

**THE IMPLICATIONS OF THE AFRICAN CONTINENTAL FREE TRADE AREA ON
EXISTING REGIONAL ECONOMIC COMMUNITIES IN AFRICA**

**MINI THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE
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DECLARATION

I, Aaron Tembo declare that The Implications of the African Continental Free Trade Area on Existing Regional Economic Communities is my own work, that it has not been submitted for any degree or examination at any other university, and that all the sources that I have used have been indicated and acknowledged by complete references.

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KEY WORDS

African Continental Free Trade Area (AfCFTA)

AfCFTA Agreement

African Economic Community (AEC)

African Union (AU)

Common Market for Eastern and Southern Africa (COMESA)

East African Community (EAC)

Economic Integration

Protocol on Relations between the African Union and the Regional Economic Communities

Regional Economic Communities (REC)

Regional Integration

Southern African Development Community (SADC)

Tripartite Free Trade Area (TFTA)

Treaty Establishing the African Economic Community



LIST OF ACRONYMS AND ABBREVIATIONS

AEC	African Economic Community
AfCFTA	African Continental Free Trade Area
AMU	Arab Maghreb Union
AU	African Union
CEN-SAD	Community of Sahel-Saharan States
CET	Common External Tariff
COMESA	Common Market for Eastern and Southern Africa
CU	Customs Union
DRC	Democratic Republic of Congo
EAC	East African Community
ECCAS	Economic Community of Central Africa
ECOWAS	Economic Community of West African States
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
IGAD	Inter-Governmental Authority on Development
LPA	Lagos Plan of Action
OAU	Organisation of African Unity
REC	Regional Economic Community
SADC	Southern African Development Community
TFTA	Tripartite Free Trade Area
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organisation

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CHAPTER ONE

INTRODUCTION

1.1 Background

Countries world over are employing different strategies to grow their economies and improve the living standards of their people. Among the initiatives being employed is regional economic integration. Regional economic integration is seen as a pathway to ensure easier access to bigger markets and increased levels of trade resulting in higher economic growth.¹ Africa is not an exception to the foregoing. Indeed, Africa has since the early years of independence in the 1960s been pursuing the regional integration agenda. Independent Africa perceived increased trade through regionalism as the universal remedy for the twin problems of slow rates of economic growth and alleviation of poverty on the continent.²

The then Organisation of African Unity (OAU) supported by the United Nations Economic Commission for Africa (UNECA) articulated its vision of an economically integrated Africa in the Lagos Plan of Action of 1980.³ In the Lagos Plan of Action, the OAU set itself the objective of establishing the African Economic Community (AEC).⁴ The Lagos Plan of Action was followed by the signing of the Treaty Establishing the African Economic Community (the 'Abuja Treaty') in 1991. The Abuja Treaty outlined a six stage roadmap to the establishment of the AEC.⁵ According to the roadmap, the

¹ Jordaan CA 'Regional Integration in Africa versus higher levels of intra-Africa trade, Development Southern Africa' available at https://www.researchgate.net/publication/262577370_Regional_integration_in_Africa_versus_higher_levels_of_intra-Africa_trade (accessed on 22 May 2022).

² Draper P, Halleson D & Alves P 'From Spaghetti to Cannelloni? SACU Regional Integration and the Overlap issue in Southern Africa' available at https://media.africaportal.org/documents/SAIIA_TRADE_POLICY_REPORT_15_-_FROM_SPAGHETTI_TO_CANNELLONI.pdf (accessed 22 May 2022).

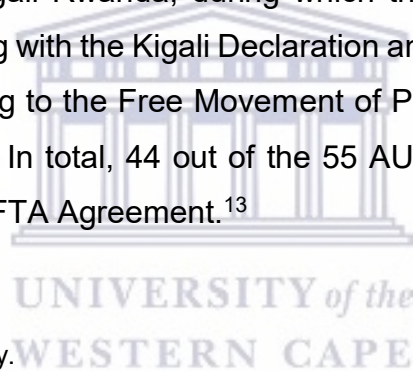
³ Lagos Plan of Action for the Economic Development of Africa available at <https://www.nepad.org/publication/lagos-plan-of-action> (accessed 22 May 2022).

⁴ Annex 1 to the Lagos Plan of Action for the Economic development of Africa available at <https://www.nepad.org/publication/lagos-plan-of-action> (accessed 15 May 2022).

⁵ The six stage roadmap for the establishment of the African Economic Community is explained in more detail in chapter two of this mini thesis.

AEC was to be established through a process of coordination and harmonisation of the activities and programmes of the Regional Economic Communities (RECs).⁶ To this effect, the OAU⁷ set out among other things to strengthen existing RECs and to establish new ones, where they did not exist.⁸ The RECs were eventually to be absorbed into the African Common Market, the penultimate stage to the establishment of the AEC.⁹

Similarly with the AEC, the African Continental Free Trade Area (AfCFTA) was to be established through a process of co-ordination and harmonisation of REC FTAs.¹⁰ This was to happen at stage four of the Abuja Treaty roadmap.¹¹ However, due to the uneven progress of the RECs at deepening regional economic integration, the African Union (AU) in 2012 took a decision to fast track the establishment of the AfCFTA by an indicative date of 2017.¹² On 21 March 2018, the African leaders held an Extraordinary Summit in Kigali Rwanda, during which the AfCFTA Agreement was presented for signature along with the Kigali Declaration and the Protocol to the Treaty Establishing the AEC relating to the Free Movement of Persons, Right of Residence and Right of Establishment. In total, 44 out of the 55 AU member states signed the consolidated text of the AfCFTA Agreement.¹³



⁶ Article 4(1)(d) of the Abuja Treaty.

⁷ The OAU was established in 1963 to among other things rid the continent of the remaining remnants of colonialism and apartheid. In 2002, the OAU was replaced with the African Union (AU) which sought to refocus attention from the fight for decolonisation and ridding the continent of apartheid to increased cooperation and integration of African states (See About the African Union available at <https://au.int/en/overview> (accessed 22 May 2022)). The OAU is thus the predecessor organisation to the AU. The AU was established in 2000 and officially launched in 2002 (See Undombana JN 'A Step Closer: Economic Integration and the African Continental Free Trade Area (2020) 31 *DUKE Journal of Comparative International Law* 5.).

⁸ Article 6 of the Abuja Treaty.

⁹ Article 6 of the Abuja Treaty.

¹⁰ Article 6 of the Abuja Treaty.

¹¹ Article 6 of the Abuja Treaty.

¹² African Union 'Decisions, Resolutions and Declarations of the 18 Ordinary Session of the African Union available at <https://au.int/en/decisions-21> (accessed 22 May 2022).

¹³ The number of signatories to the AfCFTA Agreement as at April 2022 reached 54 with Eritrea being the only country remaining to sign the Agreement. The number of ratifications on the other hand reached 41. (See African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents

The Agreement which entered into force on 30 May 2019 following the deposit of the 22 instrument of ratification, seeks among other things to create a single market for goods and services, with free movement of business persons and investments, and thus pave way for accelerating the establishment of the continental union.¹⁴ The AfCFTA is part of Africa's broader vision of establishing the (AEC).

The AfCFTA is a flagship project of the African Union's (AU) Agenda 2063, a blueprint for attaining inclusive and sustainable development across the continent over the next 50 years.¹⁵ It aims to boost intra-African trade by providing a comprehensive and mutually beneficial trade agreement among the member states, covering trade in goods and services, investment, intellectual property rights and competition policy.¹⁶ The AfCFTA is expected to bring together all 55 member states of the AU covering a market of more than 1.3 billion people, including a growing middle class, and a combined gross domestic product of more than US\$3.4 trillion.¹⁷ In terms of numbers of participating countries, the AfCFTA is the world's largest free trade area since the formation of the World Trade Organisation.¹⁸ Estimates from the UNECA suggest that the AfCFTA has the potential both to boost intra-Africa trade by 52.3 percent by eliminating import duties and to double this trade if non-tariff barriers are also reduced.¹⁹

available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#moredownloads> (accessed 22 May 2022)).

¹⁴ Article 3 of the AfCFTA Agreement.

¹⁵ The African Union 'The African Continental Free Trade Area' available at <https://au.int/en/african-continental-free-trade-area> (accessed 30 April 2022).

¹⁶ African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#moredownloads> (accessed 30 April 2022).

¹⁷ The World Bank 'The African Continental Free Trade Area' available at <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> (accessed 29 April 2022).

¹⁸ African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#moredownloads> (accessed 29 April 2022).

¹⁹ African Union (AU) 'African Continental Free Trade Area: Questions and Answers' available at <https://repository.uneca.org/handle/10855/43253> (accessed 30 April 2022).

1.2 Problem Statement

RECs in Africa predominantly follow a linear path to economic integration.²⁰ The process involves establishment of a free trade area (FTA), a customs union (CU), a common market, a monetary union and eventually an economic community. Some RECs have a few variations to the linear path,²¹ however, by and large, the process is as described above. Likewise, the AU follows a similar approach to establishing the AEC.²² The AU did not plan to establish the AfCFTA on the basis of an agreement.²³ Rather, the AfCFTA was to come about through a process of co-ordination and harmonisation of REC programmes. The RECs were thus considered as building blocs for the establishment of the AEC.²⁴

The existence of FTAs at continental and REC level suggests that there will be multiple FTAs in operation on the continent until the progress of the AfCFTA subsumes the REC FTAs.²⁵ The forgoing also means that the AU and the RECs going forward will be undertaking economic integration programmes in parallel using the linear model of economic regional integration. There is urgent need to reconcile the two processes²⁶ in order to avoid needless duplication of efforts in the pursuit of regional economic integration in Africa. This mini thesis seeks to investigate the implications of the AfCFTA on the continued existence of the existing RECs with particular focus on the

²⁰ Olayiwola W 'Governing the Interface between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges' available at <https://www.tralac.org/documents/resources/cfta/4229-governing-the-interface-between-the-afcfta-and-recs-ftas-issues-opportunities-and-challenges-uneca-november-2020.html> (accessed 28 June 2021).

²¹ The EAC for example seeks to establish a political federation as its ultimate objective.

²² Article 6 of the Abuja Treaty.

²³ Kuhlmann K & Agutu LA 'The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development (2020) 51 *Georgetown Journal of International Law* 755.

²⁴ Bello, AS 'The Prospects and Challenges of African Continental Free Trade Area Agreement' (2018) 26 *Sri Lanka Journal of International Law* 122.

²⁵ Article 19 of the AfCFTA Agreement requires member states belonging to RECs that have achieved higher levels of regional integration to maintain such higher levels until trade liberalisation levels of the AfCFTA rises above them.

²⁶ Both the AU and the RECs are pursuing economic integration using the linear model of economic integration. This is likely to lead to duplication of efforts as the same economic integrations activities and programmes being undertaken at REC level, will also be undertaken at continental level.

Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC).

COMESA is the largest REC in Africa with 21 member states and covering a land mass of 118 million square kilometres.²⁷ It is founded upon a Treaty that is comprehensive covering various areas of co-operation among its member states, besides regional economic integration. Additionally, COMESA is among the few RECs in Africa that articulates a clear vision of how it seeks to relate with the AEC, once the latter is established.²⁸

The EAC on the other hand is one of the RECs in Africa that has made tremendous progress on the economic integration front having already established a customs union and a common market and working towards establishing a monetary union and a political federation.²⁹ For SADC, the REC is home to the biggest economy in Africa, South Africa, and also envelopes a mini-REC within itself, the Southern African Customs Union comprising Botswana, Lesotho, Namibia, South Africa and Eswatini.

Interestingly the three RECs under consideration are also making steady progress towards establishing a Tripartite Free Trade Area (TFTA). As of April 2022, 10 member states had ratified the TFTA Agreement with four more ratifications needed to attain the ratification threshold for entry into force.³⁰ One would have expected the TFTA ratification process to lose momentum following the establishment of the AfCFTA. However, the contrary seems to be the case, with the three RECs working ever so hard to realise their objective of establishing a TFTA. Ratifications have increased from

²⁷ COMESA Brochure available at <https://www.comesa.int/wp-content/uploads/2019/03/Comesa-Brochure.pdf> (accessed 15 February 2022).

²⁸ COMESA seeks to convert itself into an organic entity of the AEC. The Abuja Treaty on the other envisages absorption of the RECs into the African Common Market, leading to the establishment of the AEC.

²⁹ United Nations Economic Commission for Africa (UNECA) 'Assessing Regional Integration in Africa: Aria IX' available at <https://repository.uneca.org/handle/10855/42218> (accessed on 15 February 2022).

³⁰ Gakunga M 'New Deadline set for Ratification of the Tripartite Free Trade Area' available at <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/> (accessed 15 February 2022).

four at the time of signing of the AfCFTA Agreement on 18 March 2021 to 10 as of April 2022.³¹

1.3 Research Questions

This mini thesis will be guided by the following questions:

- What are the WTO rules on regional economic integration and to what extent have they aided regional economic integration in Africa?
- What is the AfCFTA and what are its objectives?
- What is COMESA, EAC and SADC and what are their objectives?
- What does the establishment of the AfCFTA mean for the future of COMESA, EAC and SADC?
- What possible recommendations can be made on the interplay between the AfCFTA and the RECs under consideration?

1.3 Significance of the Study

The RECs have for a long time been considered pivotal to the AUs plans of achieving Africa's continental economic integration. However, in addition to efforts to contribute towards the establishment of the AEC, most if not all RECs have objectives of achieving higher levels of economic integration for participating member states. As already alluded to above, a number of RECs seek to establish economic communities which is the highest form of economic integration. The RECs to this effect have developed programmes for achieving economic integration within their regions, have set timeframes for achievement of the set milestones and continue making strides towards achieving higher levels of economic integration.

³¹ Gakunga M 'New Deadline set for Ratification of the Tripartite Free Trade Area' available at <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/> (accessed 15 February 2022).

The decision by the AU to fast track the establishment of the AfCFTA on the basis of an Agreement as opposed to through a process of coordination and harmonisation of existing REC FTAs and CUs as envisaged in the Abuja Treaty, raises fundamental questions on the future of regional integration programmes for RECs in Africa. It has been suggested elsewhere that the AfCFTA introduces the concept of 'parallelism'³² in the implementation of economic integration programmes in Africa.³³ What is interesting to note is that the RECs despite being considered building blocs for the establishment of the AEC have objectives that do not completely align with what is provided in the Abuja Treaty. According to the Abuja Treaty, the RECs were only required to establish FTAs and CUs which the AU was then going to harmonise to create the continental FTA and CU. However, looking at the objectives of most of the RECs, most of them seek to achieve higher forms of economic integration such as establishment of Common Markets, Monetary Unions and Economic Communities. In search of rationality and coherence between the regional and sub-regional integration visions, the AU has developed a number of legal instruments that seek to define the relationship that should exist between the AEC and RECs.³⁴

It is important to consider whether the RECs should continue to pursue regional programmes along the lines of the linear model of regional integration, or whether there is need re-align REC priorities in terms of resource allocation in order to avoid duplication of efforts between regional and sub-regional initiatives. One respondent in a survey conducted by the United Nations Economic Commission for Africa is reported

³² Parallelism refers to a situation where regional integration programmes are pursued in parallel by the member states involved. In this case, the AU is pursuing regional economic integration at a continental level while the RECs are also pursuing regional economic integration within their regions. The situation is even worse for countries that belong to more than one REC, as they now have to add the AfCFTA to the number of RECs that they belong to. It should be noted however that while FTAs can exist in parallel, the same cannot be said of CUs as a country cannot belong to more than one CU. When time comes for the AU to establish a continental CU, the CU so established would have to immediately consolidate any REC CUs that may be in existence at the time. The concept of parallelism would, however, apply to a common market, and a monetary union.

³³ Erasmus G 'Making the AfCFTA and the RECs work' available at [Making the AfCFTA and the RECs work - tralac trade law centre](#) (accessed 15 February 2022).

³⁴ Udombana JN 'A Step Closer: Economic Integration and the African Continental Free Trade Area' (2020) 31 *DUKE Journal of Comparative International Law* 68.

to have stated that ‘the establishment of the AfCFTA implies the natural death for RECs.³⁵ Sebahizi observes that since one of the aims of the AfCFTA is to resolve the challenges of multiple trade regimes and overlapping memberships and expedite the continental integration processes, a political decision is required for the CFTA negotiations to be prioritised over all other intra-African trade negotiations including the TFTA. He notes that such a decision would be justified not only in view of rationalising the capacity but also financial resources.³⁶ Interestingly, most REC treaties have objectives that transcend achievement of milestones set out in the linear model of regional integration.³⁷

Another issue of note is that the RECs despite being considered as building blocs of the AfCFTA are in fact not members of the AfCFTA. The AfCFTA is member states driven with the RECs only being assigned an advisory role on the Committee of Senior Trade Officials. One would have expected the RECs to play a more prominent role in the establishment and operationalisation of the AfCFTA in line with the provisions of the Abuja Treaty which envisaged the establishment of the AfCFTA through a process of coordination and harmonisation of REC FTAs. However, the fact that the RECs, except for a few, have not been very successful in meeting the Abuja Treaty timelines for the establishment of the AEC may have motivated the decision to sideline the RECs in the implementation of the AfCFTA. It has, however, been observed that RECs have

³⁵ Olayiwola W ‘Governing the Interface between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges’ available at <https://www.tralac.org/documents/resources/cfta/4229-governing-the-interface-between-the-afcfta-and-recs-ftas-issues-opportunities-and-challenges-unece-november-2020.html> (accessed 15 February 2022).

³⁶ Sebahizi P ‘Fast Tracking the Continental Free Trade Area: Regional Economic Communities (RECs as Building Blocs) available at <https://www.tralac.org/documents/resources/cfta/4369-fast-tracking-the-cfta-recs-as-building-blocks-prudence-sebahizi-november-2016/file.html> accessed on 15 February 2022).

³⁷ The COMESA Treaty for example is very elaborate on provisions that address supply side constraints to regional trade. It provides among other things for cooperation in the development of transport and communications, cooperation in industrial development; cooperation in the development of energy; standardisation and quality assurance; cooperation in the development of science and technology and cooperation in agriculture and rural development (See Chapters 11, 12, 13, 15, 17 & 18, of the COMESA Treaty). EAC and SADC treaties and protocols equally have elaborate provisions on various areas of collaboration aimed at improving the livelihoods of their citizens (See Chapters 12, 13, 15 & 16 of the EAC Treaty as well as SADC Protocols on various areas of collaboration in SADC available at <https://www.sadc.int/about-sadc/overview/sa-protocols/> (accessed on 15 February 2022).

a wealth of experience and comparative advantage in engaging with their member states that could be leveraged to implement the AfCFTA.³⁸

This study therefore investigates the probable implications of the AfCFTA on the continued existence of COMESA, EAC and SADC. In addition, the study makes recommendations on the future relations of the AfCFTA and the RECs on one hand and the RECs and the AEC on the other.

1.4 Limitations of the Study

The study is restricted to a discussion of the implications of the AfCFTA on COMESA, EAC and SADC. The study could have included an analysis of the repercussions of the AfCFTA on all the eight AU recognised RECs, however, due to the study being a mini thesis, this was not possible. This notwithstanding, some of the findings of the study and the recommendations should apply to the other RECs, particularly that they all follow nearly the same approach to economic integration.

Furthermore, the study will be restricted to consideration of the three RECs in their individual capacities and not under the umbrella of the TFTA.

1.5 Methodology

A theoretical approach to the research will be undertaken in order to arrive at an answer to the research problem. This research will rely entirely on materials available from various sources including library research and internet sources. Primary resources will include the AfCFTA Agreement, the Abuja Treaty, the Treaty establishing COMESA, the Treaty establishing the EAC, Treaty establishing SADC, the Protocol on Relations and various regional integration protocols that have been adopted by the RECs in question. Secondary sources will include books, journal articles, position papers and other scholarly material.

³⁸ Olayiwola W 'Governing the Interface between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges' available at <https://www.tralac.org/documents/resources/cfta/4229-governing-the-interface-between-the-afcfta-and-recs-ftas-issues-opportunities-and-challenges-uneqa-november-2020.html> (accessed 15 February 2022).

1.5 Chapter Outline

This research is divided into five chapters.

Chapter One

Chapter one is the background to the mini thesis. It consists of the background to the research, statement of the problem and research questions, and significance of the problem, methodology and chapter outline.

Chapter Two

This chapter examines the WTO rules on regional integration and the extent to which they have aided regional integration. The chapter also examines AfCFTA, the background to its establishment, its objectives and proposed institutional structure.

Chapter Three

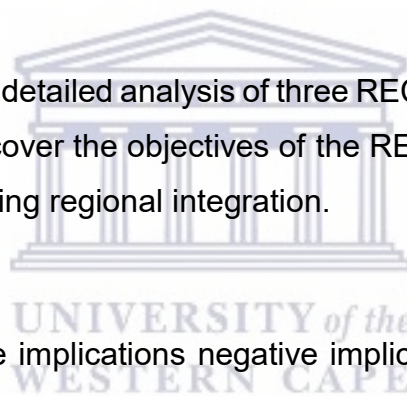
This chapter will undertake a detailed analysis of three RECs namely COMESA, SADC and EAC. The analysis will cover the objectives of the RECs, institutional set up, and the progress made in achieving regional integration.

Chapter Four

Chapter four will discuss the implications negative implications that the AfCFTA will have on the three RECs referred to above. The chapter will also discuss the future of the RECs following the establishment of the AfCFTA.

Chapter Five

This chapter concludes the mini thesis by making recommendations on the relationship that should exist between the AfCFTA and RECs what the roles of the RECs should be going forward.



CHAPTER 2

UNDERSTANDING THE AFRICAN CONTINENTAL FREE TRADE AREA

2.1 Introduction

On 21st March, 2018, African leaders re-affirmed their commitment to achieving regional economic integration at a continental level through the signing of the African Continental Free Trade Agreement which establishes the African Continental Free Trade Area (AfCFTA). The AfCFTA at the minimum is a free trade area that aims at boosting intra-Africa trade through the elimination of tariffs and non-tariff barriers.³⁹ As will be discussed later however, the AfCFTA goes beyond a free trade area as it encompasses several elements of a single market such as trade in goods and services, free movement of people, investment, intellectual property rights and competition policy.⁴⁰

Before delving into the AfCFTA in detail, it will be useful first, to contextualise the AfCFTA in light of the global intergovernmental body that regulates international trade, the World Trade Organisation (WTO). A majority of African countries are members of the WTO and are bound by the international trade rules established by the WTO. The WTO has rules in place, governing the establishment of free trade areas and conclusion of regional trade agreements.

³⁹ African Trade Policy Centre (ATPC) 'Brief on Regional Integration and the Continental Free Trade Area' (2017) 3 available at <https://www.tralac.org/news/article/11500-brief-on-regional-integration-and-the-continental-free-trade-area.html> (accessed 20 March 2022).

⁴⁰ United Nations Economic Commission for Africa (UNECA) '*Bringing the Continental Free Trade Area About: Assessing Regional Integration in Africa VIII*' (2017) 15 available at https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (accessed 20 March 2022).

2.1 World Trade Organisation

The WTO is an intergovernmental body that regulates international trade. The WTO officially commenced on 1 January 1995 under the Marrakesh Agreement signed by 124 nations on 15 April 1994.⁴¹ Prior to the establishment of the WTO, international trade, particularly trade in goods was governed by the General Agreement on Tariffs and Trade (GATT) 1947.⁴² The WTO is the largest international trade organisation in the world with 164 member states.⁴³

The WTO has as its main objective trade liberalisation.⁴⁴ It also sets and enforces rules for international trade and resolves trade conflicts between and among members.⁴⁵ Trade between WTO members is governed by WTO agreements which the members have negotiated and signed. The agreements prescribe acceptable conduct for the members and this helps to keep the world trading system predictable and reliable. Despite being signed by governments, the goal of the WTO agreements is to help producers of goods and services, exporters and importers conduct their business while allowing governments to meet social and environmental objectives.⁴⁶ The multilateral trading system is anchored on two foundational principles namely the Most-Favoured-Nation (MFN) principle and the National Treatment (NT) principle. The two principles, explained in more detail later, prohibit discrimination among WTO member states.

However, RECs by their very nature entail granting of preferences to participating states, which would seem to contradict the MFN and NT principles. In the discussion that follows,

⁴¹ The WTO available at https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 20 March 2022).

⁴² The WTO available at https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 20 March 2022).

⁴³ The WTO available at https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 20 March 2022).

⁴⁴ The WTO available at https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 20 June 2022).

⁴⁵ The WTO available at https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 20 March 2022).

⁴⁶ The WTO available at https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 20 March 2022).

the mini thesis in addition to defining the two principles will also highlight exemptions which permit the establishment of preferential trading arrangements such as RECs and the AfCFTA. The section will also highlight the requirement for free trade areas to be notified to the WTO and the two approaches to notification will also be discussed.

2.1.1 Most-Favoured Nation Principle

Art. I of the GATT 1994 as well as Art. II of the General Agreement on Trade in Services (GATS) provide for the MFN principal. The principal prohibits discrimination among WTO member states with respect to trade in goods and services. In other words, a member state is required immediately and unconditionally, to accord to other contracting parties, an advantage accorded to one member state.⁴⁷ The most-favoured nation principle is however not without exceptions. One notable exception relates to Regional Trade Agreements concluded pursuant either to Art. XXIV⁴⁸ of GATT 1994, Art. V⁴⁹ of the GATS or the enabling clause.⁵⁰

Member states that have entered into agreements establishing customs territories, free trade areas or agreements liberalising trade in services are permitted to accord each other more favourable treatment as a way of facilitating trade among themselves.⁵¹ One of the conditions for entering into such agreements however is that they should not raise

⁴⁷ Maruyama HW 'Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle' (2010) 46 *Standard Journal of International Law* 178.

⁴⁸ Article XXIV of the GATT allows members states of the WTO to enter into agreements establishing customs unions and free trade areas.

⁴⁹ Article V of the GATS allows Member States of the WTO to enter into agreements liberalising trade in services.

⁵⁰ GATT 1948 Decision of 28 November available at https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm (accessed 20 March 2022).

⁵¹ Maruyama HW 'Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle' (2010) 46 *Standard Journal of International Law* 180.

trade barriers in respect of non-members beyond the levels obtaining prior to the conclusion of the agreements.⁵²

A customs union (CU) according to GATT 1994 is understood to mean the substitution of a single customs territory for two or more customs territories so that duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union.⁵³ A free trade area (FTA) on the other hand is understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.⁵⁴ The enabling clause among other things allows developed countries, notwithstanding the provisions of Art. 1 of GATT 1994, to accord differential and more favourable treatment to developing countries of the WTO without according such treatment to other countries.⁵⁵ The enabling clause also allows less-developed member states to enter into regional or global arrangements for the mutual reduction or elimination of tariffs and non-tariff measures, on products imported from one another.⁵⁶

2.1.2 National Treatment Principle

The NT principle, like the MFN principle, is a foundational principle of the WTO.⁵⁷ It provides for equality of treatment between 'like' imported and domestic products and

⁵² Article XXIV of GATT 1994 and Article V of the GATS.

⁵³ Article XXIV (8)(a)(i) of GATT 1994.

⁵⁴ Article XXIV (8)(b) of GATT 1994.

⁵⁵ Choi W & Lee SY 'Facilitating Preferential Trade Agreements between Developed and Developing Countries: A Case for Enabling the Enabling Clause' (2012) 21 *Minnesota Journal of International Law* 1.

⁵⁶ GATT 1948 Decision of 28 November (1979) 191 available at https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm (accessed 20 March 2022).

⁵⁷ Lydgate E 'Sorting Out Mixed Messages under the WTO National Treatment Principle: A Proposed New Approach' (2016) 15 *World Trade Review*. 423.

services.⁵⁸ The main difference between the two is that the former polices domestic regulation and measures applied inside the border while the later prevents discrimination at the border in respect of like products and services originating from two or more member states.⁵⁹ The NT requirement both under GATT 1994 and the GATS, requires that domestic regulation or measures affecting trade in goods and services should not be applied so as to afford protection to like domestic products, services, and service suppliers.⁶⁰

2.1.3 The role of regional trade agreements and their relationship to the most favoured nation and the national treatment principles

Countries enter into regional trade agreements (RTAs) among other things, in order to boost trade among themselves by according each preferential trade terms.⁶¹ Preferential trade terms ordinarily should be a violation of the MFN principle discussed above, which prohibits discrimination among WTO member states with respect to trade in goods and services. However, since the WTO has as its main objective, trade liberalisation, WTO member states decided to make some exceptions to the MFN principle in order to encourage the formation of RTAs. For trade in goods, the exception is provided in Art. XXIV of the GATT 1994⁶² while for trade in services, the exception is provided in Art. V of the GATS.

As indicted above however, one of the conditions for entering into RTAs particularly for trade in goods, is that they should not raise trade barriers in respect of non-members

⁵⁸ Lydgate E (2016) 423.

⁵⁹ Lydgate E (2016) 423.

⁶⁰ Article III of GATT 1994 and Art. XVII of the GATS.

⁶¹ Mene W 'The African Continental Free Trade Area (AfCFTA): Boosting Intra-Africa Trade' (2020) 51 *Georgetown Journal of International Law* 751.

⁶² Article XXIV (5) of the GATT 1994 provides that this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free trade area or the adoption of an interim agreement necessary for the formation of a customs union or a free trade area. Article 5 of the GATS on the other hand provides that this Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration of the labour markets between or among the parties to such an agreement.

beyond the levels obtaining prior to the conclusion of the agreements.⁶³ Paragraph 6 of Art. XXIV of the GATT provides that if a CU or FTA leads to any increase in duties involving a specific WTO bound tariff item, the WTO member must negotiate an acceptable compensation package under the procedures set out in GATT Art. XXVIII. For trade in services, the conditions applicable are first, that such an Agreement should exempt citizens of the parties from the requirements concerning residency and work permits and secondly, that the Agreement should be notified to the Council for Trade in Services.⁶⁴

The NT principle still applies to CUs and FTAs. For trade in goods, this means that once imports have entered the CU, or the national frontier, in the case of an FTA, they must be treated no worse than the domestic products.⁶⁵ For trade in services, this implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers.⁶⁶ The AfCFTA and the member states will therefore be expected to adhere to the principles above especially that most countries in Africa are members of the WTO.⁶⁷

The next section looks at the requirement for notification of RTAs to the WTO.

2.1.4 Notification of Regional Trade Agreements to the World Trade Organisation

The WTO has a requirement for notification of RTAs concluded by member states. Notification of RTAs for trade in goods is done in two ways, either under Art. XXIV (7) of

⁶³ Article XXIV of GATT 1994 and Article V of the GATS.

⁶⁴ Article 5 of the GATS.

⁶⁵ The WTO available at https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 20 March 2022).

⁶⁶ World Trade Organisation (WTO) 'The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines' available at https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (accessed 20 March 2022).

⁶⁷ WTO Members and Observers available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed on 20 March 2022).

GATT 1994 or clause 4 of the enabling clause. The difference between the two is that under Art. XXIV of GATT 1994, contracting parties are required to eliminate tariffs and non-tariff barriers with respect to substantially all the trade⁶⁸ among themselves, while under the enabling clause, contracting parties are required simply to reduce or eliminate tariffs in accordance with agreed criteria and conditions. Art. XXIV of GATT 1994 is therefore more demanding compared to the enabling clause. The Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) were notified under the enabling clause while SADC was notified under Art. XXIV of the GATT 1994.⁶⁹ If a RTA also covers trade in services, it may be notified under Art. V of the GATS.

With regards to trade in goods, Simo⁷⁰ observes that the AfCFTA legal apparatus is silent on the preferred mode of notification. He further observes that if Art. XXIV of the GATT is considered too strict considering the developing status of African states, and the enabling clause too lenient a test for an area such as the AfCFTA aspiring for deeper integration, the alternative would be to notify the AfCFTA as an 'interim agreement' under Art. XXIV:8 of the GATT.⁷¹ Interim Agreements are agreements that have not yet reached the stage a FTA or CU.⁷²



⁶⁸ The General Agreement on Tariffs and Trade 1994 does not define the term 'substantially all trade'. To date, there is no agreed definition of the term although it is generally accepted that 'substantially all trade' should cover not less than 90 percent of trade (See Australian Government 'Negotiating free trade agreements: a guide' available at <http://www.oas.org/dsd/Tool-kit/Documents/ModuleV/Goode%20Reading%20Chapter%203.pdf> (accessed 20 March 2022).

⁶⁹ World Trade Organisation (WTO) 'Regional Trade Agreements' available at https://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 20 March 2022).

⁷⁰ Simo YR 'The African Continental Free Trade Area in a Decaying Multilateral Trading System: Questioning the Relevance of the Enabling Clause' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3501539 (Accessed 20 March 2022).

⁷¹ Simo YR (2019) 20.

⁷² Article XXIV (8) of the GATT 1994. Article XXIV(5)(c) has a requirement for interim agreements to include a plan and schedule for the formation of such a customs union or of such free trade area within a reasonable length of time.

With regards to trade in services, Simo⁷³ correctly observes that the AfCFTA Services Protocol clearly states its intention to conclude an Agreement compatible with Art. V of the GATS.

This mini thesis, however, proposes that the AfCFTA, with respect to trade in goods, should be notified under the enabling clause in order to accommodate the principles of variable geometry⁷⁴ and flexibility and special and differential treatment⁷⁵ enshrined in the AfCFTA Agreement. In the African context, variable geometry refers to “rules, principles and policies adopted in trade integration treaties that give members states particularly the poorest members: (i) policy flexibility and autonomy to pursue at slower paces timetable trade commitments and harmonisation objectives; (ii) mechanisms to minimise distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalisation commitments and policies...”⁷⁶ Special and differential treatment on the other hand refers to provisions in an agreement that gives least developed countries special rights and allows other members to treat them more favourably.⁷⁷

Having looked at the fundamental principles of the WTO and how they apply to RTAs, the sections that follow will discuss the background to the establishment of the AfCFTA, the objectives of the AfCFTA and the institutional framework of the continental initiative.

⁷³ Simo YR (2019) 20.

⁷⁴ Article 5 (c) of the AfCFTA Agreement.

⁷⁵ Article 5 (d) of the AfCFTA Agreement.

⁷⁶ Gathii T.J 'Variable geometry: A defining aspect of African RTAs. In African Regional Trade Agreements as Legal Regimes' 2009 *North Carolina Journal of International Law & Commercial Regulation* 609.

⁷⁷ World Trade Organisation 'Special and differential treatment' available at https://www.wto.org/english/tratop_e/dda_e/status_e/sdt_e.htm#:~:text=The%20WTO%20agreements%20contain%20special,abbreviated%20as%20S%26D%20or%20SDT (Accessed 20 March 2022).

2.2 Background to Establishment of the African Continental Free Trade Area

Despite the AfCFTA Agreement being signed in 2018, it should be noted that the vision to integrate the African continent economically did not begin with the historic summit of Kigali, Rwanda. The process began as far back as the 1970s and 1980s when the Organisation of African Unity (OAU) began mainstreaming economic development in order to make the continent self-reliant and self-sufficient.⁷⁸ From inception in the 1960s, the OAU was primarily concerned with the issue of de-colonisation of Southern Africa and ending apartheid in South Africa.⁷⁹ However with the independence of the former Portuguese territories in Africa, such as Mozambique, Angola, Cape Verde and Sao Tome and Principe, between 1974 and 1975, the OAU began to shift its focus from political emancipation to addressing the serious economic problems facing the African continent.⁸⁰ The new focus of the OAU, first found expression in the Kinshasa Declaration of December 1976, which for the first time, established the principle and defined the objectives, strategy and the stages for setting up the African Economic Community (AEC).⁸¹ The Kinshasa Declaration was followed by the Monrovia Declaration of 1979 which essentially spelt out guidelines and measures for national and collective self-reliance in economic and social development and re-affirmed the aspiration of the OAU to establish an African Common Market as a first step towards the creation of an AEC.⁸²

The above efforts, culminated in the adoption in 1980, of the Lagos Plan of Action for the Economic Development of Africa 1980-2000 ((hereafter the 'LPA'), articulating a regional

⁷⁸ Preamble to the Lagos Plan of Action for the economic development of Africa available at <https://www.nepad.org/publication/lagos-plan-of-action> (accessed 20 March 2022).

⁷⁹ Rose M.D 'Lagos Plan of Action – Legal Mechanisms for Co-Operation between the Organisation of African Unity and the United Nations Economic Commission for Africa' (1983) 27 *Journal of African Law* 6.

⁸⁰ Rose M.D (1983) 6.

⁸¹ Jeggan S 'Treaty Establishing the African Economic Community: An Introductory Essay (1993) 1 *South African Yearbook of International Law* 183.

⁸² Jeggan S (1993) 184.

development plan for Africa that included the formation of the African Common Market.⁸³ The LPA had an Annex titled the 'Final Act of Lagos' which both confirmed the main objectives of the LPA and also re-affirmed the implementation of the LPA by a commitment to set up by the year 2000, on the basis of a treaty to be concluded, an AEC, so as to ensure the economic, social and cultural integration of the continent.

2.2.1 The Lagos Plan of Action

The LPA, adopted on 29 April 1980, by 50 Heads of African States and Government and borne out of an overwhelming necessity to establish an African social and economic order based on utilising to the fullest the region's resources in building a self-reliant economy, was Africa's regional approach to the economic decolonisation of the continent.⁸⁴ The LPA had two major objectives, first it was seen as blueprint for Africa's economic development and secondly, articulated the vision of the African Heads of State to establish an AEC by the year 2000.⁸⁵

As a blue print for Africa's economic development, the LPA set out measures that member states were to implement in various sectors of the economy in order to promote the economic and social development of their economies with a view to achieving an increasing measure of self-sufficiency and self-sustainment.⁸⁶ Among the sectors that

⁸³ United Nations Commission on Trade and Development (UNCTAD) 'African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods' available at https://unctad.org/en/PublicationsLibrary/webditc2016d7_en.pdf (accessed 20 March 2022).

⁸⁴ Rose MD (1983) 4.

⁸⁵ Clause 14 of the preamble to the Lagos Plan of Action for the Economic Development of Africa. The African Heads of State expressed the desire to move away from export of raw materials to promoting growth and development based on Africa's considerable natural resources, and entrepreneurial, managerial and technical resources. The Heads of State further made a commitment to pursue African economic integration with renewed determination in order to create a continent-wide framework for economic co-operation.

⁸⁶ Preamble to the Lagos Plan of Action for the Economic Development of Africa: 1980 – 2000.

were prioritised in the LPA included: food and agriculture; industry, natural resources; science and technology and transport and communications.⁸⁷

The roadmap towards the establishment of the AEC on the other hand was set out in the Final Act of Lagos.⁸⁸ The Final Act of Lagos articulated the stages of implementation of the AEC. The 1980s were to be devoted to:

- (a) strengthening the existing RECs and establishing other economic groupings in the other regions of Africa , so as to cover the continent as a whole (Central Africa, Eastern Africa, Southern Africa, Northern Africa);
- (b) strengthening, effectively, sectoral integration at continental level, and particularly in the fields of agriculture, food, transport and communications, industry, and energy; and
- (c) promoting co-ordination and harmonisation among the existing and future economic groupings for a gradual establishment of the African Common Market.⁸⁹

The 1990s were to witness both an accelerated sectoral integration and the introduction of measures to effect the establishment of the African Common Market.⁹⁰

A 'common market' refers to an arrangement where members eliminate duties between or among themselves, adopt a common external tariff, and allow free movement of resources such as labour and capital.⁹¹ An Economic Community or Union on the other

⁸⁷ Preamble to the LPA.

⁸⁸ Annex 1 to the LPA.

⁸⁹ Final Act of Lagos.

⁹⁰ The Final Act of Lagos.

⁹¹ Agbonkhese OA & Adekola AG 'Regional Economic Integration in Developing Countries: A Case Study of Nigeria: A Member of ECOWAS' (2014) 10 *European Scientific Journal* 362.

hand goes beyond a common market with members' adopting a uniform set of economic policies such as a single currency.⁹²

In the Final Act of Lagos, the OAU envisaged the establishment of an African Common Market as a prelude to the creation of the AEC. The African Common Market was to be established gradually through a process of co-ordination and harmonisation of existing and future economic groupings.⁹³ The AEC on the other hand was to be established, on the basis of a treaty by the year 2000.⁹⁴

2.2.2 Treaty Establishing the African Economic Community

The Treaty Establishing the AEC (the 'Abuja Treaty') was adopted by the 27th Summit of the OAU held in June 1991 in Abuja, Nigeria. The Agreement entered into force in 1994. Art. 4 of the Abuja Treaty articulates the objectives of the community which includes (1) promoting economic and social development; (2) integrating the African economies in order to increase self-reliance and promote self-sustained development; (3) establish a framework for the mobilisation and utilisation of human and material resources; (4) raise the standard of living of African people; (5) maintain and enhance economic stability; (6) contribute to the progress, development and the economic integration of the Continent; and (7) coordinate and harmonise policies among existing and future economic communities in order to foster gradual establishment of the Community.

The Abuja Treaty proposed the establishment of the AEC in six stages over a period of 34 years. The six stages leading to the establishment of the AEC included:

⁹² Agbonkhese OA & Adekola AG (2014) 362.

⁹³ The Final Act of Lagos.

⁹⁴ The Final Act of Lagos.

- (a) stage one: Strengthen existing RECs and establish new RECs in regions where they do not exist (by 1999);
- (b) stage two: Stabilisation of tariff and non-tariff barriers, customs duties and internal taxes and preparation of a timetable for their gradual removal (by 2007);
- (c) stage three: Establishment of the free trade areas (FTAs) and Customs Unions in each REC (by 2017);
- (d) stage four: Coordinate and harmonise tariff and non-tariff systems among the RECs with a view to creating a continental Customs Union (by 2019);
- (e) stage five: Creation of an African Common Market by 2023; and
- (f) stage six: Establishment of an AEC, including an African Monetary Union and a Pan-African Parliament (by 2028).⁹⁵

From the foregoing, it is clear that the OAU in the Abuja Treaty did not envisage the establishment of an AfCFTA on the basis of an Agreement among member states. Rather the AfCFTA was to come about at stage four of the Abuja Treaty roadmap through the process of co-ordination of tariff and non-tariff systems among the RECs.⁹⁶ This was to happen by the year 2019. As will be seen below, due to the uneven progress of the RECs, the AU in 2012 took a decision to establish the AfCFTA on the basis of an Agreement as opposed to a process of coordination and harmonisation of REC FTAs as initially envisaged. To appreciate why the AU took the 2012 decision to establish the AfCFTA on

⁹⁵ Sommer L 'Brief on Regional Integration and the Continental Free Trade Area' available at <https://www.tralac.org/news/article/11500-brief-on-regional-integration-and-the-continental-free-trade-area.html> (accessed 20 March 2022).

⁹⁶ Article 6(2) of the Abuja Treaty.

the basis of an Agreement, it is important to look at the implementation status of the Abuja Treaty particularly with regards to the six stages referred to above.

The first stage of the Abuja Treaty roadmap was strengthening existing RECs and creating new ones in areas where they did not exist. This stage has fully been implemented after the AU recognised eight out of the existing 14 RECs in Africa, as building blocs for the establishment of the AEC.⁹⁷ These include: the Arab Maghreb Union (AMU), Economic Community of West African States (ECOWAS), Inter-Governmental Authority on Development (IGAD), Southern African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA), Economic Community of Central Africa (ECCAS), the Community of Sahel-Saharan States (CEN-SAD) and the East African Community (EAC).⁹⁸ Initially, the OAU should have recognised five RECs, one each in Central, East, South, West and North Africa.⁹⁹ However, due to the proliferation of RECs in Africa, the OAU at its 1997 summit decided to designate seven RECs as building blocs for the AEC.¹⁰⁰ In July 2006, the AU recognised the East African Community (EAC) as the eighth building bloc of the AEC and in the same year, made a decision to suspend recognition of further RECs for purposes of establishing the AEC.¹⁰¹

The second stage of the roadmap was to ensure stabilisation of tariff and non-tariff barriers within each REC and preparation of a time table for their gradual removal, to be

⁹⁷ Sommer L 'Brief on Regional Integration and the Continental Free Trade Area' (2017) 3 available at <https://www.tralac.org/news/article/11500-brief-on-regional-integration-and-the-continental-free-trade-area.html> (accessed 20 March 2022).

⁹⁸ Sommer L 'Brief on Regional Integration and the Continental Free Trade Area' (2017) 3 available at <https://www.tralac.org/news/article/11500-brief-on-regional-integration-and-the-continental-free-trade-area.html> (accessed 20 March 2022).

⁹⁹ Section B(1)(a) of Annex 1 to the Lagos Plan of Action - the Final Act of Lagos.

¹⁰⁰ Lwanda C.G. Southern African Customs Union (SACU): A viable building block for the African Economic Community (2013) 7 *African Journal of Political Science and International Relations* 184.

¹⁰¹ African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents 2018 available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (accessed 20 March 2022).

achieved between 1999 and 2007.¹⁰² As at 2012, this stage had not been fully achieved because progress in the different RECs was uneven¹⁰³.

During the January 2012 summit held in Addis Ababa Ethiopia, the AU, faced with the reality that not all RECs would achieve stage two and three of the Abuja Treaty roadmap within the set timeframes, took a decision to fast track the establishment of the Continental Free Trade Area by an indicative date of 2017.¹⁰⁴ The Summit also endorsed the framework, roadmap and architecture (hereafter the '2012 roadmap') for the establishment of the AfCFTA with the following milestones:¹⁰⁵

- (a) Finalisation of the EAC, COMESA and SADC Tripartite FTA initiative by 2014;
- (b) Completion of FTAs by Non-Tripartite RECs, through parallel arrangement(s) similar to the EAC–COMESA–SADC Tripartite Initiative or reflecting the preferences of their Member States, between 2012 and 2014;
- (c) Consolidation of the Tripartite and other regional FTAs into a Continental Free Trade Area initiative between 2015 and 2016; and
- (d) Establishment of the Continental Free Trade Area by 2017 with the option to review the target date according to progress made.

¹⁰² Article 6(1)(b) of the Abuja Treaty.

¹⁰³ United Nations Economic Commission for Africa (UNECA) 'Assessing Regional Integration in Africa V' available at <https://www.uneca.org/publications/assessing-regional-integration-africa-v> (accessed 20 March 2022).

¹⁰⁴ African Union '18 African Union Summit (AU) 'Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area' available at <https://au.int/en/decisions-21> (accessed 20 March 2022).

¹⁰⁵ African Union '18 African Union Summit (AU) 'Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area' available at <https://au.int/en/decisions-21> (accessed 20 March 2022).

Once again, the glaring criticism of Africa's plans for economic integration, of being too ambitious and less realistic and pragmatic, found application with the framework, roadmap and architecture for the establishment of the AfCFTA. The first milestone regarding the finalisation of the TFTA by 2014 was not achieved as of April 2022. The TFTA Agreement, which was opened for signature in June 2015, requires 14 ratifications for it to enter into force. As of April 2018 when the AfCFTA was opened for signature and ratification, only four TFTA member states had ratified the TFTA Agreement. As of April 2022, the number of ratifications increased to ten.¹⁰⁶ However, with the signing and entry into force of the AfCFTA Agreement, there may be need to reassess the relevance of the TFTA. According to the 2012 roadmap, the TFTA was supposed to merge with the regional FTAs between 2015 and 2016 to form the AfCFTA. The TFTA therefore appears to have been overtaken by events. This discussion however is beyond the scope of this paper. Suffice to state that the first milestone under the 2012 roadmap was not achieved.

The second milestone, requiring non-tripartite RECs to complete FTAs between 2012 and 2014 was equally not achieved. As stated in chapter one, as of March 2017 three out of the eight RECs recognised by the AU had not established FTAs. These include: CENSAD, IGAD and AMU.¹⁰⁷ The remaining non-tripartite RECs namely ECOWAS and ECCAS had free trade agreements in place, although with varying degrees of implementation.¹⁰⁸

Weak implementation of the first and second milestones of the 2012 roadmap, inevitably, meant that the AfCFTA could not be established through consolidation of the TFTA and other regional RECs by 2015 and 2016. Owing to the above state of affairs, the AU, at its

¹⁰⁶ Gakunga M 'New Deadline set for Ratification of the Tripartite Free Trade Area' available at <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/> (accessed 20th March 2022).

¹⁰⁷ Sommer L 'Brief on Regional Integration and the Continental Free Trade Area' (2017) available at <https://www.tralac.org/news/article/11500-brief-on-regional-integration-and-the-continental-free-trade-area.html> (accessed 20 March 2022).

¹⁰⁸ Sommer L 'Brief on Regional Integration and the Continental Free Trade Area' (2017) available at <https://www.tralac.org/news/article/11500-brief-on-regional-integration-and-the-continental-free-trade-area.html> (accessed 20 March 2022).

25 Ordinary Session held in Johannesburg, South Africa, in June 2015, decided to launch negotiations for the establishment of the AfCFTA.¹⁰⁹ The AfCFTA negotiating forum was tasked to organise its inaugural meeting in 2015 and to work towards concluding the negotiations by 2017.¹¹⁰

The AfCFTA negotiating forum concluded its work within the given time frame and as indicated in chapter one, in March 2018, at a historic summit of the AU held in Kigali, Rwanda, the AfCFTA Agreement was opened for signature. The Agreement entered into force on 30 May 2019.

Trade under the AfCFTA officially opened on 1 January 2021.¹¹¹ Even though the detailed protocols of the first phase were also part of the founding agreement signed in 2018, negotiations on the detailed schedules of tariff concessions or rules of origin started only thereafter. The third meeting of the AU Ministers of Trade in 2017 defined the general modalities for tariff reductions, while the actual shares of tariff lines for sensitive and excluded products were agreed at the 32 AU Ordinary Session held in 2019. African countries that ratify the Agreement consent to liberalise 90 percent of tariff lines.¹¹² This means that countries will reduce, and ultimately eliminate, tariffs on 90 percent of products traded under the AfCFTA.¹¹³ Least developed countries are expected to

¹⁰⁹ African Union '25 African Union Summit (AU) Decision on the launch of Continental Free Trade Area Negotiations' available at <https://au.int/en/documents/20150618/assembly-decision-launch-continental-free-trade-area-cfta-negotiations> (accessed 20 March 2022).

¹¹⁰ African Union '25 African Union Summit (AU) Decision on the launch of Continental Free Trade Area Negotiations' available at <https://au.int/en/documents/20150618/assembly-decision-launch-continental-free-trade-area-cfta-negotiations> (accessed 20 March 2022).

¹¹¹ African Union Bulletin 'AfCFTA Start of Trading 2021' available at <https://au.int/en/articles/trading-under-afcfta-begins> (accessed 20 March 2022).

¹¹² Viljoen W 'What can the AfCFTA add to Africa's trade liberalisation' <https://www.tralac.org/documents/events/tralac/4098-2020-annual-conference-two-pager-viljoen-what-can-the-afcfta-add-to-africas-trade-liberalisation/file.html> (accessed 20 March 2022).

¹¹³ Viljoen W 'What can the AfCFTA add to Africa's trade liberalisation' <https://www.tralac.org/documents/events/tralac/4098-2020-annual-conference-two-pager-viljoen-what-can-the-afcfta-add-to-africas-trade-liberalisation/file.html> (accessed 20 March 2022).

accomplish this over a ten year period, and non-least developed countries over a five year period.¹¹⁴ Sensitive products, of up to seven percent of tariff lines, will be fully liberalised over 13 years for least developed countries and ten years for non-least developed countries.¹¹⁵ Finally, three percent of tariff lines will be excluded from tariff liberalisation.¹¹⁶

Among the anticipated benefits of the AfCFTA include: increased trade among African countries, which currently ranges between 15 and 18 percent; stimulating production through the development of regional value chains to ensure that manufacturing, agricultural processing and other activities across the continent are stimulated to supply the market and strengthening the capacities of African companies to access and supply world markets.¹¹⁷

2.3 Objectives of the African Continental Free Trade Area

The objectives of the AfCFTA are set out in Articles 3 and 4 of the AfCFTA Agreement. Art. 3 outlines the general objectives, while Art. 4 articulates the specific objectives. Among the general objectives include: (a) creation of a single market for goods and services (b) facilitate movement of capital and natural persons (c) lay the foundation for the establishment of a continental customs union at a later stage (d) enhance the competitiveness of the economies of state parties within the continent and the global market (e) promote industrial development through diversification and (f) resolve the

¹¹⁴ United Nations Commission on Trade and Development (UNCTAD) 'Designing Trade Liberalisation in Africa: Modalities for Tariff Negotiations Towards an African Continental Free Trade' available at https://unctad.org/system/files/official-document/ditctnecd2019d4_en.pdf (accessed 20 March 2022).

¹¹⁵ United Nations Commission on Trade and Development (UNCTAD) 'Designing Trade Liberalisation in Africa: Modalities for Tariff Negotiations Towards an African Continental Free Trade' available at https://unctad.org/system/files/official-document/ditctnecd2019d4_en.pdf (accessed 20 March 2022).

¹¹⁶ United Nations Commission on Trade and Development (UNCTAD) 'Designing Trade Liberalisation in Africa: Modalities for Tariff Negotiations Towards an African Continental Free Trade' available at https://unctad.org/system/files/official-document/ditctnecd2019d4_en.pdf (accessed 20 March 2022).

¹¹⁷ African Union Bulletin 'AfCFTA Start of Trading 2021' available at <https://au.int/en/articles/trading-under-afcfta-begins> (accessed 20 March 2022).

challenges of multiple and overlapping memberships and expedite the regional and continental integration process.

The specific objectives on the other hand aid in the realisation of the general objectives. Of note, however, is the commitment by member states to (a) cooperate on investment, intellectual property rights and competition policy (b) establish a mechanism for the settlement of disputes and, (c) establish and maintain an institutional framework for the implementation and administration of the AfCFTA.

What is interesting to note is that while the AfCFTA sets out to lay a foundation for the establishment of a continental CU, it does not specifically prescribe the timeframe for achieving that goal. Similarly, there is equally no timeframe prescribed for the creation of the single market. For some reason, the AU in the AfCFTA Agreement has avoided prescribing timeframes for the achievement of set objectives. The missed deadlines of the past roadmaps may perhaps provide the rationale for the flexible approach.

Going by the timeframes in the Abuja Treaty roadmap, a continental CU should have been set up by 2019 and Common Market by 2023. The AfCFTA Agreement does not have as one of its objectives the creation of a Common Market. Rather and as observed above, it seeks to create a single market for goods and services. A single market is an advanced form of a common market as it goes beyond just the elimination of tariff barriers. A single market involves the elimination of non-tariff barriers as well. Non-tariff barriers to trade, or sometimes called non-tariff measures are barriers that impede trade through mechanisms other than the imposition of tariffs.¹¹⁸ They may take the form of import quotas, subsidies, customs delays, standards or sanitary and phytosanitary measures. If ambition is matched with implementation, it is possible for the African Union to remain on course towards the establishment of the AEC by the year 2028.

¹¹⁸ Article 1(r) of the AfCFTA Agreement.

As indicated in chapter 1 the scope of the AfCFTA Agreement covers trade in goods, trade in services, investment, intellectual property rights and competition policy.¹¹⁹ The African continent is therefore expected to have some common rules with regards to investments, intellectual property and competition policy. This is important in as far as ensuring that there is fairness in trading practices on the continent. Negotiations of the various protocols to the AfCFTA have been split in two phases. Phase I negotiations, which are currently underway, cover trade in goods and services, while phase II, shall encompass intellectual property, investment and competition policy.¹²⁰

The AfCFTA is being rolled out in parallel with the Action Plan for Boosting Intra-Africa Trade.¹²¹ This is important because trade liberalisation alone without addressing supply side constraints to trade may not be sufficient to unlock Africa's trade potential.¹²² Research indicates that, while reductions in tariffs from the AfCFTA would increase intra-Africa trade by 52 percent, additional trade facilitation measures would more than double it.¹²³

It is for the foregoing reason that the AU in 2012 decided that the AfCFTA would be rolled out in parallel with the implementation of the Action Plan for Boosting Intra-Africa Trade (APBIAT).¹²⁴ The APBIAT as endorsed by the AU summit contains seven major clusters, the implementation of whose programmes and activities is aimed at addressing key

¹¹⁹ Article 6 of the AfCFTA Agreement.

¹²⁰ Article 6 of the AfCFTA Agreement.

¹²¹ Preamble to the AfCFTA Agreement.

¹²² Albert T 'The African Continental Free Trade Agreement: Opportunities and Challenges' available at <https://www.tralac.org/documents/resources/cfta/3181-afcfta-opportunities-and-challenges-cuts-international-study-2019/file.html> (accessed 20 March 2022).

¹²³ United Nations Economic Commission for Africa (UNECA) 'Bringing the Continental Free Trade Area About: Assessing Regional Integration in Africa VIII' https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (accessed 20 March 2022).

¹²⁴ United Nations Economic Commission for Africa (UNECA) 'Bringing the Continental Free Trade Area About: Assessing Regional Integration in Africa VIII' https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (accessed 20 March 2022).

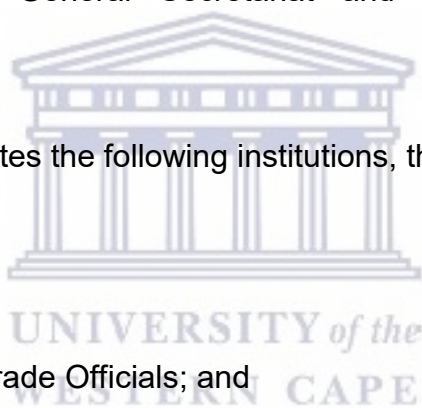
constraints and challenges of intra-Africa trade. The clusters include: trade policy; trade facilitation; productivity capacity; trade related infrastructure; trade finance; trade information and factor market integration.¹²⁵

2.4 Institutional Framework for the Implementation of the African Continental Free Trade Area

Institutional framework refers to the governance structure of an organisation or institution. It is important to note from the onset that the institutional framework of the AfCFTA, draws from the institutional architecture of the AEC. The Abuja Treaty envisaged the primary organs of the AEC as follows: the Assembly of Heads of State and Government, the Council of Ministers, the Pan-African Parliament, the Economic and Social Commission, the Court of Justice, the General Secretariat and the Specialised Technical Committees.¹²⁶

The AfCFTA Agreement creates the following institutions, the:

- a) Assembly;
- b) Council of Ministers,
- c) Committee of Senior Trade Officials; and
- d) Secretariat.



The Assembly, which comprises Heads of State and Government of the Union, is the supreme organ of the Community.¹²⁷ The role of the Assembly is to provide oversight and strategic guidance on the AfCFTA, including the APBIAT. The Assembly is also vested

¹²⁵ United Nations Economic Commission for Africa (UNECA) 'Bringing the Continental Free Trade Area About: Assessing Regional Integration in Africa VIII' (2017) https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (accessed 20 March 2022).

¹²⁶ Article 7 of the Abuja Treaty.

¹²⁷ Article 8(1) of the Abuja Treaty.

with exclusive authority to adopt interpretations of the AfCFTA Agreement, on the recommendation of the Council of Ministers.¹²⁸

The Council of Ministers comprises Ministers responsible for Trade or such other authorities designated by a member state.¹²⁹ The Council of Ministers reports to the Assembly through the Executive Council.¹³⁰ Hence, despite the Executive Council under the AU not being listed as one of the organs of the AfCFTA, the AfCFTA recognises it as the channel through which the Council of Ministers shall report to the Assembly. The Council of Ministers is responsible among other things for the effective implementation of the AfCFTA Agreement.¹³¹

The Committee of Senior Trade Officials is a creation of the AfCFTA Agreement. Such a Committee does not exist in the institutional architecture of the AEC. The Abuja Treaty however does establish a number of specialised committees, among them, the Committee on Trade, Customs, and Immigration matters. It would appear therefore that the functions of the Committee of Senior Trade Officials would be taken up by the specialised committee referred to herein, once the AEC is established. The Committee of Senior Trade Officials, which comprises Permanent or Principal Secretaries, is responsible among other things for implementing the decisions of the Council of Ministers.¹³² The RECs are allowed to attend meetings of the Committee of Senior Trade Officials, in an advisory capacity.¹³³

¹²⁸ Article 10 of the AfCFTA Agreement.

¹²⁹ Article 11(1) of the AfCFTA Agreement.

¹³⁰ Article 11(2) of the AfCFTA Agreement.

¹³¹ Article 11(3) of the AfCFTA Agreement.

¹³² Article 12(2) of the AfCFTA Agreement.

¹³³ Article 12(5) of the AfCFTA Agreement.

While the Abuja Treaty establishes a Court of Justice which is responsible for deciding disputes submitted thereto pursuant to the Abuja Treaty, no such institution is created under the AfCFTA. Rather, the AfCFTA Agreement envisages the establishment of a mechanism for the settlement of disputes between and among member states. Art. 20 of the AfCFTA Agreement states that the Protocol on Rules and Procedures on the Settlement of Disputes shall establish, among other things, a Dispute Settlement Body. Erasmus notes that the AfCFTA Dispute Settlement Mechanism is modelled after the dispute settlement system of the WTO and consists of a Dispute Settlement Body, Panels and an Appellate Body. The AfCFTA State Parties may also, if they so decide, settle their disputes through arbitration.¹³⁴

The Dispute Settlement Body has jurisdiction to settle disputes arising between State Parties.¹³⁵ Art. 1 of the AfCFTA Dispute Settlement Protocol defines an AfCFTA dispute as “a disagreement between State Parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations”. The AfCFTA Dispute Settlement Protocol further provides that the protocol shall apply to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement.¹³⁶ The foregoing implies that private parties do not have standing to bring disputes under AfCFTA procedures.¹³⁷ In addition, the AfCFTA Dispute Settlement Body

¹³⁴ What disputes can be heard by the AfCFTA Dispute Settlement Mechanism available at <https://www.tralac.org/blog/article/14802-what-disputes-could-be-heard-by-the-afcfta-dispute-settlement-mechanism.html> (accessed on 20 March 2022). Erasmus observes for example that the Dispute Settlement Mechanism of the AfCFTA will not have jurisdiction over disputes governed by EAC legal instruments.

¹³⁵ Article 3(1) of the Dispute Settlement Protocol. It is also worth noting that the AfCFTA Dispute Settlement Body held its inaugural meeting on 26th April 2021 at the AfCFTA Secretariat in Accra Ghana (See Tasks before the AfCFTA Dispute Settlement Body available at <https://www.bilaterals.org/?tasks-before-the-afcfta-dispute> (accessed on 20 March 2022)).

¹³⁶ Article 3(1) of the AfCFTA Dispute Settlement Protocol.

¹³⁷ Nwafuru observes that notwithstanding the limitation, the private sector participants such as the Small and Medium Enterprises and other business entities will be able to petition their governments to implement the rights and obligations set out in the AfCFTA Agreement (See Tasks before the AfCFTA Dispute Settlement Body available at <https://www.bilaterals.org/?tasks-before-the-afcfta-dispute> (accessed on 20 March 2022)). Akinkugbe on the other hand observes that the member states of the AfCFTA should consider amending the AfCFTA Dispute Settlement Mechanism in order to allow the private sector as actors. He notes that the majority of the cross-border transactions that occur in Africa

will not have jurisdiction to determine disputes arising from REC treaties and protocols. Erasmus observes that Dispute Settlement Body will only consider disputes arising from the interpretation and application of the AfCFTA and that where a dispute arises from the interpretation of REC Treaty or Protocol, such disputes are to be settled in accordance with the dispute settlement mechanisms applicable to the REC involved.¹³⁸

Last but not least, the AfCFTA Agreement, in contrast to the Abuja Treaty, establishes an autonomous Secretariat, The Abuja Treaty envisaged the General Secretariat under the OAU and now the Commission under the AU, to perform the role of Secretariat for the AEC. The AfCFTA Secretariat, which shall have separate legal personality, will be key to ensuring that the objectives of the continent to accelerate regional economic integration are achieved. The Commission, being the Secretariat for the Union, already has a lot of work on its hands. Given the urgency attached to the establishment of the AEC, as evidenced by the decision to accelerate the establishment of the AfCFTA, it is imperative that an independent Secretariat is put in place, dedicated to implementing the AfCFTA Agreement. The Secretariat is funded by the AU.¹³⁹ It is worth noting that the AU has had funding challenges in the past, resulting in over dependence on donor funding. This however is about to change. The AU going forward wants to be self-reliant, and is currently exploring mechanisms of ensuring sustainable self-financing for the Union.¹⁴⁰ A

have been by private parties and corporations and that private parties and corporations may be more inclined to taking legal action as opposed to state parties. He further notes that African countries have a strong discontent and apathy towards a highly legalised and formal trade dispute system, preferring instead to settle disputes through a process of mutual consultation (See Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment available at https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1483&context=scholarly_works (accessed on 20 March 2022).

¹³⁸ What disputes can be heard by the AfCFTA Dispute Settlement Mechanism available at <https://www.tralac.org/blog/article/14802-what-disputes-could-be-heard-by-the-afcfta-dispute-settlement-mechanism.html> (accessed on 26 September 2021). Erasmus observes for example that the Dispute Settlement Mechanism of the AfCFTA will not have jurisdiction over disputes governed by EAC legal instruments.

¹³⁹ Article 13(5) of the AfCFTA Agreement.

¹⁴⁰ Ndiaye M 'A Wind of Change? The Institutional Reform of the African Union and Africa's Security Provision' available at <https://www.africaportal.org/publications/wind-change-institutional-reform-african-union-and-africas-security-provision/> (accessed 27 June 2021).

discussion on the options being considered for financing the AU is beyond the scope of this mini thesis.

Funding of the Secretariat by the AU is welcome relief to member states, who are already burdened with membership contributions to the existing RECs. The situation is even worse for countries that have multiple REC memberships.

Upon entry into force of the AfCFTA Agreement, the AU Commission was to serve as the interim Secretariat of the AfCFTA, pending the establishment and operationalisation of an independent Secretariat.¹⁴¹ This provision has however become redundant following the AU's decision at its 12th Extraordinary Session in July 2019 to designate Ghana as host state for the AfCFTA Secretariat.¹⁴²



¹⁴¹ Article 13(2) of the Agreement Establishing the African Continental Free Trade Area.

The AfCFTA Secretariat is being hosted by Ghana. H.E. Mr. Wamkele Mene was officially appointed the first Secretary General of the Secretariat on 19 March 2020. It is envisaged that the Secretariat will provide administrative support for the implementation of the AfCFTA Agreement. The official handover of the AfCFTA Secretariat took place on 17 October, 2020 (See Trade Law Centre (Tralac) 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (accessed 20 March 2022)).

¹⁴² Udombana JN 'A Step Closer: Economic Integration and the African Continental Free Trade Area' (2020) 31 *DUKE Journal of Comparative International Law* 61.

2.5 Conclusion

The establishment of the AfCFTA yet again signifies Africa's determination to achieve continental economic integration. Beginning with the LPA of 1980 which articulated the vision of the African Heads of State to establish an AEC by the year 2000, to the Abuja Treaty of 1991 which set out a roadmap towards the establishment of the AEC by the year 2028, Africa has been steadily making progress towards achieving its goal of having an integrated continent. The process however has not been without its challenges. Recognised as the building blocs for the establishment of the AEC, the RECs did not make as much progress as was envisaged in the Abuja Treaty roadmap. This led the AU in 2012 to take a decision to fast track the establishment of the AfCFTA by an indicative date of 2017. The AfCFTA Agreement was opened for signature on 21 March 2018 and entered into force in May 2019.

The AfCFTA aspires among other things to liberalise trade in goods and services on the continent, and to lay a foundation for the eventual establishment of a continental Customs Union. In terms of the institutional framework, the AfCFTA shall have the Assembly of Heads of State and Government of the AU as its Supreme organ, followed by the Council of Ministers, the Committee of Senior Trade Officials and an autonomous Secretariat. The Secretariat shall have a separate legal personality and will be funded by the African Union. The AfCFTA Agreement also establishes a dispute settlement mechanism for settlement of disputes between state parties. Private parties do not have direct recourse to the AfCFTA dispute settlement mechanism. They could however petition their governments to implement the rights and obligations set out in the AfCFTA Agreement.

The AfCFTA must be understood in the context of the WTO rules governing international trade. The international trading system is founded on two fundamental principles namely the MFN and the NT principles. The MFN principle prohibits discrimination among WTO member states with respect to trade in goods and services while the NT principle provides for equality of treatment between 'like' imported and domestic products and services. More specifically, the NT principle requires that domestic regulation or measures affecting

trade in goods and services should not be applied so as to afford protection to like domestic products, services and service suppliers. Regional Trade Agreements such as customs unions and free trade areas which by their very nature entail preferential treatment for participating states are exempted from the application of the two principles provided, in the case of trade in goods that the regional trade agreements do not raise trade barriers in respect of non-members beyond the levels obtaining prior to the conclusion of the agreements and in the case of trade in services, that such an agreement exempts citizens of the parties to the agreement from requirements concerning residency and work permits and further that the Agreement is notified to the Council for Trade in Services.

In terms of notification of the AfCFTA to the WTO, it is recommended that with respect to trade in goods, the AfCFTA should be notified under the enabling clause in order to accommodate the principles of variable geometry¹⁴³ and flexibility and special and differential treatment¹⁴⁴ enshrined in the AfCFTA Agreement, as opposed to Art. XXIV of GATT 1994 which is slightly more onerous. With regards to trade in services, the AfCFTA Services Protocol clearly provides for notification of the AfCFTA under Art. V of the GATS.

Having discussed the WTO rules that govern regional trade agreements as well background, objectives and institutional framework of the AfCFTA, the next chapter will discuss the three RECs constituting the focus of this mini thesis namely COMESA, EAC and SADC.

¹⁴³ Article 5 (c) of the AfCFTA Agreement.

¹⁴⁴ Article 5 (d) of the AfCFTA Agreement.

CHAPTER THREE

THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA, THE EAST AFRICAN COMMUNITY AND THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

3.1 Introduction

Regional economic integration refers to an arrangement between or among countries to promote trade, among other interests, by reducing and ultimately eliminating tariff and non-tariff barriers to the free flow of goods, services, and factors of production between each other.¹⁴⁵ It combines elements of free trade with foreign trade protection.¹⁴⁶ Regional integration benefit countries especially in situations when those countries are small and represent small markets.¹⁴⁷ Under such conditions, regional integration will enable the member countries to combine markets, enabling firms to expand and markets to be more competitive.¹⁴⁸ An integrated market encourages competition among producers and provides scale benefits in production and more opportunities for specialisation.¹⁴⁹

The previous chapter discussed the World Trade Organisation (WTO) rules governing the establishment of regional trade agreements and the history of continental integration in Africa. It was noted that regional trade agreements such as customs unions (CUs) and free trade areas (FTAs) provide an exception to the most-favoured nation and the national treatment principles of the WTO. The previous chapter also discussed the history of continental integration in Africa, noting that African Continental Free Trade Area (AfCFTA) is part of the African Unions (AUs) broader vision of establishing the African Economic

¹⁴⁵ Hailu BM 'Regional Economic Integration in Africa: Challenges and Prospects' (2014) 8 *Mizan Law Review* 300.

¹⁴⁶ Agbonkhese OA and Adekola AG Regional Economic Integration in Developing Countries: A Case Study of Nigeria; A Member of ECOWAS (2014) 10 *European Scientific Journal* 361.

¹⁴⁷ Hailu BM 'Regional Economic Integration in Africa: Challenges and Prospects' (2014) 8 *Mizan Law Review* 306.

¹⁴⁸ Agbonkhese OA and Adekola AG, (2014) 360.

¹⁴⁹ Agbonkhese OA and Adekola AG, (2014) 360.

Community (AEC). It was further noted that the AU initially set out to establish the AfCFTA through a process of harmonisation and co-ordination of REC free trade areas (FTAs). The RECs in this regard were considered as building blocs for the establishment of the AEC. However, due to the slow and uneven progress of the RECs in establishing FTAs and customs unions (CUs), the AU in 2012 took a decision to fast track the establishment of the AfCFTA. This resulted in the signing of the AfCFTA Agreement on 18 March 2018. The AfCFTA Agreement establishes the AfCFTA.

With regards to the objectives of the AfCFTA, it was noted that the AfCFTA among other things sets out to create a single continental market for goods and services, with free movement of business persons and investments and thus paving the way for accelerating the establishment of the continental CU.

This chapter will critically examine the three RECs, namely the Common Market for Eastern and Southern Africa (COMESA); the East African Economic Community (EAC) and the Southern African Development Community (SADC), in terms of the background, objectives and the current status of their economic integration efforts. As stated in chapter one COMESA is among the few RECs in Africa that articulates a clear vision of how it seeks to relate with the AEC, once the latter is established.¹⁵⁰ There is a lot of debate going on currently on the future of the RECs following the establishment of the AfCFTA and an understanding of the envisaged relationship between the RECs and the AEC will help to put matters in perspective. The EAC is one of the RECs in Africa that has made tremendous progress on the economic integration front having already established a customs union and a common market and working towards establishing a monetary union and a political federation. For SADC, the REC is home to the biggest economy in Africa, South Africa, and also envelopes a mini-REC within itself, the Southern African Customs Union comprising Botswana, Lesotho, Namibia, South Africa and Eswatini.

¹⁵⁰ COMESA seeks to convert itself into an organic entity of the AEC. The Abuja Treaty on the other envisages absorption of the RECs into the African Common Market, leading to the establishment of the AEC.

3.2 The Common Market for Eastern and Southern Africa (COMESA)

COMESA comprises 21 member states that came together with the aim of promising regional integration through trade and the development of natural and human resources for the mutual benefit of all people in the region.¹⁵¹ COMESA seeks to become a fully integrated internationally competitive REC within which there is economic prosperity demonstrated by high living standards of its people with political and social stability within which goods, services, capital and labour, move freely across national geographic borders.¹⁵² COMESA has adopted a developmental approach to regional integration, which covers market integration, industrialisation and infrastructure development.¹⁵³ Its main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers that are faced by individual states.¹⁵⁴

3.2.1 Background to formation

COMESA traces its genesis to the mid-1960s.¹⁵⁵ In 1965, the United Nations Economic Commission for Africa (UNECA) convened a ministerial meeting of the then newly independent states of Eastern and Southern Africa and considered the proposal for the



¹⁵¹ COMESA in Brief available at <https://www.comesa.int/comesa-in-brief-en-2/> (accessed 20 March 2022).

¹⁵² COMESA 'COMESA Communication Policy and Strategy 2016-2020' available at https://www.comesa.int/wp-content/uploads/2019/02/COMESA-Communication-Strategy-final_web_email.pdf (accessed 20 March 2022).

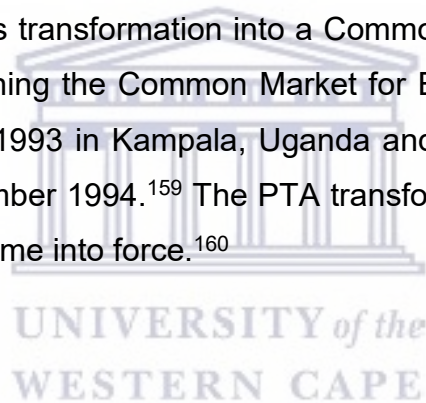
¹⁵³ A developmental approach to regional integration also includes cooperation in areas such as investment, research and development, as well development of policies aimed at accelerating regional industrial development and regional infrastructure provision such as building of better networks of roads and railways (See Trade Law Centre (Tralac) 'Shift from traditional approach to integration to developmental regionalism' available at <https://www.tralac.org/news/article/541-shift-from-traditional-approach-to-integration-to-a-developmental-regionalisma-report-urges.html> (accessed 20 March 2022)).

¹⁵⁴ Trade Law Centre (Tralac) 'COMESA Legal Texts and Policy Documents' available at <https://www.tralac.org/resources/by-region/comesa.html> (accessed 20 March 2022).

¹⁵⁵ Tadesse GS and Endale AH 'COMESA: Prospects and Challenges for Regional Trade Integration' available at <https://iiste.org/Journals/index.php/IAGS/article/download/49478/51119> (accessed 20 March 2022).

establishment of a mechanism to promote sub-regional economic integration.¹⁵⁶ In 1978, at a meeting of Ministers of Trade, Finance and Planning in Lusaka, the creation of a sub-regional economic community was recommended, beginning with a sub-regional preferential trade area which would be gradually upgraded over a 10 year period to a common market until the community had been established.¹⁵⁷ Consequently the Treaty Establishing a Preferential Trade Area (PTA) was signed on 21 December 1981 in Lusaka. The objective of the PTA was to achieve sustained transformation of the structure of production of national economies from low productivity economies producing mainly unprocessed and semi-processed agricultural and mineral products, primarily for export to developed countries, to high productivity and dynamic economies producing consumer and capital goods primarily for national and sub-regional markets.¹⁵⁸

The PTA Treaty envisaged its transformation into a Common Market and, in conformity with this, the Treaty Establishing the Common Market for Eastern and Southern Africa was signed on 5 November 1993 in Kampala, Uganda and was ratified a year later in Lilongwe, Malawi on 8 December 1994.¹⁵⁹ The PTA transformed into COMESA in 1994 when the COMESA Treaty came into force.¹⁶⁰



¹⁵⁶ Tadesse GS and Endale AH 'COMESA: Prospects and Challenges for Regional Trade Integration' available at <https://iiste.org/Journals/index.php/IAGS/article/download/49478/51119> (accessed 20 March 2022).

¹⁵⁷ Tadesse GS and Endale AH 'COMESA: Prospects and Challenges for Regional Trade Integration' available at <https://iiste.org/Journals/index.php/IAGS/article/download/49478/51119> (accessed 20 March 2022).

¹⁵⁸ Gondwe M 'From PTA to COMESA: The Quest for Sub-Regional Economic Integration in Eastern and Southern Africa' (1998) 6 *South African Yearbook of International Law* 6.

¹⁵⁹ Tadesse GS and Endale AH 'COMESA: Prospects and Challenges for Regional Trade Integration' available at <https://iiste.org/Journals/index.php/IAGS/article/download/49478/51119> (accessed 20 March 2022).

¹⁶⁰ COMESA 'An Introduction to COMESA' available at <https://diplomatist.com/2020/09/01/an-introduction-to-comesa/> (accessed 20 March 2022).

Covering a landmass of 11.8 million square kilometres, COMESA has a population of 560 million and a Gross Domestic Product of USD768 billion.¹⁶¹ COMESA member states include Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.¹⁶² COMESA is the largest REC in Africa.

3.2.2 Objectives of the Common Market for Eastern and Southern Africa

The objectives of COMESA are, to:

‘(a) attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures; (b) promote joint development in all fields of economic activity and the joint adoption of macroeconomic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its member states; (c) cooperate in the creation of an enabling environment for foreign, cross-border and domestic investment; (d) cooperate in the promotion of peace, security and stability among the member states in order to enhance economic development in the region; (e) cooperate in strengthening relations between the Common Market and the rest of the world, and the adoption of common positions in international fora; (f) and to contribute towards the establishment, progress and the realization of the African Economic Community (AEC)’.¹⁶³

¹⁶¹ About COMESA available at <https://www.comesa.int/wp-content/uploads/2019/03/Comesa-Brochure.pdf> (accessed 20 March 2022).

¹⁶² About COMESA available at <https://www.comesa.int/wp-content/uploads/2019/03/Comesa-Brochure.pdf> (accessed 20 March 2022).

It is worth noting that of the 21 COMESA member states, nine are also members of SADC. These include: Comoros, Democratic Republic of Congo, Eswatini, Madagascar, Malawi, Mauritius, Seychelles, Zambia and Zimbabwe. (See SADC member states available at <https://www.sadc.int/member-states> (accessed 20 March 2022). Multiple and overlapping membership is a common feature in most RECs in Africa and is often cited among the impediments to deeper regional integration.

¹⁶³ Article 3 of the COMESA Treaty.

The first three objectives reflect COMESA's developmental approach to regional integration. As indicated above, a 'developmental approach' to regional integration calls for cooperation among countries in a broader range of areas than just trade and trade facilitation.¹⁶⁴ COMESA also seeks to transform the structure of the economies of member states from being exporters of raw or semi-processed agricultural and mineral commodities to producing value-added products that the region's consumers want.¹⁶⁵ The last objective which expresses COMESA's intentions to contribute towards the establishment of the AEC is one of the key focus areas of this mini thesis and is considered in more detail in chapter four.

In addition to the objectives referred to above, COMESA also seeks to establish an Economic Community for Eastern and Southern Africa (ECESA). Art. 177 of the COMESA Treaty tasks the Council¹⁶⁶ to propose to the Authority¹⁶⁷ for its approval, measures which would be required to be implemented in order to assist in the eventual development and establishment of an ECESA. COMESA does not set a time frame for the establishment of the ECESA. Rather the transition from COMESA to ECESA was made conditional upon finding that the objectives of COMESA had been attained and the obligations of member states fulfilled.¹⁶⁸

Interestingly, the COMESA Treaty has some very elaborate provisions on the future relations of COMESA and the AEC. According to Art. 178(1)(a) of the COMESA Treaty,

¹⁶⁴ United Nations Economic Commission for Africa (UNECA) 'Assessing Regional Integration in Africa VIII' available at <https://www.uneca.org/fr/assessing-regional-integration-africa-viii> (accessed 20 March 2022).

¹⁶⁵ Woolfrey S and Verhaeghe E 'Understanding the COMESA Industrialisation Agenda' available at <https://ecdpm.org/wp-content/uploads/COMESA-Industrialisation-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDCM-2017.pdf> (accessed 20 March 2022).

¹⁶⁶ The Council of Ministers is one of the organs of COMESA and comprises such Ministers as may be designated by each Member State (Article 9 of the COMESA Treaty).

¹⁶⁷ The Authority is the highest organ of COMESA and comprises Heads of State or Government of the Member States (Article 8 of the COMESA Treaty).

¹⁶⁸ Article 177(3) of the COMESA Treaty.

COMESA member states committed themselves to negotiate, together with other RECs the Protocol on Relations between the AEC and the RECs (Protocol on Relations). The member states also undertook to implement the provisions of the Treaty with due consideration to the provisions of the Abuja Treaty.¹⁶⁹ Most importantly, the member states undertook to convert the Common Market or its successor, at a time to be agreed upon between the Common Market or its successor and the AEC, into an organic¹⁷⁰ entity of the AEC.¹⁷¹ Thus, while COMESA has as its final objective to contribute to the implementation of the provisions of the Abuja Treaty, it does not envision complete absorption into the AEC, rather the goal is to convert itself into an organic entity of the AEC.¹⁷²

It should be noted, however, that despite the name COMESA, the region is yet to attain the status of a common market. A common market is a CU plus common policies on regulations and the free movement of factors of production and enterprise.¹⁷³ A CU on the other hand is a FTA plus a common external tariff (CET).¹⁷⁴ At the time of signing of the COMESA Treaty in 1994, COMESA was neither a FTA nor a CU. COMESA is

¹⁶⁹ Article 178(1)(b) of the COMESA Treaty.

¹⁷⁰ In other words a living entity of the African Economic Community.

¹⁷¹ Article (178)(1)(c) of the COMESA Treaty.

¹⁷² Oppong observes that COMESA's goal of seeking to convert itself into an organic entity of the AEC, appears to suggest that COMESA does not envision the formation of the AEC as its demise (See Oppong FR 'The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African Journal of International and Comparative Law* 94). However, it is interesting to note that the drafters of COMESA's vision seem to have interpreted the relevant provisions of the Treaty to mean that COMESA was ready to merge into the African Economic Community. In COMESA in brief, the vision is stated as follows: 'To be a fully integrated economic community that is prosperous, internationally competitive, and ready to merge into the AEC' (See COMESA 'COMESA in Brief' available at <https://www.comesa.int/comesa-in-brief-en-2/> (accessed 20 March 2022)). The foregoing shows that there is need to reconcile the vision of COMESA and the applicable provisions of the COMESA Treaty in order to develop a common understanding of the future relationship of COMESA and the AEC. There is nothing in the COMESA Treaty that seems to suggest that COMESA seeks to merge into the AEC. Rather, COMESA seeks to convert itself into an organic entity, a living entity, of the AEC.

¹⁷³ Agbonkheshe OA & Adekola AG 'Regional Economic Integration in Developing Countries: A Case Study of Nigeria: A Member of ECOWAS' (2014) 10 *European Scientific Journal* 362.

¹⁷⁴ Agbonkheshe OA & Adekola AG (2014) 362.

therefore having to work backwards to achieve a common market.¹⁷⁵ As will be seen in the section that follows, a common market is the third regional integration milestone for COMESA after the FTA and the CU. To date, realising a common market, remains work in progress.

Having discussed the background and objectives of COMESA, the next section will discuss the status of regional integration in COMESA.

3.2.3 Status of Regional Integration in the Common Market for Eastern and Southern Africa

As indicted in chapter one, the three RECs under consideration follow a linear approach to regional integration, with a stepwise integration of goods, labour and capital markets, as well as eventual monetary and fiscal integration.¹⁷⁶ Accordingly, COMESA set out to establish an FTA by the 2000,¹⁷⁷ a CU by the year 2004,¹⁷⁸ a common market by 2015 and a monetary union by 2018.¹⁷⁹ COMESA's ultimate objective is to become an economic community at a date to be determined by the COMESA Authority after entry into force of the COMESA Treaty.¹⁸⁰

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¹⁷⁵ Hailu BM 'Regional Economic Integration in Africa: Challenges and Prospects' (2014) 8 *Mizan Law Review* 332. Hailu observes that the names given to some regional arrangements may not necessarily reflect the level of integration reached by the arrangements. He cites the example of COMESA which despite the use of the term Common Market, only launched the CU in 2009 and was yet to attain the level of Common Market integration.

¹⁷⁶ Melo JD & Tsikata Y 'Regional Integration in Africa: Prospects and Challenges available at <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199687107.001.0001/oxfordhb-9780199687107-e-014> (accessed 20 March 2022).

¹⁷⁷ Article 46(1) of the COMESA Treaty.

¹⁷⁸ Article 45 of the COMESA Treaty. Refer also to section 1.2.

¹⁷⁹ COMESA 'Strengthening the institutional capacity of COMESA' available at <https://www.nepad.org/publication/strengthening-institutional-capacity-of-common-market-eastern-and-southern-africa> (accessed on 20 March 2022).

¹⁸⁰ Article 177 of the COMESA Treaty.

COMESA established a FTA in 2000, and achieved 98 percent removal of non-tariff barriers in 2008.¹⁸¹ The FTA was established among nine member states (Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe) with the key aim being to facilitate regional integration through zero customs tariffs on goods traded among the Members.¹⁸² Rwanda and Burundi joined in 2004, and Comoros and Libya in 2006.¹⁸³ There are currently 16 participating states in the FTA including Democratic Republic of Congo, Seychelles and Uganda.¹⁸⁴

COMESA launched its CU on 7 June 2009.¹⁸⁵ The CU was launched by the Heads of State and Government of COMESA in Victoria Falls town, Zimbabwe.¹⁸⁶ At the same meeting, COMESA endorsed the key principles and rules that form the basis for the operation of the CU.¹⁸⁷ A transitional period of three years was provided, during which time member states would align their national customs laws with the regionally agreed CU instruments namely, the Customs Management Regulations regional customs law, the Common Tariff Nomenclature as the harmonised system for coding and describing



¹⁸¹ COMESA 'COMESA in Brief' available at <https://www.comesa.int/comesa-in-brief-en-2/> (accessed 20 March 2022).

¹⁸² Trade Law Centre (Tralac) 'COMESA Legal Texts and Policy Documents' available at <https://www.tralac.org/resources/by-region/comesa.html> (accessed 20 March 2022).

¹⁸³ COMESA Legal Texts and Policy Documents available at <https://www.tralac.org/resources/by-region/comesa.html> (accessed 20 March 2022).

¹⁸⁴ Trade Law Centre (Tralac) '16 Countries now in COMESA Free Trade Area' <https://www.tralac.org/news/article/9574-16-countries-now-incomesa-free-trade-area.html> (accessed 20 March 2022).

¹⁸⁵ COMESA 'Strengthening the Institutional Capacity of Common Market for Eastern and Southern Africa (COMESA)' available at <https://www.nepad.org/publication/strengthening-institutional-capacity-of-common-market-eastern-and-southern-africa> (accessed 20 March 2022).

¹⁸⁶ COMESA 'COMESA in Brief' available at <https://www.comesa.int/comesa-in-brief-en-2/> (accessed 20 March 2022).

¹⁸⁷ Mangeni Francis 'COMESA: Key Issues for the Integration Agenda available at https://www.comesa.int/wp-content/uploads/2021/02/customs-union-book_key-issues-for-the-intergration-agenda.pdf (accessed 20 March 2022).

the traded products and the CET as the uniform tariff system in trade with non-COMESA third countries.¹⁸⁸ The CU however is yet to become operational.¹⁸⁹

The linear model is a sequential process that allows for incremental changes leading to the establishment of an economic community.¹⁹⁰ This means for example that a REC cannot achieve a common market before it attains a CU. In this sense, a CU is precursor to a common market. Agbonkhese and Adekola observes that a common market is a higher level of economic integration than a CU as it also encompasses movement of labour and capital between member states.¹⁹¹ Cuyvers also observes that a common market is a far reaching form of economic integration as it goes beyond a free trade area and a customs union.¹⁹² He notes that a common market entails removal of all obstacles to free movement and creating a market that functions as if all member states were one country.¹⁹³ Totic and Totic adds that in a common market, international trade is not hindered by customs, duties, quotas and investment is done in an atmosphere of free competition.¹⁹⁴ In the context of COMESA therefore, it means failure to operationalise a CU within the set timeframe means the remaining integration milestones such as establishment of a common market and a monetary union equally get delayed. According

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¹⁸⁸ COMESA 'COMESA in Brief' available at <https://www.comesa.int/comesa-in-brief-en-2/> (accessed on 20 March 2022).

¹⁸⁹ Trade Law Centre (Tralac) 'COMESA Legal Texts and Policy documents' available at <https://www.tralac.org/resources/by-region/comesa.html> (accessed on 20 March 2022).

¹⁹⁰ Muzee H, Enaifoghe OA 'Towards an Inclusive Model of African Regional Integration: How Effective has the Linear Model been so Far' (2019) 11 *Journal of Economics and Behavioral Studies* 60.

¹⁹¹ Agbonkhese OA & Adekola GA 'Regional Integration in Developing Countries: A Case Study of Nigeria; A Member of ECOWAS' (2014) 10 *European Scientific Journal* 362.

¹⁹² Cuyvers A 'The EU Common Market' in Ugirashebuja E, Ruhangisa EJ & Ottervango T 'et al' (ed) *East African Community Law* (2017) 294.

¹⁹³ Cuyvers A 'The EU Common Market' in Ugirashebuja E, Ruhangisa EJ & Ottervango T 'et al' (ed) *East African Community Law* (2017) 294.

¹⁹⁴ Totic M & Totic NI 'The Common Market: Paradigm of the Integration Process within the European Community' and European Union available at https://www.researchgate.net/publication/321621979_THE_COMMON_MARKET_PARADIGM_OF_THE_INTEGRATION_PROCESSES_WITHIN_THE_EUROPEAN_COMMUNITY_AND_EUROPEAN_UNION (accessed on 20 March 2022).

to the Abuja Treaty roadmap, COMESA in addition to establishing an FTA, should have also established a CU by 2017. As highlighted above, however, this remains work in progress.

While COMESA has registered some notable improvements in global and intra-regional trade,¹⁹⁵ the overall performance of the region, compared to other regions still leaves much to be desired. Intra-COMESA exports only account for 10 percent of the region's total exports compared to about 20 percent for EAC and 60 for the European Union.¹⁹⁶ From the foregoing, it is clear that COMESA trades more with the rest of the world than it does within itself. This is despite all the efforts that have been made to deepen economic integration in the region.

The next section will consider the EAC.

3.3 The East African Community

The EAC is a regional inter-governmental organisation of six partner states: Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda.¹⁹⁷ The EAC was re-established by the 1999 Treaty¹⁹⁸ that entered into force in 2000 following its ratification by Uganda, Kenya and Tanzania.¹⁹⁹ The Republics of Rwanda and Burundi became members in 2007, while South Sudan joined in April 2016.²⁰⁰ The EAC was originally founded in 1967

¹⁹⁵ COMESA 'Key Issues in Regional Integration Volume III' available at <https://www.comesa.int/key-issues-in-regional-integration/> (accessed 20 March 2022).

¹⁹⁶ Afreximbank 'African Trade Report: Boosting Intra-African Trade: Implications of the African Continental Free Trade Area Agreement (2018) 92 available at <https://www.tralac.org/news/article/13258-boosting-intra-african-trade-implications-of-the-african-continental-free-trade-area-agreement-african-trade-report-2018.html> (accessed 20 March 2022).

¹⁹⁷ Matte R 'Analysis of the East African Community Integration Process as an Opportunity for Uganda's Medium-to Long-Term Development' (2019) 2 *Economics, Law and Policy Journal*. 13.

¹⁹⁸ The EAC Treaty.

¹⁹⁹ Matte R (2019) 13.

²⁰⁰ Verhaeghe E & Mathieson C 'Understanding the East African Community and its Transport Agenda: Informal Adaptation in Regional Trade and Transport Cooperation available at <https://ecdpm.org/wp->

by Kenya, Tanzania and Uganda, a post-independence evolution of the colonial era East African Common Services Organisation.²⁰¹ The Community was however dissolved in 1977, among other reasons, due to lack of strong political will, lack of strong participation of the private sector and civil society in the cooperation activities, disproportionate sharing of benefits among the partner states due to their differences in their levels of development and lack of adequate policies to address the situation.²⁰²

3.3.1 Background to formation

It should be noted, however, that regional economic cooperation in East Africa began as far back as 1897 during the era of the colonial administrations. The colonial administrations for the three territories implemented a number of key integration milestones between 1897 and 1961, which included: building of a railway line across the three countries; establishment of a CU in 1917; establishment of the Currency Board, Postal Union, Court of Appeal, Governor's Conference, income tax Board and the Joint Economic Council between 1905 and 1940; and establishment of the East African High Commission in 1948.²⁰³ The East African High Commission was the coordinating body to deal with the CU, a CET, currency and postage, and also with common services in transport and communications research and education.²⁰⁴ In 1961, following independence, the East African High Commission was replaced by the East African Common Services Organisation which many observers thought would lead to a political

[content/uploads/EAC-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf](https://www.ecdpm.org/wp-content/uploads/EAC-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf) (accessed 20 March 2022).

²⁰¹ Verhaeghe E & Mathieson C 'Understanding the East African Community and its Transport Agenda: Informal Adaptation in Regional Trade and Transport Cooperation available at <https://ecdpm.org/wp-content/uploads/EAC-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf> (accessed 20 March 2022).

²⁰² Preamble to the EAC Treaty.

²⁰³ Matte R 'Analysis of the East African Community Integration Process as an Opportunity for Uganda's Medium-to Long-Term Development' (2019) 2 *Economics, Law and Policy Journal* 14.

²⁰⁴ Masinde W & Omolo OC 'The Road to East African Integration' available at https://www.jstor.org/stable/10.1163/j.ctt1w76vj2.5?seq=1#metadata_info_tab_contents (accessed 20 March 2022).

federation between the three territories.²⁰⁵ However the new organisation suffered from a lack of joint planning and fiscal policy, separate political policies and Kenya's dominant economic position.²⁰⁶ In June 1965, the dissolution of the East African currency was announced and was to be replaced with national central banks and currencies. In 1967, the three countries founded the EAC which was later dissolved in 1977.²⁰⁷

Twenty two years after the collapse of the old EAC, the three East African states decided to re-establish the Community. This, as indicated above, culminated in the signing of the EAC Treaty in 1999 with the Treaty entering into force in 2000.²⁰⁸

3.3.2 Objectives of the East African Community

The objectives of the EAC are to develop policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.²⁰⁹ Arising from the foregoing, the partner states envisioned establishment among themselves of a CU, a Common Market, a Monetary Union and ultimately a Political Federation.²¹⁰ The EAC Treaty does not set timeframes for the achievement of the set milestones. However, protocols that were concluded subsequently such as the Protocol on the Establishment of the East African Community Monetary Union (EAMU Protocol) provide timeframes for specific milestones. The EAMU Protocol for example set a deadline of 2024 for convergence of currencies into a single currency for

²⁰⁵ Njenga NL 'Legal Status of the East African Community (EAC)' (2018) 22 *RUDN Journal of Law* 373.

²⁰⁶ Masinde W & Omolo OC 'The Road to East African Integration' https://www.jstor.org/stable/10.1163/j.ctt1w76vj2.5?seq=1#metadata_info_tab_contents (accessed 20 March 2022).

²⁰⁷ Njenga NL (2018) 374.

²⁰⁸ Matte R 'Analysis of the East African Community Integration Process as an Opportunity for Uganda's Medium-to Long-Term Development' (2019) 2 *Economics, Law and Policy Journal*. 13.

²⁰⁹ Article 5(1) of the EAC Treaty.

²¹⁰ Article 5(2) of the EAC Treaty.

the Community.²¹¹ In contrast, there is no stated timeframe for the establishment of a political federation. The foregoing notwithstanding, and based on the information below, the EAC is making significant strides in achieving all of the set milestones.

Despite the ultimate objective of the EAC being to establish a political federation, the region has a stated desire to contribute to the wider unity of Africa and considers itself as a step towards the achievement of the objectives of the Abuja Treaty.²¹² The EAC Treaty does not indicate whether the EAC will eventually be absorbed into the AEC, but there is a stated desire to contribute towards the unity of the African continent as a whole. In the Protocol on Relations however, the AU recognised RECs undertook to review their treaties to provide among other things for eventual absorption into the African Common Market. The African Common Market is the penultimate stage in the establishment of the AEC.²¹³ All AU RECs therefore or at least those that have not done so are required to update their objectives in line with the Protocol on Relations. The extent of the review to be undertaken is examined in the next chapter.

3.3.3 Status of Regional Integration in the East African Community

As indicated in the preceding section, the EAC set itself a four stage process of achieving regional economic and political integration.²¹⁴ These include, CU, common market, monetary union and ultimately a political federation. This section examines the current status of regional integration in the EAC with respect to the four stage process.

²¹¹ United Nations Economic Commission for Africa (UNECA) 'The East African Monetary Union: Ready or Not' available at https://www.uneca.org/sites/default/files/images/eamu_report.pdf (accessed 20 March 2022).

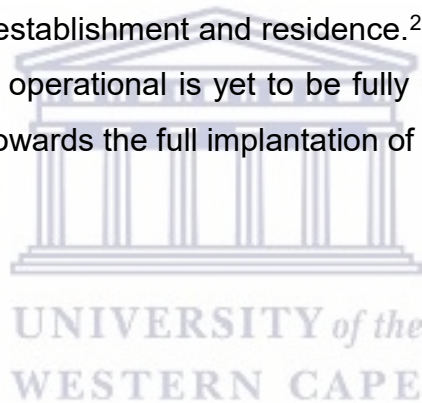
²¹² Article 130(2) of the EAC Treaty.

²¹³ Article 6(2) of the Abuja Treaty.

²¹⁴ Article 5(2) of the EAC Treaty.

The EAC CU was established in 2005, and is based on Art. 75 of the EAC Treaty.²¹⁵ Under the CU, the EAC partner states agreed to establish free trade in goods and services amongst themselves and agreed on a CET, whereby imports from countries outside the EAC zone are subjected to the same tariff when sold to any of the EAC partner states.²¹⁶

The common market has been in force since 2010 and it followed the CU, which was established in 2004 and became fully-fledged in January 2010.²¹⁷ The partner states signed a Protocol on the Establishment of the East African Common Market (EAC Common Market Protocol) in November 2009 which became effective in 2010.²¹⁸ The overall objective of the Common Market is to widen and deepen cooperation among the partner states in the economic and social fields.²¹⁹ This was to be realised through progressive removal of restrictions on the movement of goods, persons, labour, services and capital, and the rights of establishment and residence.²²⁰ It should be noted that the EAC common market though operational is yet to be fully implemented. Partner states are making steady progress towards the full implantation of the common market.²²¹



²¹⁵ Njenga NL (2018) 376.

²¹⁶ Matte R 'Analysis of the East African Community Integration Process as an Opportunity for Uganda's Medium-to Long-Term Development' (2019) 2 *Economics, Law and Policy Journal* 17.

²¹⁷ EAC 'What is a Common Market?' <https://eac.int/integration-pillars/common-market> (accessed 20 March 2022).

²¹⁸ Common Market available at <https://www.eac.int/common-market> (accessed on 20 March 2022).

²¹⁹ Article 4(1) of the Protocol on the Establishment of the East African Community Common Market.

²²⁰ Article 2(4) of the Protocol on the Establishment of the East African Community Common Market.

²²¹ Aloo OL 'Free Movement of Goods in the EAC' available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiAoMTik6LzAhVRDewKHbSzDdIQFnoECAyQAQ&url=https%3A%2F%2Fbrill.com%2Fdownloadpdf%2Fbook%2Fedcoll%2F9789004322073%2FB9789004322073_020.pdf&usq=AOvVaw1tkHeKtK1YDvQ7nAYraRL9 (accessed on 20 March 2022). See also Kago C & Masinde W 'Free Movement of Workers in the EAC' available at <https://www.jstor.org/stable/pdf/10.1163/j.ctt1w76vj2.25.pdf?refreqid=excelsior%3Adab1262dbd0680239379f833e19330ad> (accessed on 20 March 2022).

Art. 10 of the EAC Common Market Protocol guarantees the free movement, within the region, of workers who are citizens of the member states.²²² It entitles a worker to apply for employment and accept offers of employment actually made, move freely within the territories of the partner states for the purpose of employment, and conclude contracts and take up employment in accordance with the contracts, national laws and administrative actions.²²³ The key principals governing the common market include: (i) non-discrimination of nationals of other partner states on grounds of nationality; (ii) equal treatment of nationals of other partner states; (iii) ensuring transparency on matters concerning the other partner states; and (iv) share information for the smooth implementation of the Protocol.²²⁴

The EAC partner states signed the Protocol on the Establishment of the East African Community Monetary Union (EAMU Protocol) in November 2013 as the third stage of regional integration in the region, aiming at launching a single currency by 2024.²²⁵ The stated objective of the EAC Monetary Union is to “promote and maintain monetary and financial stability aimed at facilitating economic integration to attain sustainable growth and development of the Community.”²²⁶ For the period leading up to 2024, partner states were expected to progressively converge their currencies into a single currency in the Community. Prior to achieving a single currency, the EAC partner states are expected to harmonise financial monetary and fiscal policies; harmonise financial, payment and settlement systems; harmonise financial accounting and reporting practices; harmonise

²²² Article 7 of the Protocol on the Establishment of the East African Community Common Market.

²²³ Article 10 of the Protocol on the Establishment of the East African Community Common Market.

²²⁴ Article 3(2) of the Protocol on the Establishment of the East African Community Common Market.

²²⁵ United Nations Economic Commission for Africa (UNECA) ‘The East African Monetary Union: Ready or not?’ (2018) available at <https://repository.uneca.org/bitstream/handle/10855/24078/b11876748.pdf?sequence=1&isAllowed=y> (accessed 28 June 2021).

²²⁶ Article 3 of the Protocol on the Establishment of the East African Community Monetary Union.

policies and standards on statistical information; and establish a central bank for the region.²²⁷

A political federation is the ultimate goal of the EAC regional integration agenda.²²⁸ The process of attaining a political federation is supported by a resolution of the Heads of State made at a Special Summit in 2004, to examine ways and means of deepening and accelerating the integration process through a fast-track mechanism.²²⁹ The Summit set up a committee, dubbed the 'Wako Committee', to fast-track the EAC political federation.²³⁰ Following the consultative process, the office of Deputy Secretary-General responsible for Political Federation was established in 2006 to coordinate the process. In 2017, after further studies and consultations, the Heads of State adopted the political confederation as a transitional model of the East African Political Federation.²³¹ In February 2018, the summit appointed a team of experts to among other things study confederations across the world, both the previous and present, and establish why some collapsed and why some succeeded.²³² As of April 2021, the team of experts was holding consultative meetings among partner states to seek their views on the kind of Political Confederation the EAC should form.²³³

²²⁷ Matte R 'Analysis of the East African Community Integration Process as an Opportunity for Uganda's Medium-to Long-Term Development' (2019) 2 *Economics, Law and Policy Journal* 18.

²²⁸ Article 5(2) of the EAC Treaty.

²²⁹ EAC 'What is a Political Federation?' available at <https://www.eac.int/political-federation> (accessed 20 March 2022).

²³⁰ EAC 'What is a Political Federation?' available at <https://www.eac.int/political-federation> (accessed 20 March 2022).

²³¹ EAC 'What is a Political Federation?' available at <https://www.eac.int/political-federation> (accessed 20 March 2022).

²³² Press Release by the East African Community Secretariat available at <https://www.eac.int/press-releases/1976-eac-partner-states-to-largely-retain-their-national-sovereignty-under-the-proposed-eac-political-confederation> (accessed 20 March 2022).

²³³ Press Release by the East African Community Secretariat available at <https://www.eac.int/press-releases/1976-eac-partner-states-to-largely-retain-their-national-sovereignty-under-the-proposed-eac-political-confederation> (accessed 20 March 2022).

Notwithstanding the progress in regional integration, intra-regional trade within the region remains low at just about 20 percent.²³⁴ Some of the reasons that have been advanced for the low intra-regional trade include: informal (unrecorded) cross border trade; poor infrastructure; non-tariff barriers including cumbersome administrative procedures²³⁵ lack of complementarity in trading,²³⁶ institutional capacity weakness to advance regional integration; and failure to address political issues related to regional integration.²³⁷

According to the African Development Bank, lack of complementarity arises because of limited product differentiation in trade between countries in the region.²³⁸ Countries within the EAC and East Africa in general do not produce enough of what their neighbours want to import because they are all producers and exporters of primary commodities and importers of manufactured goods.²³⁹

Chapter four of this mini thesis discusses the implications of the AfCFTA on COMESA, EAC and SADC. The discussion above relating to COMESA and EAC shows that the two RECs have objectives of deepening regional economic integration. The RECs seek to achieve higher levels of economic integration along the lines of the linear model of economic integration. The EAC, however, seeks to go a step further than the linear model

²³⁴ World Trade Organisation 'Trade Policy Review: East African Community' available at https://www.wto.org/english/tratop_e/tp_r_e/tp484_e.htm (accessed 20 March 2022).

²³⁵ World Trade Organisation 'Trade Policy Review: East African Community' available at https://www.wto.org/english/tratop_e/tp_r_e/tp484_e.htm (accessed 20 March 2022).

²³⁶ African Development Bank Group 'East Africa Economic Outlook' available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2019AEO/REO_2019_-_East_Africa_.pdf (accessed 20 March 2022).

²³⁷ African Development Bank Group 'East Africa Economic Outlook' available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2019AEO/REO_2019_-_East_Africa_.pdf (accessed 20 March 2022).

²³⁸ African Development Bank Group 'East Africa Economic Outlook' available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2019AEO/REO_2019_-_East_Africa_.pdf (accessed 20 March 2022).

²³⁹ African Development Bank Group 'East Africa Economic Outlook' available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2019AEO/REO_2019_-_East_Africa_.pdf (accessed 20 March 2022).

by establishing a political federation. While the two RECs aspire to contribute towards the achievement of the objectives of the Abuja Treaty, there is nothing in their objectives that spells out how they are to interface with AfCFTA. From the perspective of the AU, the AfCFTA is the first step towards the achievement of the AEC. From the AfCFTA, the AU is expected to deepen continental economic integration further by establishing a continental CU, a single market for goods and services and follow on regional integration milestones as highlighted in Art. 6 of the Abuja Treaty.

As discussed in chapter one, the AU with the establishment of the AfCFTA appears to have introduced a concept of parallelism in Africa's regional economic integration efforts where regional integration is now being pursued at two levels, the continental level and at regional level.²⁴⁰ The foregoing is against the backdrop of the initial plans of the AU to establish the AfCFTA and continental CU through a process of coordination and harmonisation of REC FTAs and CUs.²⁴¹ The initial approach by the AU was intended to avoid duplication of efforts between the AU and the RECs in the establishment of the AEC. With the current state of affairs, however, there is need to consider whether the RECs under consideration should continue pursuing higher levels of economic integration or should instead review their objectives to align with the new AU approach towards the establishment of the AEC.

As shown above, African RECs face several challenges in their efforts to boost intra-regional trade. While economic integration remains one of the solutions to unlocking trade in Africa, it is by no means the only one.²⁴² The factors impeding trade in Africa some of which have been discussed in relation to COMESA and the EAC, show that there is more that needs to be done to boost intra-africa trade. Chapter four proposes that should the

²⁴⁰ Refer to section 1.3.

²⁴¹ Article 88(1) of the Abuja Treaty.

²⁴² SADC 'SADC Industrialisation Strategy and Roadmap 2015 – 2063' available at https://www.sadc.int/files/2014/6114/9721/Reprinting_Final_Strategy_for_translation_051015.pdf (accessed 20 March 2022).

RECs under consideration consider reviewing their treaties to align with the new AU approach to continental economic integration, their focus should be to address constraints to intra-Africa trade that fall outside the economic integration paradigm. The RECs should maintain the levels of economic integration achieved so far, allow and support the AU integration process, and review their objectives to focus on addressing supply side constraints to intra-Africa and intra-regional trade.

The next section will consider the background, objectives and status of regional integration of SADC.

3.4 The Southern African Development Community

As the name suggests, SADC is made up of countries in Southern Africa. The region currently has 16 member states namely Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.²⁴³

The vision of SADC is to build a region in which there will be a high degree of harmonisation and rationalisation, to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region.²⁴⁴

3.4.1 Background to formation

Regional integration in southern Africa started as an initiative of the Frontline States in the 1970s, and was initially directed towards the political liberation of the region.²⁴⁵ The Frontline States were Angola, Botswana, Lesotho, Mozambique, Eswatini, Tanzania,

²⁴³ SADC 'About SADC' available at <https://www.sadc.int/member-states> (accessed 20 March 2022).

²⁴⁴ SADC 'About SADC' available at <https://www.sadc.int/about-sadc/overview/sadc-vision/> (accessed 20 March 2022).

²⁴⁵ Southern African History Online 'Frontline States' available at <https://www.sahistory.org.za/article/frontline-states> (accessed 20 March 2022).

Zambia and from 1980, Zimbabwe.²⁴⁶ As more and more states attained political independence, the region decided to revise the mandate of the regional body by putting more focus on economic and political issues in the post-colonial period.²⁴⁷ Following a preparatory meeting in Arusha, Tanzania, in July 1979, nine Southern African states on 1 April 1980 founded the Southern African Development Coordination Conference (SADCC) in Lusaka, Zambia, when they signed a statement of strategy 'Southern Africa: Towards Economic Liberation, as well as a programme of action covering areas of Transport and Communications, Food and Agriculture, Industry, Manpower Development and Energy'.²⁴⁸ SADCC had more elaborate aims than the Frontline States, and aimed at reducing economic dependence on South Africa. One additional member, Malawi joined SADCC to bring the total membership to nine.²⁴⁹ SADCC managed to access considerable external aid, and embarked on numerous programmes and projects, but did not succeed in reversing the fundamental economic dependence of many of its members on South Africa.²⁵⁰ SADCC's main shortcomings were its singular focus on transport at the expense of other sectors, its one-sided dependence on the West, and its failure to make meaningful progress on reducing dependence on South Africa.²⁵¹

When it became clear, in the early 1990s, that a democratic South Africa was becoming an irreversible prospect, and against the background of changes in the global economy

²⁴⁶ Southern African History Online 'Frontline States' available at <https://www.sahistory.org.za/article/frontline-states> (accessed 20 March 2022).

²⁴⁷ Mapuva J & Mapuva ML 'The SADC regional bloc: What challenges and prospects for regional integration?' (2014) 18 *Law, Democracy & Development Journal* 22 36. 24.

²⁴⁸ SADC 'Regional Indicative Strategic Plan' available at www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (accessed 20 March 2022).

²⁴⁹ SADC 'Status of Integration in the Southern African Development Community' available at https://www.sadc.int/files/9915/9154/2991/Status_of_Integration_in_the_SADC_Region_Report.pdf (accessed 20 March 2022).

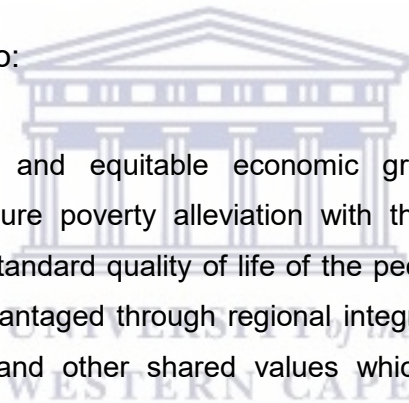
²⁵⁰ Amos S 'The Role of South Africa in SADC Regional Integration: The Making or Braking of the Organisation' (2010) 5 *Journal of International Commercial Law and Technology* 124.

²⁵¹ SADC 'Status of Integration in the Southern African Development Community' available at https://www.sadc.int/files/9915/9154/2991/Status_of_Integration_in_the_SADC_Region_Report.pdf (accessed 20 March 2022).

and severe droughts in the sub-region, the Heads of State of SADCC on 17th August 1992 turned SADCC into SADC.²⁵² This was done by way of a declaration entitled 'Towards a Southern African Development Community' in which they agreed to form an economic community of Southern African States. At the same meeting the SADCC member states adopted a Treaty establishing SADC.²⁵³ The Treaty changed the name of the organisation from SADCC to SADC and its mission also changed from that of reducing dependence on South Africa to one of creating an economic community in Southern Africa. South Africa joined SADC in August 1994.²⁵⁴ Mauritius became its 12 member in August 1995. In 1997 Congo (DRC) and Seychelles were admitted as 13 and 14 members respectively. Madagascar joined in 1999 while Comoros is the latest to join, having joined in 2017.²⁵⁵

3.4.2 Objectives of the Southern African Development Community

The objectives of SADC are, to:

- 
- (a) promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration (b) promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate, and effective (c) consolidate, defend and maintain democracy, peace, security and stability²⁵⁶ (d) promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States (e) achieve complementarity between national and regional strategies and programmes (f) promote and maximize productive employment and utilisation of

²⁵² Amos S (2010) 124.

²⁵³ The SADC Treaty signed on 17th August 1992, entered into force on 5th October 1993 after all the 10 founding members ratified it.

²⁵⁴ About SADC available at <https://www.sadc.int/member-states> (accessed 20 March 2022).

²⁵⁵ About SADC available at <https://www.sadc.int/member-states> (accessed 20 March 2022).

²⁵⁶ Article 5 of the SADC Treaty as amended in 2006.

resources of the Region (g) achieve sustainable utilisation of natural resources and effective protection of the environment (h) strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region.²⁵⁷

Unlike other REC treaties such as the COMESA Treaty,²⁵⁸ the objectives of SADC are silent on the future relationship of SADC and the AEC, once the latter is established. COMESA ultimately seeks to contribute towards the establishment, of the AEC. As indicated in chapter two and this chapter as well, the SADC Treaty entered into force earlier than the Abuja Treaty, the SADC Treaty having entered into force on 5 October 1993 and the Abuja Treaty on 12 May 1994. The foregoing notwithstanding, the RECs in 2008 undertook to amend their treaties in order to provide an organic link to the AEC.²⁵⁹ Further, the RECs committed themselves to provide for eventual absorption into the African Common Market. As will be discussed in chapter four, however, this mini thesis takes the view that RECs should not prepare for a terminal role into the AEC. Rather, they should prepare for co-existence based on the principles of complementarity and subsidiarity.

Interestingly, the SADC Treaty does not set out the roadmap for achieving regional economic integration. The objectives do not make reference to the attainment of the conventional integration milestones such as, establishment of a FTA, a CU, a common market, a monetary union and an economic community as per the linear model of economic integration.²⁶⁰ What the Treaty does however, is that it empowers member states to conclude such Protocols as may be necessary in each area of co-operation.²⁶¹ One requirement for the Protocols to be concluded is that they should spell out the

²⁵⁷ Article 5 of the SADC Treaty.

²⁵⁸ Refer to sections 3.2.2 and 3.3.2.

²⁵⁹ Article 5 of the Protocol on Relations.

²⁶⁰ Article 5 and 6 of the SADC Treaty.

²⁶¹ Article 22 of the SADC Treaty.

objectives and scope of, and institutional mechanisms for, co-operation and integration.²⁶² Pursuant to Art. 22 of the SADC Treaty, SADC in 1996 concluded the Protocol on Trade, which entered into force in 2000. The Protocol on Trade, envisaged the establishment of a FTA by 2008 through the elimination of barriers to trade. The Protocol on Trade however did not expressly provide for the establishment of a CU, common market and monetary union for SADC.

In 2003, SADC adopted the Regional Indicative Strategic Development Plan (RISDP) which provided a clear timetable for regional integration in SADC.²⁶³ The RISDP moved the SADC economic integration vision beyond what was proposed in the Protocol on Trade to include the establishment of a CU by 2010, a common market by 2015, a monetary union by 2016 and an Economic Union by 2018.²⁶⁴ It is important to note, however, that the RISDP is a non-binding Agreement which merely outlines the necessary conditions that should be realised towards the attainment of SADC's long term goals.²⁶⁵ There will be need in this regard for SADC to develop legally binding protocols on the aspects of regional integration that are not specified in the Protocol on Trade.

3.4.3 Status of Regional Integration in the Southern African Development Community

The SADC FTA was achieved in August 2008, when a phased programme of tariff reductions that had commenced in 2001 resulted in the attainment of minimum conditions for the FTA, 85 percent of intra-regional trade amongst the partner states attained zero

²⁶² Article 22 of the SADC Treaty.

²⁶³ SADC 'SADC Regional Indicative Strategic Plan available at www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (accessed 20 March 2022).

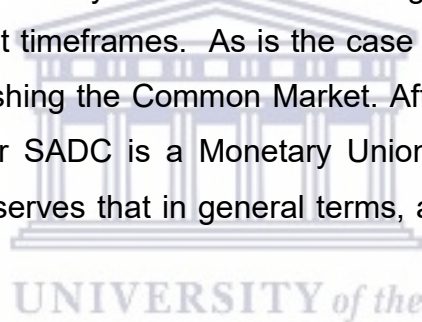
²⁶⁴ Trade Law Centre (Tralac) 'The Regional Indicative Strategic Development Plan: SADC's trade-led Integration Agenda available at <https://www.tralac.org/files/2012/04/S12TB022012-SADC-RISDP-SADC-agenda-20120418.pdf> (accessed 20 March 2022).

²⁶⁵ Trade Law Centre (Tralac) 'The Regional Indicative Strategic Development Plan: SADC's trade-led Integration Agenda' available at <https://www.tralac.org/files/2012/04/S12TB022012-SADC-RISDP-SADC-agenda-20120418.pdf> (accessed 20 March 2022).

duty.²⁶⁶ While the minimum conditions were met, maximum tariff liberalisation was only attained in January 2012 when the tariff phase down process for sensitive products was completed.²⁶⁷

After establishment of the FTA, the next SADC integration milestone is establishment of the SADC CU. This was not achieved as of December, 2020 and efforts are still underway to establish the CU.²⁶⁸ Tralac Law Centre notes that various challenges have hampered the process of establishing the CU in SADC including delays in phasing down of tariffs for the FTA and the complexity created by multiple memberships of SADC member states in various regional blocs.²⁶⁹ SADC is yet to set a new deadline for the establishment of a CU.²⁷⁰

Delay in establishing a CU inevitably meant the other integration milestones could also not be achieved within the set timeframes. As is the case with the CU, SADC is yet to set a revised date for establishing the Common Market. After the Common Market, the next integration milestone for SADC is a Monetary Union. This too remains work in progress. SADC however observes that in general terms, a number of indicators show



²⁶⁶ About SADC available at <https://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> (accessed 20 March 2022).

²⁶⁷ About SADC available at <https://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> (accessed 20 March 2022).

²⁶⁸ SADC 'Status of Integration in the Southern African Development Community' available at https://www.sadc.int/files/9915/9154/2991/Status_of_Integration_in_the_SADC_Region_Report.pdf accessed 20 March 2022).

²⁶⁹ Trade Law Centre (Tralac) 'The Regional Indicative Strategic Development Plan: SADC's Trade-led Integration Agenda' available at <https://www.tralac.org/publications/article/4612-the-regional-indicative-strategic-development-plan-sadc-s-trade-led-integration-agenda.html> (accessed 20 March 2022).

²⁷⁰ The SADC Secretariat notes that the region has not pursued a stepwise approach to regional integration. Rather, seeking first to consolidate the FTA, SADC had pursued a developmental approach to integration that focuses on sectoral co-operation, industrialisation and infrastructure development so as to enable sustainable natural resource exploitation, value addition and beneficiation, and competitiveness as a pre-requisite and necessary conditions for meaningful trade and deeper integration to occur (See Status of Integration in the Southern African Development Community available at https://www.sadc.int/files/9915/9154/2991/Status_of_Integration_in_the_SADC_Region_Report.pdf (accessed 20 March 2022).

some progress in financial integration,²⁷¹ although a lot still needs to be done.²⁷² A Monetary Union is where two or more countries achieve macroeconomic convergence, stable and harmonised exchange rates systems, liberalise capital and current accounts transactions and adopt market-oriented approaches to the conduct of monetary policy.²⁷³

The fifth and last integration milestone for SADC is the establishment of an Economic Union. SADC planned to establish an Economic Union by 2018. However, this too remains work in progress and a new timeframe is yet to be set for its realisation. An Economic Union entails implementation of a single currency in the SADC region.²⁷⁴ SADC notes that the single biggest challenge in attaining an Economic Union, and any of the more advanced economically related integration milestones, is the lack of clarity surrounding the issue of countries with membership of more than one CU.²⁷⁵ The idea of pursuing continental economic integration is one way of resolving the problem of multiple REC membership.

Despite the progress made in regional integration, statistics show that regional trade within SADC is low at 20 percent.²⁷⁶ This is compared to 40 percent in Asia and 60 percent in the European Union.²⁷⁷ This implies that SADC, like COMESA trades 90 percent with

²⁷² SADC 'Status of Integration in the Southern African Development Community' available at https://www.sadc.int/files/9915/9154/2991/Status_of_Integration_in_the_SADC_Region_Report.pdf (accessed 20 March 2022).

²⁷³ SADC 'Integration milestones' available at <https://www.sadc.int/about-sadc/integration-milestones/> (accessed 20 March 2022).

²⁷⁴ SADC 'Integration milestones' available at <https://www.sadc.int/about-sadc/integration-milestones/> (accessed 20 March 2022).

²⁷⁵ SADC 'Integration milestones' available at [Southern African Development Community :: Single Currency \(sadc.int\)](https://www.sadc.int/Southern_African_Development_Community::Single_Currency(sadc.int)) (accessed 20 March 2022).

²⁷⁶ SADC 'SADC for increased intra-regional and international trade' available at <https://www.sadc.int/news-events/news/sadc-increased-intra-regional-and-international-trade/> (accessed 20 March 2022).

²⁷⁷ Olayiwola W 'Governing the Interface between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges' available at <https://www.tralac.org/documents/resources/cfta/4229-governing-the-interface-between-the-afcfta-and-recs-ftas-issues-opportunities-and-challenges-uneca-november-2020.html> (accessed 20 March 2022).

external countries.²⁷⁸ Lewis also notes that regional trade is dominated by South Africa, which enjoys a huge surplus in the region, thus achieving equal rates of economic growth becomes difficult.²⁷⁹

The discussion above of the three RECs has shown that despite the progress made at deepening regional integration, intra-regional trade within the RECs remains dismally low. It would appear that elimination of tariffs and non-tariff barriers alone may not be the answer to boosting intra-regional trade.

Like the COMESA and EAC Treaties, the SADC treaty does not spell out the envisaged relationship between SADC and the AfCFTA. Neither does the SADC Treaty explain the envisaged relationship between SADC and the AEC. What is clear for now however is that continental regional integration will be taking place in parallel to sub-regional integration. As observed earlier, parallelism in Africa's regional integration agenda undoubtedly connotes an element of duplication of efforts between the two levels of the African regional integration paradigm. Chapter four discusses in detail the negative implications of the AfCFTA on the three RECs under consideration and highlights the need for a clear division of labour between the AU, the AfCFTA and the AEC on the one hand and the RECs on the other, in order to avoid duplication of efforts.

3.5 Conclusion

The chapter discussed three RECs, COMESA, EAC and SADC in terms of their background, objectives and status of regional integration. The three RECs seek to deepen regional integration and to promote sustainable economic growth and development for their member states. Of the three RECs under consideration, only

²⁷⁸ Mlambo HV & Mlambo ND 'Challenges impending Regional Integration in Southern Africa' (2018) 10 *Journal of Economics and Behavioural Studies* 253.

²⁷⁹ Lewis J 'Reform and opportunity: The changing role and patterns of trade in South Africa and SADC' (2001) available at <https://documents.worldbank.org/curated/en/302921468741633875/Reform-and-opportunity-the-changing-role-and-patterns-of-trade-in-South-Africa-and-SADC> (accessed 20 March 2022).

COMESA has a stated objective of contributing towards the establishment of the AEC while EAC and SADC are silent on the matter. COMESA commits to convert itself into an organic entity of the AEC.

It was further noted that the AU with the establishment of the AfCFTA appears to have introduced a concept of parallelism in Africa's regional economic integration efforts where regional integration is now being pursued at two levels, the continental level and at regional level. The foregoing is against the backdrop of the initial plans of the AU to establish the AfCFTA and continental CU through a process of coordination and harmonisation of REC FTAs and CUs. The initial approach by the AU was intended to avoid duplication of efforts between the AU and the RECs in the establishment of the AEC. With the current state of affairs, however, there is need to consider whether the RECs under consideration should continue pursuing higher levels of economic integration or should instead review their objectives to align with the new AU approach towards the establishment of the AEC.

The chapter also noted the strides that the three RECs are making at deepening regional integration. The EAC has made the most progress having established a CU, a common market, and is now working towards establishing a monetary union by 2024. COMESA and SADC on the other hand have established FTAs and are in the process of establishing CUs.

The reported progress in regional integration for the three RECs, has however not translated in the much anticipated increase in intra-regional trade. Some of the reasons for the low intra-regional trade in Africa include: lack of complementarity, infrastructure deficit, high transaction costs and non-tariff barriers. Notwithstanding the gloomy picture, the RECs are making determined efforts towards addressing the constraints to trade.

With the establishment of the AfCFTA, it has been suggested that perhaps the RECs could consider shifting their focus to addressing the supply side constraints to intra-Africa and intra-regional trade. At the same time, the RECs should also work towards supporting

the AU's efforts at expediting regional economic integration in Africa. Chapter four discusses the probable implications of the AfCFTA on the continued existence of the three RECs in question namely: COMESA, EAC and SADC.



CHAPTER FOUR

IMPLICATIONS OF THE AFRICAN CONTINENTAL FREE TRADE AREA ON THE EXISTING REGIONAL ECONOMIC COMMUNITIES

4.1 Introduction

The previous chapter discussed three regional economic communities (RECs) namely the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC) and the East African Economic Community (EAC). The three RECs were discussed in terms of the background to their establishment, their objectives, and finally the status of regional integration. The chapter also analysed some of the reasons for the low intra-regional trade among the three RECs.

It was noted that of the three RECs, the EAC has made the most progress in achieving higher levels of regional economic integration, having established a customs union and a common market and currently working towards establishing a monetary union and a political federation. COMESA and SADC on the other hand have established free trade areas and are in the process of establishing customs unions.

It was further noted that intra-regional trade within the three RECs remained low at 10 percent for COMESA, 20 percent for EAC and SADC. This was contrasted with RECs like the EU where intra-regional trade averages 60 percent. Among the reasons for the low-intra-regional trade include: lack of complementarity, infrastructure deficit, high transaction costs and non-tariff barriers.

Lack of complementarity in the exports of member states of the RECs in question was, however, highlighted as the major reason for the low intra-regional trade. Member states of the three RECs are heavily dependent on export of raw materials as opposed to finished products. It is therefore expected that the more industrialised and diversified the economies of these countries become, the higher the chances of boosting intra-regional trade.

The purpose of this chapter is to discuss the negative implications of the African Continental Free Trade Area (AfCFTA) on existing RECs with particular focus on COMESA, EAC and SADC.

4.2 Implications of African Continental Free Trade Area on the continued existence of the existing regional economic communities

As discussed in chapter two, the AfCFTA should have come about through a process of co-ordination and harmonisation of tariff and non-tariff systems of the African Union (AU) recognised RECs. However, due to the uneven progress of the RECs, the AU in 2012 decided to fast track the establishment of the AfCFTA on the basis of an agreement, the AfCFTA Agreement as opposed to through a process of co-ordination and harmonisation of REC FTAs.²⁸⁰

In discussing the implications of the AfCFTA on the continued existence of the existing RECs, it will be helpful first to appreciate the African Union's (AU) long term vision for the RECs as articulated in the Treaty Establishing the African Economic Community (Abuja Treaty) and the Protocol on Relations between the African Union and the Regional Economic Communities (Protocol on Relations). This aspect was briefly discussed in chapter one and chapter three and will be considered in some detail in this chapter.²⁸¹ With the establishment of AfCFTA, it has been suggested elsewhere that there should be consideration for the AfCFTA to eventually subsume one or two of the RECs.²⁸² The chapter will thus discuss how such proposals reconcile with the long term vision of the AU, for the RECs and most importantly, the chapter will discuss the probable future of the RECs following the establishment of the AfCFTA.

²⁸⁰ Refer to section 1.3.

²⁸¹ Refer to the sections 1.1 and 3.3.2.

²⁸² Parshotam A 'Can the African Continental Free Trade Area offer a new beginning for trade in Africa' available at <https://www.africaportal.org/publications/can-african-continental-free-trade-area-offer-new-beginning-trade-africa/> (accessed 16 April 2022).

In discussing the implications of the AfCFTA on the existing RECs and in particular the three RECs under consideration, this mini thesis submits that the AfCFTA is likely to have an effect on future economic integration programmes of the RECs as REC member states may decide to prioritise continental economic integration efforts over related sub-regional activities. The mini thesis will also examine what the future of the RECs should be arising from the potential shift in focus of REC member states from REC integration programmes to continental integration programmes.

For purposes of giving context to the discussion that follows, reference to the acronym RECs, unless the context otherwise dictates, should be construed to mean the three RECs under consideration namely COMESA, EAC and SADC.

4.2.1 The African Union's long term vision for the Regional Economic Communities

As discussed in chapter two, RECs in Africa, particularly the eight AU recognised RECs are considered as building blocs for the establishment of the African Economic Community (AEC).²⁸³ The AU envisaged the establishment of the AEC through a process of co-ordination and harmonisation of the activities of the eight RECs.²⁸⁴ RECs were also expected to have as their final objective the establishment of the AEC.²⁸⁵ Equally as discussed in chapter two, the AfCFTA was supposed to be established through a process of co-ordination and harmonisation of tariff and non-tariff systems among the various RECs with a view to establishing a Customs Union (CU) at the continental level by means of adopting a CET.²⁸⁶ This was at stage four of the six stage process for the establishment of the AEC.²⁸⁷ Stage four was expected to be achieved by 2019. Stage five which is

²⁸³ Refer to section 2.2.2.

²⁸⁴ Article 88 of the Abuja Treaty.

²⁸⁵ Article 88(2) of the Abuja Treaty.

²⁸⁶ Refer to section 2.2.2.

²⁸⁷ Article 6(2) of the Abuja Treaty.

establishment of the African Common Market is supposed to be achieved by 2023 while stage six, establishment of the AEC, African Monetary Union and Pan-African Parliament, was to be achieved by 2028.²⁸⁸

While the Abuja Treaty provided for eventual absorption of the RECs into the AEC, the Treaty fell short of indicating the stage at which the integration was supposed to occur. To resolve this uncertainty, the AU in 2008 adopted the Protocol on Relations whose objectives among others included promoting co-ordination and harmonisation of the activities of the RECs in order to facilitate their integration and absorption into the African Common Market.²⁸⁹ The Protocol, signed between the AU and the RECs, required the latter to take steps to review their treaties to provide an organic link to the AEC.²⁹⁰ The AU's vision for the RECs therefore remains one of integrating them into the AEC.

One important provision of the Protocol on Relations, was the undertaking by the parties to co-ordinate their policies, programmes and activities with a view to avoiding duplication.²⁹¹ Duplication in this case would entail the AU undertaking activities of the RECs or vice versa. This is why the Protocol on Relations was very clear on the obligations of the parties and how the RECs were to contribute to the establishment of the AEC.

Understanding the long term plan of the AU for the RECs is critical in appreciating the interface that should exist between the AfCFTA and the RECs. The Protocol on Relations among other things set out to avoid duplication of efforts between the AU and the RECs. The establishment of the AfCFTA on the basis of an agreement runs counter to the stated objective of the Protocol on Relations which necessitates an examination of the implications that the AfCFTA shall have on the RECs under consideration.

²⁸⁸ Article 6(2) of the Abuja Treaty.

²⁸⁹ Article 3(2) of the Protocol on Relations.

²⁹⁰ Article 5 of the Protocol on Relations.

²⁹¹ Article 4 of the Protocol on Relations.

4.2.2 The African Continental Free Trade Area and the Regional Economic Communities

In terms of the relationship that should exist between the AfCFTA and the RECs, the starting point is to consider the membership of the AfCFTA Agreement. The RECs are not members of the AfCFTA, rather it is the member states of the AU that are eligible for membership. The only involvement of the RECs in the activities of the AfCFTA is representation on the Committee of Senior Trade Officials, in an advisory capacity.²⁹² Interestingly, the AfCFTA Agreement identifies the REC FTAs as building blocks for the AfCFTA.²⁹³ Since the RECs are not members of the AfCFTA, this could only be interpreted to mean the AfCFTA will ride on the experiences of member states that have already established FTAs within their RECs, to lead the process of establishing the continental FTA.²⁹⁴ One would expect that as discussions on liberalisation of trade on the African Continent take place, member states of specific RECs will be expected to share regional experiences that the AfCFTA may draw on. The RECs themselves, however, will not have significant involvement in the process. Member states belonging to RECs that have not established FTAs will have to take a leaf from their counterparts in submitting schedules of tariff concessions and making commitments under the Trade in Services Protocol.

Unlike the Abuja Treaty, the AfCFTA Agreement is silent on the status of the RECs either at the entry into force of the AfCFTA Agreement, at full operationalisation of AfCFTA, or when the African single market is established. The Agreement only provides for what happens in the event of inconsistency between the AfCFTA Agreement and the REC Agreements. Art. 19(1) of the AfCFTA Agreement provides that in the event of any conflict

²⁹² Article 12(5) of the AfCFTA Agreement.

²⁹³ Article 5 (b) of the Treaty Establishing the AEC.

²⁹⁴ Olayiwola W 'Governing the Interface between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges' available at <https://www.tralac.org/documents/resources/cfta/4229-governing-the-interface-between-the-afcfta-and-recs-ftas-issues-opportunities-and-challenges-uneca-november-2020.html> (accessed 16 April 2022).

or inconsistency between the AfCFTA Agreement and any regional agreement, the AfCFTA Agreement shall prevail to the extent of the specific inconsistency.²⁹⁵

Art. 19(2) of the AfCFTA Agreement, however, provides some clarity on how progress of the AfCFTA on the trade integration front may affect the activities of the RECs. Art. 19(2) allows state parties that are members of other RECs, trading arrangements and customs unions, which have attained among themselves higher levels of regional integration than that under the AfCFTA Agreement, to maintain such higher levels among themselves. The Protocol on Trade in Goods which is annexed to the AfCFTA Agreement goes further to state that State Parties that have attained higher levels of elimination of customs duties and trade barriers than those provided in the Protocol, shall maintain, and where possible improve upon, those higher levels of trade liberalisation among themselves.²⁹⁶

Art. 19(2) of the AfCFTA Agreement entails that RECs will only maintain their levels of economic integration if they are higher than those for the AfCFTA. If the AfCFTA liberalises trade beyond the level of a particular REC, then member states of such REC should abandon trade liberalisation efforts at REC level, and align with the AfCFTA. In practice therefore, and as observed in chapter one, the particular modalities for tariff reductions in the AfCFTA will likely require REC FTAs to persist as 'islands' until the tide of liberalisation envisaged by the AfCFTA rises above them in the medium to long term.²⁹⁷

What is not clear, however, is what happens to a REC whose level of economic integration is surpassed by that of the AfCFTA. As noted in chapter one, RECs in Africa are at different stages of economic integration with some, yet to establish FTAs.²⁹⁸ The AfCFTA Agreement should have gone further to give direction on how such RECs shall operate following the establishment of AfCFTA. There is therefore likely to be some uncertainties

²⁹⁵ The AfCFTA is expected to build on and improve upon the acquis of the existing REC FTAs. The REC FTAs will only be replaced once the tide of AfCFTA liberalisation rises above level of respective RECs.

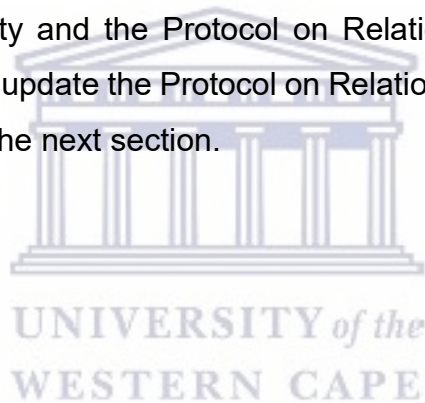
²⁹⁶ Article 8(2) of the Protocol on Trade in Goods.

²⁹⁷ Assessing Regional Integration in Africa VIII.

²⁹⁸ Refer to section 2.2.2.

particularly for RECs that will fall below the AfCFTA tide of trade liberalisation and by extension, economic integration. The Southern African Institute of Internal Affairs (SAIIA) however suggests that further consideration is warranted regarding the potential for the AfCFTA to eventually subsume one or two of the RECs, or for the AfCFTA to become more ambitious through implementation.²⁹⁹

This mini thesis submits that beyond the AfCFTA, the AU and the RECs should consider revisiting the Protocol on Relations so as to give clarity to the future relations of not only the AfCFTA and the RECs but also, of the AEC and the RECs. The Protocol for example should state what becomes of a REC whose regional integration status is overtaken by the AfCFTA and subsequent continental integration milestones. The development of the AfCFTA Agreement slightly modifies the roadmap to the establishment of the AEC as articulated in the Abuja Treaty and the Protocol on Relations and as a consequence thereof, there may be need to update the Protocol on Relations.³⁰⁰ This discussion will be considered in more detail, in the next section.



²⁹⁹ Parshotam A 'Can the African Continental Free Trade Area offer a new beginning for trade in Africa' available at <https://www.africaportal.org/publications/can-african-continental-free-trade-area-offer-new-beginning-trade-africa/> (accessed 6 July 2021).

³⁰⁰ The AfCFTA should have come about through a process of coordination and harmonisation and not on the basis of an agreement (See Articles 6(1) and 88(1) of the Abuja Treaty).

4.2.3 Implications of the African Continental Free Trade Area on economic integration programmes of the Common Market for Eastern and Southern Africa, East African Community and Southern African Development Community

COMESA, EAC and SADC, like other RECs in Africa are working towards deepening regional economic integration for purposes of liberalising trade among themselves, promoting foreign investment and boosting intra-regional trade.³⁰¹ To this end, the RECs have set themselves milestones for deepening regional economic integration which are drawn from the linear model³⁰² of regional integration. As discussed in chapter one, the linear model articulates the following stages of regional economic integration, free trade area, customs union, common market, economic and monetary union and economic community.³⁰³ COMESA, EAC and SADC are at different stages of the linear model, but are all working towards achieving higher levels of integration.

With regards to COMESA, COMESA established an FTA in 2000 and launched its CU in 2009. However, as observed in chapter three, the CU is yet to become operational. COMESA also seeks to establish a common market, a monetary union and economic community. The EAC on the other hand is the most advanced REC in Africa with regards to regional economic integration. As observed in chapter three, the EAC has established a customs union and a common market and is working towards establishing a monetary union and a political federation. By establishing a common market, the EAC has

³⁰¹ Mwasha NO 'The Benefits of Regional Economic Integration for Developing Countries in Africa: A Case Study of East African Community' available at <https://www.semanticscholar.org/paper/The-Benefits-of-Regional-Economic-Integration-for-%3A-Mwasha/18beea4e9968371264a4a0b3a577d657073bde88> (accessed 28 June 2021).

³⁰² The linear approach has been critiqued by some scholars as being inadequate and not appropriate for the development conditions of African countries. Instead Davies has proposed a "development integration" approach which argues, that "development integration stresses the need for both macro and micro co-ordination in a multi-sectoral programme embracing production, infrastructure and trade". In addition, Davies argued that to compensate the least developed countries in a regional integration project that ensured a more equitable balance of the benefits of regional integration trade integration would need to be complemented by regional industrial development (See Ismail FA 'Advancing Regional Integration in Africa through the Continental Free Trade Area' (2017) 10 *Law and Development Review* 143).

³⁰³ Refer to section 1.2.

exceeded stage three of the Abuja Treaty roadmap which required RECs to establish FTAs and customs unions by 2017.

SADC set out to establish an FTA by 2008, a customs union by 2010, a common market by 2015, a monetary union by 2016 and an economic union by 2018. In line with the above timelines, SADC establish an FTA in 2008, but has however fallen behind with the other integration milestones.³⁰⁴ The region is currently working towards establishing a customs union. While SADC has made some strides towards establishing a customs union, it has a long way to go to achieve the milestone.³⁰⁵

With regards to the implications of the AfCFTA on the existing RECs, the starting point is the Protocol on Relations. Art. 4 of the Protocol on Relations required the parties to coordinate their policies, measures, programmes and activities with a view to avoiding duplication thereof. This was in line with the AUs vision to establish the AEC gradually using the RECs as building blocs. In this regard the AU set out a clear roadmap³⁰⁶ to the establishment of the AEC, which roadmap outlined the responsibilities of the parties in the process leading up to the establishment of the continental economic community.

The establishment of the AfCFTA on the basis of an agreement however, indirectly modifies the Abuja Treaty roadmap.³⁰⁷ This is because according to the Abuja Treaty roadmap, the AfCFTA should not have been established on the basis of an agreement.

³⁰⁴ Refer to section 3.3.4.

³⁰⁵ SADC 'Status of Integration in the Southern African Development Community' available at https://www.sadc.int/files/9915/9154/2991/Status_of_Integration_in_the_SADC_Region_Report.pdf (accessed on 16 April 2022).

³⁰⁶ The Abuja Treaty roadmap.

³⁰⁷ See section 15 of the Draft framework, roadmap and architecture for Fast Tracking the Continental Free Trade Area (Draft Framework) available at <https://www.tralac.org/documents/resources/cfta/343-draft-framework-road-map-and-architecture-for-fast-tracking-the-cfta/file.html> (accessed on 16 April 2022). The African Union in section 15 of the Draft Framework observe that the institutional framework for Africa's market integration did not explicitly provide for the establishment of a Pan-African Free Trade Area. Rather its focus was on the RECs which were expected in the third of the six stages of the process of the creation of the AEC, to establish FTAs and CUs. Further, the starting point of market integration at the continental level was expected to be a Customs Union.

Rather, the AfCFTA should have come about through a process of harmonisation and coordination of REC FTAs.³⁰⁸ Establishment of the AfCFTA on the basis of an agreement lends itself to duplication of efforts as the AU is beginning the process of establishing the AfCFTA from inception as opposed to leveraging on the progress made by the RECs.

According to the Abuja Treaty, the starting point of market integration at continental level was expected to be a Customs Union³⁰⁹ followed by the African common market.³¹⁰

The foregoing means there will be duplication of efforts in the establishment of the AfCFTA. Member states belonging to RECs that have already established FTAs will have to undergo the same processes they did when establishing REC FTAs, in establishing the AfCFTA. Additionally, while the Abuja Treaty envisages absorption of the RECs into the African Common Market, most of the RECs have as their ultimate objective establishment of economic communities. This means the RECs also envisage establishment of common markets, monetary unions and eventually economic communities. This is the case for COMESA and SADC. For EAC, it envisages establishment of a monetary union and a political federation as well.

The United Nations Economic Commission for Africa (UNECA) observe that with the establishment of the AfCFTA, the other remaining role for RECs in trade will be the formation of REC CUs. Further, that these can remain islands of further integration within the AfCFTA frame work.³¹¹ The foregoing however does not address the problem of duplication of efforts that is likely to arise. This mini thesis submits that there is need for

³⁰⁸ Refer to sections 1.1, 1.2, 2.2.1 and 4.2.

³⁰⁹ Section 15 of the Draft framework, roadmap and architecture for Fast Tracking the Continental Free Trade Area (Draft Framework) available at <https://www.tralac.org/documents/resources/cfta/343-draft-framework-road-map-and-architecture-for-fast-tracking-the-cfta/file.html> (accessed on 16 April 2022).

³¹⁰ Article 6(2)(e) of the Abuja Treaty.

³¹¹ United Nations Economic Commission for Africa (UNECA) 'Assessing Regional Integration in Africa VIII' available at <https://www.uneca.org/fr/assessing-regional-integration-africa-viii> (accessed 16 April 2022).

a comprehensive review of REC trade related roles and objectives for purposes of ensuring harmony in Africa's regional integration efforts.

To prevent possible duplication of efforts, the AU Assembly in 2017 called for a clear division of labour and effective collaboration among the AU, the RECs and members states and other continental institutions in the implementation of the AfCFTA.³¹² Such collaboration according to the Assembly should be based on principles of subsidiarity and comparative advantage.³¹³ The Assembly mandated the African Union Commission to develop a proposal in collaboration with other stakeholders on an effective division of labor among stakeholders, again based on the principle of subsidiarity.³¹⁴ Udombana opines that:

'For AEC/AfCFTA, RECs will be authorised to only advance the integration agenda in specific areas. The AfCFTA organs will not take action in those areas not falling within their exclusive competences. They will do so only when their objectives cannot be adequately achieved by individual states or RECs.'³¹⁵

UNECA on the other hand opines that in the long run, as the level of continental integration deepens, the trade related functions of RECs are expected to be consolidated at the continental level in line with the 18 ordinary session of the Assembly of the African Union decision for consolidation of the Tripartite and other FTAs into a Continental Free

³¹² Udombana JN 'A Step Closer: Economic Integration and African Continental Free Trade Area' (2020) 31 *DUKE Journal of Comparative International Law* 67.

³¹³ The principal of features prominently in discussions concerning the allocation and exercise of political and legal authority in multilevel governance arrangements in which at least some competences are shared between different levels of political-legal decision making. The basic thrust of the subsidiarity principle favours governance at lower, more local levels (See Staden VA 'Subsidiarity in Regional Integration Regimes in Latin America and Africa' available at https://www.researchgate.net/publication/304263271_Subsidiarity_in_Regional_Integration_Regimes_in_Latin_America_and_Africa/link/5889b00da6fdcc9a35c30702/download (accessed 16 April 2022).

³¹⁴ Udombana JN (2020) 69.

³¹⁵ Udombana JN (2020) 69.

Trade Area.³¹⁶ The observation by the UNECA is interesting as it does not suggest absorption of the RECs into the AEC as envisaged in the Protocol on Relations. Rather it points to consolidation of REC trade related functions at continental level in line with the 18 ordinary session of the Assembly of the African Union.³¹⁷ This seems to suggest that the RECs should still be able to carry out non-trade related functions post establishment of the AfCFTA and even the AEC. The foregoing is also in line with the recommendations of the AU Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration which recommended that the RECs should be organic structures of the AU rather than just building blocs with a terminal role.³¹⁸

Arising from the foregoing, this mini thesis submits that the solution to dealing with the problem of duplication of efforts between the AU and the RECs lies in modifying the roles of the RECs on the basis of the principle of subsidiarity and allowing the RECs to focus on areas of co-operation that fall outside the linear path of regional integration.³¹⁹ The extent of the review is considered in the sections that follow. In line with the Protocol on Relations, the RECs should review their treaties to provide first, for the role of the RECs in the implementation of AfCFTA Agreement and secondly, to modify their objectives to focus on non-linear areas of co-operation.

To begin with, the AU does not clearly define the role of the RECs in the implementation of AfCFTA Agreement. While the AfCFTA Agreement recognises the REC FTAs as building blocs for the AfCFTA, the Agreement does not explain how the RECs shall

³¹⁶ African Union (AU) 'African Continental Free Trade Area: Questions and Answers' available at <https://repository.uneca.org/handle/10855/43253> (accessed 16 April 2022).

³¹⁷ African Union (AU) 'African Continental Free Trade Area: Questions and Answers' available at <https://repository.uneca.org/handle/10855/43253> (accessed 16 April 2022).

³¹⁸ African Union 'Report on the status of regional integration in Africa' available at <https://au.int/en/documents/20200523/africa-regional-integration-index-report> (accessed on 16 April 2022).

³¹⁹ Udombana JN (2020) 68.

contribute towards the successful implementation of the AfCFTA.³²⁰ The AfCFTA Agreement allows RECs to attend meetings of the Committee on Senior Trade Officials in an advisory capacity. Beyond that, the Agreement does not guide on how the RECs could enable and fast track implementation of the AfCFTA at regional level.

Udombana observes that RECs could provide expertise for members to research trade facilitation in order to participate effectively in the multilateral trading system and enhance trade competitiveness.³²¹ He further observes that RECs could provide financial support to their members to develop integration programmes and generally meet their AEC/AfCFTA timelines.³²² The UNECA on the other hand observes that the AU should encourage the RECs secretariats to develop the operational legal framework and implementation modalities of the AfCFTA provisions. It further observes that the AfCFTA secretariat should draw up a roadmap for each of the RECs in the implementation of the AfCFTA Agreement in line with the commonalities of the relevant texts, which roadmap would serve as a framework for RECs in defining the activities, objectives and priorities for co-operation in the implementation of the AfCFTA Agreement. The foregoing points to a need for the RECs to mainstream implementation of the AfCFTA into their treaties and protocols.

This mini thesis submits that rather than duplicating efforts with the AU/AfCFTA, the RECs should instead focus on fast tracking the implementation of the AfCFTA at regional level. The RECs should re-align their trade policies to ensure smooth and efficient

³²⁰ The United Nations Commission for Africa observes that there is no common understanding of 'RECs as building blocs of the AEC and Article 5(b) of the AfCFTA. UNECA further observes that this may pose a challenge in building the interface as key stakeholders may have diverse expectation of the needs and objectives of the interface. UNECA notes that the Protocol on Relations is crucial to the functionality of the interface in the presence of multiple trade regimes.

Olayiwola further notes that there is need to recognise the difficulty inherent in the definition and nature of the AU-RECs relationship as it is governed by various texts and none of them clearly present definitions of subsidiarity, comparative advantage, regional and continental complementarity, a fact which provides room for different interpretations of the principles by various stakeholders.

³²¹ Udombana JN (2020) 65.

³²² Udombana JN (2020) 65.

implementation of the AfCFTA Agreement.³²³ Further, RECs should avoid pursuing higher levels of economic integration and instead focus on the roles highlighted above. Assisting with the implementation of the AfCFTA, will help to expedite continental integration and fast track the establishment of the continental customs union ahead of schedule. With the establishment of the AfCFTA it is time to streamline regional integration efforts in Africa and work towards the common goal of achieving continental economic integration. Gumede observes that one of the possible interfaces between the AfCFTA and the RECs is the option of reducing the roles of the RECs to coordination with the idea being that the Secretariats of the RECs are trimmed down and the focus of capacities in the RECs gets dedicated to coordination of the countries that belonged to the REC at the point of the AfCFTA taking over the RECs.³²⁴ In other words, Secretariats of the RECs would service member countries and interface with the AfCFTA Secretariat.

Udombana observes that RECs may either be building or stumbling blocks in the realisation of AfCFTA. He further notes that the major problem with Africa's RECs is their overlapping membership and mandate which poses potential conflict regarding which organisations obligations should take precedence. Udombana notes that there is also absence of clear principles of coordination among the RECs which could cause them to become stumbling blocks on the path to the Pan-African vision of the AfCFTA.³²⁵ Hence to avoid RECs being stumbling blocs to the AfCFTA and the AU, there is need to carefully develop a framework of cooperation between AU and the RECs aimed at fostering complementarity, harmony and unity in the implementation of Africa's economic integration programmes.

³²³ Olayiwola observes that RECs should align various trade polices to the focus areas of the AfCFTA (See Olayiwola W 'Governing the Interface between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges' available at <https://www.tralac.org/documents/resources/cfta/4229-governing-the-interface-between-the-afcfta-and-recs-ftas-issues-opportunities-and-challenges-uneca-november-2020.html> (accessed 16 April 2022)).

³²⁴ Gumede V 'The African Continental Free Trade Agreement and the future of Regional Economic Communities' (2021) 39 *Journal of Contemporary African Studies* 479.

³²⁵ Udombana JN (2020) 66.

Erasmus makes an interesting observation on what is expected of the RECs with the establishment of the AfCFTA.³²⁶ He notes that while AfCFTA Agreement considers the RECs as building blocs for AfCFTA, it does not require them to establish CUs. He further notes that the Agreement requires state parties that are members of other RECs which have attained among themselves higher levels of regional integration to maintain such higher levels among themselves.³²⁷ This means RECs are required to maintain their current levels of economic integration be it FTAs, CUs or common markets as the case may be.

This mini thesis therefore submits that the RECs should begin to re-align their treaties and protocols in order to support and compliment the continental economic integration process. The RECs should help member states with technical support to meet AfCFTA timelines. With coordinated efforts between the AfCFTA and the RECs, there is a high likelihood of fast tracking implementation of the AfCFTA as well as the remaining integration milestones of the AU.

In addition to the RECs facilitating the continental economic integration process, the RECs should also review their treaties to focus on areas of cooperation that fall outside the linear model of economic integration. The RECs should focus on complementing the AUs efforts at among other things facilitating and boosting intra-Africa trade.³²⁸ Among

³²⁶ Erasmus G 'Making the AfCFTA and the RECs work' available at <https://www.tralac.org/blog/article/15233-making-the-afcfta-and-the-recs-work.html> (accessed 16 April 2022).

³²⁷ Erasmus G 'Making the AfCFTA and the RECs work' available at <https://www.tralac.org/blog/article/15233-making-the-afcfta-and-the-recs-work.html> (accessed 16 April 2022).

³²⁸ The Action Plan for Boosting Intra-Africa Trade already allocates responsibilities to the AU, RECs and member states in the implementation of the seven clusters identified in the Action Plan (See Action Plan for Boosting Intra-African Trade available at https://au.int/web/sites/default/files/newsevents/pressreleases/26498-pr-action_plan_for_boosting_intra-african_trade_f-english.pdf (accessed 16 April 2022). Since the AfCFTA is being rolled out in parallel to the Action Plan for Boosting Intra-Africa Trade, the RECs could compliment the efforts of the AU by mainstreaming the provisions of the Action Plan for Boosting Intra-Africa Trade into their activities and programmes.

the expected benefits of regional economic integration is increased levels and volumes of trade.³²⁹ When tariff and non-tariff barriers to trade are eliminated, countries that form part of a regional economic grouping are expected to trade more with each other than with third parties. As observed in chapter three, however, intra-regional trade within African RECs has remained very low despite all the efforts to deepen regional integration.³³⁰ Intra-regional trade in COMESA, EAC and SADC has remained low at 10 percent, 20 percent EAC and 20 percent SADC respectively.³³¹ Equally as observed in chapter three,³³² the low level of intra-regional and intra-Africa³³³ trade is attributed to a number of factors, among them lack of diversification of the export base, inadequate and poor state of Africa's ³³⁴trade related infrastructure.

In his foreword to the SADC Industrialisation Strategy and Roadmap 2015 to 2063, the late President of Zimbabwe Mr. Robert Mugabe, observed as follows:

'Despite persistent efforts to boost trade within the region through the SADC Free Trade Area, the value of intra-SADC trade has remained very low, at only 17 percent of total SADC trade. Exports from the region are dominated by unprocessed or minimally processed products mainly from the agricultural and mineral sectors, thus providing very low value returns. Such low level of intra-regional trade clearly shows that the great

³²⁹ Mwasha NO 'The Benefits of Regional Economic Integration for Developing Countries in Africa: A Case Study of East African Community' available at <https://www.semanticscholar.org/paper/The-Benefits-of-Regional-Economic-Integration-for-%3A-Mwasha/18beea4e9968371264a4a0b3a577d657073bde88>. (accessed 16 April 2022).

³³⁰ Refer to sections 3.2.3, 3.3.3, and 3.4.3.

³³¹ Refer to sections 3.2.3, 3.3.3, and 3.4.3.

³³² Refer to section 3.3.3.

³³³ Intra- Africa trade stands at 18 percent with most of that trade being in agricultural products (See Mene W 'The African Continental Free Trade Area (AfCFTA): Boosting Intra-Africa Trade' (2020) 51 *Geo. J. Int'l L.* 751).

³³⁴ African Union ' Boosting Intra-African Trade: Issues Affecting Intra-African Trade, Proposed Action Plan for boosting Intra-African Trade and Framework for the fast tracking of a Continental Free Trade Area' available at <https://au.int/en/documents/20120118/biat-issues-affecting-intra-african-trade-proposed-action-plan-boosting-intra> (accessed 16 April 2022).

emphasis placed on tariff elimination, has not brought about the intended socio-economic development, nor the enhancement of quality of life and the well-being of our people. To address this challenge, we have agreed to act collectively, as a Region, to implement effective strategies that boost the productive capacity of our industries, develop infrastructure that leverages industrialization and promotes technological advancement.³³⁵

From the foregoing, it is clear that regional integration efforts that focus predominantly on achieving integration milestones under the linear model are unlikely to yield the desired results in terms of boosting intra-Africa trade. The late President Mugabe observed that Africa needs to do more than just eliminate tariff and non-tariff barriers, in order to boost intra-Africa trade.³³⁶

The RECs should thus seek to address factors that impede intra-regional trade such as trade facilitation, industrialisation and development of trade related infrastructure. While there is a lot of optimism regarding the potential for the AfCFTA to boost intra-Africa trade, such optimism may not yield the expected results if the current impediments to Africa's trade are not addressed.³³⁷ The RECs should therefore compliment the AUs efforts at boosting intra-Africa trade by focusing among other things on addressing supply side constraints to trade in Africa.³³⁸ Otherwise Africa will continue to achieve higher levels of

³³⁵ SADC 'SADC Industrialisation Strategy and Roadmap 2015 – 2063' available at https://www.sadc.int/files/2014/6114/9721/Reprinting_Final_Strategy_for_translation_051015.pdf (accessed 16 April 2022).

³³⁶ SADC 'SADC Industrialisation Strategy and Roadmap 2015 – 2063' available at https://www.sadc.int/files/2014/6114/9721/Reprinting_Final_Strategy_for_translation_051015.pdf (accessed 16 April 2022).

³³⁷ Section 8 of the Action Plan for Boosting Intra-Africa Trade available at https://au.int/web/sites/default/files/newsevents/pressreleases/26498-pr-action_plan_for_boosting_intra-african_trade_f-english.pdf (accessed on 16 April 2022).

³³⁸ African Union ' Boosting Intra-African Trade: Issues Affecting Intra-African Trade, Proposed Action Plan for boosting Intra-African Trade and Framework for the fast tracking of a Continental Free Trade Area' available at <https://au.int/en/documents/20120118/biat-issues-affecting-intra-african-trade-proposed-action-plan-boosting-intra> (accessed 16 April 2022).

economic integration but without much to show for it in terms of improvements in intra-Africa trade.

Some scholars observe that the regional integration landscape today is extremely diverse and does not merely follow the linear approach to integration.³³⁹ They argue that the linear approach is inadequate and inappropriate for the development conditions of African countries.³⁴⁰ Ismail making reference to Davies, instead proposes a 'development integration' approach which stresses the need for both macro and micro co-ordination in a multi-sectoral programme embracing production, infrastructure and trade.³⁴¹ Davies further argues that least developed countries should be complemented with regional industrial developments in order for the benefits of regional integration to be shared equitably among the participating member states.³⁴²

Cognisant of the foregoing, the AU in 2012 made a decision to roll out the AfCFTA in parallel with the Action Plan for Boosting Intra-Africa Trade (APBIAT). The APBIAT summarises activities for boosting intra-Africa trade into seven clusters namely: trade policy; trade facilitation; productive capacity; trade related infrastructure; trade finance; trade information; factor market integration.³⁴³ Other AU programmes intended at boosting intra-Africa trade include the Action Plan for Accelerated Industrial Development of Africa (AIDA) and the Programme for Infrastructure Development in Africa (PIDA). These and other programmes were taken into account in the development of the

³³⁹ Ismail FA 'Advancing Regional Integration in Africa through the Continental Free Trade Area' (2017) 10 *Law and Development Review* 143.

³⁴⁰ Ismail FA (2017) 143.

³⁴¹ Ismail observes that UNCTAD has also been a proponent of 'developmental regionalism' which is defined as cooperation among countries in a broader range of areas than just trade and trade facilitation to include investment, research and development as well as policies aimed at accelerating regional industrial development and regional infrastructure provision, such as the building of better networks of roads and railway (See Ismail FA (2017) 143).

³⁴² Ismail FA (2017) 143.

³⁴³ Section 8 of the Action Plan for Boosting Intra-Africa Trade available at https://au.int/web/sites/default/files/newsevents/pressreleases/26498-pr-action_plan_for_boosting_intra-african_trade_f-english.pdf (accessed on 16 April 2022).

APBIAT.³⁴⁴ The AU further called on member states, RECs and AU Commission to promote industrial development of the continent, and value addition with a view to diversifying economies and moving away from reliance on traditional export commodities.³⁴⁵

Further to the foregoing, Olayiwola observes as follows:

‘Importantly, there is need to develop framework and modalities for the harmonisation of all operational trade measures in the continent. The AfCFTA secretariat with support of RECs and private sector should address unsupportive trade-related policies and formation of continental value chains. The existing platform of APBIAT, continental value chain, AU trade facilitation strategies and various RECs initiatives should be adequately explored.’³⁴⁶

In search of division of labour between the AU/AfCFTA and the RECs, this thesis submits that the AU should inspire the RECs to focus on implementing the APBIAT and other measures intended to boost intra-Africa trade. The AfCFTA secretariat should encourage the RECs to develop programmes and projects identified by the APBIAT. The RECs can also assist in developing mechanisms for their various member states to mainstream the APBIAT into their development strategies focusing on different areas that would address challenges and facilitate optimal benefits from the AfCFTA. It is also important to note that the objectives of the RECs cover more issues than the AfCFTA and the economic integration milestones. Some of the issues covered in the RECs treaties include objectives related to addressing supply side constraints to trade.

³⁴⁴ Section 9 of the Action Plan for Boosting Intra-Africa Trade available at https://au.int/web/sites/default/files/newsevents/pressreleases/26498-pr-action_plan_for_boosting_intra-african_trade_f-english.pdf (accessed on 16 April 2022).

³⁴⁵ Africa Union ‘Decisions, Declarations and Resolutions of the 18 Summit of the AUs Heads of State and Government’ available at <https://au.int/en/decisions-21> (accessed 16 April 2022).

³⁴⁶ Olayiwola W ‘Governing the Interface between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges’ available at <https://www.tralac.org/documents/resources/cfta/4229-governing-the-interface-between-the-afcfta-and-recs-ftas-issues-opportunities-and-challenges-uneca-november-2020.html> (accessed 16 April 2022).

The COMESA Treaty for example is very elaborate on provisions that address supply side constraints to regional trade. It provides among other things for cooperation in the development of transport and communications,³⁴⁷ cooperation in industrial development; cooperation in the development of energy; standardisation and quality assurance; cooperation in the development of science and technology and cooperation in agriculture and rural development. Other non-trade related areas of cooperation for COMESA include: health matters,³⁴⁸ women development and business and peace and security. It is safe to state that most of what is contained in the APBIAT is already covered in the COMESA Treaty.

The EAC Treaty equally has very elaborate provisions on addressing supply side constraints to intra-regional trade. The EAC Treaty provides among other things for cooperation in investment and industrial development, cooperation in standardisation and quality assurance, cooperation in infrastructure and services, cooperation in the development of human resources, science and technology, cooperation in agriculture and food security, and cooperation in tourism and wildlife management.³⁴⁹

The SADC Treaty on the other hand is not as elaborate as the COMESA and EAC Treaty in its objectives around addressing supply side constraints to regional trade. SADC's approach instead has been to define these areas of cooperation in various protocols that it has issued. Notable among these include: Protocol on Education Training; Protocol on Energy; Protocol on Fisheries; Protocol on Livestock; Protocol on Mining; Protocol on Transport, Communications and Meteorology; Protocol on Science, Technology and

³⁴⁷ Chapters 11, 12, 13, 15, 17 & 18, of the COMESA Treaty.

³⁴⁸ Articles 110, 154 & 163 of the COMESA Treaty.

³⁴⁹ Chapters 12, 13, 15 & 16 of the EAC Treaty.

Innovation; Protocol on Shared Watercourses and Protocol on the Development of Tourism.³⁵⁰

The AU and the RECs therefore should work towards modifying the roles and objectives of the RECs to focus on addressing the various impediments to intra-regional trade.³⁵¹ By doing so, Africa will be able to maximise the gains to be realised from the AfCFTA. Additionally, by modifying the focus of the RECs from the linear path regional integration, to impediments to intra-regional trade, also known as supply side constraints to trade, RECs will have a clear direction of what they need to focus on going forward. This will also help to resolve the uncertainties relating to the fate of the RECs, following the establishment of the AfCFTA.

Lastly on this issue, with the modification of the objectives of the RECs to focus among other things on supply side constraints, this mini thesis submits that there will be need to revisit the long term vision of the AU for the RECs as articulated in the Abuja Treaty and the Protocol on Relations. The proposal for RECs to focus on supply side constraints is long term and will require the RECs to co-exist with the AfCFTA and the AEC until Africa's trade volumes and global share of trade rises to the levels of the other developed continents. The establishment of the AfCFTA makes it imperative for the AU and the RECs to rethink economic integration efforts on the continent as a whole in order to avoid needless duplication of efforts.³⁵² The RECs should not continue with the business as usual approach to sub-regional integration. Some bold decisions may be required on the part of the RECs, in a bid to streamline the economic integration agenda of the African continent. The call by the AU Assembly in 2017 for a clear division of labour and effective

³⁵⁰ SADC 'SADC Protocols' available at <https://www.sadc.int/about-sadc/overview/sa-protocols/> (accessed on 16 April 2022).

³⁵¹ Ismail urges African countries to carefully consider their approach to regional integration and adopt a more pragmatic 'development integration approach' rather than the more ideological 'open regionalism' approach that is currently obtaining (See Ismail FA (2017) 145).

³⁵² Gumede V (2021) 479.

collaboration among the AU, the RECs and members states and other continental institutions in the implementation of the AfCFTA cannot be overemphasised.³⁵³

Further, RECs should not just be considered as building blocs to the AfCFTA and the AEC with a terminal role. Rather, the RECs should be converted at an appropriate time into organic structures of the AEC.³⁵⁴ COMESA already has as its final objective conversion into an organic entity of the AEC. The EAC and SADC on the other hand will need to add among the changes to be made to their treaties, conversion into organic entities of the AEC, as their ultimate objective.

With the proposal for RECs to be converted into organic entities of the AfCFTA and AEC, there is need to address the challenge of multiple and overlapping membership of RECs. The section that follows briefly discusses possible solutions to the problem of multiple and overlapping REC membership arising from the recommendation that RECs should co-exist with the AfCFTA and the AEC.

4.2.4 Implications of the African Continental Free Trade Area on multiple and overlapping membership of Regional Economic Communities

Overlapping membership has been identified as one of the obstacles to regional integration in Africa.³⁵⁵ Most African countries belong to two or more RECs. The resulting problems of multiple and overlapping memberships constitute a spaghetti bowl that hinders regional integration.³⁵⁶ Hailu observes the following:

³⁵³ Refer to section 4.2.3.

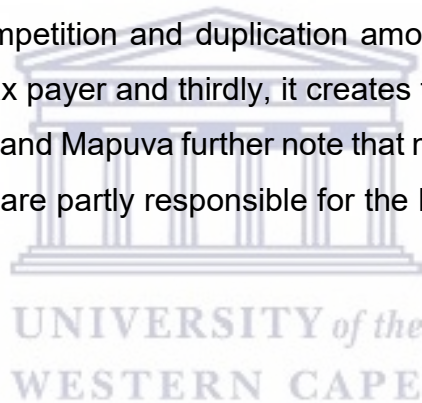
³⁵⁴ African Union 'Report on the status of regional integration in Africa' available at <https://au.int/en/documents/20200523/africa-regional-integration-index-report> (accessed on 16 April 2022).

³⁵⁵ Simo YR 'The African Continental Free Trade Area in a Decaying Multilateral Trading System: Questioning the Relevance of the Enabling Clause' available at https://www.academia.edu/41252579/The_African_Continental_Free_Trade_Area_in_a_Decaying_Multilateral_Trading_System_Questioning_the_Relevance_of_the_Enabling_Clause (Accessed 16 April 2022).

³⁵⁶ Draper P, Halleson D, & Alves P 'From Spaghetti to Cannelloni? SACU, Regional Integration and the Overlap Issue in Southern Africa available at <https://www.africaportal.org/publications/sacu-regional->

'Countries wish to join their economies for various reasons some of which include attraction of foreign investment, enhancing cooperation, fostering security and generally attaining economic development. With these aims in mind, governments sign and become members of multiple regional integration schemes. However, some of these integration schemes simply reflect the desire but not always the political will to capture the economic gains and international negotiating strength that regionalisation can bring.'³⁵⁷

The three RECs under consideration are no exception to the problem of overlapping and multiple REC membership. As observed earlier, nine out of the 21 COMESA member states also belong to SADC while four belong to the EAC.³⁵⁸ Mapuva and Mapuva observe that overlapping and multiple REC membership causes the following problems: first, it creates confusion, competition and duplication among the RECs.³⁵⁹ Secondly it constitutes a burden on the tax payer and thirdly, it creates trade inconsistencies among the regional blocs.³⁶⁰ Mapuva and Mapuva further note that multiple memberships are not only costly but inefficient and are partly responsible for the limited capacity and success of SADC and other RECs.³⁶¹



[integration-and-the-overlap-issue-in-southern-africa-from-spaghetti-to-cannelloni/](#) (accessed 16 April 2022).

³⁵⁷ Hailu BM 'Regional Economic Integration in Africa Challenges and Prospects' (2014) 8 *Mizan Law Review* 301.

³⁵⁸ The nine that belong to SADC include: Comoros, Democratic Republic of Congo, Eswatini, Madagascar, Malawi, Mauritius, Seychelles, Zambia and Zimbabwe, while the four belonging to EAC include Burundi, Kenya, Rwanda and Uganda.

³⁵⁹ Here, Mapuva and Mapuva note that a country can only belong to one customs union which is a challenge for countries that have multiple REC membership. They further note that differences in approaches to integration add to the confusion, inconsistency and incoherence in policies (See Mapuva J & Mapuva ML 'The SADC Regional Bloc: What Challenges and Prospects for Regional Integration (2014) 18 *Law, Democracy & Development Journal* 26.

³⁶⁰ Mapuva J & Mapuva ML (2014) 28.

³⁶¹ Mapuva J & Mapuva ML (2014) 28.

Draper and others observe that past attempts to address overlapping REC membership have not been successful. An example is given of the Tripartite Free Trade Area (TFTA) which initially set out to resolve the challenge of overlapping membership but later evolved into a new FTA encompassing the three existing RECs instead of consolidating them. Draper and others further observe that the AfCFTA is structured in a similar manner to the TFTA.

The AfCFTA Agreement has as one of its objectives, the goal of resolving the challenge of multiple and overlapping memberships.³⁶² The mechanism of how this will be addressed is not explained in the Agreement. However, a careful interpretation of Art. 19³⁶³ appears to shed some light on the matter. Art. 19 as discussed above requires state parties belonging to RECs that have attained higher levels of economic integration among themselves, to maintain such levels. Art. 19 further makes AfCFTA Agreement superior to REC Agreements in the event of a specific inconsistency. The foregoing speaks to a process of gradual consolidation of REC FTAs into the continental FTA. This is in line with the observation by the United Nations Economic Commission for Africa that the AfCFTA will likely require REC FTAs to persist as 'islands' until the tide of liberalisation envisaged by the AfCFTA rises above them in the medium to long term. From the foregoing, it is clear that the AfCFTA does not fully take on the task of reconciling overlap among the RECs.³⁶⁴

The AfCFTA is but only the first step by the AU to resolve the problem. Complete resolution of the problem is only expected to take place once the RECs are absorbed into the AEC in line with the Abuja Treaty.³⁶⁵ It is hoped that the AU will accelerate continental

³⁶² Article 3(h) of the AfCFTA Agreement.

³⁶³ Article 19 of the AfCFTA Agreement.

³⁶⁴ Kuhlmann K & Agutu LA 'The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development' (2020) 51 *Georgetown Journal of International Law* 762.

³⁶⁵ Article 5(1)(d) of the Protocol on Relations.

integration as a means of finding a lasting solution to overlapping REC membership.³⁶⁶ This mini thesis however argues against RECs having a terminal role into the AEC. Rather, it calls for amendment of the Abuja Treaty and Protocol on Relations so as to provide for conversion of the RECs at an appropriate time into organic entities of the AEC.³⁶⁷

This mini thesis submits that a solution to overlapping membership should instead lie within the context of a relationship of co-existence between the RECs and the AfCFTA.

One of the key reasons for countries deciding to join RECs is the desire to benefit from larger markets.³⁶⁸ Most African countries are small in terms of human population and therefore look to regionalism in order to expand their markets. With economic integration efforts in Africa being pursued at a continental level, the desire for African countries to belong to more than one REC should diminish with time. The establishment of the AfCFTA is a major milestone in this regard. Once the AfCFTA is fully operationalised, African countries will have access to a continental market for goods and services which will diminish any benefits there may have been in belonging to more than one REC FTAs.

When the RECs review their treaties to reflect the new roles they are expected to take up namely working towards addressing supply side constraints to trade and other non-market integration areas of cooperation, it should make it easy for African countries to choose to belong to one REC only. Hailu proposes adoption of a protocol on 'one country one community membership' as one of the AU recognised principles on RECs.³⁶⁹ He notes that such a protocol would cause countries to seriously think of their membership

³⁶⁶ Bello AS 'The Prospects and Challenges of African Continental Free Trade Area Agreement' (2018) 26 *Sri Lanka Journal of International Law* 141.

³⁶⁷ Refer to section 4.2.3.

³⁶⁸ Gathii TJ 'African Regional Trade Agreements as Flexible Legal Regimes' (2009) 35 *North Carolina Journal of International Law & Commercial Regulation* 648.

³⁶⁹ Hailu BM 'Regional Economic Integration in Africa Challenges and Prospects' (2014) 8 *Mizan Law Review* 324.

in different RECs before signing to one.³⁷⁰ The proposal by Hailu appears to be the most effective way of resolving the problem of multiple REC membership both in the medium to long term. This will however require some bold and brave decisions on the part of the AU.

For the three RECs under consideration, it is interesting to note, as observed in chapter three, that they still continue to push towards the entry into force of the TFTA Agreement. This is despite the entry into force of the AfCFTA Agreement. Most likely, the TFTA will be overtaken by Art. 19 of the AfCFTA Agreement. In this regard, Member States with overlapping membership of the three RECs under consideration, COMESA, EAC and SADC will have to choose to belong to only one of them.

4.3 Conclusion

In summary, this chapter has discussed the implications of the AfCFTA on the existing RECs with particular focus on COMESA, EAC and SADC. The chapter first shed some light on the envisaged future relationship between the AEC and the African RECs. According to the AU, the eight AU recognised RECs are supposed to be absorbed into the AEC at stage five of the Abuja Treaty roadmap.

The chapter also discussed the relationship between the AfCFTA and the RECs. It was highlighted that the RECs are not members of the AfCFTA, rather it is the Member States of the AU that are eligible for membership. The only involvement of the RECs in the activities of the AfCFTA is representation on the Committee of Senior Trade Officials, in an advisory capacity. It was further highlighted that the AfCFTA Agreement is silent on the status of the RECs either at the entry into force of the AfCFTA Agreement, or at full

³⁷⁰ Oppong observes that with the help of national institutions and commissioned experts, countries should be guided to decide based on predominately economic criteria, which RECs best suit their needs taking into account the fact that the ultimate realisation of the vision of an African Economic Community may help address some of their needs (See Oppong FR 'The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African Journal of International and Comparative Law* 96).

operationalisation of AfCFTA, or when the African single market is established. This has resulted in some confusion on the status of the RECs going forward.

The chapter also discussed the challenges of duplication of efforts arising from the decision by the AU to pursue continental economic integration from scratch. State parties that are members of RECs that have established FTAs will be required to make offers of tariff concessions to the AfCFTA the same way they did at REC level. The same is expected to happen with negotiations towards the establishment of the continental CU. Art. 19 of the AfCFTA Agreement makes the AfCFTA Agreement superior over REC Agreements to the extent of a specific inconsistency. This means that any progress that is achieved by the RECs on the linear model of economic integration, is likely to be surpassed by the AU economic integration process in due course. This lends itself to unnecessary duplication of work considering that the AU is doing everything from scratch.

To overcome the foregoing, this chapter has proposed a modification of the roles of the RECs to provide for, first: the role of the RECs not only in the implementation of AfCFTA but also in fast tracking continental integration, and secondly, modification of objectives of the RECs to focus on areas of cooperation that fall outside the linear model of regional integration. The chapter has highlighted that unlike in developed countries where there is specialisation in the production and supply of goods and services based on comparative advantages, in Africa production is widely dispersed and products receive minimal value addition, which diminishes the impact of the RECs sub-regional FTAs and the potential of the AfCFTA. The RECs should therefore focus on addressing issues articulated in among other programmes, the APBIAT. These issues include promoting industrialisation among African economies, development of trade related infrastructure, trade facilitation, and trade finance. This chapter also proposed that rather than be absorbed into the AEC, the RECs should instead be converted into organic entities of the AEC so that they can continue among other things to facilitate and work towards boosting intra-Africa trade.

Lastly, the chapter discussed that in order to resolve the challenge of overlapping REC membership, the AU and the RECs should work towards developing a protocol on 'one

country one REC membership' as one of the AU's recognised principles on RECs. Such a protocol would cause countries to seriously think of their membership in different RECs.



CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The aim of this mini thesis was to examine the implications of the African Continental Free Trade Area (AfCFTA) on the continued existence of the existing regional economic communities (RECs) with particular focus on the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and the Southern African Development Community (SADC). It has been noted that the decision by the African Union (AU) to establish the AfCFTA on the basis of an agreement rather than through a process of coordination and harmonisation of REC FTAs as initially envisaged in the Treaty Establishing the African Economic Community (Abuja Treaty) raises concerns on the future of the economic integration programmes of the RECs.³⁷¹ RECs for a long time have been considered as building blocs for the establishment of the AEC in line with the provisions of the (Abuja Treaty) and the Protocol on Relations between the African Union and the Regional Economic Communities (Protocol on Relations).³⁷² The establishment of the AfCFTA on the basis of an agreement fundamentally changes the approach, and calls for a re-evaluation of the role of the RECs in promoting regional economic integration in Africa.

This mini thesis has highlighted the background to the establishment of the AfCFTA as well as the objectives and institutional architecture of the continental free trade area. It has been noted that the AU envisaged the establishment of the AfCFTA through a process of co-ordination and harmonisation of REC FTAs.³⁷³ However, due to the uneven progress of the RECs in establishing free trade areas (FTAs) and customs unions (CUs), the AU in 2012 made a decision to fast track the establishment of the FTA by an indicative

³⁷¹ Refer to section 4.2.3.

³⁷² Refer to section 4.2.2.

³⁷³ Refer to sections 1.1, 2.2.1, 4.2, 4.2.1, & 5.1.

date of 2017.³⁷⁴ On 18 March 2018, the AfCFTA Agreement was opened for signature and entered into force on 30 May 2019 following the deposit of the 22 instrument of ratification. Among the objectives of the AfCFTA Agreement is the creation of a single market for goods and services.³⁷⁵

The mini thesis further discussed the three RECs under consideration in terms of their background, objectives, and status of regional economic integration. It has been noted that the three RECs all follow the linear model of regional integration which involves establishment of a free trade area (FTA), a customs union (CU), a common market, a monetary union and eventually an economic community. This is also referred to as the stepwise approach to regional integration. This notwithstanding, it is not uncommon to find slight variations in a few RECs. The EAC for example seeks to establish a political federation as opposed to an economic community as its ultimate objective.

It has also been noted that of the three RECs under consideration, the EAC has made the most progress at deepening regional integration having established a CU and common market and currently working towards establishing a monetary union and a political federation. COMESA and SADC on the other hand have established FTAs and are in the process of establishing CUs. COMESA launched its CU in 2009, however, the CU is yet to become operational.³⁷⁶

With regards to intra-regional trade, this mini thesis observed that intra-regional trade within the three RECs remains low at 10 percent for COMESA, 20 percent for EAC and 20 percent for SADC.³⁷⁷ This was contrasted with RECs like the EU where intra-regional

³⁷⁴ Refer to sections 1.1 & 2.2.2.

³⁷⁵ Refer to section 2.3.

³⁷⁶ Refer to sections 3.2.3, 3.3.3 & 3.4.3.

³⁷⁷ Refer to sections 3.2.3, 3.3.3 & 3.4.3.

trade on average stands at stood at 60 percent.³⁷⁸ Among the reasons advanced for the low intra-regional trade included lack of diversification, cumbersome border procedures and inadequate trade related infrastructure.

In chapter four, it was noted that the AfCFTA Agreement is silent on the probable relationship that should exist between the AfCFTA and RECs.³⁷⁹ The Abuja Treaty and the Protocol on Relations on the other hand requires the RECs to have as their final objective absorption into the AEC.³⁸⁰ This was supposed to occur at stage five of the Abuja Treaty roadmap. Prior to stage five, the RECs were expected to establish FTAs and CUs and the AfCFTA was expected to come about through a process of co-ordination and harmonisation of REC FTAs.³⁸¹ It has been noted that the RECs are at different stages of regional integration with some yet to even establish FTAs. It was further noted that the AfCFTA Agreement is silent on the fate of RECs that shall fall behind the AU regional integration process.

However, in the event of an inconsistency between the AfCFTA agreement and a regional agreement, the AfCFTA agreement prevails to the extent of the specific inconsistency.³⁸² Further, Art. 19(2) requires state parties that are members of other RECs, regional trading arrangements and CUs which have attained among themselves higher levels of regional integration than under the Agreement, to maintain such higher levels among themselves. The foregoing will require RECs to persist as small islands until the tide of not just continental trade liberalisation but also of the AUs economic integration programmes, rises above them.³⁸³

³⁷⁸ Refer to sections 3.2.3 & 3.4.3.

³⁷⁹ Refer to section 4.2.2.

³⁸⁰ Refer to sections 3.3.2, 3.4.2 & 4.2.1.

³⁸¹ Refer to sections 1.2 & 4.2.1.

³⁸² Refer to section 4.2.2.

³⁸³ Refer to sections 4.2.2, 4.2.3 & 4.3.4.

The biggest challenge that has arisen with the establishment of the AfCFTA in the manner that it has been established is duplication of efforts between the AU and RECs. The AU, with the establishment of the AfCFTA appears to have introduced a concept of parallelism in Africa's regional economic integration efforts where regional integration is now being pursued at two levels, the continental level and at regional level.³⁸⁴ The foregoing scenario points to an urgent need to reconcile the two process in order to avoid duplication.

There is also the challenge of multiple and overlapping REC membership which for a long time, has impeded regional integration in Africa.³⁸⁵ Most people expected the AfCFTA Agreement to resolve the challenge of overlapping membership. However, this has not been the case. While setting out to resolve the challenge of overlapping REC membership, the relevant provisions of the AfCFTA Agreement do not conclusively address the problem. At most, the AfCFTA only goes as far as consolidating the REC FTAs in Africa. Multiple REC membership is therefore expected to continue into the foreseeable future.

5.2 Recommendations

As discussed in chapter four, the establishment of the AfCFTA calls for deep reflection among the RECs on the way forward concerning their regional integration programmes. The linear model that the RECs have been following in their efforts to achieve higher levels of regional economic integration is being put to the test by the AU continental economic integration agenda. Undoubtedly, progress by the AU in achieving continental economic integration will bring into question the relevance of the RECs in promoting economic integration on the African continent.

³⁸⁴ Refer to sections 1.3 & 3.3.3.

³⁸⁵ Refer to sections 1.3, 4.2.3 & 4.2.4.

To avoid duplication of work between the economic integration programmes of the AU and the RECs, there is need to modify the roles of the RECs, first, to clarify the role of the RECs not only in the implementation of the AfCFTA but also in fast tracking continental integration, and secondly, to get the RECs to focus on areas of cooperation that fall outside the linear model of regional integration.³⁸⁶

The AU does not clearly define the role of the RECs in the implementation of AfCFTA Agreement. While the AfCFTA Agreement recognises the REC FTAs as building blocs for the AfCFTA, the Agreement does not explain how the RECs shall contribute towards the successful implementation of the AfCFTA. The AfCFTA Agreement allows RECs to attend meetings of the Committee on Senior Trade Officials in an advisory capacity. Beyond that, the Agreement does not guide on how the RECs could enable implementation of the AfCFTA at regional level. There is need therefore for the RECs to mainstream implementation of the AfCFTA into their treaties and protocols.³⁸⁷

This mini thesis also submits that the AU should fully assume the responsibility of pursuing Africa's economic integration along the lines of the linear model leading to the eventual establishment of the AEC. The RECs on the other hand should focus on other areas of cooperation that fall outside the remit of the linear model of economic integration. As observed in chapter four, regional integration in and of itself is not enough to boost intra-Africa trade. It has been observed that unlike developed countries where there is specialisation in the production and supply of goods and services based on comparative advantages, in Africa production is widely dispersed and products receive minimal value addition, which diminishes the impact of the RECs sub-regional FTAs and the potential of the AfCFTA.³⁸⁸

³⁸⁶ Refer to section 4.2.3.

³⁸⁷ Refer to section 4.2.3.

³⁸⁸ Refer to section 4.2.3.

It has further been observed that intra-Africa trade is also weak partly because fundamental aspects of trade logistics, such as infrastructure (transport, energy, ICT) are compromised. In an effort to boost intra-Africa trade, the AU decided in 2012 to roll out the AfCFTA together with the Action Plan for Boosting Intra-Africa Trade (APBIAT) which is aimed at deepening Africa's market integration and significantly increasing the volume of trade that African countries undertake among themselves.

This mini thesis submits that the AU and the RECs should as a matter of urgency and in order to avoid duplication of efforts, begin to work towards reviewing the treaties of the RECs in order to ensure effective division of labour between the AU and the RECs. Additionally, the RECs rather than having a terminal role into the AEC, should instead be converted into organic entities of the latter. This means the RECs shall continue to co-exist with the AfCFTA/AEC. The RECs working together with member states will be playing the vital role of addressing among other things, supply side constraints to intra-Africa trade. This in turn will boost intra-Africa trade and enhance Africa's trade volumes and share of global trade. The AU should amend the Abuja Treaty and the Protocol on Relations to provide for conversion of the RECs into organic entities of the AEC and to articulate the new roles of the RECs going forward. The Protocol on Relations should also articulate the legal status of the RECs post conversion into organic entities of the AEC.

Lastly, in order to resolve the problem of overlapping REC membership, the AU and the RECs should work towards developing a protocol on 'one country one REC membership' as one of the AU's recognised principles on RECs.³⁸⁹ Such a protocol would cause countries to seriously think of their membership in different RECs. This is bearing in mind the recommendation that the RECs should continue to exist post establishment of the AfCFTA and the AEC.³⁹⁰

³⁸⁹ Refer to section 4.2.4.

³⁹⁰ Refer to section 4.2.4.

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