

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

THE ESTABLISHMENT OF TRIPARTITE FREE TRADE AREA INSTITUTIONS AND ITS
REPERCUSSIONS ON COUNTRIES WITH MULTIPLE MEMBERSHIPS.

Mini-thesis submitted in partial fulfilment of the requirements for the award of the LLM degree.



UNIVERSITY *of the*
WESTERN CAPE

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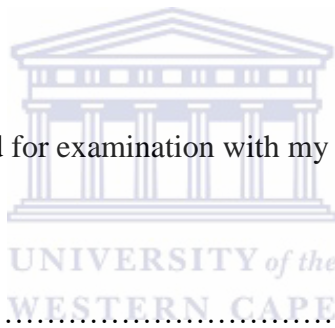
DECLARATION

I, Isaac Chiphaso Chiundira, do hereby declare that this mini-thesis is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university. All the sources used or quoted herein have been indicated and acknowledged, accordingly.

Signed:.....

Date:.....

This research paper has been submitted for examination with my approval as University supervisor.



Signed:.....

Patricia Lenaghan

Date:.....

DEDICATION

This mini-thesis is dedicated to the loving memory of my parents, William Blaiden Chiundira and Lincy Gilbertha Chiundira. Without a doubt, it is those words of encouragement from you that have led me this far. May your beautiful souls continue resting in God's eternal peace.



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To the good Lord: Without your guidance, providence, wisdom and instruction in all things, this work would not have seen the light of the day. May your Holy name be praised.

To my family; Gift, Cecilia, Daniel, Angela, Victor, Chisomo, Happy, Lincy B, William, Leticia, Samantha, Aunt Agnes and everyone: Thank you very much for your constant and immeasurable support, love and guidance throughout my life and my studies. Your words of encouragement and wisdom, and everything you continue doing for me has always been inspirational. Family, I thank you for believing in me and being my pillars of strength. May the good Lord bless you always.

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KEY WORDS

African Economic Community (AEC)
African Union (AU)
Common Market for Eastern and Southern Africa (COMESA)
East African Community (EAC)
Economic integration
Free Trade Area (FTA)
Market integration
Regional Economic Community (REC)
Regional harmonisation
Regional integration
Regional integration arrangement (RIA)
Regional integration institution (RII)
Southern African Development Community (SADC)
Tripartite Free Trade Area (TFTA)
TFTA Agreement



LIST OF ACRONYMS AND ABBREVIATIONS

AEC	African Economic Community
AU	African Union
CET	Common External Tariffs
COMESA	Common Market for Eastern and Southern Africa
DRC	Democratic Republic of Congo
DSB	Dispute Settlement Body
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU	European Union
FDI	Foreign Direct Investment
FTAs	Free Trade Areas
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
MFN	Most Favoured Nation Treatment
PTA	Preferential Trade Area for Eastern and Southern Africa
REC	Regional Economic Community
RIA	Regional Economic Arrangement
RII	Regional Integration Institution
RISDP	Regional Indicative Strategic Development Plan
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
TFTA	Tripartite Free Trade Area
UNECA	United Nations Economic Commission for Africa
VCLT	Vienna Convention on the Law of Treaties, 1969
WTO	World Trade Organisation

TABLE OF CONTENTS

CHAPTER ONE INTRODUCTION

1.1.	Background	1
1.2.	Problem Statement	3
1.3.	Significance of the Study	5
1.4.	Limitations of the Study	5
1.5.	Objectives of the Study	5
1.6.	Research Questions	6
1.7.	Proposed Methodology	7
1.8.	Chapter Outline	7

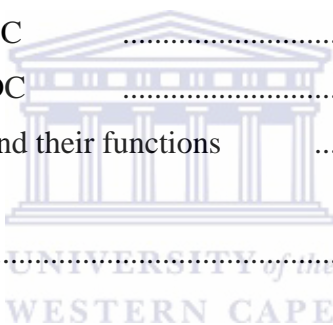


CHAPTER TWO

THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA), THE EAST AFRICAN COMMUNITY (EAC) AND THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) AND THEIR INSTITUTIONS

2.1.	Introduction	9
2.2.	The Common Market for Eastern and Southern Africa (COMESA)	12

2.2.1.	Background of COMESA	12
2.2.2.	Membership in COMESA	15
2.2.3.	COMESA institutions and their functions	17
2.3.	The East African Community (EAC)	21
2.3.1.	Background of the EAC	21
2.3.2.	Membership in the EAC	23
2.3.3.	EAC institutions and their functions	24
2.4.	The Southern African Development Community (SADC)	27
2.4.1.	Background of SADC	27
2.4.2.	Membership in SADC	29
2.4.3.	SADC institutions and their functions	30
2.5	Conclusion	33



CHAPTER THREE
THE TRIPARTITE FREE TRADE AREA (TFTA) AGREEMENT AND THE
INSTITUTIONS ESTABLISHED THEREUNDER

3.1.	Introduction	35
3.2.	The road towards the Tripartite Free Trade Area (TFTA)	36
3.3.	The Tripartite Free Trade Area (TFTA) Agreement	41
3.4.	The institutions to be established under the Tripartite Free Trade Area Agreement (TFTA) and their functions	46

3.5.	The relationship between the Tripartite Free Trade Area (TFTA) institutions and the existing institutions in the three regional economic communities (RECs)	49
3.6.	Conclusion	54

CHAPTER FOUR
ESTABLISHMENT OF TRIPARTITE FREE TRADE AREA INSTITUTIONS AND ITS REPERCUSSIONS ON COUNTRIES WITH MULTIPLE REGIONAL ECONOMIC COMMUNITY MEMBERSHIPS

4.1.	Introduction	56
4.2.	The establishment of Tripartite Free Trade Area (TFTA) institutions and its repercussions on countries with multiple regional economic community (REC) memberships	59
4.2.1.	Multiplication of financial costs	61
4.2.2.	Burgeoning human resource cost	68
4.2.3.	Increase in non-financial obligations arising from membership to multiple treaties	73
4.2.4.	Choice of law and choice of forum difficulties	76
4.2.5.	Little or nominal trade related gains	80
4.3.	Conclusion	82

CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions	84
5.2. Recommendations	87
5.2.1. Identification of sustainable resource mobilisation mechanisms	87
5.2.2. Private sector and civil society involvement and investment	88
5.2.3. Adoption of guiding principles on choice of law and choice of forum for the Tripartite area	88
5.2.4. Rationalising and amending the regional economic communities' treaties	89
5.2.5. Strengthening the existing regional economic communities' institutions	89
BIBLIOGRAPHY	91



CHAPTER ONE

INTRODUCTION

1.1. Background

On 10 June 2015, at Sharma El Sheikh in the Arab Republic of Egypt, the Africa continent witnessed the achievement of another milestone in its economic integration drive, when leaders representing 26 countries from eastern and southern Africa signed an agreement aimed at establishing the Tripartite Free Trade Area (TFTA). The TFTA initiative has been hailed as a landmark, likened to important African events, such as, the independence of Ghana in 1957 and the establishment of the Organisation of African Unity (OAU) in 1963 and its re-invention as the African Union (AU) in 2002.¹ The TFTA initiative aims at establishing a free trade area (FTA) among countries that are members of three existing regional economic communities (RECs) on the continent. These existing RECs are: the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); and the Southern African Development Community (SADC).

It is expected that once the TFTA is fully operational, it may comprise a large market of close to 632 million customers, representing 48 per cent of the entire African population and 8 per cent of the world's population.² Furthermore, the TFTA may cover an estimated area of around 17.3 million square kilometres which is similar to the size of Russia and more than four times the size

¹ Juma C & Mangeni F 'The benefits of Africa's new Free Trade Area' 11 June 2015 (Online article) available at: <http://www.technologyandpolicy.org/2015/06/11/the-benefits-of-africas-new-fretradearea/#.Vk5QHYYrKM9> (accessed 30 November 2015).

² Juma C & Mangeni F (2015).

of the European Union.³ The TFTA may also boast of a Gross Domestic Product (GDP) of US\$ 1.3 trillion, representing 51 per cent of the continent's total GDP.⁴

The TFTA is aimed at promoting the rapid social and economic development of the region it covers through: trade liberalisation; establishment of a large single market with free movement of goods and services; promoting intra-regional trade; enhancing regional and continental integration processes; ensuring regional harmonisation of trade rules and procedures; and building a strong FTA for the benefit of the people in its region.⁵

In addition, the TFTA initiative is also being seen as a launch pad in the pursuit of the broader objective of the AU, in its vision under the 1980 Lagos Plan of Action and the 1994 African Economic Community Treaty (Abuja Treaty) of creating a single continental market.⁶ The Abuja Treaty proposes the establishment of an African Economic Community (AEC), a continent-wide market of goods and services, by the year 2028.⁷ The TFTA may therefore serve as an important building block in order to achieve this AU objective. A functioning TFTA may not only help in developing resilience in firms on the African continent so that they are able to compete well in the global market, but may also help in attracting the much needed foreign direct investment (FDI) and wealth creation.⁸

Lastly, the TFTA is also aimed at addressing some problems associated with multiple REC memberships, by harmonising the various trade rules and procedures in the three RECs. In this

³ Andriamananjara S 'Understanding the importance of the Tripartite Free Trade Area' 17 June 2015 (online article) available at: <http://www.brookings.edu/blogs/africa-in-focus/posts/2015/06/17-tripartite-free-trade-area-andriamananjara> (accessed 30 November 2015).

⁴ Mabuza Z & Luke D 'The Tripartite Free Trade Area Agreement: a milestone for Africa' (online article) available at: <http://www.ictsd.org/bridges-news/bridges-africa/news/the-tripartite-free-trade-area-agreement-a-milestone-for-africa%E2%80%99s> (accessed 30 November 2015).

⁵ Art. 4 of the TFTA Agreement.

⁶ Shinyekwa I & Othieno L 'Prospects and challenges in the formation of the COMESA-EAC and SADC Tripartite Free Trade Area' Economic Policy Research Centre (ESRP) *Research Series No.87*. (Nov 2011) 1 available at: <http://ageconsearch.umn.edu/bitstream/150241/2/series87.pdf> (accessed 27 April 2016).

⁷ Shinyekwa I & Othieno L (2011) 1.

⁸ Juma C & Mangeni F (2015) 1.

study, it will be observed that some countries in the three RECs have overlapping and multiple memberships. This condition has often created trade bottlenecks and uncertainties when countries are trading with each other, hence hindered trade growth.⁹ The TFTA initiative is therefore aimed at resolving these challenges.

1.2. Problem Statement

Overlapping and multiple memberships of the RECs have been blamed as a factor inhibiting progress in intra-African trade.¹⁰ The three RECs in the TFTA contain countries that are members of more than one REC. The current membership in the three RECs is as follows.

First, COMESA was established by a treaty that came into force in 1994, consists of countries in the eastern and southern Africa.¹¹ Currently, COMESA consists of the following member states: Burundi, Comoros, Djibouti, Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland,¹² Uganda, Zambia and Zimbabwe. Of the 19 COMESA member states, four¹³ are EAC partner states while eight¹⁴ other members are SADC member states.

Secondly, the EAC is the smallest but the most advanced region in terms of integration among the three RECs in the TFTA.¹⁵ The EAC was formed in the year 2000 and, with the recent

⁹ Shinyekwa I & Othieno L (2011) 1.

¹⁰ Kalenga P 'Making the Tripartite FTA work' in Hartzenberg T (Ed) *From Cape to Cairo: Making the Tripartite Free Trade Area work* (2011) 5 available at: <http://www.tralac.org/images/docs/4660/cape-to-cairo-2-ch-1-kalenga.pdf> (accessed 28 April 2016).

¹¹ Kalenga P (2011) 5.

¹² Swaziland is also a member of the Southern African Customs Union (SACU) and therefore is unable to implement the COMESA customs union.

¹³ These countries are Burundi, Kenya, Rwanda and Uganda.

¹⁴ These countries are DRC, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe. However, DRC is not part of the SADC FTA.

¹⁵ Kalenga P (2011) 5.

accession to the EAC Treaty by South Sudan,¹⁶ now consists of the following six countries: Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. As noted above, four¹⁷ of the EAC partner states are member states of COMESA, whereas one country, Tanzania, is a SADC member state.

Lastly, SADC was established by a treaty in 1994 and currently consists of the following 15 countries: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.¹⁸ Similarly, as noted above, eight¹⁹ of SADC member states are member states of COMESA where as one country, Tanzania, is an EAC partner state.

The consolidation of these three RECs into one large TFTA is therefore being seen as a way of resolving existing regional integration challenges caused by multiple REC memberships through the harmonising of the different REC trade rules and procedures.²⁰ Much as the establishment of the TFTA is being viewed as a panacea for most of the challenges caused by multiple REC memberships, there are certain areas where the TFTA Agreement may not be able to deliver that which has been eagerly expected of it. For instance, the TFTA Agreement will, in addition to the existing REC institutions, establish new institutions to oversee the implementation and functioning of the TFTA. The sustenance of these TFTA institutions may be burdensome, especially for countries with multiple REC memberships.

This mini thesis therefore intends to investigate how the establishment of institutions under the TFTA Agreement, may negatively impact on countries with multiple REC memberships.

¹⁶ History of EAC available at: <http://www.eac.int/about/EAC-history> (accessed 29 March 2016).

¹⁷ See Footnote 13.

¹⁸ Kalenga P (2011) 5.
However, Angola, DRC and Seychelles are not part of the SADC FTA.

¹⁹ See Footnote 14.

²⁰ Kalenga P (2011) 5.

1.3. Significance of the Study

This study is significant and relevant. With the recent signing of the TFTA Agreement, countries that are members of the three RECs are currently contemplating whether to ratify the TFTA Agreement. The study therefore investigates the probable challenges that may be encountered by TFTA countries, especially those that will maintain multiple REC memberships.

The study also, to some extent, offers rare insights into the kind of considerations countries are having before the ratification of not only the TFTA Agreement, but also other legal instruments that require ratification and implementation within their respective RECs.

In addition, the study makes recommendations on areas where the TFTA Agreement may have overlooked whilst trying to address the problem of multiple REC memberships.

1.4. Limitations of the Study

This study is restricted to a discussion of the negative repercussions or consequences that may likely be encountered by countries with multiple REC memberships as a result of the establishment of TFTA institutions. The study could have included other disadvantages that may be encountered by all countries involved in the TFTA, but due to the limitation of space that was not possible.

Furthermore, since the Southern African Customs Union (SACU) is not a party to the TFTA, the discussion will be restricted to SACU countries in their capacity as SADC or COMESA member states only.

1.5. Objectives of the Study

The benefits of membership to the TFTA or the RECs have been explained by many a scholar. There is a dearth of literature on how the TFTA arrangement may help solve the problems caused by multiple and overlapping REC memberships. However, there is little literature on the flipside to this subject. The negative side of the TFTA membership has not been a subject of much academic scrutiny, let alone the consequences of multiple REC memberships in the TFTA.

This study therefore investigates the repercussions or negative consequences that countries with multiple REC memberships in the TFTA will encounter as a result of the establishment of TFTA institutions. The study therefore, discusses these repercussions and then makes recommendations on how they can be addressed or ameliorated.

1.6. Research Questions

In the above discussion, it was indicated that the TFTA Agreement will establish new institutions that will be responsible for the implementation of the TFTA. Art. 29 of the TFTA Agreement will establish several institutions that will be responsible for overseeing the functioning and implementation of the TFTA. For instance, it will establish the Tripartite Summit, the Tripartite Council of Ministers of Trade, and the Tripartite Committee of Senior officials, among others. For Tripartite member states, the TFTA institutions will bring in extra obligations, in addition to those they already have in their respective RECs. For countries with multiple REC memberships, TFTA institutions will mean fresh obligations, in addition to the multiple treaty obligations they already have by virtue of their multiple REC memberships.

Furthermore, there appears to be little clarity on how the institutions to be established under the TFTA Agreement will interact with the existing REC institutions. Art. 30 (7) of the TFTA Agreement only provides that the TFTA Agreement shall prevail in cases where there is a conflict or inconsistency between it and any REC treaty or instrument. There is no clear hierarchy between the TFTA and the existing RECs in terms of choice of law and choice of jurisdiction. The effect of such unclear scenario will mean parties, especially in countries with multiple REC memberships, will be left at a cross-road as to which instrument or law will be applicable when engaging in trading activities. This uncertain economic environment is unattractive to investors.

From the above discussion, there are several questions that come to the fore, especially with regard to countries with multiple REC memberships. These questions are as follows:

- (a) Whether the establishment of institutions under the TFTA Agreement will have any repercussions on countries that have multiple REC memberships?

- (b) Whether the lack of clarity on the hierarchy of the institutions established under the TFTA Agreement and those existing institutions in the three RECs will not further exacerbate the challenges for countries multiple REC memberships?
- (c) What are the possible conclusions that can be drawn and recommendations that can be made?

1.7. Proposed Methodology

This study is a desktop activity which draws on both primary and secondary sources available both electronically and in print. The former includes legal sources, such as the TFTA Agreement, treaties establishing the three RECs and REC communiqués. The latter comprises mainly books, chapters in books, journal articles, online publications, and REC communications and press statements. The study therefore relies on existing information on the subject in order to answer the research questions.



1.8. Chapter Outline

The mini-thesis comprises the following chapters:

Chapter Two

This chapter provides a historical background and the current membership status of the three RECs. It also discusses the COMESA Treaty, the EAC Treaty and the SADC Treaty, and gives an overview of the nature and functions of the institutions that have been established thereunder.

Chapter Three

This chapter gives a historical background to the formation of the TFTA. It also provides an overview of the TFTA Agreement and the nature and functions of the institutions which the Agreement intends to establish. This chapter also discusses the relationship expected to exist between the institutions to be established under the TFTA Agreement and those institutions established under the COMESA, EAC and SADC treaties.

Chapter Four

This chapter mainly discusses the repercussions for countries with multiple REC memberships caused as a result of the establishment of institutions under the TFTA Agreement. In answering the above question, the study will also examine the question whether the lack of clarity on the hierarchy of the institutions established under the TFTA initiative and the institutions in existence under the three RECs will have any effect on countries that have multiple REC memberships.

Chapter Five

This chapter contains a summary of conclusions drawn from the whole study and makes the necessary recommendations.



CHAPTER TWO

THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA), THE EAST AFRICAN COMMUNITY (EAC) AND THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) AND THEIR INSTITUTIONS

2.1. Introduction

One of the legacies of colonialism in Africa is the creation of small and fragmented states that have remained economically unconnected.²¹ Most newly independent African states maintained their economic umbilical cords by significantly trading with their former colonial masters in Europe, as opposed to their neighbouring states. Hence, over the years there has been insignificant intra-Africa trade.²² Lack of efficiency in the production of goods, the export of primarily raw materials to Europe, high costs of production, low foreign direct investment (FDI), and other poor macro-economic factors did very little to ameliorate the livelihood and welfare of the African people.²³

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Over the period, as a way of addressing these economic challenges, some economists have held the view that the solutions to the problems lay in the political and economic unification of the

²¹ It has been argued that the geopolitical configuration of Africa was not determined by the emergence of nation states but the political forces of colonisation.

See. World Trade Organisation (WTO) *WTO Report 2011- The WTO and Preferential trade agreements: From co-existence to coherence (2011)* 151.

²² Economic Commission for Africa (UNECA) *Assessing Regional Integration in Africa ECA Policy Report (2004)* 2.

In addition, the smallness and fragmentation of the economies was also associated with uneven distribution of natural resources and lack of economies of scale in both the production and distribution of goods and services.

²³ In the year 2007, a study by the United Nations Conference on Trade and Development (UNCTAD) found that the small sub-Saharan African economy with a population of around 819 million people was fragmented into 47 countries of which, 34 fell into a group defined as Least Developed Countries (LDCs). The average income levels also low hence poverty was rampant.

(See. UNCTAD *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development (2009)* 20).

small and fragmented Africa economies.²⁴ These economists have argued that a larger African market would be good for future economic planning and development across all the sectors, let alone industrialisation. Regional integration was therefore considered as a key element in post-colonial Africa's efforts to achieve economic development and poverty reduction.²⁵

For the purposes of this mini thesis, it will be important at this early stage to distinguish regional integration and market or economic integration. These words will be used frequently in the subsequent paragraphs and chapters. Regional integration, generally, is a legal arrangement between countries within a given geographical area, involving co-operation in areas like trade, investment, migration, infrastructural development, industrialisation, and the economic, fiscal and monetary policies of the countries involved, whereas market or economic integration refers to the actual process by which economic barriers against exchange of goods, services, capital and labour between two or more countries are eliminated or reduced.²⁶

The idea to integrate African economies became alive in the 1970s. African states, under the Organisation of African Unity (OAU), with sponsorship from the United Nations Economic Commission for Africa (UNECA) promoted an initiative towards Africa's integration. The initiative, subsequently, led to the adoption of the Lagos Plan of Action (LPA) in April 1980. The LPA proposed a framework for the rapid industrialisation of the African continent by dividing it into several regional integration areas that would later become one united economy.²⁷

²⁴ For instance, in 1968, Green and Seidman argued that African continental economic unity must be achieved if the continent was to be able to compete against the other continents on the global platform. They argued that that the small and fragmented African economies may perform better if they were unified or connected through market integration. They further argued that the unification of these small and fragmented markets would create a large economy for trade in goods, and thereby stimulate and increase production. (See Green H & Seidman *A Unity or Poverty? The Economics of Pan-Africanism* (1968) 23 available at: http://econ.duke.edu/uploads/media_items/gerardo-serra-hope-seminar-continental-visions.original.pdf. (accessed 29 March 2016)).

²⁵ Since the 1960s, there had been calls that regional integration, political solidarity and self-reliance were answers to the continent's economic woes. (See. 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 paradigm?* (2012) 8).

²⁶ Mutai H 'Memberships in multiple regional trading agreements: Legal implications for the conduct of trade negotiations' (2003) 16 available at :www.tralac.org/scripts/content.php?=-1914 (accessed 29 March 2016).

²⁷ WTO Report (2011) 151.

In accordance with the LPA, UNECA supported the realisation of three regional integration arrangements (RIAs). These are: the Economic Community of West African States (ECOWAS); the Preferential Trade Area for Eastern and Southern Africa (PTA);²⁸ and the Economic Community of Central African States (ECCAS).²⁹

Regional integration received further impetus in 1991 when the OAU adopted the African Economic Community (AEC) Treaty.³⁰ The AEC Treaty (Abuja Treaty)³¹ provides a roadmap for regional integration on the African continent, with the ultimate objective of establishing the AEC, by the year 2028.³² In pursuance of this objective, the Abuja Treaty identified eight regional economic communities (RECs) on the continent as building blocks for the African integration process.³³

Of the eight building blocks identified by the Abuja Treaty, three are situated in the eastern and southern parts of the continent. These are: the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); and the Southern African Development Community (SADC). In June, 2015, the Heads of State and Government representing the member states or partner states in these three RECs signed the Tripartite Free Trade Area (TFTA) Agreement. The TFTA Agreement, as we will discuss in the next chapter, is an arrangement aimed at establishing a free trade area among these three RECs, in order to

²⁸ As it will be observed later on in this study, the PTA was subsequently transformed to become COMESA.

²⁹ WTO Report (2011) 151.

To complete the geographical coverage of the continent, the Arab Maghreb Union (AMU) was also established, later in 1989. The AMU comprised the Arabic-speaking countries in the northern part of Africa.

³⁰ The AEC Treaty was adopted in Abuja Nigeria and entered into force in 1994.

³¹ The AEC Treaty is commonly referred to as the 'Abuja Treaty' because it was signed in Abuja, Nigeria.

³² Luke D & Mevel S *The Option of a Framework Agreement in the Continental Free Trade Area (CFTA) Negotiations: A Non-paper* (Unpublished paper from African Trade Policy Centre (ATPC) and UNECA, May 2015) 3 available at: http://www.uneca.org/sites/default/files/PublicationFiles/cfta_framework_agreement_non-paper-rev1_en.pdf (accessed 29 April 2016).

³³ These RECs are: the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); the Southern African Development Community (SADC); the Intergovernmental Authority on Development (IGAD); the Economic Community of West African States (ECOWAS); the Community of Sahel–Saharan States (CENSAD); the Economic Community of Central African States (ECCAS); and the Arab Maghreb Union (AMU).

stimulate and promote intra-Africa trade. The TFTA initiative has also been recognised by the African Union (AU) as being in tandem with the AU's vision under the Abuja Treaty, to establish one continent-wide economic community.³⁴

Having made this introduction to African regional integration initiatives, the rest of this chapter will discuss the three RECs in the TFTA, thus, COMESA, EAC and SADC. The chapter will highlight the origins and objectives of each of the three RECs and their current memberships. Of utmost significance to this study, the chapter will also discuss the important institutions that have been established in the three REC and the functions which they perform.

2.2. The Common Market for Eastern and Southern Africa (COMESA)



2.2.1. Background of COMESA

COMESA is a regional economic community comprising countries situated in the eastern and southern parts of Africa. Its major aim is to promote regional integration through trade development, and the development of human and natural resources for the benefit of its people.³⁵

It will be observed in the subsequent paragraphs when considering the other two RECs in the TFTA that COMESA was largely formed as a result of trade or commerce related needs.³⁶ It will also be noted that SADC was formed out of a need for political solidarity and economic

³⁴ See. Preamble to the Tripartite Free Trade Area Agreement.

³⁵ Ngwenya S et al (Eds) *Key Issues in Regional integration Vol 2* (2013) 1 available at: http://www.comesa.int/wp-content/uploads/2016/06/key-issues-on-intergration-ii_final_toc_30th-oct_email.pdf (accessed 29 April 2016).

As stated earlier, COMESA came from the PTA which was a product of an initiative by UNECA to establish a RIA that will constitute one unified continental economic community.

³⁶ Hess R & Hess S 'Regional Integration Arrangements in Eastern and Southern Africa-Confusion grows' *Commonwealth Trade Hot Topics, Issue No. 43* 2 available at: <http://www.oecdilibrary.org/docserver/download/5k3w8fb9ppr8.pdf?expires=1458903383&id=id&accname=guest&checksum=620BB2DF8A4827FC110FB78625A410E7> (accessed 29 March 2016).

independence, whereas for EAC, it was the desire to achieve political and economic union of the original three countries.³⁷

The origins of COMESA can be traced back from 1965, when UNECA convened a ministerial meeting for newly independent states in eastern Africa, to explore the possibility of establishing a mechanism to promote economic integration among them.³⁸ This ministerial meeting recommended the establishment of an economic community covering parts of east and central Africa. However, overt steps towards the establishment of a regional economic body only begun in 1978.³⁹ In 1978, another ministerial meeting held in Zambia adopted a declaration of intent and commitment toward the establishment of a Preferential Trade Area⁴⁰ for Eastern and Southern Africa (PTA).⁴¹ Subsequently, a treaty establishing the PTA was signed on 21 December 1981, at a meeting of Heads of States and Government.⁴² The ultimate objective of the PTA was the establishment of one economic community, taking advantage of the larger market size of its region.

In the early 1990s, the PTA decided to move further with its integration agenda, and a decision was therefore made by the PTA countries' Heads of State and Government, in January 1992, to transform the PTA into a common market covering eastern and southern Africa.⁴³ Accordingly,

³⁷ Kritzinger-van Nierken L & Pinto Moreira E 'Regional Integration in Southern Africa: Overview of Recent Development'. Discussion paper 33107 (2002) 1 available at: <http://agris.fao.org/agris-search/search.do?recordID=US2012411917> (accessed 28 March 2016).

³⁸ About COMESA available at: http://about.comesa.int/index.php?option=com_content&view=article&id=95. (accessed 29 March 2016).

³⁹ About COMESA.

⁴⁰ A preferential trade area refers to an area covered by two or more countries where goods produced in the area are subject to lower trade barriers or preferential treatment than those goods that have been produced from outside the area.

⁴¹ About COMESA.

⁴² About COMESA.
The PTA Treaty came into force on 30 September 1982.

⁴³ FAO Repository Documents. *The Preferential Trade Area of Eastern and Southern Africa* Appendix 2C available at: <http://www.fao.org/docrep/w5973e/w5973e06.htm>. (accessed 29 March 2016).

in 1994, PTA member states signed the COMESA Treaty which established COMESA to replace the PTA.⁴⁴

The COMESA Treaty spells out a wide range of aims and objectives. However, because of its history, COMESA's main focus has always been on the formation of a large economic trading bloc that is capable of promoting trade and integration among its members.⁴⁵ In line with this trade promotion agenda, on 31 October 2000, COMESA launched its free trade area (FTA).⁴⁶ A tariff reduction schedule had already been adopted in 1992.⁴⁷ Furthermore, in 2009, COMESA launched a customs union,⁴⁸ with a three year implementation plan.⁴⁹ However, the customs union has not yet been operationalised.⁵⁰



⁴⁴ The COMESA Treaty was signed on 5 November 1993. The COMESA Treaty was formally ratified on 8 December, 1994, in Lilongwe, Malawi.

⁴⁵ The Preamble to the COMESA Treaty.

⁴⁶ A free trade area (FTA) is a legal arrangement for trade in goods and services in which substantially all trade among its members is liberalised. FTAs are mostly entered into in accordance with Art. XXIV of the General Agreement on Tariffs and Trade (GATT).

⁴⁷ About COMESA.

The tariff liberalisation program to eliminate tariffs and other non-tariff barriers to inter-regional trade had initially commenced in 1984.

⁴⁸ A customs union is an FTA that has a Common External Tariff (CET). Similarly to FTAs, customs unions are also entered into in accordance with Art XXIV of the GATT.

⁴⁹ Available at: <http://www.comesabusinesscouncil.org/comesabusinesscouncil/?q=Customs%20Union> (accessed 29 March 2016).

⁵⁰ About COMESA.

2.2.2. Membership in COMESA

Currently, COMESA consists of the following 19 member states: Burundi, Comoros, Djibouti, Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.⁵¹

It should be noted that after the PTA was transformed to become COMESA in 1994, what followed next were several membership changes. These changes may have occurred as a consequence of the PTA's transformation from a mere preferential trade area to a common market,⁵² as well as regional integration developments, elsewhere, within the region. It will be observed later in this chapter that it is also around this same period of time that both the EAC and SADC also launched their FTAs.⁵³ The developments in the EAC and SADC had an effect on COMESA because, during this period, some countries withdrew their COMESA memberships.

In 1997, both Lesotho and Mozambique withdrew their membership of COMESA. But in 1998, Egypt joined COMESA by acceding to the COMESA Treaty.⁵⁴ In 2000, Tanzania withdrew its membership of COMESA. In 2003, Namibia also withdrew its membership of COMESA and was followed by Angola in 2007. Somalia has become a *defacto* non-member of COMESA due to the lack of a legitimate political leadership in that country since 1991.⁵⁵ Most of the countries

⁵¹ About COMESA.

⁵² Establishing a Preferential Trade Area is less complicated when compared to establishing a Common Market because the former involves mostly negative integration whereas the latter includes positive integration in addition to negative integration. It has been explained that negative integration merely involves the elimination of obstacles to trade among members whereas positive integration also involves a more complex policy harmonisation and co-ordination among the members.

(See. Luwan D 'Common Market for Eastern and Southern Africa countries: Multiplicity of membership issues and choices' *African Journal of International and Comparative Law Vol 18(2)* (2010) 217).

⁵³ EAC and SADC launched their FTAs in 2005 and 2000, respectively.

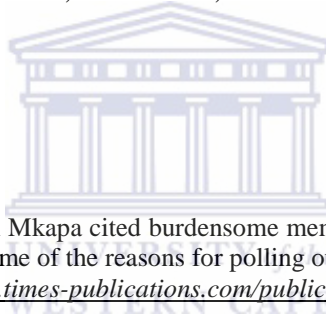
⁵⁴ Masriya A 'Q and A :What is COMESA?' Egypt Independent online newspaper 31 March 2015 available at: <http://www.egyptindependent.com/news/q-and-what-comesa> (accessed 29 March 2016). However, Egypt started applying custom exemptions to imports from other COMESA member states in 1999.

⁵⁵ Mshomba R E *Africa in the Global Economy* (2000) 183.

that withdrew their membership of COMESA during this time, for instance Tanzania,⁵⁶ cited the high costs of maintaining their memberships of two RECs whose objectives, seemingly, became similar.⁵⁷ However, all the countries that withdrew their COMESA membership elected to maintain their SADC memberships.⁵⁸

With a membership of 19, COMESA is therefore the largest REC in the TFTA, in terms of both membership and size. It covers a geographical area of approximately, 12 million square kilometres and a population of over 470.26 million.⁵⁹ The COMESA Secretariat is based in Lusaka, Zambia. There is also a strong possibility that South Sudan⁶⁰ may accede to the COMESA Treaty, eventually making the total membership of 20 countries.

However, only 11 member states are part of the COMESA FTA, and these are: Burundi, Djibouti, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Zambia and Zimbabwe.⁶¹



⁵⁶ The then Tanzanian President Benjamin Mkapa cited burdensome membership fees and lack of adequate research into the effect of regional integration as some of the reasons for polling out of COMESA. See. online article available at: http://www.times-publications.com/publications/corporate_africa/articles/mkapahtml (accessed 29 March 2016).

⁵⁷ It was argued that it was better to maintain membership of a single REC than incur a lot of financial and human resources costs of two memberships. Most countries chose to remain in SADC because of the obvious trade benefits they got from trading with post-apartheid South Africa.

⁵⁸ Richard Hess and Simon Hess argued that the reason why many countries elected to maintain their SADC membership and terminate their COMESA membership was because they were lured by the enticing carrot of the South African market. (See Hess R & Hess S 'Regional Integration Arrangements in Eastern and Southern Africa-Confusion grows' *Commonwealth Trade Hot Topics*, Issue No. 43 2 available at: <http://www.oecdilibrary.org/docserver/download/5k3w8fb9ppr8.pdf?expires=1458903383&id=id&accname=guest&checksum=620BB2DF8A4827FC110FB78625A410E7> (accessed 29 March 2016)).

⁵⁹ About COMESA.

⁶⁰ COMESA reported that its Secretary General, Mr. Sindiso Ngwenya, led a COMESA delegation to the Republic of South Sudan from 29 September 2015 to 1 October 2015 to consult with the government of South Sudan on the long awaited integration of South Sudan into COMESA available at: http://www.comesa.int/index.php?option=com_content&view=article&id=1697:south-sudan-initial-steps-to-join-comesa&catid=5:latest-news&Itemid=41 (accessed 29 March 2016).

⁶¹ These 11 countries have already eliminated tariffs on goods and are now working on the eventual elimination of quantitative restrictions and other non-tariff barriers.

In as far as overlapping membership with other RECs in the TFTA is concerned, several COMESA member states are also members of the other two RECs. Four COMESA member states are partner states of the EAC,⁶² whereas eight other member states are in SADC.⁶³

2.2.3. COMESA institutions and their functions

The objectives of COMESA which focus on promoting economic integration and trade are reflected in the institutions which its treaty has established. For instance, this mini thesis will later observe that the absence of a legislative institution or platform in the COMESA is perhaps an indication that its major focus of COMESA is economic integration and trade. The goals for the establishment of COMESA were largely motivated by economic rather than political considerations.

Art.7 of the COMESA Treaty establishes the following institutions: (a) the Authority; (b) the Council; (c) the Court of Justice; (d) the Committee of Governors of Central Banks; (d) Inter-governmental Committee; (e) Technical Committees; (f) the Secretariat; and (g) the Consultative Committee of the Business Community and Other Interest Groups.

First, Art.8 of the COMESA Treaty provides for the composition and functions of the Authority.⁶⁴ The Authority consists of the Heads of State and Government of COMESA member states and is mainly responsible for the general policy directions and control of the executive functions of COMESA.⁶⁵ The Authority is mandated to meet once every year.⁶⁶

⁶² Burundi, Kenya, Rwanda and Uganda are EAC partner states.

⁶³ The DRC, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe are members of SADC.

⁶⁴ Art. 8 (1) states that the Authority is the supreme decision making organ of COMESA.

⁶⁵ Art.8(2) of the COMESA Treaty. Art.8 (3) of the Treaty further provides that, all decisions made by the Authority shall be binding on the member states.

⁶⁶ Art.8(5) of the COMESA Treaty. The Summit may also hold an extraordinary meeting at the request of any member of the Authority, provided that such request is supported by one-third of the members of the Authority.

Secondly, the Council of Ministers is provided for under Art.9 of the COMESA Treaty. The Council of Ministers consists of such Ministers as may be designated, from time to time, by each member state.⁶⁷ The function of the Council is to constantly monitor and review the proper functioning and development of COMESA in accordance with its treaty objectives and may also make regulations, issue directives, take decisions, give directions and opinions, and make recommendations.⁶⁸ The Council meets once every year, immediately preceding a meeting of the Authority, but may also hold extraordinary meetings at the request of member states.⁶⁹

Thirdly, the Court of Justice is established under Art.19 of the COMESA Treaty.⁷⁰ The COMESA Court of Justice bears the responsibility of interpreting and applying the COMESA Treaty.⁷¹ The Court has jurisdiction over all matters referred to it by COMESA member states,⁷² the Secretary General of COMESA,⁷³ natural and legal persons,⁷⁴ employees of COMESA,⁷⁵ arbitration tribunals⁷⁶ and national courts.⁷⁷

Fourthly, the Committee of Governors of Central Banks is another specialised trade related institution peculiar to COMESA.⁷⁸ Unlike in the EAC and SADC, COMESA has established a

⁶⁷ Art. 9 (1) of the COMESA Treaty. The designation of the Ministers is dependent on the subject- matter that will be discussed at that meeting.

⁶⁸ Art. 9 of the COMESA Treaty.

⁶⁹ Art. 9 (4) of the COMESA Treaty.

⁷⁰ The COMESA Court of Justice became operational in 1998 and is based in Khartoum, Sudan.

⁷¹ Art. 19 of the COMESA Treaty.

⁷² Art. 24 of the COMESA Treaty.

⁷³ Art. 25 of the COMESA Treaty.

⁷⁴ Art. 26 of the COMESA Treaty.

⁷⁵ Art. 27 of the COMESA Treaty.

⁷⁶ Art. 28 of the COMESA Treaty.

⁷⁷ Arts. 29 and 30 of the COMESA Treaty.

⁷⁸ The roles of the Committee are stipulated under Art. 17 of the COMESA Treaty.

Committee of Governors of Central Banks with the responsibility of developing programmes and action plans in the field of finance and monetary co-operation.⁷⁹

Fifthly, Art.14 of the COMESA Treaty provides for an Inter-governmental Committee comprising principal secretaries or permanent secretaries from the member states. The function of this Committee is to develop programmes and action plans in all other sectors of co-operation, other than finance and monetary sectors.⁸⁰

Sixthly, Art.15 of the COMESA Treaty provides for the functions of sectoral technical committees in various fields, such as, agriculture, tourism and wildlife, energy, transport and communication, among others. These committees are put in place, as and when necessary, in order to ensure the attainment of the objectives of COMESA.⁸¹

Seventhly, Art.17 of the COMESA Treaty makes provision for the COMESA Secretariat. The Secretariat is headed by a Secretary General who also acts as the Chief Executive Officer of COMESA.⁸² The Secretary General represents COMESA as a legal personality and also serves and assists the other organs of COMESA in the performance of their functions.⁸³

Lastly, Art.18 of the COMESA Treaty makes provision for a Consultative Committee of the Business Community and Other Interest Groups. The purpose of this Committee is to ensure that the voice of the private sector, civil society and other interest groups is heard and taken into consideration by COMESA.⁸⁴

⁷⁹ Art.13 of the COMESA Treaty.

⁸⁰ Art.14 (1) of the COMESA Treaty. This is probably so because matters of finance and monetary sectors are left in the hands of the Committee of Governors of Central Banks.

⁸¹ Arts.15 and 16 of the COMESA Treaty.

⁸² Art.16 (2) of the COMESA Treaty.

⁸³ Art.16 (8) (a) and (f) of the COMESA Treaty.

⁸⁴ Art. 18 (3) (a) of the COMESA Treaty.

Apart from the institutions provided for under the treaty, COMESA has also established other trade specialised institutions using other legal instruments.⁸⁵ These institutions are: (a) the Competition Commission; (b) the Trade and Development Bank for Eastern and Southern Africa (PTA Bank);⁸⁶ (c) the Clearing House; (d) the African Trade Insurance Agency (ATI); (e) the COMESA Regional Investment Agency; (f) the Alliance Commodity Trade in Eastern and Southern Africa (ACTESA); and (g) the Leather and Leather Products Institute (LLPI).

This mini thesis observes that, unlike the other two RECs, COMESA is largely focussed on furthering market integration. COMESA's current strategy, 'economic prosperity through regional integration' sums it all up.⁸⁷ COMESA's objectives focus on economic integration and trade. As it will be later observed, the EAC and SADC focus on regional integration in many other sectors in addition to economic integration and trade.

In addition, COMESA's focus on economic integration and trade this difference also manifests itself in the type of institutions that it established. For instance, COMESA is the only REC, among the three, that has a special institution of the Committee of Central Bank Governors. Furthermore, there is no parliamentary forum in COMESA, whereas the other two RECs have established regional legislative forums.

⁸⁵ About COMESA.

available at: http://about.comesa.int/index.php?option=com_content&view=article&id=95. (accessed 29 March 2016).

⁸⁶ The Bank is a trade and investment institution of COMESA which was established under the PTA in 1985. More information on the PTA Bank is available at: <http://www.ptabank.org/index.php/bank-profile#.VvXJB-J96M8> (accessed 29 March 2016).

⁸⁷ About COMESA.

available at: http://about.comesa.int/index.php?option=com_content&view=article&id=95 (accessed 29 March 2016).

2.3. The East African Community (EAC)

2.3.1 Background of the EAC

The EAC is another REC in the TFTA and consists of six countries that are situated in the eastern part of Africa.⁸⁸ The EAC is the smallest REC in the TFTA but the most advanced REC in terms of regional integration.⁸⁹ Unlike COMESA and SADC, the EAC has successfully implemented its Customs Union since 2005.⁹⁰ In addition to that, from January 2010, the EAC became a Common Market,⁹¹ and subsequently, adopted a Protocol establishing the East African Monetary Union, in November 2013.⁹²

The origins of the EAC can be traced back from the early 1900s, when the modern day Kenya and Uganda, were a British colony and a British protectorate, respectively. In 1917, the British Government, which governed the two territories, established a Customs Union between these two territories.⁹³ Subsequently, in 1927, modern day Tanzania, then a British trust territory, joined the Customs Union.⁹⁴ Later in 1948, these three territories launched what was called the East African High Commission (EAHC).⁹⁵

⁸⁸ Some references to EAC membership and size in this study may exclude the membership of South Sudan, which only acceded to the EAC Treaty on the 15 April 2016, just as this study was being concluded.

⁸⁹ The EAC is the smallest REC in terms of population and membership sizes.

⁹⁰ Available at: <http://www.eac.int/integration-pillars/customs-union>. (accessed 29 March 2016).

⁹¹ In regional integration, a Common Market is a further step after a customs union, where the countries involved in the arrangement allow for the free movement of goods, services, capital and labour.

⁹² A monetary union is a regional integration step, usually after a common market, where the countries involved share a common currency or decide to peg their exchange rates in order to keep the value of their currency at a certain level. Available at: <http://www.eac.int/integration-pillars/monetary-union>. (accessed 29 March 2016).

⁹³ Nshimbi C C 'Oscillations: Short-term domestic policy considerations and Regional integration in South-east Asia and Southern Africa' Paper presented at the International Studies Association (ISA) Global South Caucus (GSCIS) Conference, 2015 Singapore. 8-10 January 2015. 10 available at: <http://web.isanet.org/Web/Conferences/GSCIS%20Singapore%202015/Archive/c555e841-40b5-41b7-b702-2e3bea13fe01.pdf>. (accessed 29 March 2016).

⁹⁴ Tanganyika was a British trust territory from 1916 to 1964, when it attained its independence.

⁹⁵ The Secretariate of the EAHC was based in Nairobi, Kenya.

In 1961, the EAHC was transformed into the East African Common Services Organisation (EACSO). EACSO was charged with the responsibility of overseeing the affairs of the common market, finance, economics and planning, social affairs and services and communication.⁹⁶ In 1967, after the three countries obtained their independence from Great Britain, the EACSO was transformed into the East African Community (EAC).⁹⁷ As EAC, the three countries jointly ran agricultural, education and tax services enacted by a Central Legislative Assembly.⁹⁸ The countries also enjoyed fiscal integration through a monetary union overseen by the East African Currency Board.⁹⁹

However, in 1977 the EAC was dissolved due to conflicts between the members as regards the mode of co-operation among the three countries.¹⁰⁰ The EAC was re-established in 1999 after Kenya, Tanzania and Uganda signed a new treaty.¹⁰¹ The EAC was re-established in order to strengthen the economic, social, cultural, political, technological and other ties for the fast, balanced and sustainable development of the region.¹⁰²

Art. 5 of the EAC Treaty provides that the objectives of EAC shall be to develop policies and programmes aimed at widening co-operation among the partner states¹⁰³ in political, economic, social, and cultural fields, research and technology, defence, security and legal and judicial affairs for the mutual benefit of the countries. It adds that in pursuance of this objective, the

⁹⁶ Nshimbi (2015) 10.

⁹⁷ Nshimbi (2015) 10.
Also see the Preamble to the EAC Treaty.

⁹⁸ Preamble to the EAC Treaty.

⁹⁹ The countries also used a common currency that was established in 1919.

¹⁰⁰ The EAC was dissolved in 1977 due to conflicts between the partners including the war between Uganda and Tanzania. The EAC was formally dissolved in 1983. On 14 May 1984, the three countries went on to sign the Mediation Agreement that made provision for the division of assets and liabilities of the dissolved EAC.

¹⁰¹ The new EAC Treaty became effective in 2000.

¹⁰² Preamble to the EAC Treaty.

¹⁰³ Art. 3(1) of the EAC Treaty defines the countries that are members of EAC as 'Partner States'.

partner states will undertake to establish a Customs Union, a Common Market, a Monetary Union, and ultimately a Political Federation.¹⁰⁴

From the above discussion, this mini thesis observes that, unlike COMESA, the objectives of EAC are much wider and cover areas other than just economic or market integration.¹⁰⁵

2.3.2. Membership in the EAC

The original EAC partner states are: Kenya, Tanzania and Uganda. These three countries also signed the treaty re-establishing the EAC on 30 November 1999.

On 1 July 2007, Burundi and Rwanda joined the EAC by acceding to the EAC Treaty. These two countries joined the EAC Customs Union on 1 July 2009.¹⁰⁶ Recently, on 15 April 2016, South Sudan acceded to the EAC Treaty making the current EAC membership rise to six.¹⁰⁷ It was also reported that Sudan and the DRC had at one time expressed interest to join EAC, but their applications were rejected on the ground that both countries did not share their borders with the EAC.¹⁰⁸

As of 2016, before the accession of South Sudan, the EAC covered an area of approximately 1.82 million square kilometres (including the area covered by water), with a population of approximately 145 million people.¹⁰⁹ The EAC partner states had a combined Gross Domestic Product (GDP) of approximately US\$ 147 billion.¹¹⁰

¹⁰⁴ Art. 5 (2) of the EAC Treaty.

¹⁰⁵ EAC includes areas like social, cultural, technological and even political integration.

¹⁰⁶ History of EAC available at: <http://www.eac.int/about/EAC-history> (accessed 29 March 2016).

¹⁰⁷ About EAC quick facts available at <http://www.eac.int/about/EAC-quick-facts-> (accessed 6 May 2016).

¹⁰⁸ Hansohm D & Kwinga L 'Institutional Anchoring of Regional Integration in East African Community' *Monitoring Regional Integration in Southern Africa Yearbook 2012* (2013) 215 available at: http://www.tralac.org/files/2013/09/Final-2012-MRI-for-web_Part-1.pdf. (accessed 29 March 2016).

¹⁰⁹ Available at: <http://www.eac.int/about/overview>. (accessed 29 May 2016).

As regards overlapping memberships with other RECs in the TFTA, Tanzania, a founding partner of the EAC, is a member of SADC.¹¹¹ Other four partners: Burundi, Kenya, Rwanda and Uganda, are COMESA members.¹¹²

2.3.3. EAC institutions and their functions

The EAC was formed as a result of a mixture of political, economic and social need for unification. These reasons are conspicuous in the institutions which the EAC Treaty has established. Art. 9 (1) of the EAC Treaty establishes the following institutions: (a) the Summit; (b) the Council; (c) the Co-ordination Committee; (d) Sectoral committees; (e) the East African Court of Justice; (f) the East African Legislative Assembly; (g) the Secretariat; and (h) such other organs as may be established by the Summit.

First, Art. 10 of the EAC Treaty provides for the composition of the Summit. The Summit consists of the Heads of State and Government of the partner states. Its major function is to give general directions and impetus to the development and achievement of the EAC objectives.¹¹³ The Summit meets once every year.¹¹⁴

Secondly, Art. 13 of the EAC Treaty makes provision for the Council. The Council comprises the following members: (a) Minister responsible for EAC affairs in each partner state; (b) such other Minister of the partner state as each partner state may determine; and (c) the Attorney

The information in this paragraph excludes data from South Sudan which was not available on the EAC website at the time of concluding this study.

¹¹⁰ Available at: <http://www.eac.int/about/overview>. (accessed 29 May 2016).

¹¹¹ Tanzania was one of the founding member states of SADC, and was also a member of SADCC, the precursor of SADC.

¹¹² As it has been noted earlier, South Sudan may soon accede to the COMESA Treaty, hence the number of EAC countries in COMESA will rise to six.

¹¹³ Art. 11 (1) of the EAC Treaty. The Summit is, in other words, the supreme decision making organ of EAC.

¹¹⁴ Art. 12(1) of the EAC Treaty. However, the Summit may hold an extraordinary meeting at the request of any member of the Summit.

General of each partner state. The function of the Council is to promote, monitor and constantly review the implementation of the programmes of the EAC, and ensure the proper functioning and development of the EAC.¹¹⁵ In addition to making regulations and issuing directives,¹¹⁶ the Council also initiates and submits Bills to the EAC Legislative Assembly, as provided under Art.14(3) (b) of the EAC Treaty.¹¹⁷

Thirdly, Art.17 of the EAC Treaty provides for the Co-ordination Committee. This Committee consists of permanent secretaries responsible for EAC affairs in each partner state and such other permanent secretaries in each partner state, as it may determine. The main function of the Co-ordination Committee is to implement the decisions made by the Council.¹¹⁸

Fourthly, Art.20 of the EAC Treaty makes provision for the establishment of sectoral committees, whose functions and composition depends on the purpose of their establishment. These committees submit their sectoral reports and recommendations to the Co-ordination Committee.¹¹⁹

Fifthly, Art.23 of the EAC Treaty makes provision for the Court of Justice. This Court is the judicial arm of the EAC, charged with the responsibility of ensuring adherence to the law and the interpretation and application of the EAC Treaty.¹²⁰ The EAC Court of Justice has jurisdiction

¹¹⁵ Art.14 (2) of the EAC Treaty. Under Art 14(4) of the EAC Treaty, the Council has power to seek an advisory opinion from the EAC Court of Justice on any matter of the EAC Treaty.

¹¹⁶ Art.13 (3) (d) of the EAC Treaty.

¹¹⁷ Art.16 of the EAC Treaty provides that the regulations, directives, etc made by the Council shall bind all organs and institutions of the EAC, except the Summit, the Court, the Legislative Assembly, and any person or institution to whom they are addressed.

¹¹⁸ Art. (a) of the EAC Treaty. The Committee also submit reports and recommendations to the Council on the implementation of the Treaty.

¹¹⁹ Art.21 of the EAC Treaty.

¹²⁰ Art.36 of the EAC Treaty also gives the EAC court jurisdiction to entertain advisory opinions from the Summit, the Council, or any partner state any question of law regarding the proper interpretation or application of the EAC Treaty.

over matters referred to it by member states,¹²¹ the EAC Secretary General,¹²² natural and legal persons,¹²³ employees of the EAC,¹²⁴ arbitration tribunals¹²⁵ and national courts.¹²⁶

Sixthly, Art.48 of the EAC Treaty makes provision for the Legislative Assembly. The EAC Legislative Assembly consists of both elected and ex-officio members.¹²⁷ In addition to its legislative function, the Legislative Assembly debates and approves EAC budgets.¹²⁸

Seventhly, Art.66 of the EAC Treaty makes provision for the Secretariat, the executive organ of the EAC.¹²⁹ The Secretariat is headed by a Secretary General who acts as the chief accounting officer of the EAC and the secretary of the Summit.¹³⁰ The EAC Secretariat is based in Arusha, Tanzania. The Secretariat is responsible for the general administration and financial management of the EAC, as well as managing and monitoring all programmes implemented by the Community.¹³¹

Lastly, Art.9 (1)(h) makes provision for the establishment of other organs or institutions as may be determined by the Summit.¹³²



¹²¹ Art.28 of the EAC Treaty.

¹²² Art.29 of the EAC Treaty.

¹²³ Art.30 of the EAC Treaty.

¹²⁴ Art.31 of the EAC Treaty.

¹²⁵ Art.32 of the EAC Treaty.

¹²⁶ Arts.33 and 34 of the EAC Treaty.

¹²⁷ It consists of: (a) nine elected members from each partner state; and (b) the Minister responsible for EAC affairs in the partner states and their respective deputies; and (c) the EAC Secretary General and the Counsel to the Community.

¹²⁸ Art. 49 (2) of the EAC Treaty.

¹²⁹ The Secretariat consists of the Secretary General, Deputy Secretaries General, Counsel to the Community and other offices as may be deemed necessary by the Council.

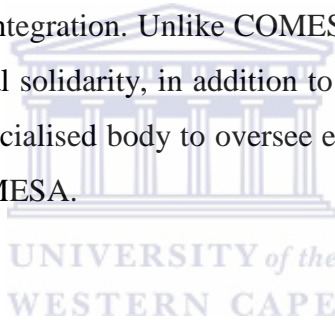
¹³⁰ Art. 67 of the EAC Treaty.

¹³¹ Art. 71 of the EAC Treaty.

¹³² In line of this, EAC has also established the following institutions: (a) the Civil Aviation Safety and Security Oversight Agency (CASSOA); (b) the East African Development Bank (EADB); the East African Health Research

This mini thesis observes that the institutions that have been established in the EAC Treaty reflect a community of states aimed at integration and co-operation in many areas, other than just market integration. For instance, unlike the COMESA Treaty, the EAC Treaty¹³³ has established a Legislative Assembly as a legislative organ of the EAC. This indicates that the objectives of the EAC are not only market integration but also political union. After all, the ultimate objective of the EAC is to achieve a political federation.¹³⁴ It is therefore submitted that the EAC Legislative Assembly is a critical institution towards a political federation.

Furthermore, as it will be observed when discussing SADC, most institutions in the EAC appear similar to those in SADC. For instance, both RECs have a parliamentary forum as one of their institutions. It has been noted that COMESA has no such institution. It can be argued that this perhaps reflects the fact that both EAC and SADC aim at achieving integration and co-operation in other areas, apart from market integration. Unlike COMESA, the EAC and SADC also aim at achieving peace, unity and political solidarity, in addition to market integration. In addition, the EAC and SADC do not have a specialised body to oversee economic affairs like the Committee of Central Bank Governors in COMESA.



2.4. The Southern Africa Development Community (SADC)

2.4.1. Background of SADC

SADC has its origins in the early 1980s, when several independent frontline southern African states¹³⁵ established the Southern African Development Coordination Conference (SADCC).

Commission (EAHRC); the East African Kiswahili Commission (EAKC); the East African Science and Technology Commission (EASTECO); the Inter-University Council of East Africa (IUCEA); the Lake Victoria Basin Commission (LVBC); and the Lake Victoria Fisheries Organisation (LVFO).

¹³³ Art. 47 of the EAC Treaty.

¹³⁴ Art. 5 (2) of the EAC Treaty.

¹³⁵ These SADCC frontline states included: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

SADCC was established in order for its members to achieve political solidarity and attain economic independence from the then apartheid South Africa.¹³⁶

Market integration was not an objective of SADCC. However, in the early 1990s, market integration became necessary. SADCC countries saw the need to revisit their objectives in order to properly integrate post-apartheid South Africa into their community. Unsurprisingly, in August 1992, in Windhoek, Namibia, the Heads of State and Government representing SADCC member states signed the SADC Declaration and Treaty that effectively transformed SADCC into SADC.¹³⁷ The rationale was not just to drop the second 'C', but that SADC should act as a vehicle for achieving regional integration and development of the people in southern Africa, South Africa inclusive.¹³⁸

The main objectives of SADC are: achievement of development and economic growth; alleviation of poverty; enhancement of the standard and quality of life of the people of southern Africa; and support of the socially disadvantaged, through regional integration.¹³⁹ The other objectives of SADC include: promotion of peace and security; achieving sustainable use of natural resources and effective protection of the environment; and strengthening and consolidating the long-standing historical, social and cultural links of the people of southern Africa.¹⁴⁰

Of the above-mentioned objectives, SADC's approach to regional integration appears to follow a sectoral development approach, rather than purely market integration.¹⁴¹ As was noted earlier,

¹³⁶ Kritzinger-van Nierken L & Pinto Moreira E (2002) 2.

¹³⁷ Preamble to the SADC Treaty.

¹³⁸ Preamble to the SADC Treaty.

¹³⁹ Art.5 of the SADC Treaty. These objectives are to be achieved through increased regional integration, built on democratic principles, and equitable and sustainable development.

¹⁴⁰ Art.5 (1) of the SADC Treaty.

¹⁴¹ Kritzinger-van Nierken L & Pinto Moreira E (2002) 2.

SADC's integration approach appears similar to the one adopted in the EAC. But COMESA's approach is different, as it emphasises on market integration.

However, due to changes in the national, regional and global environments, market integration is slowly becoming one of the core objectives of SADC. This manifested itself prominently in 1996, when SADC adopted a protocol on trade. The SADC Protocol on Trade, launched in 2000, established an FTA among the SADC countries that signed it.¹⁴² Furthermore, in 2001, SADC signed and adopted the Regional Indicative Strategic Development Plan (RISDP)¹⁴³ which stipulates the vision of SADC to ultimately establish a Common Market among its member states.

2.4.2. Membership in SADC

As discussed in the above paragraphs, there were nine original frontline states that established SADCC in 1980. These were: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. In 1992, when the SADC Treaty was signed, the original nine members had added Namibia to their fold, making it a 10-member state grouping.¹⁴⁴ By 2000, the membership of SADC had risen to 14 with the addition of South Africa, Mauritius, DRC and Seychelles.¹⁴⁵ Madagascar was the latest member to join SADC in 2005.

¹⁴² As a result of the market integration objective reflected through the adoption of the SADC Protocol on Trade, the integration agenda of SADC became more and more similar to the COMESA objectives.

¹⁴³ The RISDP was adopted at a SADC Heads of State and Government meeting on 14 August 2001, at Blantyre, in Malawi. The plan, which is based on the strategic priorities of SADC and the common agenda, is designed to provide strategic direction with respect to SADC projects, programmes and activities. Available at: <http://www.sadc.int/about-sadc/overview/history-and-treaty/#SADCC> (accessed 29 March 2016).

¹⁴⁴ About SADC available at: <http://www.sadc.int/about-sadc/overview/history-and-treaty/#SADCC> (accessed 29 March 2016).

¹⁴⁵ South Africa joined SADC in 1994, Mauritius in 1996, and the DRC and Mauritius in 1998. Seychelles opted to pull out of SADC in 2004, but applied to rejoin in 2006. She was re-admitted in 2007. It should also be mentioned that in 2007, Rwanda also applied to join SADC but it subsequently cancelled its application.

Currently, SADC covers an area of approximately 554 919 square kilometres and has a population of approximately 277 million people.¹⁴⁶ SADC also boasts of a combined GDP of approximately US\$ 575.5 billion.¹⁴⁷

Some SADC member states have maintained their memberships in the other two TFTA RECs. Tanzania is still a member of the EAC, whereas eight other members are in COMESA.¹⁴⁸

2.4.3 SADC institutions and their functions

In order to achieve economic development and reduce poverty through regional integration, the SADC Treaty has established several institutions. Art.9 of the SADC Treaty, as amended in 2001, establishes the following institutions: (a) the Summit of Heads of State and Government; (b) Organ on Politics, Defence and Security Co-operation; (c) the Council of Ministers; (d) sectoral and cluster ministerial committees; (e) Secretariat; (f) Tribunal; (g) the Troika; (h) Standing Committees of officials; and (i) SADC national committees.

Art.10 of the SADC Treaty makes provision for the Summit of Heads of State and Government. The Summit consists of the Heads of State and Government of the member states and meets at least twice every year. Being the supreme policy making institution, the Summit is responsible for the overall direction and control of the functions of SADC.¹⁴⁹

¹⁴⁶ About SADC available at <http://www.sadc.int/about-sadc/overview/sadc-facts-figures/> (accessed 29 March 2016).

¹⁴⁷ About SADC available at: <http://www.sadc.int/about-sadc/overview/sadc-facts-figures/> (accessed 29 March 2016).

It should also be pointed out that Angola and DRC are not taking part in the SADC FTA.

¹⁴⁸ These are: DRC, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe are members of COMESA.

¹⁴⁹ Art.10 (2) of the SADC Treaty.

It is also important to mention that in accordance with Art.9 (1) of the SADC Treaty, SADC has successfully implemented a Troika system, comprising the Chairperson, the incoming Chairperson and the outgoing Chairperson. The Troika makes policy decisions on behalf of SADC in the period between the SADC meetings. The Troika plays a critical role and has proved effective in SADC, as it reduces the frequency of extraordinary Summit meetings and therefore reduces costs.¹⁵⁰ The Troika system is also replicated in a few organs of SADC, like the Council, the integrated Committee of Ministers, and the Committee of Senior Officials.¹⁵¹

Art.10A of the SADC Treaty makes provision for the Organ on Politics, Defence and Security Co-operation. The function of the Organ is to support the achievement and maintenance of peace and security and the rule of law in the SADC region.¹⁵²

Art.11 of the SADC Treaty provides for the Council of Ministers, preferably Ministers responsible for foreign affairs in the member states. The Council of Ministers is mainly responsible for overseeing the functioning and development of SADC.¹⁵³

Art.12 of the SADC Treaty makes provision for sectoral and cluster ministerial committees on various areas of integration. These areas of integration include: trade, investment and finance; food, agriculture, natural resources and environment, infrastructure and services, and legal affairs and judicial matters.

Art.13 of the SADC Treaty also makes provision for the Standing Committee of Senior Official.¹⁵⁴ The Committee principally acts as a technical advisory committee to the Council.

¹⁵⁰ Saurombe A. 'The Role of SADC Institutions in implementing SADC Treaty provisions dealing with Regional Integration' *PELJ* (2012) Vol 15 (2) 463.

¹⁵¹ Saurombe A. (2012) 463.

¹⁵² Available at: <http://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/organ-politics-defence-and-security/> (accessed 29 May 2016).

¹⁵³ Art. 11 (2) also provides that the Council of Ministers shall oversee the implementation of the policies of SADC and advise the Summit on matters of overall policy and efficient and harmonious functioning and development of SADC.

Art.14 of the SADC Treaty provides for the Secretariat. The Secretariat acts as the principal executive institution of SADC and is mainly responsible for strategic planning, management and implementation of the programmes of SADC. The Secretariat is headed by an Executive Secretary and is based in Gaborone, Botswana.

Art.16 of the SADC Treaty makes provision for the Tribunal. The function of the Tribunal is to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and its subsidiary instruments. The Tribunal also adjudicates on such disputes as may be referred to it.¹⁵⁵

The SADC Treaty has also made provision for the establishment of national committees in each member state under Art.16A. These committees consist of key stakeholders in each country, with membership from government, private sector, civil society and non-governmental organisations.¹⁵⁶ The functions of the committees include, at national level: to provide input in the formulation of SADC policies, strategies and programmes; and to co-ordinate and oversee the implementation of SADC programmes of action.

In addition, Art.9(2) of the SADC Treaty allows for the establishment of other institutions of SADC as it deems necessary. In accordance with this provision, SADC has established the SADC Parliamentary Forum. The Parliamentary Forum mainly acts as a discussion platform on matters of common interest to SADC member states.

This mini thesis observes that SADC institutions reflects a community of states aimed at deepening integration in many areas of co-operation, other than market integration. This is evident from the established institutions like sectoral committees in different areas and the existence of a Parliamentary Forum. However, as reflected in the RISDP, market integration is still a prominent feature as SADC strives to achieve economic growth and poverty reduction.

¹⁵⁴ The Committee consists of a permanent secretary, or an officer of equivalent rank from each member state from a ministry that acts as the SADC Contact Point.

¹⁵⁵ Art. 16 of the SADC Treaty.

It should be mentioned that SADC has recently adopted a Protocol that made some changes in the jurisdiction and functions of the Tribunal.

¹⁵⁶ Art. 16A (13) of the SADC Treaty.

In addition to the common institutions like the Summit or Authority of Heads of State and Government, Council of Ministers, Secretariat, and other institutions, SADC and the EAC both have legislative institutions or assemblies. However, unlike COMESA, SADC does not have a Committee of Governors of Central Banks.

2.5. Conclusion

In sum, this chapter has demonstrated two things that are important to this mini thesis. First, it has demonstrated the extent of multiplicity of REC memberships in the TFTA. It has noted that all the three RECs contain countries that have maintained memberships in more than one REC. Secondly, it has demonstrated how the three RECs have established similar regional integration institutions (RIIs). The following institutions have been noted to be common in all the three RECs: (a) Summits or Authority of Heads of State and Government as the supreme policy making institution; (b) Councils of Ministers responsible for overseeing the functioning of each REC; (c) Courts or Tribunal to interpret the respective treaties and resolve disputes; (d) Committees of Senior Officials or permanent secretaries; and (e) Secretariats. As it will be observed in the next chapter, with the exception of the secretariat, similar RIIs have been replicated under the TFTA Agreement.

Furthermore, although efforts towards market integration in the three RECs started in different circumstances and were driven by different motives, the current strategies and goals are now becoming more and more similar and identical. There has been a replication of a similar linear approach to integration in the three RECs.¹⁵⁷ McCarthy defined a linear approach to integration as the sequential phases of integrating goods, services, labour and capital from an FTA, to a customs union, to a common market, and finally to a monetary or fiscal union, in that order.¹⁵⁸ A

¹⁵⁷ All three RECs proposed to start their integration through the establishment of FTAs, then custom unions and lastly common markets.

¹⁵⁸ McCarthy C 'Reconsidering regional Integration in Sub-Saharan Africa' in Hartzenberg T (Ed) *Supporting Regional Integration in East and Southern Africa: Review of Select Issues* (2010) 1 available at: <http://www.tralac.org/publications/article/4652-supporting-regional-integration-in-east-and-southern-africa-review-of-select-issues.html> (accessed 18 April 2016).

by-product of linear approach to integration in these three RECs has been the establishment of, arguably, similar RIIs that perform almost similar functions.

Due to the similarities of the RIIs and their respective functions in these three RECs, there has been duplication of effort and waste of resources in Africa, most especially for those countries that have multiple REC memberships, as they try to fulfil their multiple obligations.¹⁵⁹ It has also proven to be costly for member states to maintain membership in two RECs, as evidenced by the several countries that withdrew their COMESA memberships.¹⁶⁰

The duplication of efforts in the RIIs and costly dual memberships, has in some ways, inhibited the realisation of the full potential of intra-regional trade in Africa.¹⁶¹ Hence, came forth the suggestion to consolidate the three RECs into one trade regime, the TFTA. The next chapter will therefore be a discussion of the TFTA Agreement and the institution it envisages to establish.



A linear approach to integration has a predetermined time frame and generates formal results, such as, secretariats, legal instruments and officially specified targets.(See WTO (2011) 152)

¹⁵⁹ African Union (AU) ‘The African Union and Regional Economic Integration’ (Unpublished) available at: <http://www.sahistory.org.za/article/african-union-and-regional-economic-integration> (accessed 18 April 2016).

¹⁶⁰ For instance, as we have noted the reason cited for the withdrawal of Tanzania from COMESA in 2000. However, other countries have maintained dual memberships. Some countries with dual memberships found it very difficult to withdraw their membership of one REC, probably because of the benefits they derive from them. (See Kalenga P (2011) 4).

¹⁶¹ Akonor K *African Economic Institutions* (2009) 90.

CHAPTER THREE

THE TRIPARTITE FREE TRADE AREA (TFTA) AGREEMENT AND THE INSTITUTIONS ESTABLISHED THEREUNDER

3.1 Introduction

The previous chapter discussed how the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) were founded. These three regional integration arrangements (RIA) will be the building blocks of the Tripartite Free Trade Area (TFTA). It was also noted that much as market integration was the major aim of the formation of COMESA, the aims for the formation of both the EAC and SADC were as a result of a blend of political, social and economic factors.

The previous chapter also examined the existing membership status of these three regional economic communities (RECs). It was noted that among the current memberships of the three RECs, there are some countries that belong to more than one RIA. Furthermore, the chapter also highlighted the regional integration institutions (RIIs) that have been established in the three RECs and the panoply of functions which they perform. It was noted that in order to achieve their aims and objectives, all the three RECs have established institutions that are similar.¹⁶²

Having already examined the three RECs, this chapter will be aimed at discussing the TFTA Agreement. This chapter will recount the process that led to the negotiations and the eventual signing of the TFTA Agreement. It will also examine the aims and objectives of the TFTA as provided in the TFTA Agreement. Most significantly, this chapter will discuss the institutions that will be established under the TFTA Agreement and the functions which they will be expected to perform. Lastly, the chapter will examine the nature of the relationship that is

¹⁶² The aims and objectives of each REC are also reflected in the kind of institutions that were established. It was further noted that in the RECs, each institution has been vested with the necessary authority and mandate in order to ensure that the overall objective of that REC is achieved.

expected to exist between the institutions that will be established under the TFTA Agreement and the existing RIIs in the three RECs.

3.2 The road towards the Tripartite Free Trade Area (TFTA)

It was noted in the previous chapter that COMESA, EAC and SADC have all adopted a similar linear regional integration model.¹⁶³ In as much as the EAC envisages the ultimate attainment of a political federation, the attainment of free trade areas (FTAs), customs unions and common markets is a common feature in these three RECs. Similarly, the goals and strategies of market integration that have been adopted in all the three RECs tend to be indistinguishable.¹⁶⁴ Of course, there are areas where the RECs have adopted strategies and methods that are different. For instance, Naumann cited the Rules of Origin and trade instruments that are applicable in the three RECs as not similar.¹⁶⁵

The similarities in the goals and strategies of the three RECs put countries with multiple REC memberships in a tricky situation. In addition to the financial costs of maintaining memberships in two RECs that have similar objectives, the countries with multiple REC memberships were also expected to encounter the legal impracticability of belonging to two customs unions.¹⁶⁶ Therefore, maintaining multiple REC memberships or having overlapping REC memberships

¹⁶³ Kalenga P (2011) 4.

¹⁶⁴ Kalenga P (2011) 4.

¹⁶⁵ Naumann E 'Rules of Origin in the Tripartite FTA: Reflections on the status quo and the challenges ahead' in Hartzenberg T (Ed) *From Cape to Cairo: Making the Tripartite Free Trade Area work* (2011) 258. Naumann argued that the Rules of Origin in COMESA and the EAC are, to some extent, similar because they are generally based on a value added rule of 35 per cent for local content, whereas those in SADC are product specific and use a variety of means to determine eligibility.

¹⁶⁶ It is technically not possible for a country to belong to more than one customs union because the countries in each union set up one common external tariff (CET) and quotas against non-members. Customs unions also require not only joint policies on tariffs and quotas but also harmonisation of domestic legal instruments, and collective governance of institutions that manage the CET. (See Mwanza W 'African continental integration agenda: Suggestions for African Countries and Region' in Hartzenberg T (Ed) *Supporting Regional integration in East and Southern Africa: Review of select issues* (2010) 56) available at: http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/RI_Review_Issues_Book_Final20100507.pdf (accessed 27 April 2016).

was being singled out as a factor inhibiting intra-Africa trade growth and the realisation of tangible fruits of market integration.¹⁶⁷

Erasmus summed up the challenges, created as a result of overlapping memberships, to achieving deeper market integration as follows:

‘Overlapping membership results in multiple financial obligations, varying trade regimes, duplication of standards, waste of resources, the difficulty of belonging to two customs unions, and so forth. Overlapping membership also has serious implications for the private sector by complicating business transactions and raising the cost of doing business. For example, the business community have to contend with different trade regimes, including varying tariff levels, rules of origin and technical standards.’¹⁶⁸

The above quotation has encapsulated the cost resulting from multiple or overlapping REC memberships on the African continent. The costs are further exacerbated by the fact that most countries on the continent already have political, social and economic problems that need to be attended to.¹⁶⁹

In addition, apart from being costly and inefficient in the realisation of regional integration, multiple REC memberships tend to confuse not only the parties involved in the RECs but also third parties.¹⁷⁰ In support of this argument, Chikono and Nakana quoted the then SADC Deputy Executive Secretary, Albert Muchanga, as follows:

¹⁶⁷ Akonor K (2009) 90.

¹⁶⁸ Erasmus G ‘Legal and institutional aspects of the Tripartite Free Trade Area: The need for effective implementation’ in Hartzenberg T (Ed) *Tripartite Free Trade Area: Towards a new African integration paradigm* (2012) 14.

¹⁶⁹ Mapuva J & Mapuva L ‘The SADC regional bloc: What challenges and prospects for regional integration?’ Online article available at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100002 (accessed 27 April 2016).

¹⁷⁰ Chingono M & Nakana S ‘The Challenges to Regional Integration’ in *African Journal of Political Science and International Relations* (2009) Vol 3(10) 404. available at: <http://www.academicjournals.org/ajpsir> (accessed 14 April 2016).

‘The overlapping of mandates [of countries with multiple or overlapping memberships] does not only put pressure on countries to meet their obligations and this could also send confusing signals to donors.’ [Emphasis added]¹⁷¹

Furthermore, Hancock also added that overlapping memberships may weaken regional integration.¹⁷² This may happen in cases where the overlapping memberships lead to complications in policy co-ordination and facilitate confusion and lack of communication between countries and RECs, resulting in what Bhagwati termed the ‘spaghetti bowl’ problem.¹⁷³ The spaghetti bowl problems are obstacles characterised by conflicting implementation schedules of obligations for member states, which ends up undermining the effectiveness of trade regimes.¹⁷⁴

Due to the challenges caused by multiple and overlapping REC memberships, countries that had that status faced a difficult choice of whether to maintain or withdraw REC memberships. As we noted in the previous chapter, some countries, like, Tanzania, Angola, Mozambique, and Namibia, withdrew their COMESA membership and only maintained their SADC membership. Other countries still maintained multiple memberships. Apparently, it proved difficult for some countries to make the choice of withdrawing their memberships, since they enjoyed the variety

¹⁷¹ Chingono M & Nakana S (2009) 404.

¹⁷² Hancock K J ‘What role for the EU in the Southern African Customs Union (SACU): Advocate, cajoler, or bully?’ A paper prepared for the Conference on the Diffusion of Regional Integration, Kellogg-Forschergruppe, Transformative Power of Europe, Berlin (10 - 11 December 2010) 5.

¹⁷³ Luwan D ‘Common Market for Eastern and Southern Africa countries: Multiplicity of membership issues and choices’ *African Journal of International and Comparative Law* Vol 18(2) (2010) 218 available at: http://heinonline.org/HOL/Page?handle=hein.journals/afjincoll18&div=14&g_sent=1&collection=journals (accessed 27 April 2016).

¹⁷⁴ Shinyekwa I & Othieno L (2011) 7.

An example of inconsistent and incoherent policies can be argued against countries that are both members of COMESA and SADC. COMESA follows classical Vinerian thinking and stresses the benefits of integration that are derived after the removal of tariffs and non-tariff barriers whereas SADC supports a developmental approach to integration that focuses on sectoral co-operation. (See. Mapuva J & Mapuva L ‘The SADC regional bloc: What challenges and prospects for regional integration?’ (Online article) available at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100002 (accessed 27 April 2016).

of benefits of belonging to more than one REC.¹⁷⁵ Membership of a RIA is a political choice for any country and depends on several considerations: political, social, geographic, strategic and economic, just to mention a few.¹⁷⁶ Furthermore, at a diplomatic level, it was not possible to force countries to maintain single membership, as long as they are able to fulfil the obligations that arise from their status as members.¹⁷⁷

In addition, a decision to withdraw from a REC may require thorough consultations with different stakeholders in both the government and private sectors that may be affected by such action.¹⁷⁸ Such consultations do not come cheaply. They require a lot of financial resources.¹⁷⁹ Therefore, some countries found it hard to withdraw memberships in RECs, and instead maintained dual memberships.

In light of the failure to decisively resolve the issue of multiple and overlapping REC memberships, there were proposals to establish a new legal arrangement that would consolidate the three RECs into one FTA, the TFTA.¹⁸⁰ Rationalisation or consolidation of the three RECs into the TFTA was therefore seen as a framework that had the potential of unlocking the full

¹⁷⁵ Kalenga P (2011) 4.

¹⁷⁶ Kritzinger-van Nierken L ‘*Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience*’ Discussion paper (2005) 4 available at: http://www.sarpn.org/documents/d0001249/P1416-RI-concepts_May2005.pdf (accessed 14 April 2016).

¹⁷⁷ Countries are also afraid of withdrawing from RIAs because of the fear of the diplomatic isolation that they may possibly face as a result of such a decision, especially from countries that are left in the REC. (See. Shinyekwa I & Othieno L (2011) 7).

¹⁷⁸ Luwan D (2010) 232.

In fact, the United Nations Economic Commission for Africa (UNECA) concluded that the debate on the merits and demerits of membership of a REC has been inconclusive, even in countries where national studies have been carried out, such as Malawi. Member countries themselves see merit in belonging to more than one RIA. (See Economic Commission for Africa (ECA) *Progress and Prospects in the Implementation of Protocols in Southern Africa* (2011) 42 available at: <http://repository.uneca.org/bitstream/handle/10855/15508/bib.%2062082.pdf?sequence=1> (accessed 14 April 2016)).

¹⁷⁹ Luwan D (2010) 232.

¹⁸⁰ Kalenga P (2011) 4.

potential of intra-African trade.¹⁸¹ Shinyekwa and Othieno have argued that the TFTA market would not only have the effect of realising positive economic growth for countries in the region but also of opening up markets for their commodities.¹⁸² They added that economic advantage of one consolidated FTA in eastern and southern Africa was expected to be greater than the total economic advantage of maintaining the separate RECs. It should also be noted that, parallel to the TFTA initiative, there is another regional integration initiative under the auspices of the African Union (AU) to establish a Continental Free Trade Area (CFTA) by the year 2017, covering all African countries.¹⁸³

The first meeting to discuss the possibility of establishing an FTA among COMESA, EAC and SADC was held in 2008, in Kampala, Uganda.¹⁸⁴ In addition to endorsing the idea to establish the TFTA, the meeting directed the three RECs' secretariats to jointly undertake a study exploring the best possible way of establishing an FTA among the three RECs.¹⁸⁵

The second tripartite meeting between COMESA, EAC and SADC was held in July 2011 in Johannesburg, South Africa. This meeting launched the negotiations towards the formation of the TFTA. The meeting further agreed that the proposed TFTA should be anchored on the following

¹⁸¹ Mwanza W (2010) 51.

¹⁸² Shinyekwa I & Othieno L (2011) 7.

¹⁸³ The negotiations towards the formation of the CFTA were supposed to be launched in 2015 but have delayed due to the delays in the TFTA negotiations.

For further reading on the CFTA see: African Union (AU) 'Update on the Continental Free Trade Area (CFTA)' available at: http://www.tralac.org/images/Resources/Continental_FTA/Update%20on%20the%20Continental%20Free%20Trade.pdf (accessed 22 May 2016).

¹⁸⁴ The meeting was attended to by Heads of State and Government representing all the countries that have membership in any of the three RECs. The meeting concluded that the proposed tripartite arrangement would be a crucial building block towards the achievement of the African Economic Community (AEC) as outlined by the AEC Treaty.

¹⁸⁵ Final Communiqué of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government, Kampala, Uganda (22 October 2008) para. 13 available at: https://www.issafrica.org/uploads/COMESA-EAC-SADC_EN_221008.pdf (accessed 15 April 2016).

three pillars: (a) market integration; (b) infrastructure development; and (c) industrial development.¹⁸⁶

Finally, the Heads of State and Government representing a total of 26 countries in COMESA, EAC and SADC signed the TFTA Declaration and the TFTA Agreement in June 2015, at Sharm el-sheikh, Egypt.¹⁸⁷ By May 2016, a total of 16 countries had signed the TFTA Agreement: Angola, Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Kenya, Malawi, Namibia, Rwanda, Seychelles, Swaziland, Tanzania, Uganda and Zimbabwe.¹⁸⁸ However, at that time, no country had ratified the TFTA Agreement.¹⁸⁹ The TFTA Agreement will require 14 ratifications for it to come into force.¹⁹⁰

3.3 The Tripartite Free Trade Area (TFTA) Agreement

The TFTA Agreement aims at establishing a single market within the territories covered by COMESA, EAC and SADC countries. It is estimated that the TFTA market (excluding South Sudan), potentially, has a population of 632 million people, representing 57 per cent of the whole population on the continent of Africa.¹⁹¹ The TFTA will also boast of a total Gross Domestic Product (GDP) of US\$ 1.3 trillion, representing 58 per cent of Africa's GDP.¹⁹²

¹⁸⁶ Communiqué of the Second COMESA-EAC-SADC Tripartite Summit, Vision: Towards a Single Market, Theme: Deepening COMESA-EAC-SADC Integration, 12 June 2011 available at: <http://www.dfa.gov.za/docs/2011/comesa0613a.html> (accessed 15 April 2016).

¹⁸⁷ Eritrea and Libya were the only countries that did not sign the TFTA Declaration in June 2015. It should also be noted that South Sudan had not yet at this moment acceded to the EAC Treaty.

¹⁸⁸ Erasmus G 'The Tripartite Free Trade Area Agreement: Results of Phase One of the Negotiations' (2015) 8 available at: <http://www.tralac.org/images/docs/7803/us15wp042015-erasmus-tripartite-fta-results-of-phase-one-of-the-negotiations-20150729-fin.pdf> (accessed 15 April 2016).

¹⁸⁹ Business reporter 'Countries delay TFTA ratification' *The Herald Newspaper* 8 March 2016 available at: <http://www.herald.co.zw/countries-delay-tfta-ratification/> (accessed 15 April 2016).

¹⁹⁰ Art. 39 (3) of the TFTA Agreement.

¹⁹¹ Communiqué of the Third COMESA-EAC-SADC Tripartite Summit para. (1) (b) 2.

¹⁹² Communiqué of the Third COMESA-EAC-SADC Tripartite Summit para. (1) (b) 2.

The benefits of establishing a large market on a continent which is characterised by small and fragmented national markets can hardly be over-emphasised. Shayanowako argued that the TFTA market may help bolster intra-regional trade through: (a) increased market access for products; (b) increased economic growth; (c) increased foreign direct investment (FDI) flow; (d) elimination of some challenges associated with overlapping memberships;¹⁹³ (e) increased industrialisation; (f) improved competitiveness of products; (g) exploitation of untapped resources; and (h) development of good infrastructure.¹⁹⁴

In addition, the establishment of the TFTA is also being seen as an important step in the realisation of the vision of the AU of establishing the African Economic Community (AEC) as enshrined in the Lagos Plan of Action of 1980, the AEC Treaty of 1991 and the Resolution of the AU Summit¹⁹⁵ held in Banjul, Gambia, in 2006.¹⁹⁶

As stated earlier, the TFTA integration process will be based on a developmental approach anchored on three pillars of: (a) market integration as symbolised by the large FTA; (b) infrastructure development to facilitate and enhance connectivity, communication, and movement of goods and persons, and reduce the cost of doing business; and (c) industrialisation which will enhance competitiveness of firms and address the supply and productive capacity constraints.¹⁹⁷

Art.2 of the TFTA Agreement provides for the establishment of an FTA among the countries that are members of COMESA, EAC and SADC. The range of matters that will be covered under the

¹⁹³ See the Preamble to the TFTA Agreement.

¹⁹⁴ Shayanowako P 'Towards a COMESA, EAC and SADC Tripartite Free Trade Area' *Trade and Development Studies* Issue No. 40 (2011) 9-12 available at: http://www.panafricanglobaltradeconference.com/upload/towards_a_tripartite_free_trade_area_.pdf (accessed 19 April 2016).

¹⁹⁵ The AU Summit in Gambia directed the AU Commission and RECs to harmonise and co-ordinate policies and programmes of RECs as important strategies for rationalisation, and increasing intra-Africa trade and investment and integration of African economies in the global economy.

¹⁹⁶ Communiqué of the Third COMESA-EAC-SADC Tripartite Summit para. (1) (e) 2.

¹⁹⁷ Communiqué of the Third COMESA-EAC-SADC Tripartite Summit para. (1) (d) 2.

TFTA Agreement includes: (a) trade in goods; (b) trade in services; and (c) other trade related matters.¹⁹⁸ Art.4 of the TFTA Agreement provides for the general objectives of the TFTA. The general objectives of the TFTA include: (a) to promote economic and social development of the TFTA region; (b) to create a large single market with free movement of goods and services to promote intra-regional trade; (c) to enhance the regional and continental integration processes; and (d) to build a strong FTA for the benefit of its people.

Art.5 (e) of the TFTA Agreement provides that the TFTA Agreement shall establish and maintain an institutional framework for the implementation and administration of the TFTA. These TFTA institutions are established under Art. 29 of the TFTA Agreement, and will be considered later in this chapter.

Art.6 of the TFTA Agreement makes provision for the general principles that will govern the TFTA. These principles include the following: (a) TFTA being REC or member state driven;¹⁹⁹ (b) variable geometry;²⁰⁰ (c) building on the acquis;²⁰¹ (d) consensus decision making;²⁰² (e) Most Favoured Nation (MFN) Treatment;²⁰³ (f) National Treatment;²⁰⁴ and (g) best practices in the TFTA.



¹⁹⁸ Art.3 of the TFTA Agreement.

¹⁹⁹ The individual member or partner states will be parties to the TFTA and not the RECs. The TFTA Agreement makes no provision for a secretariat as the three REC secretariats will be its custodians.

²⁰⁰ The principle would enable groups of countries wishing to pursue a given goal to do so, while allowing those opposed to it to hold back. It also allows for the co-existence of countries in different trading arrangements with small integrating effects.

²⁰¹ The TFTA will build on the successes already achieved by the RECs through trade liberalisation.

²⁰² Decision making in its institutions will be made by consensus of the members.

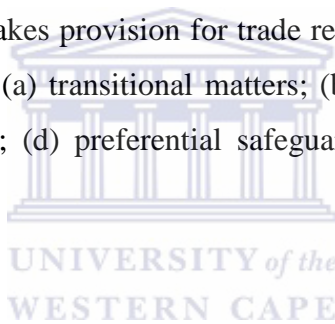
²⁰³ The principle of MFN Treatment simply means treating other countries equally. Under the WTO agreements, countries cannot normally discriminate between their trading partners. Granting special favours (such as a lower customs duty rate for one of their products) has to be done for all other WTO members. The principle of MFN Treatment is so important that it is the Art. 1 of the [General Agreement on Tariffs and Trade \(GATT\)](#), which governs trade in goods. The principle of MFN Treatment is also a priority in the [General Agreement on Trade in Services \(GATS\)](#) (Art. 2) and the [Agreement on Trade-Related Aspects of Intellectual Property Rights \(TRIPS\)](#) (Art. 4) Therefore, under the TFTA Agreement a member of the TFTA will be under an obligation to accord MFN Treatment to another member. (See. This definition of MFN Treatment is available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox (accessed 27 April 2016).

Part II of the TFTA Agreement provides for the principle of non-discrimination. Articles 7 and 8 of the TFTA Agreement provides for the principles of Most Favoured Nation Treatment and National Treatment, respectively.

Part III of the TFTA Agreement governs the liberalisation of goods. This includes matters to do with: (a) elimination of import duties;²⁰⁵ (b) non-tariff barriers;²⁰⁶ (c) rules of origin;²⁰⁷ and (d) elimination of quantitative restrictions.²⁰⁸

Part IV of the TFTA Agreement deals with issues of customs co-operation and trade facilitation.²⁰⁹ In addition, Art. 15 also makes provision for goods that are in transit from one country to another in the TFTA.

Part V of the TFTA Agreement makes provision for trade remedies and other related matters. It provides for, among other things: (a) transitional matters; (b) anti-dumping and countervailing measures; (c) safeguard measures; (d) preferential safeguards; and (e) co-operation on trade remedies.²¹⁰



²⁰⁴ National Treatment means treating foreigners and locals equally. Imported and locally produced goods should be treated equally — at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of National Treatment (giving others the same treatment as one’s own nationals) is also found in all the three main WTO agreements (Art. 3 of [GATT](#), Art. 17 of [GATS](#) and Art. 3 of [TRIPS](#)) Therefore, under the TFTA Agreement a Tripartite Member/Partner State will be expected to accord to products imported from other Tripartite Member/Partner States treatment no less favourable than that accorded to like domestic products. (See The definition of National Treatment available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox (accessed 27 April 2016).

²⁰⁵ Art.9 of the TFTA Agreement.

²⁰⁶ Art.10 of the TFTA Agreement.

²⁰⁷ Art.12 of the TFTA Agreement.

²⁰⁸ Art.11 of the TFTA Agreement.

²⁰⁹ Arts.13 and 14 of the TFTA Agreement.

²¹⁰ Arts.16, 17, 18, 19 and 20, respectively, of the TFTA Agreement.

Part VI of the TFTA Agreement provides for other trade related matters, such as, technical barriers to trade,²¹¹ sanitary and phytosanitary measures,²¹² special economic zones,²¹³ and infant industries.²¹⁴ Part VII of the TFTA Agreement makes provision for co-operation in matters of finance,²¹⁵ trade policies,²¹⁶ and research and statistics.²¹⁷

Parts VIII and IX of the TFTA Agreement make provision for the establishment of TFTA institutions and a dispute settlement mechanism, respectively.²¹⁸ These provisions will be discussed in greater detail later in this chapter when considering the TFTA institutions and their functions.

Parts X and XI of the TFTA Agreement make provision for general and security exceptions²¹⁹ and financial provisions.²²⁰ It should be noted that the member/partner states are yet to determine the modalities of how they will fund their commitments towards the implementation of the TFTA.²²¹

Lastly, Part XII of the TFTA Agreement deals with general and final provisions. These matters include: (a) working languages;²²² (b) amendments;²²³ (c) sanctions;²²⁴ (d) accession;²²⁵ (e)

²¹¹ Art.21 of the TFTA Agreement.

²¹² Art.22 of the TFTA Agreement.

²¹³ Art.23 of the TFTA Agreement.

²¹⁴ Art.24 of the TFTA Agreement.

²¹⁵ Art. 26 of the TFTA Agreement.

²¹⁶ Art.27 of the TFTA Agreement.

²¹⁷ Art.28 of the TFTA Agreement.

²¹⁸ Arts.29 and 30, respectively, of the TFTA Agreement.

²¹⁹ Arts.31 and 32 of the TFTA Agreement.

²²⁰ Art.34 of the TFTA Agreement.

²²¹ Art.34 of the TFTA Agreement.

²²² Art. 35 of the TFTA Agreement.

withdrawal;²²⁶ (f) depository and registration;²²⁷ (g) negotiation of issues that were still outstanding from Phase I;²²⁸ (h) Phase II negotiations;²²⁹ and (i) the signatures part.²³⁰

3.4 The institutions to be established under the Tripartite Free Trade Area (TFTA) Agreement and their functions

The TFTA institutional framework is provided for under Parts VIII and IX of the TFTA Agreement. These institutions will be established so that they aid in achieving the objectives of the TFTA, as enshrined in the TFTA Agreement. Furthermore, the institutions will also be vested with the necessary authority to carry out their respective mandates. It should be mentioned that Annex X, which will provide for how the Dispute Settlement Mechanism will operate, is yet to be agreed upon.²³¹

Art.29 (1) of the TFTA Agreement will establish seven institutions or organs for the implementation of the TFTA. These institutions are: (a) the Tripartite Summit; (b) the Tripartite Council of Ministers; (c) the Tripartite Sectoral Ministerial Committee on Trade, Finance, Customs and Economic Matters, and Home/Internal Affairs; (d) the Tripartite Ministerial Committee on Legal Affairs; (e) the Tripartite Task Force of the Secretariats of the three RECs; (f) the Tripartite Committee of Senior officials; and (g) the Tripartite Committee of Experts.

²²³ Art. 37 of the TFTA Agreement.

²²⁴ Art. 38 of the TFTA Agreement.

²²⁵ Art. 41 of the TFTA Agreement.

²²⁶ Art.42 of the TFTA Agreement.

²²⁷ Art.43 of the TFTA Agreement.

²²⁸ Art.44 of the TFTA Agreement.

²²⁹ Art.45 of the TFTA Agreement.

²³⁰ Pgs.21 and 22 of the TFTA Agreement.

²³¹ Art.30 (e) of the TFTA Agreement.

First, the Tripartite Summit will consist of the Heads of State and Government representing the countries that will ratify the TFTA Agreement. The major function of the Tripartite Summit will be to provide the general directions and impetus for the Tripartite arrangement.²³² This mini thesis observes that the composition and the function of the Tripartite Summit are similar to those of the Authority in COMESA; the Summit in the EAC; and the Summit of Heads of State and Government in SADC.

Secondly, the Tripartite Council of Ministers will consist of Ministers designated by the Tripartite member/partner states to act on matters relating to the TFTA.²³³ Similarly, this mini thesis notes that the composition and function of the Tripartite Council of Ministers mirrors those of the Council in COMESA; the Council in the EAC; and the Council of Ministers in SADC.

Thirdly, Art.29 (1) (c) of the TFTA Agreement provides for two types of Ministerial Committees. One is the Tripartite Sectoral Ministerial Committee on Trade, Finance, Customs and Economic Matters, and Home Affairs. The function of this Committee will be to deal with policy direction and implementation of matters to do with trade, finance, customs, home affairs and other related sectoral matters. The other is the Tripartite Sectoral Ministerial Committee on Legal Affairs. The function of this Committee is to deal with policy direction and implementation of legal matters in the TFTA. This mini thesis observes that, to some extent, the composition and functions of the two Ministerial Committees provided for under Art. 29 (1) (c) of the TFTA Agreement, are a reflection of those of, both the Council and the Committee of Governors of Central Banks in COMESA; the Council in the EAC; and the Sectoral and Cluster Ministerial Committees in SADC.

Fourthly, Art.29 (1) (d) of the TFTA Agreement makes provision for the Tripartite Task Force of the Secretariats of the three RECs. The function of this institution is to act as a secretariat to the TFTA arrangement. This Task Force will also co-ordinate the implementation of the Tripartite work programme. This institution is the one that co-ordinated all the efforts in the negotiation of

²³² Art.29 (1) (a) of the TFTA Agreement.

²³³ Art.29 (1) (b) of the TFTA Agreement.

the TFTA Agreement.²³⁴ In as much as the TFTA Agreement has not made a provision for a fully-fledged secretariat to service it, it can be argued that this institution will act as a secretariat. The Tripartite Task Force will be the custodian of the TFTA arrangement. Therefore, it will be the *defacto* TFTA secretariat. In as much as there is no provision for a functional secretariat under the TFTA Agreement, this mini thesis argues that the secretarial role of this particular institution reflects those roles being carried out by the respective secretariats of COMESA, EAC and SADC.

Fifthly, Art.29 (1) (e) of the TFTA Agreement makes provision for the establishment and function of the Tripartite Committee of Senior Officials. This Committee will be responsible for overseeing and guiding technical work. This mini thesis also observes that the composition and functions of the Tripartite Committee of Senior Officials reflect those of the Inter-governmental Committee in COMESA; the Co-ordination Committee in the EAC; and the Standing Committee of Officials in SADC.

Sixthly, Art.29 (1) (f) of the TFTA Agreement makes provision for the establishment and the function of the Tripartite Committee of Experts. The Committee of Experts will be responsible for carrying out of the technical work in the TFTA and will be reporting to the Tripartite Committee of Senior Officials. This mini thesis further observes that the composition and functions of the Tripartite Committee of Experts replicate those of the sectoral technical committees in COMESA; and sectoral committees in the EAC.

Lastly, Art.30 of the TFTA Agreement makes provision for the establishment of a Tripartite Dispute Settlement Body (DSB). The DSB will be responsible for the administration of the rules of procedure and the settlement of disputes under the TFTA arrangement. The DSB will also have the functions and powers to interpret and apply the TFTA Agreement, in addition to the resolution of any disputes between Tripartite member or partner states.²³⁵ The DSB is modelled on WTO thinking and its panels will consist of TFTA member/partner states.²³⁶ The DSB will

²³⁴ Final Communiqué of the COMESA-EAC-SADC Tripartite Summit (2008) para 13.

²³⁵ Art.30 (4) & (5) of the TFTA Agreement.

²³⁶ Erasmus G (2015) 11.

therefore be empowered to establish its own panel and an Appellate Body when conducting its operations.²³⁷ The rules of procedure of the DSB are yet to be provided for in the TFTA Agreement.

Just as has been submitted regarding the Tripartite institutions to be established under Art. 29 of the TFTA Agreement, similarly for the DSB, dispute settlement mechanisms are a common feature in all the three RECs. In as much as at the moment the exact nature of the DSB is not clear, this mini thesis argues that its major function will be similar to that of the Court of Justice in COMESA; the Court of Justice in the EAC; and the Tribunal in SADC. The major function of these four dispute settlement mechanisms is to interpret and apply the legal instruments by which they were established.

Having noted the striking similarities between the institutions established under the TFTA Agreement and those that exist in the RECs, the next paragraphs will examine the nature of the relationship that is expected to exist between these sets of institutions. It will provide an analysis of the relationship expected to exist between the TFTA institutions and the REC institutions. Understanding this relationship will be important in light of some parts of the discussion in the last two chapters of this mini thesis.

3.5 The relationship between the Tripartite Free Trade Area (TFTA) institutions and the existing institutions in the three regional economic communities (RECs)

It should be noted in the first place that the TFTA Agreement does not offer clear guidance on how the TFTA institutions and the existing REC institutions will operate. In light of this, this mini thesis will discuss the probable nature of the relationship between institutions in these two regimes.

²³⁷ Art. 30 (2) of the TFTA Agreement.

The nature of the relationship between the institutions that will be established under the TFTA Agreement and the existing REC institutions may be categorised into two types, depending on the perspective from which one looks at them. The relationship between the two regimes may differ according to: (a) the relationship between the institutions of the two regimes as governed by the TFTA Agreement itself or principles governing international trade; and (b) the relationship of the institutions of the two regimes as governed by public international law principles.

On the one hand, the TFTA Agreement and principles of international trade law appear to suggest that the relationship between the institutions of the TFTA arrangement and the existing institutions in the three RECs is not on a par but at different levels, with the former being superior to the latter. It has already been noted that the TFTA Agreement will not establish a new REC.²³⁸ The text of Art. 2 of the TFTA Agreement merely intends to establish an FTA among the member or partner states of COMESA, EAC and SADC and not a new legal personality.²³⁹ The TFTA Agreement will only serve to accommodate the separate existence of the legal and institutional arrangements of the three RECs.²⁴⁰ In contrast, the three RECs have all been established under their respective treaties as legal entities with rights and obligations under international law. For instance, Art.4 of the EAC Treaty clearly states that the EAC shall be a body corporate with legal capacity as a person.²⁴¹ Similar provisions exist in Art.186 of the COMESA Treaty and Art.3 of the SADC Treaty. The TFTA Agreement is silent on the establishment of the TFTA as a legal personality. Therefore, this mini thesis argues that the

²³⁸ Erasmus G (2015) 2.

²³⁹ The legal status of the TFTA is not clear from the text of the TFTA Agreement. It remains to be seen whether the TFTA institutions will have legal personality, with rights and obligations, under international law or it will have personality through the RECs or the members/partners. The TFTA Agreement is silent on its legal status.

²⁴⁰ Erasmus G (2015) 2.

²⁴¹ The EAC establishment formula is similarly used in the other two RECs. The establishment of the RECs as legal personalities allows them to have legal capacity to make transactions on their own as independent bodies, separated from their member countries. In the absence of a similar establishment formula under the TFTA Agreement, it therefore remains to be seen how the institutions of the TFTA will transact their business and whether they will be capable of suing or being sued or the TFTA will operate through the TFTA members/partner states. (Compare with: Art. 186 of the COMESA Treaty and Art. 3 of the SADC Treaty).

TFTA Agreement may not establish the TFTA as an entity that will be of similar nature to the existing RECs. The TFTA will be different.

Furthermore, it has been argued that the original TFTA idea was to establish one FTA in the region with legal personality and typical institutions of a REC, but this was subsequently dropped.²⁴² It has also been stated that the negotiators of the TFTA Agreement were conscious of the need to avoid creating another REC, and this influenced the choice of the legal instrument that was ultimately used to establish the TFTA.²⁴³ In supporting the choice of instrument submission, Mangeni and Muzorori have argued that the choice of a legal instrument depends on practice and intention.²⁴⁴ They stated that it is a practice in international law that treaties tend to deal with grave matters like cessation of hostilities or the establishment of new institutional orders and are multi-sectoral like REC treaties, whereas agreements tend to deal with specific sectoral matters, like trade matters, etc.²⁴⁵ They cited examples like the agreements establishing the WTO, on one hand, and treaties establishing COMESA, EAC and SADC on the other hand. The two authors concluded that the agreement nomenclature may have been chosen by the TFTA negotiators on the basis of common usage in international trade, and also that it will constitute binding rights and obligations within a specific area of law, in this case, trade.²⁴⁶

This mini thesis therefore argues that by their choice of an agreement, as opposed to a treaty, in establishing the TFTA, the drafters of the TFTA Agreement intended the TFTA to have a status that is different from those of the three RECs. It was noted in the earlier chapters that the all the

²⁴² Erasmus G (2015) 2.

The idea to establish one FTA may have been dropped because the RECs deal with a wide range of issues apart from market integration, so it would not have been possible to dissolve the RECs altogether in order to form the TFTA.

²⁴³ Mangeni F & Muzorori T 'Tripartite Text Based FTA Negotiation' in Ngwenya S (Ed) *Key Issues in Regional Integration* Vol 2 (2013) 98 available at: <http://www.comesa.int/attachments/article/1223/Key%20Issues%20on%20Regional%20Intergration.pdf>.) (accessed 21 April 2016).

²⁴⁴ Mangeni F & Muzorori T (2013) 98.

The law governing international treaties is governed by the Vienna Convention on the Laws of Treaties, 1969.

²⁴⁵ Mangeni F & Muzorori T (2013) 98.

²⁴⁶ Mangeni F & Muzorori T (2013) 98.

three RECs were established through treaties, whereas the TFTA will be established through an agreement. Hence, the two regimes cannot be on a par.

To extend the above submission, this mini thesis further argues that the TFTA Agreement appears to be more of a multilateral trading agreement than a bilateral trading agreement.²⁴⁷ Therefore, the TFTA Agreement may not be on a par with REC treaties, which are commonly regarded as bilateral trading agreements.²⁴⁸ It has been noted that multilateral institutions, like the WTO, were established by agreements whereas bilateral institutions, like the RECs, are usually established under treaties.²⁴⁹ Since the TFTA Agreement will be regarded as a multilateral agreement, whereas the REC treaties are currently regarded as bilateral agreements, it can be submitted that TFTA will be higher in the hierarchy than the existing RECs. Just as the WTO level is, arguably, higher than the REC level, this mini thesis similarly submits that the TFTA level will be higher than the REC level. Arguably, the TFTA will be at a level that is below the WTO.²⁵⁰

In addition, Art.30 (7) of the TFTA Agreement provides that in the event of any inconsistency or conflict between the TFTA Agreement and the treaties and instruments of COMESA, EAC and SADC, the TFTA Agreement shall prevail to the extent of the inconsistency or conflict. This provision therefore buttresses the submission that the TFTA Agreement may be at a level which is superior to the levels of the three REC treaties. Therefore, this mini thesis submits that the

²⁴⁷ This conclusion can be deduced from the arguments made by the framers of the TFTA Agreement who wanted to follow the WTO model of instrument as opposed to the REC model of a treaty.

²⁴⁸ On the one hand, bilateral trading agreements are entered into between two or more countries under which the participants agree to reduce tariffs, quotas and other restrictions of trade between them. Examples are the treaties establishing the COMESA, EAC and SADC. On the other hand, multilateral trading agreements emanate from the global adoption of the General Agreement on Trade and Tariff (GATT), which principally advocates for free trade among the nations of the world in order to improve human welfare. Free trade as proposed by multilateral trading system entails the removal of all tariffs and other restrictions to international trade in order to enable global production of goods and services to be effective and efficient. The multilateral trade system created by the GATT is now administered by the World Trade Organisation (WTO) which was established in 1995 to govern and monitor international trade and promote the reduction in barriers to trade.

²⁴⁹ Mangeni F & Muzorori T (2013) 98.

²⁵⁰ The argument being that since the WTO governs trade matters in almost all the countries in the world, the TFTA Agreement should still be at a lower level than the WTO. The WTO ought to be at the highest level.

jurisdiction of the institutions established by the TFTA Agreement may be superior to those existing institutions in the three RECs.

On the other hand, this mini thesis will also argue that principles governing public international law appear to suggest that the relationship between the institutions of the TFTA arrangement and those institutions in the RECs may be on a par. Therefore no regime will be superior to the other.

This argument is made on the basis that it will be individual countries, and not RECs, that will be parties to the TFTA Agreement. The preamble to the Vienna Convention on Law of Treaties, 1969 (VCLT), a legal instrument that governs international agreements and conventions in international law, recognises the doctrine of equality of states. The doctrine of equality of states provides that all states are equal at international law.²⁵¹ The VCLT further provides that countries that are parties to an international agreement derive equal rights and obligations from it. The TFTA Agreement is an international legal instrument, just like the three treaties that established COMESA, EAC and SADC. Since it has already been observed that the mandates and institutions of the two regimes are similar, therefore most of the rights and obligations arising from the two regimes will be identical and similar in nature. Hence, Tripartite member/partner states will derive equal rights and obligations as a result of being parties to both the TFTA Agreement and the RECs treaties. No regime rights or obligations will outweigh the other. This mini thesis therefore submits that the TFTA arrangement and the RECs may be on a par with each other.

From the above analysis of the relationship between the TFTA arrangement and the RECs regime, this mini thesis concludes that the exact nature of this relationship is not clearly defined. Apart from Art.30 (7) of the TFTA Agreement which deals with the resolution of inconsistencies or conflicts between the TFTA regime and the individual RECs regime, the TFTA Agreement is silent on how these two legal regimes will interact in practice. The TFTA Agreement has not provided guiding principles that will govern instances where there are substantial overlaps in the

²⁵¹ Armstrong W S 'The Doctrine of the Equality of Nations in International Law and the Relation of the Doctrine of the Treaty of Versailles' *The American Journal of Law* Vol. 14 No.4 (Oct 1920) 541 available at: https://www.jstor.org/stable/pdf/2187873.pdf?_seq=1466773116284 (accessed 29 May 2016).

obligations of the two regimes. What can be seen are two legal regimes which are, in one breath, arguably, on a par or have parallel jurisdiction; and, in another breath, that the legal regime of the TFTA is a bit higher than those of the RECs.

The lack of clarity on the nature of the relationship between the TFTA regime and the REC regimes may cause confusion and therefore create uncertainty.²⁵² These scenarios may, as it will be observed in the next chapter, hinder the aims and objectives of the TFTA itself. This is so because the situation may create an environment where member or partner states may have the liberty to choose which regime should be applicable in a particular case, otherwise called forum shopping.²⁵³ The multiplicity of the parallel TFTA and REC regimes that have similar institutions and obligations may exacerbate the uncertainty in countries that have multiple REC memberships leading to incidents of forum shopping.²⁵⁴ As it will be observed in the next chapter, this state of affairs may add to the problems that may be encountered by countries that have multiple REC memberships.

3.6 Conclusion



This chapter has discussed the background to the establishment of the TFTA. It has discussed that the TFTA Agreement is not aimed at creating a new REC, but to harmonise and consolidate the existing RECs' agreements and regimes in order to not only help reduce trade barriers by establishing one single economic trading space, but also reduce the challenges caused by multiple REC memberships. It has also been noted that the TFTA arrangement is also aimed at contributing towards the broader AU objectives, as enshrined in the LPA of 1980 and the Abuja Treaty to establish the AEC by 2028.

²⁵² Busch M L 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade' International Organisation 2007 735 available at <http://www9.georgetown.edu/faculty/mlb66/forum%20shopping%20io.pdf> (accessed 29 May 2016).

²⁵³ Erasmus G 'The Tripartite FTA: Requirements for Effective Dispute Resolution' in Hartzenberg T et al *Cape to Cairo: Making the Tripartite Free Trade Area Work* (2011) 102.

²⁵⁴ Luwan D (2010) 232.

This chapter has further highlighted the important provisions of the TFTA Agreement. It has also considered the institutions which the TFTA Agreement will establish and how these institutions and their functions mirror the existing institutions in COMESA, EAC and SADC. Finally, the chapter has demonstrated the nature of the relationship that may likely exist between the TFTA institutions and the REC institutions.

Having discussed the REC and TFTA institutions, the next chapter will discuss the repercussions of the establishment of the TFTA institutions on the countries that have multiple REC memberships. The discussion will be undertaken against the background that the TFTA arrangement itself is aimed at addressing and resolving the challenges of multiple and overlapping memberships in COMESA, the EAC and SADC.²⁵⁵



²⁵⁵Preamble to the TFTA Agreement.

CHAPTER FOUR

ESTABLISHMENT OF TRIPARTITE FREE TRADE AREA INSTITUTIONS AND ITS REPERCUSSIONS ON COUNTRIES WITH MULTIPLE REGIONAL ECONOMIC COMMUNITY MEMBERSHIPS

4.1 Introduction

The previous chapter examined the Tripartite Free Trade Area (TFTA) initiative. It was discussed that the TFTA is aimed at rationalising and consolidating the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) regional economic communities (RECs) into one single trade regime in order to overcome the problems that exist as a result of multiple and overlapping REC memberships. Multiple and overlapping REC memberships have been regarded as one of the factors that has inhibited the potential for intra-regional trade in Africa.²⁵⁶

The previous chapter also discussed the provisions of the TFTA Agreement, highlighting some of its salient provisions. The chapter also discussed the institutions that will be established by the TFTA Agreement and the functions which they will be expected to perform.²⁵⁷ The chapter further demonstrated how these TFTA institutions replicate the institutions that already exist in the three RECs, in terms of both composition and function.

Finally, the chapter analysed the probable nature of the relationship that may exist between, on the one hand, the TFTA institutions and, on the other hand, the RECs' institutions. In the analysis, it was noted that the TFTA Agreement does not provide any guiding principles on how the TFTA institutions will interact with the RECs' institutions. However, it was demonstrated how under the principles of international law, the institutions of the two regimes may be regarded as being on a par with each other. It was also demonstrated how under the norms that

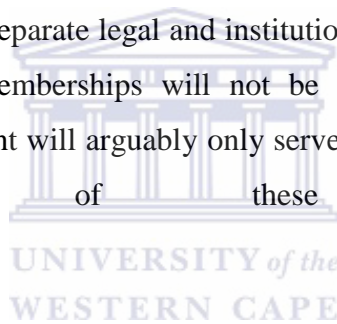
²⁵⁶ Akonor K (2009) 90.

²⁵⁷ It was noted that the TFTA institutions will be established in order to achieve their aims and objectives provided for in the TFTA Agreement. The mandates of each institution go towards the fulfilment of the aims of the TFTA.

govern international trade, supported by a construction of Art.30 (7) of the TFTA Agreement, the relationship between the two regimes may suggest that the TFTA institutions will be superior to those of the RECs. This lack of certainty about this relationship may leave a lot of room for forum shopping by member states. Forum shopping among the TFTA member/partner states may in the long run undermine the efficacy of the TFTA regime.

From the discussions in the previous chapters, this mini thesis intends to make two assumptions. These assumptions will provide the basis of the discussion later in this chapter.

The first assumption is that since the TFTA Agreement will not dissolve and merge the three RECs into one, single regime, but will only rationalise and consolidate them into a single FTA, multiple and overlapping REC memberships will continue to exist, even after the establishment of the TFTA. This is because the separate legal and institutional arrangements in the three RECs will remain intact. The REC memberships will not be altered or affected by the TFTA Agreement. The TFTA arrangement will arguably only serve the purpose of accommodating the separate existence of these three RECs.²⁵⁸



²⁵⁸Gaolaolwe D *The Nature of the Legal Relationship between the Three RECs and the envisaged TFTA: A focus on the Dispute Settlement Mechanism* (unpublished LLM Thesis, University of the Western Cape, 2013) 6.

The second assumption is that although the TFTA Agreement may not establish a new ‘REC’, the fact that it will still establish new regional integration institutions (RIIs) that have similar composition and function to those existing RIIs in the three RECs, implies that the TFTA will bring in additional obligations to Tripartite member/partner states. Consequently, the obligations of Tripartite member/partner states under the TFTA Agreement may be similar to the obligations that the same member/partner states already have under their respective RECs. Therefore, TFTA institutions will bring in new and fresh obligations for countries that ratify the TFTA Agreement.

With the above assumptions, this chapter will therefore discuss the repercussions of the establishment of institutions under the TFTA Agreement on countries that have multiple REC memberships. Generally, the chapter will discuss the negative consequences from the TFTA Agreement for countries with multiple REC memberships.



4.2 The establishment of TFTA institutions and its repercussions on countries with multiple REC memberships

As much as the establishment of the TFTA has been touted as being a plan for expediting the continent wide integration process as outlined by the African Economic Community (AEC) Treaty (Abuja Treaty), it has been suggested, elsewhere, that the establishment of institutions under the TFTA may be contrary to the AEC original plan under the Abuja Treaty.²⁵⁹ It has been argued that the Abuja Treaty does not envisage the establishment of new RIIs, but it focuses on strengthening the capacities of the existing institutions in the eight RECs that have already been identified therein.²⁶⁰ But as it has been noted, the TFTA Agreement appears to establish new RIIs, instead of strengthening the existing institutions in the three RECs.

This mini thesis therefore submits that the establishment of TFTA institutions may undermine the first three stages towards the formation of the AEC, as outlined in the Abuja Treaty.²⁶¹ Due to the establishment of TFTA institutions, the regional integration agenda on the African

²⁵⁹ Mwanza W (2010) 70.

²⁶⁰ Economic Commission for Africa (UNECA) *Assessment Regional Integration in Africa IV: Enhancing Intra-Africa Trade* (2010) 88 available at: http://www.uneca.org/sites/default/files/PublicationFiles/aria5_print_uneca_fin_20_july_1.pdf (accessed 31 May 2016).

²⁶¹ Art. 6 (2) of the Abuja Treaty provides for the following five stages leading to the ultimate establishment of the African Economic Community;

- (a) Stage 1: creation of the RECs and the strengthening of the existing RECs within five years;
- (b) Stage 2: within eight years, stabilise trade barriers, strengthening sectoral integration and co-ordination and harmonisation of RECs activities;
- (c) Stage 3: within 10 years, establish FTAs in the RECs;
- (d) Stage 4: within two years, co-ordinate and harmonise tariff and non-tariff systems in the RECs with a view to establish a Customs Union at continental level by adopting common external tariffs;
- (e) Stage 5: within four years, establish an African Common Market; and
- (f) Stage 6: consolidation and strengthening of the structures of the African Common Market through the free movement of goods, services, capital and people; setting up of an African Monetary Union, a single Central Bank and an African currency.

continent will in some way be negatively affected. Generally, the establishment of TFTA institutions may put a strain on the already scarce financial and human resources available on the continent.²⁶² Furthermore, the TFTA institutions may make countries lose their focus from the actual enhancement of regional integration and strengthening of existing REC institutions, and instead concentrate on establishing and maintaining the new TFTA institutions.²⁶³ Of all the countries that will ratify the TFTA Agreement, it may be the countries that have multiple REC memberships that may probably be affected most.

The mini thesis will submit that establishment of institutions under the TFTA Agreement may have the following repercussions on countries that have multiple REC memberships. First, countries with multiple REC memberships may experience more financial costs as a result of the added operations of the TFTA institutions, when compared with those that have single REC memberships. Secondly, there may also be a likely increase in human resource costs for these countries as they try to attend meetings of both TFTA and multiple REC institutions. Thirdly, for countries with multiple REC memberships there may also be a possible increase in non-financial obligations arising from their multiple treaty memberships. These are obligations that arise when a country becomes a party to an international treaty.²⁶⁴ Fourthly, the lack of clarity in the nature of the relationship between the TFTA and REC institutions will also negatively impact on countries with multiple REC memberships, as it may lead to possible incidents of forum shopping, which may eventually scare potential investors. Lastly, there is also a probability that countries with multiple REC memberships may reap few trade related gains from the TFTA, when compared with those that have single memberships.

²⁶² Shinyekwa I & Othieno L (2011) 23.

²⁶³ Adedeji A. 'History and Prospects for Regional Integration in Africa' Speech made at the Third Meeting of the African Development Forum, Addis Ababa, 5 March 2002 10 available at: <http://dSPACE.africaportal.org/jspui/bitstream/123456789/9695/1/History%20and%20Prospects%20for%20Regional%20Integration%20in%20Africa.pdf?1> (accessed 31 May 2016).

²⁶⁴ Art.2 (1)(g) of the Vienna Convention on the Law of Treaties,1969, defines a 'party' as a State which has consented to be bound by the treaty.

4.2.1. Multiplication of financial costs

Generally, the establishment of TFTA institutions may translate into added financial obligations for all members that will ratify the TFTA Agreement, as it will entail additional financial obligations on top of those already subsisting under their respective RECs.²⁶⁵ However, it is those countries that have existing multiple financial obligations through their multiple REC memberships that will be affected most. The countries that have multiple REC memberships will be affected most because of the direct and indirect costs associated with the operations of the TFTA institutions, among others. The TFTA institutions will therefore be more burdensome on the taxpayers in the countries that have multiple REC memberships, when compared with those in countries that have single membership.²⁶⁶

It should be noted that under the TFTA Agreement, the funding modalities of the TFTA initiative have not yet been provided for. Art. 34 of the TFTA Agreement only states that the Tripartite member/partner states shall institute appropriate modalities to fund their commitments to the implementation of the TFTA. In the absence of clear funding modalities under the TFTA Agreement, this mini thesis will make assumptions on the probable sources of funding for the operationalisation of the TFTA. It is more likely that the TFTA arrangement, just like those of the RECs, will operate using funds that will come from two major sources.

One probable source of funds for the functioning of the TFTA may be direct or indirect TFTA member/partner states' contributions. Direct member/partner state contributions will probably be made to the TFTA institutions through annual contributions or membership fees. Currently, in all the three RECs, members or partners make financial contributions towards the operations of the RECs institutions, including secretariats.²⁶⁷

²⁶⁵ Shinyekwa I & Othieno L (2011) 23.

²⁶⁶ It has been argued that multiple REC memberships not only create confusion, competition and duplication but also constitute a burden on the tax payers. (Mapuva J & Mapuva L 'The SADC regional bloc: What challenges and prospects for regional integration?' (online article) available at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100002 (accessed 27 April 2016).

²⁶⁷ See. Art.166 (4) of the COMESA Treaty; Art.32 (4) of the EAC Treaty; and Art.26 of the SADC Treaty.

Indirect members/partner states contributions towards the functioning of the TFTA institutions will probably be made to the TFTA through the functioning and mandates of the respective REC secretariats in the Tripartite Task Force. The three REC secretariats have already undertaken some TFTA work during the negotiations phase of the TFTA Agreement.²⁶⁸ The Tripartite Task Force will be expected to continue its work after the coming into operation of the TFTA Agreement in their role of providing secretarial services to the TFTA. Since the REC secretariats receive funding from member/partners states in their respective RECs, the same states will by so doing be making indirect financial contributions towards the TFTA.

The other probable source of funds for the functioning of the TFTA and its institutions will be from donor partners or development partners.²⁶⁹ This is also the case in all the three RECs, as they are all heavily reliant on donor funds.²⁷⁰ For instance, in SADC, in 2016, it was reported that external funding from International Cooperating Partners (ICPs) was projected at 61 per cent of the whole SADC annual budget.²⁷¹ In 1999, SADC's ICP contributions rose to as high as 80 per cent of the annual budget.²⁷²

In order to buttress the submission on the reliance of both member country contributions and donor funds in the operations of the three RECs, this mini thesis will consider the recent budgets of the three RECs.

²⁶⁸ See. Communiqué of the Third COMESA-EAC-SADC Tripartite Summit para 8.

²⁶⁹ In SADC, they are called International Cooperating Partners (ICPs). The donor partners include the European Union (EU), World Bank, African Development Bank and others.

²⁷⁰ Chingono M & Nakana S (2009) 404.

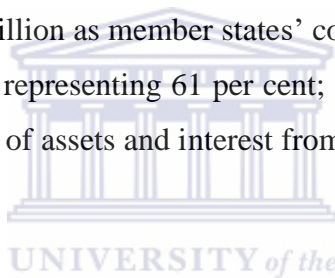
²⁷¹ SADC Secretariat 'Council Approves SADC Business Plan and Budget for 2014/15' 2 April 2014 available at: <https://www.sadc.int/news-events/news/council-approves-sadc-business-plan-and-budget-201415/> (accessed 9 May 2016).

²⁷² Chingono M & Nakana S (2009) 404.

First, in COMESA, the approved budget for the year 2015 was pegged at US\$ 64.4 million.²⁷³ COMESA also reported that this amount was to be raised from member's contributions and donor partners.

Secondly, in the EAC, the approved budget for the year 2015-2016 was estimated at approximately US\$ 110.66 million.²⁷⁴ The contributions towards the budget were estimated as follows: (a) Partner states' contributions were pegged at US\$ 47.566 million; (b) Development partner's contributions were pegged at US\$ 58.556 million; and (c) other sources were pegged at US\$ 4.537million.²⁷⁵

Lastly, the position in SADC is not any different from the other two RECs. SADC approved budget for the year 2014-15 was estimated at US\$ 88.334 million.²⁷⁶ The contributions estimates were as follows: (a) US\$ 33.675 million as member states' contribution representing 38 per cent; (b) US\$ 54.204 million from ICPs representing 61 per cent; and (c) US\$ 0.460 million from the RISDP Contingency Fund, the sale of assets and interest from the bank deposits representing one per cent.²⁷⁷



From the above financial information regarding the three RECs, it is submitted that it may be more likely that the sources of funds for the implementation of the TFTA and operationalisation of its institutions may still be the member/partner states contributions, either directly or

²⁷³ COMESA Secretariat 'COMESA has mobilized \$8.8m from member states' (online article) available at: http://www.comesa.int/index.php?option=com_content&view=article&id=1394:comesa-has-mobilized-88m-from-member-states&catid=5:latest-news&Itemid=41 (accessed 9 May 2016).

²⁷⁴ EAC Secretariat 'About EAC –Quick Facts' available at: <http://www.eac.int/about/EAC-quick-facts-> (accessed 9 May 2016).

²⁷⁵ EAC Secretariat 'About EAC –Quick Facts' available at: <http://www.eac.int/about/EAC-quick-facts-> (accessed 9 May 2016).

²⁷⁶ SADC Secretariat 'Council Approves SADC Business Plan and Budget for 2014/15' 2 April 2014 available at: <https://www.sadc.int/news-events/news/council-approves-sadc-business-plan-and-budget-201415/> (accessed 9 May 2016).

²⁷⁷ SADC Secretariat 'Council Approves SADC Business Plan and Budget for 2014/15' 2 April 2014 available at: <https://www.sadc.int/news-events/news/council-approves-sadc-business-plan-and-budget-201415/> (accessed 9 May 2016).

indirectly, and those by donor partners. Suffice it to also mention that the donor partners or development partners will most likely have a big role to play in the implementation of the TFTA. For instance, the World Bank has already made a commitment towards helping to mobilise the necessary resources for the effective implementation of the TFTA development programmes.²⁷⁸

The payment of the REC membership fee or contribution is already burdensome on the taxpayers of some member states.²⁷⁹ Similarly, multiplicity of REC memberships may be a burden on the institutional capacities and resources of many a country.²⁸⁰ It can therefore be argued that membership fees and participation in the activities of the TFTA institutions, for instance, attending TFTA meetings, will be very costly for countries with multiple REC memberships. Such financial contributions towards the functioning of the TFTA institutions and the operationalisation of the TFTA will add to the financial problems that countries with multiple REC memberships already face in their RECs. In the long run, such financial problems may cause inadequate and unpredictable funding for TFTA institutions and this may affect the proper functioning of the TFTA.

In this vein, Mwanza summed up the challenges that emanate from African regional integration initiatives, especially those that rely heavily on membership contributions:

‘.....the REC’s success at deep regional integration is limited by inadequate capabilities, insufficient and unpredictable funding, poor remuneration for staff members and weak capacity. Funding problems emanate from the lack of increase in funding in line with the expanded mandate of RECs, the delays in payment of assessed contributions by member states...and their increased financial obligations due to multiple memberships of RECs which has resulted in weak staffing at REC

²⁷⁸ The remarks made by the President of the World Bank, His Excellency Jim Yong Kim, at the launch of the TFTA on 10 June 2015, in Egypt. He re-affirmed that the World Bank remained committed to mobilise the necessary resources for the effective implementation of the development programmes through the participation of both the private and public sectors.

(See. Communiqué of the Third COMESA-EAC-SADC Tripartite Summit para. 9).

²⁷⁹ Chingono M & Nakana S (2009) 404.

²⁸⁰ Kritzinger-van Nierken L & Pinto Moreira E (2002) 2.

secretariats and consequence lack of programmatic visibility. Secretariats are not able to implement proactive activities such as monitoring the state of implementation by member countries.’²⁸¹

In the above passage, the author highlights that funding for RECs emanating from member states is most often insufficient and unpredictable. He considered the increase in financial obligations caused by multiple REC memberships to be one of the reasons for the insufficient and unpredictable funding. This, in the end, affects the functioning of not only the secretariat and other institutions of the REC, but also the overall performance of the REC.

Similarly, in the case of the TFTA, this mini thesis submits that the increased financial obligations as a result of the establishment of the TFTA institutions may worsen the already weak financial positions of most African countries, especially those with multiple REC memberships. Most of the African countries that have multiple REC memberships are already experiencing severe macro-economic disequilibrium, financial debt service burdens, over-valued currencies, high inflation rates, high taxes, huge budget deficits, lack of trade finance, and a narrow tax base that heavily relies on customs duties as a source of revenue.²⁸² As a result of these economic challenges, these countries already have very little funds available in their budgets to fund their domestic needs. Therefore, additional contributions towards the functioning of TFTA institutions will significantly constrain their budgets.

Cases of countries finding it difficult to honour their financial obligations as a result of multiple REC memberships have been already noted. It was discussed earlier in this mini thesis that Tanzania withdrew its membership of COMESA, citing difficulties in meeting its financial obligations to two RECs.²⁸³ Tanzania is a member of both the EAC and SADC. If Tanzania ratifies the TFTA Agreement that will mean Tanzania will be expected to meet its financial

²⁸¹ Mwanza W (2010) 67.

²⁸² Food and Agricultural Organisation (FAO) ‘Chapter 6: Regional Integration in Africa’ in Regional integration and food security in developing countries’ online article (undated) available at: <http://www.fao.org/docrep/004/y4793e/y4793e0a.htm> (accessed 10 May 2016).

²⁸³ See Footnote 56.

obligations not only under the TFTA Agreement but also under both the EAC and SADC treaties. The financial costs of maintaining memberships in the three regional groupings may negatively impact on the annual budget of Tanzania.

Furthermore, it has also been reported that some RECs in the TFTA do face economic challenges because members' contributions have not been forthcoming or have been inconsistent.²⁸⁴ For instance in SADC, the equal contributions from member states have, reportedly, been inconsistent.²⁸⁵ In some cases, this has forced SADC to impose sanctions on defaulting members in order to enforce compliance. An example of one of the countries with multiple REC memberships that was subjected to sanctions as a result of non-payment of membership fees is the Democratic Republic of Congo (DRC).²⁸⁶ The DRC is currently a member of COMESA and SADC.²⁸⁷ It was reported that in 2007, at a SADC Heads of State and Government Summit in Zambia, DRC was suspended from taking part in any SADC activities for owing SADC US\$ 1,369, 190 in annual contributions.²⁸⁸ It should also be noted that outside the TFTA, DRC is also a member of another REC, the Economic Community of Central African States (ECCAS). If the DRC ratifies the TFTA Agreement, it will be expected to meet its financial obligations in four regional economic groupings: TFTA, COMESA, ECCAS and SADC. Just like Tanzania, the financial costs towards these regional groupings may negatively impact on the DRC's annual budget. However, the budgets of countries with single REC memberships may not be greatly

²⁸⁴ Mapuva J & Mapuva L 'The SADC regional bloc: What challenges and prospects for regional integration?' (Online article) available at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100002 (accessed 27 April 2016).

²⁸⁵ Mapuva J & Mapuva L 'The SADC regional bloc: What challenges and prospects for regional integration?' (Online article) available at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072014000100002 (accessed 27 April 2016).

²⁸⁶ The reasons for DRC's failure to honour its payments have not been documented or provided. However, the DRC example has been given to illustrate the extent of multiple financial obligations on the RECs, the possible strain multiple REC memberships have on scarce financial resources, as well as how the functioning of the REC secretariat and other institutions is affected by such inconsistent payments.

²⁸⁷ The DRC's application for EAC membership was reported denied on the basis that it did not share its borders with the EAC.

See. Footnote 108.

²⁸⁸ SADC Secretariat, SADC Record of the Summit held in Lusaka, Zambia 16-17 August, 2007 available at: http://www.sadc.int/files/4313/5292/8401/SummitRecord_-_August_2007.pdf (accessed 10 May 2016).

affected by TFTA contributions when compared with those with multiple REC memberships, as the magnitude of the financial costs may be small.

In addition, the overburdened REC secretariats which are already under-funded and over-stretched will have to cope with the increased mandate of servicing the TFTA through the Tripartite Task Force. Financially this will imply that there will be a need for additional funds in the REC secretariats' budgets so that they are enabled to undertake and discharge their corresponding TFTA duties and responsibilities.

For instance, it was reported that, in 2010, the administrative costs of the operations of the three RECs were as follows: (a) COMESA Secretariat: US\$ 6 million; (b) EAC Secretariat: US\$ 2 million; and (c) SADC Secretariat: US\$ 9 million.²⁸⁹ Assuming that all factors remain constant, with the addition of Tripartite Task Force responsibilities under the TFTA, the administrative costs for running the three secretariats may also rise. This is so because secretariat staff will also be required to fulfil their fresh responsibilities under the Tripartite Task Force. This will put a big strain on the budgets of the cash strapped secretariats. As a consequence, the RECs member states' contributions may require an increase in order to cater for the expanded mandates of the secretariats, otherwise the integration agenda in the RECs will be negatively affected. Member states will, hence, be required to dig deep into their coffers. In the end, it will also be the countries with multiple REC memberships that will be hit hardest, as they will be expected to increase their membership contributions to two or more RECs.

This mini thesis therefore submits that due to the increased direct and indirect financial costs of the functioning of the TFTA institutions, the countries with multiple REC memberships will be hit hardest. The multiplication of the financial obligations of countries with multiple REC memberships will make it hard for them to honour these obligations and may, in the long run, affect the proper functioning of the TFTA.

²⁸⁹ Kritzinger-van Nierken L & Pinto Moreira E (2002) 2.

4.2.2. Increased human resource cost

The TFTA institutions may also have a negative impact on not only financial resources of countries with multiple REC memberships, as discussed above, but may also overstretch the human resources responsible for regional integration issues in these countries.²⁹⁰ It was observed in the s. 3.4 of this mini thesis that the TFTA institutions may not be very different from those institutions that are in existence in the three RECs. The composition and functions of these sets of institutions are mostly indistinguishable. As a result, there is a possibility that the same government personnel or officials from a Tripartite member/partner state may attend both TFTA institutions' and RECs' meetings. Since the composition and functions of the institutions in these two regimes are similar, there is a great possibility of one government official attending more than two meetings, per year, on matters that are roughly similar. This may be costly for member states, as it will put a strain on the few and weary government officials attending such multiple meetings. Similarly, it will also be the countries with multiple REC memberships that will be affected the most, as the number of meetings may, in some cases, may be tripled.

On the issue of escalation of human resource costs, an Organisation of Africa Unity (OAU) study did find that countries with multiple REC memberships face problems participating in COMESA and SADC meetings, because of the human and financial costs associated with membership.²⁹¹ Similarly, it can be argued that the addition of similar institutions under the TFTA will mean that the same government officials from countries that already faced challenges attending COMESA and SADC meetings, will have to attend additional meetings under the TFTA.

The TFTA Agreement is silent on the frequency of meetings for its institutions. So far, the TFTA arrangement has only held three Heads of State and Government Summits, in 2008, 2011 and 2015. It was reported that the next Tripartite Summit meeting will be hosted by Rwanda.²⁹²

²⁹⁰ See s 4.2.1.

²⁹¹ Geda A 'Trade Liberalisation and Regional Economic Integration in Africa: The case of COMESA' Policy Analysis Support Unit (PASU) of OAU (1998) 13 available at: <https://www.soas.ac.uk/economics/research/workingpapers/file28853.pdf> (accessed 10 May 2016).

²⁹² See Communiqué of the Third COMESA-EAC-SADC Tripartite Summit para. 18.

TFTA meetings may have probably been held at such long intervals because of the protracted negotiations regarding issues during the TFTA teething stages. However, it is likely that during the TFTA implementation stages, the intervals between TFTA meetings may be short. Therefore, shorter intervals between meetings will imply greater transactional costs for government officials in countries with multiple REC memberships as it may mean attending many regional meetings within a short space of time.

An example of a country with multiple REC memberships in the TFTA is Malawi.²⁹³ Malawi is currently a member of both COMESA and SADC. By virtue of his office, the President of the Republic of Malawi is a member of both the Authority of COMESA and the Summit of SADC. In the event that Malawi ratifies the TFTA Agreement, then the Malawian President will also become a member of the TFTA Summit. Currently, Art.8 (5) of the COMESA Treaty requires the President of Malawi to attend at least one ordinary Summit of the Authority and any other extra-ordinary Summit, per year. Similarly, in SADC, under Art.10 (5) of the SADC Treaty, the same President is required to attend two ordinary Summits and any other extraordinary summits, per year. In SADC, the meetings for the President of Malawi may be more than two, if Malawi is serving as a member of the SADC Troika. This is because SADC Troika meetings are held more frequently as compared with Summits.²⁹⁴ Therefore, under normal circumstances, in the absence of Authority or Summit extraordinary meetings or SADC Troika meetings, the President of Malawi is expected to attend a minimum of three REC meetings per year. These meetings exclude the other bilateral, regional or multilateral meetings which the same President is expected to attend annually, for instance, the AU Summit of Heads of State and Government or the UN General Assembly meeting.²⁹⁵ Now, with the establishment of the TFTA institutions, the Malawian President will also be expected to accommodate the TFTA Summit meetings in his already busy schedule.

²⁹³ This may also apply to Tanzania and DRC which were discussed in s 4.2.1 of this mini thesis.

²⁹⁴ See section 2.4.3 of this mini thesis.

²⁹⁵ Malawi is a member of both the AU and the UN.

Furthermore, the problems of time demands on key personnel attending regional meetings for countries with multiple REC memberships will run through most TFTA institutions, except the Tripartite Task Force and the Dispute Settlement Body (DSB).²⁹⁶ For instance, in Malawi, the Minister responsible for foreign affairs will also be required to attend meetings of the Tripartite Council of Ministers, in addition to his usual REC meetings as a member of the COMESA Council of Ministers and the SADC Council. Likewise, the Minister responsible for Industry and Trade will be expected to attend the meetings of the TFTA Ministers of Trade, as well as the SADC Sectoral and Cluster Ministers' meetings. Similarly, the Minister responsible for Justice will be expected to attend the meetings of the TFTA Ministers of Legal Affairs and SADC Ministerial cluster meetings. In addition to the Tripartite Committee of Senior Officials' meeting, the Principal Secretary responsible for foreign affairs in Malawi will also be expected to attend the COMESA Inter-government Committee meetings and the SADC Standing Committee of Officials' meetings. To have these important public officials out of their offices attending regional meetings at the expense of dealing with domestic matters may affect their output in executing their domestic mandates. In the long run, this may affect the overall performance of the Malawi economy. Similar implications may also exist in economies of other multiple REC countries like Tanzania and DRC.²⁹⁷

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In addition, a study by the Food and Agricultural Organisation (FAO) also concluded that the attendance at too many regional meetings in Africa leads to poor preparation for the meetings and a lack of follow-up by sectoral ministries on decisions that have been taken at a regional level.²⁹⁸ Equally in the case of the TFTA, this mini thesis argues that the frequency levels of the probable TFTA and regional meetings, especially for government officials in countries with multiple REC memberships, increases the possibility of such officials attending both TFTA and REC meetings poorly prepared. It is also possible that they may fail to adhere to agreed

²⁹⁶ The DSB will possibly not be affected because although its functions are the same as those of the RECs dispute settlement mechanisms, the compositions thereof may be different. Countries may appoint different personnel for the DSB and the REC courts.

²⁹⁷ See s 4.2.1.

²⁹⁸ Food and Agricultural Organisation (FAO) 'Chapter 6: Regional Integration in Africa' in *Regional integration and food security in developing countries* online article (undated) available at: <http://www.fao.org/docrep/004/y4793e/y4793e0a.htm> (accessed 10 May 2016).

deadlines because the same officials are also required to prepare for another meeting of another REC. The multiple REC meetings may make it difficult for these officials to work in their home countries and monitor implementation of decisions that have been taken at regional level. This is so because the officials may have little time to work in their offices. In the long run, this may affect the relevance and effectiveness of their contributions at such regional forums.

Furthermore, there is also a possibility for added tasks for government personnel as they make preparations to host frequent regional meetings for both TFTA and REC institutions. It has been noted that the next Tripartite Summit will be hosted by Rwanda. This means that Rwandese government officials will be expected to collaborate with the Tripartite Task Force in organising the logistical arrangements for hosting the TFTA Summit. The planning and hosting of such a meeting will entail a lot of material and time sacrifices by the Rwandese government officials. In addition, just like it happens in most RECs, the Rwandese government will also be expected to organise meetings of both the Tripartite Council of Ministers and the Tripartite Committee of Senior Officials, as these two institutions usually set the agenda for the Summit and most often precede it.²⁹⁹ Rwanda is a member of COMESA and the EAC. Assuming that in the same year when the TFTA Summit will be held, Rwanda will also host COMESA or EAC Summits within that same period, the capacities of the government officials in Rwanda will be overstretched as they prepare and subsequently facilitate many large meetings within a short period of time. However, the probability of hosting big regional meetings within a short period of time is slim for countries that have a single REC membership. This is because countries with single memberships will be involved in the meetings of one REC, beside the TFTA.

On the flip side of the coin, other people may argue that by bringing together officials from all the three RECs at to one TFTA meeting may help in reducing the number of regional meetings or duplication of meetings. This argument may have correct in the case where the TFTA would have succeeded in consolidating the three RECs into one REC. However, as it was noted in s 4.1 of this mini thesis, the three RECs will still continue to exist separately, advancing their own separate regional integration agendas. Given the fact that the TFTA Agreement is silent on

²⁹⁹ See Footnote 69.

It is therefore assumed that a similar approach may probably be followed in the TFTA arrangement.

frequency of meetings for its institutions, it may not be prudent to assume that duplication of regional meetings may be reduced as a result of the establishment of the TFTA. The situation may also be complicated by the fact that the TFTA Agreement will only bind those countries that have ratified it. Therefore, chances are that there may still be matters that will need to be resolved by the TFTA and each REC. Hence, the problem of duplication of regional meetings may still exist even with after the establishment of the TFTA.

However, in order to address the problem of duplication of regional meetings, this mini thesis will perhaps suggest that the TFTA should explore the possibility of merging some of the regional meetings in order to reduce the time spent in such meetings. The TFTA may also adopt the principle of subsidiarity between the TFTA and the RECs, so that most matters dealing with regional integration are handled at REC level and that the TFTA institutions should only deal with matters that cannot be resolved at REC level.³⁰⁰ The other option to reduce workload on government officials would be to involve the private sector and civil society in the TFTA affairs. The TFTA initiative has no institution for private sector and civil society participation, and has been criticised as a mere outgrowth of government bureaucracy.³⁰¹ Therefore, having a TFTA institution that will involve these groups may reduce both human and financial involvement of governments.³⁰²

It is therefore submitted that the establishment of TFTA institutions may negatively affect the human resources of countries with multiple REC memberships. This may not be the case for countries that have single REC membership.

³⁰⁰ Kritzinger-van Nierken L (2005) 8).

The principle of subsidiarity has its origins from the European Union (EU) and in simple terms advocates that regional institutions should only be responsible for those activities that cannot be better dealt with at national level.

³⁰¹ Kritzinger-van Nierken L 'Regional Integration: Concepts, Advantages, Disadvantages and Lessons' (2005) 8 available at: http://www.sarpn.org/documents/d0001249/P1416-RI-concepts_May2005.pdf (accessed 31 May 2016).

³⁰² Economic Commission for Africa (UNECA) *Assessment Regional Integration in Africa IV: Enhancing Intra-Africa Trade* (2010) 88 available at: http://www.uneca.org/sites/default/files/PublicationFiles/aria5_print_uneca_fin_20_july_1.pdf (accessed 31 May 2016).

4.2.3. Increase in non-financial obligations arising from membership to multiple treaties

In addition to the financial and human resource costs discussed above, the TFTA arrangement may also increase non-financial obligations for countries that have multiple REC memberships. These are obligations in the TFTA Agreement, other than financial obligations, which Tripartite member/partner states will be required to comply with. The obligations from the TFTA Agreement will be added on similar obligations which these countries already have under their respective RECs. Consequently, there will be more obligations on countries that have multiple REC memberships, as compared to those countries that do not. The higher the number of REC memberships, the more the number of obligations that will need to be complied with. Countries with multiple REC memberships will have more obligations to comply with and implement as compared with countries with single REC memberships.

Countries with multiple REC memberships also have a high risk of facing obligations from RECs that are inconsistent or contradictory. The more the number of obligations from different RECs are on one country, the higher the risk of those obligations being inconsistent or contradictory. Art.40 of the TFTA Agreement places an obligation on all member/partner states to refrain from acts that would defeat the objects and purposes of the TFTA.³⁰³ Furthermore, Art. 38 of the TFTA Agreement also provides that any member/partner state that fails to meet its obligations under the TFTA Agreement shall be subjected to such sanctions as may be determined by the TFTA Summit. Therefore, any country that fails to abide by the obligations imposed by the TFTA Agreement will be subjected to sanctions, as will be determined by the TFTA Summit. Similar provisions can be found in all the three REC treaties: Art.171 of the COMESA Treaty; Art.143 of the EAC Treaty; and Art.33 of the SADC Treaty. Countries with multiple REC memberships have a high risk of experiencing inconsistent or contradictory REC obligations.

³⁰³ This principle is a peremptory norm of Public International Law and is found in Art.26 of the Vienna Convention on the Law of Treaties, 1969.

It has been noted above that the three RECs will operate independently and may not be bound by TFTA resolutions.³⁰⁴ It has also been observed that the RECs will not be members of the TFTA, meaning that the RECs will not be part of the decision making process.³⁰⁵ It was further noted that under norms of Public International Law, the TFTA arrangements and the RECs will be considered to be on a par, meaning that no regime will be superior to the other.³⁰⁶ This will imply that a decision that has been made by any TFTA institution will only bind the members thereof, but will not bind the RECs and the non-TFTA members that are members of a particular REC.

Now suppose that a resolution is made under the TFTA that will bind the TFTA member/partner states and another resolution is made in one of the RECs. The REC resolution happens to substantially conflict with the resolution made under the TFTA. In such a case, the TFTA member/partner state that is a member of the REC that has made the contrary resolution will be held to have violated the TFTA Agreement, if that country decides to comply with the REC resolution. Similarly, that TFTA member/partner state may also violate its REC treaty obligations, if it elects to comply with the TFTA resolution. This will be a recipe for problems for all countries in the TFTA, but the risk of facing such situations will be high in the case of countries with multiple REC memberships. This is because of the added probability of more obligations from the multiple RECs, which may in some cases be different and conflicting, both in substance and procedure. Therefore, the countries with multiple REC memberships will be left in a quagmire, as they will have a lot more obligations to consider and implement, compared to those with single REC membership.

Another example of a treaty related obligation that should concern countries with multiple REC memberships is in Art.36 of the TFTA Agreement. Art.36 (1) of the TFTA Agreement provides that TFTA member/partner states shall from time to time conclude such protocols and annexes as are necessary for the implementation of the TFTA Agreement. Art.36 (2) further provides that such protocols and annexes shall form an integral part of the TFTA Agreement.

³⁰⁴ See s. 4.2.

³⁰⁵ See s. 3.3.

³⁰⁶ See s. 3.5.

The procedures for ratification and domestication of international agreements differ from one country to another. In many African countries, an international agreement is first, signed; secondly, ratified or acceded to; and lastly, domesticated, so that it is applicable as municipal law.³⁰⁷ The countries that require parliamentary approval before an international agreement is enforceable in their country are called dualist system countries.³⁰⁸ Monistic system jurisdictions, on the other hand, are those where once an international agreement has been ratified there is no further requirement for its domestication in order for it to be enforceable by the local courts as municipal law.³⁰⁹

For countries that will become parties to the TFTA Agreement and follow dualistic system in terms of their Constitutions, any protocol that will be concluded under the TFTA will require domestication through their respective national parliaments.³¹⁰ The obligation to domesticate the TFTA protocols will therefore be an addition to the existing REC obligations to domesticate various protocols that are already in force or those that will subsequently be concluded at the REC level.

For instance, in SADC, as of 2015, there were a total of 26 protocols in various sectors, such as, agriculture, trade, health, wildlife, culture and environment that were in force.³¹¹ Much as most protocols had been ratified, many SADC countries were yet to domesticate most of them. Domestication of these protocols is a treaty obligation of all SADC member states that ratify these protocols, so that the protocols can be enforceable by the courts in the member state concerned.³¹² With the addition of TFTA protocols, SADC member states that will ratify the

³⁰⁷ News Day Online Newspaper ‘SADC Gender protocol enters into force’ (26 February 2013) available at: www.newsday.co.zw/2013/02/26/sadc-gender-protocol-enters-into-force/ (accessed 12 May 2016).

³⁰⁸ For countries with a ‘dualist system’, international law is not directly applicable domestically. It must first be translated into national legislation before it can be applied by the national courts.

³⁰⁹ In countries with a ‘monist system’, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates that international law into national law.

³¹⁰ This will be in compliance with Art.36 of the TFTA Agreement.

³¹¹ See About SADC-Overview of SADC Protocols- available at: <http://www.sadc.int/about-sadc/overview/sa-protocols/> (accessed 12 May 2016).

³¹² See Art. 22 of the SADC Treaty.

TFTA Agreement will also bear added obligations of domesticating TFTA protocols, in addition to their obligations under the SADC Treaty. Countries with multiple REC memberships will, therefore, have even more obligations to domesticate protocols from more than two regional regimes.

It is therefore submitted that the TFTA Agreement and its institutions may have negatively affect countries with multiple REC memberships as it may entail additional treaty related obligations, besides those they already have in their respective RECs. Multiple REC membership countries may also be more exposed to the risk of finding themselves under two or more contradictory REC obligations. In addition, countries with multiple REC memberships may also have more obligations to domesticate both TFTA and multiple REC legal instruments.

4.2.4. Difficulties in choice of law and choice of institutions

It was observed in the previous chapter that the nature of the relationship between the TFTA institutions and the institutions in the three RECs is not clear. This situation should be a cause for concern, especially for countries that have multiple REC memberships, as it may lead to possible incidents of forum shopping. Forum shopping may create unnecessary uncertainty and unpredictability which may, in the medium to long term, scare away meaningful investment in the TFTA.³¹³

It has been noted in this mini thesis that the functions and composition of most TFTA institutions are similar to institutions in the three RECs. The TFTA institutions and REC institutions may, probably, end up exercising similar jurisdiction and powers over the same member/partner states. As a result, one country may become a subject to two or more regional institutions that have similar functions, powers and composition. For countries that have multiple REC memberships, such a situation may create more than one layer of legal regime or forum, with identical

³¹³ Stahl M. 'Overlapping memberships in COMESA, EAC, SACU & SADC' Trade policy Options to overcome the problem of multiple memberships' (2005) 21.

substantial obligations.³¹⁴ These identical layers of regime may possibly create overlaps, conflict and competition, in cases where one country belongs to more than one legal regime or forum.³¹⁵ In addition, legal uncertainty and unpredictability may be created for countries that have multiple REC memberships since such a country can apply the TFTA regime or that of any of the relevant REC regimes.

The challenge for countries with multiple REC memberships cannot be put any better than in the quotation below:

‘Presented with these possible layers of legal regimes and an unclear relationship between the two regimes, a problem of overlaps, conflicts and competition of jurisdiction may manifest itself. The jurisdiction being referred to is in the sense of choice of law and choice of forum..... This parallel jurisdiction is likely to stem from the fact that these will be separate legal systems with identical substantive obligations. It is not provided anywhere that the TFTA necessarily means the cessation of the RECs. The member states will still have obligations in both the RECs and the TFTA.The substantive obligations may collide where a member state takes a trade measure that is against the spirit of both [REC] and the TFTA as it would stifle implementation of both [the REC Treaty and the TFTA Agreement].[Emphasis added]’³¹⁶

Therefore, in the absence of principles that will govern the choice of institution (forum) or choice of applicable law under the TFTA, the member/partner states may be forced to start shopping for a favourable forum or law to apply for their case. This is what is commonly referred to as ‘forum shopping’. Forum shopping occurs where a matter falls within the jurisdiction of two or more

³¹⁴ Erasmus G ‘The Tripartite FTA: Requirements for Effective Dispute Resolution’ in Hartzenberg T et al *Cape to Cairo: Making the Tripartite Free Trade Area Work* (2011) 102.

³¹⁵ Braude W *SADC, COMESA AND THE EAC: Conflicting regional and trade agendas* (2008) 8.

³¹⁶ Gaolaolwe D (2013) 29.

organisations and the parties thereto have a choice of where to take their matter.³¹⁷ Forum shopping may have the effect of scaring away potential investment in the countries with multiple REC memberships, as investors may not have confidence to invest in such an uncertain and unpredictable economy.³¹⁸

Examples of regional institutions that may be exposed to forum shopping are the DSB under the TFTA, on the one hand, and the various dispute settlement mechanisms in the three RECs, on the other hand. This mini thesis will assume that the DSB, the COMESA Court of Justice, the EAC Court of Justice, and the SADC Tribunal will all have parallel jurisdiction.

Gaolaolwe did argue that due to the parallel jurisdiction of the TFTA DSB and REC courts, litigants will be left with an option of selecting a forum or court of choice for the settlement of their dispute.³¹⁹ She continued to argue that due to lack of guidelines on the exclusivity of the jurisdiction of the DSB and the REC courts, it may make it possible for litigants to commence the same matter before two or more courts, as the doctrine of *res judicata* is not applicable in regional courts.³²⁰ This mini thesis agrees with Gaolaolwe's arguments.

The above argument can best be illustrated by a fictitious trade dispute between Zambia and Zimbabwe. Currently, both Zambia and Zimbabwe are members of COMESA and SADC. Assuming that both Zambia and Zimbabwe ratify the TFTA Agreement, in case of occurrence of a trade dispute, the two countries will have before them, three possible institutions for the

³¹⁷ Whytock C 'The Evolving Forum Shopping System' *Cornell Law Review* Vo. 96 486 available at: <http://cornelllawreview.org/files/2013/02/WhytockTheEvolvingForumShoppingSystem.pdf> (accessed 16 May 2016).

³¹⁸ Braude W (2008) 8.

³¹⁹ Gaolaolwe D (2013) 27.

She further argued that forum shopping has two implications: (a) the possibility of parallel proceedings where one dispute can be initiated in and heard by two or more courts; and (b) the possibility of re-litigating a dispute, where a matter that has been settled in one court is re-opened or re-litigated in another court. She adds that this may be costly and also affect the development of case law. (See Gaolaolwe D (2013) 74).

³²⁰ Gaolaolwe D (2013) 28.

'*Res judicata*' is a legal principle that means a matter may not, generally, be re-litigated once it has been judged on the merits. (Definition available at: https://www.law.cornell.edu/wex/res_judicata (accessed 16 May 2016)).

settlement of that dispute.³²¹ The countries may choose the COMESA Court of Justice, the SADC Tribunal or the TFTA DSB. In the absence of the principle of *res judicata*, it is possible for the countries to pursue the matter in all the three regional dispute settlement mechanisms. If the judgments contradict each other, the question now becomes: which judgment will be considered as final and enforceable by the parties? Will the country that is not successful in one court, accept to be bound by, and therefore comply with, it? The countries with multiple REC memberships will therefore encounter challenges on choice of law and choice of institution (forum).

Furthermore, according to Luwan, failure to satisfy the *res judicata* requirement may create a further problem for countries with multiple REC memberships, as they may be required to enforce two contradictory judgments of regional courts.³²² Similarly, this thesis agrees with Luwan and further argues that in addition to the dilemma of enforcing two contradictory judgments, such a precarious situation is not very healthy for the proper development of precedent and case law in the TFTA region. Investment can therefore not thrive in such an uncertain economic environment, as investors do not have confidence to invest their money in it.³²³ As a consequence, countries with multiple REC memberships may experience little flow of foreign direct investment. This may affect the regional integration drive not only in the countries with multiple REC memberships but also the entire TFTA.

Therefore, there is a need to clarify the relationship between the TFTA and REC institutions. The TFTA Agreement and the REC treaties need to be rationalised and amended so that they are complementary and not contradictory to each other.³²⁴

³²¹ The assumption being that the matter is provided for under the COMESA Treaty, the SADC Treaty and the TFTA Agreement.

³²² Luwan D (2010) 218.

³²³ Luwan D (2010) 218.

³²⁴ Hess R & Hess S 'Regional Integration Arrangements in Eastern and Southern Africa-Confusion grows' *Commonwealth Trade Hot Topics*, Issue No. 43 2 available at: <http://www.oecdilibrary.org/docserver/download/5k3w8fb9ppr8.pdf?expires=1458903383&id=id&accname=guest&checksum=620BB2DF8A4827FC110FB78625A410E7> (accessed 29 March 2016).

Unless the relationship between the TFTA and REC institutions is rationalised, this mini thesis submits that the lack of clarity regarding the choice of law and choice of institution that may negatively affect the countries that have multiple REC memberships.

4.2.5. Little or nominal trade related gains

Lastly, in addition to the above-mentioned repercussions for countries that have multiple REC memberships, studies have also indicated that countries with multiple REC memberships may experience nominal or little trade related gains after the operationalisation of the TFTA. According to a 2011 computer analysis by Jensen and Sandrey, it was shown that under the TFTA arrangement there will be fewer trade related gains for TFTA member/partner states that have multiple REC memberships.³²⁵

In their analysis, Jensen and Sandrey examined the trade gains for countries in COMESA, the EAC and SADC after the formation of a genuine FTA. They used a computer software model, the Global Trade Analysis Project³²⁶ (GTAP) Version 8 database, to determine the welfare and trade gains from the TFTA as determined by the access of duty free merchandise goods and services.³²⁷ In their computer simulation, they assumed that all the three RECs had their free trade areas (FTAs) operating in a comprehensive manner and that all the countries in the three RECs had ratified the TFTA Agreement and were conducting tariff free trade. The results of their simulation were only indicative of what might happen when these three RECs form one FTA. The results of their study indicated that for countries with multiple REC memberships, there were a limited trade related gains as a result of the formation of the TFTA, whereas countries that had single REC memberships, like South Africa, Angola and Mozambique, experienced remarkable trade related gains in the TFTA.

³²⁵ Jensen G & Sandrey R (2011) 114.

³²⁶The GTAP computer software is supported by a fully documented, publicly available global database, as well as underlying software for data manipulation and for implementing the model. The framework is a system of multi-sector economy wide input/output tables linked at the sector level through trade flows between commodities used both for final consumption and intermediate use in production.

³²⁷ Jensen G & Sandrey R (2011) 114.

The probable explanation for the small gains for countries with multiple REC memberships was that these countries are already experiencing most of the trade related gains as a result of their allegiance to more than one REC.³²⁸ This mini thesis agrees with the results of the study and further submits that the countries with multiple REC memberships will gain little from the TFTA since they are already experiencing freer trade with most member/partner states in the TFTA.

In order to hit this point home, this mini thesis will give an example of sugar trade between Swaziland and Uganda. Swaziland is a member of COMESA and SADC, whereas Uganda is a member of COMESA and the EAC. Assuming that both Swaziland and Uganda become member/partner states of the TFTA, there will be little trade gains in regard to sugar exports from Swaziland to Uganda because Swaziland already has access to the Ugandan market through its COMESA membership. That means for Swaziland, the only gain it may experience under the TFTA is sugar trade with the other six EAC partner states, as it already enjoys trade gains by trading with most COMESA and SADC countries.³²⁹ On the other hand, a country with single REC membership like Mozambique may experience considerable trade gains as it will benefit from accessing markets in more countries that are members of both COMESA and the EAC.

In line with the above analysis, this mini thesis submits that countries with multiple REC memberships may experience few trade related gains, when compared to those with single REC memberships. The countries with multiple REC memberships will experience nominal or fewer gains from the TFTA Agreement and the institutions it will establish.³³⁰

³²⁸ Jensen G & Sandrey R (2011) 114.

³²⁹ It should be noted that currently the trade gains are only enjoyed by those countries that have implemented the REC FTAs and not those that are outside them. Swaziland is not participating in the COMESA FTA, as it was granted a waiver due to its SACU membership.

³³⁰ Jensen G & Sandrey R (2011) 114.

4.3 Conclusion

In sum, this chapter has discussed the probable repercussions for countries with multiple REC memberships caused as a result of the establishment of the TFTA institutions. Generally, the chapter has discussed the repercussions for countries with multiple REC memberships as a result of the operationalisation of the TFTA Agreement.

First, it has demonstrated how the establishment of institutions under the TFTA Agreement may lead to an increase in the financial cost as far as membership costs are concerned for countries with multiple REC memberships. The increased cost may arise due to direct and indirect costs of multiple memberships to both the TFTA and the respective RECs. There is also the probability of increased cost due to the raising of REC membership fees, as the RECs' secretariats may require extra funds so that they are able to serve in the Tripartite Task Force.

Secondly, it has also been argued that the establishment of TFTA institutions may also translate into increased human resource costs in respect of certain officials in the government bureaucracies for countries with multiple REC memberships. It was demonstrated how the TFTA institutions and the RECs institutions are similar as far as composition and functions are concerned. Therefore, this mini thesis has argued that since it will be these same government officials attending both TFTA and RECs meetings there may be over-extension of the working capacities of the officials in countries that have multiple REC memberships, as they may be required to attend more than two regional meetings over a very short period of time.

Furthermore, it was also discussed that there is a likelihood of hosting two or more large regional meetings within a short period of time for countries with multiple REC memberships. It has also been argued that such a strain on the human resource of a country may, in the long run, affect their productivity in addressing domestic matters. In addition, it was submitted that the short time between meetings may also result in the government officials being poorly prepared when attending regional meetings.

Thirdly, it was demonstrated how the TFTA Agreement may triple non financial obligations that emanate from treaty memberships for countries with multiple REC memberships. Multiple REC membership countries may also be more exposed to the risk of finding themselves under two or more contradictory REC obligations. In addition, countries with multiple REC memberships may also have more obligations to domesticate both TFTA and multiple REC legal instruments.

Fourthly, it was also shown how the lack of clarity in the relationship between the TFTA institutions and the RECs' institutions may negatively impact on countries that have multiple REC memberships. It was discussed that the relationship between these two regimes is not clear and therefore member states may be left to choose which regime should be utilised when conducting trade between them. This uncertainty and unpredictability is a recipe for forum shopping. In the long run, this uncertainty may scare away potential investors.

Lastly, it was demonstrated that there is a possibility that countries with multiple REC memberships may reap a few trade related gains as compared to those countries that have single REC memberships. This is so because of the gains that countries with multiple REC memberships are already enjoying by virtue of the multiplicity of their memberships.

Having discussed the various repercussions of the establishment of the TFTA institutions on countries that have multiple REC memberships, the next chapter will discuss the conclusions that can be drawn from this mini thesis. In addition to drawing the conclusion, the next chapter will also make a few recommendations.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

The aim of this mini thesis was to examine the repercussions of the establishment of institutions under the Tripartite Free Trade Area (TFTA) Agreement on countries that have multiple regional economic community (REC) memberships. It has been noted that even though the TFTA initiative is being considered as a milestone towards the ultimate establishment of the African economic Community (AEC) and that it will help solve problems associated with multiple REC memberships, the initiative may come at a cost to countries that have multiple REC memberships. This mini thesis has found that the establishment of TFTA institutions may be costly for those Tripartite member/partner states that will maintain multiple REC memberships.

First, chapter two of this mini thesis has demonstrated the extent of multiplicity of REC memberships in the TFTA.³³¹ The chapter noted that all the three RECs contain countries that have maintained memberships in more than one REC.³³² The chapter further demonstrated how the three RECs have established similar regional integration institutions (RIIs).³³³ A couple of institutions were also noted to be common in all the three RECs. Most of these institutions have been replicated under the TFTA Agreement.

Secondly, chapter three of this mini thesis not only discussed the salient provisions of the TFTA Agreement, but also examined the institutions that will be established by the TFTA Agreement and the functions which they will be expected to perform.³³⁴ The chapter further demonstrated

³³¹ See s. 2.5 of this mini thesis.

³³² See ss. 2.2.2., 2.3.2., 2.4.2. & 2.5.

³³³ See ss. 2.2.3, 2.3.3., 2.4.3 & 2.5.

³³⁴ See ss. 3.3 & 3.4.

how the TFTA institutions replicate the institutions that already exist in the three RECs, in terms of both composition and functions.³³⁵

Chapter three of the mini thesis further discussed the probable relationship that may exist between, on the one hand, the TFTA institutions and, on the other hand, the RECs' institutions.³³⁶ It was noted in the discussion that the TFTA Agreement is silent on how the TFTA institutions will interact with the RECs' institutions. Furthermore, there are no guidelines on the interface between TFTA institutions and REC institutions. This lack of clarity about the relationship therefore leaves a lot of room for forum shopping by member states. Incidents of forum shopping may scare away potential investors from the TFTA.³³⁷

In addition, chapter four of the mini thesis also established that since the TFTA will not dissolve and merge the three RECs into one, single regime, but only rationalises and consolidates them into a single FTA, multiple and overlapping REC memberships will continue to exist, even after the establishment of the TFTA.³³⁸ It further demonstrated how, despite the fact that the TFTA initiative will not establish a new REC, the obligations of member/partner states under the TFTA Agreement may not be much different from the obligations that the same member/partner states already have under their respective RECs.³³⁹

The mini thesis has concluded that the establishment of TFTA institutions may have the following repercussions on countries that have multiple REC memberships:

First, it has argued that the establishment of institutions under the TFTA Agreement may result in an increase in the financial cost, as far as membership costs are concerned for countries with

³³⁵ See s. 3.4.

³³⁶ See s. 3.5.

³³⁷ See s. 3.5 & 3.6.

³³⁸ See s. 4.1.

³³⁹ See s 4.1.

multiple REC memberships.³⁴⁰ The increased cost may come as a result of direct and indirect costs associated with multiple memberships to both the TFTA and the respective RECs. In addition, there may also be an extra cost as far as REC membership fees are concerned, as the RECs' secretariats may require more funds in order to be able to serve in the Tripartite Task Force.

Secondly, it has argued that the establishment of the TFTA institutions may also translate into increased human resource costs for officials in the government bureaucracies in the countries with multiple REC memberships.³⁴¹ The mini thesis demonstrated how some TFTA and REC institutions are similar in their composition and functions. It further argued that since it will be the same government officials attending both TFTA and RECs meetings there may be too great a workload for these officials. Furthermore, it has also been argued that for countries with multiple REC memberships, there may be a possible risk of hosting two or more big regional meetings within a short period of time. Apart from financial costs, regional meetings require investment of time and effort on the part of personnel from the hosting country. It has therefore been argued that putting a strain on government human resources of a country may, in the long run, affect their productivity in addressing their domestic matters. In addition, it was also argued that the short period of time between regional meetings may also result in government officials being poorly prepared when attending the meetings, and that this may affect the quality of their contributions.

Thirdly, the mini thesis has also argued that the TFTA Agreement may increase non financial treaty related obligations for countries with multiple REC memberships.³⁴² Multiple REC membership countries may also be more exposed to the risk of finding themselves under two or more contradictory REC obligations. In addition, countries with multiple REC memberships may also have more obligations to domestic both TFTA and multiple REC legal instruments.

³⁴⁰ See s.4.2.1.

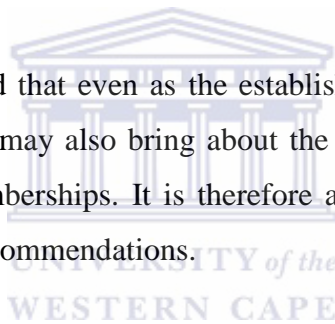
³⁴¹ See s.4.2.2.

³⁴² See s.4.2.3.

Fourthly, the mini thesis has further demonstrated how the lack of clarity in the relationship between the TFTA institutions and the RECs' institutions may negatively impact on countries that have multiple REC memberships.³⁴³ It has argued that since the relationship between the TFTA and RECs regimes is not clear, Tripartite member/partner states may be left to choose between two or more different regimes, creating uncertainty and unpredictability. This uncertainty and unpredictability may lead to forum shopping, a situation which may in the long run scare away potential investors.

Lastly, the mini thesis has argued that there is also a possibility that countries with multiple REC memberships may reap fewer trade related gains than those countries that have single REC memberships.³⁴⁴ This is so because of the gains that these countries are already enjoying by virtue of the multiplicity of their memberships.

In sum, the mini thesis has argued that even as the establishment of the TFTA initiative is an important milestone for Africa, it may also bring about the above-mentioned repercussions for countries with multiple REC memberships. It is therefore against this backdrop that this mini thesis would like to make a few recommendations.



5.2 Recommendations

5.2.1. Identification of sustainable resource mobilisation mechanism

Having noted that the countries with multiple REC memberships may encounter increased financial costs, this mini thesis recommends that the TFTA initiative should establish a sustainable mechanism for resource mobilisation. This mechanism may help reduce the financial burden on member/partner states to finance the operations of the TFTA institutions and the implementation of TFTA programs. For instance, the TFTA may establish a sustainable trust

³⁴³ See s.4.2.4.

³⁴⁴ See s.4.2.5.

fund, managed by the Tripartite Task Force.³⁴⁵ A sustainable initiative, like a trust fund, may go a long way in easing the financial burden on countries with multiple REC memberships, while also ensuring the sustainability of the TFTA institutions and their operations.

5.2.2. Private sector and civil society involvement and investment

This mini thesis also recommends the involvement and investment of the private sector and civil society in TFTA activities. This mini thesis has noted that Art. 29 of the TFTA Agreement only establishes inter-government institutions and there is no or little private sector or civil society participation in the TFTA. The TFTA initiative has thus been criticised as being a mere outgrowth of governmental bureaucracy.³⁴⁶ The private sector and the civil society may have the capacity to provide both human and financial resources towards the TFTA activities.³⁴⁷ Therefore, involving, and investing in, the private sector and civil society may help reduce the burden on both government officials and state funds.

5.2.3. Adoption of principles that will govern choice of law and choice of forum in the Tripartite area

This mini thesis further recommends that the TFTA Agreement should be amended in order to clarify the nature of the relationship between the TFTA institutions and the existing REC institutions.³⁴⁸ In addition, the TFTA Agreement must provide for principles that will govern the choice of law and choice of forum between the TFTA and REC regimes.³⁴⁹ There is a need for clear demarcation lines and rules for the TFTA and the RECs. This clarity may help avoid the problem of forum shopping by member/partner states.

³⁴⁵ See Footnote 262.

³⁴⁶ See Footnote 301.

³⁴⁷ See Footnote 302.

³⁴⁸ See s. 4.2.4.

³⁴⁹ See. s.4.2.4.

5.2.4. Rationalising and amending the RECs' treaties

This mini thesis also recommends that the treaties establishing the three RECs need to be rationalised and amended so that they support the TFTA Agreement and not contradict it.³⁵⁰ The mini thesis further recommends the harmonisation and co-ordination of TFTA and REC policies and programmes in order to avoid duplication of effort and wasting of resources.³⁵¹ To this end, the mini thesis suggests the adoption of the principle of subsidiarity between the TFTA and the RECs.³⁵² Under the principle of subsidiarity, the RECs may deal with most matters regarding integration in the region, and leave the TFTA to only deal with those matters that cannot be dealt with at REC level. Doing so will not only avoid duplication and the overloading of TFTA institutions with things that can be done at REC level, but will also reduce the frequency of TFTA meetings. This may help reduce the financial and human resource costs for countries, especially those with multiple REC memberships.

5.2.5. Strengthening of the existing RECs' institutions

Lastly, this mini thesis recommends the need to strengthen the existing REC institutions, as is required under the first stage of the AEC Treaty.³⁵³ Recently there has been an over-concentration on the establishment of new regional institutions rather than strengthening the already existing ones because this may weaken the existing institutions or undermine their effectiveness and relevance.³⁵⁴ Strengthening the REC institutions and financial markets may be vital as it may help mobilise financial and human resources needed to finance and carry out new integration projects.³⁵⁵

³⁵⁰ See Footnote 324.

³⁵¹ See s. 4.2.2.

³⁵² See s. 4.2.2.

³⁵³ See Footnote 263.

³⁵⁴ See s. 4.2.

³⁵⁵ See Footnote 263.

It is appropriate to end with a quotation from the then Economic Community of West African States (ECOWAS) Secretary General, who in his 2000 Jubilee Interim Report, berated the pattern of establishing new RIIs, in these words:

‘Instead of asking with whom, in what context and under what conditions integration might be possible, attention has been on the institutions to be established and the measures to be promoted. Giving priority to identifying institutional arrangements completely diverts attention from the vital task of determining socio-economic objectives and setting priorities.’³⁵⁶



³⁵⁶ See Footnote 263.

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