

The TFTA: A step towards trade integration in Africa?

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ABBREVIATIONS

AB	Appellate Body
ADBG	African Development Bank group
AEC	African Economic Community
AfDB	African Development Bank
ARIA	Assessing Regional Integration in Africa
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
CEMAC	Central African Economic and Monetary Community
CEN-SAD	The Community of Sahel-Saharan States
CET	Common External Tariff
CFTA	Continental Free Trade Area
CN	Combined Nomenclature
COMESA	Common Market for Eastern and Southern Africa
CU	Custom Unions
DS	Dispute Settlement
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU	European Union
FTA	Free Trade Area
FTC	Free Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product

ICBT	Informal Cross Border Trade
ICTSD	International Centre for Trade and Sustainable Development
IGAD	Intergovernmental Authority on Development
IOC	Indian Ocean Commission
MFN	Most Favored Nations treatment
NAFTA	North American Free Trade Agreement
PTA	Preferential Trade Area
REC	Regional Economic Community
RoO	Rules of Origin
RTA	Regional Trade Agreement
RTB	Regional Trade Bloc
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Co-ordination Conference
SIRESS	Integrated Regional Electronic Settlement System
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TFTA	Tripartite Free Trade Area
TMSA	Trade Mark South Africa
TPP	Trans Pacific Partnership
TPSEP	Trans-Pacific Strategic Economic Partnership Agreement
TR	Trade Remedies
TRIPS	Trade-Related Aspects of Intellectual Property
UEMOA	West African Economic and Monetary Union
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organization

Chapter one

1 Introduction

1.1 Background of the study

On 10 June 2015 the heads of state of the three RECs, the East African Community (EAC)-the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) signed the Sharm El Sheikh declaration launching the biggest free trade area(FTA) in Africa and opened the Tripartite-FTA(TFTA) Agreement for signature¹. The “Grand” FTA will stretch from Cape Town to Cairo, creating an integrated market with a combined population of almost 600 million people and a total Gross Domestic Product (GDP) of about US\$1 trillion². And this is a step towards the overdue trade integration in Africa.

At least since the time of the independence of most of its states, Africa as a continent sought trade and economic integration. For these newly independent states, regionalism was regarded as a possible panacea for the twin problems of slow rates of economic growth and poverty reduction³. However, the path has not been easy. It has been marked by a series of major initiatives and political decisions⁴. The more practical steps towards integration were taken concretely only in the late 20th century, with the Lagos plan of action and most importantly, the treaty of Abuja. The aim of the 1980 Lagos plan of action was to lead the continent toward an African common market and ultimately, an African economic community(AEC)⁵. Nevertheless, it did not include the details as to how and when the envisioned integration would come to reality.

On the other hand, the 1991 treaty of Abuja, under its Article 6 divulges the long-term strategy and the road map to build the AEC. Accordingly, the entire building process was planned to take six stages spread over a period of maximum 34 years. The first stage was to be devoted

¹ Angwenyi (2016) p.589

² ICTSD (2015) p.26

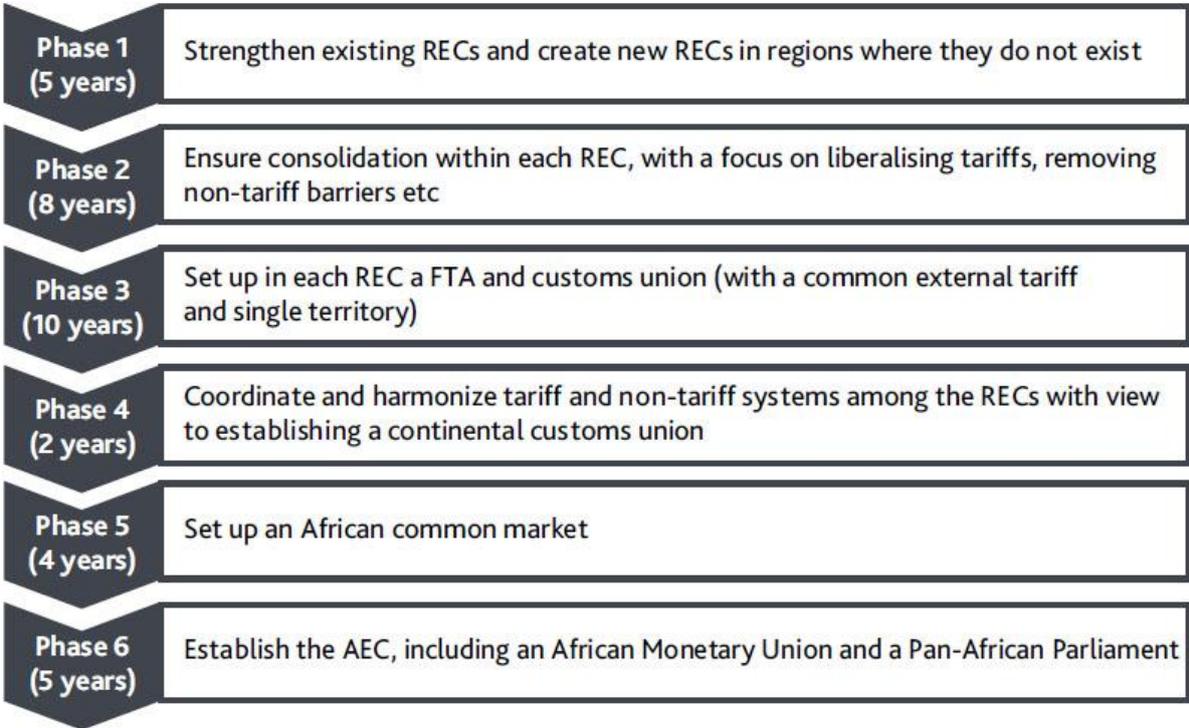
³ Draper, Halleson and Alves (2007) p.7

⁴ UNECA (2012) p.13

⁵ Preamble number 3

ed to creating and strengthening regional economic communities (RECs). In the second stage, the RECs were to stabilize Tariff Barriers and Non-Tariff Barriers, Customs Duties and internal taxes. Then, in the third stage, the RECs were to form FTAs and custom unions(CU) at regional level. Trade and market integration at the continental level was expected to commence in the fourth stage with the establishment of an African CU, through the consolidation of the CUs of the RECs⁶. The rationale behind this phased approach is that the integration vision should be first consolidated at regional level, through creating and strengthening the RECs, which would eventually merge into the AEC⁷.

Figure 1: The African Union Continental Integration Agenda



Source: Bridges Africa (2014)

As shown in **Figure 1**, the Abuja treaty does not offer the establishment of a FTA at a continental level. However, the AU heads of states and governments held a meeting in Addis Ababa, Ethiopia, from 29 to 30 January 2012, on the theme of ‘boosting Intra-African Trade’ and

⁶ Fajana (2016) p.1

⁷ UNECA (2012) p.xv

decided to form a Continental FTA(CFTA). This decision was aimed partly at addressing the lacuna in the Abuja Treaty and supports the treaty's integration intention ⁸.

According to the 2012 declaration, the formation of a CFTA is driven principally by boosting intra-regional free trade and integration ⁹. Intra-African trade stands at around 10 per cent which is miserly when compared to 60 per cent, 40 per cent, 30 per cent intra-regional trade that has been achieved respectively by Europe, North America and ASEAN.¹⁰ However, assessments of the benefits of regional integration for developing countries are not always conclusive, and the evidence for Africa is also mixed ¹¹. Despite this, in Africa, trade is believed to be a key engine for boosting growth, development, economic expansion, employment generation and poverty reduction ¹². According to the WTO, data shows a definite statistical link between freer trade and economic growth: liberal trade policies that allow the unrestricted flow of goods and services sharpen competition, motivate innovation and breed success.¹³ Many states of the world have been able to lift their peoples from poverty to prosperity through trade ¹⁴. However, despite its potential, Africa has not been able to take full advantage of its large continental market of about a billion people ¹⁵. By using trade as an instrument, the current integration efforts target to change this situation.

The 2012 declaration also provides the road map of the CFTA. According to Article 6, the CFTA should be operationalized by the indicative date of 2017, based on the framework, Roadmap and Architecture, with the appropriate milestones of:

- Finalization of the EAC, COMESA and SADC Tripartite FTA initiative by 2014;
- Completion of FTA(s) by Non-Tripartite RECs, through parallel arrangement(s), between 2012 and 2014;

⁸ Fajana, (2016) p.1

⁹ Paragraph 4,5,6 &8

¹⁰ AU (2012) p.2

¹¹ UNECA (2012) p.39

¹² AU (2012) p.51

¹³ See more at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm

¹⁴ AU (2012) p.1

¹⁵ AU (2012) p.48

- Consolidation of the Tripartite and other regional FTAs into a CFTA initiative between 2015 and 2016;
- Establishment of the CFTA by 2017 with the option to review the target date according to progress made.

As it is clear from the above, by now, at least all the RECs were expected to have formed larger FTAs amongst themselves and have commenced the process of merging in order to form a CFTA. However, the only FTA currently in progress is the TFTA. Hence, this thesis focuses on the TFTA and ask two questions: (1) How far did TFTA advance trade integration in Africa? and (2) How can we explain the current level of advancement, particularly in light of various political, economic and legal factors?

The TFTA is chosen as a focus area for the following interconnected reasons; firstly, studying the TFTA is relevant for the CFTA building process as it is possible to take lessons from the TFTA's experience of negotiation and the resulted agreement. Secondly, the TFTA is the number one milestone of the CFTA formation. In other words, its success or failure would have a significant implication on the CFTA. Thirdly, as mentioned above it is the only FTA actually existing and progressing among the RECs. Last but not least, the TFTA has large coverage. The 26 countries represent 48 percent of the AU membership and 51 percent of continental GDP. If the TFTA countries were one country, it would be the thirteenth largest economy in the world¹⁶.

1.2 Methodology

In this research, all the relevant agreements of the international and regional trade blocs are used as primary source materials. Even if most of its important annexes¹⁷ are not settled and available yet, this includes the current TFTA agreement. In addition, the three essential documents which are developed by the AU simultaneously in order to help boost inter African

¹⁶Luke & Mabuza (2015) p.4

¹⁷ Annexes on Elimination of Customs Duties, Trade Remedies and Rules of Origin are not settled yet.

trade - the Issues Paper, the Action Plan and the Framework, Road Map and Architecture for fast tracking the CFTA - have also been used. Moreover, almost all editions of ‘Assessing Regional Integration in Africa (ARIA)’’, are consulted. These are joint publications of United Nations Economic Commission for Africa (UNECA), African Union Commission (AUC) and African Development Bank (AfDB). The study also referred another secondary sources of different books, journals and articles and took into account declarations, policies, statements in press release and other soft laws.

Furthermore, in order to analyze how far the TFTA took the continent, this research adopted both ‘backward-looking’ and ‘forward-looking’ evaluative benchmarks. The WTO trade integration standards, which cover a significant majority of the states in the world are taken as backward-looking benchmarks in order to measure the minimum performance expected of the TFTA. Whereas, in order to assess how far away the TFTA is from the maximum performance it seeks to attain and also to take some lessons, the trade integration standards of other successful regional trade blocs, are adopted as forward-looking benchmarks.

1.3 Outline

The remainder of the thesis proceeds as follows. Chapter two is dedicated to familiarizing the TFTA and its three constituent RECs - the EAC, COMESA and SADC with their respective agreements – together with a brief overview of the envisioned CFTA, the umbrella continental trade bloc. Chapter three, using both the WTO integration standards and the integration standards of other successful trade blocs and the original plan of the TFTA as an evaluative departure point, assesses in depth the status, scope and meaning of the TFTA with the aim of highlighting how far it took trade integration in Africa. This chapter’s principal areas of emphasis are issues related to the TFTA’s dispute settlement system, tariff liberalization, rules of origin and trade remedies. Chapter four, presents the key issues and challenges of the process from the participant RECs perspective and evaluates the major political, economic and legal factors, which explain why the TFTA is where it is. Lastly, conclusions arising from the entire study are presented.

Chapter two

2 The TFTA and its constituent RECs

2.1 Introduction: Models of Integration in the African Context

Economic integration, the elimination of economic frontiers between two or more economies¹⁸ has been proven very vital for economic growth and development. An economic frontier is any demarcation over which actual and potential mobility of goods, services and production factors, as well as communication flows, are relatively low.¹⁹ As a result, states of the world have been and still are striving to integrate their economy at different level and degree in order to reap the benefits of integration. For example, the WTO encompasses a remarkable majority of states of the world at a global level, the European Union(EU) at a continental level, and the EAC with five East African states at a regional level.

When it comes to the degree of integration, there are different arrangements that range from a preferential trade area (PTA) to political union. As portrayed below in Table 1, the degree of economic integration varies depending on the type of arrangement agreed to by states.

Table 1: Features of regional integration

Types of arrangement	Free trade among members	Common commercial policy	Free factor mobility	Common monetary and fiscal policies	One government
Preferential trade area	No	No	No	No	No
Free trade area	Yes	No	No	No	No
Custom union	Yes	Yes	No	No	No
Common market	Yes	Yes	Yes	No	No
Economic union	Yes	Yes	Yes	Yes	No
Political union	Yes	Yes	Yes	Yes	Yes

Source: The UNECA (2012)

¹⁸ Molle (2006) p.4

¹⁹ Snorrason (2012) p.14

To form a *PTA*, states need to agree to reduce or eliminate tariff barriers on selected goods imported from other members of the area. Thus, the trade is not completely free. Whereas, in a *FTA*, states abolish tariff and quantitative restriction among themselves and yet retain their own tariffs and other restrictions against non-members²⁰. States forming a *CU* enjoy the elements of a *FTA* and adopt an identical external trade policy and tariff. Therefore, the key element which distinguishes *CU* from a *FTA* is its common approach to non-member states. In the case of *Common Market*, in addition to the features of a *CU*, states enjoy free movement of capital, labor and service only reserving different national regulations. An *Economic Union* demands states to function with common currency and common general trade policy. Finally, states can abolish their sovereignty, establish one government and form a *Political Union*.

By virtue of the Treaty of Abuja²¹, 48 states of Africa target to form an AEC that can be considered as a full Economic Union if not a Political Union. After numerous efforts, a very essential step was taken when the Trade Ministers agreed in a meeting in Kigali, Rwanda (December 2010) to move towards an African wide *FTA* by eliminating tariffs and quotas on goods and services traded among them²². According to the WTO website, 43 of those African states are members of the WTO.

Under the WTO agreements, by virtue of most favored nations(MFN) principle, countries cannot discriminate between their trading partners. If one state grants some other state a special favor such as, a lower customs duty rate, that state has to do the same for all other WTO members. This principle is so important that it is the first article of the GATT, article 2 of GATS and article 4 of the TRIPS. Although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.²³

Since a *FTA* agreement allows a party to it to grant more favorable conditions inside the *FTA*, this would appear to contravene the MFN treatment principle of the WTO. The establishment of *FTAs* is, however, legalized through Article XXIV of GATT, the Enabling Clause to GATT and Article V of GATS, which provisions give permissible exceptions to the MFN

²⁰ Balassa (1994) p.174

²¹ Article 6

²² UNCTAD (2015) p.2

²³ See more at: https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact2_e.htm

principle. These WTO legal provisions are essentially meant to encourage liberalization of trade in goods and services among WTO members.²⁴ However, the exception is not without conditions. There are a set of criteria that should be met by the States concluding a FTA agreement.

In this regard, there are three major obligations under GATT Article XXIV: both internal and external trade requirements as well as a notification responsibility. In order for a regional trade agreement (RTA) to pass WTO muster, it should seek to reduce substantially all barriers to trade amongst its members. Barriers to trade in respect of non-RTA members who are also WTO members must not be more restrictive than those obtaining prior to the conclusion of the RTA. The WTO has to be notified of the intention to create an RTA, subject to review by the Committee on RTA.²⁵ With respect to trade in services, Article V of the GATS provides for essentially the same requirements set out in GATT Article XXIV. However, arguments have been raised to the effect that the GATS is more lenient in its regional integration requirements than the GATT.²⁶ GATS allows for negotiated preferential access agreements more liberally than its GATT counterpart in Article XXIV.²⁷

Therefore, fulfilling the obligations, the WTO states can form FTAs. In 2012, the AU, adopted a decision to establish a CFTA by an indicative date of 2017. This CFTA will bring together fifty-four African countries with a combined population of more than one billion people and a combined gross domestic product of more than US \$3.4 trillion.²⁸ The general objective of the CFTA is the creation of a single market with free movement of goods and services to foster social and economic development in Africa. According to the UNECA, the CFTA will help to broaden and deepen opportunities for exporters, by reducing and then removing barriers to trade and investment, and by building the institutional superstructure to enable trade and investment links to expand. Thus, the CFTA will bolster intra-regional trade by creating a bigger market, stimulating investment, enhancing competitiveness and developing cross-regional infrastructure, among other impacts.²⁹ In addition, the CFTA can also be a solution for problems related with Africa's informal cross

²⁴ Shayanowako (2011) p.6

²⁵ Siziba (2016) p.4

²⁶ Id p.5

²⁷ Teksten (2000) p.15

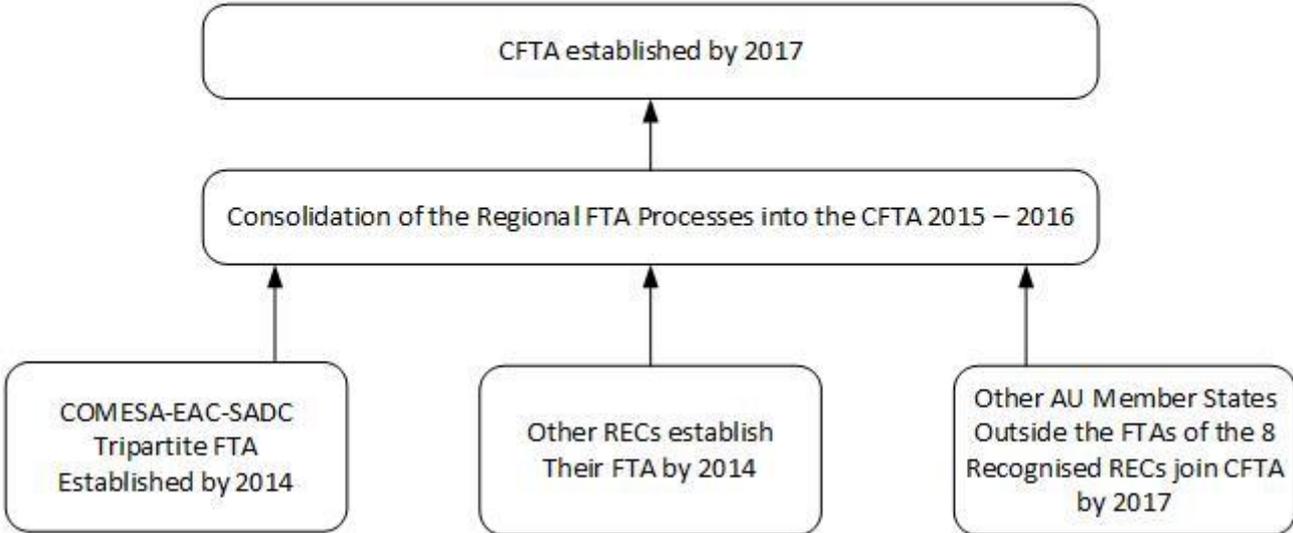
²⁸ AU (2014) p.2

²⁹ UNECA (2012) p.55

border trade(ICBT) by making the formal trade easier to conduct and liberalized so the informal trade activities can also be included in to the formal.³⁰

The groundwork of the CFTA has been done by the 2012 declaration on boosting intra-Africa trade. To indicate the main points, first, the declaration renewed the commitment of member states not only to speed up the market integration but also to deepen it. Then it named the significant stakeholders including the RECs, which can contribute to the plan’s materialization and indicate what would be expected from whom. Finally, it provided a blue-print showing when and where the process would start and when and where it would come to conclusion as demonstrated below.

Diagram1: Continental Free Trade Area (CFTA) Roadmap



Source: AU and UNECA (2012)

³⁰ Guy Afrika and Ajumbo (2012) p.2-4 and Njiwa (2013) p.9. ICBT generally refers to trade in processed or non-processed merchandise which may be legal imports or exports on one side of the border and illicit on the other side and vice-versa and is very important to Africa in general as 43 percent of Africans are involved in this form of commercial activity, with women representing the lion’s share (75%). In the TFTA region, for instance ICBT contributes between 30-40 percent of total intra-SADC trade. However, characteristically ICBT also involves bypassing border posts, concealment of goods, and other similar tricks, which gives an unfair competitive advantage to informal sector traders over formal businesses as the former do not fulfil their regulatory obligations or pay taxes and other fees.

This blue-print of the umbrella FTA, the CFTA shows, how well the movement to create a TFTA is appreciated by all AU states. The CFTA is meant to be built on the progresses of the TFTA and other regional blocs, which would follow the examples of the TFTA. The formation of the TFTA is the first milestone to be finalized by the year 2014. Then the other REC are also expected to form this kind of free trade zones between 2012 and 2014. Finally, between 2015 and 2016, the regional free trade zones and other AU states outside of the free trade zones are supposed to merge in to the CFTA.

2.2 The TFTA

A fragmented continent, small markets and small economies, poor infrastructure, as well as a large number of land-locked countries have always provided a strong motivation for regional integration in Africa.³¹ The creation of a TFTA and a CFTA is a road to a single coherent and larger market. Ultimately, it also is a road to full-fledged integration through the AEC.

Integration among the COMESA, EAC and SADC was initiated the first time in 2005, was strengthened by two subsequent summits in 2008 and 2011, and came to fruition in 2015 through the TFTA. Africa's integration process in general suffers from delays caused by multilateral and overlapping memberships hindering fast and deep integration. Among the 55 countries of Africa, 22 are members of two RECS; 22 are members of three RECs; and 4 countries are remarkably members of 4 RECs. Only 6 countries retain a single membership and only one country is not a member of any REC: the Sahrawi Arab Democratic Republic³². There is, therefore, a serious need to rationalize and harmonize their policies, activities, and programs with a view to accelerating the broader integration process. The TFTA is not an exception to this multi-layered situation. Figure 2 ³³below clearly shows the intersection among the three RECs forming the TFTA.

³¹ Erasmus (2013) p.4

³² Mengistu (2015) p.418

³³ Zamfir (2015) p.2

Figure 2: The Tripartite Free Trade Area



Source: Zamfir (2015)

From the 19 COMESA member states, 8 of them are also members of SADC. SADC has 15 member states. From 5 EAC member states 4 of them are members of COMESA. Finally, EAC and SADC share one state. This has resulted in instances of functional overlaps and duplication of integration efforts,³⁴ which the TFTA states decided to avoid by establishing a FTA with a harmonized system.

The declaration launching the TFTA reaffirmed the developmental approach to integration, which was originally adopted at the second tripartite summit³⁵. The approach is built on the three pillars of market integration, infrastructure development and industrial development. This indicates the fact that there are multiple identified bottlenecks to trade in the region de-

³⁴ Angwenyi (2016) p.601

³⁵ The 2011 Communiqué, number 1(iii)

manding multiple actions. Thus, the pillar of market integration is meant to promote the actions of trade liberalization through the TFTA³⁶.

Ultimately, the TFTA agreement seeks to liberalize trade in goods, trade in service and other trade related matters. But, according to the 2011 guideline for negotiating the TFTA and the current TFTA agreement, the three RECs did not plan to conclude the whole package of a trade agreement at once. Rather, the negotiations were intended to be conducted in two phases. The first phase was meant to cover trade in goods. Then the second phase was intended to cover major negotiations on trade in services, intellectual property rights and the like.

Given the fact that an agreement of this magnitude will be an enormous and complex undertaking, this approach appears to be practical. However, the current agreement failed to cover all of the issues related to trade in goods. As stated under Article 44, the Tripartite Member States reserved negotiations on some outstanding issues after the launch of the TFTA. While the detailed analysis of these issues is undertaken in chapter three, it is pertinent to note here that, the reserved issues, Elimination of Customs Duties, Trade Remedies and Rules of Origin, have the ability to determine how meaningful a trade agreement is.

2.2.1 Components of the TFTA

Since the formation of the first CU, SACU, in 1910, several RECs have been established by African countries. But by virtue of the 2006 Banjul decision, only eight RECs have been given recognition by the AU, which also suspended the recognition of new RECs indefinitely.³⁷ COMESA, EAC and SADC are recognized RECs and emerged as the building blocks of Africa's integration.

Generally, the RECs constituting the tripartite are formed to achieve a broad integration agenda across the social, political and economic spectrum. Nevertheless, the degree of integration that they are striving for differs. COMESA and SADC intend to integrate to the extent of a Monetary Union with a single currency. EAC on the other hand aims to establish itself ulti-

³⁶ The Infrastructure Development pillar is meant to enhance connectivity and reduce costs of doing business and Industrial development pillar is to address the productive capacity constraints.

³⁷ Hailu (2014) p.315

mately as a Political Federation. The three RECs however have common objectives which if harmonized could facilitate the tapping of great potential within the TFTA.³⁸ Hence, the following sections are devoted to assessing where those RECs started their individual integration path, the kind of structure that path is backed by, the degree of integration they managed to realize so far and some additional relevant differences among them.

2.2.1.1 The COMESA

The COMESA traces its genesis to the mid-1960s. The idea of regional economic co-operation received considerable impetus from the buoyant and optimistic mood that characterized the post-independence period in most of Africa. The mood then was one of Pan-African solidarity and collective self-reliance born of a shared destiny. It was under these circumstances that, in 1965, UNECA convened a ministerial meeting of the then newly independent states of Eastern and Southern Africa to consider proposals for the establishment of a mechanism for the promotion of sub-regional economic integration.

If we fast forward to 1978, in Lusaka, the creation of a sub-REC was recommended and, after the preparatory work had been completed in 1981, the treaty establishing the PTA was signed. After it had been ratified by more than seven signatory states, it came into force in 1982. The PTA Treaty envisaged its transformation into a Common Market and, in conformity with this, the Treaty establishing the COMESA, was signed in 1993 and was ratified a year later. Up until the late 1980s and early 1990s, most COMESA countries followed an economic system which involved the state in nearly all aspects of production, distribution and marketing, leaving the private sector to play a minor economic role. The inefficiencies inherent in this system contributed significantly to the economic decline of the PTA/COMESA region³⁹

COMESA is the largest of the three RECs consisting 19 member states and population of over 389 million. COMESA as defined by its Treaty was established with a wide-ranging series of objectives including in its priorities the promotion of peace and security in the region. However, due to its economic history and background, COMESA's main focus is the formation of a large economic and trading unit that is capable of overcoming some of the barriers that are

³⁸ Angwenyi (2016) p.592

³⁹ See more at: <http://au.int/en/recs/comesa>

faced by individual states. Consequently, its current strategy can be summed up in the phrase ‘economic prosperity through regional integration’.⁴⁰

When it comes to its structure, COMESA is accountable to the Heads of State and Government of its Member States. Its arrangement includes the Council of Ministers, COMESA court of justice, 12 technical committees, and a series of subsidiary advisory bodies, a secretariat and several other institutions promoting sub-regional cooperation and development. Overall co-ordination is achieved through the secretariat based in Lusaka, Zambia.

In October 2000, COMESA formed a FTA although not all the Member States are party to the FTA yet.⁴¹ Nevertheless, one of the clear successes of this FTA is that between 2000 and 2010, there was a six-fold increase in intra-COMESA trade⁴². It is reported that 14 of its 19 member states trade at zero tariffs, four have substantially reduced tariffs, and only Swaziland has obtained a derogation – on the basis that it needs to comply with the common external tariff regime of SACU, of which it is a member⁴³. The disparity in terms of economic development between COMESA Member States is recognized as a critical integration challenge⁴⁴. Non-harmonious and unbalanced developments hinder an equal enjoyment of the benefits of the integration. That is why the Member States agreed to take several measures designed to build and strengthen the capacities of states in the region in areas such as infrastructure, industrial development and agriculture⁴⁵.

Moreover, the COMESA Treaty set a timeline of 10 years from its entry into force for the creation of a CU⁴⁶. Though it was already beyond the timeline, COMESA created a CU in June 2009. COMESA has adopted various instruments and measures meant to give full effect to the CU. However, timelines remain largely unmet and the implementation is still low. Member States have expressed various concerns including: local industries and revenues being affected by the imported goods; loss of decision making capacity on various policy areas; and insufficient capacity, information and coordination, while some countries face serious

⁴⁰ See more at: <http://www.comesa.int/overview-of-comesa/>

⁴¹ The 14 member states participating in the FTA are, Burundi, Comoros, Djibouti, Egypt, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Zambia and Zimbabwe.

⁴² AU (2012) p.46

⁴³ ADBG (2014) p.11

⁴⁴ Angwenyi (2016) p.593

⁴⁵ COMESA treaty, Article 144

⁴⁶ Article 45

economic and industrial problems, thus requiring more time for their own economies to recover. One concern expressed that touches on the issue of overlaps is the fact that the EAC, a number of whose members are also members of COMESA, already has a CU.⁴⁷ Finally, COMESA secretariat and member states also struggled with the issue of a weak human and institutional capacity base⁴⁸.

2.2.1.2 *The EAC*

The EAC is an east African REC consisting of 5 states, Burundi, Kenya, Rwanda, Tanzania, and Uganda and 145.5 million population of the region. The current EAC came in to being in 2000 following the dissolution of the former East African Community.⁴⁹ The new EAC configuration is designed to ameliorate the asymmetrical distribution of benefits that characterized its predecessor, in terms of which only Kenya seemed to have benefited.⁵⁰ This REC has a very broad objective of developing policies and programs aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security, legal and judicial affairs⁵¹.

Overseen by the Summit of Heads of State and Government, the main organs of the EAC includes the Council of Ministers, 14 ministerial-level sectoral councils; the East Africa Legislative Assembly; the East African Court of Justice; the Coordination Committee and the Secretariat. The summit gives strategic direction towards the realization of the goal and objectives of the Community.

The EAC has a four-stage integration plan.⁵² Unlike the other RECs in eastern and southern Africa, which have adopted an evolutionary approach to attaining a CU, the EAC provides for it as the first stage in its integration process⁵³. Then the EAC planned to attain a common market, a Monetary Union and eventually a Political Federation. The first three stages are similar to COMESA and SADC objectives. The objective of a Political Federation however makes the EAC the most ambitious REC in Africa. However, the EAC Treaty neither defines

⁴⁷ Angwenyi (2016) p.594

⁴⁸ ACBF (2008) p.185

⁴⁹ See more at: <http://www.eac.int/about/EAC-history>

⁵⁰ Draper, Halleon and Alves (2007) p.14

⁵¹ EAC treaty, Article 5(1)

⁵² Id, Article 5(2)

⁵³ Ndomo (2016) p.32

what the Political Federation entails nor elaborates further on specific steps for its achievement.⁵⁴

Moreover, though it may be possible to achieve deeper economic integration, it remains highly doubtful whether a political federation is attainable. Further complexity is added by the recent accession of Rwanda and Burundi, two countries with troubled political histories; which is compounded by the unfolding crisis in the horn of Africa, which has drawn Kenya and Uganda into its orbit. If we add to this the uncertain security prognosis in Uganda, it is clear that political stability in the region is by no means guaranteed.⁵⁵

Nevertheless, EAC is the most homogeneous region in terms of population size, with similar levels of income and geographical comparability.⁵⁶ The EAC is also the most economically uniform REC, and shown a considerable reduction in economic disparity since 2000.⁵⁷ Consequently, the EAC has made the most linear progress toward economic union and the highest ambition of the eight RECs. It has developed a fully functioning FTA, first by implementing a CU more comprehensively since July 2009, when both Rwanda and Burundi joined. It established a common market in July 2010, but a lenient attitude toward exemptions, bans, and non-tariff equivalent measures has complicated its development. Its most recent achievement towards economic union is the adoption of a protocol in 2013 outlining its plan to launch a monetary union within ten years.⁵⁸ In general, the EAC is lauded as having made the most significant strides among the eight RECs in Africa and all internal tariffs are to date reported to have been eliminated.⁵⁹

Furthermore, EAC is also promoting investments and trade, as well as identifying and developing regional infrastructure projects including roads, railways, civil aviation, posts and telecommunications, energy and the Lake Victoria Development Program. Besides, the EAC passport is in force and allows multiple entries to citizens of partner states to travel freely within the EAC region for up to six months. Partner states have agreed to develop a frame-

⁵⁴ Angwenyi (2016) p.596

⁵⁵ Draper, Halleson and Alves (2007) p.15

⁵⁶ Ibrahim (2014) p.13

⁵⁷ Id, p.16

⁵⁸ ADBG (2014) p.11

⁵⁹ Angwenyi (2016) p.597

work for mutually recognizing professional qualifications. It is now possible for legal practitioners to operate in any EAC country, without having to sit new bar examinations.⁶⁰

2.2.1.3 *The SADC*

The SADC, a REC of 15 member states and population of 257.7 million, was formed in 1992 as a successor of Southern African Development Co-ordination Conference (SADCC). The SADC Treaty under its article 5 sets out its main objectives: achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. These objectives are to be achieved through increased regional integration, built on democratic principles, and equitable and sustainable development.⁶¹

Institutional reform became necessary because of the transition from a Coordinating Conference into a Community and a number of difficulties came along with it. Consequently, SADC undertook an exercise to restructure its institutions and adopted an amendment to its treaty in 2001. These reforms established eight institutions, Summit of Heads of State or Government; Organ on Politics, Defense and Security Co-operation; Council of Ministers; A Secretariat; A Tribunal; The Troika; Standing Committee of Officials; and SADC National Committees. Those are the organs building the structure of SADC.⁶²

SADC's regional integration agenda covers more than just trade, but the Trade Protocol, signed in August 1996, seems to be driving the integration process⁶³. The SADC integration plan is similar to that of COMESA involving a gradual transition from a FTA to a Monetary Union with the eventual adoption of a single currency. The timeframes that the Member States set were for the FTA to be formed by 2008, the CU by 2010, the Common Market by 2015, the Monetary Union by 2016 and the Single Currency by 2018⁶⁴.

In 2001, SADC began moving toward an FTA with the introduction of a tariff phase-down program. The program was 85% complete in August 2008 when SADC's FTA was launched, and the remaining 15% phase-down on sensitive products was completed by January 2012.

⁶⁰ UNECA (2012) p.16

⁶¹ See more at: <http://www.sadc.int/about-sadc/overview/history-and-treaty/>

⁶² Ibid

⁶³ Draper, Halleson and Alves (2007) p.11

⁶⁴ Angwenyi (2016) p.600

Mozambique is scheduled to complete its tariff phase-down by 2015. But Angola, the Democratic Republic of the Congo and the Seychelles do not offer any tariff reductions under the SADC PTAs. In February 2012, Zimbabwe imposed a 25% surtax on goods imported from other SADC member states, an action which may contravene its SADC obligations. The SADC Trade Protocol only provides for derogations from scheduled obligations subject to specific conditions, which do not appear to have been met in this case.⁶⁵

Adding to the problem, SADC lacks a tribunal whose mandate and authority have a legal force. The current SADC enforcement measures are inadequate, the rules dealing with defaulting SADC members lack clarity, and its members use sovereignty to avoid international obligations. Tribunal's ruling in *Campbell v Republic of Zimbabwe* and the subsequent non-compliance by the Zimbabwean Government with the decision clearly demonstrates that.⁶⁶ Article 33 of the SADC Treaty provides that sanctions may be imposed against any member that, without good reason, persistently fails to fulfil its obligations. The summit determines these sanctions⁶⁷. However, not only there are no examples of the possible sanctions provided under the treaty as guidance but also such decision needs to be reached by consensus⁶⁸. In other words, the decision of the summit cannot be binding unless it gets the support of Zimbabwe as well.

The SADC Summit was held. While no official response was given from SADC regarding Zimbabwe's disdain of the Tribunal's rulings, SADC members adopted a decision to undertake a review of the role, functions and terms of reference of the Tribunal within a period of six months. Most importantly, the Tribunal's power to receive and hear new matters has been withdrawn.⁶⁹ The case clearly shows the power of one state to easily challenge a SADC institution to its core.

Hence, in SADC, the minimum conditions for the FTA is met but various derogations subsequent to 2012 indicate that maximum liberalization is in reality yet to be achieved. Moreover, SADC's transition from the FTA to the CU, did not proceed according to the agreed timeframe and is proving to be quite a challenge for the Member States. This in turn means

⁶⁵ ADBG (2014) p.11

⁶⁶ Ndlovu (2011) p.63

⁶⁷ Article 33(2)

⁶⁸ Article 10(8)

⁶⁹ Ndlovu (2011) p.78

delayed implementation of the Common Market and the Monetary Union. One positive step towards the achievement of monetary integration was the launching of the SADC Integrated Regional Electronic Settlement System (SIRESS), which to date includes 11 Member States. The SIRESS has had a positive impact in ensuring secure and harmonized settlement of cross-border payments. SADC however indicates some positive figures in terms of intra-regional trade. SADC's intra-regional trade records the most development amongst the RECs in Africa, accounting for 44% of Africa's intra-regional trade as of 2011.⁷⁰

2.2.2 Objectives and structure of the TFTA

The TFTA brought the above discussed three RECs together -with their distinct size, structure, degree of progress and general integration experience. It emerged to meet multiple objectives, which are very important to take the continent in general and the member states of the three RECs in particular a step forward. First, according to the TFTA agreement, it aims to establish a single CU beginning with a FTA⁷¹. Resolving the challenges of overlapping memberships and harmonizing the involved RECs better is also one of the major objectives of the TFTA⁷². Pursuant to article 4 and 5 of the TFTA agreement, the other general and specific objectives of the TFTA are generally, promoting economic and social development of the region, creating a large single market with free movement of goods and services, and enhancing the regional and continental integration processes. These should be realized through; progressive elimination of tariffs and Non-tariff Barriers to trade in goods, liberalization of trade in services, cooperation on customs matters and implementation of trade facilitation measures, cooperation in all trade-related areas and establishment of an institutional framework that are helpful for implementation and administration of the TFTA. Overall, through improved access to market.

When it comes to its structure, pursuant to article 29, the TFTA is composed of several bodies. To mention the major ones, the highest body is the Tripartite Summit, composed of heads of state and governments and is supposed to give general direction. The TFTA also has the Tripartite Council of Ministers, Sectoral Ministerial Committees, Tripartite Committee of Experts and Senior Officials. But it does not have an independent secretariat. The Tripartite

⁷⁰ Angwenyi (2016) p.601

⁷¹ Preamble 3

⁷² Preamble 9

Task Force of the Secretariats of the three RECs is meant to provide secretariat services to the tripartite as well.

To conclude, the TFTA organizing the three RECs presents an excellent opportunity to strengthen integration among the involving member states in particular and continental integration in general. However, with this integration ambition, it is important to ask how far the TFTA actually took the continent. This would be the issue, which will be analyzed in the next chapter.

Chapter three

3 How far did the TFTA actually take the continent?

The TFTA agreement was concluded after the first round negotiation in June 2015 and to date, it is signed by 17 member states, Zambia being the last one to sign in 17th of June 2016. Other countries that have signed the TFTA are Angola, Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Kenya, Malawi, Namibia, Rwanda, Seychelles, Sudan, Tanzania, Uganda, Swaziland and Zimbabwe. Whereas, Ethiopia, Mozambique, Madagascar, Mauritius, Eritrea, Botswana, Lesotho, Libya, and South Africa have not signed yet. Therefore, setting the question of how satisfactory is it aside, in Africa the process of integration is in motion.

The TFTA text is, an important and signed undertaking to continue with the process and, hopefully, to agree on a modern and comprehensive agreement suitable to contemporary challenges⁷³. Hence, this chapter is devoted to evaluating the ambition and status of the TFTA agreement and also analyzing how meaningful this arrangement is in terms of the range of trade matters the agreement covers and the trade integration standards it offers in relation to the matters.

In order to execute this analysis, I believe it is necessary to look to some other trade blocs and take their integration standards as evaluative benchmarks. This paper uses both ‘backward-looking’ and ‘forward-looking’ benchmarks. The backward-looking benchmarks are meant to measure the minimum performance expected of the TFTA as a FTA. Whereas, the forward-looking benchmarks are meant to measure how far away the TFTA is from the maximum performance it seeks to attain.

The WTO standards are taken as backward-looking benchmarks. The standards provide the most popular minimum world trade regulations, which are foundations of multilateral trading systems. Currently, its website shows that the WTO has 164 members including 21 of the 26 TFTA states. Moreover, the WTO trade regulations cover a wide range of trade matters and provide the legal ground-rules for international commerce, which includes a nondiscrimination rules of national treatment and most favored nations treatment (MFN).

⁷³ Erasmus (2015)

With regard to the forward-looking benchmarks, currently, there are several successful regional trade blocs (RTBs) established in accordance with the WTO MFN exception rules to facilitate trade integration even more within that specific bloc.⁷⁴ The TFTA itself is also inspired by the idea of achieving deep trade integration for its member states. Hence, in this paper the trade integration standards of some of those RTBs coupled with the initial plan of the TFTA will serve as forward-looking benchmarks. From the successful RTB, this paper mainly uses different standards of the North American Free Trade Agreement (NAFTA) and/or the Trans Pacific Partnership (TPP).

NAFTA is a trade agreement between the Government of Canada, the United Mexican States and the USA. Even if there is a huge economic difference between the NAFTA and the TFTA member states, NAFTA is relevant because it sets an example of a successful FTA, which provides a similar degree of trade integration that the TFTA seeks to attain. Another example is the TPP, a trade agreement between 12 of the Pacific Rim countries, namely Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States, Vietnam, Brunei, Chile, New Zealand, and Singapore. Despite that it has not yet entered into force, TPP is relevant for multiple reasons. First, it is the most recent successfully negotiated agreement (concluded in October 2016). Second, like the 26 TFTA member states, the economic levels of the 12 member states of TPP are significantly different. Finally, like the TFTA, TPP encompasses overlapping memberships: it not only shares 4⁷⁵ member states with Association of Southeast Asian Nations (ASEAN) but it is the extension of the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP) and comprises the full members of NAFTA.⁷⁶

Thus, using the WTO standard and the TFTA's original plan and the trade integration success of other RTB as benchmarks of respectively the minimum and maximum performances expected of the TFTA, the remainder of this chapter will evaluate the TFTA. It aims to point where the TFTA effort took both the TFTA region and the continent thus far and is organized in to two major parts. The first part evaluates the ambition and status of the TFTA agreement and the second part analyzes the meaningfulness of the agreements on

⁷⁴ Virág-Neumann (2009) p.6

⁷⁵ The 4 states are, Brunei, Malaysia, Singapore and Vietnam.

⁷⁶ See more at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>

the covered trade matters. Methodologically, each part proceeds by first discussing the benchmarks and then assessing the TFTA agreement against them.

3.1 The ambition and status of the TFTA

In order to evaluate the ambition and status of the TFTA, certain aspects of its agreement are assessed. This includes the scope of the agreement, its enforceability, its inclusiveness, the nature of the organization and its dispute settlement system. These aspects are chosen because; first, the scope can demonstrate the range of trade matters, which the TFTA planned and managed to bring in to integration. Second, its enforceability indicates whether and when its obedience could be compelled from member states. Third, its inclusivity indicates not only the current geographical coverage but also the potential for more and its consequent implication for the CFTA. This analysis also evaluates if the trade integration activities of the three RECs are merged. Fourth, the nature of the organization indicates how much more trade integration facilitation role can be played by the TFTA. Finally, the dispute settlement mechanism reveals how serious the involved states are in bringing the agreement into practice or, essentially, if enforceability is backed by a proper dispute settlement system.

3.1.1 The scope of the TFTA agreement

The scope of a trade bloc's trade agreement determines to what extent it liberalizes trade. For example, simply in order to enjoy a formally liberalized trade in services, the agreement of a trade bloc should cover the area of trade in services. The WTO, as a rules based system set the standard for this. Its agreements cover goods, services and intellectual property. The agreements spell out the principles of liberalization, and the permitted exceptions. They include individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets. They set procedures for settling disputes. They prescribe special treatment for developing countries. They require governments to make their trade policies transparent by notifying the WTO about laws in force

and measures adopted, and through regular reports by the secretariat on countries' trade policies.⁷⁷

Therefore, the member states of the WTO enjoy the minimum standard of a regulated free trade in goods, in service and intellectual property. However, it is not one agreement that covers the three trade areas. The agreements fall into a simple structure with six main parts: an umbrella agreement (the Agreement Establishing the WTO); agreements for each of the three broad areas of trade (goods, services and intellectual property); dispute settlement; and reviews of governments' trade policies.

As to successful RTBs, the NAFTA agreement, an agreement which is formed with the objective of creating a framework for further regional trade cooperation⁷⁸, having eight parts and 22 chapters covers all the three major areas of trade in goods, in services and intellectual property. This agreement entered into force in January 1994 and not only lowered tariffs among the countries of Canada, Mexico, and the United States, but also liberalized foreign investment, services, intellectual property rules, and more⁷⁹. NAFTA is comprehensive, in that it seeks to cover all trade between Canada, Mexico, and the United States as well as related environmental and labor concerns⁸⁰.

Therefore, NAFTA is a trade arrangement where substantially all trade among the members is liberalized representing what could be expected from an effective FTA. However, the TPP's coverage contained within its 30 chapters surpasses even the NAFTA. In addition to updating traditional approaches to issues covered by previous FTAs, the TPP incorporates new and emerging trade issues and cross-cutting issues. These include issues related to the Internet and the digital economy, the participation of state-owned enterprises in international trade and investment, the ability of small businesses to take advantage of trade agreements, and other topics.⁸¹

Likewise, the TFTA also was planned initially with the ambition of establishing a similar kind of trade arrangement. In order for it to bring forth its envisaged and potential benefits,

⁷⁷ See more at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrml_e.htm

⁷⁸ Article 102

⁷⁹ Gallagher, Wise and Peters (2009) p.1

⁸⁰ Lopez (1997) p.164

⁸¹ See more at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>

one would expect the TFTA to seek to cover, key among other areas, trade in goods and services, investment, competition policy, technical barriers to trade, electronic commerce, customs cooperation, rules of origin, intellectual property and dispute settlement. Such a coverage and scope would make the FTA fairly comprehensive.⁸² Confirming this, Article 3 of the current TFTA agreement states that the Agreement shall comprise of trade in goods; trade in services; and other trade-related matters. However, due to the complicated challenges of the integration process, the involved states decided to make the negotiation easier by making it phase-based. The first phase negotiation covers trade in goods and the other major areas of trade in service and intellectual property are left for the second phase. All the Protocols and Annexes resulting from the different phase negotiations are intended then to form an integral part of the TFTA Agreement so it can be comprehensive⁸³.

Strictly speaking only those states which will ratify the current Agreement will be formal parties and under a legal obligation to engage in Phase II negotiations⁸⁴. Thus far, we have the 17 states, which are listed at the beginning of this chapter that signed the agreement but none of them ratified it. In other words, the TFTA does not have any state with a legal commitment to go beyond first phase negotiation and have a comprehensive trade agreement covering all the three major areas.

Unlike the agreements of NAFTA and TPP, the actual scope of the current TFTA agreement resulting from the first phase negotiation is limited only to trade in goods and is made up of 45 Articles and 10 Annexes. Tariff liberalization, disciplines on non-tariff barriers, rules of origin, trade remedies and provision for dispute settlement lie at the core of what was tried to be agreed on. Other provisions include elimination of quantitative restrictions, customs cooperation, trade facilitation, transit trade, infant industries, balance of payments, etc⁸⁵. Moreover, as it can be grasped from article 44 of the agreement, even from the matters of trade in goods, important issues of Elimination of Customs Duties, Rules of Origin and Trade Remedies are not concretely finalized yet. Hence, the scope of the TFTA is far from being comprehensive and it seem to take much more effort before such a comprehensive FTA among all the 26 member states can become a reality.

⁸² Shayanowako (2011) p.12

⁸³ Article 36

⁸⁴ Erasmus (2015)

⁸⁵ Luke and Mabuza (2015) p.4

3.1.2 Enforceability

Commonly, international trade agreements contain certain kinds of requirements which must be fulfilled in order for other member states to demand compliance. For example, NAFTA entered into force in January 1, 1994, on an exchange of written notifications certifying the completion of necessary legal procedures⁸⁶. TPP on its hand provides three different scenarios to enter into force including the laps of 60 days after the date on which all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures.⁸⁷

Similarly, in order to be binding and enforceable, the TFTA agreement is expected to be signed by the Tripartite States, ratified by them in accordance with their national laws and up on the fourteenth state depositing its instrument of ratification; it will, after thirty days, enter in to force.⁸⁸ What states undertake to do in terms of an agreement should be enforceable. Because, rules-based regimes like the TFTA, provides certainty, predictability and transparency for regional trade.⁸⁹

However, it will take time before this Agreement enters into force and domestic follow-up measures in the member states will come in place. Only then could there be tangible results. It also has to be noted that some countries that have been participating in the negotiations (such as South Africa) have not signed the text of this Agreement. Since South Africa is a member of SACU; which has a common external tariff(CET) and a single customs territory, there are major technical issues to be clarified before the participation of all SACU members⁹⁰ as members of the TFTA could follow. In principle it is not possible to retain SACU if only some of its members join the TFTA. On this score there might be some serious internal SACU discussions: South Africa has already indicated that it wants to re-negotiate the SACU agreement. Recent developments around the TFTA may well put that process at the top of SACU's internal agenda.⁹¹

⁸⁶ Article 2203

⁸⁷ Article 30.5

⁸⁸ Article 39

⁸⁹ Siziba (2016) p.12

⁹⁰ Botswana, Lesotho, Namibia, South Africa and Swaziland

⁹¹ Erasmus (2015)

It is interesting to observe that, even if the SACU is not accepted by the AU as one of the building blocks of the African integration as rendered under the 2006 Banjul decision⁹², it still keeps affecting the integration process of the continent. Because when states have a deeper integration like a CU, they cannot agree to integrate with non-members unless the members of the CU agree to adjust their CET.

Therefore, in order to produce its anticipated outcomes, through binding and enforceable African trade integration standards, the TFTA agreement must have ratification by at least 14 TFTA states in accordance with their national law – but none have done so. Moreover, this does not even include the national follow up efforts expected from the member states to practically implement the agreement. For example, NAFTA has a number of institutions working to ensure the smooth implementation and a day-to-day oversight of the agreement's provisions including NAFTA Coordinators which are Senior trade department officials designated by each country.⁹³ Given their economic situations, it might be hard for the TFTA states to perform exactly like NAFTA states. Yet, their national effort in their own context is nothing short of necessary.

3.1.3 Inclusiveness

All trade blocs, which are used in this paper as sources of both backward-looking and forward-looking benchmarks, WTO, NAFTA and TPP, are open to accession.⁹⁴ However, the article, which opens up a door to accession, is exceptionally important to the TFTA and the continental trade integration it aims to support. At the moment, the TFTA agreement is concluded only among the members of COMESA, EAC and SADC and the states which are expected to sign and ratify the agreement are only states that belong to them. However, the TFTA is also meant to be the first milestone of the CFTA formation process aiming to cover the entire continent. That is why keeping the door open for all the other interested African states is very vital.

Consequently, the current TFTA agreement under its Article 41 allowed the possibility of being a member of the TFTA through accession. This article is essential to help the planned CFTA process since the more states get covered by it, the less the required negoti-

⁹² Article 3

⁹³ See more at: http://www.naftanow.org/about/default_en.asp

⁹⁴ Article XXXIII of GATT, 2204 of NAFTA and 30.4 of TPP

ation later for the CFTA. For example, if ECOWAS with its 15 member states decides to accede, 41 of the 54 African states could easily be covered by the FTA.

Nevertheless, there is another facet of inclusiveness which was planned since 2008 in the original initiative but did not come to reality. According to the 2008 Tripartite Summit, the three RECs were supposed to immediately start working towards a merger into a single REC with the objective of fast tracking the attainment of the AEC. The Tripartite Task Force was also supposed to develop a roadmap for the implementation of this merger⁹⁵. But under the current agreement, these RECs are neither losing their status of being an independent REC nor parties yet to the TFTA Agreement. This defeats the original purpose of the TFTA, to curb problems related to multilateral and overlapping membership and collect the scattered efforts of integration by transforming the three existing RECs into one strong FTA. Therefore, in that sense, the TFTA did not move the region forward in to inclusivity and the harmony that could have come along with it.

3.1.4 The nature of the organization

The WTO was born out of negotiations, and most of what it does is the result of negotiations. There were eight rounds of negotiations which lead to the current WTO. The bulk of the WTO's existing work comes from the 1986-94 negotiations called the Uruguay Round and earlier negotiations under the GATT. Most importantly, the WTO is currently the host to new negotiations, under the “Doha Development Agenda” launched in 2001.⁹⁶ Therefore, the WTO is organized to be not only a rule based regime but also a forum of negotiation. The WTO agreements are not something static rather there are ongoing negotiations on them so WTO is organized to make reformations possible to make the world trade better from time to time.

Regarding the other trade blocs, for examples in NAFTA's case even if there is a possibility to amend the underlying treaty⁹⁷, it was intended to be a permanent one⁹⁸. That does not mean NAFTA hinders any negotiations after it entered in to force. What it means is- that the NAFTA agreement tried to encompass as much trade matters as possible and it does

⁹⁵ The final communique, Article 13

⁹⁶ See more at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm

⁹⁷ Article 2202

⁹⁸ Gallagher, Wise and Peters (2009) p.1

not seem to foresee a massive kind of reformation in the future. Obviously, stability and predictability encourages trade and investment.

However, the TFTA seems to follow the WTO trend in creating a platform of negotiation. It uses a phase-based approach to negotiations.⁹⁹ Article 36 of its agreement also allows the tripartite States from time to time to conclude such Protocols and Annexes as are necessary. Then they may be adopted by the Tripartite Council of Ministers and form an integral part of the Agreement.

This approach is good for at least two reasons. First, the stability and predictability that comes with a concretely settled complete agreement is very important. But, owing to different challenges, the TFTA agreement cannot be comprehensive at once, so making the TFTA also a forum of negotiation is nothing but indispensable. Second, it should not be forgotten that the TFTA was to serve the continental integration agenda too. The CFTA is depending on it and for instance if ECOWAS decides to use the platform and join the negotiation, 41 of the 54 African states can be covered by the FTA and that serves the continental integration agenda.

Nevertheless, the WTO is an organization which is equipped by a suitable structure that allows it to play its role competently. The WTO process works well because it has in addition to other organs, a Secretariat in Geneva, with 621 staff on the regular budget and a Director-General to oversee it.¹⁰⁰ Conversely, the TFTA lacks an independent secretariat. It is the Tripartite Task Force of the Secretariats of the three RECs which is intend to coordinate the implementation of the Tripartite work program and provide secretariat services to the Tripartite arrangement.¹⁰¹ Having a Task Force encompassing the secretariats of already functioning RECs, with already established responsibility and agenda cannot be equated to an independent secretariat, which is undividedly devoted to the TFTA responsibility and agenda. Thus, the platform created by the TFTA can facilitate further integration in the continent but the task of backing it by a suitable secretariat still requires more work.

⁹⁹ Article 44 and 45

¹⁰⁰ WTO (2010) p.140

¹⁰¹ Article 29(d)

3.1.5 Dispute settlement(DS)

It is hard if not impossible to ensure that states comply with what they have agreed without a practical DS mechanism(DSM). So, it is important for trade blocs to have a well-organized and functioning DSM.

For the WTO, DS is a third important side of its work, parallel to the work of providing the legal ground-rules for international commerce and hosting negotiations. Trade relations often involve disputes. A dispute arises when a member government believes another member government is violating an agreement or a commitment that it has made in the WTO. Moreover, agreements, including those painstakingly negotiated in the WTO system, often need interpretation. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the DS process written into the WTO agreements.¹⁰²

The authors of these agreements are the member governments themselves and as such the ultimate responsibility for DS also lies with them, through the DS Body. Procedurally, in general the WTO Members must first attempt to settle their dispute through consultations, but if these fail the Member initiating the dispute may request that a panel examine and report on its complaint. The DS understanding(DSU) provides for Appellate Body (AB) review of panel reports, panels to determine if a defending Member has complied with an adverse WTO decision by the established deadline in a case, and possible retaliation if the defending Member has failed to do so.¹⁰³ In conducting their work, WTO panels and the AB are guided by Article 3.2 of the DSU, which provides that the WTO DSM “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”¹⁰⁴

Notably, Chapter 28 of the TPP establishes a State-to-State DSM for the 12 TPP Parties. However, since the TPP is not ratified yet and NAFTA’s DSM was there for a long time, the following discussion covers the NAFTA mechanism. Considering that the three NAFTA parties already trade hundreds of billions of dollars’ worth of goods annually, one

¹⁰² See more at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm

¹⁰³ Shedd, Murrill and Smith (2012) p.i

¹⁰⁴ Id, p.4

has to expect that many trade-related controversies will arise amongst them. As a result, NAFTA's ability to settle disputes effectively is one aspect of the Agreement that has been particularly crucial to its overall success. NAFTA contains a relatively complex set of distinct DS structures. These structures include a general DS scheme for controversies concerning the interpretation, application, or breach of the Agreement (NAFTA, Chapter 20, § B), a specific device for resolving antidumping and countervailing duty disputes (NAFTA, Chapter 19) and a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal (NAFTA, Chapter 11). In addition, the NAFTA side agreements on the environment and labor each contain their own separate DSM.¹⁰⁵

One of the unique things about NAFTA is its overlapping DSM by virtue of its article 2005. Comprehensive DSMs under both the NAFTA in its Chapter 20 and the WTO DSU have provided the three NAFTA governments with choice of forum alternatives that effectively do not exist for any other group of nations.¹⁰⁶ The NAFTA creates a "Free Trade Commission"(FTC) composed of the trade ministers of the three NAFTA governments, who have the responsibility of overseeing the implementation of the agreement and DS. The Agreement also creates a NAFTA secretariat with national sections to provide assistance to the NAFTA FTC and to the panels established under Chapters 19 and 20.¹⁰⁷

NAFTA also has a three-step DS procedure. It begins with a request for consultations.¹⁰⁸ If consultation fails to resolve the dispute within a stated time period, usually within thirty days of the request, the complaining Party can request for good offices, conciliation, or mediation by the NAFTA FTC.¹⁰⁹ The third step comes after the laps of thirty days or after such other period as the consulting Parties may agree. If the good office fails to work, either Party may request the convening of an arbitral panel.¹¹⁰ Once a Party has initiated DS under Chapter 20, it is precluded from seeking parallel action under the WTO and vice

¹⁰⁵ Lopez (1997) p.165

¹⁰⁶ Gantz (1999) p.1026

¹⁰⁷ Id, p.1038

¹⁰⁸ Article 2006

¹⁰⁹ Article 2007

¹¹⁰ Article 2008

versa.¹¹¹ Chapter 19's DSM applies solely to antidumping and countervailing duty controversies.

When it comes to the TFTA, it is hard to say the three RECs forming it have the experience of an effective DS and decision implementation for, at least, the following two reasons. Firstly, like most of the other African DSs, trade DS in Africa has not received as much promotion as it should. In fact, in some jurisdictions of the three RECs, trade disputes have not ever been heard. This is despite the existence of trade DSM within the three RECS. For a variety of reasons, member states in the three RECS clearly need to improve their commitment to a rules-based regional integration agenda. Integration not only relates to the benefits stemming from the alliance, but also the practical reality around issues of obedience and the enforcement of agreements.¹¹² This leads to the other reason.

Secondly, there is resistance to comply with the REC court\tribunal's decision. The above discussed incident of the SADC tribunal, where the Zimbabwean government refused to comply with the decision of the tribunal and the consequent suspension of the court is a good example.¹¹³ The overriding role of DS bodies in regional integration initiatives is to foster predictability, transparency, accountability and participation of all member states as well as individuals conducting business in them¹¹⁴. And these kinds of resistances easily defeat the purpose of courts by diminishing the courts authority and the trust of its service consumers.

The TFTA could have centralized all the three REC tribunals and their DSM in-to a one strong DSM as per the plan at the beginning of the integration process but it did not¹¹⁵. Only in the event of inconsistency between the TFTA agreement and the treaties and instruments of COMESA, EAC and SADC, does the Article establishing the DSM of the TFTA, Article 30 (7) give priority to the TFTA agreement, which is limited to the extent of the inconsistency.

¹¹¹ Article 2005(6)

¹¹² Siziba (2016) p.12

¹¹³ Ndlovu (2011) p.63

¹¹⁴ Siziba (2016) p.2

¹¹⁵ The final communique, Article 13

Regarding its procedure, the TFTA established a multi-tiered DSM.¹¹⁶ Like in the case of NAFTA, states should first seek to resolve their conflict amicably, by engaging in consultations and negotiations. Only when this fails the dispute can be referred to the Tripartite DSB. The case can be considered by a panel or and then by an appellate body. DS among the Tripartite States is expected to imply removal of a measure not conforming with the provisions of the Agreement or causing nullification or impairment of a benefit under such provision.

Finally, effective DS and implementation of decisions are the backbone of any properly functioning trade integration and practice shows the mere existence of a tribunal may not be enough to realize them. As a result, the TFTA states needs to consider more stringent enforcement mechanisms than the mechanisms of the three RECs and a means to empower the TFTA DSB.

3.2 How meaningful are the concluded agreements on the already covered trade area?

The trade matters covered by the TFTA have been highlighted above. In general, compared to the areas covered by the WTO, NAFTA and TPP, what is covered by the current TFTA agreement is just one segment of the three major trade areas namely, trade in goods. This agreement is organized in to 12 parts and 45 articles. As to the second phase negotiations, Article 45 provides a time-frame of 24 months (up on entry in to force of the agreement) to conclude negotiations on trade in services, competition policy, intellectual property rights, cross boarder investment and other trade-related matters.

The remainder of the Agreement contains those provisions which are typical of a FTA for trade in goods. The main text provides for basic commitments regarding non-discrimination, tariff liberalization, rules of origin, non-tariff barriers, trade remedies, standards, exceptions, dispute settlement, institutional aspects, infant industries, SPS and TBT issues, and customs cooperation. The detail regarding the nature and scope of obligations appears in a number of Annexes. Some of these (on tariffs, rules of origin and trade remedies) are still to be finalized through further negotiations.¹¹⁷ Hence, the following

¹¹⁶ Article 30

¹¹⁷ Erasmus (2015)

paragraphs will analyze how meaningful the agreements are specially from the unsettled matters of tariff liberalization, rules of origin and trade remedies perspective.

3.2.1 Tariff liberalization

Tariff liberalization is the essence of a FTA. The WTO rule on trade in goods, which exempts the formation of trade blocs from the non-discrimination rule puts some criteria that must be met by trade blocs. One of these criteria is eliminating trade barriers substantially within the created trade bloc¹¹⁸. The NAFTA obviously meets the criterion provided under the GATT and GATS as it eliminates substantially all tariffs and other restrictive regulations of commerce on trade between its member states and eliminates substantially all barriers on trade in services in a substantial number of sectors covered by the Agreement.¹¹⁹ Further, through the TPP, the participating countries seek to liberalize trade and investment and establish new rules and disciplines in the region beyond what exists in the WTO.¹²⁰ Hence, the TPP eliminates or reduces tariff and non-tariff barriers across substantially all trade in goods and services and covers the full spectrum of trade, including goods and services trade and investment, so as to create new opportunities and benefits for businesses, workers, and consumers.¹²¹

Likewise, despite its scope, the inclusion of liberalization of trade in goods would be necessary and unavoidable in the TFTA agreement.¹²² Accordingly, Article 9 of the TFTA agreement first limits members from imposing new import duties or charges of equivalent effect except as provided for under the agreement. Second, it provides a room to exempt the application of liberalization on some goods that are not subject to liberalization. Finally, this article states that, the Tripartite States are expected to achieve the elimination of import duties progressively in accordance with schedules contained in Annex I. Unfortu-

¹¹⁸ Article XXIV of GATT

¹¹⁹ See more at: <http://www.jeanmonnetprogram.org/archive/papers/99/990204.html>

¹²⁰ Fergusson, McMinimy and Williams (2015) p.1

¹²¹ see more at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>

¹²² Shayanowako (2011) p.12

nately, Annex I on Elimination of Import Duties is one of the three outstanding issues, which the states could not manage to settle before the lunch of the TFTA¹²³.

This failure is mainly due to economic factors. In Africa in general, including the TFTA region, states generate a varying amount of their government revenue from customs duties. As a result, the importance of import duties and their future loss varies significantly from state to state. For instance, as can be seen from **Figure 2**, the government of Uganda receives more than 50 % of its revenue from customs duties, while the government of Angola receives only 5% of its revenue from customs duties. The details of this challenge is assessed in the next part of this thesis but in general the tariff liberalization is not going to affect all of the TFTA states the same way and it was\is a challenge. Consequently, at the time of the lunch of the TFTA, not all Tripartite countries had finalized their tariff offers. The Third Tripartite Council of Ministers meeting held in Sharm El Sheikh has given countries until June 2016 to finalize their offers¹²⁴. Therefore, the overdue negotiation on this matter is still pending.

Nevertheless, it is not as if every TFTA state’s position is new to the other TFTA states. There are already established free trade relations not only among the states of each of the REC internally but also between the states of a REC and another TFTA state. Table 2 demonstrates it clearly.

Table 2: Full permutation of tariff negotiations

No.	Column 1	Column 2	Column 3
	Country	No negotiations needed – already trading on FTA terms with these countries	Negotiations needed
1	EAC (Burundi, Kenya, Uganda, Rwanda and Tanzania)	11 countries: Comoros, Djibouti, Egypt, Libya, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe	10 countries: SACU, Angola, Eritrea, Ethiopia, Mozambique and DRC
2	SACU (Botswana, Lesotho, Namibia, South Africa and	5 countries: Madagascar, Malawi, Mauritius, Zambia and Zimbabwe	16 countries: EAC, Angola, Djibouti, DRC, Comoros, Egypt, Ethiopia,

¹²³ Article 44

¹²⁴ Luke and Mabuza (2015) p.5

	Swaziland)		Eritrea, Libya, Mozambique, Seychelles and Sudan
3	Angola	None	25 countries: EAC, SACU, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, Sudan, Zambia and Zimbabwe
4	Comoros	15 countries: EAC, Djibouti, Egypt, Libya, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe	10 countries: SACU, Angola, DRC, Ethiopia, Eritrea and Mozambique
5	Democratic Republic of Congo (DRC)	None	25 countries: Angola, Botswana, Burundi, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Lesotho, Libya, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe
6	Djibouti	15 countries: EAC, Comoros, Egypt, Libya, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe	10 countries: SACU, Angola, DRC, Mozambique, Eritrea and Ethiopia
7	Egypt	15 countries: EAC, Comoros, Djibouti, Libya, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe	10 countries: SACU, Angola, DRC, Eritrea, Ethiopia, and Mozambique
8	Eritrea	None	25 countries: EAC, SACU, Angola, Comoros, DRC, Djibouti, Egypt, Ethiopia, Libya, Madagascar, Mozambique, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe
9	Ethiopia	None	25 countries: EAC, SACU, Angola, Comoros, DRC, Djibouti, Egypt, Ethiopia, Libya, Madagascar, Mozambique, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe
10	Libya	15 countries: EAC, Comoros, Djibouti, Egypt, Madagascar, Malawi, Mauritius, Seychelles, Sudan, Zambia and Zimbabwe	10 countries: SACU, Angola, DRC, Eritrea, Ethiopia and Mozambique
11	Madagascar	21 countries: EAC, SACU, Comoros, Djibouti, Egypt, Libya, Malawi,	4 countries: Angola, DRC, Eritrea and Ethiopia

		Mauritius, Mozambique, Seychelles, Sudan, Zambia and Zimbabwe	
12	Malawi	21 countries: EAC, SACU, Comoros, Djibouti, Egypt, Libya, Madagascar, Mauritius, Mozambique, Seychelles, Sudan, Zambia and Zimbabwe	4 countries: Angola, DRC, Eritrea and Ethiopia
13	Mauritius	21 countries: EAC, SACU, Comoros, Djibouti, Egypt, Libya, Madagascar, Malawi, Mozambique, Seychelles, Sudan, Zambia and Zimbabwe	4 countries: Angola, DRC, Eritrea and Ethiopia
14	Mozambique	10 countries: SACU, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe	15 countries: EAC, Angola, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Seychelles and Sudan
15	Seychelles	15 countries: EAC, Comoros, Djibouti, Egypt, Libya, Malawi, Madagascar, Mauritius, Sudan, Zambia and Zimbabwe	10 countries: SACU, Angola, DRC, Eritrea, Ethiopia and Mozambique
16	Sudan	15 countries: EAC, Comoros, Djibouti, Egypt, Libya, Malawi, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe	10 countries: SACU, Angola, DRC, Eritrea, Ethiopia and Mozambique
17	Zambia	21 countries: EAC, SACU, Comoros, Djibouti, Egypt, Libya, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, Sudan and Zimbabwe	4 countries: Angola, DRC, Eritrea and Ethiopia
18	Zimbabwe	21 countries: EAC, SACU, Comoros, Djibouti, Egypt, Libya, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, Sudan and Zambia	4 countries: Angola, DRC, Eritrea and Ethiopia

Source: TMSA

As shown in the table, not all the 26 TFTA states are expected to negotiate with each other. States, which are listed in **column 1**, have established terms of a FTA with the states listed in the corresponding **column 2** but not with the states which are listed in the corresponding **column 3**. For example, the five EAC states, which are the number one in the **column 1** do

not need to negotiate with the 11 states listed in the corresponding **column 2** but they have to negotiate with the remaining 10 states listed in the corresponding **column 3**.

At the end of the negotiation, the TFTA aims at liberalizing 100 percent of tariff lines taking into account the usual general, specific and security exceptions. According to the WTO, tariff line is a product as defined in lists of tariff rates¹²⁵. While tariff offers have not yet been finalized for all countries, the five members of EAC and five members of the SACU, along with 10 members of COMESA, made tariff offers of 100 per cent liberalization on a reciprocal basis.¹²⁶ However, in addition to deciding how far tariffs will be cut, countries also have to decide how quickly the cuts will be made. It is unusual for all cuts to be made upon entry into force of the agreement; phase-ins are commonly employed¹²⁷.

It should be noted though that the modalities for tariff negotiations agreed among Tripartite countries in 2013 are not ambitious at all: 60 to 85 per cent of tariff lines are to be liberalized upon entry into force of the Agreement, while the remaining 15 to 40 per cent will be negotiated over a period of five to eight years¹²⁸. This presents a challenge for countries that have significantly liberalized trade regimes (with more than 80 percent of their tariff lines at 0 per cent MFN) vis-à-vis the principle of building on the acquis.¹²⁹ For instance, Mauritius's¹³⁰ trade regime is already liberalized this way and the principle of building on the acquis requires Mauritius to continue liberalizing without making the other TFTA states commit as much or at least requiring them to commit progressively.

Another challenge relates to the issue of sensitive products. Given that trade liberalization can have negative effects on a country's economy, certain products may be exempted from tariff liberalization and are designated as sensitive products. The TFTA should allow for parties to protect their sensitive industries through a regime of sensitive products on which duty and quota free market access is restricted¹³¹. However, what constitutes a sensitive product differs from REC to REC and even within the RECs; and there are no common

¹²⁵ See more at: https://www.wto.org/english/thewto_e/glossary_e/tl_e.htm

¹²⁶ UNECA (2016) p.14

¹²⁷ TMSA p.14

¹²⁸ UNECA (2016) p.14

¹²⁹ Luke and Mabuza (2015) p.5

¹³⁰ WTO, ITC and UNCTAD (2016) p.118

¹³¹ Shayanowako (2011) p.12

criteria used to determine sensitive products. SADC trade policy advisor Paul Kalenga is quoted as saying, ‘In the TFTA negotiations, officials have a tendency to list everything that a country produces as ‘sensitive’ These products are then excluded”, He further adds that countries should not be allowed to simply exclude whole sectors from the FTA, they should justify exclusions on the basis of development policies.¹³² There have been discussions around the issue of sensitive products within the individual RECs and within the Tripartite FTA itself thus emphasizing the significance of this issue.¹³³

Therefore, in order to have a meaningfully functioning FTA, the TFTA states need to make their tariff liberalization agreement concrete by settling Annex I. This might involve drafting some kind of compensation mechanisms for the states who will suffer from the immediate change and revenue lose and also a determination to base their selection of sensitive products on genuine public policy objectives.

3.2.2 Rules of origin

Rules of Origin (RoO) are instruments used to determine the real source and economic origin of traded goods. Different types of RoO however serve different objectives. Non-preferential RoO are used by countries for various commercial policy objectives, and have criteria that define the origin of goods with the purpose of capturing and classifying trade flows for statistical and record-keeping purposes and so forth. On the other hand, preferential RoO are those contained in specific preferential trade arrangements (PTAs) and are used to determine the economic origin of a traded good in the context of trade within a specific PTA.¹³⁴

RoO are a key factor determining whether trade agreements meet their objectives as they ensure only eligible products receive tariff preferences.¹³⁵ When countries agree to allow duty-free/reduced-duty imports from each other, it is necessary to verify that shipments claiming the resulting preferential treatment actually originate in one of the partner coun-

¹³²Nderitu (2012) p.4

¹³³ Fundira (2011) p.3

¹³⁴ Virág-Neumann (2009) p.2

¹³⁵ Brenton, Flatters and Kalenga (2005) p.iv

tries. But, the way that the RoO are designed and implemented will have profound implications for trade flows and the extent of regional integration.¹³⁶

With regard to the advanced trade blocs, a key feature of the EU and NAFTA models of RoO is that these rules are specified at a very detailed level on a product-by-product basis and can be very complex—they often run to well over 200 pages.¹³⁷ Since the TFTA's draft RoO resembles a bit more the EU RoO model, the next paragraph discusses the EU RoO briefly.

The EU's concept of origin of goods comes from the idea that goods have an economic national identity that is determined through the various elements under each trade pact the EU has with individual states, geographically grouped states, trading blocs or groups of countries. The European Commission further distinguishes between two types of origin of goods: those with preferential access and those with non-preferential access. Goods entering or exiting the Community are identified via the Combined Nomenclature (CN) using headings, sub-headings, sub-sub-headings and so forth to determine which rate of customs duty applies and how the goods are treated for statistical purposes. The classification of goods is critical in determining not only the rate of duty but also which rules of origin threshold apply to the specific good.¹³⁸ The EU operates a complex set of rules of origin, with layers of institutions involved in administering it.

It is very difficult to envisage most African states being able to implement such complex systems, because the attempt to do so is quite likely to generate avoidance and, therefore, corruption.¹³⁹ The current negotiations towards a TFTA RoO have been significantly complicated because of the fundamental differences between the list rules of the SADC and the generic rules of COMESA and the EAC. The SADC RoO are modelled on the EU rules¹⁴⁰.

However, in pursuing a single set of rules, there should be a drive towards more objective, understandable, fair, consistent and predictable rules. The approach towards a single set of rules should start with the adoption of the principle of simplicity. And the way this can be

¹³⁶ Flatters (2012) p.7

¹³⁷ Brenton (2011) p.168

¹³⁸ Draper, Chikura and Krogman (2016) p.15

¹³⁹ Id, p.18

¹⁴⁰ Kalaba (2009) p.126

done is by designing rules in such a way that they converge towards those which are the simplest amongst the three trade blocs. Besides, economic theory suggests that preferential RoO are used as an instrument to avoid trade deflection but with the proliferation of RTAs since the beginning of the 21st century, they may increasingly play an additional role as "hidden protectionism," that offsets the benefits of tariff liberalization.¹⁴¹ However, for the TFTA, the primary objective of the rules should be to prevent trade deflection. And where possible, that should also be the only objective.¹⁴²

Presently, article 12 and Annex 4(draft) of the TFTA Agreement set out the criteria and conditions for goods to qualify for preferential RoO based on a product list of rules. At the time of the launch, however, only about 25 percent of the product list had been negotiated and agreed. The Third Tripartite Council of Ministers undertook to finalize the Tripartite RoO within 12 months following the TFTA launch.¹⁴³ In general, the limited progress the TFTA made in this area shows, not only how difficult harmonizing the RoO of the involved RECs is but also the need to rethink the model they are following so they can make it more suitable for the TFTA's regional condition.

3.2.3 Trade remedies

Trade remedies(TR) are contingent measures enacted to defend local producers in certain circumstances. They take three principal forms: anti-dumping measures, countervailing measures and safeguard measures.¹⁴⁴ Safeguard measures are temporary trade restrictions, typically tariffs or quotas, which are imposed in response to import surges that injure or threaten serious injury to a competing industry in an importing nation. Antidumping duties are tariffs in addition to ordinary customs duties that are imposed to counteract certain unfair pricing practices by private firms that injure or threaten to cause material injury to a competing industry in an importing nation. Whereas, countervailing duties are tariffs in addition to ordinary customs duties that are imposed to counteract certain subsidies be-

¹⁴¹ Donner (2013) p.5

¹⁴² Kalaba (2009) p.130

¹⁴³ Luke and Mabuza (2015) p.5

¹⁴⁴ Illy (2013) p.1

stowed on exporters by their governments, again when they cause or threaten to cause material injury to a competing industry.¹⁴⁵

WTO laws on TR are very complex and demanding to master. Many African countries do not possess the economic and legal expertise, and the resources, to fully meet these requirements when they would have to carry out investigations.¹⁴⁶ Only four countries in Africa—Egypt, Morocco, South Africa, and Tunisia – have functional TR mechanisms and have ever employed such measures to defend their domestic producers.¹⁴⁷ From those countries, only Egypt and South Africa belong to the TFTA region.

Despite this, the three TFTA RECs have TR rules and those rules are more or less similar to the WTO rules. For instance, in various cases, the TR regulations of the COMESA Main Regulation draw verbatim from the existing WTO agreements¹⁴⁸. The most detailed disciplines concerning safeguards are contained in Annex VI to the Protocol Establishing the EAC CU and they mirror, to large extent, the safeguard provision of the WTO, albeit with some modifications¹⁴⁹. And article 20 of the SADC Trade Protocol is composed of six paragraphs containing a series of requirements imposed on Members wishing to enforce safeguard measures. The Article is modelled on and inspired by the WTO's Agreement on Safeguards and explicit references are made to it¹⁵⁰.

When it comes to the TFTA itself, TR and DS Articles 16-20 and Annex 2 of the TFTA Agreement provides for the application of antidumping, countervailing and safeguard measures to address dumping, subsidization, imports surges, etc. but the technical details are yet to be finalized. There is a commitment to complete this body of work within 12 months following the launch. Article 30 and Annex 10 of the TFTA Agreement provides for a DS Body and its powers which include, among others, the establishment of panels and an appellate body, surveillance over the implementation of rulings and recommendations of panels and the appellate body.¹⁵¹

¹⁴⁵ Sykes (2005) p.2

¹⁴⁶ Illy (2013) p.27

¹⁴⁷ Id, p.3

¹⁴⁸ TMSA p.6

¹⁴⁹ Id, p.11

¹⁵⁰ Id, p.13

¹⁵¹ Luke and Mabuza (2015) p.5

Like the case of the three TFTA RECs, the trade remedy articles¹⁵² of the TFTA agreement also make an explicit reference to both WTO agreement and the agreements of the involving RECs. Nevertheless, the question of whether or not African countries should embrace trade remedies activity to a greater extent is a much-debated one. Some contend that Africa is plagued by so many problems and priorities, and that instead of using the scarce resources of the continent to build up trade remedy systems, these countries should rather invest in much more needed sectors such as infrastructure, education, healthcare, etc. No doubt, there is much truth in this argument. Indeed, how rational would it be to spend huge amount of money to set up even more expensive trade remedy authorities which may end up handling one or two cases per year while urgent investments are needed elsewhere?¹⁵³.

The counter argument on the other hand reveals that, development story in this world has always been a story of industrialization. And one may wonder if a genuine industrialization process can take place in today's world, with all protections being cut off as a result of WTO and free trade agreements, among others. Most countries that are currently industrialized used protectionist policies when they were at their early stages of development. The British industrialization between 1770 and 1830, the North Atlantic revolution between 1873 and 1914, the South-East Asia miracle between 1950 and 1995 all occurred when tariffs trend was high. Africa would thus be the only region in history that would have to industrialize without these policies. Therefore, as blatant protectionism is no longer permissible or desirable, mastering "smart" protection instruments such as TR is vital for developing world and African countries in particular.¹⁵⁴

To conclude, the continent of Africa and the TFTA region have much to prioritize and much work to do. However, since TR are an important component for the achievement of overall trade liberalization¹⁵⁵, they should not be ignored. The TFTA negotiation with regard TR, started late and it was agreed that interim provisions will apply while finalizing a Tripartite mechanism¹⁵⁶. Accordingly, to achievement an overall trade liberalization the states of TFTA should proceed and finalize the TFTA TR mechanism.

¹⁵² Article 16-18

¹⁵³ Illy (2013) p.24

¹⁵⁴ Id, p.25

¹⁵⁵ Denner (2009) p.43

¹⁵⁶ Luke and Mabuza (2015) p.6

Finally, this part shows the amount of effort the TFTA with its commendable integration ambition needs to exert to reach into its planned destiny as some of the most relevant issues of a FTA are not settled yet. The next chapter assess why the progress of the TFTA movement is where it is now and the challenges that limited it. This can be helpful to indicate how the future should be planned.

Chapter four

4 The key challenges of the TFTA formation process

The draft TFTA Agreement, which was intended to be used by Member States as the basis for negotiations, contained 14 Annexes covering various complementary areas necessary for effective functioning of a regional market. The main proposal was to establish a tariff-free, quota-free, and exemption free trading arrangement, with simplified rules of origin¹⁵⁷. Such a comprehensive and liberalized trade agreement could have produced a stronger single market that can rescue the continents poor economy.

However, despite the initiative and the consequent move made by the three TFTA RECs, it is hard to say the results achieved so far are satisfactory both in terms of comprehensiveness and trade liberalization. Bearing in mind that tripartite integration is an ongoing process, this chapter examines why it was\is challenging to conclude the TFTA agreement in a more meaningful way.

It is plausible to categorize the interrelated and multifaceted challenges of the TFTA formation process as political, economic and legal. Some aspects of those challenges are general, in a sense that they are not directly linked with the above analyzed three unsettled matters of trade in goods. Whereas, the others explain why those three matters were difficult to settle. Moreover, a single factor can contribute to multiple challenges and the current outcome is arguably their cumulative effect. It is important to assess all the three categories of challenges because all of them have affected and still are affecting the process in a non-negligible way. That makes it hard if not impossible to portray the full picture of the process without raising all of them.

4.1 Political challenges

Even though the degree varies, in all the COMESA, EAC and SADC RECs there is a gap between the plan and actual implementation. In addition to other factors, this is due to domestic politics and the political will of the member states. In other words, domestic politics and political will of states may hinder them in acting according to their agreed arrangement. That does not mean their effect is limited only to the implementation stage. Rather it can also come in to

¹⁵⁷ Hartzenberg (2013) p.2

picture at the beginning of an integration process and be directly or indirectly the reason why states or RECs do not successfully conclude an agreement which builds up their integration as they initially anticipate. Treaties reflect politics and their negotiation and ratification reflects, the power, organization and aspiration of the governments who negotiate and sign them¹⁵⁸.

4.1.1 Domestic politics

Domestic politics firstly the internal political stability of states. But both internal and external conflicts can affect it. Africa entertains significant domestic instability and protracted conflicts¹⁵⁹. The area covered by the TFTA also has a history of political instability. For example, in the eastern part of the TFTA, there is a protracted conflict in South Sudan and Sudan, Somalia and the Great Lakes region¹⁶⁰. In Southern Africa, two countries have relatively recently emerged from prolonged conflict (Angola and Mozambique) whilst a third has managed to avoid overt conflict at the expense of chronic political and economic instability (Zimbabwe)¹⁶¹.

Such conflicts can affect States' ability and general energy to negotiate and integrate with other states. Moreover, states would be more open to ratify an agreement and integrate with states that are more allied than antagonistic to them. Of course, sometimes states ratify an agreement with a motive other than anticipated compliance. For instance, the single strongest motive for ratification in the absence of a strong value commitment is the preference of nearly all governments to avoid the social and political pressure of remaining aloof from a multilateral agreement to which most of their peers have already committed themselves¹⁶². However, if the states are ratifying an integration agreement with the intention of compliance, it is only logical that they would do it more openly and sincerely with their allies. Trade and economic integration involves give and take and a certain degree of integration demands a certain amount of trust between the involved states. The more the involved states are allied to each other and trust each other, the more likely that are open to integration. Thus, the TFTA formation process cannot be exempted from the influence of political tensions stemming from domestic politics and political instability in the region.

¹⁵⁸Simmons (2009) p.12

¹⁵⁹ Ibrahim (2014) p.18

¹⁶⁰ Ibid

¹⁶¹ Draper (2010) p.9

¹⁶² Simmons (2009) p.13

4.1.2 Political will

Political will is the driver of state action. The TFTA formation challenges related to it can be twofold, depending on its existence and nonexistence. First, more than half of the current world trade occurs within trading blocks, and nearly every country in the world is a member of one or more regional integration agreements. Africa is also going through different waves of regionalism¹⁶³. With very few exceptions, African countries belong to more than one REC, in a continent where 17 regional integration agreements are in place ¹⁶⁴. Notably, as discussed more below political reasons even more than economic interests are often stated as the main determinant for joining multiple RECs ¹⁶⁵.

Regarding the particular TFTA area, apart from Mozambique, every country in the sub-region belongs to more than one REC.¹⁶⁶ Moreover, this area comprises states like Kenya and Burundi, which belong to more than three RECs. Therefore, political will, driven by different political interests has created the currently existing situation of multiple and overlapping REC memberships. Hence, the following para-graphs discuss the interesting implication it has on the TFTA formation.

4.1.2.1 *Multiple membership*

Multiple memberships occur when states become partakers in more than one REC and there are some advantages attached to it. For instance, initially most RECs were established for purposes other than being a building block of the African integration. The SADCC was formed in 1980 by ‘front line states’ to coordinate development projects that would reduce their economic dependence on apartheid South Africa. Whereas, the PTA of Eastern and Southern Africa was created primarily as a building block of the AEC. As the SADCC became SADC and the PTA became COMESA, their activities expanded and led to greater overlap of mandates.¹⁶⁷ Thus, initially the RECs had relatively narrow and distinct purposes to pursue and there was no functional overlap of their mandates. Such kinds of circumstances allowed states to gain different kinds of benefits by belonging to different REC. Besides,

¹⁶³ Hailu (2014) p.13

¹⁶⁴ ADBG (2014) p.15

¹⁶⁵ UNECA and AU (2006) p.52

¹⁶⁶ Draper, Halleson and Alves (2007) p.9

¹⁶⁷ ADBG (2014) p.17

some RECs might offer a deeper integration and the others a larger market. For example, Uganda belongs to both the EAC and COMESA and the possibility of multiple memberships enables Uganda to capture the benefits of a deeper integration through EAC and a larger market through COMESA.

However, being an effective rather than solely a symbolic member of a REC requires investment of time, money, manpower and other resources. If the states are participating in more RECs than what their resources afford them to, eventually that will negatively affect the performance of all the involved RECs. For example, according to the UNECA and the AU's joint assessment, except for very few non-TFTA RECs¹⁶⁸, no RECs receives full contributions from all its members. On average, a third of members fail to meet their contribution obligations, and in some cases (CEN-SAD, ECCAS, and IGAD) more than half do not pay. One of the reasons which explains this poor performance is that countries are spread too thinly among the many RECs.¹⁶⁹ Accordingly, the advantages of multiple memberships can be realized only if the state can afford handling it. Otherwise, the RECs may underperform, which is arguably what is currently happening in Africa.

Moreover, if all the RECs have similar goals, there is no point in investing in all of them. It not only defeats the advantage of multiple membership but also results duplication of efforts, which most of African states cannot afford. For instance, the above- mentioned assessment revealed that from 14 REC, eight of them acknowledged that duplication of integration efforts is a problem, especially in the programs related to trade facilitation and trade and market integration.¹⁷⁰ To be sure, the three TFTA RECs are were endorsed to be the building blocks of the continent's integration. They do share common purpose and the efforts they exert, goes to more or less similar goals. And the TFTA was intended to avoid precisely the problems of multiple memberships this through merger¹⁷¹. However, according to the current TFTA agreement, the RECs did not merge and the problem remains. In my view, the outcome of the first round negotiation could have been better if the TFTA was the remaining sole trade bloc after the negotiation. Instead, it is simply one of the alternative trade blocs, only with a bigger number of members.

¹⁶⁸ CEMAC, UEMOA, and the much smaller IOC

¹⁶⁹ UNECA and AU (2006) p.59

¹⁷⁰ Id, p.55

¹⁷¹ The final communique, Article 13

4.1.2.2 *Overlapping membership*

Overlapping memberships, on the other hand, occur when two RECs share members. The possibility of multiple membership causes overlapping membership. In initiatives like the TFTA, when the participating RECs share members there will be less negotiation given the REC's degree of integration is relevant. To put it differently, since all COMESA, EAC and SADC are already FTAs, the member states, which belong to the intersections already have an agreement with both sides and that avoids negotiations. Moreover, it can also be beneficial in terms of facilitating useful experience sharing between different RECs through the shared member states. However, many analysts believe that overlapping memberships in RECs cause complications and inconsistencies due to conflicting obligations and divided loyalty¹⁷². Overlapping memberships not only hinder the further deepening of integration beyond FTA on the later stages (as states can't have more than one CET with more than one REC), but also it can undermine the TFTA kinds of integration efforts, for instance when the trade rules differ. Further examination of these two challenges is included in the below, 'Legal challenges' section.

To conclude, the problems of multiple and overlapping memberships constitute a 'spaghetti bowl' that hinders regional integration by creating a complex entanglement of political commitments and institutional requirements adding significantly to the costs of conducting intra-regional business. Africa, with its weak states and institutional capacities can afford none of these things.¹⁷³

When it comes to the absence of political will, trade experts say that the future of free trade is largely in the hands of politicians. According to the words of Barclays Africa chief executive Maria Ramos, 'You cannot get the rules of the game harmonized without getting the people who make these rules around the table'.¹⁷⁴ As pointed out in a recent report for UNCTAD, the solution to Africa's challenges, including accelerated integration, is less economic than political in nature. A lack of political will in relinquishing national priorities in favor of regional ones can hold back the progress of any FTA including the TFTA. Aligning long-term national

¹⁷² Ndomo (2016) p.12

¹⁷³ Draper, Halleon and Alves (2007) p.7

¹⁷⁴ Roerig (2015)

interests with regional interests requires firm determination and coordination from political leaders¹⁷⁵. Notably, in the TFTA's case, the process seem to lack at least in the beginning a strong political leadership support of the involved leading economies like South Africa, Egypt and Kenya¹⁷⁶. The role of strong states (the US in the GATT; France and Germany in the EU) was essential to the success of both regimes¹⁷⁷. TPP's success came to reality because of the support of the US political leadership.¹⁷⁸ Therefore, the existence of political will from the leading economies side would have been very helpful for the TFTA formation.

4.2 Economic challenges

The TFTA comprises states, which are in varying stages of development. It encompasses states like South Africa and Egypt relatively with a stronger economy and also states like Burundi and Seychelles with a relatively weaker economy. They were all supposed to negotiate and liberalize their tariff but, until now, have not done so. Challenges related to economy can explain this.

The economic challenges of this process can be seen from two different perspectives. On one hand, from the economically less powerful states' perspective, there is a general reluctance to adhere to integration programs due to concerns over losses and uneven gains¹⁷⁹. The particular TFTA region involved concerns related to the fact that the expected direct gain is moderate and it might mainly benefit the economically powerful ones.¹⁸⁰ There is some evidence which make these concerns legitimate. For instance, at a continental level, intra-African trade is dominated by five countries, ranked according to their trade weight: South Africa, Nigeria, Côte d'Ivoire, Kenya and Egypt. Together, they account for 62.3% of total intra-African exports.¹⁸¹ In other words, the remaining 49 countries account for only 37.7 %. It is noteworthy that three of those 5 dominant countries belong to the TFTA region and as a result, unlike the

¹⁷⁵ UNCTAD (2015) p.3

¹⁷⁶ Erasmus (2013) p.11

¹⁷⁷ Draper (2010) p.11

¹⁷⁸ Cheong (2013) p.3-4

¹⁷⁹ Ndomo (2016) p.12

¹⁸⁰ Zamfir (2015) p.1

¹⁸¹ Id, p.8

majority of the TFTA states, they are expected to benefit instant and dominantly from the FTA.

For states that are struggling to survive and develop (which is what most of the TFTA states do), immediate direct gains are clearly more attractive and the wait that they have to go through before they start enjoying the actual benefit of integration can be a discouraging factor. The UNECA and AU joint assessment, explained states poor performance towards their responsibilities with the uncertainty of the gains from RECs¹⁸². Likewise, performances of tariff negotiation and liberalization might be dismayed by gain related considerations.

Moreover, comparatively some of those states are highly dependent on custom duties for their government revenue. Integration through FTAs and trade liberalization that comes along with it promotes tariff cuts and tariff cuts will have negative repercussions on trade tax earnings of countries¹⁸³. Consequently, the fear of revenue loss felt by the TFTA states can determine a state's integration enthusiasm, and this concern varies considerably.

To demonstrate this, I have developed **Figure 2**. It contains a comparison of eight TFTA state's GDP per-capita (in USD) of two calendar years (2011 and 2015) as revealed in World Bank's database¹⁸⁴ with customs revenue. The vertical axis shows GDP per-capita and the horizontal axis shows the percentage of government's revenue generated from customs duties. With available data¹⁸⁵ on their government revenue I selected eight states Mauritius, South Africa, Angola, Egypt, Botswana, Kenya, Uganda and Lesotho which represent a spectrum of states with lower, medium and higher proportion of government revenue from customs duties.

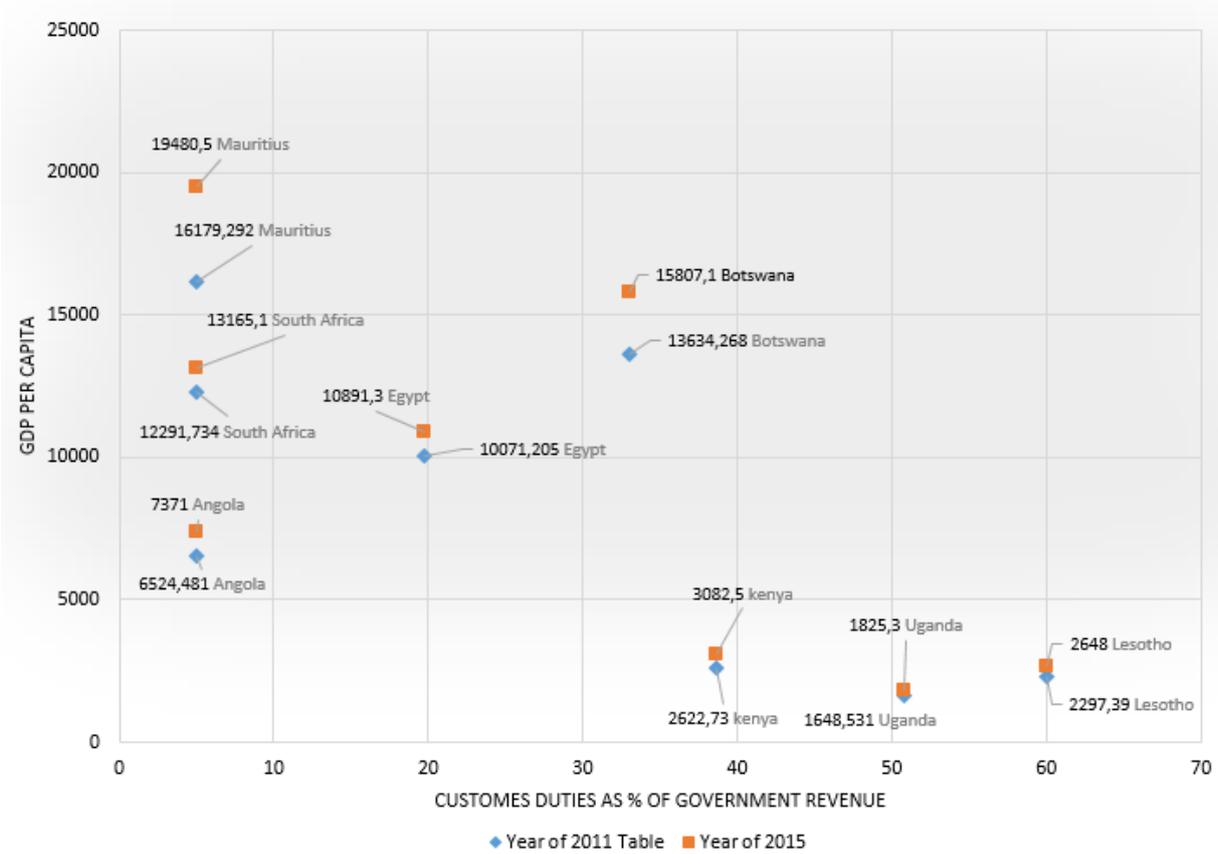
¹⁸² UNECA and AU (2006) p.59

¹⁸³ UNCTAD (2015) p.8

¹⁸⁴ See more at: <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD>

¹⁸⁵ Makochekanwa (2014) p.189

Figure 2: The GDP per-capita and customs duties as % of government revenues of eight selected TFTA states.



To be sure, as shown in the **figure 2**, a higher GDP per-capita does not necessarily mean a lesser dependence on customs duties for the government revenue or vice-versa. Botswana has a higher GDP per-capita than South Africa, Angola and Egypt but a higher dependence on customs duties relative to them; and Angola has lower GDP per-capita than Egypt and Botswana but still lower dependence. However, all of the top and medium customs duties dependents states have a GDP per-capita below 5000 USD. Most importantly, this chart reveals a large variation of the importance of customs duties for the involved TFTA states and the related challenge to finalize the TFTA tariff negotiation. For instance, full trade liberalization for Lesotho might mean jeopardizing 60 % government revenue but for South Africa it only means jeopardizing 5% of government revenue. This is a monumental gap.

The major concern on revenue loss comes from the fact that a reduction in government revenue resulting from a loss of customs duties can affect a government's ability to provide essential public services. This is so given that a larger percentage of provision of public services such as education, health and sanitation rests with governments, especially in developing countries. Thus, the developmental effects of such losses in revenue can be enormous in most TFTA unless alternative funds for such losses are found.¹⁸⁶

On the other hand, when it comes to the relatively economically powerful states perspective, there is a fear of competition from states with less production costs. For example, it was generally expected that the TFTA would kick off in December 2014 in Egypt. However, South Africa, a key member of the SADC, pulled out citing inadequate consultations on contentious issues, such as tariff offers and rules of origin. It was suggested at the time that South Africa seemed to have developed cold feet on the TFTA, fearing that the TFTA would open up its market to intense competition from its regional counterparts¹⁸⁷. Consequently, the speed of the progress has been limited.

4.3 Legal challenges

According to UNCTAD, high on the list of challenges to the CFTA is the conflicting disciplines and benefits of the different RECs already in place.¹⁸⁸ The same is true for the TFTA region. The three RECs forming the tripartite, the COMESA, EAC and SADC, are established RECs with their own sophisticated trade rules in place. The TFTA is meant to bring these rules in to harmony so all of them can function together and benefit from it. However, the already developed trade rules are sometimes very incompatible and that makes it hard for them to negotiate and come to an agreement.

This explains why the process of harmonizing rules of origin in the COMESA-EAC-SADC TFTA has been fraught¹⁸⁹. The difficulty emerged because, when COMESA and EAC apply a somehow similar generic approach, SADC applies product-specific rules of origin and harmonizing them is challenging. Notably, the draft TFTA Annex originally

¹⁸⁶ Id, p.191

¹⁸⁷ Anyanzwa (2014) p.1

¹⁸⁸ UNCTAD (2015) p.4

¹⁸⁹ Draper, Chikura and Krogman (2016) p.8

proposed a general methodological basis for determining origin, based on a percentage criterion. This aspect was similar to the model employed in the COMESA and EAC regions. Notwithstanding this apparently generic approach to setting RoO criteria, in the latter agreements, in practice the approach used was rather more product-specific with lengthy Annexes setting out the list of products for which the generic approach did not apply.¹⁹⁰ This has significantly complicated the TFTA negotiation on RoO and hindered its finalization.

Besides, the tripartite RECs are integrated to different degrees. The EAC achieved a CU and the others, COMESA and SADC are still working towards it. In addition, some of the SADC states are members of SACU which is also a CU. The TFTA comprises overlapping membership since those RECs share member states. As stated above, the fact that the member states of the three RECs belonging to more than one TFTA covered FTA might be beneficial to make the trade integration speedy. The FTA measures to remove tariffs and non-tariff barriers were already in place. However, belonging to a CU is different.

A CU entails the adoption of a CET which can be incompatible with the TFTA kind of arrangement since it would mean putting up a tariff barrier in respect of goods coming from FTA states that are not part of the CU and are thus regarded as third countries.¹⁹¹ For example, the EAC established a three band CET with a minimum rate of 0 per centum, a middle rate of 10 per centum and a maximum rate of 25 per centum in respect of all products imported into the Community.¹⁹² Hence, even if they both belong to the TFTA, Ethiopia is a third country to Kenya and Kenya can only treat products from Ethiopia based on the established EAC CET. Most importantly, the three TFTA RECs are not merging now and the TFTA agreement Annex I on Elimination of Import Duties is not finalized yet. Consequently, harmonizing the TFTA requires the challenging work of adjusting the involved two CU's CET with the TFTA tariff liberalization scheme. This on its hand requires the uneasy task of giving up the REC's established rule for the sake of the TFTA. There are some instances where states even demanded derogations of free trade terms so they can comply with the CET regimes of a CU. Swaziland, a COMESA member state can be a good example for this as it has obtained a derogation because of the needs to comply with the CET of SACU, of which it is

¹⁹⁰ Virág-Neumann (2009) p.5

¹⁹¹ Angwenyi (2016) p.602

¹⁹² East African CU protocol, Article 12

also a member¹⁹³. So this challenge is not only hindering the progress of the TFTA agreement now but it also has a potential to hamper its future implementation.

To conclude, all political, economic and legal factors played their part to limit the progress and realization of the TFTA in a more meaningful way. Hence, passing this limit would also probably require all round solution.

¹⁹³ ADBG (2014) p.11

5 Conclusion

The TFTA among the EAC, COMESA and SADC, created the largest free-trade zone in Africa, reaching from Egypt to South Africa. The continent's problems related with fragmented and small markets, small economies, poor infrastructure and the development constraints produced by them motivated regional integrations in Africa¹⁹⁴. The very existence of the RECs signals the interest of African countries to use regional integration as an instrument of development and the importance the countries attach to integration is reflected in the high number of integration schemes on the continent¹⁹⁵.

In Africa, there are 17 regional integration agreements that also give rise to challenges related to overlapping memberships and the consequent duplication of integration efforts¹⁹⁶. This necessitated AU's decision¹⁹⁷ to recognize only eight RECs as building blocks of African integration on the one hand and AU's action to fast-track a CFTA on the other¹⁹⁸. The TFTA is part of an overarching project to economically integrate all the countries on the African continent.¹⁹⁹ It is entrusted to be the first milestone of the CFTA building process. The TFTA is also committed to resolve the challenges of overlapping memberships of the Tripartite Member States²⁰⁰, which makes it a double agent of integration for both the TFTA region and eventually for the continent.

However, the original ideal to transform the three existing RECs into one new FTA, and to find answers for problems of overlapping membership, is yet to be achieved.²⁰¹ In other words, with the TFTA, states of the three RECs would be adding more trade bloc membership on top of multiple membership, which almost all of them already have (Mozambique being the exception). Given the current status of the TFTA, the only thing that makes the TFTA different from the other RECs is its larger area of coverage.

¹⁹⁴ Erasmus (2013) p.4

¹⁹⁵ AU (2012) p.46

¹⁹⁶ ADBG (2014) p.15

¹⁹⁷ Banjul decision (2006)

¹⁹⁸ The 2012 Declaration

¹⁹⁹ Zamfir (2015) p.1

²⁰⁰ Preamble 9

²⁰¹ Erasmus (2015)

While the signing of the TFTA Agreement is an important development, the assessment in this thesis of the TFTA as a FTA using different evaluative benchmarks shows that the TFTA has a long way to go before it becomes a meaningful and well-functioning FTA. The reason is that compared to the other trade blocs, the TFTA agreement's scope is limited to trade in goods and the outstanding issues of Elimination of customs duties, RoO and TR are not finalized yet.

Those matters are essential for any functioning FTA. Normally, FTAs are formed so that countries and businesses can benefit from the resulting economic integration and the subsequent eradication of barriers to trade including tariff barrier. Eradication of tariff barriers requires detailed rules and unless these rules are settled such barriers cannot be eradicated. Thus tariff barriers will remain in the region until the TFTA states finalize Annex I on Elimination of customs duties. Settlement of this issue is made difficult by the fact that economic power of African countries is very unequal and so is their share of trade.

In addition, agreement on the RoO is vital for the TFTA. Because, free market access granted to goods originating in a FTA member state should extend only to those effectively produced in that state. Agreement on TR would also equip the states with a means to defend themselves whenever the other states abuse their rights and obligations under the agreement. Thus far, the TFTA does not have a concrete rule on them either and in addition to other political challenges, difficulties related to converging and harmonizing already established distinct rules of the RECs caused it.

Such kinds of challenges require relinquishing of national priorities in favor of regional ones and doing this requires firm determination and coordination from political leaders, so as to align long-term national interests with regional interests.²⁰² In addition, the AU firmly believes economic integration is very vital to change unsatisfactory economic situation of its member states. Therefore, although the short term advantages of the TFTA, like direct gains might be moderate and might mainly benefit the more economically powerful countries, the real advantages should be broader, including an improved business environment, more foreign direct investment, enhanced economic development in general, and, most importantly, bring-

²⁰² UNCTAD (2015) p.3

ing impetus to the realization of the CFTA. That is why the TFTA states should work on the finalization of the unsettled issues and make their agreement more meaningful.

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