus, the countermeasure from the REC system is challenged as a measure in breach of the TFTA system. This type of conflict could be illustrated by the Mexico- Tax measures on Soft Drinks and other beverages (DS 308) case[111], where Mexico imposed a twenty percent tax on all soft drinks with high fructose corn syrup in retaliation to a United States of America (US) sugar import regime that Mexico considered as a breach to the North American Free Trade Agreement (NAFTA). This is a product that Mexico predominantly imported from US. In this Mexico US scenario, the countermeasure may have been permissible under NAFTA but on the face of it, it is a violation of the national treatment principle under the WTO. This case illustrates how a 'legitimate' measure in NAFTA was challenged as an 'offensive' measure at the WTO which predicate from jurisdictional overlap between the two systems.

2.8 Conclusion

It is concluded that there is considerable overlap between the substantive obligations contained in the agreements establishing the RECs and the TFTA draft agreement. The RECs and the TFTA focus on regional integration and trade liberalisation. This is not a new phenomenon as this is usually the case with the RTAs and the WTO. It is further submitted that similar to the RTAs and The WTO, the RECs and the TFTA are separate legal systems which have created or will create their own dispute settlement mechanisms that are expected to resolve trade disputes that may arise in relation to the implementation of the relevant agreements. This could be said to be a step in the right direction but it comes along with its own complexities. One such complexity is jurisdictional overlap. Jurisdictional overlap is where the same dispute may be adjudicated in two or more courts. Jurisdictional overlap has been shown to exist between the RECs but that is not the focus of this paper, which has confined itself to jurisdictional overlap between the RECs and the TFTA. Jurisdictional overlap has been discussed from the viewpoint of double breach and the enforcement of rights and obligations in one

[111]Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf* (accessed 30 January 2013).

system which turns out to be a violation in another system. Jurisdictional overlap is tied to the selection of law as well as of the forum that one would use for purposes of resolving disputes. The concept of choice of forum in relation to the proposed TFTA shall be discussed in the next chapter.

CHAPTER THREE

CHOICE OF FORUM: ISSUES, CONCERNS AND POSSSIBLE RESOLUTIONS FOR THE PROPOSED TRIPARTITE FREE TRADE AREA

3.1 Introduction

The previous chapter has extensively discussed the overlap of subject matter between the regional economic communities (RECs) and the anticipated tripartite free trade area (TFTA). This overlap of subject matter has been shown to be one of the reasons for overlap of jurisdiction between the RECs and the TFTA. Overlap of jurisdiction may create an environment where parties have to carefully think and select the law which they would wish to apply to their dispute. Tied to the selection of the law is the selection of the forum because the law which the parties seek will lead them to a particular forum. For instance, a Southern African Development Community (SADC) member state may prefer the World Trade Organisation (WTO) law over SADC law and in that case such as member state will have to take its dispute to the WTO instead of SADC.

The above analogy demonstrates that parties may have the luxury of bringing one trade dispute to different fora. Thus, overlap of jurisdiction may create an opportunity for forum shopping between the RECs DSM and the TFTA DSM. This chapter will attempt to discuss how the issues of choice of forum and choice of law may play between the RECs and the TFTA. This discussion will focus on factors that may influence member states of the RECs and the TFTA in choosing the forum or the law to be applied in a dispute due to be heard in either of the DSMs. It will further discuss possible consequences of such choices on the regional law as well as the African trade agenda. It will conclude by discussing possible solutions based on domestic law principles such as *res judicata*, *lis pendens* and *forum non coveniens* as well as exclusive choice of forum which has been used in some regional trade agreements.

3.2 Choice of forum and choice of law in international tribunals

As pointed out in the introduction of this chapter, overlap of jurisdiction has its consequences and one of these may be forum shopping. Forum shopping is whereby parties to a dispute bring their action in the forum that they consider will be most favourable to them. Forum shopping has also been defined as a litigant's attempt to have his action tried in a particular court or jurisdiction where he feels he will receive the most favourable judgement or verdict.[112] The issue related to choice of forum is not only forum shopping, states may also decide to commence proceedings in more than one forum or re-litigate a dispute that has already been decided in another forum.

3.3 The World Trade Organisation and Regional Trade Agreements

The World Trade Organisation (WTO) approves the creation of regional trade agreements (RTAs) under its Article XXIV[113] of the General Agreement on Tariffs and Trade (GATT). Taking into account that the RTAs may design their own DSMs, they tend to offer much more than preferential treatment within the trade arrangement. They also offer an alternative to dispute settlement at the WTO.[114] Conversely, the WTO has exclusive compulsory jurisdiction over disputes that arise under any of its agreements.[115] This means that any trade related dispute could be brought to the WTO regardless of the fact that there might be regional forum that can hear the matter.

This opportunity or risk to pick and choose gives rise to forum shopping because complainants can bring actions regionally, multilaterally or can choose not to bring an action at all.[116] Parties have different reasons for making such choices and these shall be further discussed later in this chapter.
The luxury of forum shopping has been shown between the WTO and RTAs. *The Mexico- Tax measures on Soft Drinks and other beverages (DS 308*) case[117] (hereinafter referred to as the

[112]Black Law's Dictionary.
[113]WTO 'The Legal Texts'Article XXIV, GATT 1994.
[114]Busch M L 'Overlapping Institutions,Forum Shopping, and Dispute Settlement in International Trade' International Organisation 2007 available at *http://www9.georgetown.edu/faculty/mlb66/forum%20shopping%20io.pdf* (accessed 8 March 2013) 735.
[115]WTO 'The Legal Texts'Article 23 (1) of the DSU.
[116]Busch M L 'Overlapping Institutions,Forum Shopping, and Dispute Settlement in International Trade' International Organisation 2007 available at *http://www9.georgetown.edu/faculty/mlb66/forum%20shopping%20io.pdf* (accessed 8 March 2013) 736.

Mexico-Tax measures on Soft drinks case) is one of those cases that illustrate that parties to RTAs may have a luxury of bringing the same dispute before the WTO and an RTA. In the abovementioned case, Mexico in its pursuit to enforce its rights under the NAFTA had requested a panel at the NAFTA in relation to the sugar quota it was allocated at the NAFTA. The process of formation of a panel was stalled as the US refused to appoint panellists. Mexico then retaliated by imposing a discriminatory tax on US import soft drinks. The US then responded to this tax by bringing an action against Mexico at the WTO and received a ruling in its favour. The sugar quota issue remained to be resolved at the NAFTA.

This case without delving into its finer details simply demonstrates that the US had a luxury of going to either the NAFTA DSM or the WTO DSM. The US carefully 'shopped' around and decided that the WTO would be the best forum for their dispute although they had the NAFTA DSM which could still entertain the matter. It is the writer's opinion that maybe the US could foresee that it may not succeed at the NAFTA DSM because the tax issue may be tied to the sugar issue.

The choice of law as mentioned in section 3.2 of this chapter is tied to the choice of forum. *The Mexico- Tax measures on Soft Drinks case*[118] shows that the US was interested in the WTO law. The US realised that it has the substantive law advantage at the WTO, rather than NAFTA. It is not just about preferring to have the dispute in Geneva, but choosing the law that will lead to a forum which may give a favourable ruling.

Another relevant case is the *Canada- Certain Measures Concerning Periodicals (DS31)* case[119]. In this case the US was the complainant and the measures which were at issue were the Canadian prohibition of the importation into Canada of any periodical that was a special edition, the Canadian

[117]Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf* (accessed 30 January 2013).
[118]Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf* (accessed 30 January 2013).
[119]Canada- Certain Measures Concerning Periodicals (DS31) available at *http://www.wto.org/english/res_e/booksp_e/dispu_summary95_11_e.pdf* (accessed 8 March 2013).

assessment of an eighty percent excise tax on split- run issue edition of a periodical and the postal rate scheme that under which applied differently between domestic and foreign periodicals.

This case went all the way to the appellate body of the WTO and it was found that the prohibition of importation of periodicals by Canada was against Article XI of the GATT[120] which prohibits quantitative restrictions. The Canadian first measure could also not be justified under Article XX (d)[121] because it could not be regarded as a measure necessary to secure compliance with Canadian tax laws. Article XX (d) is an exception to the WTO rules and applies if a measure is necessary to secure compliance with laws. The appellate body further found that the second Canadian measure was inconsistent with Article III: 2 of the GATT.[122] The third measure was found to be justified under Article III: 8 (b) of the GATT.[123]

The US and Canada are both parties to the NAFTA; therefore the US could have brought it case to the NAFTA, but opted to go the WTO. It turns out once again the US was very careful in its choice of law. The US realised that the WTO law could be to their advantage as the NAFTA permitted discrimination between foreign made and domestic made periodicals. That choice of law leads to the WTO forum.

3.4 The Common Market for Eastern and Southern African Court, Eastern African Court of Justice and Southern African Development Community Tribunal

Regionally there are not much reports, at least on record of forum shopping between the RECs. Desire Kayihura registrar of Common Market for Eastern and Southern African Court (COMESA) court (2010)[124] in her report mentioned that there has been instances of forum shopping between the

[120]WTO 'The Legal Texts' Article XI (prohibition on quantitative restrictions), GATT 1994.
[121]WTO 'The Legal Texts' Article XX (d), GATT 1994.
[122]WTO 'The Legal Texts' Article III:2 (National Treatment, taxes and charges).
[123]WTO 'The Legal Texts' Article III:8 (b) (national treatment, domestic lwas and regulations).

RECs whereby parties opted to file their matter at the COMESA court in Lusaka, Zambia, though they had an option to file the matter at the Eastern African Court of Justice (EACJ) in Arusha, Tanzania which was closer to their domicile being Uganda and the Democratic Republic of Congo (DRC). Uganda and the DRC are members of both COMESA and EAC. It should be noted that the focus of this paper is not on the interactions between the RECs but the RECs and the proposed tripartite free trade area (TFTA). It is therefore important to discuss and analyse how choice of forum may be approached between the TFTA and the RECs.

3.5 The Regional Economic Communities and the proposed Tripartite Free Trade Area

It is the writer's opinion that since there is no hierarchy between the RECs DSM and the proposed TFTA DSM, member states may have an option of bringing an action in either one the DSM or both the RECs DSM and the TFTA DSM. It would appear that the non-exclusive jurisdiction in the RECs DSMs as discussed in section 2.7.1 of chapter two suggest that forum shopping is a freedom that member states have chosen to retain. The issue related to choice of forum is not only forum shopping, states may also decide to commence proceedings in more than one forum or re-litigate a dispute that has already been decided in another forum.

For instance, Zambia and Swaziland are members of COMESA and may ultimately join the TFTA. Both COMESA and the TFTA address trade issues such as quantitative restrictions. Now, if the two countries find themselves embroiled in a dispute over quantitative restrictions, the COMESA court or the TFTA DSM have jurisdiction to hear the matter. The two states have a luxury of forum shopping. Other forum shopping, Zambia may commence proceedings in the COMESA court whilst Swaziland goes to the TFTA DSM or the one of the parties may re litigate the dispute after it has been heard in either court.

[124]Kayihura D 'Parallel Jurisdiction of courts and tribunals: the COMESA Court of Justice perspective' (2010) 36 Iss.3 *Commonwealth Law Bulletin* 587.

3.6 Influential factors in choosing a forum

Factors that parties may consider in choosing a forum at which their dispute may be heard are varied. As some have stated:[125]

> '... States do not pursue multiple dispute settlement proceedings needlessly, working instead towards ensuring that their grievances are brought before the most equipped fora for settling their disputes.'

The questions are how do states determine the most equipped fora? What do they consider? What influences their decisions? It is argued that complainants strategically discriminate among different fora depending on the measure at issue.[126] This argument is similar to the one that suggests that in making a choice of forum, such decision is made on a case by case basis.[127]The above arguments are related because a complainant will have different measures to consider for different cases, therefore the discrimination of various fora cannot be done wholesale. The influential factors may be legal, political and practical considerations. The legal requirements may be that under a particular treaty, depending on the subject matter at issue and the wording of the treaty the dispute may be brought to a particular forum. In that case, the subject matter or the wording of a treaty determines where the dispute should be heard. The institutional rules would pre determine where complainants may file their claims.

[125] Marceau G 'Conflicts of Norms and Conflicts of Jurisdictions: The relationship between the WTO Agreement and MEAs and other treaties' (2001) 35(6) *Journal of World Trade* 1081 available at *http://jpkc.zzu.edu.cn/esjmyzzf/ebook/lw/Conflicts_of_Norms_and_Conflicts_of_Jurisdictions-_The_Relation.pdf* accessed (8 March 2013).

[126]Busch M L 'Overlapping Institutions,Forum Shopping, and Dispute Settlement in International Trade' International Organisation 2007 available at *http://www9.georgetown.edu/faculty/mlb66/forum%20shopping%20io.pdf* (accessed 8 March 2013) 735.

[127]Gantz D 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties' (1999) *Am.U.Int'l. L. Rev*.1097.

For instance, the wording of GATT 1994[128] mandates WTO member states to seek recourse at the WTO DSM in the event that the complainant member alleges violation of benefits under the WTO covered agreements. It reads:[129]

> 'When members seek the redress of a violation or other nullification or impairment of benefits under the covered agreements or an impediment of to the attainment of any objective of the covered agreement, they shall have recourse to, and abide by, the rules and procedures of this understanding.'

It has been argued that not only does Article 23 provide for compulsory jurisdiction but it also provides for exclusive jurisdiction such that violations of the covered agreements must be settled by the WTO DSM, exclusively.[130] One could argue that if there is a legal requirement that a dispute should be compulsorily settled at a particular forum, then there are no qualms since that will be the only competent judicial body.

Another controlling factor which may be considered by parties to a dispute in choosing a forum is the substantive law advantages. This means that a party to a dispute would choose a forum where it considers it would be advantageous in view of the applicable law. The complainant is interested in the treaty in which its claim would stand the best chance and for the defendant it is about the defences available under the respective treaties.

This was demonstrated earlier at section 3.3 of this chapter in *Mexico- Tax measures on Soft Drinks case*[131]. This controlling factor is logical because ultimately the complainant wants a favourable decision which could be more or less liberal or free trade oriented than the prevailing circumstances created by the defendant.[132] On the other hand the defendant would like to maintain the *status quo*. It

[128] WTO 'The Legal Texts' Article 23 (1) of the DSU.
[129] WTO 'The Legal Texts' Article 23 (1) of the DSU.
[130] K Kwak and Marceau G 'Overlaps and Conflicts of jurisdiction between the WTO and RTAs' available at *http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf* (accessed 16 May 2013).
[131] Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf* (accessed 30 January 2013).
[132] J Gaurav 'The Luxury of Forum shopping in International Trade Disputes: Problems and Solutions' available at *http://www.cuts-citee.org/pdf/BP07-WTO-11.pdf* (accessed 1 March 2013).

is the author's opinion that what the US wanted in the abovementioned case was a more free trade oriented outcome which would ensure that the tax imposed by Mexico would be discontinued.

The substantive law advantage maybe a controlling factor in the process of choosing a forum between the RECs DSM and the proposed TFTA DSM. Member states are likely to carefully assess and consider the forum at which they may have substantive law advantage. This assessment will have to be on a case by case basis. It cannot really be a general assessment because in one case the complainant maybe seeking a more liberal ruling and at other times the complainant may be seeking an otherwise ruling. The author is of the opinion that the only general assessment that may be undertook is in relation to jurisdiction. As noted in this paper at section 2.7.1 of chapter two, the RECs DSMs have jurisdiction to only examine claims under their respective treaties. On the other hand, the jurisdiction of the proposed TFTA DSM is not clearly defined and this may be attributed to the fact that it is still an agreement in the making. Be that as it may, the proposed TFTA DSM mentions that the TFTA DSM shall apply in the implementation of the provisions of the agreement.[133]

The TFTA will be a free trade that is going to be built on the work that has already been done at the RECs[134], and that the EAC has implemented a customs union,[135] the COMESA is an FTA that is about to implement a customs union,[136] and some SADC member states are implementing the SADC trade protocol.[137] Considering the above facts, it is likely that the TFTA will have less strict rules compared to the RECs; therefore complainants may have an incentive to bring their cases to the TFTA instead of the RECs. This submission is made with a view that if indeed the TFTA will be

[133] Draft TFTA text Article 3 of Annex 13

[134] Annex1-Tripartite Negotiating Principles, Processes and Institutional Framework Guidelines for negotiating tripartite free trade are among the member/partner states of COMESA, EAC and SADC (2011) 2.

[135]Shayanowako P 'Towards a COMESA, EAC and SADC Tripartite Free Trade Area' available at *http://www.panafricanglobaltradeconference.com/upload/towards_a_tripartite_free_trade_area_.pdf* (accessed 9 January 2013).

[136]Kalenga P 'Making the Tripartite FTA work' in From Cape to Cairo ch 1 available at *http://www.tralac.org/2011/09/08/new-book-cape-to-cairo-making-the-tripartite-free-trade-area-work/* (accessed 7 January 2013).

[137] Angola, Democratic Republic of Congo and Seychelles are yet to implemet the SADC Trade Protocol see *http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/* (accessed 14 March 2013).

built on work that has already been done, then the performance of all states in their various RECs will have to be taken into account and the average performance may be the basis of the TFTA.

It has been suggested that a controlling factor in the choice of forum could be the complainant's expectation with regard to the future value of the ruling or the precedent set.[138] Precedent in this context means adding to the judicial body's case law concerning the obligations at issue. In the discussion of choice of forum between the WTO and RTAs, it was argued that a complainant has an option of setting a precedent regionally or multilaterally. The purpose of the precedent would be to prevent the defendant's protectionism and also facilitate future litigation.

It is the author's opinion that this view seems to be a weak motivation for choice of a particular forum. This submission stems from the view that when trade disputes arise, the main goal for the parties is to get a resolution and allow trade to continue on agreed terms. It is the author's view that member states seek to change trade behaviours by agreements rather than court rulings and that a precedent can only be a bonus and not the primary factor of choosing a particular court. Although the author hereof is of the view that precedent maybe a weak motivation for choice of forum, the author acknowledges the importance of WTO precedents as non binding as they are and other precedents form other rules based systems.

In a comparative analysis of the SADC DSM and the WTO DSM,[139] eleven factors influencing choice of law were discussed. In addition to the ones already discussed in this section, the issue of standing was highlighted as one of the factors. The issue of who can initiate a complaint and against who plays a vital role when choosing a forum at which a dispute could be resolved. In the abovementioned analysis it was concluded that since private actors play an important role in trade,

[138]Busch M L 'Overlapping Institutions,Forum Shopping, and Dispute Settlement in International Trade' International Organisation 2007 available at *http://www9.georgetown.edu/faculty/mlb66/forum%20shopping%20io.pdf* (accessed 8 March 2013) 736.

[139]Pauwelyn J ' Going Global, Regional, or Both? Dispute Settlement in the Southern African Development (SADC) and Overlaps with the WTO and other istitutions' (2004) Minnesota Journal of Global Trade available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=478041* (accessed 28 February 2013). Other factors are: cost of litigation, procedural advantages, possibility of appeal, special procedures for least developed countries, what are the available remedies, what happens in the event of non compliance and who is bound by the eventual ruling.

that is being the traders themselves, they would be inclined to choose a court where they have standing.

It was concluded that the favourable court would be the SADC Tribunal as it were instead of the WTO DSM since legal and natural persons could initiate complaints at the SADC Tribunal.[140] This conclusion appears to be logical because private individuals are the ones who actually trade and would be very active and influential in a trade dispute, therefore if there is an opportunity for them to initiate a complaint they would jump at the opportunity. As pointed out in section 2.6 of chapter two, only member states would be able to initiate and defend claims before the TFTA DSM. The COMESA court and the EACJ as was pointed out in sections 2.3 and 2.4 of chapter two are accessible to both member states and private actors. This feature in COMESA court and the EACJ may be an incentive for complainants to initiate disputes at the said RECs rather that the proposed TFTA DSM.

3.7 Concerns associated with forum shopping

As some have argued, multiple courts are better than no courts at all.[141] This argument is from a view that complainants will have various fora at which they can file their claims. This could be an advantage to the complainants because a healthy competition between the courts could breed an opportunity for improved quality of rulings and expediency of proceedings.[142] In this instance, forum shopping is not a real concern as it seems states would only be seeking a better service. It is not a real problem if parties choose a particular forum, stick with it and accept its ruling as was done in the Canada- Certain Measures Concerning Periodicals (DS31) case.[143] While multiple judicial fora may be considered an indication of willingness of states to submit themselves to the rule of law in their

[140]Pauwelyn J ' Going Global, Regional, or Both? Dispute Settlement in the Southern African Development (SADC) and Overlaps with the WTO and other institutions' (2004) Minnesota Journal of Global Trade available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=478041* (accessed 28 February 2013).

[141]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 80 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).

[142] Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 80 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).

[143]Canada- Certain Measures Concerning Periodicals (DS31) available at *http://www.wto.org/english/res_e/booksp_e/dispu_summary95_11_e.pdf* (accessed 8 March 2013).

interactions with the international community, various concerns concomitant to the same may also be identified.

Problems arise when there is re-litigation or multiple filings. This is whereby parties decide to take the luxury of forum shopping a step further and decide to engage in duplicative proceedings or simply re-litigate in a different forum because they consider a ruling they received unsatisfactory. The latter scenario is demonstrated by the *Argentina- Definitive Anti-Dumping Duties on Poultry from Brazil DS 241* case[144](hereinafter referred to as the *Argentina-Definitive Anti-Dumping on Poultry* case) In this case Brazil complained of specific anti dumping measures imposed by Argentina on poultry from Brazil at the WTO DSM. This case is relevant because prior to its submission to the WTO DSM, the Mercado Comun del Sur (MERCOSUR)[145] tribunal had ruled in Argentina's favour. In the subsequent case brought by Brazil at the WTO, Argentina argued that the MERCOSUR ruling could not be disregarded by the WTO panel but the panel dismissed Argentina's claim.[146]

Cases such as the one between Canada and the US over countervailing duties and anti-dumping measures in the soft wood trade have been multilayered and complex.[147] In that case, Canada brought four separate WTO proceedings and four NAFTA proceedings. Private actors or the industry in both countries further litigated in the US courts.[148] This illustrates how duplicative and complex proceedings can be.

The *Mexico- Tax measures on Soft Drinks case*[149] is also relevant because during the proceedings at the WTO DSM (both panel and appellate body), Mexico requested that the WTO DSM should

[144]Argentina- Definitive Anti-Dumping Duties on Poultry from Brazil DS 241 *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds241sum_e.pdf* (accessed 8 March 2013).

[145] Economic and Political Agreement among Argentina, Brazil, Paraguay,Uraguay and Venezuela.

[146] J Gaurav 'The Luxury of Forum shopping in International Trade Disputes: Problems and Solutions' available at *http://www.cuts-citee.org/pdf/BP07-WTO-11.pdf* (accessed 1 March 2013).

[147] Hillman J 'Conflicts between Dispute Settlement Mechanism in Regional Trade Agreements and the WTO- What should the WTO Do?' (2009) 42 *Cornell International Law Journal* 202.

[148]Hillman J 'Conflicts between Dispute Settlement Mechanism in Regional Trade Agreements and the WTO- What should the WTO Do?' (2009) 42 *Cornell International Law Journal* 202.

[149] Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf* (accessed 30 January 2013).

decline jurisdiction and recommend to parties to submit their claims to the NAFTA panel.[150] Mexico was of the view that NAFTA panel could address both the sugar quota and the tax issues but this claim presented by Mexico was rejected as the WTO DSM was of the view that the WTO DSU does not grant them discretion whether or not to decline jurisdiction of a case brought before them.[151]

The *Argentina- Definitive Anti-Dumping Duties on Poultry* case clearly shows re-litigation and how the notion of party autonomy as was discussed in section 2.7.2 of chapter two plays out at the WTO and would likely to be the case with other international fora. The Mexico- Tax measures on Soft Drinks and other beverages (DS 308) case, although was not litigated at the NAFTA panel, shows how the lack of hierarchy may play out. One may argue that if there was some kind of hierarchy between the WTO and the NAFTA, may be the WTO DSM would not have rejected Mexico request.

The two cases present dimensions which are different from the simple choice of forum as demonstrated in the *Canada- Certain Measures Concerning Periodicals (DS31*) case and this is where concerns arise. These concerns can be either party related or system related.[152] A concern would be party related in the sense that it will be issues that concern the parties only, to the exclusion of the system itself. A system related concern would be otherwise, it would be related to the regime as a whole. A concern that has been noted as a party concern is the issue of costs or expenses. These are costs or expenses associated with re-litigation and multiple filings. This concern is for the parties and does not have a significant if any impact on the system or the regime. Although the issue of costs has been argued to be less of a concern in international law,[153] it could be a serious concern for

[150]J Gaurav 'The Luxury of Forum shopping in International Trade Disputes: Problems and Solutions' available at *http://www.cuts-citee.org/pdf/BP07-WTO-11.pdf* (accessed 1 March 2013).
[151]J Gaurav 'The Luxury of Forum shopping in International Trade Disputes: Problems and Solutions' available at *http://www.cuts-citee.org/pdf/BP07-WTO-11.pdf* (accessed 1 March 2013).
[152]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 80 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).
[153]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 80 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).

the African region which has limited resources. Pauwelyn argues that most parties in international disputes are states and states generally do not have a problem with funding.[154] To a large extent this argument is logical as countries such as the United States of America, Canada and the EC have been at the WTO DSU repeatedly. Clearly these countries would be asserting their rights and sometimes defending their rights, but one may argue that it has been a lot easier for them since they have the resources.

The situation is different from that of the African countries. Poor countries in the African will have difficulty funding multiple proceedings or even defending re-litigated cases. A country such as the Republic of South Africa ranked as an upper middle income country by the World Bank[155] is the largest economy in Africa. It could be one of those African countries that could afford multiple proceedings between the RECs and the TFTA. Re-litigation where South Africa is of the view that a previous ruling was not satisfactory could be affordable to her economy. On the other hand South Africa's neighbouring country Lesotho which has been classified as a lower middle income by the World Bank[156]would probably have difficulty in engaging in multiple proceedings and re-litigation. It is the author's view that with African countries' unequal economies; multiple proceedings would serve those who can afford it to the exclusion of other poorer countries. Thus, multiple proceedings and re-litigation of cases can be a huge burden on the limited developing country budgets.

Another concern is the issue of inconsistent rulings. This has been classified as a system concern and also identified as the main concern in international law.[157] It is argued that inconsistent rulings may leave the dispute unresolved or threaten the stability and legitimacy of a system or regime within which judicial bodies exist.[158] Multiple interpretations of similar concepts by different DSMs may

[154]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 81 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).
[155]South Africa: Economy Overview available at *http://www.southafrica.info/business/economy/econoverview.htm#.UT3AAvXlbmw* (accessed 11 March 2013).
[156]World Bank Doing Business Report available at *http://www.doingbusiness.org/data/exploreeconomies/lesotho/* (accessed 11 March 2013).
[157]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 83 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).
[158]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 83 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).

lead to the fragmentation of international law which would in turn defeat the very notion of certainty and predictability of a system. The lack of certainty and predictability not only affect the governments, the traders and producers are also affected. One can only imagine how confusing traders and producers were during the Argentina- Definitive Anti-Dumping Duties on Poultry from Brazil DS 241 case. Although the case between the US and Canada over softwood lumber trade did not really end up with contradictory decisions, and much as it may elate lawyers as they could make a lot of money from such cases, it does show that there is potential for such decisions and if such decisions are made, each party would insist on a ruling that favours it and the dispute would remain unresolved.

It is crucial for the RECs and the TFTA, not to engage in contradictory decisions, especially with the recent developments in the SADC Tribunal whereby the tribunal was suspended, and subsequently renegotiations of the tribunal being called for. It is the author's view that such developments are indicative of the fragile nature of Africa's regional law. Contradictory decisions are certainly undesirable as they could undermine the unity of the African trade regime.

3.8 Possible Solutions to possible jurisdictional conflicts between the Regional Economic Communities and the proposed Tripartite Free Trade Area

It appears that overlap of jurisdiction is an inevitability in international trade law simply because at the WTO under its Article XXIV of the GATT permits the creation of RTAs, which tend to have identical obligations to the WTO. In the African region it has been shown in section 2.7.3 of Chapter two that the RECs and the envisaged TFTA may have overlap of jurisdiction. These overlap of jurisdiction presents opportunities and risks to member states and the risks tied to forum shopping which can result in inconsistent rulings and unnecessary expenses. Various writers have discussed numerous solutions and it is important to explore if these possible solutions could be useful to the RECs and the TFTA arrangement. The possible solutions are *res judicata, lis alibi pendens, forum non coveniens* as well as exclusive choice of forum.

3.8.1 *Forum non conveniens*

Forum non-conveniens permits a judicial body with jurisdiction over a dispute to stay or dismiss litigation when there is a more suitable DSM.[159] It could be argued that, Mexico in its *Mexico- Tax measures on Soft Drinks)* case was requesting the WTO DSU to apply this doctrine, to rule that the NAFTA panel is the appropriate forum. This decision would probably be difficult for the WTO DSU as it may have to be certain that the dispute presented to it would be resolved at the NAFTA panel. This doctrine is widely recognised in domestic courts, particularly in common law systems[160] but it is not popular in the international law arena. The unpopularity may be due to the fact that judicial bodies are granted a wide discretion in the application of the doctrine which renders its application unpredictable.[161] It is the author's view that it is ideal and desirable to have a predictable trade regime in Africa for the benefit of governments, traders and producers. This ideal situation cannot be paired with an unpredictable doctrine since it may only cause solution and fail to provide one. The author submits that *forum non conveniens* will not suitable for the RECs and TFTA interaction.

3.8.2 *Lis alibi pendens*

The above doctrine provides that proceedings on the same facts cannot be commenced if there are parallel proceedings pending in another court.[162] This doctrine applies to a situation where a ruling has not yet been made in a court and then parallel proceedings on the same facts are commenced in another court. This is a controversial doctrine in international law as there is no agreement on whether it applies in international law or not.[163] The difficulty with this doctrine in the international arena is attributed to the strict conditions that have to be fulfilled in order for it to apply. The specific

[159]Yang S 'Resolving Potential Jurisdiction Conflicts in ACFTA: The principle of *Res judicata*' (2011) 3 *Tsinghua China Law Review* 351 available at *http://tsinghuachinalawreview.org/articles/PDF/TCLR_0302_Yang.pdf* (accessed 11 March 2013).

[160]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 110 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).

[161]Yang S 'Resolving Potential Jurisdiction Conflicts in ACFTA: The principle of *Res judicata*' (2011) 3 *Tsinghua China Law Review* 352 available at *http://tsinghuachinalawreview.org/articles/PDF/TCLR_0302_Yang.pdf* (accessed 11 March 2013).

[162]Yang S 'Resolving Potential Jurisdiction Conflicts in ACFTA: The principle of *Res judicata*' (2011) 3 *Tsinghua China Law Review* 353 available at *http://tsinghuachinalawreview.org/articles/PDF/TCLR_0302_Yang.pdf* (accessed 11 March 2013).

[163]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 106 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).

requirement that would cause a problem is that the earlier court where the matter is filed should be able to resolve the legal cause of action brought in the subsequent court. Drawing an analogy form the *Mexico- Tax measures on Soft Drinks* case, the legal cause of action that would have been brought before the NAFTA panel had it not been for the US refusal of panel formation would have been a claim of violation of a NAFTA rule.

At the WTO the claim was a violation of a WTO rule. Now according to the doctrine, in the above analogy the NAFTA panel would have to be in a position to resolve the legal cause of action brought at the WTO DSU. This would prove difficult for the NAFTA panel to execute because it can go as far as dealing with rules found in its treaty, rendering it not capable of resolving a legal cause of action brought at the WTO DSU. This would then mean that according to the doctrine, the requirement would not be fulfilled therefore parallel proceedings would be permitted.
Similarly, a RECs DSM would have difficulty resolving a legal cause of action brought at the TFTA DSM or vice versa. It is the author's view that as with *forum non conveniens*, the doctrine of *lis alibi pendens* would not be a suitable solution to the problem of parallel proceedings that may arise between the RECs and the TFTA.

3.8.3 *Res judicata*

Unlike *forum non conveniens* and *lis alibi pendens*, writers agree that res judicata is a recognised legal principle[164] that is applicable before international tribunals.[165] *Res judicata* precludes disputants form engaging in sequential claims. Thus, it precludes parties from initiating the same litigation involving the same claim or cause of action after a court with competent jurisdiction has adjudicated the matter.[166]When a court has to determine whether is precluded from hearing the case because of an earlier adjudication in another court, it has to consider three elements. The first consideration is the parties involved in the two cases. The parties have to be the same. The second consideration or

[164]Yang S 'Resolving Potential Jurisdiction Conflicts in ACFTA: The principle of *Res judicata*' (2011) 3 *Tsinghua China Law Review* 355 available at *http://tsinghuachinalawreview.org/articles/PDF/TCLR_0302_Yang.pdf* (accessed 11 March 2013).
[165]Pauwelyn J and Salles E. L 'Forum Shopping Before International Tribunals: (Real) Concerns and (Im) Possible Solutions' 102 available at *http://ssrn.com/abstract=1768742* (accessed 20 September 2012).
[166]Yang S 'Resolving Potential Jurisdiction Conflicts in ACFTA: The principle of *Res judicata*' (2011) 3 *Tsinghua China Law Review* 355 available at *http://tsinghuachinalawreview.org/articles/PDF/TCLR_0302_Yang.pdf* (accessed 11 March 2013).

test whether the subject matter in the two cases is the same and the third one is the legal cause of action.[167]

It is the opinion of the writer that for res judicata to effectively resolve the issue of re-litigation, the judicial bodies involved must recognise this doctrine as an applicable principle in international law. Alternatively, that recognition could be inherent in the founding instruments of the judicial bodies. For instance, the arrangement between China and the Association of Southeast Asian Nations known as the ASEAN-China Free Trade Area (ACFTA) seems to have accepted the principle of *re judicata* and it has rules governing the refusal of jurisdiction when another DSM is seized with the matter.

It is important to note that Article 38 (4) of the draft agreement of the TFTA appreciates that there may be inconsistencies between the agreements of the RECS and the TFTA. It goes further to say that in that situation; the provisions of the TFTA will prevail. The reason for bringing up this article is that it is easy for one to conclude that this provision accepts the doctrine of *res judicata*, therefore the issue of re-litigation would be dissolved. The author is of the view that such a conclusion would be flawed since Article 38 (4) only seeks to harmonise the provisions of the RECs and the TFTA and such harmonisation would be effective if one is appearing at the TFTA DSM. And even if the RECs were to recognise such harmonisation, it does not preclude member states from having a dispute over the same provision, obtaining a ruling at the TFTA and then re-litigating at a REC DSM. It is the author's opinion that the doctrine of *res judicata* remains a possible solution, if the TFTA accepts and reflects it in its agreement.

3.8.3.1 Exclusive Choice of Forum

The writer is of the opinion that drawing from the doctrine of *res judicata*, the TFTA may craft its DSM provisions in such a manner that it captures the spirit of the doctrine and may even go beyond what the doctrine requires. The TFTA DSM as discussed in section 2.7.2 of chapter two does not have exclusive jurisdiction. The parties of the TFTA may choose to go to any fora they prefer to resolve their trade disputes. The non exclusive nature of the jurisdiction clearly opens gates for

[167] J Gaurav 'The Luxury of Forum shopping in International Trade Disputes: Problems and Solutions' available at *http://www.cuts-citee.org/pdf/BP07-WTO-11.pdf* (accessed 1 March 2013).

forum shopping but this could be controlled by an exclusive choice of forum clause. Such exclusion clauses are now being found in other RTAs DSMs such as the ACFTA which reads:[168]

> 'Once dispute settlement proceedings have been initiated under this Agreement or any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising from the Framework Agreement or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.'

The above provision clearly precludes parties from engaging in multiple proceedings but it does not necessarily prevent re-litigation. One could argue that after obtaining a ruling from a particular judicial body, the matter is closed and re-litigation would be a new case in a new forum. This thought is motivated by the fact that litigants are always looking for new ways to approach matters, so there will be a need to make the provision watertight and address re-litigation.

Other RTAs such as the NAFTA have a similar provision to that of the ACFTA and it shall be further discussed in chapter four where a comparative analysis will be carried out.

3.9 Conclusion

It is concluded that issues of choice of forum such as forum shopping has been recognised as a concern in the international trade law arena. Numerous examples have been shown through relations and interactions between RTAs and the WTO. It is further submitted that not only could this be a problem at the WTO level, it is a possible problem in the African region due to the parallel jurisdiction between the RECs and the TFTA. The author acknowledges that forum shopping *simplicita* is not a real problem but it is a serious problem when member states have the opportunity to engage in multiple proceedings and re-litigation of cases. It is particularly a concern for the African region since the necessary resources are limited and inconsistent rulings could discredit the fragile African trade law regime. The solutions that are usually used under domestic law to address

[168]Agreement on Dispute Settlement of the Framework Agreement on the Comprehensive Economic Co-operation between ASEAN and China available at *http://www.asean.org/* (accessed 15 March 2013).

the above concerns are not suitable but borrowing from the doctrine of res judicata, member states may choose to nip multiple proceedings and re-litigation in the bud, so to speak metaphorically by having an exclusive choice of forum. It is an attractive resolution for the RECs and the TFTA since the TFTA is still at the negotiations stage and forum shopping seems to be an endogenous problem inherent in the relevant treaties. This resolution has been explored by other RTAs such as ACFTA and NAFTA. The approach of NAFTA shall be analysed in chapter to gain insight on how it has worked for that trade regime and if it will be suitable for the TFTA.

CHAPTER FOUR

NORTH AMERICAN FREE TRADE AGREEMENT: EFFICACY OF THE FORUM SELECTION CLAUSE AND RECOMMENDATIONS FOR THE PROPOSED TRIPARTITE FREE TRADE AREA

4.1 Introduction

It has been established in the previous chapters that there is a possibility of jurisdictional overlap between the regional economic communities (RECs) and the proposed tripartite free trade area (TFTA). It has further been established that this overlap may create an opportunity or risk of forum shopping. This has been demonstrated through cases and possible solutions have been highlighted. This chapter will explore how the issue of forum shopping has been approached by the North American Free Trade Agreement (NAFTA) dispute settlement mechanism (DSM) and the efficacy of the NAFTA choice of forum clause that seek to address the issue of jurisdictional overlap between NAFTA and the General Agreement on Tariffs and Trade. This analysis will introduce the NAFTA and contrast its DSM with that of the World Trade Organisation. It will further examine the jurisdiction of the NAFTA DSM, and that of the WTO DSM. The aforementioned examination will provide the basis of the discussion of the propensity of jurisdictional conflict between the two mechanisms and the extent to which the NAFTA forum selection clause is able to resolve such conflict. The chapter will culminate by discussing recommendations for the design of the TFTA in view of the NAFTA approach as well as judicial cooperation between the TFTA and the RECs.

4.2 North American Free Trade Agreement Overview

The NAFTA is a comprehensive agreement notified under article twenty four[169] of the general agreement on tariffs and trade (GATT). On the first day of January 1994, NAFTA came into effect with a primary goal of eliminating restrictions on trade and investment.[170] NAFTA is an extension of

[169]Article XXIV, GATT permits the creation of customs territories.

[170]Kondonassis A.J, Malliarias A.G and Paraskevopoulos C 'NAFTA: Past, present and future' available at *http://ssrn.com/abstract=1084662* (accessed 10 April 2013).

the free trade agreement between Canada and the United States of America to include Mexico. NAFTA goes beyond the traditional elimination of trade barriers objective to include the so called new generation issues such as promotion of fair competition, investment and provision of adequate and effective protection and enforcement of intellectual property rights in each NAFTA party's territory.[171] Since its implementation, NAFTA has been celebrated in some quarters as a tool that would create jobs and raise standard of living in the respective member states and has also been condemned for causing loss of jobs and not bringing changes that were anticipated.[172] NAFTA's value continues to be controversial and it is the writer's opinion that this controversy may largely emanate from the fact that NAFTA is composed of countries with disparate levels of development. Canada and the US being industrial states and Mexico at a level much lower than that of the two countries in terms of industrialisation.

NAFTA, like most of regional trade organisations has created institutions within its organisation and the one that is relevant to our discussion is the one that deals with dispute settlement. It is an important institution because disagreements are bound to arise and in lieu of this fact, NAFTA has created what some have described as an impartial rules based system that is able to resolve disputes that may arise between the NAFTA parties.[173]

4.3 North American Free Trade Agreement Dispute Settlement Mechanism

The NAFTA establishes its dispute settlement mechanism under chapters eleven, nineteen and twenty of its founding agreement. Chapter eleven primarily deals with disputes between a party and an investor from another party.[174]Chapter nineteen has a limited scope which deals with the review of final anti dumping and countervailing duty determinations[175] and it operates under national laws

[171] Article 102-Ojectives available at *http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=122* (accessed 17 April 2013).
[172]Kondonassis A.J, Malliarias A.G and Paraskevopoulos C 'NAFTA: Past, present and future' available at *http://ssrn.com/abstract=1084662* (accessed 10 April 2013).
[173]'The NAFTA at five: Overview' available at *http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/nafta5_section03.aspx* (accessed 10 April 2013).
[174]NAFTA, Chapter eleven, Article 1115 to 1138 available at *http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=142* (accessed 17 April 2013).
[175]NAFTA, Chapter nineteen, Article 1904 available *at http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=152#A1904* (accessed 17 April 2013).

rather than regional or international trade laws. Chapter twenty addresses institutional arrangements and dispute settlement procedures and it is a government to government dispute settlement.[176] The NAFTA has a potential of raising a wide range of legal issues relevant to international trade law, however in order to stay in the scope of the present discussion this section will only focus on the general dispute settlement mechanism, that is chapter twenty.

4.3.1 Dispute resolution under chapter 20 of the North American Free Trade Agreement

The dispute settlement provisions of chapter 20 provide a means of resolving disputes related to the application and interpretation of the NAFTA among the NAFTA parties.[177]Chapter 20 sets out three main steps that are intended to resolve disputes. Similar to the World Trade Organisation's dispute settlement unit[178] (WTO DSU) and other international organisations, the process of resolution of disputes under chapter 20 is commenced by consultations between the parties. There has to be a request for consultations in writing regarding any actual or proposed measure or any other matter that the requesting party considers may affect the operation of the NAFTA.[179] Parties to a dispute are expected to make an attempt at resolving the dispute through consultations as Article 2006 (5) of the NAFTA stipulates that:

> 'The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement.'

NAFTA places a lot of emphasis on resolving disputes at the consultation phase. If the parties fail to reach an agreement through consultations within a stipulated period of time, the matter may then be

[176]NAFTA, Chapter twenty, Article 2003 to 2019 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153* (accessed 17 April 2013).
[177]Gantz D 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties' (1999) *Am.U.Int'l. L. Rev*.1030.
[178]Annex 2-Understanding on rules and procedures governing the settlement of disputes, Article 3.
[179]Consultations, Article 2006 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2006* (accessed 17 April 2013).

referred for good offices, conciliation and mediation by any party to the dispute to the NAFTA Free Trade Commission which has the responsibility of overseeing the implementation of the NAFTA and resolving disputes.[180] This step is also similar to the one provided for in Article 5 of the agreement dealing with dispute settlement at the WTO. The difference is that good offices, conciliation and mediation are voluntary at the WTO DSM whilst they are compulsory at NAFTA. If the Free Trade Commission convenes and there is still no resolution, party to the dispute may request establishment of an arbitral panel[181] which would then arbitrate the matter. According to the NAFTA agreement, the NAFTA parties have to maintain a panel roster of up to thirty individuals.[182] These members are appointed by consensus for terms of three years.[183] Similar to the WTO DSU, the panelists are expected to have expertise in international trade law or policy and generally matters covered in the relevant agreements.[184]Unlike the WTO DSU where panels are composed of three panelists,[185] NAFTA panels are composed of five panelists.[186] Following arbitration, the panelists

[180]The Free Trade Commission comprises of cabinet level representatives (trade ministers) of the three NAFTA parties see Article 2001 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2006* (accessed 17 April 2013).

[181]Request for an arbitral panel, Article 2008 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013).

[182]Article 2009.1 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013)

[183]Article 2009.1 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013)

[184]Article 2009.1 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013). See also Article 8 (1), WTO DSU.

[185]WTO DSU Article 8(5).

[186]Article 2011 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013).

have to issue an initial panel report on which the parties to a dispute may submit written comments.[187]

After the initial report follows the final report on which the disputing parties have to agree on the resolution of the dispute which normally shall be similar to the determinations and recommendations of the panel.[188] Although it may seem as if the arbitral panel is playing a facilitative role than an authoritative one of resolving a dispute, failure by the affected parties to implement the final report may result in serious consequences that may be acted upon promptly. If the final report is not implemented or another mutually satisfactory agreement has not been reached, the complaining party may retaliate. Retaliation would be suspension of the application to the party complained against of the benefits of equivalent effect until such time the partiers reach an agreement on the resolution of the dispute.[189]

To a large extent the NAFTA DSM mirrors the dispute settlement provided in Article twenty three of the General Agreement on Tariffs and Trade 1994 (GATT 1994). They are both rules based systems with formal adjudicatory decision making process and clear provisions on implementation mechanisms. The two systems incorporate dispute settlement that is based on consultations, conciliation and binding proceedings where consultations fail to bring forth resolution. The two systems also impose time limits for the various stages of dispute resolution. It is therefore apparent from the drafting, sequencing of stages of dispute settlement and the substantive content that the NAFTA DSM is modelled on the WTO Dispute Settlement Unit (DSU). A notable difference would be the fact that unlike the WTO DSU which has an appellate body, the NAFTA DSM does not have one.

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[187]Initial Report, Article 2016 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013).

[188]Implementation of Panel Report, Article 2018 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013).

[189]Non-implementation,Article 2019 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013).

4.3.2 Jurisdiction of the North American Free Trade Agreement dispute settlement mechanism

The jurisdiction of NAFTA chapter 20 dispute resolution mechanism is captured as follows:[190]

> 'Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.'

The first point to note is that chapter 20 relates to application and interpretation of the NAFTA. NAFTA's coverage is expansive and is only logical that the subject matter of its jurisdiction is broad. NAFTA covers areas such as trade in automotive sector[191], textile and apparel goods[192], rules of origin[193], customs procedures[194], energy and basic

[190]Recourse to dispute settlement procedures, Article 2004 available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2001* (accessed 17 April 2013).
[191] Trade and Investment in automotive sector, Chapter three, Annex 300A available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299* (accessed 17 April 2013).
[192]Textile and Apparel goods, Chapter three, Annex 300B available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299* (accessed 17 April 2013).
[193]Rules of Origin, Chapter five available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299* (accessed 17 April 2013).
[194]Customs procedures, Chapter five available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299* (accessed 17 April 2013).
[195]Energy and basic petrochemicals, Chapter six available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299* (accessed 17 April 2013).
[196]Government Procurement, Chapter ten available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299* (accessed 17 April 2013).
[197]Agriculture and Sanitary and Phytosanitary measures, Chapter seven available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299* (accessed 17 April 2013).

petrochemicals[195], government procurement[196] and agriculture. [197] All these areas would be subject to chapter 20 disciplines and it should be noted that although chapter eleven and chapter nineteen provide special procedures for settlement of disputes between investors and states as well as for the review of anti dumping and countervailing determinations, questions regarding the application and interpretation of those sections could be addressed under chapter 20. [198]

The second point to note is that chapter 20 is also applicable in instances where a complaining party is of the view that an actual or proposed measure by another party is or would be inconsistent with the obligations of the NAFTA or may cause nullification or impairment in the relevant NAFTA provisions.

The NAFTA DSM has non exclusive jurisdiction. The parties' recourse to the WTO is expressly preserved by Article 2005 (1) which provides:[199]

> 'Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the *General Agreement on Tariffs and Trade* , any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.'

[198]Gantz D 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties' (1999) *Am.U.Int'l. L. Rev*.1034.

[199]GATT Dispute settlement, Article 2005 (1) available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2004* (accessed 17 April 2013).

It should be noted that where a NAFTA party decides to initiate an action at the WTO against another NAFTA party and third NAFTA party expresses interest in the matter and prefers the NAFTA DSM, the three parties are expected to agree on a single forum and if they cannot reach an agreement, the dispute would normally be settled under the NAFTA DSM.[200] Although there is this non exclusive jurisdiction, once a complainant has selected a forum at which they wish the dispute to be settled, that forum must be used to the exclusion of all others.[201] This requirement will be referred to as the NAFTA forum selection clause and its efficacy will be tested in relation to its interaction with the WTO DSU.

4.4 Jurisdiction of the World Trade Organisation dispute settlement unit

The WTO DSM has jurisdiction over all disputes arising from the WTO covered agreements.[202] A complaining member state must request consultations pursuant to the relevant WTO provisions. Article twenty three sets out conditions under which a member state may request consultations. As with the NAFTA DSM, the WTO DSU allows disputes concerning violation of a WTO agreement which equates to inconsistencies referred to in article 2004 of the NAFTA. The WTO DSU also refers to nullification or impairment of a benefit which we had also come across at the aforementioned article.

Unlike the NAFTA DSM, WTO DSU has exclusive jurisdiction over all disputes that arise from the WTO covered agreements. Article twenty three of the dispute settlement agreement mandates compulsory recourse[203] by WTO members to the WTO DSM. The WTO jurisdiction as already mentioned in section 3.3 of chapter three would appear to be

[200]GATT Dispute settlement, Article 2005 (2) available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2004* (accessed 17 April 2013).
[201]GATT Dispute settlement, Article 2005 (6) available at *http://www.nafta-alena.gc.ca/en/view.aspx?x=299&mtpiID=153#A2004* (accessed 17 April 2013).
[202]WTO 'The Legal Texts'Article 23 (1) of the DSU.
[203]'...they *shall* have recourse to, and abide by, the rules and procedures of this Understanding.' Own italics for emphasis.

applicable to all trade disputes notwithstanding the fact that there might be other relevant fora. Although there seem to be an obligation to use the WTO DSU[204], the complainant still has a choice to opt for the WTO DSU or the NAFTA DSM.

Article twenty three of the DSU will not preclude a NAFTA party from invoking the NAFTA dispute settlement process. Therefore NAFTA is able to hear a dispute that concerns a measure that potentially breaches both the NAFTA and the WTO agreement.[205] Unlike the NAFTA DSM, the WTO DSU does not contain any express or forum selection clauses allowing for disputes concerning WTO covered agreements to be resolved in other fora. It would appear from the above-mentioned observation and the wording of article twenty three of the DSU agreement that the WTO DSU is designed to be the sole forum for the resolution of disputes concerning WTO covered agreements.

4.5 Jurisdictional overlap between the North American Free Trade Agreement and the World Trade Organisation

Jurisdictional overlap which may lead to conflict thereof can only occur where the NAFTA and WTO obligations are binding on both parties involved in a dispute.[206] All parties to the NAFTA are members of the WTO.[207] Accordingly, disputes between parties to the NAFTA may be subject to both the WTO and the NAFTA DSM. The above observation has also been acknowledged in article 2005 of NAFTA. NAFTA and the WTO agreement cover essentially the same areas and some substantive provisions under the NAFTA mirror those in the WTO

[204]WTO 'The Legal Texts'Article 23 (1) of the DSU.
[205]Example, Argentina- Definitive Anti-Dumping Duties on Poultry from Brazil DS 241 *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds241sum_e.pdf* (accessed 8 March 2013).
[206]See section 2.7.3 of chapter 2 of this paper for definition of jurisdictional overlap.
[207]Canada, Mexico and the United States of America have been members of the WTO since 1 January 1995; see *http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm* (accessed 18 April 2013).
[208]Gantz D 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties' (1999) *Am.U.Int'l. L. Rev*.1037.

agreements.[208] These similarities in the breadth and scope of the two agreements may result in trade disputes being brought in either one of the DSMs.

As mentioned in section 4.3.2 of this chapter, NAFTA does not attempt to prevent a WTO DSU from making determinations on the rights under the NAFTA agreements. On the other hand, the compulsory jurisdiction of the WTO DSU attracts disputes concerning violation of WTO covered agreements, which encompass a wide spectrum of trade disputes which may fall within the jurisdictional competence of the NAFTA DSM. As a result of the compulsory nature of the jurisdiction of the WTO DSU, the WTO panel may be inclined to exercise its jurisdiction notwithstanding the fact that such an action may lead to jurisdictional conflict.[209] As mentioned in section 3.2 of chapter three, jurisdictional overlap may lead to forum shopping which may have unpleasant consequences such as inconsistent and contradictory judgements. In order to avoid such consequences, NAFTA has included a forum selection clause to regulate choice of forum.

4.6 North American Free Trade selection of forum clause

Jurisdictional overlap has been recognised by NAFTA and other regional trade agreements[210] as a possible problem. This recognition is demonstrated by the inclusion of an express provision aimed at avoiding jurisdictional conflict. This provision, which we may refer to as the selection of forum clause seeks to address jurisdictional conflict by regulating the choice and use of forum in a dispute. NAFTA forum selection clause requires that in cases where a complaint can be brought before the NAFTA panel as well as under the WTO DSU, the forum selected by the parties shall become the exclusive forum for the dispute. Article 2005 (6) of the NAFTA provides that: 'once dispute settlement procedures have been initiated...the

[209] *Mexico- Tax measures on Soft Drinks* case-Although the case never proceeded at the NAFTA DSM, the WTO panel did not give much consideration to the fact Mexico had already requested establishment of a panel at NAFTA.

[210] ASEAN- China Free Trade Area (ACFTA) has a selection of forum clause, US-Central American Free Trade Article 20.3, US bilateral FTAs such as US-Singapore, US-Australia contain forum selection clauses see *http://www.ustr.gov/trade-agreements/free-trade-agreements* (accessed 22 April 2013).

forum selected shall be used to the exclusion of the other.' Initiation in this context means a request for an establishment of a panel at the WTO DSU[211] whilst under the NAFTA chapter 20 it would be the request for conciliation by the Free Trade Commission.[212]

Prima facie, the NAFTA forum selection clause could be effective in resolving the issues associated with jurisdictional overlap. These issues or concerns, namely multiple fillings and re-litigation have been identified and discussed in section 3.7 of chapter three. The intention of the NAFTA forum selection clause is to prevent parallel or multiple proceedings as a party is prohibited from initiating proceedings before the WTO panel and then initiating duplicitous proceedings before the NAFTA panel. This prohibition applies vice versa. Article 2005 of NAFTA seems to address re-litigation as once a forum is selected for a dispute, it is regarded as the exclusive forum for that dispute and that dispute should not be referred to another adjudicatory body.

It should be noted that there has not really been instances where NAFTA parties have violated article 2005 (6). NAFTA parties tend to choose either NAFTA DSM or the WTO DSU, depending on which one will end with a favourable outcome.[213] The selection processes in on a case by case basis.

4.6.1 Efficacy of the North American Free Trade selection of forum clause

In cases where a question of jurisdiction has been brought before the WTO DSU, clear answers have not been extracted. For instance in the *Mexico- Tax measures on Soft Drinks* case[214] the appellate body left unanswered the question as to how a WTO tribunal should deal with a forum selection clause in a regional trade agreement. This scenario brings out an important limitation of the efficacy of the NAFTA forum selection clause in achieving its

[211] GATT Dispute settlement, Article 2005 (7) available at *http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=153#A2005* (accessed 22 April 2013)
[212] GATT Dispute settlement, Article 2007 available at *http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=153#A2007* (accessed 22 April 2013).
[213]Agricultural Products Tarrification Case (US vs Canada)- US requested consultations at NAFTA. The dispute involved both GATT and NAFTA issues but the US did not have an effective alternative to NAFTA chapter 20 as Canada was implementing WTO obligations which lead to alleged violations of the NAFTA, *Canada- Certain Measures Concerning Periodicals (DS31) case* (US vs Canada)- US requested consultations under the WTO DSU.
[214] Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf* (accessed 30 January 2013).

aim. In simple terms, the forum selection clause in the NAFTA may not be applicable at the WTO. The writer hereof is of the opinion that NAFTA panel would not have a difficulty with giving effect to the NAFTA forum selection clause. This aforementioned opinion is based on the assumption that since the forum selection clause is contained within the NAFTA, there should not be much contention.

It is submitted that the abovementioned limitation could be augmented or pacified by a tribunal faced with a question of whether jurisdiction should be exercised by it or otherwise. It is further submitted that where there is no cooperation between the concerned adjudicatory bodies, it is entirely at the discretion of a tribunal faced with such a question as the abovementioned one to be receptive to arguments for the application of forum selection clauses contained in regional trade agreements.

Another limitation of the NAFTA forum selection clause is that it may appear to be applicable where the same dispute could be brought before the NAFTA panel or the WTO panel. Article 2005 (1) of the NAFTA reads:

> ' ... disputes regarding any matter arising under both this Agreement and the *General Agreement on Tariffs and Trade* , any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.'

It is the writer's opinion that the above clause could be interpreted as meaning the same dispute arising out of the two different agreements. The writer holds that view because generally a forum selection clause is meant to preclude parallel proceedings and re-litigation in respect of the same dispute, rather than different disputes. The difficulty is that the dispute may arise in the different agreements but the NAFTA panel and the WTO may construe the word dispute differently. The legal dispute would be different in each forum even if the *de facto* dispute is fundamentally the same. Thus the legal basis of a dispute would be in two different agreements.

For instance, a NAFTA party may allege violation of national treatment under the NAFTA whilst it is possible to do so under the relevant WTO covered agreement. The legal action

would be different but the measure complained of would be the same. Therefore if an adjudicating body opts to narrowly construe dispute by focusing on the legal dispute or *de jure* dispute, a forum selection clause will be ineffective because the legal action can never be the same if based on two different agreements. At the NAFTA panel the proceedings will be in respect of the NAFTA whilst before the WTO panel the proceedings will be in respect of a WTO covered agreement.

Once again, as like the question of whether to exercise jurisdiction or not, it is at the discretion of a judicial body faced with the task of determining whether it is the same dispute to opt for a narrow construction or broader construction. A broader construction of dispute appears to be the option that could address jurisdictional conflict since it will look beyond the legal basis and define dispute by reference to the trade measure complained of or other issues that are subject the subject of the complaint.

It is the author's view that a narrow construction appears to place adjudicatory bodies in glass houses, indifferent to the existence of jurisdictional overlap and its possible consequences. This indifference can result in a judicial body exercising jurisdiction over aspects of a dispute for which it has competence, oblivious to the fact that the dispute could be better resolved in another forum. This could lead to multiple proceedings over the same de *facto* dispute and eventually contradictory decisions.

This narrow construction could be demonstrated in the *Mexico- Tax measures on Soft Drinks* case.[215] Although Mexico in its preliminary arguments did not request the WTO to test the application of the NAFTA forum selection clause, the WTO appellate body was faced with a matter composed of more than one aspect which only one could be resolved by the WTO. In view of the fact that it was a broad trade dispute, Mexico requested the panel to declare by way of a preliminary ruling that the matter that the dispute in its totality went beyond the WTO jurisdiction since NAFTA the panel could address the matter as a whole.[216] In this case

[215] Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf* (accessed 30 January 2013).

[216] Biachi A, Gradoni L and Samson M 'Developing countries, countermeasures and WTO: Re-interpreting the DSU against the backjground of international law' available at *http://ictsd.org/downloads/2009/02/reinterpreting_dsu1.pdf* (accessed 22 April 2013).

the NAFTA panel was in a position to consider both the legality of the United States of America (US) quotas on import of Mexican sugar and the appropriateness of Mexico's retaliatory measure under the NAFTA.

The above claim by Mexico was rejected and in its response, the panel considered that the DSU gave it no discretion to decline jurisdiction once a WTO member has requested a panel concerning the violation of its WTO right.[217] The WTO then focused on the dispute in respect of which the US had requested the establishment of a panel. The WTO confined itself to the *de jure* dispute and did not consider the dispute holistically but instead 'salami sliced' the dispute to address its share.

4.7 Lessons and Recommendations for the proposed Tripartite Free Trade Agreement

4.7.1 Recommendation one: Inclusion of a forum selection clause in the proposed Tripartite Free Trade Agreement

Although the negotiators of the anticipated tripartite free trade agreement (TFTA) cannot be certain whether a forum selection clause would have any effect on the three regional economic communities (RECs) discussed in section 2.1 of chapter two, it is submitted and recommended that such a clause should be included in the TFTA. A clear advantage is that a forum selection clause would be applicable under the TFTA DSM; therefore it would assist in avoiding conflicts of jurisdiction. It would assist in the maintenance of regional trade law jurisprudence by avoidance of duplication of judgements related to the same matter. For instance, if partner state in both the TFTA and the East African Community initiates a matter at the Eastern African Court of Justice (EACJ), and simultaneously initiates the same matter at the TFTA DSM, the TFTA can invoke the forum selection clause and refuse to exercise jurisdiction on such a matter.

[217]Biachi A, Gradoni L and Samson M 'Developing countries, countermeasures and WTO: Re-interpreting the DSU against the background of international law' available at *http://ictsd.org/downloads/2009/02/reinterpreting_dsu1.pdf* (accessed 22 April 2013).

However, as the *Mexico- Tax measures on Soft Drinks* case[218], has demonstrated (although Mexico did not raise the claim of forum selection clause), forum exclusion clause may not prevent the respondent in the original forum from initiating proceedings before another forum. This observation buttresses the point that ultimately it is at the discretion of a tribunal faced with the task of testing the applicability of a forum selection clause to determine its effectiveness. In light of the aforementioned observation, it remains unclear whether a forum selection clause suggested for inclusion in the TFTA would be effective at the RECs DSMs. The RECs DSMs could be inclined to follow a jurisdictional analysis which is based on a parochial desire to maintain their legitimacy and relevance.

The emphasis of the above argument is that assuming the TFTA includes a forum selection clause similar to the one in the NAFTA, a TFTA party who disregards the forum selection clause under the TFTA and initiates proceedings at the EACJ would be liable for that violation before the TFTA DSM but there would be no legal impediment against double or successive proceedings since TFTA DSM and the EACJ would be considering different matters under different applicable law. This approach would definitely defeat the purpose of a forum selection clause because it would render the forum selection clause valid at the TFTA only. Therefore a matter that has been settled at the TFTA could be re-litigated at the RECs DSMs.

Since the East African Court of Justice (EACJ), the Common Market for Eastern and Southern Africa courts (COMESA court) and the dispute settlement under Annex VI of the SADC trade protocol do not have a forum selection clause[219], it would be logical for the RECs to take a holistic approach in terms of considering the broader definition of dispute, that is the *de facto* dispute and also in terms of the outlook of the general administration of justice. In this regard, the RECs should when faced with overlapping or successive disputes

[218]Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf (accessed 30 January 2013).
[219]SADC is commencing negotiations for a new tribunal see About SADC available at http://www.sadc. int/about-sadc/sadc-institutions/tribun/ (accessed 11 January 2013).
[220]See section 3.8.3 of chapter three, Res judicata is could be effective when dealing with sequential judgements since the declination of jurisdiction is based on an earlier ruling by another court on the same matter. Also see Pauwelyn J 'How to win a World Trade Organization dispute based on non-World Trade Organization Law Questions of jurisdiction and merits' (2006) 37 *Journal of World Trade* 1017.

consider applying principles of private international law such as *res judicata*[220] and where principles are not applicable, apply comity as part of judicial cooperation within the African trade law arena.

As for the Southern African Development Community (SADC), a lot or very little could be said about it. In section 2.5 of chapter two it is mentioned that the SADC tribunal has was suspended and later a resolution was made to re-negotiate the SADC tribunal. It appears that SADC tribunal is now in limbo and suffering a serious democratic deficit.[221] The attention that it may have grabbed during its demise of suspension has since fizzled off as there is not much discussion about it in the media or within the academic community. Be that as it may its saga continues on the ground as a South African court has issued a judgement which confirms some aspects of the SADC tribunal judgement that was made against the Republic of Zimbabwe in an earlier ruling.[222] The progress or rather the regress that has since occurred is the view that summit of August 2012 has expressed, that is, to limit access to the tribunal to states only.[223] SADC at this stage of re-looking at the tribunal could introduce some positive aspects such as an exclusive forum selection clause that could regulate choice of forum between the SADC tribunal and the TFTA DSM. In the meantime the recommendation of application of comity applies for the dispute settlement under Annex VI.

[221]Erasmus G 'Another chapter in the SADC Tribunal saga: South African court confirms the Tribunal's costs order' available at *http://www.tralac.org/files/2012/10/S12WP092012-Erasmus-AnotherChapter-TribunalCostsOrder-20121003fin.pdf* (accessed 7 May 2013).

[222]Erasmus G 'Another chapter in the SADC Tribunal saga: South African court confirms the Tribunal's costs order' available at *http://www.tralac.org/files/2012/10/S12WP092012-Erasmus-AnotherChapter-TribunalCostsOrder-20121003fin.pdf* (accessed 7 May 2013).See also The Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12 [2013] available at *www.saflii.org.za* (accessed 28 August 2013).

[223]Erasmus G 'Another chapter in the SADC Tribunal saga: South African court confirms the Tribunal's costs order' available at *http://www.tralac.org/files/2012/10/S12WP092012-Erasmus-AnotherChapter-TribunalCostsOrder-20121003fin.pdf* (accessed 7 May 2013).

4.7.2 Recommendation two: Judicial cooperation between the anticipated Tripartite Free Trade Area and the three regional economic communities

As a way of assisting the region's legal systems to work together in harmony, rather than at cross purposes, especially since there is a possibility of inconsistent rulings[224], the three RECs would have to consider the application of comity. Comity is a domestic law principle designed to instil judicial restraint in cases where there are issues of overlapping jurisdiction.[225] It has been argued that comity is a concept with a long legal and political pedigree[226] and described as almost having as many meanings as sovereignty.[227] From the above descriptions it is deducible that the doctrine of comity has not really crystallised in the international legal arena.

Comity does not impose a legal obligation on the courts but it is rather a flexible doctrine that enables cooperation of adjudicating bodies within the international legal community.[228] It allows a court to decline to exercise jurisdiction in matters that it deems would be appropriately adjudicated by another forum or that the other forum maybe more competent to hear the matter. In this regard, it could function as a principle for resolving issues associated with overlapping jurisdiction. A court faced with a case that involves overlapping or successive proceedings would be permitted under comity to limit its jurisdiction where it considers that exercise of that jurisdiction would be inappropriate in that particular matter.

Although this is an attractive option for the RECs DSMs, they may be unwilling to use their inherent discretionary powers to apply this doctrine. This may be due to the fact that the said

[224]See section 3.7 of chapter three.

[225]Henckels C 'Overcoming jurisdictional isolationism at the WTO-FTA nexus: A potential approach for the WTO' (2008) 19 *The European Journal of International Law* 584.

[226]Slaughter A 'A global community of courts' (2003) 44 *Harvard International Law Journal* 205.

[227]Slaughter A 'Court to Court' (1998) 92 *American Journal of International Law* 708.

[228]Henckels C 'Overcoming jurisdictional isolationism at the WTO-FTA nexus: A potential approach for the WTO' (2008) 19 *The European Journal of International Law* 584.

DSMs may view this approach as diminution to their esteem and relevance and most importantly from the perspective of the African region where resources are limited; it may be viewed as a threat to the security of funds generated through court process.

In order to retreat from the abovementioned possible perceptions, the RECs DSMs would have to retrace their purpose, recognise and appreciate the 'bigger picture' which is integration. It is the author's view that integration would not bring change and bear benefits to the African region if it only goes so far as stating the rules of the game, which is how trade is supposed to be conducted between nations but disintegrate when it relates to addressing violation of those rules. The author hereof submits that the RECs DSMs, as well as the TFTA DSM would have to acknowledge judicial comity as a means of integration whereby the EACJ can stay proceedings where there are related proceedings before the TFTA. It should be noted that declining jurisdiction does not equate to deference to a superior judicial body as there is no hierarchy between the RECs and the TFTA DSM. As Slaughter sums it up:[229]

> 'Comity requires more than consultation born of intellectual curiosity. Its expressions and appreciation of different assignments and a global allocation of judicial responsibility; sharpened by the realization that the performance of one's court's function increasingly requires cooperation with others. On the other hand, it does not import subordination or even the more subtle constraints of ritual deference.'

The writer hereof submits that using the inherent powers in the RECs DSMs to apply comity could be a useful pragmatic tool to solve issues of jurisdictional overlap where principles of private international law such as *res judicata* are not applicable. This form of jurisdictional cooperation is therefore recommended for the RECs when faced with jurisdictional overlap issues. The UNCLOS tribunal will be examined in the next section as it has experienced a multi-faceted case and in the process applied a holistic view in that case, which lead to it declining to exercise jurisdiction.

4.7.2.1 Experience of comity in the United Nations Convention on the Law of the Sea

One of the cases where it was found that a dispute before one tribunal was inextricably connected to another antecedent or concurrent dispute is the *Southern Bluefin Tuna (New*

[229] Slaughter A 'Court to Court' (1998) 92 *American Journal of International Law* 711.

Zealand v Japan; Australia v Japan) provisional measures case[230] (hereinafter referred to as the *Southern Bluefin Tuna* case). In 1993, Australia, Japan and New Zealand a convention on the conservation of southern bluefin tuna (hereinafter referred to as the 1993 Tuna Convention). Japan later unilaterally decided to engage in what it called an 'experimental fishing program' which it legality was then challenged by Australia and New Zealand under the 1993 Tuna Convention, the United Nations Convention on Law of the Sea (UNCLOS) and customary international law.[231] Acknowledging that the 1993 Tuna Convention and the UNCLOS were applicable to the dispute, the UNCLOS arbitral tribunal found that carving out or 'salami slicing'[232] elements of a dispute for adjudication was unwarranted. The tribunal was of the view that finding that the UNCLOS dispute was distinct from the 1993 Tuna Convention would be artificial.[233] The tribunal declined jurisdiction over the UNCLOS part on the basis of its single dispute theory despite the compulsory jurisdiction of the UNCLOS.[234]

This case demonstrates that formal coordination among international tribunals could address the issues of jurisdictional overlap which tend to lead to segmentation of international law and ultimately conflicting regimes. It further demonstrates how adoption of a principle such as comity could assist in resolving such issues.

4.7.2.2 Threshold of application of comity

A question that might linger in the minds of those considering applying comity maybe whether considering broader issues in trade cases would not open floodgates-type scenario. The above

[230] *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) provisional measures* case available at www.itlos.org/index.php?id=62 (accessed 25 April 2013).
[231] Romano C 'The Southern Bluefin Tuna Dispute: Hints of the World to Come... Like It or Not' available at http://class.lls.edu/spring2007/intlenviron-romano/documents/SouthernBluefinTuna.pdf (accessed 25 April 2013).
[232] Pauwelyn J 'How to win a World Trade Organization dispute based on non-World Trade Organization Law Questions of jurisdiction and merits' (2006) 37 *Journal of World Trade* 1015. Pauwelyn describes the splitting out of a dispute as salami slicing.
[233] Henckels C 'Overcoming jurisdictional isolationism at the WTO-FTA nexus: A potential approach for the WTO' (2008) 19 *The European Journal of International Law* 589.
[234] Henckels C 'Overcoming jurisdictional isolationism at the WTO-FTA nexus: A potential approach for the WTO' (2008) 19 *The European Journal of International Law* 589.

concern was noted in the *Mexico- Tax measures on Soft Drinks* case[235] where it was noted that considering broader issues of that case would leave the factors which could be taken into account limitless. This concern seems to be valid to the extent of considering the circumstances in which the power to apply judicial comity should be exercised by a judicial body. In view of this concern it would be prudent for adjudicating bodies to exercise inherent powers cautiously and in the interest of the overall system.

Therefore, the proposed approach for the RECs DSMs, which is to exercise their inherent powers to decline jurisdiction might create uncertainty in the adjudication of trade disputes if left untrammelled. It is the writer's view that the threshold for application f comity at the RECs DSMs and the TFTA nexus could be confined to situations where the disputes arising in the TFTA and the RECs trade agreements are inextricably connected. These could be concurrent or antecedent disputes.

4.8 Conclusion

It has been observed that the NAFTA dispute settlement procedure, particularly settlement under chapter twenty of the NAFTA possesses characteristics similar to that of the WTO. Both systems have clearly defined steps that should be followed during dispute resolution process. The difference that has been note between the two systems is that unlike the WTO dispute settlement, NAFTA does not have an appeals procedure. It has been established in this chapter that the subject matter of NAFTA overlaps with that of the WTO agreement. As a result, disputes at the NAFTA may overlap with disputes under the WTO. In view of the fact that there is a possibility of the abovementioned overlap, NAFTA contains a forum selection clause that is meant to address disputes that may arise under both the General Agreement on Tariffs and Trade (GATT) which is a WTO covered agreement and the NAFTA.

The NAFTA forum selection clause makes any selected forum exclusive. This means that once a dispute settlement procedure has been initiated under either the NAFTA or the WTO, the other

[235] Mexico- Tax measures on Soft Drinks and other beverages (DS 308) available at *http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds308sum_e.pdf* (accessed 30 January 2013).

forum is precluded from exercising jurisdiction over that particular matter. It has been noted in this chapter that although the NAFTA parties have not violated their forum selection clause, this clause may not be able to prevent states from re-framing their dispute under the WTO law. The writer is of the view that the NAFTA forum selection clause may only have effect in s far as the NAFTA is concerned but may not be validated at the WTO since it would not be a WTO covered agreement violation. It is difficult to predict how the WTO may receive a forum selection clause if it was to be laid as a claim before the WTO panel. For the question of forum selection to arise the dispute has to the same hence it is important how the court or tribunal would construe dispute. Two possible opposing approaches arise, that is the narrow construction of dispute, which would confine itself to the legal basis of the dispute. This narrow approach has been referred to a *de jure* dispute. On the other hand, a court faced with a question of the applicability of a forum selection clause may opt for a broader construction which considers the broader issues surrounding the case. We refer to this as a *de facto* dispute. It is submitted that the broader construction of dispute is preferable as the narrow one would render the forum selection clause ineffective.

In light of the analysis of the efficacy of the NAFTA forum selection clause, the writer hereof recommends its inclusion in the TFTA. The reason for the inclusion of a forum selection clause is that the TFTA would not have difficulties in applying it as it would originate from the TFTA and would assist in regulating overlapping disputes. A limitation of the efficacy of the TFTA forum selection clause would arise where the forum selection clause from the TFTA has to be addressed at one of the RECs DSMs. Unlike at the TFTA where the clause would be acceptable, the RECs DSMs may be textual and decide to consider the *de jure* dispute only to the exclusion of the *de facto* dispute. In view of this possible problem the writer submits that there is need for judicial cooperation within the African region in order to achieve the trade agenda and integration in general. The writer suggests that the RECs have to consider applying comity where they are faced with antecedent and parallel disputes. Comity would permit the RECs to decline jurisdiction where they are of the view that another court would be more appropriate. In conclusion the RECs are cautioned not to leave the application of comity untrammelled which may affect the certainty and predictability. Inextricably connected disputes are suggested as a threshold for the application of comity.

CHAPTER FIVE

CONCLUSION

Ambitious as they are, the tripartite free trade agreement (TFTA) negotiations have begun and they are between member states from the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC).[236] This is an important and progressive initiative for trade in the African region. It is important because it could create a wider market for traders in Africa and it is progressive as it could promote intra-African trade which could lead to optimum use of the African raw materials. The importance of regional integration such as the proposed TFTA cannot be over emphasised especially in view of the fact that Africa is characterised by countries with small economies and markets. It is only logical to hold a view that integrating these economies and markets may facilitate efficiencies in trade and in turn propel development within the African region.

There is no doubt that for this initiative to work and bear the desired results, it has to be well designed right from its founding documents. The design of the TFTA is crucial as it may its downfall because a poor design may prove difficult if not impossible to implement. The writer acknowledges that other factor such as political will may play a role in the implementation stage. There are various important institutions[237] in the proposed TFTA but this study focused on the judicial organ of the TFTA or its dispute settlement mechanism (DSM) *vis a vis* the existing DSMs from the RECs. This is a vital organ which should be effective and its effectiveness can contribute to the success of the TFTA.[238]

It has been established in section 2.7.3 of chapter two of this study that the RECs and the TFTA basically deal with the same subject matter and in turn have similar substantive obligations. They all seek to address trade issues such as tariff liberalisation, production and infrastructure. They have

[236] See section 1.1 of chapter 1.
[237] Include inter alia the secretariat, council of ministers etc.
[238] See section 2.2 of chapter 2.

a common goal of reaching the status of a monetary union at some point in time. Thus, the RECs and the TFTA have overlapping mandates and visions.[239] It has been observed that the RECs DSMs and the TFTA DSM would be independent of each other and would not be in any hierarchical form as is the norm in domestic legal systems.[240] The overlap is also apparent in the institutions created or to be created within these agreements, particularly the institutions dealing with dispute settlement. There is possible significant jurisdictional overlap between the RECs DSMs and the TFTA DSM.[241] Jurisdictional overlap is discussed in this study as a situation where there is double breach, which is where a violation of a particular obligation in one agreement is a violation in another agreement.[242] Jurisdictional overlap or parallel jurisdiction makes it possible for two courts to hear the same dispute.

It has been observed in this study that such jurisdictional overlap may create the luxury of forum shopping.[243] Two main implications associated with forum shopping were identified. The first one being parallel proceedings, where the same dispute is simultaneously initiated in two or more courts. The second one is re-litigation where a dispute that has been settled in one court is re-opened or re-litigated in another court. These problems can be costly to member states in terms of finances and they can jeopardise the African trade law system as a whole because of inconsistent rulings that may be reached in the various courts.[244]

Borrowing from the experiences between the North American Free Trade Agreement (NAFTA) dispute settlement mechanism and the World Trade Organisation (WTO) dispute settlement mechanism, a recommendation that has been put forward for the TFTA is the inclusion of an exclusive forum selection clause.[245] The TFTA should permit its member states to choose a DSM which could settle a particular dispute but once chosen that DSM should be exclusive. This approach acknowledges jurisdictional overlap and attempts to regulate it. This regulation may assist

[239] See section 2.7.3 of chapter 2.
[240] See section 2.7.3 of chapter 2.
[241] See section 2.7.3 of chapter 2.
[242] See section 2.7.3 of chapter 2.
[243] See section 3.1 of chapter 3.
[244] See section 3.7 of chapter 3.
[245] See section 4.5.1 of chapter 4.

will definitely be an effective tool for resolving issues of jurisdictional overlap at the TFTA DSM. It is observed in section 4.5.1 of chapter four that the recommended forum selection clause may only be effective in so far as its application at the TFTA DSM. This means that it may not be recognised at the RECs DSM such that it would not be applicable at that level. Confronted with this impediment, it is recommended that there should be judicial cooperation between the TFTA and the RECs.[246] Such cooperation should be the recognition and application of comity in cases where there is jurisdictional overlap. The RECs DSMs should not operate as self contained a regimes but instead work harmoniously with the TFTA because the ultimate goal is the same, which is an alive to the fact that the TFTA may be a competent adjudicatory body for particular disputes. Judicial cooperation would allow the RECs DSMS to decline jurisdiction where they determine that the dispute brought before as a REC DSM is inextricably connected to the one that is or was before the TFTA DSM and that the TFTA DSM is the competent judicial body to settle the whole matter.[247] This approach would assist in avoiding re-litigation and unnecessary segmentation of cases.

Jurisdictional overlap between the TFTA DSM and the RECs DSM will have to be addressed at some point in time during the interactions of the two layers of regimes. Developing a form of regulatory tool such as an exclusive forum selection clause at the TFTA level is progressive and will go a long way in assisting the TFTA DSM to resolve issues of jurisdictional overlap between it and the RECs DSMs. Judicial cooperation will also ensure that the RECs DSM are on board in terms of resolution of cases where there is jurisdictional overlap. Instead of having a segmented trade law system, the two recommended solutions would propel the formation of a unified regional trade law system. It is without a doubt that they would play an important role in regional integration.

26,503 words

[246] See section 4.5.2 of chapter 4.
[247] See section 4.5.2 of chapter 4.

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