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Addis Ababa University
School of Graduate Studies
College of Law and Governance Studies

**COMESA- EAC- SADC Tripartite Free Trade Area: Stepping Stone
towards the Continental Free Trade Area?**

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Jan, 2018

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Thesis Submitted in Partial Fulfillment of Master of Laws Degree
(LLM) in Public International Law at Addis Ababa University

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Jan, 2018

Declaration

I declare that the thesis, “COMESA- EAC- SADC Tripartite Free Trade Area: Stepping Stone towards the Continental Free Trade Area?” is my original work, that has not been presented for obtaining a degree in any other university and that all sources of materials used or quoted in the thesis have been duly acknowledged.

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Conformation

This thesis is submitted for examination with my approval as an advisor to the candidate.

Martha Belete (Assist. Professor)
Jan, 2018

Approval Sheet

This thesis is submitted to the faculty of Law and to the School of Graduate Studies of Addis Ababa University in fulfillment of all requirements for the degree of Masters in Public International Law.

Title of Thesis: **COMESA- EAC- SADC Tripartite Free Trade Area: Stepping Stone towards the Continental Free Trade Area?**

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Acknowledgments

Above all, I would like to thank GOD for giving me the courage to complete this work. My appreciation also goes to my wife Zinash and my sons (YEABs), for their unconditional love.

My Advisor, Martha, words are not enough to describe my sincere gratitude. Thank you for your valuable and insightful comments as well as guidance. It was a privilege for me to work under your guidance.

I would also like to thank my Supervisor, Fekadu MAMO, DesalegnYehouala and my colleagues for their tireless effort in taking over my duty throughout my study. Had it not been for their support, I would not have been able to reach at this stage. Finally, I would like to thank all who gave a helping hand and advice for the completion of this thesis.

Abstract

In Africa, various integration initiatives have been undertaken both, at the continental and regional levels, to bring economic and political integration. The effort to establish The Tripartite Free Trade Area (TFTA) and the Continental Free Trade Area (CFTA) are among the measures to secure economic cooperation between Partner States of COMESA, EAC and SADC and African Member States respectively.

Regional leaders and policymakers intended to use the Tripartite Free Trade Area (TFTA) as stepping stone for the establishment of the CFTA. The notion of building the CFTA on the success and commitments of the TFTA is a well-founded direction adopted to boost continental integration. Both Tripartite and African Leaders designed their FTAs towards this end. However, it continues to be debatable whether the TFTA serves as a stepping stone or otherwise for the establishment of the CFTA.

This thesis examines whether the TFTA serves the purpose it is called for. The analysis begins with identifying the areas of commonalities of the two FTAs. Review has been made on legal and negotiation aspects, so as to reveal gaps and inconsistencies among the two FTAs. The paper also assesses the TFTA's ability to meet the objective of resolving overlapping of membership in the Tripartite Region and its impact on the way forward of the two FTAs. It also examines challenges that could affect the building block objective of the TFTA.

From the finding of the research, the thesis concludes that, despite the lessons learnt from the TFTA negotiation process, the building block objective is now turned in to stumbling block for the CFTA in particular and continental integration in general as it creates duplication of process and waste of resource. In addition, the TFTA's failure to meet its own deadlines, inability to resolve the problem of overlapping membership, adopted conflicting negotiation principles and unavailability of legal framework channeling the two FTAs water down the proposal to start the CFTA negotiation from the point where the TFTA has reached. Thus, the thesis recommends the necessity for a more realistic approach to enable the TFTA to perform the function it is called for, i.e. stepping stone.

Key Words: TFTA, CFTA, Stepping Stone

Acronyms

AEC	The African Economic Community
AU	The African Union
BIAT	Boosting Intra African Trade
CETs	Common External Tariffs
CFTA	The Continental Free Trade Area
CFTA-NF	The Continental Free Trade Area Negotiating Forum
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECOWAS	Economic Community of West African States
FTA	Free Trade Area
GATT	General Agreement on Trade and Tariffs
MFN	Most Favored Nations
NTB	Non-Tariff Barrier
OAU	The Organization of African Unity
RECs	Regional Economic Communities
RoO	Rules of Origin
SADC	Southern African Development Community
SACU	South African Customs Union
TFTA	The Tripartite Free Trade Area
TTF	The Tripartite Task Force
ICSTD	International Centre for Trade and Sustainable Development
TWGs	Technical Working Groups

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Chapter One

1. Introduction

1.1 Background

No African state is economically large enough to construct a modern economy alone. Africa as a whole has the resources.... Africa as a whole could provide markets able to support large scale efficient industrial complexes; no sub-regional economic union can do so.... The only way to achieve the economic reconstruction and development essential to fulfill the aspirations, needs and demands of the peoples of Africa is through a sustained shift to continental planning, so as to unite increasingly the resources, markets and capital of Africa in a single substantial economic unit.¹

Understanding this individual African Member States impotence, improving regional cooperation and integration has been high on the agenda of African countries and Regional Economic Communities (RECs).² Several integration initiatives have been undertaken in the continent concurrently at continental and regional levels to bring economic and political integration.³

The Post-Independence era saw African governments embracing the idea of regional integration, initially for political reasons and later as a development strategy to rise above challenges of small markets, landlocked-ness and to benefit from production and trade.⁴ In recent years, Africa's regional integration discourse is focusing on a 'developmental regional integration'⁵ paradigm

¹Reginald Green and Ann Seidman, Unity or Poverty: The Economics of Pan Africanism, (1968), P. 22.

² Jan Vanheukelom, "The Political Economy of Regional Integration in Africa," The African Union Report, European Centre for Development Policy Management, (2016), P.1

³ Martha Belete Hailu, "Regional Economic Integration in Africa: Challenges and Prospects," Mizan Law Review, Vol. 8, No.2, (2014), P. 301

⁴Tanyanyiwaet.al, "Challenges and Opportunities for Regional Integration in Africa: The Case of SADC," IOSR Journal Of Humanities and Social Science, Vol. 19, Issue 12, Ver. IV, (2014), P.103.

⁵ It is an integration strategy to use regional economic integration for the purpose of development. See David J. Francis, "Linking Peace, Security and Developmental Regionalism: Regional Economic and Security Integration in Africa," Journal of Peace building and Development, Vol. 2, No.3, (2006), P. 11.; See also generally Economic Commission for Africa, "Economic Report on Africa: Industrializing through Trade," (2015), it emphasizes the need for trade to serve as an instrument of accelerated industrialization and structural transformation in Africa, rather than an end in itself.

which is anchored on three pillars: market integration, industrial development and infrastructure.⁶

The move towards the establishment of the African Economic Community (AEC) is one of the major initiatives taken by African leaders to realize full economic integration. To this end, on 3rd of June 1991, they signed the Treaty for the Establishment of an African Economic Community (AEC) by 2025 with the purpose of creating a framework for the development, mobilization, and utilization of African human and material resources to achieve continental self-sufficiency.⁷

As per the AEC Treaty, the African Economic Community shall be established mainly through the co-ordination, harmonization and progressive integration of the activities of RECs.⁸ The RECs, the building blocks of the AEC, are ultimately to merge or be absorbed to form the African Economic Community.⁹

The transformation from the Organization of African Unity (here after the OAU) to African Union (hereafter the AU) also emphasized regional integration agenda. The Constitutive Act of the AU and Agenda 2063, incorporate the Vision of the AU, to become an integrated, prosperous and peaceful Africa, driven by its own citizens.¹⁰ Following the establishment of the AU, a number of legal instruments have been adopted by the AU General Assembly to enhance regional integration in the continent.

Out of the various forms of integration, the well-known forms of regional economic collaboration-from free trade area (FTA), to custom Union, to common market, to economic union reflects a hierarchy of constraints that the scheme imposes the autonomy.¹¹ Among these typologies, the research revolves around the formation of FTA. For the purpose of this thesis,

⁶ Invest in Africa, Official Publication of the African Union for the 28th AU Summit, News Desk Media Publisher, (2017), P. 74

⁷ Kwako Danso, "The African Economic Community: Problems and Prospects," Africa Today, The Politics of Economic Integration in Africa, (4thQtr., 1995), Vol. 42, No. 4, Indiana University Press, P. 34

⁸ Treaty Establishing the African Economic Community, (1991), (entered into force on May, 1994), Art. 88/1 (here after called Abuja Treaty)

⁹ Richard Frimpong Oppong, "The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web," African Journal of International and Comparative law, Vol. 18, No.1, (2010), P.2

¹⁰ Agenda 2063, "Africa We Want," Popular Version, (2nd ed., 2014), Aspiration 2; See also the Constitutive Act of the African Union, (2000), (came into force on May, 2001), Art. 3/C

¹¹ Danile H. Levine and Dawn Nagar (ed.), Region building in Africa, Political and Economic Challenge, (2016), P.40; See also Martha, cited above at note 3 , PP. 2-3

FTA is an agreement between two or more countries to increase the flow of trade and services so as to bring about greater economic integration between them.¹² As a principal goal, it seeks to encourage and assist trade between the signatory countries through the requirement that their firms have preferential access to each other's market.¹³

Given the growing belief that free trade enhances social welfare, majority of countries, especially developing ones, increasingly focus on liberalizing their economies.¹⁴ One way of doing this is to form or join regional free trade areas, where the only requirement is that states abolish or reduce barriers to trade among themselves while maintaining independent external tariffs with non-FTA trade partners.¹⁵

RECs in the continent are undertaking various activities and programs in several areas of integration, especially on the establishment of FTAs. The COMESA-EAC-SADC Tripartite arrangement represent best practice that other RECs are encouraged to emulate in order to accelerate the harmonization of their programs and activities.¹⁶

The Tripartite Free Trade Area (TFTA) is a planned free trade area aimed at the integration of members of three African regional economic communities namely COMESA, EAC and SADC (here after the three RECs). Once completed, it will stretch from Egypt to South Africa, almost completely covering the eastern and southern parts of the continent.¹⁷ It will include 26 countries (almost half the continent's countries) with a combined population of 625 million and gross domestic product (GDP) of US\$1 trillion, amounting to 58% of the continent's total GDP.¹⁸ The agreement was signed on June 10, 2015 and was expected to enter into force in January 2016.¹⁹

¹²Glossary of Statistical Terms, OECD, (<https://stats.oecd.org/glossary/detail.asp?ID=3128>), last visited on Feb, 2017, 09:30 AM

¹³ B.W.T. Mutharika, Towards Multinational Cooperation in Africa, (1972), P. 45; See also Maria Panezi, "The WTO and The Spaghetti Bowl of Free Trade Agreements: Four Proposals For Moving Forward," Policy brief, CIGI publications, No.87, (2016), P. 1

¹⁴ Tewodros Makonnen and Halellujah Lulie, "Ethiopia, Regional Integration and the COMESA Free Trade Area," the South African Institute of International Affairs, (SAIIA), Occasional Paper 198, (2014), P.5

¹⁵ *Ibid.*

¹⁶ Status of Integration in Africa, (SIA V), (2010), P. 11, (http://au.int/en2/sites/default/files/newsevents/workingdocuments/12582-wd-sia_v-_en_f_0.pdf), last visited on Mar. 25, 2017, 10:02 AM

¹⁷ Africa's TFTA: An Exercise in Economic Integration, (2016) (<http://johanhburger.com/africas-tfta-an-exercise-in-economic-integration/>), last visited on Mar. 07, 2017, 2:58 PM

¹⁸ "The Tripartite Free Trade Area Project Integration in Southern and Eastern Africa," Briefing to the European Parliament, (2015), P.2; See also AU and ECA "Report on Boosting Intra-African Trade Issues Affecting Intra-

On the other side, on January 2012, the AU Summit approved an action plan for boosting Intra-African Trade (BIAT) and the establishment of a Continental Free Trade Area (CFTA) by an indicative date of 2017.²⁰ The CFTA is also one of the pillars for the implementation of the Agenda 2063's aspiration, prosperous Africa based on inclusive growth and sustainable development. This aspiration is predicated on the implementation of policies aimed at achieving systematic convergence with more developed countries and regions and growing integration into the global economy as a respected partner.²¹ The CFTA encompasses 54 AU Member States, a population of more than a billion people and a combined GDP of over US\$3 trillion in 2014.²²

These efforts show that Africa is pursuing integration agenda as a collective development and transformation strategy leading to the eventual creation of a continental market as it develop larger markets, foster greater competition and improve policy stance in many areas of the development agenda.

1.2 Statement of the problem

As mentioned above, the establishment of the two FTAs expected to be the driving force towards market integration effort at the RECs and continental level respectively.

Regional policy makers and scholars like Soamiely Andriamananjara,²³ Othieno and Shinyekwa²⁴ and Shayanowako²⁵ consider the TFTA as potential game changer for the African trading system in general and serve as launching pad for the establishment of the CFTA in

African Trade, Proposed Action Plan for boosting Intra- African Trade and Framework for the Fast Tracking of a Continental Free Trade Area,"(2012),P.5

¹⁹ Stephen Karingi, Ottavia Pesce and Simon Mevel, "Preferential Trade Arrangements in Africa: Lessons from the Tripartite Free Trade Agreements and an African Continent-Wide FTA," in Patrick Low *et.al.*, (ed.), African Perspective on Trade and the WTO, Domestic Reforms, Structural Transformation and Global Economic Integration, (2016), P.255

²⁰*Id.*, P.259

²¹Babajide Sodipo and David Luke, "Launch of the Continental Free Trade Area: New prospects for African trade?,"in Andrew Crosby (ed.)"The Tripartite FTA: The Great Leap forward for Regional Integration in Africa?," Bridges Africa, ICSTD, Volume 4, issue 6, (2015), P.8

²² Pablo Quiles, "Africa's Continental Free Trade Area," International Trade and Investment review, Quarter 2, (2016), P. 12

²³Soamiely Andriamananjara, Understanding the importance of the Tripartite Free Trade Area, (2015) (<http://www.brookings.edu/blogs/africa-in-focus/posts/2015/06/17-tripartite-free-trade-area-andriamananjara>),last visited on Jan. 29, 2017, 10:45 PM;

²⁴Lawrence Othieno and Isaac Shinyekwa, "Prospects and challenges in the Formation of the COMESA-EAC and SADC Tripartite Free Trade Area," The Economic Policy Research Centre, (EPRC),Research Series no. 87, (2011), P. 3

²⁵Petros Shayanowako,"Towards a COMESA, EAC and SADC Tripartite Free Trade Area," Trade and Development Studies,Issue No. 40, (2011), PP.8-11

particular. In the legal instruments of both FTAs, the TFTA is accepted to form part of the *acquis*²⁶ of the CFTA, meaning the CFTA is expected to build upon the success and commitments of the TFTA.²⁷ Moreover, it is believed that the TFTA makes ratifying the CFTA much easier than having negotiation on individual country basis.²⁸

Contrarily, Disenyanai²⁹, Taku Fundira³⁰ and Sean Woolfrey³¹ argue that there are numerous challenges that may confront, ruin or even preempt TFTA from achieving its stepping stone objective. Defying its importance as a strategy to resolve the problem of overlapping membership, Nagar portray the TFTA as stumbling block for the continental convergence and creates more overlap.³²

As the above lines arguments are made at the start of the negotiation process of the two FTAs, taking the current level of success and failures in to consideration, the researcher seeks to assess and examine whether or not the TFTA still serves as a stepping stone for the establishment of the CFTA. And if not, the researcher tries to come up with a way forward on how the TFTA will be used as a bedrock not a barrier for the effective implementation of the CFTA.

²⁶Definitions for The Continental Free Trade Area (CFTA) Negotiations Guiding Principles, Meeting of African Union Ministers of Trade, Annex III, TI/CFTA/AMOT/GP/FINAL, (2016), P.2. 'Aquis' in the context of the CFTA agreement it means that the negotiations start from the point which the TFTA and other RECs FTA negotiation have reached.

²⁷ Bridge Africa, CFTA Negotiators Establish their Launch Pad, International Centre for Trade and Sustainable Development (ICTSD), (2016) (<http://www.ictsd.org/bridges-news/bridges-africa/news/cfta-negotiators-establish-their-launch-pad>),last visited on Jan. 29,2017, 10:55 PM

²⁸ Invest in Africa, cited above at note 6, P.74; See also James Thuo Gathii, African Regional Trade Agreements As Legal Regimes, (2011), P 180; See also Martha cited above at note 3, P. 327 arguing the establishment of the TFTA as the right direction towards the Continental integration.

²⁹Tsidiso Disenyanana, "Towards an EAC, COMESA and SADC Free Trade Area: Issues and Challenges,"South African Institute of International Affairs, (2009), PP. 19-20

³⁰Thaku fundira , "Towards a Continental Free Trade Area: Analysis of the Status of the Regional Trade Regimes," TRALAC Working Paper, S16WP08/2016, (2016), P.5and 48

³¹Sean Woolfrey, "Industrial development in the Tripartite Free Trade Area" in Trudi Hartzenberger *et.al.*, The Tripartite Free Trade Area- Towards a New African Integration Paradigm?, (2012), PP. 294-297

³² Dawn Nagar, The Politics and Economics of Regional Integration in Africa: A Comparative Study of COMESA and SADC, 1980–2015, (2016, Unpublished, School of Social Sciences, University of the Witwatersrand), P.193

1.3 Objective of the Study

1.3.1 General Objective

The main objective of this study is to examine and unveil the viability or other wise of the approach building the CFTA on the success of the TFTA that forms part of the acquis of continental trade integration.

1.3.2 Specific Objectives

To attain the aforementioned general objective, this study seeks to:

- Explore issues related to the legal personality of RECs in TFTA and TFTA in the CFTA;
- Examine the status of TFTA and CFTA in light of major legal instruments governing African continental integration program;
- Unfold lessons learned from the TFTA in the negotiation process of the CFTA;
- Critically assess capability of the TFTA in resolving the problem of overlapping of membership; and
- Provide possible mechanisms that strengthen the proposed relationship between the two FTAs or bridge the gap, if any.

1.4 Research Questions

On the basis of the problem and objective of the study, the research question of this research paper is:

- Can the TFTA be able to serve as stepping stone for the establishment of the CFTA?

In addressing this major question, the following sub questions will be considered:

- Is there any Nexus established between the legal frameworks of the two FTAs? What is the position of the two FTAs in light of the continental legal frameworks? Particularly towards establishing the AEC.
- What are the potential benefits of the establishment of the TFTA to the CFTA?
- Is there any lessons drawn from the TFTA in negotiating the CFTA?

- What is the current state of play of the two FTAs? Is any legal or other form of inconsistency between the two FTAs?
- Is there any considerable challenge that hinders the TFTA from playing its stepping stone function in the establishment of a CFTA?
- Does the TFTA resolve the major problem of duplication of membership to the three RECs?

1.5 Significance of the Study

This study provides background and serves as spring-board information on the current direction of the approach adopted for other researchers inspired to conduct in-depth research on the area under study. Moreover, as the two FTAs are contemporary and found at the developmental stage of negotiation, it also gives insight for policy makers and legal experts to utilize the findings and recommendations of this study.

1.6 Research Methodology

This descriptive and analytical study describes relevance of the TFTA towards the establishment of the continental wide FTA. It also tries to analyze lessons drawn from the TFTA to the process of establishment of the CFTA.

Extensive desk research carried out on the available primary and secondary source of information; published and unpublished books, journal/ articles, decisions and resolutions, communiqués and scholastic resources related to the subject under study and continental integration. The researcher chose to follow a doctrinal research method, as this research heavily relies on legal instruments governing the area under study and it is found out to be most suitable to achieve the research objectives. This study follows qualitative research design, as it focuses on analyzing the legal rules and factual situation related to the two FTAs.

1.7 Limitations of the Study

Like any other human work, this research is not free from any form of limitations. To begin with the sources, as the major sources of information rely on the documents to be collected from the concerned organs of African Union and liaison office of the RECs, there was difficulty to get

access to such documents because of limited rules of access for external users to official documents. Moreover, due to the developmental stage of the subject under study, frequent updates and changes brought difficulty in tracing modification, alterations and change of structure and approach with in the two FTA. This impacted the data collection as it was difficult to access those updates easily. These gaps have been filled with information from other trade focused online sources (like TRALAC, ICSTD and the respective RECs web pages).

1.8 Scope of the Study

The scope of this study focuses on legal and negotiation issues in the TFTA and CFTA. Detail economic matters are outside the realm of this study. In this study, emphasis has been given to major constitutive instruments, guiding principles governing negotiation, modalities adopted for negotiation and other related legal instruments of the two FTAs.

1.9 Organization of the Study

The thesis is organized into five chapters. The first chapter incorporates the statement of problem, the objectives, methodological aspects and organizational matters. The second chapter, composed of two sections, familiarizes the TFTA and the CFTA in the umbrella of brief overview of the two FTAs. It describes the two FTAs in terms of their evolution, objectives, guiding principles, benefits, the governing legal frameworks and their current state of play.

The third chapter of the research provides a detailed analysis on the problem of overlapping of membership, necessary to achieve the stepping stone objective. In the fourth chapter, issues arising from legal and institutional aspects of the two FTAs will be dealt. Scope and sequences of the two FTAs and lessons drawn from the TFTA negotiation process also form part of this chapter. The fifth, last chapter of the study, encompasses concluding remark and recommendations.

Chapter Two

Overview of the Tripartite Free Trade Area and the Continental Free Trade Area

2.1. Introduction

This chapter, designed to familiarize the two FTAs, indicates their relationship from various aspects, in two separate sections. The first section deals with the TFTA, and provides highlight on the development of the TFTA. It also unveils the tripartite agenda and ambition. The benefits from and challenges of the TFTA and the current state of play of the TFTA are also topics covered in this section.

The second section, in a similar fashion, briefly goes through the evolution, Scope of negotiations and areas of integration of the CFTA. Moreover, it discovers the guiding principles and the actual benefits from the realization of the CFTA. It also assesses the progress made so far for its realization. The chapter finally comprises concluding remarks of the discussions made.

Section One

2.2. Overview of the Tripartite Free Trade Area

2.2.1. Evolution of the Tripartite Free Trade Area

The decision to establish the TFTA is traced back to 2004 when the Chairpersons of the COMESA authority and the SADC Summit met to discuss the foregoing challenges in regional integration programs.¹ These RECs recognize duplication of integration effort as a problem in trade facilitation and market integration.² To lead the process of cooperation and harmonization the Chairperson of the COMESA authority and SADC executive met in 2004³ and agreed to setup a Joint COMESA-SADC Bilateral Taskforce at secretariat level to discuss and agree on

¹COMESA-EAC-SADC Tripartite Framework: State of Play Report by the Chair of the Tripartite Task Force, (2011), (http://www.eac.int/index.php?option=com_content&id=581&Itemid=201), last visited on Feb. 27, 2017, 09:30 AM.

² Paul Kalenga, "Making the Tripartite FTA work," in Trudi Hartzenberg, *et.al*, Cape to Cairo: Making the Tripartite Free Trade Area work, (2011) P.4; see also James Thuo Gathii, African Regional Trade Agreements As Legal Regimes, (2011), P. 219.

³ Report of the Chair of TTF, Cited above at note 1.

harmonization of their programs.⁴ The Task Force later expanded in 2007 with the inclusion of EAC.⁵

Right after the inclusion of EAC, the Tripartite Task Force (TTF), headed by the Secretaries General of COMESA and the EAC, and the Executive Secretary of SADC started the initiative.⁶ The main focus of the deliberation was harmonization of the REC's programs in the areas of trade and infrastructure development.⁷ The TTF recommended that a Tripartite Summit of Heads of State and the Government of COMESA, EAC and SADC (hereafter used interchangeably with the Three RECs) be convened to provide for political certification and direction on how to cooperate and harmonize.⁸ The recommendation later accepted by the three RECs in different period of time.⁹ The main aim of the Tripartite Summit was to ultimately allow the three RECs to merge into a single REC through regional integration in the following areas: trade, customs and economic integration; and infrastructure development, including a seamless upper airspace and inter-regional ICT Broadband Infrastructure Network.¹⁰

The first Tripartite Summit held in October 2008, under the theme: Deepening COMESA-EAC-SADC Integration.¹¹ The summit endorsed the harmonization agenda through adoption of the *Kampala Communiqué 2008*.¹² The core recommendations of the Summit were establishment of the TFTA within a 5 year period as well as adoption of a roadmap for its achievement.¹³ It was also endorsed that a Memorandum of Understanding (MOU) between the three RECs be concluded, to set the cooperation objectives, legal and institutional framework and a coordination

⁴ Danile H. Levine and Dawn Nagar (ed.), Region building in Africa, Political and Economic Challenge, (2016), P.192.

⁵ Gathi, cited above at note 2, P. 219.

⁶ "Status of Integration in Africa,"(SIA IV), Annual Publication of the AUC Department of Economic Affairs, (2013),P.163.

⁷ Gathi, cited above at note 2, P.219; See also Memorandum of Understanding (MOU) on Inter regional Cooperation and Integration amongst COMESA, EAC and SADC, (2008), (signed Kampala, Uganda), Art 2 and 3.

⁸ Status of Integration, cited above at note 6, P. 163.

⁹ Teurai Thirdgirl Dari, Tripartite Free Trade Agreement as a Solution to Increasing Intra-African Trade, (2015, Unpublished, University of the Western Cape), P. 36.

¹⁰ Gathii, Cited above at note 2, P.180; See also Final Communiqué of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government, (Oct. 2008), (Kampala, Uganda), Para. 14.

¹¹ Richard Frimpong Oppong, Legal Aspects of Economic Integration in Africa, (2011),P. 68.

¹² The main objective was to chart out how the three RECs can move towards deeper cooperation in their efforts towards trade and economic liberalization, including joint programmes targeting free movement of persons and infrastructure development.; See also Vincent Angweny, "The Tripartite Free Trade Area: A Step Closer to the African Economic Community?," in Marc Bungenberg, *et.al*, (ed.), European Yearbook of International Economic Law, (2016), P. 602.

¹³ *Id.*,P. 603

mechanism for the tripartite process.¹⁴

The second Summit, held in June 2011, adopted a three-pillar development approach: market integration, infrastructure development, and industrial development.¹⁵ The summit also achieved three key milestones; signing of a Declaration Launching the Negotiations for the Establishment of the COMESA-EAC-SADC TFTA, adoption of a Roadmap for the establishment of the TFTA and the TFTA negotiating principles, processes, and institutional framework.¹⁶

The third tripartite summit held, in 2015, windup it session by signing the Declaration Launching the TFTA negotiations, opening the Agreement Establishing the TFTA for signature and adopting the Post-signature Implementation Plan detailing activities in fulfillment of provisions of the TFTA Agreement.¹⁷

2.2.2. The TFTA Agenda and Ambitions

As clearly stipulated in the TFTA Agreement, the TFTA is meant for:

“...promoting economic and social development of the Region, creating a large single market with free movement of goods and services to promote intra-regional trade, enhancing the regional and continental integration processes and building a strong Tripartite Free Trade Area for the benefit of the people of the Region”¹⁸

Specific objective of elimination of all tariffs and non-tariff barriers to trade in goods, liberalization of trade in services, cooperation on customs matters, promotion of cooperation in all trade related areas and maintenance of institutional framework for the implementation and administration of the TFTA are enshrined the TFTA Agreement.¹⁹ Though reverted later (see

¹⁴Oppong, cited above at note 11, P. 68.

¹⁵Communiqué of the Second COMESA-EAC-SADC Tripartite Summit, Distr.: General, Ref.: T/TS/II/6, (2011), P.2. See also JB Cronje, “Power Markets in the Tripartite Free Trade Area and Prospects for Energy Services Negotiations,” in Trudi Hartzenberg, *et.al*, Cape to Cairo: Exploring the Tripartite FTA agenda, (2013), P.180.

¹⁶Angweny, cited above at note 12, P. 603; See also Progress Report on the COMESA- EAC- SADC Tripartite (TFTA) Negotiations, (2013, unpublished, East Africa Business Council), P. 1.

¹⁷Communiqué of the Third COMESA-EAC-SADC Tripartite Summit, (Jun. 2015), (Sharm El Sheikh, Arab Republic of Egypt), Para.2

¹⁸The Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), (2015), Art.4; See also Ionel Zamfir, “The Tripartite Free Trade Area Project Integration in Southern and Eastern Africa,” European Parliamentary Research Service, PE 551.308, (2015), P.3.

¹⁹*Id.*, Art.5

section 3.2.3), the TFTA also aimed at merging the three RECs into a single regional economic community²⁰ and boost the establishment of the CFTA,²¹ by resolving the problems of overlapping memberships.²²

Tripartite Members pursue the development of common programmes that enable them to achieve the objectives of their respective mandates. In this regard, the TFTA agreement, covers trade in goods and services as well as other trade-related matters i.e. competition policy, cross-border investment, trade and development, and Intellectual Property rights.²³

The TFTA negotiations over the above area are set to be undertaken in two phases. Phase I negotiation, expected to be concluded within 24-36 months, after the launching of the negotiation,²⁴ covers Tariff liberalization, RoO, Dispute Resolution, Customs Procedures and simplification of customs documentation, Transit Procedures, Non-tariff barriers, Trade Remedies, Technical Barriers to Trade and Sanitary and Phyto-sanitary measures.²⁵ The Tripartite States agreed to negotiate movement of business persons under a separate track and parallel with trade in goods negotiations.²⁶ The second phase covers trade in services and trade-related issues such as Intellectual Property Rights, Competition Policy and Trade Development and Competitiveness and is expected to be completed within 36 months after the entry in to force of the agreement.²⁷

²⁰The Draft Tripartite Free Trade Area Agreement, (as revised Dec.2010), Art 3/3 of, (https://www.tralac.org/images/Resources/Tripartite_FTA/Draft%20Agreement%20Establishing%20Tripartite%20FTA%20Revised%20Dec%202010.pdf), last visited on Feb 10, 2017, 10:50 AM.

²¹Kampala communiqué, cited above at note 10, Para. 13.

²²“Advancing Regional Integration in Southern Africa: An Evidence-Based, Forward Looking Study on Regional Trade and Integration in the Tripartite Region, Focusing Primarily on Southern Africa,” Final Report, (2014), SANNA Consulting, P. 31; See also TFTA Agreement, cited above at note 18, the preamble shows how tripartite members are committed to resolve the challenges of overlapping memberships to the three RECs.

²³TFTA Agreement, cited above at note 18, Art. 3; See also MOU, cited above at note 7, Art. 3/3 (a-f).

²⁴Roadmap for Establishing the TFTA, Activity Matrix (2011-2016), ANNEX II, (2012), P.1. The Tripartite Summit adopted the matrix of planned activities on its 2nd Summit.

²⁵The TFTA Negotiating Principles, Processes and Institutional Framework: Guidelines for Negotiating the Tripartite Free Trade Area among the Member/ Partner States of COMESA, EAC and SADC, (2011), Art. 2.

²⁶Sharm El Sheikh Declaration Launching the Negotiations for the Establishment of the Tripartite Free Trade Area, (Signed June 2011), (Johannesburg, South Africa), Para.5/a.

²⁷Ernest Tooche Aniche, Post-neo-functionalism, Pan-Africanism and Regional Integration in Africa: Prospects and Challenges of the Proposed Tripartite Free Trade Area (TFTA), (2015, Unpublished University of South Africa) P.5; Ibid; See also The TFTA Agreement, cited above at note 18, Art. 45.

With a view to avoid negotiations anchored by national interest, the second Tripartite Summit, adopted the Negotiating Principles, Process and Institutional Framework of the TFTA,²⁸ and determine how the official negotiations will be conducted, what rules will be applied and what outcomes are expected.²⁹ These negotiating principles which were not clarified upon adoption later clarified in December 2012³⁰ and subsequently become the real focus and basis in the process of establishing the TFTA.

Thus, the TFTA negotiation process shall be REC and / Member driven and guided by the principles of Variable Geometry, Flexibility and Special and Differential Treatment, Transparency, Building on the *acquis* of the existing REC FTAs, Single undertaking, Substantial liberalization, Most Favored Nations (MFN) Treatment, National Treatment, Reciprocity, and Decisions by consensus.³¹

2.2.3. Benefits and challenges of the Tripartite Free Trade Area

The initiative to establish the TFTA divided African scholars into two: The optimists, believing its prospects and potentially capable of overcoming its challenges and the pessimists, thinking the number of challenges that may confront, even exacerbate the problem of integration.

2.2.3.1. Benefits of the Tripartite Free Trade Area

Those arguing the TFTA's benefits begin with its relevance to build a larger market. It creates a single economic space than anyone of the three RECs and result in more attraction to investment

²⁸2nd Communiqué, cited above at note 15, Para.2/iii

²⁹Gerhard Erasmus, "Legal and Institutional aspects of the Tripartite Free Trade Area: the need for Effective Implementation," in Trudi Hartzenberg, *et.al*, The Tripartite Free Trade Area- towards a new African integration paradigm?, (2012), P. 27.

³⁰ Gerhard Erasmus, "Redirecting the Tripartite Free Trade Agreement Negotiations," TRALAC Trade Brief, S13TB02/2013, (2013), P.5; See also Kalenga, cited above at note 2, P.2

³¹ TFTA Guiding Principles, cited above at note 25, Art. 3; See also The TFTA Agreement, cited above at note 18, Art.6.

and large scale production.³² This market will also help to increase the three REC's economic growth at 6-7% per year and project the GDP of Africa to \$29 trillion by 2050.³³

Secondly, as it aims at converging programs and activities of the three RECs through harmonization and coordination initiatives, the TFTA helps to eliminate challenges resulting from overlapping of membership.³⁴ This was believed to greatly contribute for the continental integration process, i.e. Continental Free Trade Area.³⁵

Thirdly, it increases trade among countries involved, and brings diversion of trade from the rest of the world towards intra-TFTA trade and, most importantly, gains to consumers, as they get access to cheaper and better quality products.³⁶

Fourthly, the TFTA eases the movement of goods, services and people across the region and benefit Tripartite States, foreign investors, and African citizens by more readily harnessing the potential of the continent's people i.e. both as a labor force and growing consumer base.³⁷ Lastly, the TFTA will also have an impact on the development of good infrastructure that result in low level of investment across the different trading blocs.³⁸ The TFTA's establishment will stimulate investment in joint infrastructural development programmes as partner countries seek to unlock all the potential benefits of trading under the TFTA.³⁹

³² Ernest Tooche Aniche, "Problematizing Neo-functionalism in the Search for a New Theory of African Integration: The Case of the Proposed Tripartite Free Trade Area in Africa," IISTE Journal, Vol.4, No.20, (2014), P.129; See also Petros Shayanowako, "Towards a COMESA, EAC and SADC Tripartite Free Trade Area," Trade and Development Studies, Issue No. 40, (2011), P.10.

³³ The Benefits of Africa's New Free Trade Area, Harvard Kennedy School Belfer Center for science and International Affairs, (2015), (<http://www.belfercenter.org/publication/benefits-africas-new-free-trade-area-0>) last visited on Jan. 29, 2017, 10:39 PM

³⁴ Johannes Uusiku, Law and Regional Integration in Africa: An In-depth Analysis of the Complexities Raised by the Proposed Tripartite Free Trade Area, (2016), (<https://www.linkedin.com/pulse/law-regional-integration-africa-in-depth-analysis-raised-uusikuA>), last visited on, Jan. 29, 2017, 11:05 PM

³⁵ Simon Mevel and Stephen Karingi, "Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union," Paper presented on the 7th African Economic Conference, (2012), P.4, See also Shayanowako, cited above at note 32, P.10.

³⁶ Zamfir, cited above at note 18, P.7; See also Shayanowako, cited above at note 32, P. 11.

³⁷ Dante Disparte and John Bugnacki, TFTA: Africa's Crucial Inflection Point, (2016), (http://www.huffingtonpost.com/dante-disparte/tfta-africas-crucial-infl_b_7965650.html), last visited on Apr. 2 , 2017, 11:02 AM

³⁸ The Benefits New FTA, cited above at note 33.

³⁹ Shayanowako, cited above at note 32, P.12.

2.2.3.2. Challenges of the Tripartite Free Trade Area

Recognizing the benefits, others argue that the realization of the benefits associated with the effective implementation of the TFTA may be constrained by number of factors. This include among others:

Firstly, having 26 member states at a table may result in potential drawbacks on the negotiation process that may even reverse the achievements made on individual RECs and the decision making may start to move at a snail's pace.⁴⁰ Taking precedent from other regional integration efforts in Africa, Tripartite Members may drag their feet when it comes to implementation. The TFTA might also face difficulties in gaining political commitment of leaders. Some leaders expressed a concern that the proposed roadmap for regional integration may be unrealistically ambitious and the reality that economic integration takes time, whereas others have cautioned care must be taken to ensure that such liberalization actually produces the desired results.⁴¹ This political will remains a stubborn stumbling block, as tripartite leaders hold the ultimate power in making the ambitious TFTA a reality.⁴²

Secondly, despite the increased market it offers, the TFTA may result in economic polarization.⁴³ The more developed economies of Kenya, Egypt and South Africa will become in a much better position to market their exports, this result in possible polarization of inflow investment to these economies and it seriously undermine the proposed integration effort.⁴⁴

⁴⁰ Amos Saurombe, "A synopsis of problems and prospects of SADC, EAC and COMESA Tripartite Free Trade Area," International Journal of Liability and Scientific Enquiry, Vol. 6, Nos. 1/2/3, (2013), P.119; see also Disparte and Bugnacki, cited above at note 37.

⁴¹ Zamfir, cited above at note 18, P.9; See also SAANA consulting, Report on Advancing Regional Integration in Southern Africa, An Evidence-based, forward looking Study on Regional Trade and Integration in the Tripartite Region, Focusing Primarily on Southern Africa, (2014), P. 21

⁴² Kelvin Kajuna, "Connecting to the World through Regional Value Chains," in Andrew Crosby (ed.), "Towards Africa's own mega-regional: The CFTA," Bridges Africa, ICSTD, Vol. 5, Issue 1, (2016), P.17

⁴³ Dawn Nagar, The Politics and Economics of Regional Integration in Africa: A Comparative Study of COMESA and SADC, 1980–2015, (2016, Unpublished, School of Social Sciences, University of the Witwatersrand), P. 206; See also MOU, cited above at note 7, P.3

⁴⁴ Tsidiso Disenyana, "Towards an EAC, COMESA and SADC Free Trade Area: Issues and Challenges," South African Institute of International Affairs, (2009), P.19; See also Johan Burger, Africa's TFTA: An Exercise in Economic Integration, (<http://africabusiness.com/2016/06/22/tfta/>), last visited on Jan. 29, 2017, 10:44 PM; See also Mold *et.al.*, "The Effects of the Tripartite Free Trade Area: Towards a new Economic Geography in Southern, Eastern and Northern Africa," Credit Research Paper, No. 15/04, (2015), P.23

Thirdly, related to fiscal challenge, as majority of the countries in these RECs, with few exceptions are dependent on trade taxes for fiscal revenue,⁴⁵ losses in customs revenue will be unwelcome news and become a major obstacle for liberalization of tariff.⁴⁶ Similarly the TFTA arrangement may lead to change in the structure of individual countries on important sources of revenues which could be raised as “excuse” to delay the implementation of the TFTA.⁴⁷

Fourthly, the varying stages of economic integration and regulatory regimes among the three RECs pose difficulty in negotiating TFTA agreements.⁴⁸ Countries not participating in any form of FTA, like Angola, DRC, Eritrea and Ethiopia may present special challenges. On top of this, some RECs practice different levels of trade liberalization which cannot easily be matched by all participating RECs.⁴⁹ Taking this in to account, Fundira argue that RECs themselves and the trajectories they have taken turned from being building blocks for the creation of an integrated African market into stumbling blocks, and thus obstacles in the path of its formation.⁵⁰

Fifthly, the contradiction between the negotiating principles is also one of the major challenges for the TFTA negotiations. These include variable geometry, that allow ready countries to move ahead, and decision-making by consensus on the other that allow countries, not ready, to hold others back.⁵¹ (See Section 3.3)

Last but not least, the difficulties in institutional harmonization of the TFTA arrangement pose a threat on the success of the TFTA negotiation process.⁵² Though Tripartite States did not openly pronounce themselves in replacement of the three RECs, it brings complications on how to deal with the current configurations since the three RECs are all legal entities with specific legal

⁴⁵Virendra Polodoo, Tripartite Free Trade Area in Africa: Problem and Prospects, (2013), P. 17, (<https://sgp.undp.org/images/Captial%2028%20August%202013%20-%20Mauritius.pdf>), last visited on June 12, 2017 08:53 AM

⁴⁶Saurombe, cited above at note 40,P. 121; See also Zamfir, cited above at note 18, P.8

⁴⁷Disenyana, cited above at note 44, P.19

⁴⁸Disparte and Bugnacki, cited above at note 37.

⁴⁹United Nations Economic Commission for Africa,Final Report Study on the Establishment of Inter-RECs’ Free Trade Areas in Africa Drawing on Lessons from the COMESA-SADC-EAC FTA Experience, (2011), P.15

⁵⁰ J.B. Cronjé,“Negotiations on Movement of Business Persons in the COMESA-EAC-SADC Tripartite region,” TRALAC Trade Brief, No. S14TB02/2014, (2014), P.4

⁵¹Zodwa Mabuza and David Luke, “The Tripartite Free Trade Area Agreement: A Milestone for Africa’s Regional Integration Process,” in Andrew Crosby (ed.) “The Tripartite FTA: The Great Leap forward for Regional Integration in Africa?,” Bridges Africa, ICSTD, Volume 4, issue 6, (2015), P 6

⁵²Disenyana, cited above at note 44, P.20

regimes.⁵³ Apart from this, the existing institutions in the TFTA criticized of having weak institutional framework that affects their performance.⁵⁴ (See section 4.2)

The discussion above revealed, despite the benefits accrued from the establishment of the TFTA, there are challenges that needs to be tackled for the effective establishment the TFTA and stepping stone objective to the continental integration.

2.2.4. Current status of the Tripartite Free Trade Area

The current status of the TFTA can be best explained in terms of instrument and institutional development achieved so far and by discussion on the status of phases of negotiations.

Unlike the Declaration for the launching of TFTA, concluded on RECs level, the TFTA Agreement requires negotiation, signing and ratification of individual Tripartite States. Out of the 26 Tripartite Members, 24 states, except Libya and Eritrea, signed the Declaration for the launching of the TFTA negotiation.⁵⁵ Whereas the Agreement is signed by 21 out of 26 member countries, Mauritius being the most recent country to sign on 9 October 2017.⁵⁶

The TFTA Agreement requires 14 ratifications to enter into force, so far, Egypt⁵⁷ and Uganda⁵⁸ ratified it. The EAC, unlike COMESA and SADC that negotiate on individual state, negotiate in the TFTA as a bloc postponed the ratification of the TFTA from March to December 2017.⁵⁹

⁵³ Erasmus, cited above at note 29, P.14

⁵⁴ “COMESA-EAC-SADC Tripartite Capacity Building Programme: Appraisal Report,” African Development Fund, Office of NEPAD Regional Integration Department (ONRI), (2013), P.12

⁵⁵ Status of African Integration, “The Implications of Agenda 2063 and Agenda 2030 on African Integration,” 9th Joint Annual Meetings of the African Union Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration and the Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development, E/ECA/COE/35/4 AU/STC/FMEPI/EXP/4(II), (2016), P.9.

⁵⁶ Daily Monitor 25, Countries to Ratify Tripartite Free Trade Area this Month, (<http://www.monitor.co.ug/Business/Prosper/Countries-ratify-Tripartite-Free-Trade-Area-month/688616-4121694-omihk2z/index.html>) last visited on Oct 28, 2017, 02:32 AM; See also COMESA, Tripartite FTA signatures rise to 21 as Mauritius signs, (<http://www.comesa.int/tripartite-fta-signatures-rise-to-21-as-mauritius-signs/>), last visited on Oct 28, 2017, 03:04 AM

⁵⁷ Parliament Ratifies Agreement to Establish COMESA-EAC-SADC Tripartite Free Trade Area, State Information Service of Egypt, (2017), (<http://www.sis.gov.eg/Story/108931?lang=en-us>) last visited on May 07, 2017, 08:16 AM

⁵⁸ The Independent, Cabinet Approves the Ratification of the Tripartite Free Trade Area, (2017), (<https://www.independent.co.ug/cabinet-approves-ratification-tripartite-free-trade-atrea/>), last visited on Oct 28, 2017, 03:21 AM

⁵⁹ James Anyanzwa, East Africa Bloc Puts Off Ratification of Tripartite Trade Deal, All Africa, (2017), (<http://allafrica.com/stories/201705030414.html>), last visited on May 07, 2017, 08:06 AM; see also COMESA-

With regard to negotiation progress as defined in the TFTA road map matrix, Six annexes on Non-Tariff Barriers; Trade Facilitation; Customs Cooperation and Mutual Administrative Assistance; Transit Trade and Transit Facilitation; Technical Barriers to Trade and Sanitary and Phyto-Sanitary Measures, have been finalized and legally scrubbed and wait the approval by the Council to form integral part of the TFTA agreement.⁶⁰ After prolonged negotiation, the Ministerial meeting, on July 2017 finalized and adopted the remaining three Annexes: on rules of origin, trade remedies and dispute settlement, thus producing the full Tripartite Agreement.⁶¹

The TFTA aimed at liberalizing 100 percent of tariff lines taking into account the usual general, specific and security exceptions.⁶² Only EAC, Egypt and South African Customs Union (SACU) members have exchanged tariff offers and are currently engaged in negotiations of their exchanged tariff offers⁶³ and no bilateral negotiations have been concluded,⁶⁴ for inclusion in Annex I of the Agreement. Tripartite States failure to translate their commitments in to action within a given period of time, as defined in the road map, seems to lessen the original intention of building block function and creation of an integrated African market.

Despite the Tripartite Members successes in finalizing the annexes, particularly the last three annexes, are still unfinished businesses and considered outstanding. Moreover, negotiation on RoO form built in agenda that requires progressive negotiation between Tripartite States. In addition they are also expected to conclude negotiation on the guideline under the annex trade remedies, modalities for Phase two negotiations and ratification of the TFTA, the difficult

EAC-SADC Tripartite FTA Report, 5th Meeting of the Tripartite Sectoral Ministerial Committee (TSMC) for Trade, Customs, Finance, Economic Matters and Home/Internal Affairs, TP/TSMC/5/2016/2.1, (2016), Para.38.

⁶⁰ Report of Dr. Stergomena Lawrence Tax, SADC Executive Secretary and Chairperson of the Tripartite Task Force, 4th Meeting of the Tripartite Council of Ministers, (2016), P.5.

⁶¹ TRALAC News, The Tripartite Free Trade Area – a breakthrough in July 2017 as South Africa signs the Tripartite Agreement, (<https://www.tralac.org/news/article/11860-the-tripartite-free-trade-area-a-breakthrough-in-july-2017-as-south-africa-signs-the-tripartite-agreement.html>), last visited on Oct 28, 2017, 02:42 AM.

⁶² Africa Regional integration: Appraising the Tripartite Free Trade Area (TFTA) between EAC, SADC and COMESA in the Process towards the Continental Free Trade Area (CFTA) ,Trademark East Africa, (<https://www.trademarka.com/blog/new-tripartite-free-trade-area-agreement-to-scale-up-economic-integration-for-africa/>), last visited on Jan 29, 2017, 10:02 PM ; See also F. Fajana, “Preparedness of the Different AU-Recognized Regional Economic Communities (RECs) for the Continental Free Trade Area (CFTA),” ATPC-UNECA/AUC, (2016), P.2.

⁶³ Zodwa Mabuza and David Luke, “The Tripartite Free Trade Area Agreement: A milestone for Africa’s regional integration process,” in Andrew Crosby (ed.), “The Tripartite FTA: The great leap forward for regional integration in Africa?,” Bridges Africa, ICSTD, Volume 4, issue 6,(2015), P. 5; See also COMESA-EAC-SADC Tripartite FTA Report, 4th meeting of the Tripartite Council of Ministers, TP/TC/5/2016/2.1, (2016), Para.11

⁶⁴ Fifth Meeting of the Tripartite Sectoral Ministerial Committee (TSMC) for Trade Customs, Finance, Economic Matter and Home/ Internal Affairs, TP/TSMC/2016/2.1, (2016), P.3

portion to reach in agreement easily.⁶⁵In spite of the above progress made and the exhibited political commitment, the initial calendar set under the Road Map to Establish the TFTA, as annexed, lapsed on October 2016. Again the new time frame set by the ministers, April 2017, too missed. The recent time line, 30 October 2017, set to complete the above issues⁶⁶ also lapsed, achieving only two ratifications. The TFTA's failure to meet its own deadlines forced Tripartite States to amend their calendar thrice may not be the last. This shows the difficulty in reaching agreement easily and Tripartite Members' engaged in the parallel negotiation of the CFTA that is tied by over ambitiously time frame, December 2017.

Section Two

2.3. Overview of the Continental Free Trade Area

2.3.1. Evolution of the Continental Free Trade Area

When the Lagos Plan of Action criticized for not having a detailed implementation strategy, the Organization of African Unity (OAU) addressed the gap by adopting the Abuja Treaty that adopts a step-by-step approach to regional integration in Africa.⁶⁷ However, the signing of the Abuja Treaty did not result in the kind of impact on Africa's trade performance as expected. Two decades after the signing of the Treaty both intra-Africa trade and external trade remain low and Africa has not been able to take full advantage of its large continental market.⁶⁸The slow progress made by the RECs in becoming customs unions in the context of the Abuja Treaty has delayed the emergence of a continental customs union.⁶⁹

Following these disappointing results, a new approach, independent of the progress made by individual countries and RECs, proposed by African Union Ministers of Trade. The 6th Ordinary

⁶⁵*Ibid*

⁶⁶ TRALAC news, cited above at note 61.

⁶⁷Faizel Ismail (Dr.), "Advancing the Continental Free Trade Area (CFTA) and Agenda 2063 in the Context of the Changing Architecture of Global Trade," Trade and Industrial policy Strategies, Working Paper, (2016), PP.5-6

⁶⁸*Ibid*; See also AU and UNECA, "Report on 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," (2012), P. 48

⁶⁹United Nations Economic Commission for Africa (UNECA), "Assessing Regional Integration in Africa towards an African Continental Free Trade Area," (ARIAV),(2012), P.32

Session, on December 2010, decided to fast track the creation of a Continental Free Trade Area (CFTA),⁷⁰ which was later reaffirmed in the 7th Ordinary Session.⁷¹

This proposal subsequently draw the attention of the AU Assembly of Heads of State and Government to focus its January 2012 Ordinary Session on the theme of “Boosting Intra-African Trade”.⁷² The Assembly on the same year, in its 18th Ordinary Session, endorsed Accra’s Declaration on Boosting Intra-African Trade (BIAT), which outlines the benefits of an open market and the need to develop a competitive services sector and the Establishment of a Continental Free Trade Area, by the indicative date of 2017.⁷³ The Assembly also endorsed the Framework, Road Map and Architecture for Fast Tracking the establishment of the Continental Free Trade Area (CFTA) and the Action Plan for Boosting Intra-African Trade.⁷⁴ The commitment of African Heads of States to the CFTA Roadmap, and the need to launch the CFTA negotiations in 2015 was reaffirmed by the Assembly in January 2014.⁷⁵

Among the institutions established to fast track the CFTA, the Continental Task Force (CTF), in its 2nd meeting, April 2014, put forward draft objectives and guiding principles for negotiating the CFTA and forwarded to the Extraordinary Session of the Conference of AU Ministers of Trade (CAMOT) in April 2014.⁷⁶ The 25th AU Head of State and Government Summit, in 2015, agreed to start negotiations for the creation of a CFTA⁷⁷, aimed at integrating Africa’s markets in

⁷⁰ “Revised draft Synthesis Paper on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area,” African Union Commission, (2012), P.3.

⁷¹ Report of the 7th Ordinary Session of the AU Conference of Ministers of Trade to the Executive Council 20th Ordinary Session, EX/CL/700(XX), (2012), P.8.

⁷² Draft Synthesis, cited above at note 70, P.3.

⁷³ Ilmari Soininen, “The Continental Free Trade Area: Current State of Play,” Policy Brief 01, SAANA Consulting Institute, (2014), P.1; See also Viola Sawere and David Ndolo, “Approaching the CFTA services negotiations: Which way towards delivery by 2017?,” in Andrew Crosby (ed.), “Harnessing the Potential of the Services Sector in Africa.” Bridges Africa, ICSTD, Vol. 5, Issue 4, (2016), P.8; See also Boosting Intra African Trade, Assembly of the African Union (AU Assembly), Assembly/AU/2(XVIII), adopted in tis 18th Ordinary Session, (2012), P.43.

⁷⁴ Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area, Assembly of the African Union (AU Assembly), Assembly/AU/Dec.394 (XVIII), adopted in its 18th Ordinary Session, (2012), P.1, Para.3.

⁷⁵ Soininen, cited above at note 73, P.3.

⁷⁶ *Ibid*

⁷⁷ Declaration of AU Assembly on the Launch of the Negotiations for The Establishment of the Continental Free Trade Area (CFTA), Assembly of the African Union (AU Assembly), Assembly/AU/DECL.3 (XXV), Doc. Assembly/AU/11(XXV), adopted in its 26th Ordinary Session, (2015) of P.1; See also Decision on The Launch of Continental Free Trade Area Negotiations, Assembly of the African Union (AU Assembly), Assembly/AU/DEC.569 (XXV), adopted in its 26th Ordinary Session, (2015), P.1.

line with the Abuja Treaty, through negotiations on the liberalization of trade in goods and services.⁷⁸

2.3.2. The CFTA Agenda and Ambitions

Within the broader framework of the Abuja Treaty, the objective of launching negotiations for the CFTA is to achieve a comprehensive and mutually beneficial trade agreement among Member States of the African Union.⁷⁹ I.e. integrating fragmented African markets.⁸⁰

In particular, the CFTA have the following specific objectives⁸¹:

- *Create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Continental Customs Union and the African customs union;*
- *Expand intra African trade through better harmonization and coordination of trade liberalization and facilitation regimes and instruments across RECs and across Africa in general;*
- *Resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes; and*
- *Enhance competitiveness at the industry and enterprise level through exploiting opportunities for scale production, continental market access and better reallocation of resources.*

These set of objectives reaffirmed by the Draft Protocol to the Treaty Establishing the African Economic Community on the Continental Free Trade Area.⁸²

⁷⁸ Pablo Quiles, “Africa’s Continental Free Trade Area,” International Trade and Investment Review, Quarter 2, (2016), P. 11; See also “The Continental Free Trade Area: Making it Work for Africa ,”United Nations Conference on Trade and Development , Policy Brief No.44, UNCTAD/PRESS/PB/2015/18 (No. 44), (2015),P.1.

⁷⁹ Objectives and Guiding Principles for Negotiating the Continental Free Trade Area (CFTA), Ref: TI/TD/AMOT/OGP/1, Annex II, adopted at the 25th Extra Ordinary Session of the AU Assembly, (2015) P.3; See also AU Assembly Decision cited above at note 73, P. 58.

⁸⁰ AU Assembly Declaration, cited above at note 77, P.2.

⁸¹ Report of AU and UNECA, cited above at note 68, P. 65; See also Prudence Sebahizi, “The CFTA: Elements, Expectations, Schedules and Challenges,” Presentation with CSOs consultation, (2016), P.14; See also Jude C. Okafor and Ernest TooichiAniche, “Deconstructing Neo-Functionalism in the Quest for a Paradigm Shift in African Integration: Post-Neo-Functionalism and The Prognostication of The Proposed Continental Free Trade area In Africa,” IOSR Journal of Humanities and Social Science, Vol. 22, Issue 2, Ver. I (2017), P. 63.

⁸² The Draft Protocol to the Treaty Establishing the African Economic Community on the Continental Free Trade Area, (2017), forwarded for discussion on the 7th Continental Task Force, Art. 3.

For the fulfillment of the above objectives, the CFTA covers contents on the elimination of tariff and non-tariff barriers to Intra African trade in goods trade in services, investment and other trade related issues (Intellectual property rights, competition policy and ...) so as to serve as a stepping stone for the African Customs Union and, African Economic Community.⁸³

Negotiations launched in June 2015, planned to be conducted in two phases. Trade in services is negotiated during phase one in separate parallel sessions, having separate legal instrument, with the negotiations on the trade in goods.⁸⁴ In its second phase, the CFTA seeks to achieve deeper market integration by including behind the border issues in the scope of its negotiations.⁸⁵ Regimes for competition policy, investment, and intellectual property rights are scheduled to be negotiated during this phase.⁸⁶

Despite the slight difference and non-incorporation of the principle of single undertaking, most of the guiding principles adopted in the TFTA are also found in the CFTA, to govern the negotiation process. The AU Ministers of Trade adopted Objectives and Principles Guiding the Negotiations for the CFTA so as to form part of the document launching the negotiations.⁸⁷ This objectives and principles later adopted by the Assembly in the decision launching CFTA negotiations.⁸⁸ Thus, the CFTA negotiations shall be AU Member States/RECs/Customs Territories driven and guided by the principles of: REC FTA as building block, Reservation of Acquis, Variable geometry, Flexibility and Special and Differential Treatment Transparency and disclosure of information, Substantial liberalization, MFN Treatment, National Treatment, Reciprocity, Decisions by consensus and Adoption of Best Practices.⁸⁹

⁸³ Gerhard Erasmus, "One Year after its Launch: Has the Tripartite Free Trade Area been overtaken by Events?," TRALAC Trade Brief, No. US16TB03/2016, (2016), P. 6; see also Draft Protocol, cited above at note 82, Art. 5 (The agreements on the areas attached form an integral part of the Protocol)

⁸⁴ Fajana, cited above at note 62, P.5; See also The COMESA-EAC-SADC Tripartite Ministerial Committee Meeting Report in Preparation for the Tripartite FTA Negotiations, TP/II/3, (2011), P.4;

⁸⁵ Gerhard Erasmus, "How the CFTA could advance the Framework of the Abuja Treaty," TRALAC Trade Brief, (2015), P.6.

⁸⁶ Sawere and Ndolo, cited above at note 73, P.8.

⁸⁷ Report of Meeting of Ministers, Dedicated Session of Experts and Senior Officials Followed by Ministers Of Trade on The Continental Free Trade Area(CFTA), AU/TD/DS/AMOT/RPT.FINAL,(2015), P.4.

⁸⁸ AU Assembly Decision, cited above at note 74, P.1.

⁸⁹ Draft Objectives and Guiding Principles for Negotiating the Continental Free Trade Area (CFTA), 2nd Meeting of the Continental Task Force (CTF) on the Continental Free Trade Area (CFTA), TI/TD/CTF/2/ONP/01/REV1 (2013),P.3; See also Draft Modalities for CFTA Trade in Services Negotiations, TI/CFTA/TIS/MOD/Draft/Rev4, Submitted for consideration on the 5th CFTA-NF, (2017), P.4.

2.3.3. Benefits of Establishing the Continental Free Trade Area

Once fully implemented, the CFTA would offer considerable benefits for African countries. According to studies, access to regional market for African goods and services will increase intra-African trade significantly.⁹⁰ It is estimated that the removal of tariff barriers could raise intra African trade share from 10.2% in 2010 to 15.5% in 2022.⁹¹ This significant growth of Intra Africa trade in turn assists Africa to use its trade more effectively.⁹²

Beyond expanding intra-African trade, the CFTA also serves as a powerful opportunity for achieving the continental mandate of the AEC, as it transform diverse and heterogeneous political and economic of African entities into a more manageable and homogeneous market.⁹³ A gradual amalgamation of RECs into a single continental unit will enlarge the market that in turn creates larger economies of scale and enhances specialization.⁹⁴

Intra African trade is weak partly because fundamental aspects of trade logistics, such as infrastructure (transport, energy, ICT etc.), are compromised.⁹⁵ The CFTA also bridge such disconnect, in physical infrastructure and trade, across the continent.⁹⁶

As developing regionally integrated value chain and markets is important for Africa, The CFTA can also create conditions for African countries to take advantage of existing and new regional value chains (RVCs)⁹⁷. Such integrated market would facilitate the integration of different countries in the various stages of production according to their competitive advantages, thus also

⁹⁰ Miguel Rodriguez Mendoza, "The CFTA: Moving towards an African Mega-Regional Agreement?," in Andrew Crosby (ed.), "Towards Africa's own Mega-Regional: The CFTA," Bridges Africa, ICSTD, Vol. 5, Issue 1, (2016), P.4; see also "Regionalism in Africa," CUTS International, Discussion Paper, (2015), P.4.

⁹¹ Assessing Regional Integration, cited above at note 69, P 43.

⁹² Report of AU and UNECA, cited above at note 68, P. 46

⁹³ Assessing Regional Integration, cited above at note 69, P 43.

⁹⁴ *Ibid.*

⁹⁵ The High Level Committee of Heads of State and Government /Chairs of The Regional Economic Communities (RECs), Report on Boosting Intra-African Trade Assembly/AU/11(XIX), African Union Assembly (AU Assembly), in its 19th Ordinary Session, (2012), P.7

⁹⁶ Assessing Regional Integration, cited above at note 69, P. 43.

⁹⁷ The main objective of the Productive Capacity Cluster, one of the Priority Programme Clusters of the Action Plan for boosting Intra African Trade, is creating regional and continental value chains/complementarity, to increase local production/ trade in goods produced in Africa. See AU and UNECA report, cited above at note 68, P.37.

foment the creation of new regional value chains.⁹⁸ This value chain could eventually become part of global ones and increase the international competitiveness of African economies.⁹⁹

As the conflicts and contradictions stemming from the complex “spaghetti bowl” of RECs undermine moves towards the AEC by engendering poor coordination and costly duplication of programmes and activities,¹⁰⁰ the CFTA believed to be an efficient way of resolve the overlapping and multiple memberships¹⁰¹.

2.3.4. Current status of the Continental Free Trade Area

Following the initiative to establish the CFTA, progress has been made to prepare the yard, and actors, AU Member States, AUC, RECs, Respective Institutions and Partners pave the ways for its realization.

The Assembly on top of endorsing Framework, Road Map and Architecture for Fast Tracking the Establishment of the Continental Free Trade Area (CFTA) and the Action Plan for Boosting Intra-African Trade,¹⁰² adopted various legal instruments: The Objectives and Principles of Negotiating the CFTA, The Terms of Reference for the CFTA Negotiating Forum (CFTA-NF), the institutional arrangements for the CFTA negotiation and the Draft Declaration on the Launch of negotiation for the establishment of the CFTA.¹⁰³

The African Union Commission to ensure implementation of the Assembly’s decisions, carried out analytical studies to inform negotiators, organize capacity building programs for negotiators, conduct study on NTB elimination mechanism and organize Africa Trade week that brought together key stakeholders to discuss the CFTA culminated in to the High level Trade Facilitation Forum.¹⁰⁴

⁹⁸“African Continental Free Trade Area: Advancing Pan-African Integration, Some Considerations,” UNCTAD, UNCTAD/WEB/DITC/2016/5, (2016), P.11; see also Cronje, cited above at note 50. P.4

⁹⁹United Nations Economic Commission for Africa, “Economic Report on Africa: Industrializing through trade,” (2015), P. 151.

¹⁰⁰ Assessing Regional Integration, cited above at note 69, P. 35

¹⁰¹Decision on the Continental Free Trade Area, African Union Assembly (AU Assembly), Assembly/AU/Dec.608 (XXVII), in its 27th Ordinary Session, (2016), P.1

¹⁰² AU Assembly Declaration cited above at note 77, P.2; See also AU Assembly Decision, cited above at note 77, P.1.

¹⁰³ AU Assembly Decision cited above at note 77, P.1.

¹⁰⁴ The AUC Report, “The Continental Free Trade Area: Expanding Opportunities for Intra African Trade, Business and Investments,” African Economic Plat form, (2017), PP.5-6.

The Commission on the request of the Assembly¹⁰⁵ also developed a Draft of the CFTA Model Text both on trade in goods and trade in services.¹⁰⁶ The draft text has been validated by the RECs and members of the Continental Task Force on the CFTA. The next step was to send the draft text to the Member States for national consultation and it was sent at the end of January 2017, for national consultation.¹⁰⁷

So far, to fast track the establishment of the CFTA, the CFTA-NF held six (6) meetings. The first CFTA-NF meeting intended to consider all the post launch preparatory issues, essential process issues and technical document, agreed on the draft Rules of Procedure (RoP) for the CFTA Negotiating Institutions that were subsequently approved by the African Union Ministers for Trade in May 2016.¹⁰⁸ In the 2nd CFTA-NF, the Forum adopted definitions of the CFTA negotiations guiding principles and discuss on approached and modalities for the CFTA negotiations.¹⁰⁹ In the third meeting, the Forum considered the Terms of Reference (ToR) for the different Technical Working Groups (TWGs), the work plan and schedules of negotiations for trade in goods and trade in services.¹¹⁰ In its 5th meeting, it considered the documents on Modalities for Tariff Liberalization and Modalities for services Negotiations, so as to equip the negotiators to finalize the draft modalities.¹¹¹ The recent 6th meeting, discussions in the CFTA-NF paved the way for the AMOT to adopt the CFTA modalities or framework for goods and services liberalization.¹¹² The remaining agenda the work on a draft text to establish

¹⁰⁵ The request was made on the Decision on the Continental Free Trade Area, Assembly of African Union (AU Assembly) Assembly/AU/Dec.608 (XXVII), in its 27th Ordinary Session, (2016), P.1, Para. 4

¹⁰⁶ Update on the CFTA and the Proposed Mechanism for the Elimination of Non-Tariff Barriers (NTBS) in the Continental Free Trade Area (CFTA), Assembly of the African Union (AU Assembly) Assembly/AU/4(XXVIII), in its 28th Ordinary Session, (2017), P.2. Para.2.

¹⁰⁷ *Ibid.*

¹⁰⁸ Media Advisory, The 2nd Meeting of the CFTA-NF, (2016), (<https://www.au.int/en/newsevents/30316/2nd-meeting-continental-free-trade-area-negotiating-forum-cfta-nf>) last visited on May 01,2017, 02:25 AM; see also update on the CFTA, cited above at note 106, P.2

¹⁰⁹ AUC Press Release, The 2nd meeting of the Continental Free Trade Area Negotiating Forum, Press Release No. 183/2016 (2016), Department of Information and Communication, AUC P.2,

¹¹⁰ TRALAC News, Note on the 3rd Meeting of the CFTA-NF, (2016), (<https://www.tralac.org/news/article/10633-note-on-the-3rd-meeting-of-the-cfta-nf.html>), last visited on Apr. 20, 2017, 09:30 AM.

¹¹¹ The Draft Modalities for African Union Trade in Service Negotiations, TI/CFTA/MOD/Draft/Rev4, and The Draft Modalities for CFTA Tariff Negotiations, TI/CFTA/TIG/MOD/Draft, are among the documents presented for consideration of the 5th CFTA-NF, (2017).

¹¹² UNECA Media Center, CFTA Modalities on Goods and Services Adopted in Niamey, (<https://www.uneca.org/stories/cfta-modalities-goods-and-services-adopted-niamey>), last visited on Nov. 11, 2017, 10:04 PM

commitments in a range of disciplines including rules of origin, trade remedies, customs cooperation and trade facilitation are set to be finalized by the end of 2017.

2.4. Conclusion

From the discussion in the above two sections, it is seen that the two FTAs, have several areas of intersection, that fits the stepping stone objective. To begin with the purpose of their establishment, they are meant to promote economic and social development, create a large single market with free movement of goods and services (having the difference in the scope and coverage), to eliminate overlapping or multiple membership in different RECs and to promote intra-regional trade. The two FTAs adopted similar set of negotiating principles that determine how the official negotiations will be conducted. Despite the slight difference in the sequence of negotiation, the principle of Variable geometry, Flexibility and Special and Differential Treatment, Acquis, Reciprocity, and Decisions by consensus... are among the major principles governing negotiations of State Parties at both levels.

Taking their geographical coverage in to consideration, the benefits that will be accrued from the effective implementation of the two FTAs are almost similar. Once implemented, the two FTAs will be able to serve as a stimulant for structural transformation, opportunity for the continental integration, to increase Intra African Trade, inflow of foreign direct investment and development of good infrastructure. Despite their commonalities and the difference in levels of development, the discussion shows that the two FTAs can be used to serve each other's objective.

Chapter Three

Resolving Overlapping of Membership in the Tripartite Free Trade Area

3.1. Introduction

Countries in the Tripartite Region and other parts of the continent developed a tradition of signing FTA agreements without taking the impact into consideration. This brought the problem of overlapping membership where one country belongs to more than one RECs. Tripartite States considering the problem took the initiative to harmonize their policies and programs and establish one FTA. As indicated in the TFTA Agreement¹ resolving overlapping membership is one of the major objectives while forming the TFTA. I believe resolving this problem in the tripartite region relieves the burden of the CFTA and serve as a launching pad to extend the arrangement to the other part of the continent. .

Accordingly, this chapter is designated to investigate overlapping membership in the continent in general and the tripartite region in particular. In doing so it addresses the extent and nature of the problem, its impact on the effort of Tripartite States and the proposed TFTA solutions to overcome the problem. At last the effectiveness or other wise of the TFTA to resolve the problem and plausibility to meet the building block objective will be analyzed.

3.2. The Problem of Overlapping of Membership in the Tripartite Region

In pursuit of deeper integration, one of the major problems faced by the African Member states in general and Tripartite States in particular is multiple or overlapping memberships.² The problem, exemplifies a classic case of the ‘spaghetti bowl’³ where multiple RECs membership illustrates the flexibility or open-door membership that African RECs offer.⁴

¹The Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), (2015), the Preamble.

²Gerhard Erasmus, “Legal and Institutional aspects of the Tripartite Free Trade Area: the need for Effective Implementation,” in Trudi Hartzenberg, *et.al*, The Tripartite Free Trade Area- towards a new African integration paradigm?, (2012), P. 14; See also Vincent Angweny, “The Tripartite Free Trade Area: A Step Closer to the African Economic Community?,” in Marc Bungenberg, *et.al*, (ed.), European Yearbook of International Economic Law, (2016), P. 601.

³“Status of Integration in Africa,” UNECA, ARIA II, (2006), P.50. The spaghetti bowl is defined as a metaphor for African countries’ many overlapping memberships in regional economic communities.

⁴James Thuo Gathii, African Regional Trade Agreements as Flexible Legal Regimes, Working Papers, Series No. 20, (2009, unpublished, Albany Law School), P. 2

According to Gathii, the criticisms over multiple-membership in RECs can be divided into two main categories.⁵ The first category relates to reflections of the proliferation of RECs in creating the spaghetti bowl and the other relates the high transaction costs and administrative difficulties of complying with multiple rules of different RECs.⁶

Despite the criticisms, James Gathii⁷ and Arvind Panagariya⁸ explain why African countries join different regional schemes. As different RECs offer benefits to members, multiple memberships reflect countries' desire to pick and choose among the options offered by competing RECs.⁹ For these countries, multiple memberships offer them flexibility and adaptability and accrue benefits from multiple regimes otherwise not available through sole memberships.

From the 54 African countries Eighty Nine percent are members of more than one REC.¹⁰ Out of this 21 are members of two AU recognized RECs, 24 belong to three, 2 countries are members of four, and only 6 countries are members of a single REC.¹¹ In the Tripartite Region, as indicated below, EAC shares four member States with COMESA and one Member State with SADC and COMESA and SADC have eight member States in common.¹²

⁵James Thuo Gathii, African Regional Trade Agreements As Legal Regimes, (2011), P.76

⁶ Ibid; TE Taole, Membership in African Regional Trade agreements: A focus on SADC and COMESA, (2014, Unpublished, North-West University), P.30

⁷Gathi, cited above at note 5, P. 30

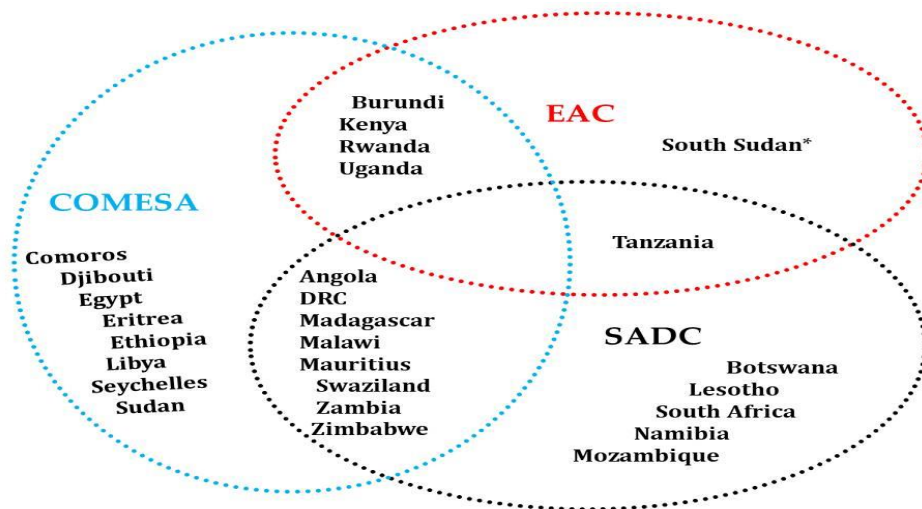
⁸ Arvind Panagariya, "The Regionalism Debate: An Overview," Journal of World Economy, Vol. 22 No. 4, (1999), P. 36

⁹ Martha Belete Hailu, "Regional Economic Integration in Africa: Challenges and Prospects," Mizan Law Review, Vol. 8, No.2, (2014), P. 319; See also Gathi cited above at note 5. P.67-68;

¹⁰ R. Nantchouang (Dr.), Are the Regional Economic Communities' (RECs) Overlapping Membership an issue?" A discussion on the "free rider" Syndrome as applied to a Small Economy, (2014), P.14 (<http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH01d2.dir/20140228.pdf>) last visited on June 20, 2017, 11:10 AM

¹¹*Ibid*

¹²Eduard Vasilev Marinov, "Current Trends in the Economic Development of the Participating in the Tripartite Free Trade Area Regional Economic Communities,"Journal of Economics and Political Economy, Vol. 3, Issue 1, (2016), P.88



*Note: *South Sudan is not a Tripartite State.*

Figure 1 Overlapping of Membership in the Tripartite RECs

The TFTA believed to reduce combined memberships of the three RECs from 40 memberships to 26 memberships as well as eliminates 13 duplicative memberships in the three RECs.¹³

3.2.1. Implication of Overlapping of Membership in the Tripartite Free Trade Area

Overlapping membership among RECs has serious implications both on the three RECs and the continental integration. There are administrative and legal difficulties arising from the overlap. A country that belongs to two or more RECs, in the administrative side, faces not only multiple financial obligations, but must cope with different meetings, policy decisions, instruments, procedures, and schedules.¹⁴

Moreover, Customs officials will be expected to deal with different tariff reduction rates, RoOs, trade documentation, and statistical nomenclatures depending on the range of requirements multiplies customs procedures and paperwork.¹⁵ For these reasons such members find themselves

¹³ Ernest Tooichi Aniche , “Post-neo-functionalism, Pan-Africanism and Regional Integration in Africa: Prospects and Challenges of the Proposed Tripartite Free Trade Area (T-FTA),” A Paper Presented at Toyin Falola International Conference (TOFAC), (2015), PP. 10-11

¹⁴ Gerhard Erasmus, “Is it possible to have better Governance in Africa’s Regional Economic Communities?,” in Andrew Crosby (ed.), “The Tripartite FTA: The Great leap forward for Regional Integration in Africa?,” Bridges Africa, ICSTD, Vol. 4, Issue 6,(2015), P.11.; See also Audit of the African Union, Report of the High Level Panel, (2017), P.129, Para 357; See also Martha, cited above at note 9,P.320

¹⁵ Aniche, cited above at note 13, PP. 10-11.

in a difficulty to honor their contribution obligations to the RECs they belong to. In some instances it becomes mere membership to the REC.

From legal point of view, a country cannot apply two different Common External Tariffs (CETs) and therefore technically cannot be a member of more than one Customs Union (CU).¹⁶In CU, there will be a CET decided at the community level, and not by individual countries and these countries encounter difficulties in deciding the CET to be imposed.¹⁷In deed membership of a country in two customs unions is only possible if both customs unions have the same CETs.¹⁸ But, according to the current pattern of the three RECs, it becomes impossible to maintain membership in both RECs once COMESA and SADC become CU as in the case of EAC. The non-alignment of the CET of COMESA and SADC unlike the case of COMESA and EAC forces member states of the two RECs to decide to which CU they want to belong to.¹⁹

Overlapping membership also affect the use of RoO among member countries and RECs. If not harmonized a country may use two or more set of RoO while trading with different countries which are members of different RECs.²⁰When countries apply different RoO to different countries, uncertainty, confusion and barriers to trade will increase.²¹ Unless a single set of RoO ideally agreed, this creates a challenge since SADC Member States follow a different methodology of RoO as compared with COMESA and the EAC.²²

The discussions above shows how the problem creates inconvenience on Tripartite States and continue to challenge the future of the TFTA, unless resolved effectively. However, the TFTA which doesnot seem concerned of these implications allowed the current REC's arrangement to continue in parallel with the TFTA regime, than harmonizing the dissimilarities among rules.

¹⁶Lunogelo B. (Dr.) and Mbilinyi, Apronius V.,“ Convergence of COMESA-SADC-EAC Regional Frameworks,”the Economic and Social Research Foundation (ESRF), (2009),P.4.

¹⁷Martha, cited above at note 9, P 320

¹⁸Derk Bienen, “The Tripartite Free Trade Area and its Implications for COMESA, the EAC and SADC,” Trade and Development, BPK Development Research and Consulting, Discussion Paper No. 01/2010, (2010), P.4

¹⁹*Ibid*

²⁰Eckart Naumann, “Rules of Origin in the Tripartite FTA: Reflections on the Status quo and the Challenges ahead,” in Trudi Hartzenberg, *et.al*, Cape to Cairo, Making the Tripartite Free Trade Area Work, (2011), P. 202

²¹*Ibid*

²²Gerhard Erasmus, “The Tripartite Free Trade Agreement: Results of Phase One of the Negotiations,”TRALAC Working Paper, No. US15WP04/2015, (2015), P.20

3.2.2. Resolving Mechanisms adopted in the Tripartite Free Trade Area

It is believed, by various scholars, that the TFTA eliminates duplicative membership and proliferation of RECs.²³ Particularly, the successful amalgamation of the three RECs brings an opportunity to tackle the problem.

Harmonization of programmes across the three RECs is among the strategies devised to overcome the problem.²⁴ The TFTA in this connection plays a pivotal role in harmonization of policies, principles, and practices among the three RECs, in the area of trade, customs and infrastructure development, so as to eliminate the contradictions.²⁵

The TFTA also proposed to address the problem through incorporation of developmental integration approach, which focuses on development pillar and infrastructure development pillar, apart from market integration.²⁶ As multiple memberships is a reflection of countries' desire to look for options offered in different RECs, the TFTA's proposal to engage in the above areas will inspire Tripartite States' to join the club leaving their multiple membership behind.

Moreover, the TFTA to bring on board the different levels of development among the participating countries enshrined the principles of Variable Geometry, flexibility, special and differential treatment.²⁷ This decision allows Tripartite States for flexible progression of

²³ Stephen Karingi, Ottavia Pesce and Simon Mevel, "Preferential Trade Arrangements in Africa: Lessons from the Tripartite Free Trade Agreements and an African Continent-Wide FTA," in Patrick Low *et.al.*, (ed.), African Perspective on Trade and the WTO, Domestic Reforms, Structural Transformation and Global Economic Integration, (2016), P.258 ; See also Aniche , cited above at note 13, PP. 10-11; See also Okeke V.O.S , "The Prospects and Challenges of the Proposed African Free Trade Zone (AFTZ): a Search for a New Theory," Global Advanced Research Journal of Management and Business Studies ,Vol. 3(4) , (2014), PP. 144-154.

²⁴ Memorandum of Understanding (MOU) on Inter regional Cooperation and Integration amongst COMESA, EAC and SADC, (2008),(signed Kampala, Uganda), Art. 2/1; See also Communiqué of the 2nd COMESA-EAC-SADC Tripartite Summit, Distr.: General, Ref.: T/TS/II/6, (South Africa), (2011), P.1, Para. 1

²⁵ UNECA, "Final Report Study on the Establishment of Inter-RECs' Free Trade Areas in Africa Drawing on Lessons from the COMESA-SADC-EAC FTA Experience," (2011), P. 24 ; See also Dr. Zolomphi Nkowanji, "Making Haste Slow: Harmonization Of Economic Laws in the SADC Region and the Impact of the Proposed Tripartite Free Trade Area (TFTA) for SADC, COMESA AND EAC," Paper presented at the 3rd International Conference on Integration and SADC Law Conference, (2013), P.4 ; See also Tsidiso Disenyana, "Towards an EAC, COMESA and SADC Free Trade Area Issues and Challenges," The South African Institute of International Affairs (SAIIA), African Perspective Global Insight, (2009), P.21

²⁶ Zodwa Mabuza, African TFTA: A key Milestone for Continental Integration, Conference organized by the ICSTD, (2015), (<https://www.youtube.com/watch?v=CVelUcgffD0>) last visited on May 10, 2017, 09:35 AM; See also 2nd communique , cited above at note 25, Para.1/iii

²⁷ The TFTA Agreement, cited above at note 1, Art. 6: The difference in economic development among the participating countries is also highlighted in the preamble of the Agreement.

cooperation in a variety of areas and at different speeds, than refraining from participation due to their level of economic development.

3.2.3. The Reality: Living with the Problem of Overlapping Membership

Despite understanding the problem of overlapping membership and strategies intended to overcome, it is hard to believe the TFTA will be able to remove the existing overlapping membership. From the beginning there were scholars suspicious as to whether the TFTA will be able to remove the existing subgroups or possibly form future ones.²⁸ Looking the reality, where the TFTA is heading, the likelihood of resolving the problem of multiple memberships is weakened.

To start with Tripartite States' commitment to eliminate the problem of overlapping membership, the initial intention as manifested under the draft TFTA Agreement²⁹ was to establish an inclusive FTA among the three RECs. The cumulative reading of paragraph 13 and 14/i of the Kampala Communique also revealed the Tripartite States' interest towards merging in to single REC, ultimately establishing a single Customs Union. The approach to merge and unify the three RECs for sure will serve as a way out from this long-lasting problem between Tripartite States.

However, departing from their initial commitment, *"the parties agree to work towards avoidance of duplication of efforts in areas of common interest where each one of them has attained progress; in this regard the parties shall harmonize programs of their meetings"*³⁰ The *a contrario* reading of this provision convey the existence of parallel similar arrangements, which clearly negate the idea of merging the three RECs. The MOU, in addition, revealed the shift from a single free trade area objective in to harmonizing the three RECs policies.³¹ The signed TFTA agreement on its

²⁸Nkowane, cited above at note 27, P.10; See also Dawn Nagar, The Politics and Economics of Regional Integration in Africa: A Comparative Study of COMESA and SADC, 1980–2015, (2016, Unpublished, School of Social Sciences, University of the Witwatersrand), P.193; See also Gerhard Erasmus and Trudi Hartzenberg, "The Tripartite Free Trade Area: What Will It Be, and How Will It Come About?," in Christoph Herrmann, *et.al.* (ed.), European Yearbook of International Economic Law, EYIEL 5, (2014), P.347

²⁹The Draft Tripartite Free Trade Area agreement (as revised Dec.2010), Art 3/3, (https://www.tralac.org/images/Resources/Tripartite_FTA/Draft%20Agreement%20Establishing%20Tripartite%20FTA%20Revised%20Dec%202010.pdf), last visited on Feb 10, 2017, 1050 AM,

³⁰ Tripartite MOU, cited above at note 24, Art 10/2

³¹*Id.*, Para. 6 of the preamble

part,³² despite incorporating Tripartite states' Commitment to resolve the problem, a kind of lip service for me, omitted resolving overlapping membership from its objective and skip merging the three RECs. (See Section 4.2.3). Such deviation, in my view, left the Tripartite States out of the track that could lead them to the successful elimination of the problem of multiple memberships, vital to the continental integration process.

Furthermore, the ratification procedure in the TFTA agreement also creates further complication in regard to overlapping membership. The agreement provides its entry into force on the thirtieth day after the deposit of the fourteenth instrument of ratification.³³ Taking Tripartite States commitment to their milestone in the roadmap and signing of the Agreement at a snail pace (out of the 26 Tripartite States 21 signed at a snail pace with in 2 1/2 years period), questions, of suspicious nature will stem from this procedure. Among these: What will happen if some Member States decide not to ratify or delay the ratification? What will be the fate of non-ratifying countries? Will they continue with their REC FTA arrangement?

I believe this procedure create rival groups between the ratifying and non-ratifying countries, if not ratified by all Tripartite States. Rather than waiting for such number of ratification for the entry in to force of the agreement, it could have been better to start with few members and others can join some other time when they are ready, accepting the progress achieved. This gives an opportunity to tackle the creation of groupings averts additional layers over the existing FTA arrangement in the three RECs.

Above all, allowing non ratifying countries, for sure they should be, to continue trading with other Tripartite States in terms of the existing REC rules to the minimum result in the creation of four RECs (the three RECs plus the TFTA). Thus, the ratification procedure paves the way for other REC(s) to spring up in future from the TFTA, following dissatisfaction on the negotiation outcomes.

Despite this frustrated approach to settle the problem with in the three RECs, the TFTA may not be able to eliminate multiple or duplicative memberships of Tripartite States across the

³² TFTA Agreement, cited above at note 1, preamble, Paragraph 8.

³³ The TFTA Agreement, cited above at note 1, Art. 39/3

continent.³⁴ As shown in the table below, Tripartite States in addition to their memberships in the three RECs also belong to other RECs in the continent.

TFTA	ECCAS	CENSAD	AMU	IGAD
Angola	Angola			
Burundi	Burundi			
Comoros		Comoros		
Demo. Rep. of Congo	Demo. Rep. of Congo			
Djibouti		Djibouti		Djibouti
Egypt		Egypt		
Eritrea		Eritrea		Eritrea
Ethiopia				Ethiopia
Kenya		Kenya		Kenya
Libya			Libya	
Rwanda	Rwanda			
Uganda				Uganda

Table 1 Overlapping Memberships of the Tripartite Member in other RECs³⁵

Assuming the TFTA will be effective in resolving intra TFTA overlapping membership and reduce the number multiple memberships in the Tripartite Members. But such reduction cannot be significant given that many of the Tripartite Members continue to maintain double or triple memberships in other RECs. Hence, the problem still persists within or outside the TFTA.

To further the discussion, the next section leads us whether the Tripartite Negotiation Principles are capable enough to push forward the effort to resolve overlapping membership.

3.3. Negotiating Principles fueling the Problem of Overlapping Membership

As mentioned under section 2.4.2, the guiding principles in the TFTA agreement regulate the overall negotiation process. Though the principles are meant to achieve certain set of objectives, they do have their own unanticipated or otherwise outcome on the negotiation process. The principles, as adopted in most of FTA arrangement are not problem makers rather the way interpreted in the TFTA regime affect the outcome of the principles. For the purpose of this

³⁴ Ernest Aniche, "Problematizing Neo-functionalism in the Search for a New Theory of African Integration: The Case of the Proposed Tripartite Free Trade Area (T-FTA) in Africa," *IISTE Journal*, Vol.4, No.20, (2014), P.134

³⁵ *Id.*, P.141

thesis discussion will be made on the Principle of MFN, Acquis, Variable Geometry and Single Undertaking.

3.3.1. The Principle of Most Favored Nation (MFN) Treatment

The MFN obligation as enshrined in the GATT, Members have the general obligation not to discriminate against other GATT Members³⁶ unless otherwise allowed.³⁷ In other words any benefit granted by a WTO Member to any country (Member or not Member to the WTO) must be extended to all WTO Members immediately and unconditionally.

As a rule, the TFTA agreement obliges Tripartite States to accord the MFN treatment to one another.³⁸ This article by itself would appear to impose an absolute MFN obligation on Tripartite States. The problem lies in defining the application of the principle. The agreement unlike the WTO, define MFN treatment, in a conditional way, *as any advantages that Tripartite Member/Partner State offers to third countries "would be" offered to other Tripartite member/Partner States.*³⁹ The "would be" phrase refers to the qualifying reciprocity, to extend advantages to other Tripartite States.

Indeed inclusion of MFN treatment in the TFTA is to ensure Tripartite States trade amongst each other on terms as good as or better than that offered to non-TFTA partners. But one can raise a question whether the TFTA should be WTO plus or minus agreement. The very purpose of the establishment of the TFTA, in my view, is to do more from what is enshrined in the WTO and ensure deeper integration. As some Tripartite States are not WTO members, inclusion of the MFN will serve to extend the privileges given by Tripartite States to the WTO. However, for Tripartite States (WTO Members), it gives them no privilege, rather it erode their unconditional and immediate privilege under the WTO. Such MFN provision among the WTO Tripartite States will be incompatible as it defies consistent and equal application MFN rule.

Moreover, the MFN treatment under the TFTA is an exception from the WTO concept of the MFN obligation.⁴⁰ The WTO regime exceptions to MFN treatment from the general non-

³⁶ The General Agreement on Tariffs and Trade, (GATT), (1947), Art 1/1

³⁷ *Id.*, Art. 1/2, list the exceptions made to the General MFN treatment.

³⁸ The TFTA Agreement, cited above at note 1, Art 7/1

³⁹ *Id.*, Art.1

⁴⁰ GATT, cited above at note 36, Article XXIV or the 'Enabling Clause'. When it fulfills the necessary elements

discrimination rule are made under various grounds having its own justifications. However the TFTA will have no justification and objective to meet while using reciprocity to extend the privilege, unless it has an *ulterior motive* to secure the interest of the more developed economies in the tripartite region.

The application of MFN rule, as envisaged in the TFTA also creates administrative difficulties. Reciprocity on the one hand, requires Tripartite States or RECs to grant each other mutually agreed trade concessions.⁴¹ On the other hand the TFTA Agreement have “grandfather clauses” that allow existence of inconsistent trade commitments with a third country.⁴² Moreover, in view of deep integration among the Tripartite States, the agreement permits two or more Tripartite States to enter into new preferential agreements.⁴³ The benefit from both clauses will be extended to other Tripartite States reciprocally.

Let’s say country “X” (Tripartite State) entered into an FTA agreement with Non-Tripartite State and another new preferential arrangement with Country “Y”, Tripartite State. Extending the privilege from both agreements necessitate a number of tariff offers/ RoO, as the case may be, between Tripartite States willing to reciprocate and country “X” and “Y”. Assuming all Tripartite States are interested, the number of schedules out of these two agreements will reach up to 75 depending on various levels of reciprocities. The more agreement of this nature is the higher the complexity of tariff schedule in the TFTA.

As pointed by Erasmus, these different offers to different states (or a single state) will work on an ad hoc fashion and there cannot be comprehensive reciprocity.⁴⁴ There will not be mutually agreed concession, as required in reciprocity, among the Tripartite Members due to the different configurations of negotiations. This in turn devalues the efforts made to finalize negotiations on tariff offers/ RoO to annex as integral part of the TFTA agreement.

Given the complexity of FTA negotiations, the varying ability of Tripartite States to reciprocate and the difficulty to administer different tariff offers and RoO on reciprocity basis, the

⁴¹ Interpretation of Tripartite FTA Negotiation Principles, 2nd Meeting of the COMESA-EAC-SADC Tripartite Trade Negotiation Forum, TP/TTNF/I/2012/3, (2012), P.16

⁴² The TFTA Agreement, cited above at note 1, Art 7/2

⁴³ *Id.*, Art. 7/3

⁴⁴ Gerhard Erasmus, “Redirecting the Tripartite Free Trade Agreement Negotiations?,” TRALAC Trade Brief, S13TB02/2013, (2013), P.9

application of MFN treatment worsens overlapping membership and refutes the idea harmonizing policies within the three RECs.

3.3.2. The Principle of Acquis

This principle refers to a stage by which the progress already achieved among the three RECs is meant to build upon and consolidated.⁴⁵ Tripartite States expected to engage in negotiations for the establishment of the TFTA recognizing their substantial progress made on trade liberalization. Among the Tripartite States, ECOWAS, EAC members and Southern Africa Customs Union (SACU) Tripartite States, agreed to 100% tariff liberalization, within their respective REC. Taking the varying level achievement, difficulties may arise as to which REC's achievement should be taken as basis to build the TFTA.

Moreover, the TFTA aim to liberalize 60-85 % of tariff lines upon entry into force of the Agreement and the remaining 40-15 % to be negotiated over a period of 5 to 8 years.⁴⁶ As compared to the above 100% liberalization, the TFTA will become less ambitious than the RECs. The TFTA built on the success of its RECs as envisaged in the principle of *acquis* cannot happen, due to its inability to consolidate the RECs *acquis*.

On top of this, the agreed TFTA *acquis* based modality of negotiation on tariff liberalization also escalates the problem of overlapping membership. As per the modality, no tariff negotiations will take place between Tripartite States in an already existing FTA, except consolidating their liberalization levels to the TFTA standard.⁴⁷ These Tripartite States are permitted to maintain the existing preferential terms between their Members. In another category, Tripartite States not participating in the REC FTA have to negotiate with all the Tripartite States.⁴⁸ Furthermore,

⁴⁵ The TFTA Negotiating Principles, Processes and Institutional Framework: Guidelines for Negotiating the Tripartite Free Trade Area among the Member / Partner States of COMESA, EAC and SADC, (2011), P.5

⁴⁶ Zodwa Mabuza and David Luke, "The Tripartite Free Trade Area Agreement: A milestone for Africa's Regional Integration Process," in Andrew Crosby (ed.) "The Tripartite FTA: The Great leap forward for Regional Integration in Africa?," Bridges Africa, ICSTD, Volume 4, issue 6, (2015), P.5; See also Tripartite Free Trade Area Report, N Gage Consulting S.A.E, Public Strategy and government relation Specialists, (2015), P.4

⁴⁷ Bridges Africa News, Launch of African Tripartite FTA now set for June, (16 March, 2015), (<http://www.ictsd.org/bridges-news/bridges-africa/news/launch-of-african-tripartite-fta-now-set-for-june>) last visited on May 21, 2017, 09:27 AM; See also Angweny, cited above at note 2, P.605

⁴⁸ Lonel Zamfir, "The Tripartite Free Trade Area Project Integration in Southern and Eastern Africa," European Parliamentary Research Service (EPRS), PE 551.308, (2015), P.3

Tripartite States participating in the REC FTA have to negotiate with other Tripartite States of the other REC FTAs.⁴⁹ These countries will submit tariff offers to each other.

The last two categories of Tripartite States need to negotiate their own terms and submit tariff offers to each other. Though it was meant to serve as spring board for the TFTA negotiations, the above offers bring in additional and separate trade arrangements.⁵⁰ It result in different configurations of parties and will mean more trade agreements, new notifications and more overlapping membership challenges.⁵¹ Such agreements increase the number of separate independent trade agreements, i.e. increasing the volume of spaghetti to the bowl⁵² than harmonizing and rationalizing the preexisting agreements. In its entirety, the principle has gone far from the notion of establishing comprehensive system as envisaged in the TFTA and washed-out the effort to tackle overlapping membership.

3.3.3. The Principle of Variable Geometry

To address the different levels of development among the Tripartite States, the TFTA incorporated the principle of Variable Geometry that green light the existence of a FTA agreement, not uniformly binding to all Tripartite States. As defined in the TFTA agreement, it is among the principles of flexibility allowing progression in cooperation amongst Tripartite Members in a larger integration scheme, in a variety of areas and at different speeds.⁵³

Indeed the TFTA agreement saying “... *Nothing in this Agreement shall prevent two or more Tripartite Member/Partner States from entering into new preferential agreements...*”⁵⁴ intended to allow broader participation in the TFTA and to accommodate different speeds of liberalization. This is done to make suitable for Tripartite States who wants to go beyond the TFTA’s commitments in terms of scope and time.

⁴⁹ Erasmus, Cited above at note 22 P.17

⁵⁰ Gerhard Erasmus, “The Agreement preceding the Agreement: How the Negotiating Principles Decided the Tripartite FTA Game plan” in Trudi Hartzenberg, *et.al.* Cape to Cairo: Exploring the Tripartite FTA Agenda, (2013) P. 10

⁵¹ Erasmus, cited above at note 44, P.8

⁵² REC’s, EPA’s and the ‘Clarified’ T-FTA: Cannelloni in Theory, Spaghetti in Practice, P.9, (http://www.academia.edu/16198104/REC_s_EPA_s_and_the_Clarified_T-FTA_Cannelloni_in_Theory_Spaghetti_in_Practice), last visited on May 09 2017, 10:50 AM

⁵³ The TFTA agreement, cited at note 1, Art. 1; The differences in economic development among the participating countries is also highlighted in the preamble of the Agreement

⁵⁴ *Id.*, Art. 7/3

However, the number of trading arrangements which are being applied by Tripartite States and new trading arrangements that will arise out of the application of this principle will be countless. This principle also gives leeway for Tripartite States to pursue only what is beneficial for them, ignoring the mutually agreed trade concession with in the Tripartite Framework. This leads to fragmentation of trade agreements with in the TFTA.

Another major challenge posed by the adoption of variable geometry is its contradiction with the principle of decision making by consensus. By virtue of variable geometry, countries are allowed to move ahead, whereas in case decision-making by consensus on the other hand countries that are not ready to push forward are allowed to hold others back.⁵⁵

Thus, the principle of variable geometry despite making tariff adjustment difficult to administer found out to be inconsistent with the above two negotiation principles. Trade liberalization through bilateral trade agreements further hampers the principle of variable geometry, and appears in contrast with the variable geometry approach, as the pace of integration varies between these two approaches.⁵⁶ While variable geometry implies a slower pace, trade liberalization requires faster pace. Sanctioning such multiplicity within the TFTA may ultimately complicate the integration into a single FTA which is crucial to the continental convergence.⁵⁷

3.3.4. Single Undertaking

The Principle as referred in the TFTA, all Tripartite States negotiating the TFTA should agree on components covering phase I on trade in goods.⁵⁸ All components of the negotiation are parts of a whole and indivisible package and cannot be agreed separately.⁵⁹ The agreement by incorporating this principle in various phases of the agreement, wanted to come up with all-inclusive agreement, as it entail nothing is agreed until everything is agreed.

⁵⁵ David and Zodwa, cited above at note 46, P.6; See also The advisory Opinion of the East African Court of Justice, Application No. 1, (2008), for the conflict among the two principles in general.

⁵⁶ Erasmus, cited above at note 44, PP. 9–11

⁵⁷ Vincent Angweny, “The Tripartite Free Trade Area: A Step Closer to the African Economic Community?,” in Marc Bungenberg, *et.al*, (ed.), European Yearbook of International Economic Law, (2016), P. 605; See also the TFTA agreement, cited above at note 3, part two.

⁵⁸ The TFTA Agreement, cited above at note 1, Art. 6/f.

⁵⁹ Report of the 2nd Meeting of the COMESA-EAC-SADC Tripartite Trade Negotiation Forum, TP/TTNF/2/2012/5, (2012), P.15

However, this sparks a question on how to reconcile it with the concept of a built-in agenda. The concept of a built in agenda (issues scheduled for continued negotiations)⁶⁰, initially targeted for phase two negotiations, is now shifted in respect of outstanding aspects of phase one negotiations including trade in goods.⁶¹ Though negotiated, the Kampala Ministerial meeting left the three Annexes outstanding.⁶² The concept of built in agenda despite its significance to respond for the current level of negotiating capacity of Tripartite States, halts the possibility of forming a comprehensive single free trade area agreement, as it refers to work in progress.

In total, the above TFTA negotiating principles, irrespective of their significance in determining the pace and fairness of the TFTA negotiation, have an adverse effect in establishing single and comprehensive FTA and exacerbate the problem of overlapping membership. This was the basic achievement expected from the TFTA to serve as stepping stone for the CFTA. Though, the negotiations offered some hope as a model to be followed as building blocks for the CFTA, the TFTA has not lived up to expectations and has not delivered on its objective of establishing a single integrated FTA comprising members of the three RECs.⁶³ Such failure turned the TFTA into stumbling block for the continental convergence in general and the CFTA in particular.

3.4. Conclusion

Tripartite States taking the problem of overlapping membership into consideration decided to harmonize their policies and programs and establish one FTA. But scholars were suspicious whether the TFTA will be able to tackle the problem, or end up forming new FTA. To resolve the problem, the TFTA devised harmonization of programmes, incorporation of developmental integration approach that emphasize on development pillar and infrastructure development pillar and adopted the principles of Variable Geometry, flexibility, special and differential treatment to bring on board the different levels of development. Despite the tackling measures, as shown in the above discussion, modification of the initial objective, Tripartite State's commitment shift,

⁶⁰Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area, (signed June 2015), (Sharm El Sheikh, Egypt) The Preamble, Para 5, acknowledge the existence of some outstanding issues on the TFTA Agreement.

⁶¹Angweny, cited above at note 57, P.610

⁶²TRALAC News, The Tripartite Free Trade Area –a breakthrough in July 2017 as South Africa signs the Tripartite Agreement, (<https://www.tralac.org/news/article/11860-the-tripartite-free-trade-area-a-breakthrough-in-july-2017-as-south-africa-signs-the-tripartite-agreement.html>), last visited on Oct 28, 2017, 02:42 AM

⁶³Thaku fundira ,”Towards a Continental Free Trade Area: Analysis of the Status of the Regional Trade Regimes,” TRALAC Working Paper, S16WP08/2016, (2016), PP.5and 48

and controversial interpretation of the negotiating principles departed the TFTA from the commitment to resolve overlapping membership, vital to the stepping stone objective of the CFTA. The TFTA in its current approach exacerbate the problem creating more overlaps and will be stumbling block for the continental convergence. In sum, though the negotiations offered some hope to use it as building block for the CFTA, the TFTA failed to meet the expectations and has not delivered on the objective of establishing a single integrated FTA.

Chapter Four

Legal and Institutional Framework between the Tripartite Free Trade Area and the Continental Free Trade Area

4.1. Introduction

Creating nexus between the two FTAs, this chapter stresses on the legal, institutional and procedural inconsistencies/difficulties that hampers the TFTA from serving its building block objective towards the establishment of the CFTA.

Thus, the chapter analyzes effectiveness or other wise of the available legal frameworks to ensure the stepping stone objective of the TFTA. In so doing, it addresses legal personality of the TFTA, status of the TFTA in the CFTA and difficulties arising from transformation of RECs in to the TFTA. It also deals with the overlapped negotiation sequences of the two FTAs and resulting difficulties to use the TFTA as stepping stone. Lessons for the CFTA from the tripartite efforts will also be discussed. At last, the chapter presents conclusion on major findings.

4.2. Legal Personality of the Tripartite Free Trade Area

For any economic community to be classified as a proper legal system, Oppong¹ suggests four necessary elements. These are rules of conduct which regulate behavior and activities within the legal system, necessary institutions to which rules apply to, basis of rules and finally implementation and enforceability.²

Among the above four elements, this thesis focuses on the second element only, i.e. the subject of legal system, necessary for the TFTA to interact with outside world and is open to question. Once established the TFTA should not be alienated from the outside FTA arrangement. For instance the TFTA to engage in the ongoing CFTA negotiation or other similar beneficial arrangements needs to have legal personality. Necessity of legal personality is undeniable not only for outside relationship but also to regulate internal behavior of Tripartite States.

¹Richard Frimpong Oppong, Legal Aspects of Economic Integration in Africa, (2011), P. 37.

²*Ibid*

The TFTA, in this regard, makes no clear reference whether or not it will exist in separation from the forming RECs, having its own legal personality. The Agreement merely provides establishment of the TFTA among the three RECs,³ reaffirming the Kampala Communique that seeks merger of the three RECs to form a single REC.⁴

Scholars, however, have different views on legal personality of the TFTA. Though it is not clearly mentioned in the agreement, Oppong argues that inference can be made to the intention of the Heads of States and Government of the three RECs, as they envision to work towards merging into a single REC, with the objective of fast tracking the attainment of the AEC.⁵ Challenging this view, Erasmus hold the position that the intention of the Heads of States and Government of the three RECs, as manifested in the TFTA agreement, provides no information as to whether the TFTA will have a separate legal personality as in the case of establishment Treaty of COMESA, EAC and SADC.⁶ Extending his argument to the nature of the agreement itself, the TFTA, unlike the constituting RECs, it is not, a legal person, it is rather a *sui generis*⁷ framework agreement for promoting trade in goods among the potential Tripartite Members.⁸

The Agreement neither discusses granting international legal personality to the TFTA nor creates new regional institutions to conduct the TFTA's business. Tripartite States operate collectively to administer the TFTA's business through the ministerial, senior official and technical expert committees/ Coordination Units.⁹ The TFTA officials stand in this aspect is fallacious. Secretary General of COMESA, Sindiso Ngwenya, argue as the TFTA is not a new legal structure neither

³ The Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), (2015), Art. 2.

⁴ Final Communiqué of the COMESA-EAC-SADC Tripartite, Summit of Heads of State and Government, (here after Kampala Communique), (Oct. 2008), (Kampala, Uganda), Para.13.

⁵ Oppong, cited above at note 1, P. 68.

⁶ Gerhard Erasmus, "Legal and Institutional aspects of the Tripartite Free Trade Area: the need for Effective Implementation," in Trudi Hartzenberg, *et.al*, The Tripartite Free Trade Area- towards a new African integration paradigm?, (2012), P.34; The Establishing Treaty of the three RECs indicates as they have their own separate legal personality.

⁷ It is to mean that of its own kind or class; See Henry Campbell Black, Black's Law Dictionary, (Rev. 4th ed.), (1968), P.1678, (<http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf>), last visited on May 13, 2017 04:23 AM

⁸ Gerhard Erasmus, "The TFTA as a legal construct: What is it and how will it be implemented?," TRALAC Trade brief, (2017), P.6.

⁹ The TFTA Agreement, cited above at note 3, Art. 29

is it a new REC, it is rather an attempt to merge the three RECs into the AEC.¹⁰ As the effect of merger requires, if the TFTA is meant to merge the three RECs, by default it creates a new structure encompassing the three RECs, which is not materialized. In addition, as discussed in section 3.2.3, Tripartite States abandon the idea of merging the three RECs. The TTF directed to develop a road map for the implementation of merger also skip mechanisms on how to merge. (See annex)

To determine negotiating competency, Tripartite States agreed negotiations to be REC and/or Member/Partner State driven.¹¹ Adopting this principle to grant negotiation competency for Tripartite States, in itself, does not have harm. But it poses complication when it comes to Tripartite State negotiation with third parties, exercising their right to enter in to preferential trade agreements individually. Unlike its EAC counterpart,¹² the TTF serving as the secretariat does not have negotiating competency. Due to lack of such negotiating competency Tripartite States engage in the CFTA negotiations and with third parties (outside the continent) with their individual capacity. Therefore, individual pursuit of Tripartite States in the CFTA negotiation would be a redundancy of process already done in the TFTA banner. This circumstance forces them to start negotiating from the scratch, though they have common position, which is in contradiction with the stepping stone function of the TFTA. Moreover their negotiation with third parties creates in different trading arrangement while dealing with different countries. (See section 3.3.1)

Apart from this, absence of strong legal and political institution (independent institution), to coordinate Tripartite States' direction, will have its own impact, even after negotiations are completed. After the completion of negotiations, Tripartite States are expected to monitor implementation of the TFTA and coordinate policies among the Tripartite States, to ensure adherence to their commitment. The effectiveness of collective administration approach i.e.

¹⁰Sindiso Ngwenya, Tripartite Free Trade Area: An Opportunity not a Threat, (<http://www.instituteoftrade.org/index.php/news/11-news/37-tripartite-free-trade-area-an-opportunity-not-a-threat>), last visited on 20, June 2017, 11:05 AM

¹¹ The TFTA Agreement, cited above at note 3, Art. 6/a

¹² The Treaty for the Establishment of the East African Community, (Signed on 30th November 1999), Art. 138/1 The secretariat is given the power to act on behalf of the EAC.

inter-governmental committee¹³ to undertake such task would become questionable. As shown in various integration initiatives in the continent, such approach will result in failures on implementation, especially noncompliance. It is due to lack of this strong institution that the TFTA failed to meet both deadlines set under its own roadmap and the BIAT indicator.

Thus, the question whether the TFTA will be an international organization and a subject of international law in its own right is unresolved. This denies Tripartite States to interact with third parties collectively holding their common position. Such denial significantly hampers the notion of using the TFTA benchmark and extending to the rest part of the continent, as they have no basis of mutual interest in relation to third party.

4.2.1. Parties to the Tripartite Free Trade Area

By virtue of the TFTA Agreement, the TFTA is going to be established among the Members/ Partner States of the three RECs. Negotiating parties are only the Tripartite Member/Partner States of COMESA, the EAC, and SADC, and the three participating RECs are not parties to the Agreement.¹⁴ Although, Member States (for the most part) serve as the main actors in the TFTA negotiations, Tripartite Members also agreed RECs to have negotiating competency.¹⁵ Thus, the three RECs, not signatories to the TFTA agreement, have their part in the negotiation process of the TFTA agreement. To this end SACU decided to negotiate as a bloc within the framework of SADC¹⁶ and the EAC's reiterated not only to negotiate as bloc but also to ratify the TFTA agreement as a bloc is an indication of the position given to the RECs in the TFTA negotiations.¹⁷ The direction followed expedite the negotiation process can be drawn as lesson for the CFTA to extend negotiation competency for the Tripartite States to act collectively.

¹³ The TFTA Agreement, cited above at note 3, Art. 29. The Tripartite Task Force of the Secretariats of the three RECs is given the mandate to coordinate the implementation of the tripartite work programme and provide secretariat services to the tripartite arrangement.

¹⁴ Erasmus, cited above at note 8, P.6

¹⁵ The TFTA Agreement, cited above at note 3, Art. 6; See also Tripartite FTA Negotiating Principles, Processes and Institutional Framework: Guidelines for Negotiating the Tripartite Free Trade Area among the Member/ Partner States of COMESA, EAC and SADC, (2011), Art. 3; See also SAANA Consulting, "Report on Advancing Regional Integration in Southern Africa, An Evidence-Based, Forward Looking Study on Regional Trade and Integration in the Tripartite Region," Focusing Primarily on Southern Africa, , (2014), P. 53

¹⁶ Report of the 2nd Meeting of the COMESA-EAC-SADC Tripartite Trade Negotiation Forum, TP/TTNF/2/2012/5, (2012), Para 20/a

¹⁷ COMESA-EAC-SADC Tripartite FTA Report, Fifth Meeting of the Tripartite Sectoral Ministerial Committee (TSMC) for Trade, Customs, Finance, Economic Matters and Home/Internal Affairs, TP/TSMC/5/2016/2.1, (2016), Para.38.

The TFTA agreement also envisages bringing on board nonmembers of the three RECs to their club. As per Article 41/2 of the Agreement, it shall “...remain open for accession to other member states of the African Union.” This signifies Tripartite Member’s intention to incorporate nonmembers of the three RECs from the continent, to expedite continental integration process. Doubtful to the expansion, Andriamananjara, argues that onboarding Non-Tripartite State is dependent upon the requirement of a “coincidence of wants” among all the interested parties.¹⁸ Following the gains from obtaining better (and preferential) access to the TFTA’s market, new members might be interested to join the bloc whereas the TFTA members could also start to say, “Our market is big enough” and including non TFTA members could just dilute the trade preferences.¹⁹ This may go against the continental integration effort. Moreover, accession to the TFTA agreement will be dwindled once the CFTA, encompassing the 55 African countries succeeded.

The accession provision unless it serves as a backup for continental mechanism failure, goes against the AU Assembly decision that expect the other pole of integration to take a lesson from the TFTA and form similar arrangement than joining the club. (See section 4.3.3)

4.2.2. Status of the Tripartite Free Trade Area in the Continental Free Trade Area Negotiations

In international trade agreements, it is true that member states have the sole mandate to negotiate, but RECs also play an important role in facilitating negotiations and building national-level capacity and ownership.²⁰ The AU Assembly adopted AUC and respective RECs to drive the process of boosting intra-African trade and the CFTA negotiations through the implementation of short, medium, and long-term programmes and activities contained in the Action Plan at the national, regional and continental levels.²¹ Moreover the CFTA principle of

¹⁸Soamiely Andriamananjara, Regional integration in Africa: Can the Tripartite FTA be a Stepping Stone toward a Continental FTA?, (2015), (<https://www.brookings.edu/blog/africa-in-focus/2015/08/24/regional-integration-in-africa-can-the-tripartite-fta-be-a-stepping-stone-toward-a-continental-fta/>) last visited on 16 May, 2017, 05:53 PM

¹⁹*Ibid.*

²⁰Ilmari Soininen, “The Continental Free Trade Area: What’s going on? ,” in Andrew Crosby (ed.), “Going Continental: Opportunities and Challenges for Free Trade across Africa,”Bridges Africa, ICSTD, Vol.3, Issue 9, (2014), P.7

²¹Declaration on the Launch of the Negotiations for the Establishment of the Continental Free Trade Area (CFTA), Assembly of African Union (AU Assembly), Assembly/AU/DECL.3(XXV), Doc. Assembly/AU/11(XXV), adopted in its 26th Ordinary Session, (2015) Page 9, See also Decision on Boosting Intra-African Trade and Fast

acquis depicts that its structure is designed to build on the TFTA as well as ECOWAS, CENSAD, UMA and ECCAS FTAs.²²

As mentioned in the Guiding Principles for CFTA negotiation, as a rule the CFTA negotiations shall be AU Member States/RECs/Customs Territories driven.²³ The actual negotiation process, as per the draft modalities, however, denotes two distinct approaches. For negotiation on Tariff liberalization, only custom unions are allowed to negotiate collectively, member states participating in RECs that are not customs union shall negotiate with others as individual states.²⁴ Whereas in case of trade in services negotiations, taking the basic rule into consideration, members of RECs are encouraged to coordinate their positions at RECs level and negotiate collectively with other member states.²⁵

Despite informal mechanism of consultative meetings to coordinate their common positions, Tripartite States do not have collective negotiations competency, in the CFTA negotiations. Their negotiation on individual Tripartite States basis will be a replica of the process made under the TFTA and cannot allow them to serve the function they are called for. So as to serve the stepping stone objective and boost CFTA negotiations, Tripartite States must be given a room to act collectively. Otherwise Tripartite States may shift from their initial common position as the playing ground varies in terms of States' interest and implication to their economy.

4.2.3. Merger Versus Parallel existence of the Three RECs

Similar to the debate in the continental integration, AEC vis-a-vis the constituting RECs, the fate of the founding three RECs after the establishment of the TFTA poses another difficulty. Thus, it is worth to discuss whether the three RECs will continue to have legal personality and authority over the TFTA, or they will completely be absorbed by the TFTA.

The two extreme outcomes will be complete absorption of the RECs by the TFTA and parallel existence of the RECs with the TFTA. The Tripartite Summit indicated merging the three RECs

Tracking The Continental Free Trade Area, Assembly of African Union (AU Assembly), Assembly/AU/Dec.394 (XVIII), adopted in its 18th Ordinary Session, (2012), Para.5

²²Soininen, cited above at note 20, P.7

²³ AU Declaration, cited above at note 21, Annex I

²⁴ Draft Modalities for CFTA Tariff Negotiations, TI/CFTA/TIG/MOD/Draft, ANNEX IV, (2017), P.3

²⁵ Draft Modalities for African Union Trade in Services Negotiations, TI/CFTA/TISMOD/draft/Rev4, (2017), P.4

into a single REC²⁶ through regional integration on the areas of trade in goods, trade in services and other trade-related matters.²⁷ As reaffirmed in the final communique, the three RECs are ultimately expected to merge or absorb to form the TFTA or a single economic community.²⁸ In contrary, scholars argue that the three RECs will continue to pursue their own individual integration agenda.²⁹ They are not parties to the TFTA agreement, will continue to exist and function alongside the TFTA.³⁰

The third Scenario, middle ground, advocates for the FTA arrangements of each participating REC will be replaced by the TFTA.³¹ When joining the TFTA, Tripartite States will be compelled to abandon their own set of rules and submit to the TFTA.³² Reinforcing the argument, ZODWA argues that the three RECs have wider mandate than what is agreed in the TFTA, they will continue dealing with issues like peace and security and infrastructure development which do not fall under the realm of the TFTA agreement, leaving matters covered by the TFTA.³³

Despite the above scholars view, I believe parallel existence of the three RECs with the TFTA is inescapable. The three RECs as they have their own international legal personality, their extinction or merger can only be regulated by their own establishing treaty. Simply having supremacy clause³⁴ in the TFTA agreement to resolve potential conflicts between the TFTA agreement and the treaties and instruments of COMESA, EAC and SADC do not grant the TFTA the authority to merge the three RECs. On top of this, the TFTA itself allow parallel existence of the three RECs, letting them to maintain the existing and enter into new preferential

²⁶ Kampala Communique, cited above at note 4, Para. 14(i)

²⁷ The TFTA Agreement cited above at note 3, Art. 3

²⁸ Kampala Communique, cited above at note 4, Para. 13; See also Francis Mangeni, "The Future of the COMESA, EAC and SADC Tripartite," Key Issues in Regional Integration, Vol.2, (2013), P.93

²⁹ Vincent Angweny, "The Tripartite Free Trade Area: A Step Closer to the African Economic Community?," in Marc Bungenberg, *et.al*, (ed.), European Yearbook of International Economic Law, (2016), P.611

³⁰ Erasmus, cited above at note 8, P.1

³¹ UNECA, "Final Report Study on the Establishment of Inter-RECs' Free Trade Areas in Africa Drawing on Lessons from the COMESA-SADC-EAC FTA Experience," (2011), Para.85

³² Dlamini, Nothando and Kongolo, Mukole, "An Analysis of the Tripartite Free Trade Area between COMESA, SADC and EAC and its Effects on Swaziland's Economy," African Research Review, Vol. 6 (3) Serial No.26, (2012), P.9

³³ African TFTA: A key Milestone for Continental Integration, Conference organized by the ICSTD, (2015), (<https://www.youtube.com/watch?v=CVeIUcgffd0>), last visited on May 10, 2017, 09:35 AM

³⁴ The TFTA agreement, cited above at note 3, Art. 41(2)

arrangements. The three RECs, therefore, continue to exist not only to administer issue that fall outside the TFTA, but also to manage their respective FTA.

This parallel existence further complicates the integration into a single FTA. In addition, allowing the RECs Agreements to be applied on a continuing basis and only among those Members of the REC would represent a deviation from the MFN nondiscrimination principle for treatment of trade within the TFTA. (See section 3.3.1.) It also creates additional layer of regional integration, which can be averted fully if and only if the TFTA replace the existing RECs.³⁵

Hence, the TFTA needs to respond for the call of such complications and institutional hurdles and amalgamate the different legal regimes governing the same game, so as to play the expected role in the continental integration. The CFTA taking lesson from this should avert the problem and settle its relation with the existing FTA arrangements, functioning in the continent.

4.3. The Tripartite Free Trade Area and Continental Free Trade Area in light of Continental Integration Instruments

To ensure the building block objective of the TFTA meaningful coordination between the two FTAs is important. One of the major mechanisms is having strong legal and institutional framework channeling their direction to the expected outcome. Legal framework sets activities to be carried out, role of actors and their respective mandates and mechanisms to attain a certain objective. Thus, the discussion in this section shows the available legal mechanisms, particularly continental mechanisms, adopted and analyzes their effectiveness towards using the TFTA as a building block.

4.3.1. The African Economic Community Treaty/the Abuja Treaty

The link between the Abuja Treaty and the two FTAs can be best understood from the recognition given to them in the Treaty and willingness/ intention of member states of both FTAs towards achieving the objectives of the African Economic Community (AEC). The Treaty

³⁵Derk Bienen, "The Tripartite Free Trade Area and Its Implications for COMESA, the EAC and SADC," Trade and Development, BPK Development Research and Consulting, Discussion Paper No. 01/2010, (2010) P.4

establishing AEC, with the objective³⁶ of integrating the continent’s economic effort, set out six stages crucial to the successful establishment of the AEC.³⁷ The stages are:

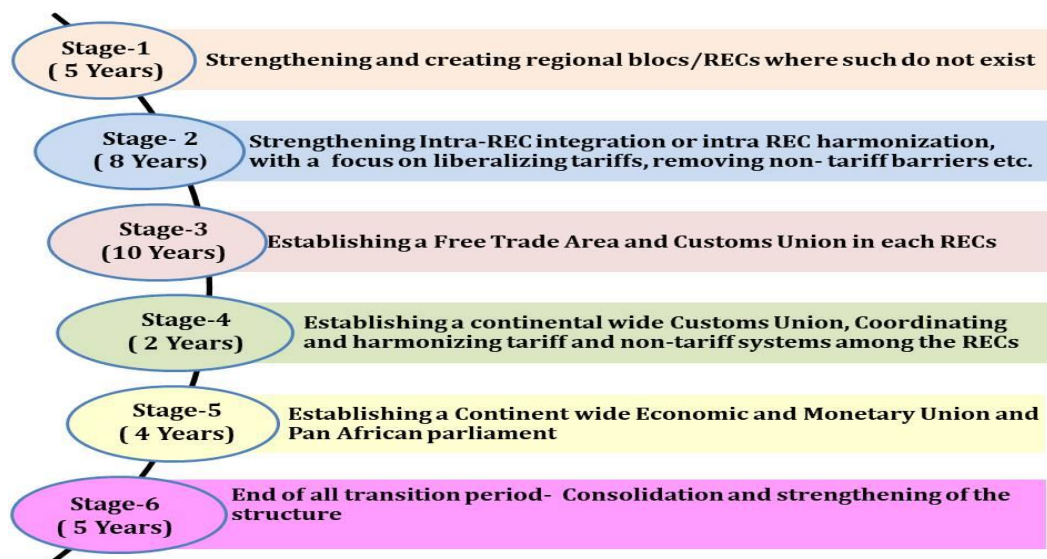


Figure 2 Time Frame for Abuja Treaty Six Stages of Establishment

A bird’s eye view of the above stages indicates that the two FTAs are not part and parcel of any of the stages. The Abuja Treaty does not include the establishment of a CFTA in any of its stages.³⁸ Trade and market integration at the continental level was expected to start at the fourth stage by establishing African Customs Union, consolidating Customs Union of the RECs.³⁹

The inception to establish the CFTA came in to picture following the slow progress of the RECs in realizing the stages of the AEC treaty.⁴⁰ Moreover, the Abuja Treaty requirement of a particular sequence i.e. no ‘*jumping the queue*’⁴¹ brought impossibility to adhere to it.⁴² To

³⁶ The Treaty Establishing the African Economic Community, (here after called Abuja Treaty), (1991),(entered into force on May, 1994), art 4/1

³⁷*Id.*, Art. 6/2

³⁸ F. Fajana, “Preparedness of the Different AU-Recognized Regional Economic Communities (RECs) for the Continental Free Trade Area (CFTA),”*African Trade Policy Centre-UNECA/AUC*, (2016), P.1; The gap is also acknowledged under AU and ECAREport, “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,” (2012),PP. 46-47

³⁹*Ibid*

⁴⁰*Id.*, P.48

⁴¹ The Abuja Treaty, cited above at note 36, Article 6(4) puts the transition from one stage to another shall be determined when the specific objectives set in this Treaty or pronounced by the Assembly for a particular stage, are implemented and all commitments fulfilled.

⁴²Erasmus, cited above at note 6, PP. 17 and 19

overcome these challenges, the AU Assembly adopted an approach to fast track the establishment of a CFTA independent of the progress made by individual RECs.⁴³

Though the AEC Treaty did not foresee the CFTA, the latter has given due emphasis to the objectives of the former. The CFTA is designed in line with the goal of Abuja Treaty and help to fast track the realization of the Treaty's vision of an African Common Market, and ultimately the AEC.⁴⁴ In addition, it is intended to achieve a comprehensive and mutually beneficial trade agreement among the African States, within the broader framework of the Abuja Treaty.⁴⁵

Similarly the TFTA has been given no space in the Abuja Treaty that covers individual RECs and continental integration. But, the TFTA gave due emphasis to the objectives of the Abuja Treaty in its instruments. The TFTA agreement recognizes its contribution to enhance the continental regional integration process⁴⁶ and Tripartite Members expressed their commitment to champion and expedite integration process as envisaged in the Abuja Treaty.⁴⁷ They stress on the TFTA to serve as crucial building block towards the AEC⁴⁸ and intertwine integration agenda with the objective of fast tracking the attainment of the AEC.⁴⁹

Despite mere intention to work towards the AEC Treaty, Members of the two FTAs seems to have lost the desire to set mechanism that harmonizes their effort and successfully meet the objectives of the Abuja Treaty.

4.3.2. Agenda 2063

Agenda 2063 is a new shared framework for inclusive growth and sustainable development in Africa to be realized by 2063.⁵⁰ Drawing from lessons learned and encompassing all key continental initiatives, it is the culmination of efforts to achieve the Pan-African Vision of “An

⁴³Boosting Intra African Trade, cited above at note 38, P.48

⁴⁴Boosting Intra African Trade, Assembly of the African Union (AU Assembly), Assembly/AU/2(XVIII), adopted in its 18th Ordinary Session (2012),P. 2

⁴⁵ Gerhard Erasmus, “How the CFTA could advance the Framework of the Abuja Treaty,”TRALAC Trade Brief,(2015), P. 5; See also Objectives and Guiding Principles for Negotiating the Continental Free Trade Area (CFTA), Ref: TI/TD/AMOT/OGP/1, Annex II, adopted at the 25th Extra Ordinary Session of the AU Assembly, (2015) P.3.

⁴⁶The TFTA Agreement, cited above at note 3,Art 4/c

⁴⁷*Id.*,Preamble Para. 6

⁴⁸Kampala Communique, cited above at note 4, Para. 11; See also Communiqué of the Third COMESA-EAC-SADC Tripartite Summit, (Jun. 2015), (Sharm El Sheikh, Arab Republic of Egypt), Para.1/e

⁴⁹*Id.*, Para. 13

⁵⁰Agenda 2063, “Africa We Want,” (Final ed., 2015), the preamble, Paras. 3-4.

*integrated, prosperous and peaceful Africa driven by its own citizens and representing a dynamic force in the global arena”.*⁵¹

Among the seven aspirations set under, “*a prosperous Africa based on inclusive growth and sustainable development*”⁵² and “*an integrated continent, politically united, based on the ideals of Pan-Africanism and the vision of Africa’s Renaissance*”⁵³ are highly linked with the creation of the CFTA.⁵⁴ Reaffirming Chapter VI of the Abuja Treaty, Agenda 2063 also expresses its vision to make Africa; “*a continent where the free movement of people, capital, goods and services will result in significant increases in trade and investments amongst African countries...*”⁵⁵ Fast Tracking the establishment of the CFTA is also among the 13 Continental Flagship Programmes, in the second aspiration.⁵⁶ It is also believed that the CFTA has the momentum of catalyzing Africa’s plans endorsed in the Abuja Treaty and most importantly, has the potential of accompanying the continent towards realizing its 7 pillars/aspirations prescribed in Agenda 2063.⁵⁷

Except the objective of enhancing regional and continental integration process that refers impliedly, the TFTA mentioned nothing with respect to Agenda 2063. The responsibility for the implementation of the Agenda lies on individual REC/Country level, not under the umbrella of the TFTA. RECs, Member States and AU organs are expected to adopt Agenda 2063 and the associated Ten Year Implementation Plans as a basis for developing their regional visions and plans.⁵⁸ RECs also serve as focal points for the facilitation of the adoption, implementation, monitoring and evaluation of all continental frameworks related to Agenda 2063.⁵⁹

Agenda 2063 also failed to foresee the idea of using the success story of the TFTA. If geared towards the aspirations of Agenda 2063, the TFTA would serve as a hub for the implementation,

⁵¹ Status of African Integration, “The Implications of Agenda 2063 and Agenda 2030 on African Integration,” 9th Joint Annual Meetings of the African Union Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration and the Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development, E/ECA/COE/35/4 AU/STC/FMEPI/EXP/4(II), (2016), P.14.

⁵² Agenda 2063, cited above at note 50, Aspiration 1

⁵³ *Id.*, Aspiration 2

⁵⁴ Dr. Faizel Ismail, “Advancing the Continental Free Trade Area (CFTA) and Agenda 2063 in the Context of the Changing Architecture of Global Trade,” Trade and Industrial Policy Strategies, Working Paper, (2016), P.7

⁵⁵ *Ibid*; See also Fajana, cited above at note 38, P.7

⁵⁶ Implications of Agenda 2063 and 2030, cited above at note 51, P.18; See also “Agenda 2063 Framework Document, The Africa We Want,” The African Union Commission, (2015), PP.97-99

⁵⁷ Kenneth T. Tanyi, “Assessing Africa’s Two Billion Populated Market by 2063: the Facts and Fallacies of a Continental Free Trade Area,” Business and Economics Journal, Vol.6, No.154. (2015), P.8

⁵⁸ “Agenda 2063, First Ten-Year Implementation Plan 2014 – 2023,” The African Union Commission, (2015), P.25

⁵⁹ *Ibid*

monitoring and evaluation of the flagship programme, especially the aspiration related to the CFTA.

4.3.3. The Framework Instruments for Boosting Intra African Trade

Unlike the above two, the initiative instrument to build the CFTA on the success of the TFTA provides linkage between the two FTAs. The AU Assembly adopted the Action Plan on Boosting Intra African Trade (BIAT), to ensure the attainment of the full potential/ benefits from the envisaged CFTA and Customs Union.⁶⁰ As the name implies, the Action Plan is more action oriented and highlights programme or activity, key objectives, output or target sought, how it should be done and the expected timeframe with the respective responsibility...⁶¹

The AU Assembly, in addition, adopted a Framework, Roadmap and Architecture for Fast Tracking the Establishment of the CFTA. The Framework particularly addresses the ambitious programme of launching the CFTA and proposes a Road Map to fast track the process, an institutional architecture, Monitoring and Evaluation and Dispute Settlement Mechanisms.⁶² Reaffirming the RECs as building blocks to the AEC, the AU Assembly decided to build the CFTA on the acquis of the RECs FTAs, mainly the TFTA negotiations.⁶³ To this end, the AU Assembly decided operationalization of the CFTA in the following milestones:⁶⁴

- *Finalization of the TFTA initiative by 2014;*
- *Completion of FTA(s) by Non-Tripartite RECs, through parallel arrangement(s) similar to the TFTA Initiative or reflecting the preferences of their Member States, by 2012 and 2014;*
- *Consolidation of the TFTA and other regional FTAs into a CFTA initiative between 2015 and 2016; and*
- *Establishment of the CFTA by 2017 with the option to review the target date.*⁶⁵

⁶⁰ AU Assembly Decision, cited above at note 21, Para.3

⁶¹ Revised Draft Synthesis Paper on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area, African Union Commission,(2012),P.4

⁶² *Id.*,P.5; See also Boosting Intra African Trade, cited above at note 38, P. 47

⁶³ Soininen, cited above at note 20, P.5

⁶⁴ AU Assembly Decision, cited above at note 31, P.1, Para.4

⁶⁵ Revised Draft Synthesis, cited above at note 61, P.5-6; See also Declaration on Boosting Intra-African Trade and the Establishment of a Continental Free Trade Area (CFTA), Assembly of the African Union (Au Assembly), Assembly/AU/Decl.1 (XVIII), adopted in its 18th Ordinary Session,(2012), P.2; See also AU Assembly Decision, cited above at note 31, P.1, Para. 4.

With the view to emulate the TFTA success, the initial consultation to establish the second bloc (between ECOWAS, ECCAS, CENSAD and AMU) took place on 2013⁶⁶ and a formal memorandum of understanding to outline how decisions will be made and establishing the coordination mechanisms still needs to be signed along with the launching of work on technical studies and key institutional preparatory work on the formation of this bloc.⁶⁷ Unfortunately, the arrangement similar to the TFTA has not materialized.⁶⁸ Above all, the completion of the TFTA negotiation, which was expected to be building block for the CFTA, missed the deadline, 2014. The CFTA, in end has got nothing to draw from and build on, as envisioned.

In sum, the two FTAs despite the recognition made in their establishing instruments, currently there are no legal frameworks to channel them to the intended direction. Shaping the TFTA in to a suitable building block for the CFTA requires clear plan to the direction where the CFTA is heading and what is expected from the TFTA. This can only be done through adopting legal instrument governing the relationship between the two FTAs. Though the incorporated milestones was meant to build the CFTA consolidating the TFTA and other similar arrangement, failure to achieve the two poles of integration forced the CFTA to start negotiation from scratch. Setting aside the option to review the target date based on the progress made,⁶⁹ and launching CFTA negotiation, reveals African leaders mistrust on the full realization of their milestones.

4.4. The Overlapped Scope and Sequences of Negotiations

The scope of negotiations under the TFTA and the CFTA are almost identical. The scope and coverage of the two FTAs mainly include trade in goods, trade in services, and other trade-related matters. (See sections 2.2.2. and 2.4.2.) As their area of integration is the same, the TFTA considered as unnecessary and redundant. However, the confidence to build the CFTA on the success stories the TFTA and finalization of the TFTA ahead of the CFTA negotiation granted two distinct layers of negotiations, irrespective of the overlap in jurisdiction.

⁶⁶Soininen, cited above at note 20, P.5

⁶⁷Ilmari Soininen, "The Continental Free Trade Area: Current State of Play," (2014), SAANA Institute, Policy Brief 01, P.2 ; See also Concept Note on Modalities for the Creation of a Second Bloc of RECs, African Union Commission, P.3 (https://www.au.int/web/sites/default/files/newsevents/conceptnotes/12571-cn-concept_note_-_proposed_modalities_for_the_creation_of_a_2nd_bloc.pdf), last visited on June 3, 2017, 09:12 AM,

⁶⁸Fajana, cited above at note 38, P.4

⁶⁹AU Assembly Decision, cited above at note 21, Para 4/iv

As for the sequences of negotiations, the two FTAs categorize negotiation aspects in two phases. Despite their distinction, the sequence of negotiations, now a day's, are creating difficulties. There is a fear that the TFTA might never cover all the disciplines originally identified to be included.⁷⁰As the CFTA negotiations are also in progress, Tripartite States might lose their appetite to negotiate and finance both negotiation processes and stick to the CFTA negotiations encompassing all AU Members.

Moreover, the TFTA Negotiations on trade in service, set for second phase,⁷¹is now on the CFTA table for negotiation, under phase I⁷² and planned to be finalized before 2017. The CFTA negotiations coincides with the TFTA Trade in service negotiations and pauses a question whether there is a need for *de novo* service negotiations in the TFTA context while the same agenda has already been discussed and finalized at the CFTA level.⁷³ This does not make sense for Tripartite States to conduct two set of services negotiations simultaneously but in different fora. Extending this argument to the whole phase II TFTA negotiation, duplication of fora continues to exist in the two FTAs. As suggested by Erasmus, it rather makes more sense to negotiate services, investment, and intellectual property issues under the CFTA banner, which will include all 54 Member States.⁷⁴

Cognizant of duplication of process and the advancement of CFTA process ahead of the Tripartite process in trade in service aspect, the fourth Ministerial meetings of the TFTA,⁷⁵ recommend the work on trade in services be undertaken at the continental level. To this end the TTF requested to examine the implication for the Tripartite States to negotiate Trade in Services only at the CFTA level and whether this would not contradict the Tripartite Summit mandate to negotiate trade in service at the tripartite level.⁷⁶ But this recommendation unless followed by resolution over the legal personality of the TFTA and mechanisms to internalize the outcomes to

⁷⁰Gerhard Erasmus, "One Year after its Launch: Has the Tripartite Free Trade Area been overtaken by Events?," TRALAC Trade Brief, No. US16TB03/2016, (2016), PP.7-8

⁷¹The TFTA Agreement, cited above at note 3, Art. 45.

⁷²The COMESA-EAC-SADC Tripartite Ministerial Committee Meeting, "Report in Preparation for the Tripartite FTA Negotiations," TP/II/3, (2011), P.4; See also Viola Sawere and David Ndolo, "Approaching the CFTA Services Negotiations: Which way towards delivery by 2017?," in Andrew Crosby (ed.), "Harnessing the Potential of the Services Sector in Africa," Bridges Africa, ICSTD, Vol. 5, Issue 4,(2016),P.8

⁷³ Erasmus, cited above at note 45, PP.3-4

⁷⁴ Erasmus, cited above at note 70, PP.7-8

⁷⁵COMESA-EAC-SADC Tripartite FTA Report, Fourth meeting of the Tripartite Council of Ministers, TP/TC/5/2016/2.1, (2016), Para.44

⁷⁶*Ibid*

the TFTA agenda, will create further confusion as Tripartite States negotiate at the CFTA in their individual capacity.

In addition to the overlapped scope and sequence, there is a discrepancy over the scope of movement of business person, as enshrined in the TFTA and the continental mechanism. Unlike the TFTA negotiations, free movement of business persons is not mentioned as a negotiating issue under the CFTA⁷⁷, it is left for the continental mechanism. The TFTA's scope of negotiations on movement of persons is limited to business persons whereas the Continental mechanism, Action Plan for BIAT, identifying movement of persons as an important ingredient for cross-border trade, calls for the removal of all restrictions on travel in the continent.⁷⁸ If the effort at the continental level, that broaden the scope to all Africans, succeeded by the year 2018 the TFTA negotiation over movement of business person becomes irrelevant. The continental approach sets clear parameters and implications for individual Members' immigration policies, namely the establishment of an African passport and the abolishment of visa requirements for all African citizens from all African countries by 2018.⁷⁹

Moreover, despite the inclusion of negotiation on business person on separate track under the Declaration,⁸⁰ Tripartite Members failed to incorporate the negotiation on movement of business persons in the signed TFTA Agreement.⁸¹ Movement of business persons does not form part of the stated scope and coverage of the Agreement as provided in Article 3 and is not covered by the principles governing the Agreement under Article 6.⁸² As pointed by Erasmus, the relegation of the movement of business persons to "a separate track" means that firm commitments and inclusion into the TFTA are not considered as priority concerns.⁸³

⁷⁷ The Draft Protocol to the Treaty Establishing the African Economic Community on the Continental Free Trade Area, (2017), forwarded for discussion on the 7th CTF Meeting, Art. 5

⁷⁸ JB Cronjé, Innovating for Temporary Movement of Natural Persons in Africa: Leveraging the CFTA, Case Study, (2016, unpublished the University of Sussex's CARIS), P.44

⁷⁹ Agenda 2063, cited above at note 50, Para 23, Aspiration 2; See also Declaration on Migration, Assembly of African Union (AU Assembly), Assembly/AU/18(XXV), adopted in its 20th Ordinary Session, (2015), P; See also Decision on the Free Movement of Persons and the African Passport, Assembly of African Union (AU Assembly), Assembly/AU/Dec.607(XXVII), adopted in its 20th ordinary Session, (2016), Para.7.

⁸⁰ Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area, (signed June 2015), (Sharm El Sheikh, Egypt) Para. 8

⁸¹ Cronjé, cited above at note 78, P.17

⁸² *Ibid*

⁸³ Erasmus, cited above at note 70, P.3

In sum, the existence of duplication of negotiation over the same issue, and the disconnects between the TFTA and the continental mechanism and its ineffectiveness to conclude negotiations on movement of business person force the Tripartite Members to look for the solution at the continental level. As the TFTA Negotiations outcome, particularly trade in service and movement of business person, have been overtaken by most recent events at the continental level, this imply the shift towards responding the TFTA challenge at the continental level. This in effect puts the TFTA building block objective in to question. Ones the deal over the same issue is done at the continental level, the TFTA negotiation outcome will be of no use or too late to be used as a benchmark for the CFTA.

4.5. Lessons for the Continental Free Trade Area

In light of TFTA's experience, including its achievements and short-comings, the following lessons are/should be highlighted to the CFTA negotiation. The success stories of the TFTA convey mechanisms to adapt for the CFTA negotiations and its failure, on the other hand, will give an insight to the CFTA negotiators to take preventive measures not to repeat the same mistake.

Though the two FTAs are at developmental stages, the TFTA gave a clear picture on the complexity of tariff negotiation between regional hegemony in the TFTA region.⁸⁴ After four years of negotiations, Tripartite States could not reach agreement on the essential elements of a trade in goods agreement (tariff offers and RoO) and are still outstanding.

In addition the TFTA agreement has been signed without the negotiations being concluded, in my view, for ceremonial purpose. The CFTA took a lesson to avoid wasting time on procedural issues and giving priority to substantive negotiations regarding rules of origin, tariff elimination/reduction offers, and the text of the agreement to finalize the negotiation before the signing of the CFTA agreement.⁸⁵ Although it is costly and time taking, negotiating goods and services simultaneously, in the case of the CFTA can also be attributed to a lesson from the TFTA's inability to ensure trade-offs between countries with stronger comparative advantage in

⁸⁴TRALAC Discussions, CFTA Soapbox: What legal format for the Continental FTA? (2015), (<https://www.tralac.org/discussions/article/7884-cfta-soapbox-what-legal-format-for-the-continental-fta.html>), last visited on May 19, 2017, 04:30 AM

⁸⁵Francis Mangeni, The Relation between the Tripartite FTA and the Continental FTA, (2017), (<http://wtocenter.vn/news/relation-between-tripartite-fta-and-continental-fta>) last visited on May 13, 2017 ,05:36 AM

either of these sectors.⁸⁶ The parallel negotiation in the CFTA also provide for cross-cutting synergies, which is not the case under the TFTA.⁸⁷

The overall TFTA challenges (see section 2.2.2) conveys a message for CFTA negotiators on the need to come up with different modalities, flexible rules of procedure and fresh approach to secure the objective of the CFTA negotiations. The CFTA need to take note of the inconsistencies created in clarifying the TFTA negotiating principles and scrub up the conflicting issues, as addressed in section 3.3.

The TFTA Online NTB Reporting and Monitoring System/SMS Reporting Tool taken as best practice and the AUC is now conducting a study to see if these can be escalated to the CFTA framework.⁸⁸ The AUC advancement consideration to deal with NTBs and regulatory policies of the TFTA as a building block, broadening them to the Economic Community of West African States (ECOWAS) region and scaling up to the continental level is also taken as a development on the TFTA practice.⁸⁹

In addition the TFTA number of parallel, robust infrastructure development programs designed to consolidate the regional market through interconnectivity in both transport and telecommunications, could be used as a foundation to the building of infrastructure and the enhancement of productive capacity to make the CFTA a realistic and beneficial initiative.⁹⁰ The on-going consolidation and harmonization of trade policies of the TFTA, as well as the removal of tariff and non-tariff barriers by Tripartite/Member States also provide a firm foundation from which the CFTA can be developed and strengthened.⁹¹

4.6. Conclusion

The TFTA initially presented an opportunity to fast track the establishment of the CFTA and eventually the AEC. Indeed the CFTA negotiations learned a lot from the TFTA negotiation

⁸⁶Babajide Sodipo and David Luke, “Launch of the Continental Free Trade Area: New Prospects for African Trade?,” in Andrew Crosby (ed.) “The Tripartite FTA: The Great Leap forward for Regional Integration in Africa?,” *Bridges Africa, ICSTD*, Volume 4, issue 6, (2015), P.10

⁸⁷ Erasmus, cited above at note 8, P.3

⁸⁸Update On The CFTA and the Proposed Mechanism for the Elimination of Non-Tariff Barriers (NTBS) in the Continental Free Trade Area (CFTA), Assembly/AU/4(XXVIII), adopted in its 28th Ordinary Session, (2017), P.2

⁸⁹*Id.*, P.3

⁹⁰AU Assembly Declaration, Cited above at note 21, P. 5

⁹¹*Id.*, P. 6

process. The overall challenges and failure of the TFTA negotiation urge the CFTA negotiators to come up with different modalities and fresh approach to secure the objective of the CFTA and not to repeat the same mistake. Best practices of the TFTA in few areas, in addition, provided a firm foundation from which the CFTA can be built on.

However, as thoroughly discussed, there are considerable legal and institutional difficulties to be tackled for the TFTA to materialize and meet its stepping stone objective. The two FTAs are not in a common umbrella of rules so as to govern the direction they are heading to and ensure the intended outcome. Lack of legal personality and negotiating competency of the TFTA, particularly in the CFTA negotiation process; left the Tripartite States without the chance to negotiate as a bloc, necessary to coordinate their position and expedite the process. In addition, the overlapped scope, and sequences of the two FTAs, put Tripartite States in dilemma to negotiate Trade in service and trade related aspects in the CFTA banner. These cumulative factors not only halt the pace of the TFTA negotiations but also water down the idea of building the CFTA on the TFTA achievement.

Chapter Five

Conclusion and Recommendations

5.1. Conclusion

The TFTA, the predominant initiative to economically integrate the Eastern and Southern part of the continent has been entrusted to be the milestone for the CFTA building process that aimed at enhancing the continental integration effort. The idea using the TFTA as launching pad for the establishment of a unified CFTA is a well-founded and convincing approach. Both AU and Tripartite Members intended to build the CFTA on the successes and commitments of the TFTA i.e. the TFTA to form part of the CFTA acquis, with the belief that it will do more than half of the job of creating the CFTA.

Having this in mind, the main idea behind this research has been to carryout analysis whether or not the TFTA serves the purpose, it is called for.

Parties to both FTAs cognizant of this relationship incorporated the building block objective in their respective constituting instruments. Undeniably the CFTA negotiators learned a lot from the TFTA negotiation process. The overall challenges and failures of the TFTA negotiations paved their way to come up with different modalities, flexible rules of procedure and fresh approach to secure the objective of the CFTA negotiations. The Online NTB Reporting and Monitoring System/SMS Reporting Tool, consolidation and harmonization of trade policies and robust infrastructure development programs of the TFTA provided a firm foundation from which the CFTA can be built on.

Despite these lessons and Tripartite/ AU Members States' intention, an examination in this thesis however shows that, there are legal, institutional and procedural difficulties that hold back the TFTA from playing its expected role.

As enshrined in the BIAT, using the TFTA for this purpose anticipate its achievement in the integration process. The overall picture, though, shows that a lot more still needs to be done to effectively utilize the TFTA accomplishment. Out of the 26 countries 21 are signatories of the Agreement and only two Tripartite States, Egypt and Uganda ratified the TFTA Agreement,

which is far from the 14 ratification requirement for the agreement to enter into force. Eventhough the last ministerial meeting injected fresh momentum into the tripartite negotiations to realize the TFTA, negotiations scheduled for phase one is not completed. The remaining three Annexes (tariffs, trade remedies and rules of origin)to the TFTA Agreement though adopted by the Ministers, in Kampala, yet to be scrubbed by lawyers and still considered outstanding. No tariff offer has been finalized so as to form integral part of the Agreement. Above all, negotiations on trade in services, competition and intellectual property have yet to commence, and may never do so. Review of the TFTA Roadmap revealed that the TFTA failed to meet its deadlines and forced Tripartite States to amend their calendar thrice,¹ which may not be the last. The newly set deadline Oct. 31, 2017 has already lapsed, regardless of Tripartite States commitment to finalize their task ahead of the CFTA deadline. The manifested slow progress and unfinished businesses of the TFTA lessened the ambition of stepping stone objective.

Though commended to be landmark for the CFTA negotiation and resolve the challenges of overlapping memberships, the TFTA's design stumbled its way out from the problem. The shift from their initial objective of resolving the problem into harmonizing policies commitmentexhibited lack of enthusiasm among Tripartite States in the fight against multiple memberships. Moreover, the adopted inconsistent definitions for major negotiating principles are among the reasons that fuel the problem of overlapping membership and forced down the Tripartite States to neighborly live with the problem. The application of the negotiating principles: the MFN principle, the principle of Acquis, and Variable Geometry,as adopted in the TFTA, also creates complication on establishing a single and comprehensive FTA agreement, after the completion of the TFTA negotiation process. Particularly, tariff offers based on these principlesend up with different configurations of parties, more trade agreements and new notification thatexacerbate overlapping membership among the three RECs, which contravene their struggle to continental convergence.

To ensure effective stepping stone function, pertinence of a continental legal framework channeling the direction of the two FTAs is unquestionable. Suitable building block for the CFTA requires clear plan as to the direction where the CFTA is heading and what is expected from the

¹ TRALAC news, [The Tripartite Free Trade Area – a breakthrough in July 2017 as South Africa signs the Tripartite Agreement](https://www.tralac.org/news/article/11860-the-tripartite-free-trade-area-a-breakthrough-in-july-2017-as-south-africa-signs-the-tripartite-agreement.html), (https://www.tralac.org/news/article/11860-the-tripartite-free-trade-area-a-breakthrough-in-july-2017-as-south-africa-signs-the-tripartite-agreement.html), last visited on Oct 28, 2017, 02:42 AM

TFTA. However, except the abandoned initiative in the BIAT, the research revealed that there are no legal mechanisms devised to govern the direction of the two FTAs. Apart from drumming the stepping stone drum, the overall arrangement to ensure efficient linkage between the two FTAs is left without enforceable legal instruments and effective institutions to monitor implementation.

Moreover, the TFTA's inability to address problems arising from its legal personality and its relationship with the constituting RECs wasted the possibility of coordinating Tripartite States' positions and step-up the pace of CFTA negotiations. Tripartite States denied of collective negotiation competency, forced to start the CFTA negotiation individually from the scratch which is redundancy of process.

The fresh start of CFTA negotiation on individual state basis emanated from African leaders' skeptical view on the full realization of the TFTA and other similar arrangement, in fact, green light emergence of two separate forums over the same issue. This parallel negotiation, as revealed in this study, creates difficulties on the sequences of negotiations in the two FTAs. The CFTA negotiations overlapped with phase II of the TFTA negotiations and pose a question on the need for *de novo* service negotiations in the TFTA context while the same agenda is already been under discussion at the CFTA level. Trends show that, the final rounds of TFTA negotiations on phase II will be subsumed by the CFTA outcomes.

In light of the aforementioned reasons, it becomes clear that the initial idea of using the TFTA as building block for the establishment of the CFTA is turned in to stumbling block. By abandoning their initial milestone and starting CFTA negotiations from clean slate, African leaders disregard their word manifested in the framework for BIAT and unravel the success stories of the TFTA. Unless a strong and urgent measure is taken to ensure the stepping stone objective is not forgotten and warrant coherent implementation to escalate the continental integration, complications streaming from parallel existence of the two FTAs continue to exist.

Despite this fact, The TFTA, a result of nine years negotiations, is an achievement in itself and the CFTA's stand to start fresh negotiation, setting aside this effort, is not reasonable. FTA negotiations by their nature are time and resource consuming and dragged by Member States' interest, the AU Members States pursuit of the CFTA goals discarding the TFTA success cannot lead them to realization on the slated year, 2017. On top of this, the CFTA deadline set is meant

only to conclude the agreement. After the signing of the CFTA agreement, AU Member States needs to deal with negotiations set for the second phase and post adoption period, i.e. implementation and monitoring. The TFTA, in this regard will serve as an effective mechanism to ensure uniformity of adherence among the three RECs, through knowledge and experience sharing and easing the reporting mechanism of the implementation process.

5.2. Recommendations

To maintain the stepping stone function of the TFTA and ensure synergies between the two FTAs are mutually supportive, a more realistic approach must be adopted. Hence, the researcher recommends:

- ❖ There must be a clear division of labor among the TFTA and CFTA. On top of specifying expectations from the TFTA, this gives lee way for the two FTAs to play their own part in their respective aspects and avoid redundancy and waste of resources.
- ❖ The Tripartite Members should revisit their agreement to accommodate provision either towards merging the three RECs or mechanisms that urge Tripartite States to abandon their multiple FTA scheme and ensure Tripartite States are confined in a unified FTA. This can be done through promoting incentive having deterrent effect on Tripartite States belonging to more than one bloc.
- ❖ Tripartite States needs to get rid of their lip service to the continental integration effort. Their commitment must be translated in to action within a given period of time by developing sound rules, establish the right structures, respect obligations and monitor compliances to objectives set under the BIAT and regional integration instruments.
- ❖ Rather than bouncing from decision to decision (AEC to BIAT to CFTA- which may not be the last), the AU should impose sanction on defaulting RECs where the REC either deliberately or through omission failed to comply with, so as to ensure Member State's compliance to deadlines and requirements set under the BIAT framework.

- ❖ The CFTA negotiation on individual member state basis time taking, duplication of efforts and wastage of resource. Thus the CFTA must extend negotiating status to the Tripartite Members to negotiate as a bloc. Such competency will allow the TFTA to play its role, coordinating Tripartite States' common positions and building their capacity for effective participation, Monitoring and Evaluation process of the CFTA negotiations.
- ❖ Tripartite States must appraise their challenges and institutional difficulties and come up with arrangement that fits in with the BIAT roadmap indicators. These include scrubbing fallacious negotiating principles and resolving issues of legal personality of the TFTA.

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Annex

ANNEX II ROADMAP FOR ESTABLISHING THE TRIPARTITE FTA January 2011 - January 2016: Activity Matrix

Thematic Area	Activity	Output	Responsibility	Time
Memorandum of Understanding	Signing of MoU establishing the Tripartite	Signed MoU	REC Chairs	By Jan 2011
Policy Organs Meetings to Launch TFTA Negotiations	Meetings of the Tripartite Ministerial Committee, Council and Summit	<ul style="list-style-type: none"> • Approve principles, processes and institutional framework; • Approve Roadmap with negotiation timeframes; • Official launch of the FTA negotiations and Declaration signed • Comprehensive publicity campaign initiated 	Member States with assistance of Tripartite Task Force	May-June 2011 Ongoing
Post-Launch Pre Negotiations Preparations	Preparatory phase	<ul style="list-style-type: none"> • Information exchange, including applied national tariffs and trade data and measures • Adopt TORs and rules of procedure • Adoption of schedule of negotiations • Monitoring and evaluation mechanism established • National negotiating positions prepared for core FTA items 	Member States with assistance of Tripartite Task Force	6-12 Months
Negotiations	Commencement and completion of Phase I negotiations	Agreement reached on trade in goods	Member States with assistance of Tripartite Task Force	24-36 months
	Commencement and completion of negotiations on movement of business persons	Agreement reached on movement of business persons	Member States with assistance of Tripartite Task Force	24-36 months
	Review of progress in the FTA negotiations on Phase I	Revised roadmap	Ministerial Council	continuous
	Commencement of negotiations of Built-in Agenda under Phase II	Negotiations of Built-in Agenda commenced	Member States with assistance of Tripartite Task Force	After completion of Phase I
Finalization of FTA Agreement and Entry into Force	Tripartite Summit	FTA Agreement on trade in goods approved by Summit and signed by Member States	Member States	At end of Phase I
Performance Monitoring	Monitoring and Evaluation	Monitoring and evaluation reports considered	Tripartite Council	continuous