



**UNIVERSITY of the
WESTERN CAPE**

**TRIPARTITE FREE TRADE AGREEMENT AS A SOLUTION TO INCREASING
INTRA-AFRICAN TRADE**

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A mini- thesis submitted in partial fulfilment of the requirements for the degree of
Master of Laws (LLM) in the Department of Mercantile Law & Labour Law,
University of the Western Cape

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May 2015

DECLARATION

I declare that The Tripartite Free Trade Agreement as a solution to increasing intra-African trade is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Teurai Thirdgirl Dari

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Signature:

Date:

DEDICATION

This research is dedicated to my parents Mr Doubt Dari and Mrs Roslyn Dari. You are special. I can never thank you enough for everything you have done for me.



ACKNOWLEDGEMENTS

This mini-thesis marks the beginning of a new journey and the end of another.

I would like to extend my appreciation to the following individuals:

- My first appreciation is for my almighty God who strengthened me during trying times and gave me the courage to complete this mini-thesis.
- My supervisor Professor Patricia Lenaghan, words are not enough to describe my sincere gratitude and appreciation. Thank you for your valuable and insightful comments, as well as guidance throughout the period of research and writing of the mini- thesis.
- I am indebted my parents, Mr Doubt Dari and Mrs Roslyn Dari and siblings for their unconditional love, support and prayers throughout the period of my studies. You have all been a pillar of strength.
- Obdiah Mawodza, thank you for your unwavering support and unflagging love in my life and studies, you are my beam of light. Mitchel Dari you are a star, thank you for praying for me. Victor Amadi, thank you for encouraging me to write on intra-African trade.
- To Virginia Kisi Mungazi, Dr Y Mupangavanhu and all my friends and colleagues who were there for me during this journey, thank you very much. You made the process more manageable and the completion of this mini- thesis a possible task.
- I am grateful to Tinashe Kondo, Noreen Wini Dari and Dr Bhukumthetho Ncube for the technical support.
- Thanks, to the Law Faculty GLA Programme for giving me the opportunity to work in a programme that has contributed immensely to my personal growth and many thanks to the University of the Western Cape and Law Faculty for the financial support.

KEYWORDS

Regional Integration

Trade Facilitation

Tripartite Free Trade Area

Intra- African Trade

Increased Market Access

Common Market for Eastern and Southern Africa

Southern African Development Community

East African Community



ABBREVIATIONS

AEC	African Economic Community
AU	African Union
Bali TFA	Trade Facilitation Agreement
BALI TFTA	Trade Facilitation Agreement Facility
CEOs	Chief Executive Officers
CET	Common External Tariff
COMESA	Common Market of Eastern and Southern Africa
CRTA	Committee on Regional Trade Agreements
CTTTFP	Comprehensive Tripartite Trade and Transport Facilitation Programme
DSM	Dispute Settlement Mechanism
EAC	East African Community
EC	Enabling Clause
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Area
GATT	General Agreement on Trade and Tariffs
GSP	Generalised System of Preferences
MFN	Most Favoured Nation
NT	National Treatment
NTBs	Non-Tariff Barriers
PTA	Preferential Trade Agreement

REC	Regional Economic Community
RIDSP	Regional Indicative Strategic Development Plan
RTA	Regional Trade Agreement
SADC	Southern Africa Development Community
SADCC	Southern African Development Coordination Conference
SIPO	Strategic Indicative Plan for the Organ
TCSO	Tripartite Committee of Senior Officials
TFTA	Tripartite Free Trade Agreement
Tripartite FTA	COMESA-EAC-SADC Tripartite Free Trade Area
TTNF	Tripartite Trade Negotiations Forum
TWGs	Technical Working Groups
UN/CEFCAT	United Nations Centre for Trade Facilitation and Electronic Business
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNECE	United Nations Economic Commission for Europe
WCO	World Customs Organisation
WTO	World Trade Organisation

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO STUDY

The concept of international trade has made it possible for consumers to enjoy a wide range of goods and services. In advancing international trade, countries have embraced the process of trade liberalisation¹ in a bid to trade effectively. The process of liberalisation, has led to the gradual erosion of tariffs through successful multilateral negotiations.² However, non-tariff barriers (NTBs) have become noticeable, and are proving to be a challenge to intra-African trade.³ They are acting as impediments to the movement of goods, services and people across African borders.⁴ The former Ethiopian Prime Minister, Meles Zenawi, believed that the simple scrapping of tariffs while speeding up bureaucracy at border posts cannot absolutely ensure intra-African trade.⁵ By its definition, the word 'intra' means within.⁶ This thesis refers to intra-African trade as trade amongst African countries only. In Africa, however, this is not the case as most African trade partners are from outside Africa.

Africa carries in it some of the fastest growing economies, yet the continent exports wealth and imports poverty.⁷ Several reasons can be attributed to such weak regional trade performances in Africa. Among others is the fact that regional economic integration is poor and much emphasis

¹ Trade liberalisation is concerned with the removal of or reduction in trade practices that thwart free flow of goods and services from one nation to another. It includes dismantling of tariff as well as non-tariff barriers.

² Tussie D & Aggio C 'Economic and social impacts of trade liberalisation' (2007) 89 available at <http://www.unctad.info/upload/TAB/docs/TechCooperation/fullreport-version14nov-p106-119.pdf> (accessed 21 September 2014).

³ Kanyimbo P & Manduna C 'Trade Facilitation in the Bali Package: What's in it for Africa?' (2013) available at <http://www.afdb.org/en/blogs/integrating-africa/post/trade-facilitation-in-the-bali-package-whats-in-it-for-africa-12698/> (accessed 20 September 2014) (hereafter Kanyimbo P & Manduna C (2013))

⁴ Kanyimbo P & Manduna C (2013).

⁵ Louw-Vaudran L 'Realising the Dream of Greater Intra-African Trade' (2013) available at <http://isnblog.ethz.ch/international-relations/realising-the-dream-of-greater-intra-african-trade> (accessed 21 September 2014).

⁶ Oxford Dictionaries 'British and World English' available at <http://www.oxforddictionaries.com/definition/english/intra-> (accessed 20 September 2014).

⁷ CNBC Africa 'Intra-Africa Trade Still Hampered By Infrastructure Deficit' (2013) available at <http://www.cnbc africa.com/news/resources/2013/08/01/intra-africa-trade-still-hampered-by-infrastructure-deficit> (accessed 20 September 2014).

has been placed on eliminating trade barriers, and less on developing productive capacities which are necessary for trade.⁸ In addition, the road and rail networks in Africa were mostly constructed during the colonial era. These networks were used to transport goods out of Africa which in turn failed to create regional networks which would facilitate intra-African trade.⁹ As a result, trading within Africa is expensive because the infrastructure fails to support trade facilitation mechanisms.¹⁰ Ben Barka's observation has found support from the United Nations Conference on Trade and Development (UNCTAD) 2013 report on intra-Africa trade which noted that between 2007 and 2011, the average share of intra-African merchandise exports in Africa was 11 per cent.¹¹ This is far lower compared to trading in other different parts of the world's continents.¹²

Despite these challenges, African states have progressively realised the need for regional agreements to purposively boost intra-African trade. This is evidenced by the current negotiation of the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC) Free Trade Area (Tripartite FTA).

In October 2008, heads of states in Kampala came to a decision to develop the Tripartite FTA. The Tripartite FTA is meant to build upon the already existing free trade agreements in COMESA, EAC and SADC. This regional bloc is intended to cover all 26 Tripartite countries. These include: Angola, Botswana, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Lesotho, Libya, Madagascar, Malawi, Mauritius, Mozambique,

⁸ United Nations Conference on Trade And Development *Economic Development In Africa United Nations Report 2013- Intra-African Trade: Unlocking Private Sector Dynamism*(2013) 45.

⁹ Kunateh MA 'Intra-Africa Trade Potential Untapped-Says UBA Ghana Boss' (2014) available <http://thechronicle.com.gh/intra-africa-trade-potential-untapped-says-uba-ghana-boss/> (accessed 20 September 2014).

¹⁰ Ben Barka H 'Border Posts, Checkpoints, and Intra-African Trade: Challenges and Solutions' (2012) *African Development Bank Publication* 12.

¹¹ United Nations Conference on Trade And Development *Economic Development In Africa United Nations Report 2013- Intra-African Trade: Unlocking Private Sector Dynamism*(2013) 46.

¹² United Nations Conference on Trade And Development *Economic Development In Africa United Nations Report 2013- Intra-African Trade: Unlocking Private Sector Dynamism*(2013) 47.

Namibia, Rwanda, Seychelles, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.¹³

The aims of this regional bloc are to adopt and implement policies in all sectors of economic and social life that promote and consolidate an equitable society and social justice.¹⁴ One of the main benefits to be secured from the Tripartite TA is the establishment of a common market, with a single economic space which will boost production capacities.¹⁵ If the Tripartite FTA is successfully implemented, it will pave the way for improved cooperation and amalgamation of the African Economic Community (AEC)¹⁶ as sought in the 1991 Abuja Treaty.¹⁷

Interestingly, twenty of the Tripartite FTA member countries are also members of the World Trade Organisation (WTO). These members should be guided by guiding principle of non-discrimination.¹⁸ The Tripartite FTA as a regional trade agreement (RTA) may, however, have the potential of departing from the guiding principles of WTO because it is preferential in nature.¹⁹ However WTO members may only enter into a RTA under specific conditions as stated in Article XXIV of the General Agreement on Trade and Tariffs (GATT), the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) and Article V of The General Agreement on Trade in services (GATS).²⁰

The Tripartite FTA covers different objectives but for purposes of this mini-thesis focus shall be on liberalisation of trade in goods and trade facilitation mechanisms. Liberalisation of trade in

¹³ COMESA-EAC-SADC Tripartite 'Focal area 1: The Tripartite Free Trade Area (FTA)' available at http://www.comesa-eac-sadc-tripartite.org/intervention/focal_areas/tripartite_fta (accessed 10 October 2014).

¹⁴ Article 4(8) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

¹⁵ COMESA-EAC-SADC Tripartite 'The Tripartite Free Trade Area (FTA)' available at http://www.comesa-eac-sadc-tripartite.org/intervention/focal_areas/tripartite_fta (accessed 30 September 2014).

¹⁶ Daniels M *Regional integration in the COMESA-EAC-SADC Tripartite Free Trade Area and the importance of infrastructure development in promoting trade and reducing poverty* (unpublished LLM thesis, University of the Western Cape, 2012) 5.

¹⁷ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2014 Investing in the SDGs: An Action Plan* (2014) 39 (hereafter UNCTAD (2014)).

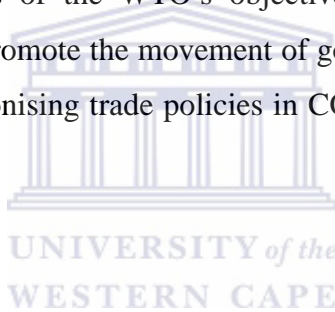
¹⁸ World Trade Organisation 'Regional Trade Agreements: Rules' available at http://www.wto.org/english/tratop_e/region_e/regrul_e.htm (accessed 04 November 2014).

¹⁹ Tripartite FTA is a Regional Trade Agreement (RTA) and has potential to discriminate and therefore there is need for it to comply with WTO's rules on RTAs.

²⁰ World Trade Organisation 'Regional Trade Agreements: Rules' available at http://www.wto.org/english/tratop_e/region_e/regrul_e.htm (accessed 04 November 2014).

goods is about the elimination of all tariffs and NTBs in trade and goods.²¹ On the other hand trade facilitation looks at reducing cost burdens associated with procedures, how the control of governing the movement of goods across national borders can be improved and how to maximise efficiency while safeguarding legitimate regulatory objectives.²² In ensuring effective regional and international trade, the 2013 Agreement on Trade Facilitation (Bali TFA) was reached during the ninth Bali Ministerial Conference in Indonesia.²³ The agreement is now the multilateral framework governing trade facilitation.

African countries are encouraged to implement the Bali TFA so as to reduce trade costs in the region. As discussed above, the proposed Tripartite FTA has included trade facilitation as one of its main objectives in their quest for regional economic integration. This mini thesis will assess if trade facilitation is indeed the effective way in increasing intra-African trade. This discussion will be best understood in terms of the WTO's objective of simplifying and harmonising international trade procedures to promote the movement of goods and services.²⁴ In addition, the Tripartite FTA objectives of harmonising trade policies in COMESA, EAC and SADC will also be analysed.²⁵



1.2 PROBLEM STATEMENT

Trade has been widely accepted as an important tool in spearheading economic growth and development. In many different parts of the world, countries have alleviated poverty and economically prospered through effective trade.²⁶ Despite the efforts to dismantle trade restrictions and create a common market, the problem remains that of African disintegrated markets which then lead to poor intra-African trade.²⁷ There is therefore the need to use intra-

²¹ Economics Help 'Definition of trade liberalisation' available at

<http://www.economicshelp.org/blog/glossary/trade-liberalisation/> (accessed 04 November 2014).

²² Moisé E & Sorescu S 'Trade Facilitation Indicators: The Potential Impact of Trade Facilitation on Developing Countries' Trade' (2013) *Organisation for Economic Co-operation and Development Trade Policy Papers* No. 144 6.

²³ World Trade Organisation 'Trade facilitation' available at

http://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.html (accessed 03 October 2014).

²⁴ World Trade Organisation 'WTO training package on Trade Facilitation, Market Access' Slide no. 52 available at www.wto.org/english/thewto_e/whatis_e/eol/wto2_269.html (accessed 03 October 2014).

²⁵ COMESA-EAC-SADC Tripartite 'Home' available at <http://www.comesa-eac-sadc-tripartite.org/> (accessed 08 March 2015).

²⁶ African Union *Zero Draft Action Plan For Boosting Intra-African Trade* (2011) 2.

²⁷ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 193.

African trade as an instrument that effectively serve in the attainment of rapid and sustainable social and economic development. The aim of this study is to therefore determine whether the solution to increasing intra-African trade can be found in the Tripartite FTA. This thesis will be guided by the following questions:

- What are the WTO rules on RTAs, how have they aided regional economic integration in Africa?
- How has regional economic integration in COMESA, EAC and SADC aided or hindered intra-African trade?
- What is Tripartite FTA and what are its objectives towards improving or facilitating intra-African trade?
- What are the possible opportunities and challenges that the Tripartite FTA is likely to encounter?
- What trade facilitation is as discussed in the Bali Package and the Tripartite FTA: What's in it for intra-African trade?



1.3 SIGNIFICANCE OF STUDY

The interrelated basic features (size, structure and direction) of African trade have made it impossible for trade in the region to serve as a catalyst for sustainable economic growth and poverty alleviation.²⁸ The share of Africa in global trade is around three percent and that is relatively small compared to other regions.²⁹ Regrettably, this global trade has been marked by a decline over the decades.³⁰ Export trade in Africa is heavily concentrated on primary commodities that are branded by relatively slow growth, price instability and long-term

²⁸ African Union Zero Draft Action Plan For Boosting Intra-African Trade (2011) 2.

²⁹ Twn-Africa - Trade & Development 'Africa still gets less than 3% of global trade as intra- Africa Trade falters at 10%' available at <http://www.twinside.org.sg/twnf/2012/3805.htm> (accessed 05 October 2014).

³⁰ African Union Zero Draft Action Plan For Boosting Intra-African Trade (2011) 2.

weakening of terms of trade.³¹ This is as a resultant of inadequate attention being given on improving Africa's competitiveness and participation in both the global and intra-African trade.³²

As such, this thesis details insight on the importance of Tripartite FTA in furthering regional economic integration. It has been proved in other successful Regional Economic Communities (RECs) such as European Union (EU) that if a region is more integrated the level of intra-regional trade is also higher.³³ Since Africa is mostly disintegrated due to overlapping membership, this study will show that the Tripartite FTA may be the solution to integration problems in Africa. The establishment of the Tripartite FTA can make some significant changes which will see Africa thrive from trading within its own borders.

The Tripartite FTA is a major tool in facilitating intra-African trade. Thus, the study will enhance the academic literature on intra-African trade and trade facilitation. Finally, the importance of this study is to point out that if Tripartite FTA is functional, in conjunction with existing Bali TFA, there is tremendous potential for increasing intra-African trade. The Bali Package complements a lot of the infrastructure investments that are being undertaken across the continent particularly in the transport sector³⁴ and it holds a lot of potential for intra-African trade.

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1.4 METHODOLOGY

A theoretical approach to the research will be undertaken in order to arrive at an answer of the research problem. This research would rely entirely on materials available from various primary sources including textbooks, national legislation, international and regional agreements that propose trade facilitation and liberalisation of trade in goods. These include: the policy documents on the Tripartite FTA, different WTO agreements as well as available materials on COMESA, the EAC and SADC. Secondary sources such as journal articles, academic textbooks,

³¹ Gondwe M 'Facilitating trade and building economies on the African continent' 2 available at <http://www.bis.org/review/r130924i.pdf> (accessed 05 October 2014).

³² See generally The World Bank *Challenges of African Growth Opportunities, Constraints and Strategic directions* (2007)129-180.

³³ United Nations Economic Commission for Africa 'Trade Experience beyond Africa' (2011) 470 available at <http://www.mcli.co.za/mcli-web/downloads/ARIA4/chap13.pdf> (accessed 05 October 2014).

³⁴ Kanyimbo P & Manduna C (2013).

and commentary reports of the negotiation processes undertaken by the member countries of the Tripartite FTA, newspaper articles and internet sources will be also used.

1.5 LITERATURE REVIEW

The importance of regional integration to trade expansion, attracting investment opportunities and creating employment cannot be disputed.³⁵ However, Africa's regional trade is lagging behind. Advances in intra-African trade growth are dependent on other important policies implemented by individual or group of countries. Furthermore, Africa lacks the political will to implement policies.³⁶ These challenges need to be overcome in the wake of the proposed formation of the Tripartite FTA.³⁷ The whole assessment of the literature is based on analysing various sources. It is certainly not a far-reaching exposure of the relevant literature available on the topic and also that it is not asserting that it is an exhaustive view on the topic.

Abuka notes that inadequate infrastructure in Africa is one of the key impediments to increased trade and economic growth.³⁸ He went on to compare Africa with the rest of the world in terms of the measure of infrastructure coverage and reasoned that Africa lags behind and its growth is seriously affected.³⁹ African regional institutions have been stalled by the lack of institutional capacity to create the much needed infrastructural development projects which are essential in trade facilitation, the creation and support of market access.⁴⁰ Abuka's study does not however shed light on regional infrastructure development programmes identified as a priority area in the Tripartite FTA.⁴¹

³⁵ WTO News 'Trade and foreign direct investment' (1996) available at https://www.wto.org/english/news_e/pres96_e/pr057_e.htm (accessed 04 November 2015).

³⁶ Tafirenyika M 'Intra-Africa trade hurdles: beyond politics' 27 August (2014) available at <http://www.iol.co.za/business/opinion/intra-africa-trade-hurdles-beyond-politics-1.1741497#.VNn7U-aUc1Y> (accessed 02 February 2015).

³⁷ Daniels M *Regional integration in the COMESA-EAC-SADC Tripartite Free Trade Area and the importance of infrastructure development in promoting trade and reducing poverty* (unpublished LLM thesis, University of the Western Cape (2012) 7.

³⁸ Abuka C 'Regional Integration and Growth in Africa' in Teunissen JJ & Akkerman A *Africa in the World Economy: The National, Regional and International Challenges* (2005) 123. (hereafter Abuka C (2005)).

³⁹ Abuka C (2005) 123.

⁴⁰ Stephan H , Power M, Hervey A & Fonseca R.S *The Scramble for Africa in the 21st Century - A view from the South* (2006) 261.

⁴¹ See generally http://www.comesa-eac-sadc-tripartite.org/intervention/focal_areas/tripartite_fta.

A briefing by the African Trade Policy Centre (ATPC) points out that the course of Africa's trade continues to be shaped by the continent's historical links with the outside world.⁴² It is against this backdrop that more than 80 percent of Africa's trade takes place with markets outside Africa.⁴³ This study shows that intra-African trade presents opportunities for sustained growth and development in Africa.⁴⁴ Further, there is potential to reduce vulnerability to global shocks, contribute to economic diversification, enhance export competitiveness and create employment.⁴⁵ Therefore, this thesis will present the Tripartite FTA and the Bali TFA as catalysts to improving intra-African trade so that the benefits by ATPC may be realised.

This mini-thesis seeks to assess how regional economic integration in the three RECs (COMESA, EAC and SADC) negotiating the Tripartite FTA is the basis for increasing intra-African trade. The study will show that for full integration to take place there is need for Tripartite FTA to focus not just on elimination of all tariff barriers and NTBs but also trade facilitation mechanisms. There are limited researches incorporating a study of the Tripartite FTA and the Bali TFA as these are relatively new approaches to regional integration in Africa which has necessitated the need for academic discussions.

1.6 CHAPTER OUTLINE

Chapter One

This will be an introductory chapter which will provide an overview of the: background to the study, the problem, the significance of the study and the methodology.

Chapter Two

This chapter will give an overview of WTO rules on preferential trade agreements and what regional economic integration in COMESA, EAC AND SADC is about.

⁴² African Trade Policy Centre 'Is there a Potential for Intra-African Trade' (2010) available at <http://www.uneca.org/sites/default/files/publications/atpcpolicybriefs13.pdf> (accessed 12 September 2014).

⁴³ African Trade Policy Centre 'Is there a Potential for Intra-African Trade' (2010) available at <http://www.uneca.org/sites/default/files/publications/atpcpolicybriefs13.pdf> (accessed 12 September 2014).

⁴⁴ African Trade Policy Centre 'Is there a Potential for Intra-African Trade' (2010) available at <http://www.uneca.org/sites/default/files/publications/atpcpolicybriefs13.pdf> (accessed 12 September 2014).

⁴⁵ United Nations Conference on Trade And Development *Economic Development In Africa United Nations Report 2013- Intra-African Trade: Unlocking Private Sector Dynamism* (2013) 47.

Chapter Three

This chapter will look at deeper economic integration as a tool for furthering intra-African trade. Focus will be on the developments and objectives of the Tripartite FTA.

Chapter Four

This chapter will give an overview of WTO developments on trade facilitation, trade facilitation in the Tripartite FTA as vehicles for increasing intra-African trade.

Chapter Five

Conclusion, an opinion and possible recommendations with regard to regional economic integration and intra-African trade will be outlined.



CHAPTER 2

REGIONAL INTEGRATION IN SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, EAST AFRICAN COMMUNITY, AND COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

2.1 INTRODUCTION

In Africa, regional integration is expected to produce considerable economic gains crucial to strategy development and furthering of intra-regional trade.⁴⁶ This concept of regionalism seeks to enhance trade liberalisation and development. As a result, regional integration is often viewed as a tool for industrial policy development.⁴⁷ Consequently, developing countries regard regionalism as an opportunity for economic integration with the global village.⁴⁸ Therefore, it is important to understand the meaning, advantages and disadvantages of regional integration.

Regional integration was defined by Bischoff as, ‘a process by which a group of states voluntarily gives each other access to each other’s markets and establishes mechanisms and techniques that diminish conflicts and make the most of the internal market and external economic, social, political and cultural profits of their cooperation’.⁴⁹ This definition asserts that regional integration is not only concerned about economic integration but also the socio-political aspect of integration. Economic regional integration has considerable influence on less developed countries if one or more partners in the integration are better developed.⁵⁰ This is because if one partner is more developed than others, it enables the less developed partners to

⁴⁶ United Nations Economic Commission for Africa ‘Regional Integration and Trade’ available at <http://www.uneca.org/our-work/regional-integration-and-trade> (accessed 12 February 2015).

⁴⁷ Industry Policy is a plan of country which contains determinant factors of the course of industrial development for specified time. See Jurčić L, Bilas V & Franc S ‘Regional Economic Integration And Developing Countries: The Example Of South African Regional Integration - SADC’ (2011) 1 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232667 (accessed 12 February 2015) (hereafter Jurčić L et al (2011)).

⁴⁸ Jurčić L et al (2011) 1.

⁴⁹ Bischoff 2004 as quoted in Karlsson C ‘Regionalism from Outside: The EU Foreign Aid Policy and Regional Integration in SADC’ 5 available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1323693&fileId=1323694> (accessed 18 December 2014).

⁵⁰ Jurčić L et al (2011) 1.

overcome the obstacles represented by their relatively small domestic markets.⁵¹ Greater economies of scale enables producers of less developed countries to realise their potential and take advantage of the establishment of regional infrastructures of other partners who are more developed than them.⁵²

The benefits of regional integration include the fact that a follower country⁵³ has access to knowledge that promotes higher growth rates in their home market.⁵⁴ Technological spillovers are a key source to long term growth.⁵⁵ Moreover integration progressively reduces transaction costs through elimination of trade barriers; and together with product imitation it encourages growth and convergence in a member country.⁵⁶

Furthermore, a large market can be created where a change in its demand for imports can influence the price at which those imports can be purchased.⁵⁷ Where there is a demand for imports, competitive markets are created. As a result both partner and third country domestic markets benefit, meanwhile the union's terms of trade vis-à-vis the rest of the world also improves.⁵⁸ In the same vein, when a firm is exposed to enhanced competition, firms lower costs which ultimately facilitate improvements in productivity and efficiency.⁵⁹

Despite the above mentioned benefits, they are also considerable disadvantages associated with regional integration. If countries are involved in a regional integration set up they might be need

⁵¹ International Monetary Fund 'Regional Integration in Africa An Important Step Toward Global Integration' (1999) available at <https://www.imf.org/external/np/speeches/1999/041499.htm> (accessed 12 February 2015).

⁵² International Monetary Fund 'Regional Integration in Africa An Important Step Towards Global Integration' (1999) available at <https://www.imf.org/external/np/speeches/1999/041499.htm> (accessed 12 February 2015).

⁵³ A follower country is a country that 'spends most of its resources in adopting and assimilating already existing technologies, and uses only limited resources in re-inventing'. See Papageorgiou C 'Technology adoption, human capital, and growth theory' (2002)6 no. 3 *Review of development economics* 352.

⁵⁴ Dion DP 'Regional integration and economic development: A theoretical approach' (2004) *SFB/TR 15 Discussion Paper* 201 (hereafter Dion DP (2004)).

⁵⁵ Department for International Development (DFID) *Regional Integration and Trade in Sub-Saharan Africa* (2011) 5.

⁵⁶ Dion DP (2004) 1.

⁵⁷ Matthews A *Regional Integration and Food Security in Developing Countries* (2003) 35 (hereafter Matthews A (2003)).

⁵⁸ Matthews A (2003) 17.

⁵⁹ Department for International Development *Regional Integration and Trade in Sub-Saharan Africa* (2011) 5.

to give up some of their authority to supranational bodies.⁶⁰ In such instances ceding sovereignty to supranational bodies have possible negative consequences for poverty and food security.⁶¹

Moreover, very few countries are willing to cede some, if not all of their authority to supranational bodies.⁶² This usually leads to stalling of negotiations and some countries may even choose to leave the union.⁶³ Issues of product demand, amongst others, usually impede the full fledging of regional integration. For greater integration to take place there must be a demand by market actors.⁶⁴ Therefore, if all the market actors have similar industries there may be no demand in the other markets which can lead to protectionism.

The above discussion explored the important aspects of regional integration. In sum, the advantages of regional integration outweigh its disadvantages owing to the tremendous acceleration of intra-trade and or inter-trade. In Africa, which is the focus of this study, most economies are characterised with small growth and the concept of deeper integration is an optimistic feature which can facilitate and secure economic freedom. The regional integration initiatives which have been pursued across Africa include; The Southern African Development Community (SADC); The East African Community (EAC) and The Common Market for Eastern and Southern Africa (COMESA). These three regional economic communities (RECs) are currently negotiating a free trade area known as COMESA-EAC-SADC Tripartite Free Trade Area (Tripartite FTA).⁶⁵ Their effort is to strengthen regional integration. These three RECs will form the key area of this mini thesis discussion.

This chapter will discuss what regional integration in COMESA, EAC and SADC regions entails. Regional economic integration is the basis upon which the Tripartite FTA is to be built. Therefore, it is of utmost importance to momentarily look at the efforts of regional economic integration which exist specifically in the RECs as these will help in assessing whether the RECs

⁶⁰ Best E 'Supranational Institutions And Regional Integration' (2005) 3 available at <http://www.cepal.org/brasil/noticias/paginas/2/22962/best-supranational%20institutions%20and%20regional%20integration.pdf> (accessed 09 April 2015).

⁶¹ Matthews A (2003) 35.

⁶² Rugumamu S 'Africa's Search For Regional Cooperation And Integration In The 21st Century' (2004) *African Capacity Building Foundation Working Paper No.38* (hereafter Rugumanu (2004)).

⁶³ Rugumanu (2004) 8.

⁶⁴ Rugumanu (2004) 8.

⁶⁵ The COMESA-EAC-SADC Tripartite was established in 2005 with the main objective of strengthening and deepening economic integration of the southern and eastern Africa region.

have aided or hindered economic integration. Most member states that belong to the RECs negotiating Tripartite FTA are also member's states of the World Trade Organisation (WTO). Therefore it is important to first determine what WTO rules on preferential trade agreements (PTAs) entail since the RECs are preferential in nature.

2.2 WORLD TRADE ORGANISATION

The WTO primarily deals with the regulation of trade between countries with the key objective of regulating and liberalising international trade.⁶⁶ The two basic rules of WTO are the most favoured nation (MFN) and national treatment (NT) which are premised on the notion of non-discrimination.⁶⁷ They ensure that there is a levelled playing field between all trading partners.⁶⁸ In furthering trade liberalisation, WTO allows its members to enter into regional trade agreements (RTAs)⁶⁹ such as that of COMESA, EAC and SADC. These RTAs are subject to WTO rules and exceptions to the basic rules of non-discrimination.⁷⁰

2.2.1 Most Favoured Nation

The first basic rule in WTO is the MFN. It is considered to be a cornerstone principle in the multilateral trading system.⁷¹ It was designed to promote non-discrimination in trade policy through equal treatment of trading partners.⁷² GATT contains a number of provisions which require MFN⁷³ but for purposes of this chapter, the general MFN clause found in Article I of the

⁶⁶ World Trade Organization *Understanding the WTO* 5ed (2015) 9 (hereafter WTO (2015)).

⁶⁷ Van den Bossche P & Zdouc W *The Law and Policy of the World Trade Organization: Text, Cases and Materials* 3ed (2013) 36 (hereafter Van den Bossche P & Zdouc W (2013)).

⁶⁸ United Nations Conference On Trade And Development (UNCTAD) *Most-Favoured Nation Treatment UNCTAD Series on Issues in International Investment Agreements II*(2010) 13 (hereafter UNCTAD (2010)).

⁶⁹ WTO 'Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance-of-Payments (BOPs) & Waivers' 2 available at https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf (accessed 10 April 2015).

⁷⁰ WTO 'Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance-of-Payments (BOPs) & Waivers' 2 available at https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf (accessed 10 April 2015).

⁷¹ Mayurama W 'Preferential Trade Arrangements And The Erosion Of The WTO's MFN Principle'(2010) 46 *Stanford Journal Of International Law*177.

⁷² Bown CP 'Trade Policy under the GATT/WTO: Empirical Evidence of the Equal Treatment Rule' (2003) 37 *Canadian Journal of Economics* 678 (hereafter Brown CP (2003)).

⁷³ Van den Bossche P & Zdouc W (2013) 317.

GATT 1994⁷⁴ is of much relevance. It deals with most of the issues associated with regional trade. MFN principle is centred upon the notion of non-discrimination of like products.⁷⁵ It requires immediate and unconditional extension of any advantages to all members of WTO if one member grants some WTO members such.⁷⁶ The existence of this pillar in the multilateral system constitutes the main difference between multilateral and RTAs which, by their very nature, allow for discrimination.⁷⁷

Signatories in RTAs agree to offer better terms of market access to the members of the RTAs than those offered to non-members.⁷⁸ Besides what RTAs offer, MFN looks promising to developing countries in Africa because they may benefit their economies by making use of the unconditional advantages which stem from it without having to compromise much as they would have had they negotiating individually.⁷⁹

2.2.2 National Treatment

As stated in the above paragraphs there are two basic rules of non-discrimination in the WTO which are the MFN and the NT. Under NT members are not allowed to discriminate between imports and like domestic products however exceptions exist.⁸⁰ NT is found in Article III of GATT and applies once a product has entered the market and imposition of customs duty on an import does not amount to violation of NT.⁸¹

⁷⁴ Article 1.1 of the General Agreement on Tariffs and Trade (GATT 1947) states that 'with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'.

⁷⁵ 'Like' products are subsets of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'. [WT/DS84/AB/R](#) para.118.

⁷⁶WTO (2015) 11.

⁷⁷Taifeng C 'Regional Trade Agreements vs. Multilateral Trading System: A Study of Chinese Interests and Policy Options' (2009) *Norwegian Institute of International Affairs* Working Paper 762 19.

⁷⁸Brown CP (2003) 678.

⁷⁹Countries may have limited leverage in a negotiation with the United States, but if all the African countries acted cooperatively in using a common trade policy, they would increase their leverage.

⁸⁰National Treatment Principle 15 available at <http://www.meti.go.jp/english/report/downloadfiles/qCT0002e.pdf> (accessed 10 April 2015).

⁸¹WTO (2015) 11.

WTO members are allowed to depart from MFN and NT and trade on preferential terms but WTO rules on RTAs should be complied with.⁸² Most members of the proposed Tripartite FTA are also signatories to WTO. Therefore there is need to discuss WTO rules that allow for establishments of RTAs and after give an overview of how COMESA, EAC and SADC co-exist with WTO.

2.2.3 Exceptions

2.2.3.1 Article XXIV of General Agreement on Trade and Tariff 1994

2.2.3.2 Enabling Clause

Trading on preferential terms is also allowed under the EC.⁸³ Under the EC parties are allowed ‘notwithstanding the provisions of Article I of the General Agreement, to accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties.’⁸⁴ The differential treatment applies to ‘preferential tariff treatment accorded in accordance with the Generalised System of Preferences (GSP),⁸⁵ ‘differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT’,⁸⁶ ‘regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the contracting parties, for the mutual reduction or elimination of non-tariff measures, on products imported from one another...’.⁸⁷

⁸²Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance-of-Payments (BOPs) & Waivers 2 available at https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf (accessed 10 April 2015).

⁸³ The Enabling Clause is officially called the ‘Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries’ and was adopted under GATT in 1979 and enables developed members to give differential and more favourable treatment to developing countries. It is also the legal basis for regional arrangements among developing countries.

⁸⁴ Differential And More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries *Decision Of 28 November 1979(L/4903* (hereafter Enabling Clause).

⁸⁵ Enabling Clause.

⁸⁶ Enabling Clause.

⁸⁷ Enabling Clause.

The EC does not only relate to preferences provided by developed countries to developing countries, but also applies to reciprocal trade preferences among developing countries⁸⁸ such as that that exist between EAC members.

The exceptions above apply to RTAs and thus the next section will briefly discuss what RTAs are, and COMESA-EAC and SADC as RTAs under WTO.

2.2.3.3 Regional Trade Agreements

RTAs are a prominent feature of international trade and numbers of these arrangements are ever-growing.⁸⁹ The Dictionary of Trade Policy Terms defines regionalism as, ‘actions by governments to liberalise or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions’.⁹⁰ In the WTO, RTAs are defined as, ‘reciprocal trade agreements between two or more partners’.⁹¹ RTAs can be categorised into five groupings depended upon level of integration.⁹² These groupings are: ‘Preferential Trade Agreements (PTAs), Free Trade Agreements (FTAs), Customs Unions, Common Markets and Economic Unions’.⁹³

A PTA in the WTO is a ‘unilateral trade preference which includes generalised system of preferences schemes as well as other non-reciprocal preferential schemes granted a waiver by the General Council’.⁹⁴ A FTA is deemed to be a special branch of PTAs and member countries agree to ‘completely abolish trade barriers for goods origination within the member countries’.⁹⁵ The COMESA-EAC- SADC Tripartite FTA being negotiated is an example of a FTA. Customs Unions are defined by the World Customs Organisation (WCO) as an ‘entity formed by a

⁸⁸ Tangermann S *The future of preferential trade arrangements for developing countries and the current round of WTO negotiations on agriculture*(2002) available at <http://www.fao.org/3/a-y2732e/y2732e08.htm#bm08> (accessed 18 December 2014).

⁸⁹ Regional trade agreements and preferential trade arrangements available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (accessed 18 December 2014).

⁹⁰ Goode W *Dictionary of trade policy terms* 4 ed (2003) 304.

⁹¹ Regional trade agreements and preferential trade arrangements available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (accessed 18 December 2014).

⁹² Pal P ‘Regional Trade Agreements in a Multilateral Trade Regime: An Overview’ (2004) 2 available at http://www.networkideas.org/feathm/may2004/survey_paper_rta.pdf (accessed 11 May 2014) (hereafter Pal P (2004)).

⁹³ Pal P (2004) 2.

⁹⁴ Regional trade agreements and preferential trade arrangements available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (accessed 18 December 2014).

⁹⁵ Pal P (2004) 2.

customs territory, replacing two or more territories and having in its ultimate state the following characteristics:

- Common customs tariff and common or harmonised customs legislation for the application of that tariff;
- the absence of any customs duties and charges having equivalent effect in trade between the countries forming the customs union in products originating entirely in those countries or in products of other countries in respect of which import formalities have been complied with and customs duties and charges having equivalent effect have been levied or guaranteed and if they have not benefited from a total or partial drawback of such duties and charges;
- the elimination of restrictive regulations of commerce within the customs union'.⁹⁶

A common market is 'a more developed type of customs union in which, in addition to the free movement of goods between member states, labour, capital and services can also move without restriction' and this leads to highly integrated economies.⁹⁷ An economic union exists where 'countries implement common economic policies and regulations and adopt a single currency'.⁹⁸

RTAs have a propensity to go far beyond tariff-cutting exercises as they increasingly provide for complex regulations governing intra-trade.⁹⁹ They also provide for a preferential regulatory framework for mutual services trade.¹⁰⁰ The WTO supports this contention as it realises that most sophisticated RTAs go beyond traditional trade policy mechanisms to include regional rules on investment, competition, environment and labour.¹⁰¹ Liberalisation of trade through RTAs is

⁹⁶ World Customs Organisation *Glossary Of International Customs Terms* (2013) 13.

⁹⁷ Goode W *Dictionary of trade policy terms* 4 ed (2003) 77.

⁹⁸ Pal P (2004) 2.

⁹⁹ World Trade Organisation 'Regional trade agreements and preferential trade arrangements' available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (accessed 18 December 2014).

¹⁰⁰ World Trade Organisation 'Regional trade agreements and preferential trade arrangements' available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (accessed 18 December 2014).

¹⁰¹ RTAs have become increasingly prevalent since the early 1990s. As of 8 January 2015, some 604 notifications of RTAs (counting goods, services and accessions separately) had been received by the GATT/WTO. Of these, 398 were in force. These WTO figures correspond to 446 physical RTAs of which 259 are currently in force.

not debatable; however, there is generalised fear that RTAs may also increase incentives and raise protectionist trade barriers against countries outside the RTA.¹⁰²

WTO members participating in regional agreements are required to notify WTO on such developments. SADC was notified to WTO under Article XXIV.¹⁰³

For a country to participate in the WTO and add value, a two-stage policy is necessary.¹⁰⁴ The first stage requires good capacity for formulation and analysing trade policies and negotiation positions, whilst the second requires the identification of a negotiation strategy.¹⁰⁵ When negotiating, stakeholders who share common views come together.¹⁰⁶ Hence, both stages should not be seen as independent since they complement each other.¹⁰⁷ In SADC, the second stage is not as efficient as it can potentially be because trade issues have traditionally received less attention because of SADC's broader mandate, which encompasses development and political dimensions.¹⁰⁸

The SADC Secretariat is understaffed and has insufficient financial and technical support which affects their formation with WTO to work efficiently with regards to trade issues.¹⁰⁹ It is not a member of the WTO in its own right and the negotiations are conducted individually by member states.¹¹⁰ On April 4th in 2013, a WTO Reference Centre was opened at the SADC Secretariat. It



¹⁰² Suravonic S Policy and Theory of International Trade (2012) available at <http://internationalecon.com/Trade/Tch110/T110-2.php> (accessed 18 December 2014).

¹⁰³ World Trade Organisation 'Welcome to the Regional Trade Agreements Information System: Southern African Development Community (SADC)' available at <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=45> (accessed 18 December 2014).

¹⁰⁴ Bilal S & Szepesi S 'How regional economic communities can facilitate participation in the WTO: the experience of Mauritius and Zambia' in Gallagher P, Low P, & Stoler AL (eds) *Managing the Challenges of WTO Participation: 45 Case Studies* (2005) 384 (hereafter Bilal S & Szepesi S (2005)).

¹⁰⁵ Bilal S & Szepesi S (2005) 384.

¹⁰⁶ Institute for International Economics 'Negotiating Trade Agreements' available at http://www.iie.com/publications/chapters_preview/392/02iie3624.pdf 18 (accessed 11 April 2015).

¹⁰⁷ Bilal S & Szepesi S (2005) 385.

¹⁰⁸ Bilal S & Szepesi S (2005) 384.

¹⁰⁹ Southern African Development Community *Desk Assessment of the Regional Indicative Strategic Development Plan 2005 - 2010* (2011) 30.

¹¹⁰ African, Caribbean, and Pacific Group of States 'Enhancing The Participation Of SADC Member Countries And The Role Of The SADC Secretariat In Regional And Multilateral Trade Negotiations' available at <http://www.acp.int/content/enhancing-participation-sadc-member-countries-and-role-sadc-secretariat-regional-and-multila> (accessed 21 January 2015).

was mandated to act as a channel through which SADC Secretariat will receive information, technical and training assistance to improve the capacity of its staff on WTO issues.¹¹¹

Whilst SADC was notified under Article XXIV, COMESA was notified to WTO under the Enabling Clause on 29th June 1995.¹¹² Currently COMESA has sixteen members that are also members of WTO.¹¹³ It has been noted that three are observers of which two of those are seeking accession and only two are not members of WTO.¹¹⁴ COMESA's and WTO's aspirations are identical in many areas as they both realise the benefits of trade liberalisation.¹¹⁵ COMESA Secretariat aims to enlighten and resolve issues which concern the WTO by providing technical back-up and analysis of WTO issues and proposing appropriate recommendations just like SADC Secretariat.¹¹⁶ COMESA aims to ensure consistency between the regional integration process and the WTO obligations of its member states.¹¹⁷ It has been pivotal in pursuing the regional agenda of promoting the visibility of trade matters.¹¹⁸

EAC was notified to WTO under the EC¹¹⁹ and General Agreement on Trade in Services (GATS) Article V.¹²⁰ This is different from SADC which was notified under Article XXIV, and but similar to COMESA where notification under the EC was considered. All EAC members are also WTO members. Although EAC has established both a customs union and a common

¹¹¹ SADC News 'WTO Reference Centre Opens At SADC Secretariat' (2013) available at <http://www.sadc.int/news-events/news/wto-reference-centre-opens-sadc-secretariat/> (accessed 21 January 2015).

¹¹² WTO 'Common Market of East and Southern Africa' <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=121> (accessed 21 January 2015).

¹¹³ COMESA 'History of COMESA - Key Challenges in the Global Economy' http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117&limitstart=1 (accessed 21 January 2015).

¹¹⁴ COMESA 'History of COMESA - Key Challenges in the Global Economy' http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117&limitstart=1 (accessed 21 January 2015).

¹¹⁵ See Common Market for Eastern and Southern Africa Ministerial Conference Second Session Geneva, 18 and 20 May 1998 available at https://www.wto.org/english/thewto_e/minist_e/min98_e/mc98_e/st74.pdf (accessed 18 February 2015).

¹¹⁶ Gallagher P *Managing the Challenges of WTO Participation: 45 Case Studies* (2005) 381.

¹¹⁷ Bilal S & Szepesi S (2015) 386.

¹¹⁸ Lui D & Van Seters J 'Review of the COMESA Aid for Trade Strategy' (2012) *European Centre for Development Policy Management Discussion Paper No. 130* 1.

¹¹⁹ [The Enabling Clause](#) is officially called the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' and was adopted under GATT in 1979 and enables developed members to give differential and more favourable treatment to developing countries. It is also the legal basis for [regional arrangements](#) among developing countries.

¹²⁰ See Generally GATS Article V.

market, the EAC member states are still represented individually in WTO negotiations.¹²¹ This means that they have less bargaining power and they are hampering on their potential powerful position to bring in WTO and other trade negotiations.¹²²

2.3 REGIONAL ECONOMIC INTEGRATION

Regional economic integration is concerned with the removal of trade barriers between members that belong to the same region.¹²³ Levels of economic integration are: FTA being the first step towards integration, customs union, common market and economic union being the last stage (full integration).¹²⁴ The next section will discuss regional economic integration in SADC, COMESA and EAC and determine which level of integration has been achieved by each REC. The three RECs are negotiating a Tripartite FTA, and the level of integration in the blocs is of importance because the more integrated a region is the greater the potential of increasing intra-regional trade.

2.3.1 Southern African Development Community

2.3.1.2 History and Background

SADC is a predecessor of the Southern African Development Coordination Conference (SADCC) which was established in 1980 in terms of the Lusaka Declaration.¹²⁵ The formation of SADCC was a result of wanting to reduce dependence on apartheid era and advance the cause of political liberation in Southern Africa;¹²⁶ in essence, the response was political and defensive.¹²⁷

¹²¹ Pact EAC 'Call for an 'EAC Bloc' in WTO Negotiations' available at <http://www.cuts-geneva.org/pacteac/publications/77-action-alerts/236-call-for-an-eac-bloc-in-wto-negotiations.html> (accessed 16 February 2015).

¹²² Pact EAC 'Call for an 'EAC Bloc' in WTO Negotiations' available at <http://www.cuts-geneva.org/pacteac/publications/77-action-alerts/236-call-for-an-eac-bloc-in-wto-negotiations.html> (accessed 16 February 2015).

¹²³ Trade barriers can be tariffs (taxes imposed on imports to a country), quotas (a limit to the amount of a product that can be imported) and border restrictions.

¹²⁴ Levels of Economic Integration available at <http://www.slideshare.net/sinhasum/regional-economic-integration-presentation> (accessed 13 April 2015).

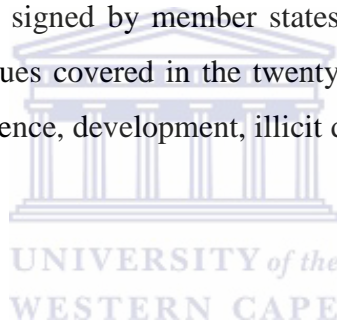
¹²⁵ Southern African Development Community 'History and Treaty' available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 21 January 2015).

¹²⁶ Southern African Development Community 'History and Treaty' available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 21 January 2015).

When the period of colonialism ended, the most logical path to follow was one headed towards stronger regional integration.¹²⁸ In other parts of the world the phenomenon of regionalism was already taking shape.¹²⁹ A transformation in the world of politics and economics was expected making firms within the RECs benefit from economies of scale provided by large markets and providing opportunities to be globally competitive.¹³⁰

For firms in Southern Africa, it became essential for a large regional market to be established so that they too could benefit from economies of scale.¹³¹ It was therefore inevitable that SADCC had to move away from its initial objectives. SADC¹³² replaced SADCC in August 1992 at a summit meeting when the participating heads of states signed the SADC treaty.¹³³ The main objective of SADC is to achieve deeper regional integration and eradicate poverty within the region.¹³⁴

A number of protocols have been signed by member states in their efforts to realise SADC's aims and objectives. The main issues covered in the twenty seven legally binding protocols in SADC deal with issues such as defence, development, illicit drug trade, free trade and movement



¹²⁷ Schoeman M 'From SADCC TO SADC And Beyond: The Politics Of Economic Integration' (2001) 1 available at http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf (accessed 21 January 2015).

¹²⁸ Corrie J 'ACP-EU JOINT ASSEMBLY Working Group on regional cooperation in the ACP countries' (1999) available at http://www.europarl.europa.eu/intcoop/acp/94_01/020_00_01_en.htm (accessed 21 January 2015).

¹²⁹ Watanabe A & Kikuchi T 'Japan's Perspective on APEC: Community or Association?' in Hellmann DC & Pyle KB (eds) *From APEC to Xanadu: Creating a Viable Community in the Post-war Pacific* (1997)129.

¹³⁰ Southern African Development Community 'Regional Indicative Strategic Development Plan' 2 available at http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (accessed 21 January 2015).

¹³¹ Southern African Development Community 'Regional Indicative Strategic Development Plan' 3 available at http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (accessed 21 January 2015).

¹³² The fifteen SADC member countries are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

¹³³ Southern African Development Community 'History and Treaty' available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 21 January 2015).

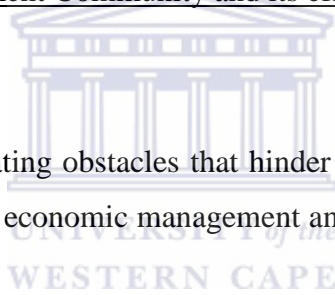
¹³⁴ Southern African Development Community 'SADC Protocols' available at <http://www.sadc.int/about-sadc/overview/sa-protocols/> (accessed 21 January 2015).

of people.¹³⁵ The most relevant protocol for purposes of this mini-thesis is the Protocol on Trade (1996)¹³⁶ as amended in 2000, 2007, and 2008.

Besides SADC's Protocol on Trade the Regional Indicative Strategic Development Plan (RISDP)¹³⁷ and the Strategic Indicative Plan for the Organ (SIPO)¹³⁸ are also of relevance as they are the guiding frameworks for realising deeper economic integration in SADC. RISDP was developed to enhance the efficiency and effectiveness of SADC while helping in the realisation of overarching goals.¹³⁹ SIPO is a distinct document from the RISDP. However, the documents were designed to complement each other.¹⁴⁰ Both RISDP and SIPO provide SADC member states with a consistent and comprehensive programme of long-term economic and social policies.¹⁴¹ They also provide insights of what is prioritised by SADC's institutions and approved economic and social policies within the organisation.¹⁴²

2.3.1.2 Southern African Development Community and its efforts in furthering economic integration

SADC has made efforts in eliminating obstacles that hinder integration which have contributed to the improvement of the region's economic management and performance through regional co-



¹³⁵ SADC has 27 Protocols, including those that have not yet entered into force see <http://www.sadc.int/about-sadc/overview/sa-protocols> (accessed 21 January 2015).

¹³⁶ SADC passed its Protocol on Trade in the Southern African Development Community (SADC) Region on 24th August 1996.

¹³⁷ In 1999 at a meeting of the SADC Heads of State and Government in Maputo, Mozambique decision was made to develop the RISDP.

¹³⁸ SIPO was launched in 2004 to maintain an environment that is conducive to accomplishing its objectives of socio-economic development, poverty eradication, and regional integration by focusing on political stability and security within the region. See Strategic Indicative Plan for the Organ (SIPO) available at <http://www.sadc.int/index.php?CID=203> (accessed 21 January 2015).

¹³⁹ SADC 'SADC: History' available at <http://globaledge.msu.edu/trade-blocs/sadc/history> (accessed 21 January 2015).

¹⁴⁰ SADC 'SADC: History' available at <http://globaledge.msu.edu/trade-blocs/sadc/history> (accessed 21 January 2015).

¹⁴¹ Southern African Development Community 'SADC – Member States, background, vision' available at <http://www.mikecampbellfoundation.com/page/sadc-member-states-background-vision> (accessed 21 January 2015).

¹⁴² Southern African Development Community 'SADC – Member States, background, vision' available at <http://www.mikecampbellfoundation.com/page/sadc-member-states-background-vision> (accessed 21 January 2015).

operation.¹⁴³ Trade liberalisation programme in SADC is premised on the implementation of the SADC Protocol on Trade as amended.¹⁴⁴ The protocol creates a number of obligations which are subject to dispute settlement mechanism (DSM) under article 32 of the SADC Treaty.¹⁴⁵

The liberalisation of trade in goods is supposed to be achieved in a period of eight years starting from 2008.¹⁴⁶ It is structured ‘along elimination of tariffs and non-tariff barriers (NTBs) under article 3.1; phased reduction and eventual elimination of import duties; elimination of export duties under article 5, adoption of policies and implementation of measures to eliminate all forms of existing NTBs and avoidance of the imposition of any new NTBs elimination of import restrictions’.¹⁴⁷

The initial view of the Protocol was establishing a FTA but this was not achieved as only 11 member states ratified the Protocol with its implementation starting only in September 2000.¹⁴⁸ The delay in the implementation was deemed by Mutai as ‘lack of the region’s preparedness to undertake trade liberalisation’.¹⁴⁹ SADC Free Trade Area (SADC FTA) was eventually launched in August 2008 when a phased programme of tariff reductions that had commenced in 2001 resulted in the attainment of minimum conditions for the FTA.¹⁵⁰

85 per cent of intra- SADC trade amongst the partner states attained zero duty.¹⁵¹ However, SADC is said to consider that maximum tariff liberalisation was only attained by January 2012 and it’s misleading since some exceptions exist with regard to sensitive products.¹⁵²

¹⁴³ Daniels M *Regional integration in the COMESA-EAC-SADC Tripartite Free Trade Area and the importance of infrastructure development in promoting trade and reducing poverty* (unpublished LLM thesis, University of the Western Cape, 2012) 21.

¹⁴⁴ SADC Protocol on Trade was signed by 11 member States and its implementation began in September 2000 with 85 per cent of all intra-SADC trade scheduled to be duty free by 2008.

¹⁴⁵ Munyuki E ‘An Assessment of the Impact of Economic Partnership Agreements (EPAs) on the SADC Regional Integration Process’ (2011) *African Trade Policy Centre Work in Progress* No. 87 9 (hereafter Munyuki E (2011)).

¹⁴⁶ Mutai HK ‘Regional trade integration strategies under SADC and the EAC: A comparative analysis’ (2011) 1 *SADC Journal of Law* 85 (hereafter Mutai HK (2011)).

¹⁴⁷ Munyuki E (2011) 10.

¹⁴⁸ Ahmed AK ‘An Analysis of Regional Integration in Southern Africa: A South African Perspective’ (2011) *Tralac Paper* 10.

¹⁴⁹ Mutai HK (2011) 84.

¹⁵⁰ Southern African Development Community ‘Free Trade Area’ available at <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> (accessed 02 February 2015).

¹⁵¹ Southern African Development Community ‘Free Trade Area’ available at <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> (accessed 02 February 2015).

SADC's effort to promote intra-regional trade has not been without challenges. Their decision to remove trade restrictions was not fully implemented as some countries did not eliminate tariffs as stipulated by the agreement.¹⁵³ Moreover tariffs have been reinstated by the countries who initially scrapped them.¹⁵⁴ SADC's intra-regional trade may have remained steady because emphasis has mainly been on elimination tariffs but addressing tariff barriers alone is not enough to enhance trade.¹⁵⁵ There is need to focus on development of the productive capacities necessary for trade and not dwell much on tariffs.¹⁵⁶ Most SADC countries fail to sustain their obligations on SADC Protocol since they rely mainly on tariffs for revenue.¹⁵⁷ Thus, focus should be put on other trade enhancers for them to achieve full integration.

Though opportunities exist for trade to grow across regional borders in SADC, policy constraints serve as hindrances.¹⁵⁸ The SADC Protocol on Trade under Article 14 and RIDSP provides for trade facilitation measures but borders between Southern African countries remain complicated and inefficient.¹⁵⁹

Besides establishing a FTA, SADC has had ambitious integration objectives but has not honoured some of its deadlines.¹⁶⁰ SADCs customs union should have been implemented by 2010. It is 'aspiring to create a common market by 2015, a monetary union by 2016 and a single currency by 2018'.¹⁶¹ However it lacks a clear plan on how achieve these objectives.¹⁶²

¹⁵² Sandrey R 'An Analysis of the SADC Free Trade Area' (2013) *Tralac* Working Paper No D13TB0120132 also Zimbabwe, Malawi and Tanzania have derogations that include allowances for a 25% import duty on sugar and paper products until 2015.

¹⁵³ Tafirenyika M 'Intra-Africa trade hurdles: beyond politics' 27 August (2014) available at <http://www.iol.co.za/business/opinion/intra-africa-trade-hurdles-beyond-politics-1.1741497#.VNn7U-aUc1Y> (accessed 02 February 2015) (hereafter Tafirenyika M (2014)).

¹⁵⁴ Tafirenyika M (2014).

¹⁵⁵ Gilson I 'Deepening Regional Integration to Eliminate the Fragmented Goods Market in Southern Africa' in Brenton P & Isik J (eds) *De-Fragmenting Africa: Deepening Regional Trade Integration in Goods and Services* (2012) 199 (hereafter Gilson I (2012)).

¹⁵⁶ United Nations Conference on Trade And Development *Economic Development In Africa United Nations Report 2013- Intra-African Trade: Unlocking Private Sector Dynamism* (2013) 02.

¹⁵⁷ Saurombe A (2011) 304.

¹⁵⁸ Gilson I (2012) 92.

¹⁵⁹ Gilson I (2012) 93.

¹⁶⁰ Peters C 'Is SADC losing track?' in Bösl A, Du Pisani A, Erasmus G, Hartzenberg T & Sandrey R (eds) *Monitoring regional integration in Southern Africa yearbook* (2010) Vol. 10 151.

¹⁶¹ Zamfir L 'The Tripartite Free Trade Area project: Integration in southern and eastern Africa' (2015) 6 available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551308/EPRS_BRI%282015%29551308_EN.pdf (accessed 12 May 2015) (hereafter Zamfir L (2015)).

¹⁶² Zamfir L (2015) 6.

2.3.2 Common Market for Eastern and Southern Africa

2.3.2.1 History and Background

COMESA replaced the former Preferential Trade Area in December 1994 which had existed around 1981.¹⁶³ It is regarded as one of the most prominent arrangements in Africa with its origins tracing back to the mid-1960s.¹⁶⁴ It was established as an organisation for free independent states which ‘agreed to co-operate in developing their natural and human resources for the good of all their people’.¹⁶⁵ It was created with a range of objectives that aid in realising its aims. COMESA’s vision is:

‘To be a fully integrated, internationally competitive regional economic community with high standards of living for its entire people ready to merge into an African Economic Community’.¹⁶⁶

COMESA strives for global co-operation in different aspects of development as evidenced by its commitment to merge into African Economic Community (AEC). At present COMESA have nineteen members.¹⁶⁷

2.3.2.2 Common Market for Eastern and Southern Africa and its efforts in furthering regional economic integration

The main focus of COMESA is to support regional integration by promoting cross-border trade and investment.¹⁶⁸ COMESA FTA was launched in 2000. At that time, only nine member states

¹⁶³ COMESA - Common Market for Eastern and Southern Africa available at <http://www.uneca.org/oria/pages/comesa-common-market-eastern-and-southern-africa-0> (accessed 12 May 2015).

¹⁶⁴ Daniels M *Regional integration in the COMESA-EAC-SADC Tripartite Free Trade Area and the importance of infrastructure development in promoting trade and reducing poverty* (unpublished LLM thesis, University of the Western Cape, 2012)12.

¹⁶⁵ COMESA ‘History of COMESA’ available at http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117 (accessed 03 February 2015).

¹⁶⁶ COMESA ‘Vision and Mission’ available at http://about.comesa.int/index.php?option=com_content&view=article&id=76&Itemid=114 (accessed 12 May 2015).

¹⁶⁷ COMESA has 19 members which Angola, Burundi, Comoros, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Rwanda, Swaziland, Uganda, Zambia, and Zimbabwe of which eleven members participate in a free trade area.

participated in FTA with the remaining members trading on preferential terms.¹⁶⁹ The number has now increased to 15 with Uganda having joined late last year.¹⁷⁰ The remaining countries have been urged to join but Ethiopia has been most reluctant fearing exposing its manufacturing sector to rival industries from Kenya and South Africa.¹⁷¹ Swaziland enjoys a special status since its exports enter COMESA members' markets duty free without it being a member of the FTA and without having to reciprocate.¹⁷²

COMESA's FTA is based on substantive transformation which takes place on the basis of the value addition rule unless stated otherwise.¹⁷³ This rule helped to ensure that FTA launch was not delayed by negotiations on rules of origin.¹⁷⁴ Unlike SADC, COMESA FTA has gone beyond tariff barriers to include the elimination of NTBs and other productive capacities that include services and capital.¹⁷⁵

COMESA Customs Union was launched at the Summit of the COMESA Authority of Heads of State and Government which took place in June 2009 in Zimbabwe.¹⁷⁶ Council Regulations Governing the COMESA Customs Union and the Common Market Customs Management Regulations are the two key legal instruments that govern the customs union.¹⁷⁷

The move towards a customs union was meant to advance economic integration since reduction in business costs was expected and border crossing made easy as documentation will be

¹⁶⁸ Ngwenya S 'Overview of the Common Market for Eastern and Southern Africa in 2013' in Mugunga A (ed) *Key Issues in Regional Integration Volume* (2013) 1.

¹⁶⁹ The nine members that implemented the FTA in 2000 are Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe

¹⁷⁰ Burundi, Comoros, Djibouti, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe participate in the FTA.

¹⁷¹ Odhiambo A 'Uganda, Ethiopia to join COMESA Free Trade Area' *The East African* 4 March (2014) available at <http://www.theeastafrican.co.ke/news/Uganda-and-Ethiopia-to-join-Comesa-free-trade-area/-/2558/2230370/-/y2wrj0/-/index.html> (accessed 13 April 2015)

¹⁷² Thieno L & Shinyekwa I 'Prospects and Challenges in the formation of the COMESA-EAC and SADC Tripartite Free Trade Area' (2011) *Economic Policy Research Centre Research Series No. 87* 8.

¹⁷³ African Development Bank *African Development Report 2014 Regional Integration for Inclusive Growth* (2014) 11 (hereafter African Development Bank (2014)).

¹⁷⁴ African Development Bank (2014) 11.

¹⁷⁵ Zamfir L (2015) 5.

¹⁷⁶ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (2010) 13.

¹⁷⁷ COMESA 'Customs Union has more Benefits' available at http://www.comesa.int/index.php?option=com_content&view=article&id=83:comesa-customs-union-has-more-benefits&catid=5:latest-news&Itemid=41 (accessed 09 February 2015)

streamlined and harmonised.¹⁷⁸ Further, the common external tariffs or the taxes that are charged on imports are structured in such a way that in areas where the region need protection taxes will be higher at 25 per cent on finished products and for areas that need capital good, inputs and raw materials the taxes will be zero rated.¹⁷⁹ Importantly, the industrial policies of the member states in the COMESA region will be harmonised in terms of affording protection for the industries to produce more effectively on the COMESA market.¹⁸⁰

When the customs union was launched members were given a transition period of three years to adhere to the proposed CET on which two more years were extended but to date not all members have implemented CET and no measures have been taken on how implementation should be done.¹⁸¹ In addition, members like Malawi reported that they experience serious challenges relating to sensitivity of some tariff lines to trade liberalisation.¹⁸² Complaints were based on the fact that trade liberalisation resulted in the loss of revenue.¹⁸³ The situation is similar to that of SADC which saw Mozambique and Zimbabwe reinstating tariffs that they had scrapped off under their FTA due to loss of revenue.¹⁸⁴ Resource constraints in the form of financial, human resource and material are also another major challenge in implementation and domestication of COMESA programmes.¹⁸⁵

Besides a FTA and a Customs Union, in 1992 COMESA adopted the COMESA Monetary Cooperation Programme which paved for the establishment of a Monetary Union in the year 2025. The COMESA Council of Ministers in 2006 changed the date to 2018. This programme has the following stages:

¹⁷⁸ COMESA 'Uganda reaffirms commitment to COMESA' available at http://www.comesa.int/attachments/article/85/ecomesa_newsletter_326.pdf 2 (accessed 09 February 2015)

¹⁷⁹ COMESA 'Uganda reaffirms commitment to COMESA' available at http://www.comesa.int/attachments/article/85/ecomesa_newsletter_326.pdf 2 (accessed 09 February 2015).

¹⁸⁰ COMESA 'Customs Union has more Benefits' available at http://www.comesa.int/index.php?option=com_content&view=article&id=83:comesa-customs-union-has-more-benefits&catid=5:latest-news&Itemid=41 (accessed 11 February 2015).

¹⁸¹ Zamfir L (2015) 5.

¹⁸² Mzale D 'Malawi submits final list of sensitive products to COMESA' *The Nation* 6 March (2015) available at <http://mwnation.com/malawi-submits-final-list-sensitive-products-comesa> (accessed 11 February 2015).

¹⁸³ Mzale D 'Malawi submits final list of sensitive products to COMESA' *The Nation* 6 March (2015) available at <http://mwnation.com/malawi-submits-final-list-sensitive-products-comesa> (accessed 11 February 2015). Malawi stated that a good component (35%) of Malawi's tax revenue comes from trade taxes (customs duties)

¹⁸⁴ Tafirenyika M (2014).

¹⁸⁵ Trademark Southern Africa 'COMESA: The Customs Union' available at <http://www.trademarksa.org/news/comesa-customs-union> (accessed 9 February 2015).

- ‘Stage one: consolidation of existing instruments of Monetary Co-operation and implementation of policy measures aimed at achieving macroeconomic convergence. To gauge progress towards this objective convergence criteria were formulated;
- stage two: introduction of limited currency convertibility and informal exchange rate union;
- stage three : formal exchange rate union and co-ordination of economic policies by a common monetary institution; and
- Stage four 2018: full Monetary Union involving the use of one common currency issued by a common Central Bank.’¹⁸⁶

Unlike SADC, COMESA has taken clear steps in how they plan to move towards a customs union.

Apart from COMESA, there are three other major regional integration groups in the East and Southern Africa region. Simultaneous membership of countries in more than one regional group is prevalent in Africa.¹⁸⁷ Overlapping membership hinders regional integration and places a huge burden on member states’ financial capacity stretching the administrative and technical capacities of member countries.¹⁸⁸ A country can have concurrent membership in a customs union and a different FTA but cannot concurrently be a member of different customs union since it cannot apply two different CET rates at the same time.¹⁸⁹

2.3.3 East African Community

2.3.3.1 History and Background

In East Africa regional cooperation goes back to pre-colonial times. The first moves towards cooperation between states can be traced back to 1919 when Kenya, Tanganyika and Uganda,

¹⁸⁶ COMESA ‘Monetary Co-operation in the COMESA Region’ available at http://programmes.comesa.int/index.php?option=com_content&view=article&id=85&Itemid=139 (accessed 11 February 2015).

¹⁸⁷ Dimaranan B & Mevel S ‘The COMESA Customs Union: A Quantitative Assessment’ (2008) 13 available at www.gtap.quecon.purdue.edu/resources/download/4048.pdf (accessed 11 February 2015) (hereafter Dimaranan B & Mevel S (2008)).

¹⁸⁸ Muneesamy L ‘Issues pertaining to deeper regional integration in Africa: Part 2 Implications and ability to address key developmental challenges’ (2010) *Tralac* Essay 7.

¹⁸⁹ Dimaranan B & Mevel S (2008) 13.

under British administration, formed a customs union.¹⁹⁰ Before the signing of the treaty establishing EAC in 1999¹⁹¹ there had been a try-out at regional integration in Africa which failed, and subsequently the EAC collapsed in 1977.¹⁹² However when it collapsed regional integration in East Africa had reached the highest level experienced in the world with the EAC encompassing both a fully-fledged customs union and a common market.¹⁹³

The EAC consists of six members. Its headquarters are in Arusha, Tanzania.¹⁹⁴ EAC adopted a four stage process in its regional integration efforts.¹⁹⁵ Many of the said stages have already been achieved despite the fact that the negotiation process may have taken longer. Countries in EAC have a couple of similarities because of their common location, climate and history.¹⁹⁶

2.3.3.2 East African Community and its efforts in furthering regional economic integration

EAC adopted a four stage process in its efforts of regional integration. Among those includes a customs union, common market, monetary union and ultimately a political federation.¹⁹⁷ Implementation of the customs union and common market has already begun.

EAC Customs Union is provided for under Chapter Eleven of the Treaty establishing the East African Community and established under the Protocol establishing the Customs Union.¹⁹⁸ It

¹⁹⁰ Reith S & Boltz M 'The East African Community Regional Integration Between Aspiration And Reality' (2011) *KAS INTERNATIONAL REPORTS* 92.

¹⁹¹ The Treaty for the Establishment of EAC was signed on the 30th of November 1999.

¹⁹² Mwapachu JV 'EAC: past, present and future' 10 available at <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.firstmagazine.com%2FDownloadSpecialistPublicationDetail.480.ashx&ei=3XaVOv9MYL4UuiKgNgO&usq=AFQjCNHbkmEWIduFJmYwflXGRjpTk4KP8w&bvm=bv.85464276,d.ZWU> (accessed 03 February 2015) (hereafter Mwapachu JV 'EAC: past, present and future').

¹⁹³ Mwapachu JV 'EAC: past, present and future' 10.

¹⁹⁴ Members of EAC are Republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania, and the Republic of Uganda see About EAC available at http://www.eac.int/index.php?option=com_content&view=article&id=1:welcome-to-eac&catid=34:body-text-area&Itemid=53 (accessed 03 February 2015).

¹⁹⁵ Article 5 (2) of the Treaty Establishing the East African Community stipulates that: 'Partner States undertake to establish among themselves and in accordance with the provisions of the Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.

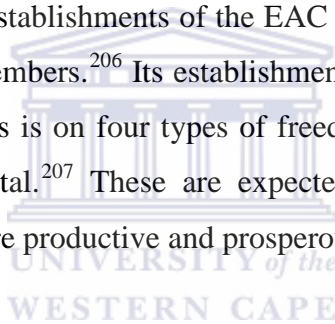
¹⁹⁶ Daniels M *Regional integration in the COMESA-EAC-SADC Tripartite Free Trade Area and the importance of infrastructure development in promoting trade and reducing poverty* (unpublished LLM thesis, University of the Western Cape, 2012) 16.

¹⁹⁷ Article 5 (2) of the Treaty Establishing the East African Community.

came into operation in 2005 and was intended to be part of the transitional stages towards the establishment of the proposed last two stages of gradual integration.¹⁹⁹ The reason for gradual integration is because due to the fact that at time of operation partner states were at different levels of development.²⁰⁰ The partner states agreed to eliminate customs duties on imports²⁰¹, NTBs²⁰² and apply a CET in respect of all goods imported into the region from foreign countries.²⁰³

The EAC customs union has created an environment where producers are at level because of uniform rules and this has supported the region to advance its economic development.²⁰⁴ Intra-EAC trade has grown since the coming into operation of the customs union though it continues to face challenges such as 'inefficient border posts, road blocks, and transit road weighbridges, long clearances at ports, corruption, and poor roads and railways infrastructure'.²⁰⁵

In July 2010 the Protocol on the Establishments of the EAC Common Market entered into force after it was ratified by all EAC members.²⁰⁶ Its establishment was in line with the provisions of the EAC Treaty and its main focus is on four types of freedoms namely the free movement of goods; labour; services; and capital.²⁰⁷ These are expected to significantly boost trade and investments making the region more productive and prosperous.²⁰⁸



¹⁹⁸ Gaitta I, Anjarwalla & Khanna 'Going Regional: The EAC Customs Union' (2010) 1 available at <http://www.africalegalnetwork.com/wp-content/uploads/2012/10/The-EAC-Customs-Union-Ian-Gaitta-Anjarwalla-Khanna-ALN-Insight-November-2010.pdf> (accessed 04 February 2015) (hereafter Gaitta et al (2010)).

¹⁹⁹ Gaitta et al (2010) 1.

²⁰⁰ Mutai HK (2011) 85.

²⁰¹ Article 2 (4) (a) of the Protocol On The Establishment Of The East African Customs Union.

²⁰² Article 2 (4) (b) of the Protocol On The Establishment Of The East African Customs Union

²⁰³ Article 2 (4) (c) of the Protocol On The Establishment Of The East African Customs Union

²⁰⁴ EAC 'Benefits of a Customs Union' available at

http://www.eac.int/customs/index.php?option=com_content&view=article&id=21&Itemid=91 (accessed 13 April 2015).

²⁰⁵ Mwapachu JV 'EAC: past, present and future' 12.

²⁰⁶ Ssekalo E (ed) 'Common market two years down the road' (2012) 3

http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=301&Itemid=159 (accessed 13 April 2015).

²⁰⁷ EAC 'EAC Common Market Overview' available at

http://www.eac.int/commonmarket/index.php?option=com_content&view=article&id=80&Itemid=117 (accessed 04 February 2015).

²⁰⁸ EAC 'EAC Common Market Overview' available at

http://www.eac.int/commonmarket/index.php?option=com_content&view=article&id=80&Itemid=117 (accessed 04 February 2015).

Article 5 of Protocol on the Establishments of the EAC Common Market provides that the member states shall eliminate tariff, non-tariff and technical barriers to trade; harmonise and mutually recognise standards and implement a common trade policy.²⁰⁹ It is strongly argued that the successful implementation of this article will foster deeper economic integration in the region as it commits to addresses all barriers that affect integration.

EAC is the most successful regional economic integration compared to SADC and COMESA because it has efficient markets and sound institutions and implementation of its regional programmes is more advanced.²¹⁰

2.4 CONCLUSION

This chapter has highlighted the concept of regional integration including its benefits, disadvantages and the issues surrounding regional integration on the African continent. It has also shown that trade in the WTO is based upon rules of non-discrimination which are MFN and NT.²¹¹ There are exceptions to MFN and NT namely; Article XXIV and EC. These exceptions give provision to WTO members to trade on preferential terms which depart from rules of non-discrimination.²¹² It has discussed that RTAs should be notified to the WTO and the agreements should not lead to restrictive trade.²¹³ The discussion noted that regional integration, if not abused, may compliment rather than destroy the multilateral system.

This chapter further highlighted that a number of institutional issues in the design of RTAs may affect their capacity to act effectively. Modern RTAs tend to go far beyond tariff-cutting exercises since they provide for increasingly complex regulations governing intra-trade.²¹⁴ In

²⁰⁹ Article 5 of the Protocol on the Establishments of the EAC Common Market.

²¹⁰ Sharma S 'A perspective on economic integration in Africa - Part 1' (2013) available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1231:a-perspective-on-economic-integration-in-africa-part-1-&catid=87:african-finance-a-economy&Itemid=294 (accessed 13 April 2015).

²¹¹ Van den Bossche P & Zdouc W (2013) 13.

²¹² Exceptions to WTO Rules: General Exceptions, Security Exceptions, Regional Trade Agreements (RTAs), Balance-of-Payments (BOPs) & Waivers 2 available at https://ecampus.wto.org/admin/files/Course_382/Module_537/ModuleDocuments/eWTO-M8-R1-E.pdf (accessed 10 April 2015).

²¹³ World Trade Organisation 'Regional trade agreements and preferential trade arrangements' available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (accessed 18 December 2014).

²¹⁴ Scope of RTAs available at http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (accessed 08 February 2015).

addition, the chapter commented that COMESA, SADC and EAC have made efforts in furthering economic integration by adopting policies that are favourable to intra-regional trade with EAC being the most advanced.²¹⁵ However some of the policies are over ambitious and the lack of commitment to implement policies have hampered the efforts of full regional economic integration in groupings such as SADC and COMESA.²¹⁶ It has also underlined the challenge of overlapping membership which, at one point, a country is obliged to fulfil different obligations in line with different RTAs.²¹⁷ In many circumstances it may prove to be burdensome which then leads to so some countries not adopting certain protocols which hinders full integration.

The chapter has also pointed out that though COMESA-EAC and SADC are committed to working with WTO the level of integration in Africa is not yet advanced. This places huge vulnerability on the continent. Upon crisis on major markets, Africa will most likely suffer more than other continents because of low intra trade.²¹⁸ It is now essential to advance regional economic integration so that it fosters the increase of intra-regional trade in Africa.

The basis upon which the Tripartite FTA is to be built upon is regional economic integration. The Tripartite FTA is a move towards stronger regional economic integration. This happens when cooperation among members will be in all fields of economic development enhanced by increased competitive advantage of enterprises in the regional market. With this background in mind, the next chapter focuses on the proposed Tripartite FTA. Focus will be on the proposed legal and institutional structures and the challenges and benefits Tripartite FTA will likely encounter in furthering regional co-operation and in turn increase intra-African trade.

²¹⁵ EAC has achieved two stages that are part of its four stage process of integration.

²¹⁶ Khandelwal P 'COMESA and SADC: Prospects and Challenges for Regional Trade Integration' (2004) *IMF Working Paper* WP/04/227 15.

²¹⁷ Dimaranan B & Mevel S (2008) 13.

²¹⁸ Africa's hopeful economies: The sun shines bright (2011) available at <http://www.economist.com/node/2154100> (13 April 2015).

CHAPTER 3

DEEPER REGIONAL ECONOMIC INTEGRATION A TOOL FOR FURTHERING INTRA- AFRICAN TRADE

3.1 INTRODUCTION

The previous chapter has highlighted the fact that regional integration and intra-regional trade are not new concepts to Africa.²¹⁹ African leaders have been advised by the World Bank to further regional integration by expanding access to trade finance and reducing trade restrictions.²²⁰ They have however sought to accelerate regional integration process as envisaged by the 1991 Abuja Treaty.²²¹ They agreed on the set up of an African Economic Community (AEC) through a gradual process of coordinating, harmonising and progressively integrating the activities of regional economic communities (RECs).²²² Chapter 2 discussed some of these RECs activities on economic integration namely that of Common Market of Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC).

The establishment of the AEC is to take place over a period of 34 years, subdivided into six stages of variable duration.²²³ During the different stages focus will be on integrating different sectors such as transport and communication, industry, agriculture, energy, education, science and technology, trade, money and finance.²²⁴ The third stage in the establishment of AEC ought to be completed in 2017 calls for the establishment of a free trade area (FTA) and customs union in each regional bloc.²²⁵ As building blocs of the AEC, COMESA, EAC and SADC are currently

²¹⁹ See Generally 2.3 Regional Economic Integration.

²²⁰ Tafirenyika M 'Intra-Africa trade hurdles: beyond politics' 27 August (2014) available at <http://www.iol.co.za/business/opinion/intra-africa-trade-hurdles-beyond-politics-1.1741497#.VNn7U-aUc1Y> (accessed 25 February 2015).

²²¹ United Nations Conference On Trade And Development (UNCTAD) *World Investment Report 2014 Investing In The SDGs: An Action Plan* (2014) 39 (hereafter UNCTAD (2014)).

²²² UNCTAD (2014) 39.

²²³ African Union Commission *Third Publication African Union Commission July 2011* (2011) 25 (hereafter African Union Commission (2011)).

²²⁴ African Union Commission (2011) 24.

²²⁵ African Union Commission (2011) 25.

negotiating a Tripartite FTA in line with the third stage in the establishment of the AEC which is expected to be in place in May 2015.²²⁶

In chapter 2 a brief discussion on why COMESA, EAC and SADC have failed to achieve their desired economic integration was made.²²⁷ These reasons include but not limited to lack of complementarity of member countries economic structures,²²⁸ political will to ensure regional agreements are incorporated into national plans.²²⁹ The national and regional institutions are weak and there is unbalanced allocation of resources highly tilted in favour of conflict related issues as against economic cooperation and integration issues.²³⁰ Moreover there is inadequate infrastructure to support integration initiatives,²³¹ public revenue loss due to tariff reduction and lack of assurance of market integration benefits to individual member countries.²³²

Amongst the many reasons that attribute to the failure of RECs to achieve desired integration, the one which stands out deals with the lack of coordination and harmonisation of economic policies.²³³ This may be attributed to the multiplicity of schemes and overlapping memberships and mandates.²³⁴ Membership of regional integration in Africa has become so rampant resulting in each country in Africa being a member of more than one REC.²³⁵ Even if Africa has this highest concentration of economic integration and cooperation arrangements, its intra-regional trade still ranks amongst the lowest.²³⁶

²²⁶ Coast Week 'Tripartite Africa free trade zone now preparing for launch in May' (2015) available at <http://www.coastweek.com/3808-Tripartite-Africa-free-trade-zone-prepares-for-launch-in-May.htm> (accessed 22 April 2015).

²²⁷ See Generally 2.3 Regional Economic Integration.

²²⁸ Gathii JT *African Regional Trade Agreements as Legal Regimes* (2011) 207.

²²⁹ Sako S 'Challenges Facing Africa's Regional Economic Communities In Capacity Building' (2006) *African Capacity Building Foundation Occasional Paper No 6 5* (hereafter Sako S (2006)).

²³⁰ Sako S (2006) 7.

²³¹ See generally Ndulu, BJ 'Infrastructure, regional integration and growth in sub-Saharan Africa: dealing with the disadvantages of geography and sovereign fragmentation' (2006) 15.suppl 2 *Journal of African Economies* 212-244.

²³² See generally 2.3.1.2 Southern African Development Community and its efforts in furthering economic integration.

²³³ Sako S (2006) 5.

²³⁴ See generally 2.3.2.2 Common Market for Eastern and Southern Africa and its efforts in furthering regional economic integration.

²³⁵ Twenty-seven of the fifty-three Member States of the AU belong to two or more integration schemes.

²³⁶ See Generally United Nations Reports on Regional Integration in Africa.

Africa can use intra-regional trade to free itself from poverty and provide productive employment.²³⁷ Enhancing intra-African trade should help promote specialisation amongst African countries and help achieve the desired diversification that allows for competitiveness.²³⁸ As part of their collective development and transformation strategy, African countries need to aggressively pursue comprehensive and harmonised regional trade policies.²³⁹ There is a need to enhance the level of intra-African trade so that it can act as a development tool for regional integration in Africa as it does in regions such as the European Union.²⁴⁰

The first part of the chapter will discuss what the Tripartite FTA is. The second part will consider how the legal and institutional structure the Tripartite FTA should take for the effective achievement of deeper integration and boosting intra-African trade. To assess deeper economic integration this chapter will discuss the key objectives of the Tripartite FTA specifically liberalisation of trade in goods. The chapter will also discuss the possible opportunities and challenges that the Tripartite FTA is likely to encounter in furthering regional economic integration which in turn boosts intra-African trade.

3.2 COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA-EAST AFRICAN COMMUNITY SOUTHERN AFRICAN DEVELOPMENT COMMUNITY-TRIPARTITE FREE TRADE AREA

3.2.1 Background

The decision to develop a Tripartite FTA can be traced back to 2004 when the Chairpersons of the COMESA Authority and the SADC Summit met to discuss foregoing challenges in regional

²³⁷ Mashayekhi M, Peters R & Vanzetti D 'Regional integration and employment effects in SADC' in Lippoldt D (ed) *Policy priorities for international trade and jobs* (2012) 388 (hereafter Lippoldt D (2012)).

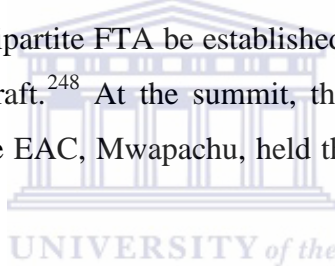
²³⁸ African Trade Forum 'Can Africa Trade Itself Out of Poverty? Accelerating Intra-African Trade and Enhancing Africa's participation in Global Trade' (2011) 3 available at http://www.uneca.org/sites/default/files/page_attachments/atf2011-background-note.pdf (accessed 26 February 2015).

²³⁹ AU Echo '19th African Union Summit To Focus On Boosting Intra-African Trade' (2012) 1 available at <http://summits.au.int/ar/sites/default/files/AU%20Echo%20issue%20July%209%202012.pdf> (accessed 26 February 2015).

²⁴⁰ African Union Commission *Boosting Intra-African Trade Issues Paper* (2011) 2.

integration programmes.²⁴¹ They agreed on establishing the COMESA-SADC Task Force at the Secretariat level to deliberate on coordination of programmes within COMESA and SADC.²⁴² EAC was co-opted in 2005 leading to the materialisation of the Tripartite Task Force.²⁴³ Since 2005 the Tripartite Task Force has met, under the guidance of the Chief Executive Officers (CEOs), to forge collaboration focusing on harmonisation of programmes in different areas trade, customs and infrastructure development.²⁴⁴ After different meetings since 2005 the task force identified the need to effectively own the tripartite process.²⁴⁵ In 2007, it then recommended that a Tripartite Summit of Heads of State and Government of COMESA, EAC and SADC be summoned to provide political certification and direction to how cooperation and harmonisation should happen.²⁴⁶ The recommendation was accepted by COMESA in May 2007, EAC in June 2008 and SADC in August 2008.²⁴⁷

The first Tripartite Summit was convened in October 2008 in Kampala. Heads of states of three RECs decided and directed that Tripartite FTA be established and they also signed the Tripartite Free Trade Agreement (TFTA) draft.²⁴⁸ At the summit, the chairman of The Tripartite Task Force and Secretary General of the EAC, Mwapachu, held that there are a lot of benefits which



²⁴¹ COMESA-EAC-SADC Tripartite Framework: State Of Play 'Report By The Chair Of The Tripartite Task Force February 2011' (2011) 1 available at http://www.eac.int/index.php?option=com_content&id=581&Itemid=201 (accessed 27 February 2015).

²⁴² COMESA-EAC-SADC Tripartite Framework: State Of Play 'Report By The Chair Of The Tripartite Task Force July, 2010' (2010) available at http://www.eac.int/index.php?option=com_content&id=474&Itemid=68 (accessed 27 February 2015).

²⁴³ First COMESA-EAC-SADC Tripartite Summit 20th October 2008 'Vision: Towards A Single Market Theme: Deepening COMESA-EAC-SADC Integration' (2008) 3 available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.eac.int%2Ftrade%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D10%26Itemid%3D124&ei=JVo_VcLTDovB7AbP-ICwCA&usq=AFQjCNGSjRERZjzOJtxTyBJCqQ4m4TzEwg&bvm=bv.91665533,d.ZWU (accessed 26 February 2015) (hereafter First COMESA-EAC-SADC Tripartite Summit (2008)).

²⁴⁴ First COMESA-EAC-SADC Tripartite Summit (2008) 3.

²⁴⁵ COMESA-EAC-SADC Tripartite Framework: State Of Play 'Report By The Chair Of The Tripartite Task Force July, 2010' (2010) available at http://www.eac.int/index.php?option=com_content&id=474&Itemid=68 (accessed 27 February 2015).

²⁴⁶ Southern African Customs Union *Analysis Of Implications Of The Proposed Establishment Of A Tripartite FTA Between COMESA, SADC And The EAC On SACU* (2010) 3

²⁴⁷ The recommendation was accepted by COMESA Summit in May 2007, EAC Summit in Kigali in June 2008 and SADC Summit in August 2008. The Tripartite Summit was held on 22 October 2008 in Kampala, Uganda. See also http://www.eac.int/index.php?option=com_content&id=581&Itemid=201.

²⁴⁸ East African Business Council 'Progress Report on the EAC COMESA EAC- SADC Tripartite Negotiations' (2013) 1 available at http://www.eabc.info/uploads/progress_report.pdf accessed 28 May 2015).

can be secured from the Tripartite FTA. He placed emphasis on its ability to assist addressing the current challenges resulting from membership overlap.²⁴⁹

The Tripartite FTA aims to establish and promote cooperation in all trade-related areas among Tripartite Member States;²⁵⁰ and build competitiveness at the regional, industry and enterprise level so as to promote beneficial utilisation of regional and global market and investment opportunities and beneficial participation in globalisation.²⁵¹ It aims at adopting and implementing policies in all sectors of economic and social life that promote and consolidate an equitable society and social justice.²⁵²

The Tripartite FTA has prioritised programmes in the areas of trade, customs and infrastructure development and seeks to harmonise policies and programmes of the three RECs.²⁵³ Tripartite Strategy has three main pillars namely; market integration; infrastructure development; and industrial development.²⁵⁴ The adoption of these pillars is on the basis that they will be key to addressing market constraints in Africa. The same will also increase investment flows, whilst enhancing competitiveness of firms and developing cross-regional infrastructure.²⁵⁵

Though it is expected that the RECs trading arrangements will co-exist with the Tripartite FTA, the TFTA will be the main instrument for fast-tracking liberalisation and furthering economic integration throughout southern and eastern Africa.²⁵⁶ Therefore in order to comprehend the ambitious objectives of the Tripartite FTA lessons need to be drawn from the RECs and address the issues that made the RECs not to fully achieve the objectives in the respective agreements.

²⁴⁹ COMESA-EAC-SADC Tripartite 'Focal area 1: The Tripartite Free Trade Area (FTA)' available at http://www.comesa-eac-sadc-tripartite.org/intervention/focal_areas/tripartite_fta (accessed 03 March 2014).

²⁵⁰ Article 4 (5) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁵¹ Article 4 (7) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁵² Article 4 (8) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁵³ COMESA-EAC-SADC Tripartite 'Home' available at <http://www.comesa-eac-sadc-tripartite.org/> (accessed 08 March 2015).

²⁵⁴ Southern African Development Community 'Tripartite Cooperation' available at <http://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation/> (accessed 08 March 2015).

²⁵⁵ Southern African Development Community 'Tripartite Cooperation' available at <http://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation/> (accessed 08 March 2015).

²⁵⁶ Aid for Trade Case Story 'Negotiating the COMESA-EAC-SADC Tripartite FT' (2011) 2 available at <http://www.oecd.org/aidfortrade/47407301.pdf> (accessed 08 March 2015).

The official launch of negotiations on the Tripartite FTA began during the Second Tripartite Summit which was held in South Africa in 2011.²⁵⁷ Among what was agreed upon were the negotiating principles, institutional framework, roadmap and timelines for establishing the Tripartite FTA.²⁵⁸ An institutional framework was laid down to guide the task force in creating a roadmap for deeper integration. This creates an effective process where benefits of the Tripartite FTA will accrue.

3.2.2 Institutional framework of the Tripartite Free Trade Agreement

The Tripartite FTA initiative is a pivotal step to achieving the AEC as intended in the Lagos Plan of Action and the Final Act of Lagos of 1980.²⁵⁹ There is need for it to be supported by a robust institutional framework than is currently in place in the RECs because it is more ambitious than the RECs.²⁶⁰ The term institution is referred by some analysts as to mean ‘solely formal bureaucratic groups with a legal charter whilst other analysts refer to it as formal rules and procedures used in collective governance’.²⁶¹ In both definitions it is clear that the structure of an organisation should be governed by a set of rules.

Important lessons should be drawn from other Africa RTAs in considering what the institutional framework should be like so that it can contribute immensely to the Tripartite FTA being successful.²⁶² Currently the record is marked by grand schemes, weak legal and institutional systems that do not promote an effective rules-based era of regional integration, and

²⁵⁷ Communiqué of the Second COMESA-EAC-SADC Tripartite Summit ‘Vision: Towards A Single Market Theme: Deepening COMESA-EAC-SADC Integration’ (2011) 1 available at <http://www.comesa-eac-sadc-tripartite.org/sites/default/files/documents/Communique%20of%20the%202nd%20Tripartite%20Summit%20-%20English%20-%202012.06.2011.pdf> (accessed 28 April 2015) (hereafter Communiqué of the Second COMESA-EAC-SADC Tripartite Summit (2011)).

²⁵⁸ Trade Mark Southern Africa News ‘COMESA-EAC-SADC Free Trade Area launched’ (2011) available at http://www.trademarksa.org/about_us/programme_news/comesa-eac-sadc-free-trade-area-launched (accessed 28 April 2015).

²⁵⁹ Communiqué of the Second COMESA-EAC-SADC Tripartite Summit (2011) 1.

²⁶⁰ Daniels M *Regional integration in the COMESA-EAC-SADC Tripartite Free Trade Area and the importance of infrastructure development in promoting trade and reducing poverty* (unpublished LLM thesis, University of the Western Cape, 2012) 32.

²⁶¹ Henning CR ‘Regional economic integration and institution building’ in McKay J, Amerngol MA & Georges P *Regional Economic Integration In A Global Framework* (2005) 82.

²⁶² Hartzenberg T *Regional integration in Africa* (2011) *World Trade Organisation Economic Research and Statistics Division Staff Working Paper ERSD-2011-14 20* (hereafter Hartzenberg T (2011)).

implementation records that do not demonstrate serious commitment.²⁶³ It is therefore submitted that a permanent institutional and legal framework should be established for the Tripartite FTA to be able to achieve its ambitious integration programmes. These structures should be in place after the Tripartite FTA comes into place; currently it has not yet attained a formal institutional status.

Though the Tripartite FTA does not have formal institution status it has a governing structure and its negotiations were conducted under the following structures:

- i. 'The Tripartite Summit – as the highest policy making body;
- ii. The Council of Ministers – as the organ mandated to oversee and guide the negotiations;
- iii. The Tripartite Sectoral Ministerial Committee on Trade, Finance, Customs, Economic Matters and Home/Internal Affairs – as the organ to manage and supervise the negotiations;
- iv. The Tripartite Committee of Senior Officials (TCSO) – as a higher level negotiating structure; and
- v. The Tripartite Trade Negotiations Forum (TTNF) – as the negotiating body. The TTNF created four Technical Working Groups (TWGs) to assist with the technical work in the negotiations.²⁶⁴
- vi. The Tripartite Task Force is made up of the Heads of Secretariats of the three RECs; they provide technical and administrative support and coordinate the negotiations.²⁶⁵

It is however not clear whether these structures will form the permanent formal structures of the Tripartite FTA after it comes into place. In the above definition of institutional framework it is

²⁶³ Hartzenberg T (2011) 20.

²⁶⁴ Tralac News 'Update on the Tripartite Free Trade Area Negotiations: Statement by Mr Sindiso Ngwenya, Secretary General of COMESA' (2015) available at <http://www.tralac.org/news/article/6974-update-on-the-tripartite-free-trade-area-negotiations-statement-by-mr-sindiso-ngwenya-secretary-general-of-comesa.html> (accessed 04 March 2015).

²⁶⁵ Oxfam 'A briefing summary for small businesses and informal traders' March (2013) 7 available at <http://www.business-swaziland.com/new/images/fta%20summary%20final.pdf> (accessed 04 March 2015).

clear that institutional framework and legal framework coexist, with the one not function without the other.

3.2.3 Suggested Legal framework of the Tripartite Free Trade Area

The term suggested points out to the fact that the Tripartite FTA does not have legal status as yet. It is expected to be in place in end of May 2015 and for it to be classified as a proper legal system Oppong suggests that four elements should be present. These are ‘rules of conduct which regulate behaviour and activities within the legal system,’ necessary institutions to which rules apply to, basis of rules and finally implementation and enforceability.²⁶⁶

The rules of conduct constitute an essential element that fosters trade and investment growth as they will encourage the private sector to participate in commercial endeavours.²⁶⁷ Where necessary, institutions of which rules apply is concerned Article 2 of TFTA draft only make available formation of a FTA among the three RECs negotiating the Tripartite FTA.²⁶⁸ It does not give information on whether the Tripartite FTA will be a separate legal entity as in the case of COMESA, EAC and SADC.²⁶⁹ There is need to simplify this aspect because if the Tripartite FTA is separate legal entity there is need for it to be notified to WTO using either Article XXIV of General Agreement on Trade and Tariffs (GATT) or Enabling Clause.²⁷⁰

The last aspect for the Tripartite FTA to be classified as a legal system has to do with implementation and this call for a dispute settlement mechanism (DSM)

3.2.3.1 Dispute Settlement Mechanism

Economic integration arrangement between nations may not fully integrate without the creation of an effective DSM. This is because in any trading arrangement, a possibility for potential disputes between the trading partners exists; hence if there is no good DSM some disputes can

²⁶⁶ Oppong RF *Legal aspects of economic integration in Africa* (2011) 37.

²⁶⁷ Erasmus G ‘Legal and Institutional Aspects of the Tripartite Free Trade Area: the need for effective implementation in Hartzenberg T (ed) *The Tripartite Free Trade Area: Towards A New African Integration Paradim?* (2012) 34 (hereafter Erasmus G (2012)).

²⁶⁸ Article 2 of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁶⁹ Erasmus G (2012) 13.

²⁷⁰ Erasmus G (2012) 13.

threaten the continued operation of a trading arrangement.²⁷¹ Therefore there is a necessity that the Tripartite FTA should put in place an effective DSM so that full integration takes place.

Chapter two pointed out that 20 out of 26 states involved in the Tripartite FTA are WTO members.²⁷² The Tripartite FTA may learn from WTO's DSM which has developed over time to become more efficient. The dispute settlement has been designed as a means of settling disputes; making the system effective since the rules can be implemented allowing the systems to flourish from being secure and probable.²⁷³

Currently Article 38 of the TFTA draft and the Annex on Dispute Settlement provides for a DSM which is different from the DSMs found in the RECs which have regional courts.²⁷⁴ The one provided for is similar to that of WTO and aim should be directed by the Tripartite FTA to create an effective DSM just like that of WTO. Under Article 38 of the TFTA draft member states are encouraged to agree upon the interpretation and application of the TFTA, and in so doing make effort, through co-operation and consultation, to reach a commonly satisfactory solution where interpretation is concerned.²⁷⁵ In instances where there is failure to resolve a dispute amicably, members shall have recourse to the Tripartite Dispute Settlement Mechanism.²⁷⁶

To date, no procedures are specified or considered for this mechanism. These need to be specified at the end of negotiations because an effective DSM should be clear with regards to adjective law. The TFTA draft provides that whenever possible the settlement of any dispute between member states implies exclusion of a measure not compatible with the provisions of the

²⁷¹ Evolution of the COMESA-EAC SADC Law International Essay available at <http://www.uniassignment.com/essay-samples/law/evolution-of-the-comesa-eac-sadc-law-international-essay.php> (accessed 05 March 2015).

²⁷² Angola, Botswana, Burundi, Democratic Republic of Congo, Djibouti, Egypt, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe are all WTO Members. Libya on 27 July 2004 was given green light to negotiate WTO membership, Sudan, Eritrea, Ethiopia Comoros, are not WTO members. Seychelles accession was approved on 10 December 2014 by The General Council but will only become a WTO Member after formally notifying the WTO that it has ratified its Accession Protocol.

²⁷³ World Trade Organization *Understanding the WTO* 5 ed (2015) 55.

²⁷⁴ The Tripartite Free Trade Area Dispute Settlement Mechanism – A need for further analysis available at <http://www.tralac.org/discussions/article/5324-the-tripartite-free-trade-area-dispute-settlement-mechanism-a-need-for-further-analysis.html> (accessed 05 March 2015).

²⁷⁵ Article 38 of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁷⁶ TradeMark Southern Africa (TMSA) 'Training Module on Dispute Settlement Mechanisms for Trade Agreements' 17 available at <http://pages.au.int/sites/default/files/Dispute%20Settlement%20Training%20Module.pdf> (accessed 05 March 2014).

TFTA or resulting in nullification or impairment of a benefit under such provision.²⁷⁷ Where there is inconsistency or a conflict between the TFTA and the Treaties and instruments of COMESA, EAC and SADC, the TFTA prevails to the extent of the inconsistency or conflict.²⁷⁸ This gives the TFTA an upper hand where there are inconsistencies between the TFTA and the three RECs.

The draft provides that, disputes regarding the interpretation and application of the TFTA shall be settled in accordance with the Annex 14 on the Tripartite Dispute Settlement Mechanism, but only as a last resort.²⁷⁹ However the TFTA draft does not exclusively claim jurisdiction where a dispute arises amongst its members. There may be danger in such because when a decision has been arrived at and one member is not satisfied that member may initiate the proceeding in another body.²⁸⁰

In order to avoid such a situation, the TFTA may recognise the doctrine of *Res judicata*. The doctrine prevents a litigant from getting yet another day in court after the first lawsuit is concluded by giving a different reason than they gave in the first for recovery of damages for the same invasion of his right.²⁸¹

With regards to disputes between a Tripartite Member State and a third country, the draft provides that the WTO Dispute Settlement Understanding may apply as appropriate where the parties are Tripartite Members of the World Trade Organisation.²⁸² Thus the TFTA will not apply where member states are involved in a conflict with countries that are not part of the Tripartite FTA.

As said above, the DSM of the Tripartite FTA should try to emanate that of the WTO and most importantly Tripartite FTA members should not invoke sovereignty when it comes to escaping

²⁷⁷ Article 38 (2) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁷⁸ Article 38 (4) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁷⁹ Article 38 (3) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010) *NB This draft says Annex 13 but it is now Annex 14.

²⁸⁰ Civil Procedure Res Judicata (Former Judgements) available at <http://www.west.net/~smith/resjud.htm> (accessed 06 March 2015).

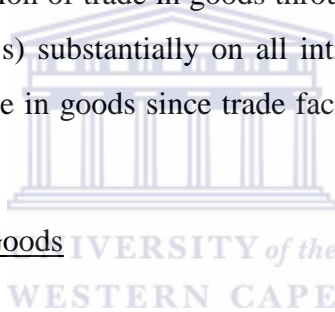
²⁸¹ Civil Procedure Res Judicata (Former Judgements) available at <http://www.west.net/~smith/resjud.htm> (accessed 06 March 2015).

²⁸² Article 3 TFTA, Dispute Settlement Mechanism (Annex 14).

from conforming to a decision reached by the dispute panel. The issues of sovereignty may undermine the Tripartite FTA and integration may be hindered if members are not willing to implement their obligations. If a dispute system is flawed the unfortunate fate of the SADC Tribunal will be a constant reminder especially if the consensus principle applies to crucial decisions.²⁸³ The Tripartite FTA should aim at not repeating the same mistakes.

3.2.4 Key Objectives of the Tripartite Free Trade Area

This chapter has so far focused on the background of Tripartite FTA and the suggested framework. The focus will now turn to objectives and principle guiding the Tripartite FTA negotiations. Article 3 of the draft contains general objectives while Article 4 contains specific objectives that aid in realising Article 3. Among the objectives of the Tripartite FTA are the issues of liberalisation and facilitation of trade in goods through among others the elimination of tariff and non-tariff barriers (NTBs) substantially on all intra-RECs trade.²⁸⁴ This section will only focus on liberalisation of trade in goods since trade facilitation will form the discussion of chapter 4.



3.2.4.1 Liberalisation of Trade in Goods

Inclusion of liberalisation of trade in goods is a crucial aspect of any FTA. There is always duty and quota free movement of goods and elimination of import duties and NTBs in the final TFTA would be necessary and unavoidable.²⁸⁵

3.2.4.2 Elimination of Import duties

Elimination of Import duties is included in Article 8 of the TFTA draft. It states that ‘the elimination on all import duties and equivalent charges of effect shall be applied on goods

²⁸³ Jere K ‘The Tripartite Free Trade Area Dispute Settlement Mechanism – A need for further analysis’ (2013) available at <http://www.tralac.org/discussions/article/5324-the-tripartite-free-trade-area-dispute-settlement-mechanism-a-need-for-further-analysis.html> (accessed 06 March 2015).

²⁸⁴ Sharma S ‘A perspective on economic integration in Africa - Part 2’ (2013) available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1263:a-perspective-on-economic-integration-in-africa-part-2-&catid=87:african-finance-a-economy&Itemid=294 (accessed 07 March 2015).

²⁸⁵ Shayanowako P ‘Towards a COMESA, EAC and SADC tripartite free trade area’ (2011) *Trade and Development Studies* Issue No. 4013 (hereafter Shayanowako P (2011)).

originating in the Tripartite region in accordance with provisions of paragraph 3.²⁸⁶ It further prohibits the imposition of new import duties or equivalent charges as provided for under TFTA.²⁸⁷ Article 8(3) of the draft provides how and when elimination of import duties and charges of equivalent be effected in accordance with schedules in Annex 1 of the agreement.²⁸⁸

These provisions are important because costs of obtaining essential raw materials and production are reduced by removal of tariffs. This results in making the region's products cheaper, more accessible to the region and competitive on the global market.²⁸⁹ Therefore for a successful FTA Tripartite members should be willing to eliminate import duties as directed by the TFTA as elimination may boost intra-regional trade.

Shayanowako supports the elimination of import duties but suggests that sensitive industries be protected for a maximum period of two years after Tripartite FTA enters into force through a regime of sensitive products on which duty and quota free market access do not apply.²⁹⁰ Policy formulation in the RECs show that modest progress has been made in the removal of tariffs but progress is nominal because some countries are reluctant to remove or forfeit the huge revenue that accrues from this source.²⁹¹ Therefore the two years suggested by Shayanowako may not be enough for tripartite member states to adjust and a longer period may be viable.

Tripartite FTA does not seek to eliminate only tariff barriers but NTBs as well since both are impediments to full integration and hampers intra-regional trade.

3.2.4.3 Elimination of Non-Tariff barriers

²⁸⁶ Article 8 (1) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁸⁷ Article 8 (2) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁸⁸ Article 8 (3) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010)

²⁸⁹Shayanowako P (2011)13.

²⁹⁰ Shayanowako P (2011)13.

²⁹¹ United Nations Economic Commission For Africa (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)19.

NTBs have nothing to do with import taxes; but they contribute in growing contestability of regional markets as elimination of tariffs alone is not effective.²⁹² NTBs are much problematic in addressing than tariff barriers more so they pose substantial challenges to increasing contestability.²⁹³ A number of protectionist measures are applied as NTBs by many African States of which pose as obstacles to the promotion of intra-regional trade.²⁹⁴

The address and implementation of NTBs provisions in the proposed Tripartite FTA may be the difference between minimal and full liberalisation of trade in goods in the Tripartite FTA. The TFTA draft provides that the NTBs mechanisms existing in the RECs should be recognised but there should be efforts to harmonise them and form a single mechanism.²⁹⁵ The fact that the Tripartite FTA seeks to harmonise policies on NTBs in the RECs is commendable since it will do away with the issue of complying with various standards applied by the RECs which are negotiating the Tripartite FTA.

Annex 3 on NTBs under Article 10(2) of the TFTA provides for a mechanism for the elimination of NTBs based on a common systematic elimination of NTBs, within the Tripartite FTA arrangements.²⁹⁶ By providing a common system in the elimination of NTBs, it will prevent the incidence of having to comply with different standards as goods or services move from one country or region to another.²⁹⁷

If the objectives of the Tripartite FTA are realised, many benefits will flow, inclusive but not limited to creation of a larger market, opportunity to eliminate problems associated with overlapping membership and increased foreign direct investment (FDI).

²⁹² Visser M & Hartzenberg T 'Trade Liberalisation and Regional Integration in SADC: Policy Synergies Assessed in an Industrial Organisation Framework' (2004) *African Development and Poverty Reduction: The Macro-Micro Linkage* Forum Paper 12 (hereafter Visser M & Hartzenberg T (2004)).

²⁹³ Visser M & Hartzenberg T (2012) 12.

²⁹⁴ Abdoulahi M 'Progress Report on Regional Integration Efforts in Africa towards the Promotion of Intra-African Trade' (2005) *African Trade Policy Centre Work in Progress* No. 30 32.

²⁹⁵ Article 10 (2) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

²⁹⁶ Tripartite FTA Annex 3 of Annex on Non-Tariff Barriers (Revised Dec 2010).

²⁹⁷ Shayanowako P (2011) 14. The WTO has categorised NTBs into seven categories, which are all recognised in Annex 3 of Annex on Non-Tariff Barriers .Therefore the minimum requirements that WTO prescribes that include those in a FTA, should be satisfied hence harmonised standards under the Tripartite FTA would have to conform to those requirements.

3.3 PROSPECTIVE BENEFITS

The proposed Tripartite FTA is built on a strong and clear agenda. Its main objective is centred on the strengthening and deepening of economic integration in the southern and eastern Africa region.²⁹⁸ The numerous benefits, associated with the Tripartite FTA are depended upon how well negotiated, crafted, and comprehensive the TFTA is.²⁹⁹

The main benefit of the Tripartite FTA is the creation of a much larger market which will be lucrative to investment, while at the same time supporting greater production because of its single economic space.³⁰⁰ The enlarged market is very possible because the Tripartite FTA has a combined population of 57% in the AU's total population enabling the region to become Africa's larger market.³⁰¹ Moreover the remarkable increase in imports and exports volumes within the regions of the Tripartite FTA between 2000 and 2008 as a result of measures spurred by the FTA initiatives of the three RECs is an added advantage.³⁰² It is therefore submitted that the enlarged market will create more opportunities for producers and traders to expand while at the same time giving consumers a wide range of products to choose from which will in turn expand intra-regional trade.

An enlarged market will lead to increase in economic growth which facilitates creation of employment.³⁰³ This is done through facilitation of movement of unskilled labour from more developed industries that do not need such; to low wage countries within a regional cooperation that require such skills.³⁰⁴ This will give opportunity for Tripartite FTA; unskilled labour citizens to migrate from their country of origin and seek employment where it's needed in the region.

²⁹⁸ Home available at <http://www.comesa-eac-sadc-tripartite.org/> (accessed 08 March 2015).

²⁹⁹ Shayanowako P (2011) 11.

³⁰⁰ COMESA-EAC-SADC Tripartite Framework: State Of Play 'Report By The Chair Of The Tripartite Task Force February 2011' (2011) available at http://www.eac.int/index.php?option=com_content&id=581&Itemid=201 (accessed 27 February 2015).

³⁰¹ Common Market Of Eastern And South Africa Economics Essay available at <http://www.uniassignment.com/essay-samples/economics/common-market-of-eastern-and-south-africa-economics-essay.php> (accessed 09 March 2015).

³⁰² Business Editor National 'Regional blocs to launch Free Trade Area by 2012' *Zimguardian* 25 November (2009) available at http://www.bilaterals.org/spip.php?page=print&id_article=16367 (accessed 08 March 2015).

³⁰³ Department for International Development *Growth: Building Jobs And Prosperity In Developing Countries* (2008)

2.

³⁰⁴ African Union Commission (2011) 18.

Moreover the creation of employment should ease poverty among the population of the Tripartite FTA which is in line with objectives of Abuja Treaty.³⁰⁵

The establishment of the Tripartite FTA will be beneficial for financial markets.³⁰⁶ Economies in the tripartite region will be more integrated which promotes firms to borrow finances at low rate of interest, because capital liquidity of the larger capital market increases, and the resultant diversification effect reduces the risks associated with high investment.³⁰⁷ Acceleration and development of the most backward financial markets in the Tripartite FTA will allow companies and households from these countries to access the credit and security markets of the more advanced countries of the Tripartite FTA.³⁰⁸

It has been demonstrated in recent theoretical approach in Europe that financial development is associated with higher economic growth and economists including policy makers expect financial integration to have a growth dividend.³⁰⁹ The same can be attributed to the Tripartite FTA as the economic growth in the region will be beneficial to the financial markets in the region. However one has to bear the fact that the European Union is more established and it may take time for the tripartite member countries to enjoy the same benefits in their financial markets.

The establishment of the Tripartite FTA will be an opportunity to eliminate challenges associated with overlapping membership.³¹⁰ Current challenges resulting from overlapping membership will be addressed through advancing of the ongoing harmonisation and coordination initiatives of the three RECs to achieve convergence of programs and activities.³¹¹ In this way, the arrangement will greatly contribute to fairness within the continental trade. When there is a uniform system of rules, there is less opportunity for cronyism, or the ability of participating

³⁰⁵ CUTS Africa Resource Centre *Making The Tripartite Work For The Interest of EAC Countries: Perspectives from Kenya* (2012) 4.

³⁰⁶ African Union Commission (2011) 18.

³⁰⁷ African Union Commission (2011) 18.

³⁰⁸ Guiso L, Jappelli T, Padula M & Pagano M 'Financial Market Integration and Economic Growth in the EU' (2004) *Centre For Studies In Economics And Finance* Working Paper No. 118 7 (hereafter Guiso L et al (2004)).

³⁰⁹ Guiso L et al (2004) 7.

³¹⁰ See generally 2.3.2.2 Common Market for Eastern and Southern Africa and its efforts in furthering regional economic integration.

³¹¹ COMESA-EAC-SADC Tripartite Framework: State Of Play 'Report By The Chair Of The Tripartite Task Force February 2011' (2011) available at http://www.eac.int/index.php?option=com_content&id=581&Itemid=201 (accessed 27 February 2015).

nations to tilt trade advantages towards favoured parties.³¹² In the absence of a harmonised system in the RECs, bigger and better-connected industries can easily acquire unfair advantages, such as tax and regulatory loopholes, which shield them from competition.³¹³

The integration of the three RECs will be an opportunity for increased FDI.³¹⁴ Countries which have larger economies in the Tripartite FTA or are geographically closer to other larger countries within the arrangement can expect a larger increase in FDI as a result of joining than those countries that have smaller economies or are located in the periphery.³¹⁵ COMESA countries have increased in trade, cross-border investments through integration of geographically connected countries over the years from the year 2000 to 2008.³¹⁶ However despite this increase in investment in COMESA, countries in the tripartite region are in terrible need of FDI in order to continue stimulating economic growth.³¹⁷ FDI in the Tripartite FTA will increase the investment opportunities in the whole continental region which will attract new investors in different fields³¹⁸ that are important in the economic development of the tripartite region.³¹⁹

The proposed Tripartite FTA will stimulate increased industrialisation.³²⁰ New industries that can produce diverse products in order to exploit the new and bigger African markets are created and a higher demand for products of Tripartite FTA could further stimulate businesses.³²¹ The

³¹² Boudreaux DJ 'The Benefits of Free Trade: Addressing Key Myths' (2013) 2 available at http://mercatus.org/sites/default/files/Benefits-of-Free-Trade_EP_110513.pdf (accessed 09 March 2015) (hereafter Boudreaux DJ (2013)).

³¹³ Boudreaux DJ (2013) 2.

³¹⁴ Competition & Tariff Commission 'The COMESA-EAC-SADC Tripartite Free Trade Area: Benefits & Implications' available at <http://www.competition.co.zw/news/223-the-comesa-eac-sadc-tripartite-free-trade-area-benefits-implications> (accessed 09 March 2015).

³¹⁵ African Union Commission (2011) 19.

³¹⁶ CUTS Africa Resource Centre *Making The Tripartite Work For The Interest of EAC Countries: Perspectives from Kenya* (2012) 5.

³¹⁷ CUTS Africa Resource Centre *Making The Tripartite Work For The Interest of EAC Countries: Perspectives from Kenya* (2012) 5.

³¹⁸ Fields such as agriculture, mining, forestry, manufacturing, financial services, telecommunications and energy.

³¹⁹ Shayanowako P (2011) 10.

³²⁰ Sharma S 'A perspective on economic integration in Africa - Part 2' (2013) available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1263:a-perspective-on-economic-integration-in-africa-part-2-&catid=87:african-finance-a-economy&Itemid=294 (accessed 09 March 2015).

³²¹ CUTS Africa Resource Centre *Making The Tripartite Work For The Interest of EAC Countries: Perspectives from Kenya* (2012) 5.

result of increased industrialisation in the tripartite region will ensure value addition of primary products so that they get better returns on the global market.³²²

The establishment of the Tripartite FTA should improve competitiveness of products. In improving such, existing local monopolies in tripartite countries may be broken bringing the previously imperfectly competitive market structures closer to perfectly competitive ideal.³²³ Markets that are more competitive are likely to provide efficiency gains by improving resource allocation, lowering production costs, as well as increased diversified output.³²⁴ A country such as Zimbabwe has already identified various measures that aim at speeding up economic development whilst preparing its industries to survive solid competition in an open market.³²⁵

The proposed Tripartite FTA may be the key to developing good infrastructure. The existence of good infrastructure is striking to new investment since good infrastructure makes production costs low and production efficiencies high.³²⁶ Shayanowako notes that good infrastructure is necessary for the success of the Tripartite FTA because whilst benefits exist for infrastructure lack of the same impedes efficient and cost-effective production.³²⁷ Stimulation of investment in joint infrastructural development is likely to happen in the tripartite region as partner countries seek to unlock all the potential benefits of trading under the Tripartite FTA.³²⁸

The potential benefits of Tripartite FTA include; creation of a much larger market, increase in economic growth, effective financial markets, and opportunity to eliminate challenges associated with overlapping membership, opportunity for increased FDI, increased industrialisation, improved competitiveness of products and key to developing good infrastructure.³²⁹ The role these benefits play in increasing trade is noteworthy, but some experts are sceptical about this role. They have underlined the fact that the Tripartite FTA could only be sustained if

³²² CUTS Africa Resource Centre *Making The Tripartite Work For The Interest of EAC Countries: Perspectives from Kenya* (2012) 5.

³²³ African Union Commission (2011) 19.

³²⁴ African Union Commission (2011) 19.

³²⁵ These measures are contained in the newly crafted Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset), a Government blueprint that will guide economic transformation and development in Zimbabwe for the next five years, spanning October 2013 to December 2018.

³²⁶ Shayanowako P (2011) 9.

³²⁷ Shayanowako P (2011) 10.

³²⁸ CUTS Africa Resource Centre *Making The Tripartite Work For The Interest of EAC Countries: Perspectives from Kenya* (2012) 6.

³²⁹ See generally 3.3 Prospective Benefits.

impediments currently discouraging trade in Africa are addressed.³³⁰ Overlapping memberships, lack of economic diversification; and lack of infrastructure are amongst the impediments.³³¹ Therefore it is important to look at the challenges that the proposed Tripartite FTA may encounter in creating a successful FTA.

3.3.1 Challenges

One of the major challenges that the Tripartite FTA will face has to do with political commitment and drive. Geda and Kibert profess that the lack of a strong and sustained political commitment has been a major player in hindrance of economic integration in Africa.³³² As highlighted in chapter 2 there is a reluctance to cede power to a supra-national body by some of the countries involved in inter-RECs negotiations. The problem has deeper roots, which *inter alia* include a failure to implement commitments made at the REC level.³³³ Mupangavanhu avers that governments must make a sustained commitment and infuse a political will vital to succeed in a regional economic grouping.³³⁴

The pace of progress is not uniform in the three RECs due to lack of implementation, which may in turn affect the effective implementation of the Tripartite FTA. Among the three RECs, EAC is the most advanced. Whilst SADC and COMESA have made considerable efforts in adopting phased elimination of their tariffs on internal trade, some countries in the two blocs are lagging behind.³³⁵ REC's have displayed variable performances. Notably, some are still struggling to establish their FTAs,³³⁶ while others are still in partial FTAs or partial customs union.³³⁷

³³⁰ Bridges Africa 'Negotiations on the tripartite free trade agreement are moving forward' (2014) available at <http://www.ictsd.org/bridges-news/bridges-africa/news/negotiations-on-the-tripartite-free-trade-agreement-are-moving> (accessed 09 March 2015).

³³¹ Bridges Africa 'Negotiations on the tripartite free trade agreement are moving forward' (2014) available at <http://www.ictsd.org/bridges-news/bridges-africa/news/negotiations-on-the-tripartite-free-trade-agreement-are-moving> (accessed 09 March 2015).

³³² Geda A & Kebret H 'Regional economic integration in Africa: A review of problems and prospects with a case study of COMESA' (2008) 17 *Journal of African Economies* 358.

³³³ See generally 2.1 Introduction.

³³⁴ Mupangavanhu Y *The Regional Integration Of African Trade Mark Laws: Challenges And Possibilities*. (Unpublished LLD Thesis, University of the Western Cape (2013) 65.

³³⁵ See generally 2.3 Regional Economic Integration.

³³⁶ See generally 2.3 Regional Economic Integration.

³³⁷ CUTS Africa Resource Centre *Making The Tripartite Work For The Interest of EAC Countries: Perspectives from Kenya* (2012) 8.

Much of the failure to implement FTA's in the RECs is a direct consequence of lack of commitment. These challenges in question may also be faced in the implementation of the Tripartite FTA. The signing and ratification of instruments does not take place within the agreed time.³³⁸ To date SADC has reviewed and approved 15 protocols.³³⁹ However Democratic Republic of Congo has neither signed nor ratified any protocol; Seychelles has signed 3 but never ratified them and Botswana, is the only SADC country that has ratified more than 11 protocols.³⁴⁰

Furthermore Tripartite FTA is more ambitious than the RECs because it seeks to harmonise policies of the three RECs, as such, lack of commitment to implement is likely to be the greatest challenge.³⁴¹ The fact that the negotiations have taken longer than the initial agreed time for members to sign the final agreement is an early warning system that some tripartite members may not be ready to commit.

The other problem that the Tripartite FTA is likely to face has to do with industry diversification and specialisation.³⁴² There is competition around particular industries and commodities which African countries rely on for economic growth and diversification may be a problem.³⁴³ An analysis by Bridge Africa points out that most of Africa's industries have few corresponding goods to exchange with each other; as a result they cannot exploit the gains of comparative advantage.³⁴⁴ Draper is also deeply sceptical about the ability of certain countries, with particularly strong industrial sectors, to nurture those with weak through trade protection.³⁴⁵ As a

³³⁸ Mupangavanhu Y *The Regional Integration Of African Trade Mark Laws: Challenges And Possibilities* (Unpublished LLD Thesis, University of the Western Cape (2013) 65.

³³⁹ United Nations Economic Commission for Africa *Assessing regional integration in Africa (ARIA I): Sub regional Blocs as Regional Building Blocks?* (2006) 49.

³⁴⁰ United Nations Economic Commission for Africa *Assessing regional integration in Africa (ARIA I): Sub regional Blocs as Regional Building Blocks?* (2006) 49.

³⁴¹ Shayanowako P (2011) 12.

³⁴² Douglas K 'Will we ever see Africa's Tripartite Free Trade Area succeed?' (2013) Available at <http://www.howwemadeitinafrica.com/will-we-ever-see-africas-tripartite-free-trade-area-succeed/25153/> (accessed 09 March 2015) (hereafter Douglas K (2013).

³⁴³ Douglas K (2013).

³⁴⁴ Babatunde A & Odularu G 'Intra-African trade: Not an easy path' (2012) Bridges Africa Volume 1 - Number 3, available at <http://www.ictsd.org/bridges-news/bridges-africa/news/intra-african-trade-not-an-easy-path> (accessed 10 March 2015) (hereafter Babatunde A & Odularu G (2012)).

³⁴⁵ Douglas K (2013).

result, African economies fail to have globally competitive industries and services, which may be the case in the Tripartite FTA.³⁴⁶

The other challenge that the Tripartite FTA is likely to face has to do with trade facilitation mechanisms.³⁴⁷ Border barriers make it costly to facilitate trade, as a result, the push for rationalisation does not materialise because trading costs erode the gains from regional integration.³⁴⁸ In the previous chapter, it was pointed out that removal of tariffs alone is not enough to support integration³⁴⁹ and if impediments to trade facilitation in the Tripartite FTA are not addressed the benefits may not materialise.

Lack of infrastructure to support initiatives in the Tripartite FTA is also a likely challenge. The President of South Africa Mr Jacob Zuma stated that 'Africa's time has come and without infrastructure our dreams will never be realised as we cannot trade on the continent because of the lack of communication and infrastructure is created it will provide new opportunities for our continent.'³⁵⁰ Therefore despite the Tripartite FTA providing a comprehensive text on integration mechanisms, poor infrastructure may hamper trade within the region.

The other challenge that the Tripartite FTA may encounter which is closely connected with infrastructure is financial constraint. There is lack of capacity to undertake massive investments in infrastructure development under Tripartite FTA because many of the countries in the RECs are financially weak and fall within the category of Least Developed Country (LDCs).³⁵¹

The Tripartite FTA seeks to harmonise policies within the RECs, the same prospective benefit of overcoming problem associated with membership overlap is the challenge that the Tripartite FTA will face. Overlapping memberships hinders harmonisation, standardisation, as well as the enforcement of rules of origin.³⁵² Moreover, the three RECs have different rules of origin and the

³⁴⁶ Babatunde A & Odularu G (2012).

³⁴⁷ United Nations Economic Commission for Africa (UNECA) Assessing regional integration in Africa (ARIA II): Rationalising Regional Economic Communities (2006) 67 (hereafter UNECA 2006).

³⁴⁸ UNECA (2006) 67.

³⁴⁹ See Generally 2.3.1.2 Southern African Development Community and its efforts in furthering economic integration.

³⁵⁰ NEPAD 'Africa launches an ambitious programme for infrastructure development' (2010) available at <http://www.nepad.org/regionalintegrationandinfrastructure/news/1628/africa-launches-ambitiousprogramme-infrastructure-de> (accessed 10 March 2015).

³⁵¹ Babatunde A & Odularu G (2012).

³⁵² Babatunde A & Odularu G (2012).

discussion on how to apply a common rule to the full Tripartite FTA has already caused stalling in the negotiations.³⁵³ Mupangavanhu is of the opinion that ‘mistrust and perceived competition between African countries are some of the factors that gave rise to each region establishing its own trade bloc.’³⁵⁴ If the mistrust continues the efforts of the Tripartite FTA may be in vain.

3.4 CONCLUSION

This chapter has shown that a number of activities and programmes are being implemented by RECs in the attainment of the AEC, as outlined in the Abuja Treaty. It has also highlighted that RECs themselves are not parties to the Abuja Treaty.³⁵⁵

The Tripartite FTA is regarded as a step to the bigger picture of establishing the AEC. It was highlighted that it is expected to help enlarge African markets, unlock productive potential, and increase intra-African trade.³⁵⁶ The Tripartite FTA is expected to cover a number of areas including: the ones discussed above is the liberalisation of trade in goods which will happen through elimination of import duties and NTBs.³⁵⁷

The chapter highlighted that the institutional and legal framework of the Tripartite FTA should be carefully crafted to guarantee the legal personality of the Tripartite FTAs to prevent the collapse of the FTA due to the lack of a DSM.³⁵⁸

The chapter highlighted that the Tripartite FTA will be underpinned by robust infrastructure programs designed to consolidate the regional market however implementation may be a challenge.³⁵⁹ Lack of political will by some countries in the Tripartite FTA³⁶⁰ deepens the challenges likely to be faced. Most importantly, the chapter showed that the challenges discussed

³⁵³ Bridges Africa ‘Good progress on Tripartite FTA; Rules of Origin remain a challenge’ (2014) available at <http://www.ictsd.org/bridges-news/bridges-africa/news/good-progress-on-tripartite-fta-rules-of-origin-remain-a-challenge> (accessed 02 May 2015).

³⁵⁴ Mupangavanhu Y *The Regional Integration Of African Trade Mark Laws: Challenges And Possibilities* (Unpublished LLD Thesis, University of the Western Cape (2013) 77.

³⁵⁵ See generally 3.1 Introduction.

³⁵⁶ United Nations Economic Commission for Africa *Seventh Session of the Committee on Trade, Regional Cooperation and Integration: Progress on Regional Integration in Africa* (2011) 14.

³⁵⁷ UNECA (2011) 14.

³⁵⁸ See 3.2.3.1 Dispute Settlement Mechanism.

³⁵⁹ UNECA (2011)14.

³⁶⁰ See Generally 3.3.1 Challenges.

above need to be addressed before for the benefits of the Tripartite FTA to materialise fully. It is therefore essential to ensure removal of these constraints because removal of tariffs alone is likely to have a limited effect in boosting intra-African trade.³⁶¹

As discussed in chapter 2, a FTA aims to facilitate trade between the constituent territories by establishing a trade regime based on tariff-free, quota-free, and exemption-free trade basis.³⁶² In other successful FTAs it has been proved that just focusing on removal of tariffs undermines the efforts to achieve objectives on which the FTA aims to accomplish.³⁶³ Besides elimination of tariffs discussed under 3.2.4.2, governments can assist their regional integration efforts by facilitating trade.³⁶⁴ Chapter 4 will discuss amongst other things what trade facilitation is and how it can complement efforts of regional integration and further intra-regional trade.



³⁶¹ African Union Commission *Action Plan For Boosting Intra-African Trade* (2011) 6.

³⁶² See Generally 2.2.3.3 Regional Trade Agreements.

³⁶³ See Generally 2.2.3.3 Regional Trade Agreements.

³⁶⁴ Erasmus G 'Legal and Institutional Aspects of the Tripartite Free Trade Area: the need for effective implementation in Hartzenberg T (ed) *The Tripartite Free Trade Area: Towards A New African Integration Paradim?* (2012) 10.

CHAPTER 4

TRADE FACILITATION

4.1 INTRODUCTION

Africa ranks lowest when it comes to intra-African trade and on trade policy and facilitation performance.³⁶⁵ This is not surprising due to the fact that African markets are fragmented and borders are difficult to cross which then impedes the timely movement of goods.³⁶⁶ Development of industries and supply chains³⁶⁷ in Africa is affected by trade and transport facilitation issues more than any other region.³⁶⁸ Trade facilitation has topped the list of priorities in most African countries with suggestions that trade facilitation measures channels investment and profits the nation within a short period of time.³⁶⁹

In Chapter 3 it has been discussed that the African Union (AU) has adopted a plan of action which seeks to build an African Economic Community (AEC) through Regional Economic Communities (RECs). The plan of action realises that the adoption and implementation of coherent and efficient trade policies at the national, regional and continental levels is essential in furthering intra-African trade.³⁷⁰ Most of Africa's RECs have protocols which seek to integrate markets in the RECs but priority is rarely focused on the elements that are essential for the realisation of market integration.³⁷¹

³⁶⁵ Pearson M & Chaitezvi C 'Trade Facilitation in the COMESA-EAC-SADC Tripartite' (2012) *Trade Mark Southern Africa* Regional Integration Research Network Discussion Paper RIRN/DP/12/025 5 (hereafter Pearson M & Chaitezvi C (2012)).

³⁶⁶ Simuyemba S 'Linking Africa Through Regional Infrastructure' (2000) *African Development Bank Economic Research Papers* No 6 7.

³⁶⁷ Pearson M & Chaitezvi C (2012) 5.

³⁶⁸ Rubiato J M 'Promoting African intra-regional trade through trade facilitation negotiations' (2013) available at <http://www.ictsd.org/bridges-news/bridges-africa/news/promoting-african-intra-regional-trade-through-trade-facilitation> (accessed 26 March 2015) (hereafter Rubiato JM (2013)).

³⁶⁹ Rubiato JM (2013).

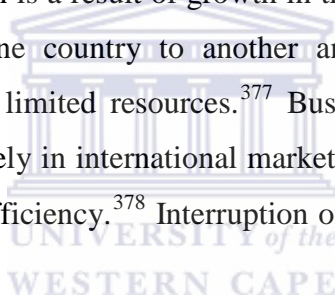
³⁷⁰ African Union Commission *Boosting Intra-African Trade Issues Affecting Intra-African Trade, Proposed Action Plan for boosting Intra-African Trade and Framework for the fast tracking of a Continental Free Trade Area* (2012) 31 (hereafter African Union Commission *Proposed Action Plan For Boosting Intra-African Trade* (2012)).

³⁷¹ African Union Commission *Proposed Action Plan For Boosting Intra-African Trade* (2012) 31.

In many instances focus has been on removal of tariffs as a way of boosting trade among African countries, neglecting the fact that the biggest contributor to the low level of intra-African trade is trade facilitation constraints.³⁷²

Africa still ranks low on trade facilitation policies though efforts have been made to design policies that promote trade facilitation.³⁷³ The Common Market of Eastern and Southern Africa (COMESA) strategic medium plan 2011-2015, contains trade facilitation provisions and measures that have been taken to improve market access and addressing challenges that hinders comparative advantage.³⁷⁴ Southern African Development Community (SADC) has a regional indicative strategic development plan (RISDP)³⁷⁵ which as guiding frameworks for realising deeper economic integration contains trade facilitation measures, and the (East African Community (EAC) has different instruments³⁷⁶ with trade facilitation included as agendas.

The importance of trade facilitation is a result of growth in trade liberalisation which means that more goods are moving from one country to another and need to comply with customs formalities which are a strain on limited resources.³⁷⁷ Businesses need a competent customs administration to compete effectively in international markets and economies benefit more from trade when there is cross-border efficiency.³⁷⁸ Interruption of goods at ports or border crossings



³⁷² African Union Commission *Proposed Action Plan For Boosting Intra-African Trade* (2012) 34.

³⁷³ Pearson M & Chaitezvi C (2012) 5.

³⁷⁴ Common Market For Eastern And Southern Africa *Medium Term Strategic Plan Towards An Integrated And Competitive Common Market 2011 – 2015* (2010) 22.

³⁷⁵ SADC 'Regional Indicative Strategic Development Plan' 69 available at http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (accessed 26 March 2015).

³⁷⁶ The examples of instruments that contain trade facilitation measures are The EAC Treaty (1999), The Customs Union Protocol (2004) and the Customs Management Act (2004).

³⁷⁷ Ad Hoc Expert Group Meeting cum Workshop on Supporting the Establishment of inter-REC Free Trade Areas and the Establishment of Harmonized FTA regimes among RECs 31 May - 1 June (2011) Addis Ababa, Ethiopia available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0CE8QFjAI&url=http%3A%2F%2Fwww1.uneca.org%2FPortals%2Fctrci%2F7th%2FPresentations%2FPresentation%2520on%2520Trade%2520Facilitation%2520and%2520Intra%2520African%2520Trade.ppt&ei=LojVeeql8evU6LKq5AK&usq=AFQjCNE NU5ip-JfTGvZExfyqzF_0kGV6Kq&bvm=bv.89947451,d.d24 (accessed 07 April 2015) (hereafter Ad Hoc Expert Group Meeting (2011)).

³⁷⁸ Economic Commission for Africa 'Trade Facilitation and Intra-African Trade' (2010) African Trade Policy Centre No. 15 3 available at <http://www.uneca.org/sites/default/files/publications/atpcpolicybriefs15.pdf> (accessed 07 April 2015).

increases costs making the consumer pay for more than their supposed to. Further, efficient trade facilitation measures are required in the current business environment to prevent such costs.³⁷⁹

The efforts to fully integrate in Africa are yet to manifest in trade, complex customs-related processes, together with poor and inadequate infrastructure is making it difficult for trade gains to become noticeable.³⁸⁰ As discussed in chapter 2, enhancing trade capacity requires more than just removal of tariffs.³⁸¹ Trade facilitation is one of the ways that can further intra-regional trade.

This chapter will discuss what trade facilitation is, the international instruments on trade facilitation, trade facilitation in the proposed COMESA-EAC-SADC Free Trade Area (Tripartite FTA) and the potential benefits trade facilitation has on intra-African trade and the challenges that are likely to be encountered by the Tripartite region when implementing trade facilitation measures. In discussing trade facilitation in the proposed Tripartite FTA and the multilateral system, this thesis will be limited to issues that do not include customs management, as custom management rules in the Trade Facilitation Agreement (Bali TFA) are already contained in the World Customs Organisation (WCO) International Convention on the Simplification and Harmonisation of Customs Procedures as revised in the Revised Kyoto Convention.³⁸² The focus of this thesis is on increase of intra-African trade and putting too much focus on customs procedures may cause some duplication which may ultimately defeat the purpose of the thesis.

4.2 DEFINING TRADE FACILITATION

The concept of trade facilitation has been up for discussion at numerous trade initiatives, but still the definition of trade facilitation varies accordingly.³⁸³ Some authors refer to it as the heating

³⁷⁹ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 197.

³⁸⁰ Kugler K 'Trade facilitation: The key to unlocking Africa's trade potential' (2014) available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1735:trade-facilitation-the-key-to-unlocking-africas-trade-potential&catid=87:african-finance-a-economy&Itemid=294 (accessed 27 March 2015).

³⁸¹ See generally 2.3.1.2 Southern African Development Community and its efforts in furthering economic integration.

³⁸² Shayanowako P 'Study into the cooperation of border management agencies in Zimbabwe' 2013 *Tralac* Working Paper No S13WP06/20134 (hereafter Shayanowako P (2013)).

³⁸³ Lisinge RT 'Trade Facilitation to Integrate Africa into the World Economy' (2004) *African Trade Policy Centre* Work in Progress No. 4 3.

system of international trade because of its focus on the efficient implementation of trade rules and regulations.³⁸⁴ Trade facilitation aims to bring certainty among trading across borders and saves time and costs while ensuring safety and security in cross border trading.³⁸⁵ The United Nations Economic Commission for Europe (UNECE) and its United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) defines trade facilitation as ‘the simplification, standardisation and harmonisation of procedures and associated information flows required to move goods from seller to buyer and to make payment.’³⁸⁶ Grainger reckons that the emphasis on payment procedures by UN/CEFACT acknowledges that financial institutes play an important role in international trade because commercial invoices contain information needed for trade facilitation.³⁸⁷

Zoellick, the former United States Trade Representative described trade facilitation measures as ‘basically an extension of market access procedures that lower transaction costs and increase timeliness of transit.’³⁸⁸ World Trade Organisation (WTO) defines trade facilitation as the ‘simplification and harmonisation of international trade procedures’.³⁸⁹ This definition is the one that is adopted by many modern authors.³⁹⁰ Trade procedures in WTO are ‘the activities, practices and formalities involved in collecting, presenting, communications and processing data required for the movement of goods in international trade.’³⁹¹

³⁸⁴ Duval Y ‘Trade Facilitation beyond the Doha Round of Negotiations’ (2007) *Asia-Pacific Research and Training Network on Trade Working Paper Series No. 50* 4.

³⁸⁵ Trade facilitation - principles and benefits available at <http://tfiq.unece.org/details.html> (accessed 30 March 2015).

³⁸⁶ Trade facilitation - principles and benefits available at <http://tfiq.unece.org/details.html> (accessed 30 March 2015).

³⁸⁷ Grainger A ‘Customs and trade facilitation: from concepts to implementation’ (2008) 2 no. 1 *World Customs Journal* 22 (hereafter Grainger A (2008)).

³⁸⁸ Robert Zoellick quote in WTO Trade Facilitation Agreement A Business Guide for Developing Countries (2013) 1 available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.intracen.org%2FWTO-Trade-Facilitation-Agreement-for-web%2F&ei=fDQZVeLUC-KU7Qami4GABA&usq=AFQjCNEqCYKWKYM78voe_enf5h8qwh_9qq&bvm=bv.89381419,d.d24 (accessed 30 March 2015).

³⁸⁹ Grainger A (2008) 22.

³⁹⁰ Grainger A (2008) 22.

³⁹¹ WTO Trade Facilitation Agreement A Business Guide for Developing Countries (2013) 2 available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.intracen.org%2FWTO-Trade-Facilitation-Agreement-for-web%2F&ei=fDQZVeLUC-KU7Qami4GABA&usq=AFQjCNEqCYKWKYM78voe_enf5h8qwh_9qq&bvm=bv.89381419,d.d24 (accessed 30 March 2015).

Moisé and Sorescu define trade facilitation as the reduction of transaction costs in trade through application of uniform rules and improvement of efficiency at each stage of the international trade chain.³⁹²

Shayanowako asserts that over the years trade facilitation has progressed in that it no longer focuses only on simplification and harmonisation of procedures.³⁹³ It now includes border management, transit development and regional facilitation, service markets logistics and gateway infrastructure.³⁹⁴ Shayanowako's contention has found support from the United Nations Economic Commission for Africa (UNECA) which notes that trade facilitation should not only be perceived as a problem in transportation and customs, but one should rather take an all-inclusive approach that looks at broader issues, and address many aspects of weak capacities that exist in many developing countries, deterring their effective participation in international trade.³⁹⁵

From the discussions above the constant point from all the discussions is that trade facilitation involves harmonisation of procedures for the benefit of reducing transaction costs. The definitions above are that of various organisations and authors including that of the WTO. The next section will look at trade facilitation specifically in the multilateral trading system.

4.3 TRADE FACILITATION IN THE MULTILATERAL TRADING SYSTEM

At this point the various definitions of what trade facilitation entails have been discussed including that of the WTO. It has been pointed out in chapter two that the WTO deals with regulation of trade between countries with the key objective of regulating and liberalising international trade.³⁹⁶ In chapter two it was also pointed out that most favoured nation (MFN) and national treatment (NT) are cornerstone principles in WTO agreements, prohibiting

³⁹² Moisé E & Sorescu S 'Trade Facilitation Indicators: The Potential Impact of Trade Facilitation on Developing Countries' Trade' (2013) *Organisation for Economic Co-operation and Development Trade Policy Papers* No. 144 6.

³⁹³ Shayanowako P (2013) 4.

³⁹⁴ Shayanowako P (2013) 4.

³⁹⁵ [Fourth Session of CTCRI - Trade Facilitation to promote Intra-African Trade \(2005\)](http://www1.uneca.org/ctrci/4TradeFacilitationIntraAfricanTrade.aspx) available at <http://www1.uneca.org/ctrci/4TradeFacilitationIntraAfricanTrade.aspx> (accessed 31 March 2015).

³⁹⁶ World Trade Organization *Understanding the WTO* 5 ed (2015) 9 (hereafter WTO (2015)).

discrimination amongst WTO members.³⁹⁷ However there are instances where preferential treatment is permitted.

Both Article XXIV of General Agreement on Trade and Tariffs 1994 (GATT) and the Enabling Clause (EC) which relates to the regional trading agreements acknowledges that tariffs and other barriers to trade can be reduced on a preferential basis by states under regional arrangements.³⁹⁸ As discussed in chapter 2 SADC, COMESA and EAC are Regional Trade Agreements (RTAs) notified to WTO.³⁹⁹ Therefore where trade facilitation is concerned WTO members belonging to SADC, EAC and COMESA are also bound by WTO agreements which envisage provisions on trade facilitation.

However WTO members can form RTAs in terms of Article XXIV which contains trade facilitation provisions and benefits flowing from these agreements do not necessarily need to be extended to other WTO members who are not members of such an RTA.⁴⁰⁰

The WTO negotiated the Bali TFA after it realised that there is no economic sense in simplifying border procedures for one country but benefits exists where procedures are simplified for all countries.⁴⁰¹ Before the Bali Ministerial Decision and the Bali TFA, trade facilitation provisions were contained in the General Agreement on Trade and Tariffs (GATT).⁴⁰²

4.3.1 Trade Facilitation under the General Agreement on Trade and Tariffs

Articles in GATT are aimed at reducing trade costs through facilitation of trade. Article V in summary states that goods need to be transported through the most convenient route, avoiding unnecessary delays and restrictions, also included is MFN and non-discrimination.⁴⁰³ It requires

³⁹⁷ Mayurama W 'Preferential Trade Arrangements And The Erosion Of The WTO's MFN Principle'(2010) 46 *Stanford Journal Of International Law* 177.

³⁹⁸ Varsha MC 'Understanding the legal framework of the Most Favoured Nation Rule from a SIDS perspective'2013 *Faculty of Law and Management, University of Mauritius* ISSN: 16941225 10 (hereafter Varsha MC (2013)).

³⁹⁹ See Generally 2.2.3.3 Regional Trade Agreements.

⁴⁰⁰ Varsha MC (2013) 10.

⁴⁰¹ Regional initiatives cannot substitute for the multilateral trading system—Azevêdo (2015) available at https://www.wto.org/english/news_e/spra_e/spra50_e.htm (accessed 30 March 2015).

⁴⁰² Trade facilitation available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 19 April 2015).

⁴⁰³ WTO Doha Round & South Asia: Linking Civil Society with Trade Negotiations available at www.cuts-international.org/documents/.../Trade%20Facilitation.ppt (accessed 31 March 2015) (hereafter WTO Doha Round

that charges and regulations imposed for goods in transit to be reasonable.⁴⁰⁴ However, in Africa costs may sometimes be unreasonable. The UNCEA in 2004 shows that transport costs is generally high in Africa.⁴⁰⁵ Landlocked African countries are affected the worst, with costs averaging a whopping 14 per cent of the value of exports.⁴⁰⁶ Countries, such as Malawi average 56 per cent, Chad 52 percent, and Rwanda 48 per cent.⁴⁰⁷ This is unfortunate as transit procedures are among non-tariff barriers which cripple the intra-African trade.⁴⁰⁸

Article VIII of GATT deals with fees and formalities connected with importation and exportation.⁴⁰⁹ It seeks to regulate fees charged for import and export, its limitation to cost of services, by minimising the incidence and complexity of import and export formalities.⁴¹⁰ It also recognises the need to decrease and simplify documentation requirements which are involved when either importing or exporting.⁴¹¹ Where there is a simplification of documentation processes it contributes significantly to reducing trade costs.⁴¹² Unnecessary delays in customs can be avoided where the process is simplified, and costs are saved.⁴¹³ World Bank study reported in Portugal-Perez and Wilson shows that sub Saharan Africa is second when it comes to regions with the highest number of export and import procedures,⁴¹⁴ and this hinders integration in the region and in the end intra-African trade remains low.

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& South Asia: Linking Civil Society with Trade Negotiations) also see Article V: Freedom of Transit available at https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleV (accessed 31 March 2015).

⁴⁰⁴ Article V (4) of GATT.

⁴⁰⁵ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa V Towards an African Continental Free Trade Area* (2012) 102.

⁴⁰⁶ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa V Towards an African Continental Free Trade Area* (2012) 102.

⁴⁰⁷ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa V Towards an African Continental Free Trade Area* (2012)102.

⁴⁰⁸ Kafeero E 'Customs And Trade Facilitation In The East African Community (EAC)' (2008) 2 no. 1 *World Customs Journal* 69.

⁴⁰⁹ Article VIII of GATT.

⁴¹⁰ WTO Doha Round & South Asia: Linking Civil Society with Trade Negotiations also see Article VIII of GATT.

⁴¹¹ WTO Doha Round & South Asia: Linking Civil Society with Trade Negotiations also see Article VIII of GATT.

⁴¹² United Nations Economic Commission for Africa *Assessing Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 216.

⁴¹³ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 218.

⁴¹⁴ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 219.

Article X of GATT 1994 regulates the publication and administration of trade regulations.⁴¹⁵ This article ‘provides for: transparency of trade related laws, regulations and decisions and predictability of the application and enforcement of these rules; and review and appeals.’⁴¹⁶ African countries have generally progressed in improving their ‘efficiency in relationship to the formalities connected with importation, exportation, and transit, and ongoing activities on the continent span across most of the above issues.’⁴¹⁷ Eleven African countries⁴¹⁸ have so far reduced the number of documents required for import and export between 2007 and 2013.⁴¹⁹ The change is commendable because in Africa the lack of integration has made access into the market of finished goods dreadful, and imports have risen more than exports due to the and restricted market access.⁴²⁰

Besides the GATT articles on trade facilitation, the Bali TFA is now the multilateral framework that regulates trade facilitation. The Bali TFA has clarified Articles V, VIII and X of the GATT 1994 ‘with a view to further expedite the movement, release and clearance of goods, including goods in transit; while recognising the need for effective cooperation among members on trade facilitation and customs compliance issues.’⁴²¹

4.3.2 Trade facilitation as discussed in the Bali Package

At the beginning of the Doha round in 2001, many African countries appreciated the importance of trade facilitation as a tool for economic growth but were skeptical about the need to regulate trade facilitation through a multilateral framework.⁴²² Their main concern had to do with

⁴¹⁵ Article X of GATT.

⁴¹⁶ Information Note: WCO instruments and GATT Articles V, VIII and X available at http://www.wcoomd.org/en/topics/wco-implementing-the-wto/atf/~/_/media/C8CFAD75EDCB465E9D480F347E00D620.ashx (accessed 31 March 2015).

⁴¹⁷ United Nations Economic Commission for Africa *Trade Facilitation from an African Perspective Trade Facilitation Instruments: WTO Provisions and African Realities* (2013) 30.

⁴¹⁸ These countries are Algeria, Angola, Botswana, Burkina Faso, Djibouti, Malawi, Madagascar, Rwanda, Senegal, Uganda and Zimbabwe.

⁴¹⁹ United Nations Economic Commission for Africa *Trade Facilitation from an African Perspective Trade Facilitation Instruments: WTO Provisions and African Realities* (2013) 30.

⁴²⁰ Bolhöfer CE ‘Trade Facilitation – WTO Law And Its Revision To Facilitate Global Trade In Goods’ (2008) 2 no. 1 *World Customs Journal* 33.

⁴²¹ Preamble of Agreement On Trade Facilitation.

⁴²² Lisinge RT ‘Leveraging WTO Negotiations on Trade Facilitation to Operationalise the Almaty Programme of Action’ 2008 *African Trade Policy Centre Work in Progress* No. 717 (hereafter Lisinge RT (2008)).

financial and technical assistance.⁴²³ They pointed out that improved facilitation meant channelling resources to narrow the technology and human resources gaps that existed between developed and developing countries, and WTO negotiations did not have the capacity to ensure that such assistance.⁴²⁴

Despite these concerns a consensus was reached by WTO members on Bali TFA at the Bali Ministerial Conference in December 2013.⁴²⁵ However, after the Bali Conference implementation reached a deadlock due to some difficulties which prevented agreement on the implementation of the Bali Package.⁴²⁶

In November 2014, the stalemate related to the political link between the Decision on Public Stockholding for Food Security Purposes and the Bali TFA was resolved; resulting in the rebirth of the multilateral trading system.⁴²⁷ The ratification process for the Bali TFA is underway, and countries are expected to have ratified the agreement by the next ministerial meeting taking place on the 15-18th December 2015 in Nairobi.⁴²⁸ However, a number of developing countries have highlighted challenges in their domestic legislation and are not capable of ratifying the agreement by this next ministerial meeting.⁴²⁹

The Bali TFA contains 24 Articles which are grouped in three sections. Section I contains the substantive obligations and these are set to help to address some of these bottlenecks that faced Africa as region with regards to trade.⁴³⁰ Section 1 of Bali TFA has provisions in the following areas:

- 'Publication and availability of information

⁴²³ Lisinge RT (2008) 7.

⁴²⁴ Lisinge RT (2008) 7.

⁴²⁵ WTO Trade Facilitation Agreement available at <http://www.iccwbo.org/Global-influence/World-trade-Agenda/Trade-Facilitation-Resources/WTO-Trade-Facilitation-Agreement/> (accessed 01 April 2015).

⁴²⁶ Erasmus G 'The WTO Breakthrough on the Bali Package: the trade facilitation value chain and African integration' (2014) available at <http://www.tralac.org/discussions/article/6762-the-wto-breakthrough-on-the-bali-package-the-trade-facilitation-value-chain-and-african-integration.html> (accessed 01 April 2015) (Hereafter Erasmus G (2014)).

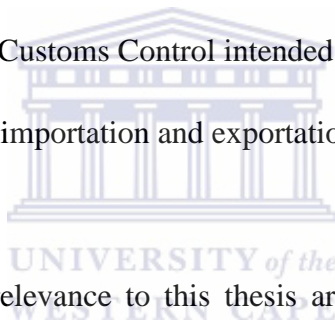
⁴²⁷ Erasmus G (2014).

⁴²⁸ WTO: 2015 News Items 'Encouraging signs on acceptance of WTO's Trade Facilitation Agreement' 24March (2015) available at https://www.wto.org/english/news_e/news15_e/fac_24mar15_e.htm (accessed 01 April 2015) (hereafter WTO: 2015 News Items (2015)).

⁴²⁹ WTO: 2015 News Items (2015).

⁴³⁰ WTO News: Speeches — Dg Roberto Azevêdo Trade facilitation will support African industrialization and development—Azevêdo 1 July (2014) available at https://www.wto.org/english/news_e/spra_e/spra27_e.htm (accessed 01 April 2015) (hereafter WTO News: Speeches — Dg Roberto Azevêdo (2014)).

- Opportunity to comment, information before entry into force and consultation
- Advance rulings
- Appeal and review procedures
- Other measures to enhance impartiality, non-discrimination and transparency (notifications for enhanced controls or inspections, detention and test procedures)
- Disciplines and fees and charges imposed on or in connection with importation and exportation
- Release and clearance of goods
- Border Agency Cooperation
- Movement of Goods under Customs Control intended for import
- Formalities connected with importation and exportation and transit
- Freedom of Transit'.⁴³¹



The provisions that are of most relevance to this thesis are ‘release and clearance of goods, border agency cooperation, movement of goods under customs control intended for import, formalities connected with importation and exportation including transit and freedom of transit’.⁴³² The provisions are important because they help in addressing some of Africa’s problems discussed above. The problems include that of costs incurred by goods in transit and transportation of goods which are generally high in Africa.⁴³³ These costs may be lowered if Africa makes use on the provisions on release and clearance of goods as they seek to simplify the

⁴³¹ United Nations Economic Commission for Europe ‘WTO Agreement on Trade Facilitation’ available at http://tfig.unece.org/contents/WTO_Agreement.htm (accessed 02 April 2015).

⁴³² Section I of The Trade Facilitation Agreement.

⁴³³ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa V Towards an African Continental Free Trade Area* (2012) 102.

processes of clearance of goods⁴³⁴ which then will save costs and help further intra-African trade which is currently crippled by non-tariff barriers (NTB) such as border procedures.⁴³⁵

Also there are complex customs-related processes and poor inadequate infrastructure which makes it difficult for trade gains to be noticeable in Africa.⁴³⁶ This problem may be addressed by provisions on border agency cooperation. These may help to minimise procedures involved in importing and exporting goods in Africa considering that sub Saharan Africa is second when it comes to regions with the highest number of export and import procedures.⁴³⁷

These provisions are set to allow African companies to reach a larger market and achieve economies of scale, which then contribute to increased competitiveness in global markets.⁴³⁸ This is so because trade facilitation measures will foster cross-border value chains in which companies in different countries will increase production chain.⁴³⁹ Azvedo has said that the capacity the African markets is undoubted because they offer firms the opportunity to diversify their production and achieve greater value addition.⁴⁴⁰

Section II includes the provisions special and differential treatment for developing and least developed country members as well as the provision of technical assistance and capacity building.⁴⁴¹ On this section Bali TFA broke new ground for developing and least-developed countries. Section II provides that ‘the implementation of the Bali TFA is directly linked to the

⁴³⁴ Hoekman B ‘The Bali Trade Facilitation Agreement and Rulemaking in the WTO: Milestone, Mistake or Mirage?’ (2014) *Robert Schuman Centre for Advanced Studies Research Paper No RSCAS 102 13*.

⁴³⁵ Nwonwu F ‘Regional Integration in Africa: Constraining Issues and Implications for Economic Development’ (2009)12 available at https://www.uni-leipzig.de/~ecas2009/index.php?option=com_docman&task=doc_download&qid=1463&Itemid=24 (accessed 20 April 2015).

⁴³⁶ Kugler K ‘Trade facilitation: The key to unlocking Africa’s trade potential’ (2014) available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1735:trade-facilitation-the-key-to-unlocking-africas-trade-potential&catid=87:african-finance-a-economy&Itemid=294 (accessed 27 March 2015).

⁴³⁷ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 219.

⁴³⁸ International Trade Centre News ‘Unlocking Africa’s trade potential: leaders pinpoint strategies to increase intra-African trade’ 20 May (2014) available at <http://www.intracen.org/news/Unlocking-Africas-trade-potential-leaders-pinpoint-strategies-to-increase-intra-African-trade/> (accessed 02 April 2015) (hereafter International Trade Centre News 20 May (2014)).

⁴³⁹ International Trade Centre News 20 May (2014).

⁴⁴⁰ Trade Facilitation Will Support African Industrialisation available at <http://www.ipsnews.net/2014/07/trade-facilitation-will-support-african-industrialisation/> (accessed 02 April 2015).

⁴⁴¹ 10 years of negotiations to reach Agreement on Trade Facilitation available at <http://tfig.unece.org/contents/wto-trade-facilitation-negotiations.html> (accessed 21 January 2015)

capacity of the country to do'.⁴⁴² It is strongly argued that this section is commendable in Africa as member states will not face pressure to channel resources to implementation of the agreement without the capacity but do so as result of pressure from developed countries.

The structure of the Bali TFA has led authors such as Kanyimbo to conclude that the agreement holds tremendous potential for African countries because of its complementary nature to infrastructure investments that are being undertaken across the continent mostly in the transport sector.⁴⁴³

Section III is made up of two articles addressing institutional arrangements and final provisions.⁴⁴⁴ These institutional arrangements help to address the particular needs of developing and Least Developed Countries (LDCs) by supporting them in capacity building in the area of trade facilitation.⁴⁴⁵ The Trade Facilitation Agreement Facility (Bali TFAF) is tasked to provide such assistance to LDCs and developing countries by helping them develop projects that help improve border procedures and access the necessary funds to improve the border procedures.⁴⁴⁶

African countries need to comply with the requirements stipulated in the Bali TFA. Facilitation programmes such as Comprehensive Tripartite Trade and Transport Facilitation Programme (CTTTFP) which is tasked to deal with trade facilitation by the Tripartite FTA can help make sure that they comply within a reasonable transitional period in order to enjoy the benefits of trade facilitation accruing in the region.⁴⁴⁷ The Tripartite FTA as discussed in chapter 3 is an effort to deeply integrate Africa as a region and Bali TFA has a potential to support regional integration, which in turn complements the efforts by AU to create a continental free trade area⁴⁴⁸ and the end result can further intra-African trade.

⁴⁴² WTO News: Speeches — Dg Roberto Azevêdo (2014).

⁴⁴³ Kanyimbo P & Manduna C 'Trade Facilitation in the Bali Package: What's in it for Africa?' (2014) 15 available at <http://ecdpm.org/wp-content/uploads/BN-61-Trade-Facilitation-Bali-What-is-in-it-for-Africa.pdf> (accessed 01 April 2015).

⁴⁴⁴ 10 years of negotiations to reach Agreement on Trade Facilitation available at <http://tfig.unece.org/contents/wto-trade-facilitation-negotiations.html> (accessed 21 January 2015)

⁴⁴⁵ Preamble of Agreement On Trade Facilitation.

⁴⁴⁶ Erasmus G (2014).

⁴⁴⁷ Shayanowako P 'The Bali WTO Trade Facilitation Agreement: Implications for southern Africa' (2014) *Tralac* Working Paper No us14wp01/2014 19.

⁴⁴⁸ Trade facilitation will support African industrialization and development—Azevêdo.

4.4 TRADE FACILITATION IN THE TRIPARTITE FREE TRADE AREA

In Chapter 3, the mini-thesis discussed how COMESA, EAC and SADC as building blocs of AEC are working towards implementation of AEC through negotiating the Tripartite FTA. It also discussed liberalisation of trade in goods as a way of unlocking Africa's trade potential and now the discussion will focus on trade facilitation in the Tripartite FTA and how it will unlock Africa's trade potential.

The high cost of doing business across borders in the COMESA-EAC-SADC region is a major constraint not only to economic development but it hinders potential for trade in the region to grow.⁴⁴⁹ While the three RECs involved in the Tripartite FTA have had some success in facilitating trade through programmes in the blocs, they have faced challenges with regards to implementation especially countries belonging to more than one REC because they did not have the capacity to adopt all the programmes.⁴⁵⁰

The CTTTFP offers some solutions to the problems which were faced by the RECs as it seeks to harmonise 'customs co-operation provisions for the exchange of information on changes in customs legislation, procedures and duties and information on regulatory requirements and information required to implement and administer Rules of Origin.'⁴⁵¹ Both CTTTFP and Bali TFA aim at reducing red tape where movement of goods are concerned. CTTTFP will be discussed in detail below. However it is important to know that CTTTFP was created as one overall integrated approach to trade facilitation in the tripartite region.⁴⁵² It was born out of Article 14 of the Tripartite Free Trade Agreement (TFTA) and it ensures that the objectives of Article 14 are realised.

Article 14 of the draft establishing the TFTA Tripartite Member States undertake to initiate trade facilitation programs aimed at:

⁴⁴⁹ Focal area 2: Trade and transport facilitation available at http://www.comesa-eac-sadc-tripartite.org/intervention/focal_areas/trade_facilitation (accessed 02 April 2015).

⁴⁵⁰ Pearson M & Chaitezvi C (2012) 7.

⁴⁵¹ Focal area 2: Trade and transport facilitation available at http://www.comesa-eac-sadc-tripartite.org/intervention/focal_areas/trade_facilitation (accessed 02 April 2015).

⁴⁵² CUTS International *Trade Facilitation in the TFTA: A Closer Look at the EAC* (2012) 4.

- (a) Reducing the cost of processing documents and the volume of paper work required in respect of trade between Tripartite Member States;
- (b) Ensuring that the nature and volume of information required in respect of trade within the free trade area does not adversely affect the economic development of, or trade among, the Tripartite Member States;
- (c) Adopting common standards of trade procedures within the free trade area where international requirements do not suit the conditions prevailing among Tripartite Member States;
- (d) Ensuring adequate coordination between trade and transport facilitation within the free trade area;
- (e) Keeping under review the procedures adopted in international trade and transport with a view to simplifying and adopting for use by Tripartite Member States;
- (f) Collecting and disseminating information on international development regarding trade facilitation;
- (g) Promoting the development and adoption of common solutions to problems in trade facilitation among Tripartite Member States;
- (h) Initiating and promoting the establishment of joint programmes, for the training of personnel engaged in trade facilitation among Tripartite Member States; and
- (i) Promoting the establishment of one-stop border posts'.⁴⁵³

The above objectives are to be realised through various elements contained in the CTTTFP. The discussion of this thesis will, however, be limited to the elements that have not been discussed in chapter 3. This discussion will be concerned with those that deal with saving costs and facilitate a smoother movement of goods. These are effective management of border posts and transport procedures.⁴⁵⁴ The focus of these trade facilitation elements may be the key to solving the key to

⁴⁵³ Article 14 of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

⁴⁵⁴ Pearson M & Chaitezvi C (2012) 7.

challenging the low intra-African trade which is inextricably linked to a country's economic objectives of increasing primary exports while diversifying the economy.⁴⁵⁵

A major constraint in the movement of imports and exports in eastern and southern Africa has to do with border crossings and article 14 (d) of TFTA seeks to ensure adequate coordination between trade and transport facilitation within the free trade area.⁴⁵⁶ It has been demonstrated by different studies efficient border posts saves waiting times at border crossings lowering costs for both importers and exporters.⁴⁵⁷ Coordinated Border Management (CBM) is a major pillar in CTTTFP and it seeks coordinate management of border crossings.

The most striking concept in the effective management of border crossings is that of one-stop border post (OSBP) which has been embraced by a number of tripartite countries because it saves time and costs involved at border crossings.⁴⁵⁸ OSBP means that goods and passenger vehicles only stop once at the border, and exit one country and enter another at the same time.⁴⁵⁹

There are four elements involved in the implementation of the OSBP namely basis for legal framework and in the case of tripartite countries the TFTA will be the basis for the framework.⁴⁶⁰ There is need to 'design procedures and traffic flows which will be used in the whole common control zone,' 'information and communication technologies and integrated facilities which will be used by the two countries concerned'.⁴⁶¹ These elements should be integrated and they are all essential for a successful implementation of OSBP.⁴⁶²

The OSBP at Chirundu between Zimbabwe and Zambia is an example of how the four elements above work and it has been a model of how trade facilitation can unlock Africa's potential.⁴⁶³

⁴⁵⁵ African Transport Corridors – the key to unlocking Africa's potential available at <http://www.aurecongroup.com/en/thinking/current-articles/african-transport-corridors-the-key-to-unlocking-africas-potential.aspx> (accessed 02 April 2015).

⁴⁵⁶ Article 14 (d) of the Draft Agreement Establishing The COMESA, EAC And SADC Tripartite Free Trade Area (Revised December 2010).

⁴⁵⁷ Aid-For-Trade Case Story 'The COMESA-EAC-SADC Tripartite Trade and Transport Facilitation Programme' (2011) 3 available at <http://www.oecd.org/aidfortrade/47407250.pdf> (accessed 02 April 2015).

⁴⁵⁸ Aid-For-Trade Case Story 'The COMESA-EAC-SADC Tripartite Trade and Transport Facilitation Programme' (2011) 3 available at <http://www.oecd.org/aidfortrade/47407250.pdf> (accessed 02 April 2015).

⁴⁵⁹ Pearson M & Chaitezvi C (2012) 11.

⁴⁶⁰ Pearson M 'Trade Facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area' (2011) *Tralac Working No S11WP11/2011* 9 (hereafter Pearson M (2011)).

⁴⁶¹ Pearson M (2011) 9.

⁴⁶² Pearson M (2011) 10.

⁴⁶³ Aid For Trade Case Story 'Chirundu One Stop Border Post: A Regional Trade Facilitation Programme' (2011) 8 available at <http://www.oecd.org/aidfortrade/47750237.pdf> (accessed 20 April 2015).

The border post has already contributed to a reduction of delays associated with clearance at borders and costs have been reduced with a number of revenue being saved from reduction of fraudulent activities by importers and clearing agents.⁴⁶⁴ It is therefore submitted that Africa can learn from the Chirundu OSBP and can further integrating by creating more OSBPs in the region which will facilitate trade.

Management of border crossings is essential, but so are rules and regulations that specifically address the transport sector in the tripartite region.⁴⁶⁵ These rules are few in the tripartite region, and this is problematic because the transport sector is one of the key drivers of economic growth and regional integration.⁴⁶⁶ The need to develop concrete rules to govern the sector stem from the fact that goods need to be moved from one place to the other and trade may never be mentioned without reference to transport.⁴⁶⁷

The tripartite region is addressing market liberalisation in the transport sector, and the process being followed to achieve such is done in five phases which focuses on assessments of current bilateral transport agreements and development of new agreements through harmonisation.⁴⁶⁸ The simplification and further liberalisation of the terms of market access will help facilitate the creation of a regional license.⁴⁶⁹ With a system that has an 'effective framework for a manual to guide implementation and support use of the system to enable operator registration by country transport authorities,⁴⁷⁰ Africa's trade growth in the coming years may be imminent.

The discussed trade facilitation mechanisms can help Africa integrate and as discussed in chapter 2 the benefits of integration outweigh the disadvantages because integration contributes

⁴⁶⁴ Viljoen W 'The evolution of the trade facilitation concept, best practices and the Tripartite Comprehensive Tripartite Trade and Transport Facilitation (CTTTFP)' (2013) 9 available at http://www.ictsdsymposium.org/wp-content/uploads/bsk-pdf-manager/11_Evolution-of-the-trade-facilitation-concept-best-practices-and-the-CTTTFP_20131017.pdf (accessed 02 April 2015) (hereafter Viljoen W (2013)).

⁴⁶⁵ Pearson M (2011) 23.

⁴⁶⁶ Transport Market Liberalisation in the Context of the Tripartite Free Trade Area Presented at the SADC Transport Sector Forum 11-13 September (2012) available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFiAA&url=https%3A%2F%2Ftis.sadc.int%2Ffiles%2F3813%2F4744%2F3914%2F11092012_Transport_Market_Lib_at_Tripartite_Level.ppt&ei=boohVZuJCCGtUajcq5AP&usq=AFQjCNFh1JYQ1OqwyzHde18LfZ6gUum24Q&bvm=bv.89947451,d.d24 (accessed 02 April 2015) (hereafter SADC Transport Sector Forum (2012)).

⁴⁶⁷ SADC Transport Sector Forum (2012).

⁴⁶⁸ See Generally Pearson M (2011) 23-25.

⁴⁶⁹ Comprehensive Tripartite Trade and Transport Facilitation Programme available at http://www.trademarksa.org/our_work/trade_facilitation/tripartite_wide_programme (accessed 05 April 2015).

⁴⁷⁰ Pearson M & Chaitezvi C (2012) 21.

significantly to economic development of a nation.⁴⁷¹ The next section will discuss more of the benefits and challenges associated with trade facilitation.

4.4.1 Prospective Benefits of Trade Facilitation in Tripartite region

Improved trade facilitation in Africa can significantly lower trade costs, by reducing the delays at border or port crossings.⁴⁷² When trade costs are lowered different stake holders will gain from an efficient system. Governments will gain by increasing revenue through efficient that controls fraud.⁴⁷³ Private sector will gain by making their goods competitive and consumers gain by paying the actual costs of the products that do not include costs of lengthy border delays.⁴⁷⁴

Transport costs in East Africa are on average 80 percent higher than in the US and Europe and to move a container from Mombasa to Kampala costs almost the same as it does from Mombasa to Shanghai.⁴⁷⁵ This is unreasonable and hampers trade and reduction of trade costs is important because as discussed in chapter 3 reductions in tariffs and improvement in market access alone may not contribute fully to integration in Africa.⁴⁷⁶

Trade facilitation measures may increase the volume of trade, imports and exports.⁴⁷⁷ Rippel reckons that increase in imports and exports leads to open trade, because open markets lead to production of new ideas that lead to opportunities regionally and in the global markets.⁴⁷⁸ The estimated results of imports and exports are not only important for the direct impact on imports

⁴⁷¹ See Generally 2.1 Introduction.

⁴⁷² United Nations Economic Commission for Africa *Assessing Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 199.

⁴⁷³ The Costs and Benefits of Trade Facilitation (2005) Organisation For Economic Co-Operation And Development (OECD) 3 available at <http://www.oecd.org/trade/facilitation/35459690.pdf> (accessed 07 April 2015) (hereafter The Costs and Benefits of Trade Facilitation (2005)).

⁴⁷⁴ The Costs and Benefits of Trade Facilitation (2005) 3.

⁴⁷⁵ Ninth WTO Ministerial Conference (Bali, Indonesia, 3-6 December 2013)European Commission Memo Brussels, 29 November (2013) available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDMQFjAD&url=http%3A%2F%2Feuropa.eu%2Frapid%2Fpress-release_MEMO-13-1076_en.doc&ei=FeqjVdf6AoHiU9rzqlqD&usq=AFQjCNH1bHCovTPLyfb53cZ97X6e2lLveq&bvm=bv.89947451,d.ZWU (accessed 07 April 2015)(hereafter European Commission Memo 2013).

⁴⁷⁶ The Costs and Benefits of Trade Facilitation (2005) 3.

⁴⁷⁷ Ad Hoc Expert Group Meeting (2011).

⁴⁷⁸ Rippel B 'Why Trade Facilitation is Important for Africa' (2011) *Africa Trade Policy Notes* Note #27 1 (hereafter Rippel B (2011)).

and exports, but also for the significant effects that this can have on the domestic market 'competitiveness through the access to necessary imported intermediate goods'.⁴⁷⁹

Trade facilitation may result in improved infrastructure that may attract foreign direct investment.⁴⁸⁰ A European Commission Memo notes that trade facilitation could result in expanding transit warehouses in ports of entry which such have already proved useful in West Africa for landlocked countries such as Mali, Niger or Burkina Faso.⁴⁸¹ In improving such infrastructure and building ports warehouses, it means that that trade facilitation will be creating employment opportunities. As a result, improved infrastructure will help save costs.

Trade facilitation does not only benefit trade but is a catalyst for poverty reduction because it creates more and broad-based job and income opportunities.⁴⁸² Although scholars argue on quantifying the contribution of trade in poverty reduction it has 'been demonstrated that a vibrant export sector and affordable access to imports can contribute to economic growth and poverty reduction.'⁴⁸³ The debate may be because there are negative effects when it comes to social risks⁴⁸⁴ associated with trade flows.⁴⁸⁵

The benefits discussed above come at a cost and this cost is the challenges that the tripartite region is likely to encounter when implementing trade facilitation measures.

4.4.2 Challenges likely to be encountered by the Tripartite region on trade facilitation

Despite the fact that the tripartite member countries have a CTTTFP, they are likely to encounter challenges in implementing trade facilitation measures. The first challenge has to do with NTBs which tend to change form from country to country and these restrictions are difficult to

⁴⁷⁹ Moïse E, Sorescu S, Hummels D & Minor P 'Trade Facilitation Indicators: The Potential Impact Of Trade Facilitation On Developing Countries' Trade' (2013) *Organisation for Economic Co-operation and Development* Trade Policy Paper No. 144 11.

⁴⁸⁰ Viljoen W 2013 2.

⁴⁸¹ European Commission Memo (2013).

⁴⁸² Rippel B (2011)4.

⁴⁸³ Rippel B (2011) 4.

⁴⁸⁴ Trade flows in the past has been among the contributory factor to increase of infections of HIV/AIDS in the as Chirundu area as truck drivers were left with nothing to do for almost five days while waiting for their documentation to be cleared which then attracted sex workers which resulted in high HIV/AIDS infections amongst the drivers and the community.

⁴⁸⁵ Integrating poverty and social analysis into Aid for Trade programmes: trade facilitation and trade-related infrastructure (2010) 4 available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6210.pdf> (accessed 07 April 2015) .

manage.⁴⁸⁶ UNECA quotes Baldwin who shows that countries with few restrictions on trade ‘achieve faster economic growth than countries that have more restrictions on trade.’⁴⁸⁷ The reason for this is that trade distortion is reduced by liberalisation and it gives activities with a comparative advantage to expansion of economic growth.⁴⁸⁸ In the tripartite region member states have different NTBs and coordination of these is made more difficult due to membership overlap and harmonisation of the RECs laws governing NTBs may be problematic if Tripartite FTA does not replace the jurisdiction of the three RECs.

Another challenge in implementing trade facilitation measures in Africa has to do with capacity and skills limitations at African ports.⁴⁸⁹ Buyonge and Kireeva aver that the problem of delays at African border ports is not because there is lack of necessary equipment but are due to inefficient and ineffective port management.⁴⁹⁰ Similarly studies by Ben Barka have indicated that port capacity limitations and lack of institutional reforms are the two critical constraints which must be addressed without delay in order to make African ports function effectively and contribute to boosting trade.⁴⁹¹ Therefore, both authors suggest that the problem is not that there are few ports in Africa but the ones that are there are not being utilised effectively so that they can grow trade in Africa.

The other major hindrance to trade facilitation in Africa is that there is poor road and rail transport infrastructure. The quality of rail and road infrastructure in Africa is a major problem as it hinders the free flow of goods across borders.⁴⁹² The fact that ten of the tripartite countries are landlocked means that they need to rely more on rail and road for transportation of goods for

⁴⁸⁶ Kigongo OZ ‘WTO Agreement on Trade Facilitation: Implications for LLDCs’ (2014) available at <http://www.lldc2conference.org/custom-content/uploads/2014/06/3-Mrs.-Olive-Z.Kingongo.-Monqolia-WTO-Agreement-on-Trade-Facilitation.pdf> (accessed 07 April 2015) (hereafter Kigongo OZ (2014)).

⁴⁸⁷ United Nations Economic Commission for Africa Assessing *Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 40.

⁴⁸⁸ Ad Hoc Expert Group Meeting (2011).

⁴⁸⁹ Ad Hoc Expert Group Meeting (2011).

⁴⁹⁰ Buyonge C & Kireeva I ‘Trade Facilitation In Africa: Challenges And Possible Solutions’ (2008)2 no. 1 *World Customs Journal* 45.

⁴⁹¹ Ben Barka H ‘Border Posts, Checkpoints, and Intra-African Trade: Challenges and Solutions’ (2012) *African Development Bank Publication* 4 available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/INTRA%20AFRICAN%20TRADE_INTRA%20AFRICAN%20TRADE.pdf (accessed 07 April 2015) (hereafter Ben Barka (2012)).

⁴⁹² Ben Barka (2012) 4.

them to be competitive.⁴⁹³ There are poor connections between markets due to the bad conditions of roads in Africa and this means that the problem is not that African markets are inaccessible but how to get goods to their destination without incurring delays and cost increases is the challenge.⁴⁹⁴ High trade costs affect the final price of goods and impinge on competitiveness of the product because of low consumer demand.⁴⁹⁵

The harmonisation of laws and policies that deal with trade facilitation in the RECs may also be a challenge. In chapter three the thesis discussed that membership overlap⁴⁹⁶ is among the greatest challenges that will face the Tripartite FTA and if it does not replace the RECs in its entirety the problem may still extend to trade facilitation. Hansen P and Annovazzi-Jakab share the opinion that laws that are conducive to the development of a competitive business environment encourage fair participation in markets, and lead to efficient transport services.⁴⁹⁷

4.5 CONCLUSION

This chapter has discussed that there is no clear definition of what trade facilitation is. Be that as it may, trade facilitation aims at cutting red tape at the border and reducing all transactions costs associated with enforcement, regulation and administration of trade policies.⁴⁹⁸ It involves the simplification, harmonisation and rationalisation of trade procedures which can be achieved through automation, applying modern risk analysis techniques, transport procedures.⁴⁹⁹

The chapter discussed that trade facilitation measures are also key to furthering intra-African trade because open trade is created. Trade facilitation measures that are provided for in GATT have now been clarified in the Bali TFA, and Bali TFA is now the multilateral framework that governs trade facilitation. In the Tripartite FTA the CTTTFP is tasked to with trade facilitation in

⁴⁹³ Botswana, Burundi, Ethiopia, Lesotho Malawi, Rwanda, Swaziland, Uganda, Zambia and Zimbabwe are landlocked.

⁴⁹⁴ Hansen P & Annovazzi-Jakab L 'Facilitating cross-border movement of goods: A sustainable approach' in Lawrence RZ et al (eds) *The Global Enabling Trade Report* (2008) 69 (hereafter Hansen P & Annovazzi-Jakab L (2008)).

⁴⁹⁵ Ben Barka (2012) 4.

⁴⁹⁶ Babatunde A & Odularu G 'Intra-African trade: Not an easy path' (2012).

⁴⁹⁷ Hansen P & Annovazzi-Jakab L (2008) 69.

⁴⁹⁸ Jayanetti S 'Rationale for Free Trade and Types of Protection' available at <http://www.teriin.org/events/srilanka/sanath.pdf> (accessed 07 April 2015).

⁴⁹⁹ WTO Doha Round & South Asia: Linking Civil Society with Trade Negotiations available at www.cuts-international.org/documents/.../Trade%20Facilitation.ppt (accessed 31 March 2015).

the tripartite region. The chapter discussed that if trade facilitation measures are implemented there is a causal link between trade facilitation and trade flow as increase is significantly linked to reductions in trade transaction cost.⁵⁰⁰ The potential gains of trade facilitation reforms include reduction of costs, increased investments, increase in gross domestic products (GDP),⁵⁰¹ improved infrastructure, poverty reduction and creation of employment.⁵⁰²

Though inefficient movement of goods across borders is a serious impediment to trade and growth,⁵⁰³ it may not be enough to address only transport facilitation. One has to also look at the broader facilitation measures.⁵⁰⁴ The chapter also deliberated on the challenges that may be faced by the tripartite region in implementing trade facilitation measures. In summary, these include poor road and rail infrastructure, skill limitation at African port and membership overlap.⁵⁰⁵ With these challenges in mind, chapter 5 will give recommendations on how these challenges can be managed and also conclude how regional economic integration can further intra-African trade using trade facilitation as a tool to further integration.



⁵⁰⁰ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa (ARIA IV) Trade Facilitation and Intra-African Trade* (2012) 199.

⁵⁰¹ Viljoen W (2013) 1.

⁵⁰² Ben Barka (2012) 4.

⁵⁰³ Trade Facilitation and Intra-African Trade available at <http://www.mcli.co.za/mcli-web/events/2010/28apr2010/002.pdf> (accessed 07 April 2015).

⁵⁰⁴ Viljoen W (2013) 11.

⁵⁰⁵ See generally 4.4.2 Challenges likely to be encountered by the Tripartite region on trade facilitation

CHAPTER 5

CONCLUSION AND RECOMENDETATIONS

5.1 CONCLUSION

The above discussion has highlighted the fact that the concept of regional economic integration in Africa has spread throughout the region. The integration schemes in the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) are an example of how African leaders have ambitiously sought to co-operate in regional matters.

The benefits of regional integration discussed above include the fact that greater economies of scale exists where producers benefit extensively than they would have if there were no co-operation in the region.⁵⁰⁶ Countries benefit reciprocally from accessing knowledge that promotes economic growth in their home market.⁵⁰⁷ Regional economic integration leads to progressive reduction of transaction costs through the elimination of trade barriers.⁵⁰⁸ Furthermore, a large market can be created where a change in its demand for imports can influence the price at which those imports can be purchased.⁵⁰⁹ If Africans cooperate and create powerful units, they could establish a formidable force that will place Africa in a tactical global position, where they can amongst other things influence the global economy in desensitising treatments being meted to the continent globally.⁵¹⁰

⁵⁰⁶ See Generally 2.1 Introduction.

⁵⁰⁷ See Generally 2.1 Introduction.

⁵⁰⁸ See Generally 2.1 Introduction.

⁵⁰⁹ See Generally 2.1 Introduction.

⁵¹⁰ Nwonwu F 'Regional Integration in Africa: Constraining Issues and Implications for Economic Development' (2009) 4 available at

https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCcQFjAA&url=https%3A%2F%2Fwww.uni-leipzig.de%2F~ecas2009%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D1463%26Itemid%3D24&ei=usZJVceyEtSM7AbqjoHwCQ&usq=AFQjCNFuFH7Y0XsbrJ7qldO2qo7Y8PWOWq&bvm=bv.92291466.d.d24 (accessed 04 May 2015).

When a region is fully integrated, the level of intra-regional trade is considerably high.⁵¹¹ The discussion made it clear that intra-African trade has the potential to draw in investment, foster economic growth and increase employment.⁵¹²

COMESA, EAC and SADC have however failed to achieve their desired integration due to a number of reasons. Amongst the reasons is the fact that there is lack of coordination and harmonisation of economic policies.⁵¹³ This is mainly attributed to the multiplicity of schemes and overlapping memberships and mandates.⁵¹⁴ As a result each country in Africa belongs to more than one (Regional Economic Community) REC.⁵¹⁵ Other reasons include; too much emphasis placed on elimination of tariffs and not on capacities that build trade.

In realising the need for deeper regional economic integration and as building blocs of the African Economic Community (AEC), COMESA, EAC and SADC are currently negotiating a Tripartite FTA in line with the third stage in the establishment of the AEC.⁵¹⁶ COMESA, EAC and SADC are expected to merge with other RECs in Africa creating the AEC. If the Tripartite FTA is laid on a solid foundation the merging into AEC should not be much of a challenge as the Tripartite FTA would have addressed most of the challenges that has led to the failure of RECs achieving their desired economic integration.

The solid foundation of the Tripartite FTA is based upon it addressing most of the challenges that it is likely to face. This thesis will therefore highlight some of the recommendations that the Tripartite FTA may consider in order to achieve its objectives.

This paper identified trade facilitation as one the trade capacities that Africa can prioritise in increasing intra-African trade. The high cost of doing business across borders in the COMESA-EAC-SADC region hampers economic development and potential for trade in the region to grow.⁵¹⁷ The discussion in chapter 4 highlighted all the likely benefits that implementation of

⁵¹¹ See Generally 1.3 Significance of Study.

⁵¹² See generally 3.3 Prospective Benefits & 4.4.1 Prospective Benefits of Trade Facilitation in Tripartite region.

⁵¹³ See generally 3.1 Introduction.

⁵¹⁴ See generally 2.3.2.2 Common Market for Eastern and Southern Africa and its efforts in furthering regional economic integration.

⁵¹⁵ See generally 3.1 Introduction.

⁵¹⁶ See generally 3.1 Introduction.

⁵¹⁷ See generally 4.4 Trade Facilitation In The Tripartite Free Trade Area.

trade facilitation mechanisms have for intra-African trade.⁵¹⁸ The discussion highlighted that if Africa utilises the Trade Facilitation Agreement (Bali TFA) together with the facilitation mechanisms in the Tripartite FTA the potential to increase intra-African trade is large.

5.2 RECOMMENDATIONS

It is commendable that the Tripartite FTA has identified trade facilitation as one of the trade capacities that can foster economic growth and increase intra-African trade. There is need, however to first address the issue of overlapping membership as it may hinder the progress of Tripartite FTA.⁵¹⁹

As highlighted in Chapter 3 and 4, the member states of Tripartite FTA have different non-tariff barriers (NTBs)⁵²⁰ and coordination and harmonisation of the RECs laws governing NTBs may be problematic if Tripartite Free Trade Agreement (TFTA) does not become the only framework that governs NTBs. The Tripartite FTA may need to replace the jurisdiction of the three RECs so that there is no overlap of membership.

COMESA, EAC and SADC should become one REC because there are some rules that cannot be harmonised. It was highlighted in chapter 3 that the negotiations have been stalled when it comes to the issue of harmonising rules of origin in the three RECs. The solution to this may lay in the Tripartite FTA replacing the RECs⁵²¹ and it negotiating its own rules of origin separate from the RECs.

Tripartite FTA member states should be politically committed to making the arrangement work by willing to cede power to a supra-national body.⁵²² In chapter 3 it was highlighted that Tripartite FTA members should not invoke sovereignty when it comes to implementing a decision reached by the dispute panel.⁵²³ If they cede power and cannot invoke sovereignty it

⁵¹⁸ See generally 4.4.1 Prospective Benefits of Trade Facilitation in Tripartite region.

⁵¹⁹ See generally 4.4.2 Challenges likely to be encountered by the Tripartite region on trade facilitation.

⁵²⁰ See generally 4.4.2 Challenges likely to be encountered by the Tripartite region on trade facilitation.

⁵²¹ See generally 3.3.1 Challenges.

⁵²² See generally 3.3.1 Challenges.

⁵²³ See generally 3.2.3.1 Dispute Settlement Mechanism.

gives the dispute panel power to reach a decision without fear, favour or prejudice making the dispute settlement mechanism effective.

One of the major benefits for the Tripartite FTA is establishment of a larger market.⁵²⁴ However in order for the market to operate effectively there is need for Africa to diversify and specialise.⁵²⁵ African countries production profiles are similar, intra-African trade facilitation would be best achieved if the product they produce are the same. There is need to encourage the production of non-traditional export commodities with comparative advantage in regional and global markets.

For trade facilitation mechanisms to be implemented effectively there is need for Tripartite member states to provide adequate and efficient transport infrastructure and services.⁵²⁶ Maintenance should be done on existing transport infrastructure and governments should priorities new road and railway construction in their national fiscals.

Capital is required in building one stop border posts (OSBP)⁵²⁷ that facilitate trade by speeding up customs and border crossing procedures. Efforts should therefore be made on enacting national laws that favour foreign direct investment (FDI)⁵²⁸. FDI may generate the capacity that is needed to develop ideas and solutions needed for intra-African trade.

This study serves as a confirmation that the Tripartite FTA may be the formidable force that is needed for increase of intra-African trade. It carries ambitious objective of which implemented may produce the best results that foster economic growth. However the challenges in chapter 3 and 4 bear testimony to the fact that the Tripartite FTA has significant challenges that must be addressed.

[29 300 words including footnotes]

⁵²⁴ See generally 3.3 Prospective Benefits.

⁵²⁵ Mensah JA 'Boosting Africa's Intra-African Trade by Enhancing Trade Facilitation' 2014 available at <http://africaupclose.wilsoncenter.org/boosting-africas-intra-african-trade-by-enhancing-trade-facilitation/> (accessed 04 May 2015).

⁵²⁶ Mensah JA 'Boosting Africa's Intra-African Trade by Enhancing Trade Facilitation' 2014 available at <http://africaupclose.wilsoncenter.org/boosting-africas-intra-african-trade-by-enhancing-trade-facilitation/> (accessed 04 May 2015)

⁵²⁷ See Generally 4.4 Trade Facilitation In The Tripartite Free Trade Area

⁵²⁸ Mensah JA 'Boosting Africa's Intra-African Trade by Enhancing Trade Facilitation' 2014 available at <http://africaupclose.wilsoncenter.org/boosting-africas-intra-african-trade-by-enhancing-trade-facilitation/> (accessed 04 May 2015)

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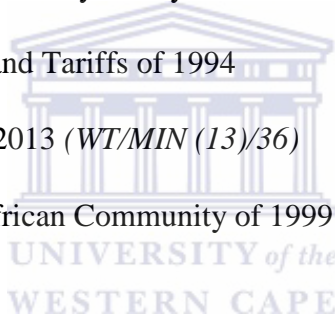
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