The Comesa-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving the African Economic Community Dream?

*By: Wilfred A Mutubwa**

"…I am an African…
Whatever the setbacks of the moment, nothing can stop us now!
Whatever the difficulties, Africa shall be at peace!
However improbable it may sound to the sceptic, Africa will prosper!

*Whoever we may be, whatever our immediate interest, however much we carry baggage from our past, however much we have been caught by the fashion of cynicism and loss of faith in the capacity of the people, let us err today and say – nothing can stop us now!…"***

1.1 Introduction

Ever since decolonisation, Africa has always aspired for political and economic integration. The now defunct Organization of African Unity (OAU) charter underscores this dream in most succinct terms[1]. The story of an African Economic Community and an African government can therefore be traced as far back as to the formation of the OAU in 1963. In the year 2000, the OAU was transformed and rebranded into the African Union (AU)[2] with one of its core objectives being

* LL.B (Hons), LL.M (Unisa), PG Dip. (Ksl), PG Dip in Arbitration (CIArb –UK), FCIArb, CIArb and Kenya Judiciary Accredited Mediator, Advocate of the High Court of Kenya, Commissioner of Oaths and Notary Public, LL.D candidate (Unisa) and Partner in Lubulellah and Associates Advocates.

**Thabo Mbeki, 8th May 1996, Cape Town at the adoption of the Republic of South Africa Constitution Bill.

[1] OAU Charter, 25th May 1963 concluded by the 33 then independent African states. The OAU Charter in its preamble speaks to cooperation among states and unity transcending national differences. The OAU summits of 1973 and 1976, and Monrovia Declaration of 1979 also underscored this objective. OAU charter available at www.au.int/en/sites/default/files/.../7759-sl-oau_charter_1963_0.pdf. Accessed on 4th July 2016.

[2] The Constitutive Act of the African Union (AU Act) viewed at www.au.int/en/sites/default/files/constutive_EN.pdf. Accessed on 28th June 2016. The AU was created on 9th September 2000 at an extra ordinary session of the AU in Sitre Libya

to "accelerate the political and social economic integration of the continent, and to coordinate and harmonise policies between the existing and future Regional Economic Communities (RECs) for the gradual attainment of the union".[3]

Fifty three years after the formation of the OAU and the decolonisation of the entire African continent, echoes of the clarion call by the founding fathers of the OAU on Africa's integration still reverberate over its valleys and mountains.[4] This call is largely informed and inspired by the desire of Africans to redress the arbitrary balkanisation of the continent through colonisation following the Berlin and Brussels conferences held by its colonial powers in the late 19th century.[5]

The Abuja treaty establishing the African Economic Community (AEC)[6] identifies Regional Economic Communities (RECs) as centres and building blocks towards the establishment of an African Economic Community and ultimate economic and political integration of Africa, and as catalysts for the continent's growth.[7]

It follows therefore that both the AU and AEC treaties underline the importance African states attach to the ultimate economic integration of the continent. Although there have been various efforts at the economic integration on the

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when the AU Act was signed by the 53 member states of the defunct OAU. Accessed on 3rd July 2016.

[3] *Ibid,* Article 3(l).

[4]Recent support for the idea of the proposed federation includes President Alpha Omar Konare former President of Mali and former Chairperson of the AU Commission who spoke on the commemoration of Africa Day on May 25, 2006. Notable also is the late Libyan President, Mummar Al-Gadhafi who was the AU Chairman in 2009. Most recently, in the year 2015, President Robert Mugabe of Zimbabwe lent his voice to this call.

[5] Also called the scramble and partition of Africa, Berlin (1884-1885) and Brussels (1889-1890) conferences in which European powers in a bid to avoid war among themselves, carved out African boundaries and territories among themselves as overseas colonial possessions. For a discussion on the reasons for the scramble and partition of Africa , see Foeken Dick "On the Causes for Partition of Central Africa 1875-85" *Political Geography*, Vol. 141 1995, 80 to 100.

[6] See the preamble to the Abuja treaty available at www.au.int/en/sites/.../treaties/7775-st-treaty_establishing_the _aec.pdf. Accessed on 3rd July 2016.

[7] See the communique of the third COMESA-EAC-SADC Tripartite summit page 2 thereof at www.tralac.org/images/Recources/Tripartite-FTA/Third-Tripartite-summit-communique-10062015.pdf. Accessed on 4th July 2016.

African continent, none has been as profound and far reaching as the COMESA-SADC-EAC Tripartite Free Trade Area Agreement (TFTA). Previous efforts at Africa's integration have largely been blueprints, declarations and political statements driven by an Afrocentric sentiment.[8] Efforts at economic integration have hitherto also been limited to sub regional levels.[9] There has also been a significant attempt at the harmonisation of business laws, but equally at the sub regional level.[10]

The signing of the COMESA- SADC-EAC Tripartite Free Trade Area Agreement (TFTA)[11] is, therefore, perhaps the most significant of efforts yet towards the economic integration of the African continent as envisaged in the Abuja Treaty. If and when fully realised, the TFTA will represent a giant step by African states towards the realisation of the AEC as espoused in the Abuja Treaty.

The TFTA is the largest Free Trade Area Agreement (FTA) on the African continent. It brings together 26 member states of the Common Market for Eastern and Southern Africa (COMESA)[12], Southern Africa Development Community

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[8] For example, the Lagos Plan of Action for Economic Development of Africa 1980-2000 was a blueprint on economic development adopted by the OAU following its Monrovia, Liberia – July 1979 16th ordinary session where a declaration on collective self-reliant international economic order for Africa was agreed. Another such effort is seen in the AU Agenda 2063, an ambitious economic prosperity of the continent, 100 years after the OAUs formation. Full text of the AU Agenda 2063 is available at www.un.org>africa7osaa>pdf>agenda2063.pdf. Accessed on 3rd July 2016.

[9] Uzodike U.O, "The Role of Regional Economic Communities in Africa's Economic Integration: Prospects and Constraints" 2009 Africa *Insight* Vo. 39/2 at 2 and 5.

[10] A case in point is the Organization for Harmonisation of African Business Laws (OHADA). See OHADA Treaty on at www.ohadalegis.com/anaglais/triteharmonisationab.htm. Accessed on 31st March 2016. For a discussion OHADA, see Fagbayibo B, "Towards the Harmonisation of laws in Africa: is OHADA the way to go?" 2009 CILSA 309-322.

[11] See the full text of the Agreement establishing The Tripartite Free Trade Area at www.tralac.org/images/docs/7531/tfta-agreement-June.2015.pdf.Accessed on 3rd July 2016.

[12] The COMESA is the successor of the Preferential Trade Area for Eastern and Southern Africa (PTA), established by treaty in 1981. Following the decision of the Authority of the PTA states taken at its tenth meeting held in Lusaka, Zambia from 30-31 January 1992. The COMESA treaty was signed by state parties on 5th November 1993 in Kampala, Uganda and ratified on 8th December 1994 in Lilongwe, Malawi. COMESA Treaty

(SADC)[13] and the East African Community (EAC).[14] The 26 member countries that comprise the bloc represent 48 percent of the AU membership, 57 percent of the African continent's Gross Domestic Product (GDP) or USD 1.3 trillion, and a combined population of 632 million.[15] Looked at as an economy, it would be the 13th largest economy in the world with a merchandise trade of US$ 55 billion.[16]

The TFTA agreement is a Regional Integration Agreement (RIA) in the nature of a customs and Free Trade Area hence subject to Article XXIV of the WTO 1994 guidelines.[17] These guidelines are imperative or ideal to the proper functioning and coordination of RIAs.[18] The guidelines underscore two critical points. Firstly, that the purpose of regional integration is the creation of a truly multilateral trading system with few or completely devoid of any tariff and non-tariff barriers to trade. Secondly, that RIAs are seen as building blocks towards a truly multilateral global trading system.[19]

Accessed at www.comesa.int/attachments/article/28/COMESA_treaty.pdf. Accessed on 4th July 2016.

[13] Established as the Southern African Development Coordinating Conference (SADCC) on 1st April 1980 and transformed into SADC on 17th August 1992 in Windhoek, Namibia where the SADC treaty was adopted. See www.sadc.int/documents.pubications/sadc-treaty. Accessed on 7th March 2016.

[14] The EAC treaty was signed on 30th November 1999 and entered into force on 7th July 2000, following ratification by its original members; Kenya, Uganda and Tanzania. Burundi and Rwanda acceded to the EAC treaty on 18th June 2007 and became full members of the community with effect from 1st July 2007. The Republic of Southern Sudan acceded to the treaty on the 12th day of April 2016. Ethiopia is also expected to join the block shortly. EAC Treaty available at www.eac.int/treaty.

[15] David Luke and Zodwa Mabuza, "The Tripartite Free Trade Area Agreement; A milestone for Africa's Integration Process" Bridges *Africa* volume 4 Number 6. 23rd June 2015 at www.ictsd.org/bridges news/bridges Africa/news/the_tripartite-free_trade_ area. Accessed on 7th March 2016.

[16] *Ibid*.

[17] Article XXIV: Territorial Application-Frontier Traffic- Customs union and Free Trade Areas. www.wto.org/english/res_el/booksp_e/analytic_index_e/gatt 1994_09_e.htm Accessed on 14 March 2016.

[18] The full text of the said WTO Article available at www.wto.org/english_e/res_e.htm. on 7th March 2016.

[19] Gantz, D, "Regional Trade Agreements" in *The Oxford Handbook of International Trade*. Oxford. Oxford University Press at 237 to 265 posits that RIAs provide a deeper and faster international trade reform than the entire WTO effort. This thinking, he advances, is more current following failure of WTO multilateral talks (Doha round 2001). He therefore recognises sub-regional efforts as building blocks to greater multilateralism.

Despite over five decades of efforts towards political and economic integration of Africa, mostly at the sub-regional level, little tangible results have been achieved at an effective free trade arrangement that assures of a truly multilateral trade system covering the whole or most of the continent.

This research is therefore an interrogation of the TFTA with a view to answering the question; whether or not the TFTA Agreement brings Africa closer to the attainment of the AEC. This investigation is undertaken within the context and seen through the prism of Article XXIV of the WTO 1994 guidelines on the ideals of regional integration as a platform for growth of multilateral global trade. Impediments to the integration effort under the TFTA also form part of this discourse. Recommendations and suggestions on how to surmount the problems identified are then postulated.

This paper comprises five parts. The first part captures a synopsis of the study and conceives its salient features. The second part discusses the theoretical framework of regional integration, Free Trade Areas and the WTO multilateral trade regime. The third part illuminates the philosophical foundations, historical development and structure of TFTA in the context of the AEC Treaty and WTO 1994 arrangement on multilateral trade. The penultimate part of this work, part four, offers an in depth prognosis of the challenges, potential pitfalls and problems of the TFTA. That part also projects the prospects of the TFTA. Part five postulates conclusions and offer recommendations.

2. Conceptual Framework

2.1 Introduction

From the earliest known free ports in Challis and Direus in modern day Greece and in the Roman empire port of the Aegean island of Delos, the fundamental economic basis for free trade has implicitly always been political.[20] Schulze advances that the arguments in favour of integration have always invariably been based on the need for the nation's general economic welfare, and in the ultimate global welfare.[21] Schulze is not alone in this view. Mirrany examines at least three political science approach

[20] Schulze H.C.A.W, 1997. *International Tax-Free Zones and Free Ports*. Durban. Butterworths at p. 1.
[21] *Ibid*.

theories to integration: functionalism, neo-functionalism and intergovernmentalism, and opines that the functionalist idea of integration, is premised on the gradual process towards peace and unification with mutual benefits that it is hoped lead to ultimate political unification.[22] Uzodike equally contends that although the integration process takes place in the economic, social and technical contexts, the same cannot be separated from the political realm. Indeed, he contends that the same have political ramifications and as such the political perspective is imperative for a proper understanding of the dynamics of integration.[23]

In the context of Africa, Mukamunana and Moeti argue that the early roots of integration on the continent can be traced back to the 1960s when regional integration "was perceived largely as an instrument for safeguarding recently acquired political freedom, and a strategy to be used to facilitate economic development".[24] They also observe that during the independence movements in the 1960s, African political leaders emphasised the need for regional cooperation and unity, a Pan African notion that was eventually underlined in the OAU charter.
The rationale for integration is therefore imperative to briefly consider, as the paper now proceeds to do.

2.2 Rationale for Integration

The motivation for integration of states can be discerned from the three principal theories of integration; functionalism, neo-functionalism and intergovernmentalism. Despite conceptual differences, the three approaches converge and find unanimity in the conclusion that integration is motivated by both or either political or economic reasons.

2.2.1 Political Justification

Functionalism as a theory is characterised by a sectorial approach to integration premised on a gradual process towards peace and unification.[25] The theory

[22] Mirrany D, *A Working Peace*. Chicago: Quadrangle books, 1966.
[23] Uzodike, note 9 above at p.2.
[24] Mukamunana R and Moeti K, "Challenges of Regional Integration in Africa: Policy and Administrative Implications", *Journal of Public Administration*, Conference Proceedings, October 2005, at p.90.
[25] Mirrany, note 22 above.

underscores that cooperation in economic and social fields, may spill over into the political field and lead to ultimate political union.[26]

The neo-functionalism approach is basically a variation of functionalism.[27] The approach goes further than the functionalism assumptions of gradual building of peace and unification to explain why nations surrender or pool aspects of their sovereignty so as to enjoy benefits of integration.[28] The theory therefore recognises that whereas the state is the primary actor in integration, it is not alone nor does it act in isolation. Sub-state actors (political parties and interest groups) and supranational institutions (regional institutions) equally give momentum to the integration process.[29] Nationally and regionally constituted bodies therefore may have motivations and interests that predispose them towards favourable integration. According to neo-functionalists, therefore, states deepen their interdependence by taking joint actions in one sector after another through the process of upgrading of common interests. [30]

A 2003 WTO secretariat report notes that political considerations have taken primacy in the creation of RTAs thus overshadowing and transcending economic reasons. The pertinent part of the report reads:

"Political considerations are also reported to be key to the decision to foster regional trading arrangements. Governments seek to consolidate peace and increase regional security with their RTA partners, or to increase their bargaining power in multilateral negotiations by securing commitment first on a regional basis, or as a means to demonstrate good governance and to prevent backsliding on political and economic reforms. They may also be used by larger countries to forge new geopolitical alliances and cement diplomatic ties, thus ensuring or rewarding political support by providing increased discriminatory access to a larger market. Increasingly, the choice of RTA partners appears to be based on political and security concerns, thus potentially

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[26] Uzodike, note 9 above at p.4.
[27] Forere, M, "Is the Discussion of the United States of Africa Premature? Analysis of ECOWAS and SADC Integration Efforts "*Journal of African Law*, Vol. 56, No.1 (2012) at p. 30. The concept of neo-functionalism is said to have been popular in the 1950s and 60s and is attributed to Haas E, *The Uniting of Europe*, Stanford: Stanford University press, 1958.
[28] Uzodike, note 9 above.
[29] *Ibid.*
[30] *Ibid.*

undermining or diluting the economic rationale which might be used in support of participation in RTAs."[31]

2.2.2 Economic Justification

Intergovernmentalism, on the other hand, defines integration as an inter-state process of negotiating by heads of states where the state's economic interests transcend any other interests.[32] While large states drive the process, small ones use regional institutions as a strategy to deal with more expansive and complex issues. This economic approach is founded on the assumption that productivity is enhanced if states engage in economic activities in which they have comparative advantage which in the ultimate reduces the cost of production and with a ripple effect of reducing prices of goods and services.[33]

On the economic front, Schott suggests that regional integration may provide a depth of incremental trade reform going beyond what has occurred under the WTO multilateral trade system.[34] These include aspects such as consumer protection and competition law.[35] Socio-economic and human rights protection are also more emphasised and given the highest priority at RTA levels than at the WTO multilateral level. [36]

Cottier and Foltea note that economic rationales for concluding preferential agreements include the search for larger markets and for deeper integration, in particular among

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[31] WTO Secretariat, Regional Trade Agreements Section, Trade Policies Review Division, "The Changing Landscape of RTAs" 2003, paras 23 and 24.
[32] *Ibid.*
[33] *Ibid.*
[34] Schott JJ, "Free Trade Agreements: Boon or Bane of the World Trade System? In Schott JJ (ed.), *Free Trade Agreements: US Strategies and Priorities* (Washington, DC: IIE, 2004)3at p. 10-11.
[35] Gantz ,note 19 above at p.241, cites the example of the North American Free Trade Agreement (NAFTA) chapter 11 which provides for mandatory investor state international arbitration of disputes)
[36] *Ibid* at p. 242 cites Article 1a ff of the Treaty of Lisbon 2007 amending the Treaty on European Union and the Treaty establishing the European community. The same goes for African RECs, although observance of the provisions especially of human rights and good governance set out in African RECs remains far from satisfactory. See preambles to the TFTA agreement, SADC, COMESA and EAC treaties. This aspect is discussed in detail in chapter 4 of this work.

neighbouring countries.[37] The 2003 WTO secretariat report aptly summarises the economic basis for integration in the following terms:

> "RTAs can also be used by some countries as a vehicle for promoting deeper integration of their economies than is presently available through the WTO, particularly for issues which are not fully dealt with multilaterally, such as investment, competition, services, preferential access may confer long term advantages in a market and may enable a supplier to steal an irreversible march on the competition. Discriminatory liberalization might also be attractive for countries which seek to reap gains from trade in product areas where they cannot compete internationally. Smaller countries particularly would see RTAs as a defensive necessity, while even larger economies may turn to RTAs to avoid being left out in the cold. Membership in RTAs can provide a means of securing foreign direct investment, particularly for a country with low labour costs which has preferential access to a larger, more developed market."[38]

2.3 Classification of Regional Integration Agreements

Balassa classifies integration models based on the characteristics and objectives which typify them.[39] The relevant typological nomenclature for free trade concepts and models of Regional Integration therefore take the following forms: Free Trade Areas, Customs Unions, Common Markets, Economic Unions and total Economic Integration/Political Unions.[40] These five forms of integration are preferred by most RECs in Africa because of their stepwise or progressive nature that ascends from FTAs through to Political Unions.[41] This model is also called the linear market progression paradigm.[42]

However, some RIAs defy the stepwise progression and skip some of the steps in the linear progression model or remain rooted at a mid-stage such as the customs union or common market. Some RIAs get stunted in their ascendancy due to challenges which shall

[37] Cottier T, and Foltea M, "Constitution and Function of the WTO and Regional Trade Agreement" in Bartles L, 2006.Regional Trade Agreements and the WTO Legal System. Oxford, Oxford University.
[38] WTO, note 32 above
[39] Balassa B, *The Theory of Economic Integration*, London: George Allen &Unwin Ltd, 1961.
[40] Uzodike, note 9 above at p. 5.
[41] Hartzenberg T., "Regional Integration in Africa" 2011-*Trade Law Centre for Southern Africa*"-WTO Working Paper at p.5.
[42] The concept is interrogated in more detail in chapter 4 of this work.

be addressed in the penultimate section of this work, while some achieve their goals at either the customs union, or common market or economic union stages, while others still aspire to trudge all the way to political union.[43]

A brief outline of the fore-listed integration concepts is therefore useful in putting this discourse firmly into context.

2.3.1 Free Trade Areas

A FTA is either a bilateral or multilateral mechanism established by agreement or treaty between nations with an intention of furthering the liberalisation of world trade. The goal is usually to liberalise trade between member states with the ultimate goal of liberalising world trade.[44] As a nascent and initial step towards integration, member states of a FTA are free to maintain or independently modify their external tariff and other barriers to imports from third states.[45] A uniform tariff on imports is usually not yet achieved at this stage, but partners receive preferential access to each other's markets. Each member country retains national tariffs against non-members.[46] Rules of origin with some intra-bloc quotas and tariffs may also be maintained.

2.3.2 Customs Unions

It is said to be the oldest concept of regional economic integration and is characterised by integration of factors of production and the free movement of goods with exclusive privileges between member states.[47]

The significant difference between a FTA and a Customs Union is that whereas the former bloc members are free to maintain or independently modify their external structure of tariffs and other barriers with third parties, customs unions erect a common tariff wall and import quotas towards non-members.[48] Closer cooperation on the sharing of customs revenues collected from imports from third non-member states is yet another feature of a customs union. Usually a common or coordinated customs administration system is put in

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[43] E.g. COMESA aims at becoming a Common Market, Southern Africa Customs Union (SACU) was established as a Customs Union with no ambition to go beyond that, while the EAC aims at political federation.
[44] Schulze, note 20 above at. p. 5.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*

place at this stage. Member states however remain distinct states. Rules of origin are therefore unnecessary at this stage. Customs Unions are therefore more deeply integrated than FTAs. In the linear progression model, Customs Unions should have evolved from a FTA as the members grow towards a Common Market.[49]

2.3.3 Common Markets

A Common Market bears similar features to those of a Customs Union but includes further elements of free movement of factors of production (labour and capital).[50]Uniform regulations regarding the movement of people and capital are put in place at this stage. The aim is to achieve market integration through trade liberalisation and integration of product markets and free movement of goods.

A common market is considered the first stage of deep integration. The benefits of a customs union is to achieve trade efficiencies by movement of capital, skills and labour to places where opportunities abound. For the common market to succeed non-tariff barriers have to be dismantled, fiscal and monetary policies realigned. This, it is hoped, will lead to economic interdependence that transcends national policies and the welfare of member states.[51]

2.3.4 Economic Unions

An Economic Union takes the form of a common market but proceeds further with harmonisation of national economic policies such as tax rates, common monetary and fiscal policies and common currency.[52] This is the next step in integration after the common market. It adds the following to the common market; a harmonised fiscal, monetary and labour market policies. Tax and monetary policies determine where a business locates, and because labour market policies affect migration patterns and production costs, these will require streamlining by member states.[53] Differences in national transportation, regional and industrial policies which distort competition among firms and nationals of member states are eliminated.

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[49] Examples of Customs Unions on the African continent include; Southern Africa Customs Union)SACU, which was established over a century ago, and customs unions under the EAC, ECOWAS and the AEC as stages in their various integration progressions.
[50] Uzodike, note 9 above at p. 30.
[51] Mirus R and Rylska N, Economic Integration: Free Trade Areas vs. Customs Union available at www.ualberta.ca/ business, at .p.4. Accessed on 27th July 2016.
[52]Uzodike, note 9 above.
[53] Mirus and Rylska, note 51above.

To achieve effective Economic Union, it, therefore, enjoins members to form supranational institutions that legislate on the rules of trade for the union and leaving administration of the rules to national, joint or regional secretariat organs. Recourse for dispute resolution and interpretation of the trade rules is to a supranational administrative and judicial tribunal so as to ensure the benefit of a uniform application of the rules. An economic supranational commercial law therefore replaces national law.[54]

Further, an Economic Union is made effective by a common currency.[55] This has the cost of having states cede monetary sovereignty but assures them of consistency and certainty in exchange rates which would otherwise influence decisions on location of businesses, borrowing costs and exchange risks associated with particular member country's currency.[56]

2.3.5 Political Unions

A Political Union goes even further than an Economic Union and creates an entity with total integration akin to a federated union with a central, supranational political authority whose decisions are binding on members.[57]

A political union therefore refers to a possibility that, at some point, a combination of the above five levels leads to the emergence of a cohesive and consolidated supranational political region. It is marked by the member states giving up their political sovereignty and having common legislation and political structures.[58]Lindberg defines political integration as "the process whereby nations forego the desire and ability to conduct foreign and key domestic policies independently of each other, seeking instead to make joint decisions or to delegate the decision making process to new central organs; and the process whereby

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[54] *Ibid.*

[55] Examples of monetary Unions in Africa abound. The East African Monetary Union Protocol (EAMU) signed in November 2013, envisages progressive convergence of all EAC member currencies into a single currency in 10 years, by year 2024.The pre-1977 EAC had a common currency. SADC has as one of its ultimate goals under the Rapid Strategic Development Plan (RISDP) its principal plan, to achieve a Monetary Union by 2016. ECOWAS also planned to establish a single currency by 2013.

[56] *Ibid.*

[57] Fagbayibo B., "Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview" 2013 (16*) PER/PELJ* 32-39 at 33.

[58] Omoro MFA, Organisational Effectiveness of Regional Integration Institutions : A Case Study of the East African Community, 2008 (UNISA DISSERTATION) at p. 29

political actors in several distinct settings are persuaded to shift their expectations and political activities to a new centre".[59]

The desired outcome of a political union is often a federal union or a supranational entity with government organs and /or an effective control over entire membership's region. For example, the AU Constitutive Act and the AEC treaty all aspire to achieve a supranational political and economic authority in the nature of an African Union government of a totally integrated body with the entire continent's membership.[60]AEC's institutional capacity and effectiveness is the subject of discussion in the ensuing section of this work.

2.4 Summary

The distinction between the political and economic justifications that underpin integration is drawn in the foregoing discourse. These theories, however, remain largely relevant at the theoretical level since the various approaches to integration find convergence in one central theme: that integration is a response by states to shared economic and political needs and aspirations. [61] The formation of RTAs is thus driven by a variety of factors which include economic, political and security considerations.

Integration of economies and states seeks to progressively achieve true greater world output and welfare in the following five ways: firstly, by abolishing tariffs and import quotas among members through establishing FTAs; secondly, by establishing common external tariffs and quotas through Customs Unions; thirdly, by creating Common Markets so as to allow free movement of goods, services and labour; fourthly, by harmonising competition, structural, fiscal, monetary and social policies by establishing Economic Unions; and lastly, by unifying economic policies and establishing supranational institutions through Economic and Political Unions.
The paper now proceeds to discuss the architecture and structure of the TFTA.

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[59] Lindberg L, *The Political Dynamics of European Economic Integration,* 1963, Stanford, California: Stanford University Press at. P.6.
[60] See Article 3(c) of AU Constitutive Act, and Article 5 of the Abuja (AEC) Treaty.
[61] Uzodike, note 9 above at p.6.

3.0 The Evolution and Structure of the TFTA

3.1 Introduction

A discourse on the TFTA must commence with an understanding of the African Economic Community (AEC) treaty. This inescapable reality is borne out of the appreciation that the TFTA Agreement is a creature of the objectives and aspirations stipulated in the AEC treaty.[62] The two are therefore inextricably intertwined and a discussion of one cannot merit without an understanding and reference to the other.

This section will outline the salient features of the AEC treaty before proceeding to set out an exposition of the structure of the TFTA Agreement. Subsequently, an overview of the pertinent aspects, achievements and challenges of the three merging RECs (COMESA, EAC and SADC) will be outlined.

3.2 The Architecture and Structure of the AEC Treaty

The Abuja Treaty establishing the Africa Economic Community (AEC) is premised on the pan African aspiration underwritten in the OAU charter, for economic integration and ultimate political union of the continent. This objective is vividly captured both in the Constitutive Act of the AU (AU Act) and the AEC treaty. The Constitutive Act of the AU deliberately incorporates the objectives of the AEC Treaty and reaffirms the OAU principles and pan African inspired values of unity and cooperation of African states, in both its preamble and substantive provisions.[63] This emphasis in the AU Constitutive Act renewed the commitment of the AU membership to the goal of the economic integration of Africa while rebranding the OAU to the AU, 38 years after the former's creation.

The AEC treaty acknowledges the substantial efforts already made at sub-regional and regional levels towards economic integration.[64] The treaty places a responsibility upon its 51 members to promote and observe the principles and objectives of the community.[65] The treaty further provides that the community

[62] Articles 4 and 5 of the TFTA Agreement.
[63] Preamble p. 2 and 3, and Article 3(j) and (i) of the Constitutive Act of the AU.
[64] Article 5.
[65] Article 3.

shall, by stages, ensure the strengthening of existing RECs and the establishment of new ones where none exist.[66]

As an economic bloc, the AEC treaty also enjoins its members to eventually harmonise their national policies in order to promote economic activities.[67] This is intended to be achieved, through traditional integration models such as the adoption of a common trade policy vis-a-vis third states, establishment and maintenance of a common external tariff and common market.[68] The members are also expected to gradually reduce tariff and non-tariff barriers to trade and encourage free movement of goods and services within the community. Notably, the treaty also provides for affirmative action for land locked, semi-land locked, least developed countries and islands.[69]

The establishment of the AEC is to be implemented and achieved through a gradual and step-wise approach, with six stages of varying durations including a 34 year transition period.[70] The first stage is for strengthening of existing RECs and establishing of REC's in regions where RECs do not exist. This is envisaged to take a maximum of 5 years. The second stage involves the gradual harmonisation of customs duties of the RECs established under stage one, with third parties, and gradual removal of tariff and non-tariff barriers to regional and intra-community trade. During the second stage, member states are also expected to strengthen sectional integration at the regional and continental levels, particularly in the fields of trade, agriculture, money and finance, transport and communication, industry and energy. The second stage is set to take 8 years from the date of the treaty.

The third stage is envisioned to establish a Free Trade Area at the individual REC level with gradual removal of tariff and non-tariff barriers to intra-community trade and to establish a customs union by means of adopting a common external tariff. This stage is to take 10 years. The fourth stage is to be achieved within a period of two years. During this period, the community intends to harmonize the

[66] Article 4 (2) (a).
[67] Article 4(2) e.
[68] Article 4(2) (f) and (g).
[69] Article 4(2) (i).
[70] Article 6.

tariff and non-tariff systems, among the various RECs with a view to establishing a customs union at the continental level by means of adopting a common external tariff.

Stage five, the penultimate stage, is to be completed in 4 years and basically provides for establishment of an African Common Market. Stage six is to be achieved in five years and focuses largely on institutional strengthening and the consolidation of a common market, free movement of people, goods, capital and services. It entails the economic, political, social and cultural integration with a single domestic market and a pan African Economic and Monetary Union with a single African Central Bank and single African currency. Stage six will also see the establishment of pan African parliament with election of its members by continental universal suffrage and setting up of executive structures of the political community.[71]

The AEC treaty aspires to transform Africa into a supranational economic entity. The organs of the community include; the Assembly of Heads of States and Government which is the apex and supreme organ of the community.[72] Beneath it is the council of ministers which is responsible for the functioning and development of the community at the policy level.[73] Also established is a Pan-African Parliament (PAP) whose role is left to a future protocol to define its composition functions, powers and organization.[74] This has since been achieved with the establishment in 2004 of the PAP.[75]

There is also an Economic and Social Commission consisting of ministers responsible for economic development, planning and integration of members.[76] The Commission reports to the Council of Ministers and makes recommendations to the Assembly of Heads of States and Government. The Commission is the technical policy vehicle of the community.

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[71] *Ibid.*
[72] Article 7 and 8.
[73] Article 11, 12 and 13.
[74] Article 14.
[75] Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament.
[76] Article 15 and 16.

A secretariat headed by the Secretary General is charged with the day to day operations of the community, implementation of decisions of the council of Ministers and the Assembly of Heads of States and Government, and projects of the community including its monitoring.[77] Specialised technical committees comprising members with relevant expertise in specific strategic areas originate projects and concepts and recommend the same to the assembly through the Council of Ministers and Secretariat. The committees are also tasked with assessing the viability of projects, their execution and coordination.[78]

RECs have been given special focus by the AEC Treaty with an entire chapter dedicated to the place, functions and with emphasis on the strengthening existing RECs and establishing new ones where none exist.[79]

The Court of Justice of the Community is also established.[80] Its jurisdiction extends to ensuring the adherence to the law in interpretation and application of the treaty and to decide disputes submitted to the court pursuant to the treaty and to mete out sanctions as prescribed under the treaty, protocols and rules. The court is to be independent of the member states, who can bring actions before it, and also independent of the other organs of the community.[81]

The AEC is discernibly a very ambitious project. The time frame of 34 years for its implementation seems to acknowledge its monumental implementation task. The six stage plan however seems to have two fundamental shortcomings. Firstly, it is bottom heavy, meaning that it leaves critical matters of the creation of structures and undertaking of programmes which should hold the community together, to the very last five years of its implementation yet these are ideally natured over time, preferably over the prescribed 34 years or most of them, for proper efficacy. Secondly, the implementation milestones set in the AEC treaty still heavily rely on RECs and right to end still maintain and encourage existence of the merging RECs structures yet at that stage the RECs should have transited or evolved into or have been subsumed structures of the AEC.

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[77] Article 21 and 22.
[78] Chapter IV Article 28.
[79] Article 75 and 26.
[80] Chapter IV Article 28.
[81] Article 18, 19 and 20

The metamorphosis from a FTA to the supranational community is expected to be generic and organic without considering the vicissitudes of the evolution process. There is therefore a real and founded danger and apprehension of running parallel systems, at the sub-regional and the continental level. Perhaps this is deliberate and is partly informed by some scepticism on the part of the crafters of the AEC treaty over its full and eventual realisation and as such they would rather have members fall back to the safety of the architecture of their respective RECs, in the event the AEC experiment fails to take off or be achieved.

The promulgation of the AEC treaty is predicated on the OAU charter. The OAU charter further inspired plans on how to achieve economic development in Africa. One such plan is the Lagos Plan of Action for the Economic Development of Africa 1980-2000.[82] The Lagos Plan of Action was a blue print on economic development adopted by the OAU following its Monrovia, Liberia-July 1979 16th Ordinary session where a declaration on a collective self-reliant international economic order in Africa was agreed.[83]

The recognition in the AU Act and the AEC treaty that both the political and economic unity of Africa can only be achieved progressively suggests an inclination by African States towards a step-wise model towards integration. Further, both instruments also seem to appreciate the pivotal role RECs play as building blocks towards the desired AEC and ultimately the political union of the continent. Fundamentally too, is that the AEC treaty seeks to draw from the structures and experiences of RECs in the progressive attainment of the AEC. In essence, the AU member states which are also the AEC treaty members recognise that economic integration through RECs can be achieved faster than political integration and that even such economic integration must build on the existing structures provided by existing and future RECs in Africa.

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[82] This plan is said to have been borne out of the overwhelming necessity to establish an African social economic order for self-reliance. For a critique of the plan see Appraisal and review on the Impact of the Lagos Plan Action on the Development and Expansion of Intra- African trade http://repository.uneca.org/handle/10853/14129. And Towards Economic Emancipation, from Lagos Plan of Action to Nepad. http://www.sardc.net/.../towards_economic .emancipation. from. lagos_plan_of .action to. nepad_. Accessed on 4th July 2016.

[83] See full text of the plan at http://www.merit.unu.edu. Accessed on 4th July 2016.

It is perhaps instructive that the African continent having built and learnt from 53 years of experience in economic integration at the sub-regional levels would want to progress the march towards the AEC and political union by merging its RECs. This is where the TFTA Agreement enters the scene and stakes its relevance in the African integration matrix.

3.3 The TFTA Agreement

The Agreement establishing the TFTA agreement was concluded on 10th June 2015.[84] The agreement followed years of engagement between member states negotiating the TFTA agreement. A tripartite summit of Heads of States and Government representing the three merging RECs held on 22nd October 2008 agreed, inter alia, to establish a single Customs Union, beginning with a Free Trade Area.[85] A tripartite memorandum of understanding was signed on 19th January 2011.[86] This was soon to be followed by the declaration launching the negotiations of the establishment of the Tripartite Free Trade Area in Johannesburg, South Africa, on 12th June 2011.[87]

Similar to the AU Act, the TFTA Agreement acknowledges the place and role of RECs as building blocks for trade liberalisation in Africa.[88] Like the AEC treaty, the Agreement also expressly recognises the successes and best practices of RECs as important lessons from which it can draw on its march towards trade liberalisation under the TFTA Agreement framework.[89]

The objectives of the TFTA can be gleaned from the Agreement. They fundamentally include, among others, a commitment to resolving the challenge of overlapping membership of the tripartite member/partner states to several RECs, job creation and income generation for the people of the member states, progressive liberalization of trade in goods and service, deepening integration among member states and progressively achieving elimination of import duties

[84] Preamble to TFTA Treaty note 7 above at page 2
[85] *Ibid*.
[86] *Ibid*.
[87] *Ibid.*
[88] *Ibid* at page 3.
[89] Article 4 and 5 TFTA Treaty, *Ibid* at pg. 6.

and other barriers to trade within the bloc.[90] These objectives resonate with the ideals of multilateral trade as promulgated in Article XXIV of the 1994 Agreement.[91]

The TFTA Agreement proceeds from the principle that member states shall accord each other the Most Favoured Nation Treatment but qualifies the same by providing that nothing in the Agreement shall prevent a member state from maintaining or entering into new preferential trade agreements with third countries provided that any advantages, concessions, privileges or favours granted to a third country under such agreements are offered to the other members of the TFTA on a preferential basis.[92] Preferential agreements between member states of the TFTA are also not prohibited except that other members of the TFTA, not parties to such preferential agreement, shall on a reciprocal basis, be accorded benefit of privileges under such an Agreement despite not being party thereto.[93]

In furtherance of its harmonisation of import duties and in a bid to eliminate trade barriers, the TFTA members also agreed to design and standardise their trade and customs documentation and information in accordance with internationally accepted standards and to initiate trade facilitation programmes.[94]

3.3.1 Structure of the TFTA

The organs for the implementation of the TFTA Agreement include the tripartite summit of Heads of States and/or government, which sits at the pinnacle of its organisational superstructure. Just below it is the council of ministers, sectorial ministerial committees and a task force of the secretariats of the RECs, which gives policy guidance to the TFTA. A tripartite committee of experts enjoined to be responsible for overseeing and to guide its technical work, is also established.[95]

A Dispute Settlement Body is also created to administer the rules and procedures

[90] *Ibid.*
[91] Discussed in part 4 of this Article.
[92] Article 7 TFTA Agreement at page 6.
[93] *Ibid.*
[94] *Ibid.*
[95] Article 29 of the TFTA Agreement p. 4.

as well as settle disputes under the Agreement.[96] The Settlement body shall operate through panels and appellate bodies. The body shall go further to maintain surveillance of implementation of rulings and recommendations of panels and its appellate bodies. The Dispute settlement Body's jurisdiction can only be invoked as a residual mechanism in the event of failure of good faith consultation and negotiations entered into with a view to amicably settling a dispute.[97]

Significantly, the TFTA Agreement is categorical that in the event of inconsistency or conflict between the Agreement and the treaties and instruments of COMESA, EAC and SADC, the TFTA agreement shall prevail to the extent of the inconsistency or conflict.[98] However, the TFTA Agreement does not take a similar position with respect to inconsistencies or conflicts between it and the AU Constitutive Act or the Continental Free Trade Area established by the AEC treaty.

The Tripartite Agreement retains the structure of the merging RECs and hopes to build upon their successes, experiences and structures before progressively incorporating them into its own systems. The seamless transition, therefore, heavily borrows and relies, at least at the technical implementation level, on the COMESA, EAC and SADC structures. It is in appreciation of this important nexus between the TFTA and the merging RECs that a brief exposition of the salient features of the three amalgamating blocs' structures is necessary.

3.3.2 The Three Amalgamating Blocs of the TFTA

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

COMESA began as the Preferential Trade Area (PTA) in 1981 and was, by way of treaty, transformed into COMESA in 1994. Its objectives go beyond economic integration to include promotion of peace and security, besides developing the

[96] Article 30 of the TFTA Agreement p. 15.
[97] *Ibid*.
[98] *Ibid.*

member states' natural and human resources. It establishes an FTA and customs Union and currently consists of 19 members.[99]

COMESA has established a trade and development bank, a clearing house, leather institute, an association of commercial banks and a reinsurance company. The COMESA Court of Justice is also established under Article 7 of the treaty and became operational in 1998.

Like most RECs on the African continent, the COMESA treaty decision making hierarchy starts with the summit of Heads of States at the top, the council of ministers responsible for policy making, technical committees and several advisory bodies, in that order.[100]

Article 3(f) of the COMESA treaty cites, as one of its core aims and objectives that it aims to make a contribution towards the establishment, progress and the realisation of the objectives of the African Economic Community.

The bloc has achieved some significant milestones. COMESA has been able to transform from a Free Trade Area to a common market, with relative free movement of goods and ease in movement of persons.[101] The COMESA region has also galvanised members who can now collectively engage in global trade and negotiate with larger economies such as the United States of America (USA) and the European Union. However, movement of labour remains restricted in most member states with work permits still required. Integration into a fully-fledged customs union also remains a challenge due to reasons such as a lack of commitment to projects by some member states, divided loyalty by members with

[99] COMESA Treaty at www.comesa.int/attachments/article/28/COMESA_Treaty.pdf. Accessed on 10th June 2016.the COMESA membership includes Angola, Burundi, Comoros, Congo, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somali, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe
[100] Article 7 of the COMESA Treaty at page 13.
[101] With the exception of the difficulties in implementation of the protocol on rules of origin 2015, COMESA has common external tariffs and intra trade quotas meant to protect smaller economies and sectors which are still granted preferential treatment.

other blocs such as SADC and EAC, low intra-bloc trade due to production of similar raw materials and agricultural goods.[102]

b) *The Southern African Development Community (SADC)*

SADC was first created in 1980 as the Southern African Development Coordinating Conference (SADCC). Its underlying principal objective was to reduce its members' dependence on the then apartheid South Africa.[103] In anticipation of the democratisation of South Africa, SADCC transformed into SADC in 1992 and South Africa joined it in 1994. SADC's predecessor SADCC was not a market integration arrangement in its strict sense but one whose members, known as front line states,[104] adopted a broad development mandate. SADCC, therefore, engaged in cross-border sector specific projects in infrastructure and energy such as the regional development corridors and the Southern African Power pool.[105]

The SADC treaty (and subsequently the SADC trade protocol) does not elaborate a detailed integration plan but such detail is to be found articulated in the Regional Indicative Strategic Development Plan (RISDP) of 2003.[106] The RISDP articulates a roadmap of SADC from a FTA by 2008, to a Customs Union in 2010, a Common Market in 2015, a Monetary Union in 2016 and the introduction of a single currency in 2018.[107] Though not a legally binding instrument, the RISDP bears significant political legitimacy and is recognised as a blueprint towards the integration of SADC Member states.

Article 16 of the SADC treaty established the SADC tribunal whose role is to interpret the treaty and its subsidiary instruments and to adjudicate upon disputes

[102] These problems have been discussed in more detail in Chapter 4 of this work. See Ibrahim S G and Nwokedi LO, "Bi-regional integration in Africa: An Evaluation of the Major Challenges of the Common Market for Eastern and Southern Africa (COMESA)" *International Journal of Multidisciplinary Research and Modern Education (IJMRME)* (Online):2454-6119 (www.rdmodernresearch.org) Volume I, issue I, 2015 p.2. Accessed on 9th September 9, 2016.
[103] Hartzenberg, note 41 above at p.5.
[104] Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.
[105] Hartzenberg, note 41 above.
[106] *Ibid.*
[107] *Ibid.*

that may be referred to it. It can also give advisory opinions to the summit of Heads of States and Government and Council of Ministers, if called upon. The SADC tribunal was disbanded in the year 2012 after being suspended and staying moribund since 2010.[108] Following a decision of the summit of heads of states held in 2014, a new SADC Tribunal Protocol was signed but has not received the requisite 10 ratifications for it to come into force.[109] It may take years to comply with the ratification processes under the new protocol, which involves compliance with the domestic laws of member states.[110]Under the new protocol, the tribunal's jurisdiction was curtailed to only deal with disputes between state members, and as such its necessity and continued existence is cast in doubt, particularly since member states do not ordinarily sue each other.[111]

The watering down of the mandate of the tribunal and its eventual disbandment by the bloc's summit of heads of states was seen as an attempt to appease Zimbabwe. Zimbabwe had threatened to withdraw from the protocol establishing the tribunal following the adverse decisions and orders by the tribunal against it in *the Michael Campbell v Zimbabwe case.*[112]The developments surrounding the SADC tribunal and their impact and potential import on the TFTA integration process is discussed in the ensuing section of this work.

The SADC approach has been likened to that of the EAC.[113] Both are based on the linear market progression paradigm[114] with the only striking difference being that while the EAC envisages a political federation, the SADC integration only ends at economic integration with a monetary union.[115] SADC prides itself as having achieved 85% of intra- regional trade amongst its members in a phased

[108]The summit of heads of states refused to appoint new judges or to renew the appointments of those serving. See, Erasmus G, "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 at p. 1 Tralac, available at https://www.tralac.org. Accessed on 2nd September 2016. The new protocol is available at www.tralac.org. Accessed on 2nd September 2016.
[109] Article 53 of the new Protocol.
[110] Erasmus, note 108 above at p.1.
[111] Article 33.
[112] [2008] SADCT 2 (28 November 2008) SADC Tribunal (SADC).
[113] *Ibid* at page 6.
[114] *Ibid*. The linear model or linear market paradigm is discussed in more detail in part 4.4 of this article.
[115] Hartzenberg, note 41 above, at p.5.

programme achieved in 2008.However the set minimum tariff liberalisation was achieved in 2012, way after the target date of 2008.[116] Most member states still lag behind and as a result the strategic plan to achieve a customs union with common external tariffs by 2010, a common market with common policies and production regulation by 2015, a macroeconomic convergence and monetary union by 2016 have not been met.[117] The envisaged monetary union set for 2018 seems unlikely to be achieved. The monetary union was first set to be achieved in 2016 and is now postpone to the year 2018.[118] The fundamentals key for the establishment of monetary union, such as the establishment of a SADC central bank, are still lacking.[119]

c) The East African Community (EAC)

The Treaty establishing the EAC entered into force in the year 2000.[120] The original EAC members included Kenya, Uganda and Tanzania. Burundi and Rwanda acceded to the treaty in 2007 and the Republic of Southern Sudan in 2016. Ethiopia and Somalia are also expected to join the bloc shortly.[121]

The original three members of the EAC have long political and economic historical integration ties that go as far back as the colonial period.[122] In 1917, Kenya and Uganda, both English colonies, formed the Customs Union which Tanganyika later joined in 1927.[123] The East Africa Commission was operational between 1948 and 1961.[124] The East African Common Services Organization (EACSO) existed between 1961 and 1967.[125] Under this arrangement services such as telecommunication, infrastructure, electricity generation and

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[116] www.sadc.int/integration milestones. Accessed on 2nd September 2016.
[117] *Ibid.* Also see Padamja K "COMESA and SADC: Prospects and Challenges for Regional Trade Integration" 2004 IMF working Paper WP/04/227.p. 12 and 13.
[118] *Ibid*, SADC treaty, p.13.
[119] *Ibid.*
[120] EAC Treaty at www.eac.int/treaty. Accessed on 1th June 2016.
[121] Maiyo J "EAC: How New Members will Alter Regional Bloc" available at www.pambazuka.org. Accessed on 5th September 2016.
[122] East African was colonized by the British in the late 19th Century as a homogenous entity known as: The East Africa Protectorate, before Tanganyika come under the German hegemony and later, after the First World War, reverting to British rule.
[123] Supra note 75.
[124] *Ibid* at page 1.
[125] *Ibid.*

transmission, an airline and tax resources collection were shared between the three East African Countries. A common central bank also issued a common currency, the East African Shilling. There also existed the East African Court of Appeal, which was the apex judicial body within the EAC. The EACSO was succeeded by the East African Community between 1967 and 1977. However the EAC was dissolved in 1977, mostly due to ideological differences between the then Heads of States of the EAC countries.[126]

A Mediation Agreement was then negotiated and concluded in 1984 by which the three member States (Kenya, Tanzania and Uganda) agreed to explore areas of future cooperation. This birthed the permanent Tripartite Commission for East African Cooperation on 30th November 1993 and a permanent secretariat of the EAC in Arusha, Tanzania in 1996. The EAC treaty was later signed in 1999 and entered into force on 7th July, 2000.

The EAC model is based on four integration pillars: the Customs Union, Common Market, Market Union and Political Federation.[127] The Customs Union Protocol has been in force since 2005 and is founded upon Article 75 of the EAC Treaty. The Customs Protocol establishes a FTA where zero duty is imposed on goods and services among members and a Common External Traffic (CET) towards imports from third countries when sold to any EAC partner state. Another function of the Customs Union Protocol is to establish common rules of origin.[128]

The second pillar of the EAC is the Common Market Protocol which became fully fledged in 2010.[129] The protocol sets out rules that encourage free movement of the factors of production including free movement of goods, persons, labour, rights of establishment, rights of residence, free movement of services and free movement of capital. The principles that underline the EAC Common Market are: non-discrimination of nationals of other partner states on

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[126] *Ibid*. During the cold war era-Kenya and Uganda pursued a capitalist approach while Tanzania preferred a socialist approach.
[127] www.eac.int/intergration_pillars. Accessed on 4th July 2016.
[128] www.eac.int/resources/documetns/protocal-establishement-eac-customs-union. Accessed on 5th July 2016.
[129] www.eac.int/resources/docuemtns/protocal/establishemnt_common_market. Accessed on 5th July 2016.

account of nationality, equal treatment of nationals of other states, ensuring transparency in matters concerning the other partner state and sharing of information for the smooth implementation of the protocol.[130]

The East African Monetary Union (EAMU) Protocol was signed on 30th November 2013.[131] It envisages a monetary union within 10 years and sets the foundation for the progressive convergence of member currencies into a single currency. The partner states have therefore agreed through the protocol to harmonise monetary and fiscal policies; harmonise financial, payment and settlement systems harmonise financial accounting and reporting practices; harmonise polices and standards or statistical information; and establish an East African Central bank.[132]

The last pillar of the EAC integration effort is the political federation. This is more of a goal or an aspiration than it is an actual instrument in the nature of a protocol. The political federation is the ultimate goal of the integration process under the EAC Treaty and is premised upon Article 5(2) of the EAC Treaty.[133] The EAC member states appreciate the fact that the attainment of the political union is a process and not an event and as such it was resolved by a special summit of Heads of Sates in August 2004, to establish a committee which would consult and advice on the process and progress of political integration.[134] The committee presented its report to the summit on 29th November 2004 and following which an office of the Deputy Secretary General responsible for political federation was established.[135]

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[130] As above.

[131] www.eac.int/resources/documetns/protocol_establishemnt_eac_moneatry_union. Accessed on 5th July 2016.

[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.*

[135] The Report of the committee on Fast Tracking of East African Federation also known as the Wako committee report after the committee's chairman, Amos Wako, the then Attorney General of the Republic of Kenya. See full text of report at www.federation.eac.int/index.php/opition.com_docman & tax_doc. Accessed on 4th July 2016.

The main organs of the EAC are the summit of Heads of States and Governments, council of Ministers, Coordinating Committee, Sectorial Committees, the East African Court of Justice (EACJ), the East African Legislative Assembly (EALA) and the community's secretariat.[136]

The hierarchical structure of most RECs in Africa takes the same shape. The EAC is no exception. The summit made up of Heads of states and Governments of partner countries gives strategic direction to the community. The Council of Ministers meets twice a year and gives policy direction and decisions for the EAC. The EALA is the legislative organ of the community with the mandate to legislate and oversight the secretariat. It was established under Article 9 of the EAC Treaty. It has 45 members (nine from each partner state).[137] The EACJ is the principal judicial organ of the community and ensures interpretation and application of the EAC treaty and protocols.[138] The Court's seat is currently at Arusha, Tanzania with sub registries in the capitals of the partner states. It comprises 10 judges appointed by the summit of heads of state and governments from sitting judges or jurists of member states and has two divisions, an appellate and first instance division.[139] The EAC secretariat is the executive organ of the community and runs the day to day operations of the community. It is headed by a Secretary General who is appointed by the summit for a non-renewable period of 5 years. The Secretariat ensures the regulations and directions adopted by the council are properly implemented.[140]

The long history and seemingly clear and developed structure of the EAC, perhaps vindicates the view taken by commentators to the effect that the EAC, rivalled only by the now defunct European Community (now European Union), is arguably one the most deeply integrated RECs in the world and perhaps the most integrated region in Africa.[141]

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[136] Chapter Three of the EAC Treaty. 17.
[137] Chapter Nine of the EAC Treaty. 38.
[138] Chapter Eight of the EAC Treaty 25.
[139] *Ibid,* Article 24.
[140] Article 23(1) of the EAC Treaty.
[141] Fagbayibo B, note 57 above, 42.

The EAC draws lessons from the failure and dissolution of the first EAC in 1977 and seeks to build its structures along the defunct pre – 1977 EAC. It however aspires to go further and create a federated political union. The advantage of hindsight certainly informs its cautious progressive evolution so as to avoid the pitfalls that led to its collapse in 1977. This seems to have guided the conscious effort by member states to adopt a step-wise integration model for the EAC.

The EAC has achieved free movement of goods and people within the region but still lags behind in areas of movement of labour, services, right of residence and establishment.[142] This is principally blamed on reluctance by some member states to fully open up their markets to larger more established economies such as Kenya by imposing non-tariff barriers to circumvent the agreed tariffs.[143] A common external tariff remains elusive particularly as member states separately engage third parties such as the EU hence weakening their negotiating leverage. The bloc has long term integration ambitions, with a customs union taking effect in 2010, a monetary union set to be fully implemented in 2023, and ultimately, political union. Despite a myriad of challenges in implementing the customs union, the EAC transitioned into a common market in 2010 after concluding negotiations in 2009.[144]

3.4 Summary

This section has examined the architecture of the AEC treaty and the TFTA. The salient features of the three RECs that intend to merge under the TFTA (COMESA. SADC and the EAC) have also been substantively highlighted. The step wise process of transition from the respective RECs through to the TFTA and the ultimate goal of the economic integration of the African continent under the AEC, was also underlined.

In the next part, the potential problems and prospects of the proposed integration of the merging RECs into the TFTA will be discussed.

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[142] www.eac.int/integration.pillars. Accessed on 2nd September 2016.

[143] Maina B, "Strides in Regional Trade despite Problems" *Daily Nation* Wednesday February 25, 2015.

[144] Makame A, "The East Africa Integration: Achievement and Challenges" 2012 Maastricht: ECDPM available at www.ecpdm.org/great-insights. Accessed on 9th September 2016.

4.0 Problems and Prospects of the TFTA

4.1 Introduction

On its path to economic integration, the TFTA is bound to meet a myriad of challenges. The challenges and prospects are multifarious; economic, political and geographical. However, even in the midst of these obstacles prospects still abound.

This section will address the various challenges that attend the process of attaining the TFTA. Prospects of the TFTA shall thereafter follow before drawing conclusions.

4.2 Problems and challenges of the TFTA

4.2.1 Compatibility with Article XXIV of the 1994 WTO Agreement on Regional Economic Integration

As a starting point, being a Regional Trade Arrangement/ Agreement (RTA), the TFTA is expected under international law on trade, to reflect the ideals or principles of regional economic integration as prescribed in Article XXIV of the 1994 WTO Agreement.[145] The TFTA Agreement's compatibility with the Article XXIV of the WTO 1994 agreement is, therefore, a convenient place to begin the discourse on the problems of economic integration under the TFTA Agreement.

The WTO/GATT framework, as a whole, is a rule based effort towards a multilateral free trade system or regime with minimum or no barriers, be they tariff or non-tariff.[146] However, in recognition of the fact that a truly globally free trade system is still a mirage, the WTO/GATT recognises and acknowledges RIAs as viable vehicles or building blocks towards a multilateral trade system.[147] Accordingly, Article XXIV of the GATT/WTO 1994 encourages the establishment of RIAs and proceeds to prescribe regulation for regional integration.

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[145] Full text of the Article available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm.Accessed on 19th September 2016.
[146] Cottier and Foltea, note 37 above.
[147] Article XXIV WTO 1994, note 145 above.

Sub-paragraphs 8(a) and 8(b) of Article XXIV define a Customs Union and a Free Trade Area, respectively. Article XXIV in a nutshell prescribes rules of engagement, regulations or requirements for effective establishment and management of the FTAs and Customs Unions. These are the substantive concerns of this part of the article. From a reading of Article XXIV, the following prerequisites of an RTA are discernible.

Firstly, RTAs should cover substantially all trade in goods.[148] An RTA, be it an FTA or Customs Union, should cover substantially all the trade in goods within members of the RTA. In achieving this, RTAs should remove all tariffs and quantitative restrictions within a reasonable time.

Secondly, RTAs should abolish internal trade restrictions by placing minimum preferential rules of origin.[149] The elimination of discrimination and the granting of national treatment are required to take place either at the date of entry into force of the agreement or within a reasonable time frame. Article XXIV prescribes a minimal, if any, rules of origin so as to discourage discrimination of goods from third party states. The rationale can be understood to be founded on the reasoning that rules of origin exist to not only discourage "trade deflection" but also ensure that imports of product will not always enter the region through low tariff countries hence depriving the other members of revenue and any protection the tariff may provide to the higher tariff party's enterprise.

Thirdly, RTAs should cultivate ground for an ultimate global multilateral free trade. Under Article XXIV paragraph 4 and indeed running through the entire edifice of the article is an emphasis on the ultimate goal of multilateral free-trade with minimum, if any, restrictions. The article seems, even in its rather permissively couched language, to deliberately not only acknowledge the place of RTAs as building blocks towards multilateralism but also encourage free trade with third parties and growth of the RIAs into much larger viable multilateral trade systems. In a nutshell, the article provides RTAs should not result in stricter or severer barriers to trade for non-members or third parties. Third parties should not suffer upon liberalization through RTAs.

[148] Article XXIV paragraph 8 GATT/WTO 1994.
[149] Article XXIV, paragraph 5 GATT/WTO 1994.

Having identified the principles espoused by the WTO on regional integration, attention will now proceed to briefly focus, using the principles identified above, on the TFTA's compatibility with identified principles.

Although Article XXIV of the GATT 1994 indicates the elimination or near elimination of tariff and non-tariff barriers to trade, save for necessary circumstances or for limited periods, rules of origin remain common place in African RTAs. The rules exist in almost all FTAs and are always complex. They pose a real potential for disputes both in their administration and comprehension. Ideally the rules are designed to prevent trade deflection in a free trade area where external trade barriers such as tariff levels differ.[150] They are employed to also discourage producers from using what Gantz calls "final assembly screw-driver operations" where such producers use non-regional parts and components from duty free states or regions to enjoy the free trade status of the RTA[151]. Rules of origin are a critical non-tariff barrier to export and import trade and are difficult or near impossible to enforce by developing countries' customs authorities.[152]

The TFTA Agreement recognises that elimination of rules of origin can only be progressively achieved.[153] However, the challenge lies in the timeous elimination of the various rules of origin that subsist under the various merging RECs. To renegotiate and navigate such complex, often conflicting, and dispute prone rules of origin may stifle the growth of multilateral trade under the aegis of the TFTA.

4.2.2 Lack of Institutional Independence

The TFTA Agreement establishes various institutions that should ensure the effective discharge of its overall mandate. These institutions include the tripartite summit of Heads of States and/or Governments, an executive Council of Ministers, a secretariat, sectorial technical committees of ministers of the trade of the merging RECs; and the Dispute Settlement Body as its judicial arm.[154] The

[150] Gantz, note 19 above at p.243 to 244.
[151] *Ibid.*
[152] *Ibid.*
[153] Article 12 of the TFTA Treaty as read with Annexe 4 thereof.
[154] The features of the TFTA are discussed in detail under part 3.2 of this article.

realisation of the TFTA largely depends on the technical committees of the secretariat of the merging RECs.[155]

According to Fagbayibo, to achieve supranationalism an integration entity must be independent enough to implement the integration initiatives.[156] Although the realisation of the TFTA is dependent on the organs of its merging RECs, critical institutions of those RECs remain devoid of institutional independence. At the very elementary, institutional independence connotes a measure of subscription to the doctrine of separation of powers and the concept of judicial independence particularly for the judicial organs.[157] These constitutional principles which are mostly applied in national legal systems also find credence on the international plane. In practical terms, though interdependent, the executive (summit of heads of states and council of ministers and secretariat), legislative and judicial arms (the dispute settlement body) of a REC such as the TFTA should remain distinct and retain their independence even as they coexist within the broader organisational framework.

There is real and founded apprehension, going by the growing body of evidence of lack of independence or the outright undermining of independence of organs of RECs in Africa. This trend is more likely to permeate the organs of the TFTA because the TFTA structure and organs mirror the very same features of the RECs it intends to amalgamate including those which have a history of its executive organs undermining the independence of other organs. This is more worrying when such organs are invariably judicial organs which are meant to oversight the executive arm, check on excesses, interpret treaties and protocols, and determine rights and obligations of members and their citizens, between members *inter se* and even with third party states or individuals and entities.

Lack of institutional independence in the TFTA organs can therefore be traced back to the merging RECs where evidence of such void abounds. For instance,

[155] TFTA treaty Article 29.
[156] Fagbayibo B, note 57 above at. p.49.
[157] The doctrine of separation of powers is attributed to the French philosopher Montesquieu and it in essence requires the executive, legislative and judicial powers of the state to be separate as far as possible but remain inter-dependant for a proper functioning of a constitutional democracy by offering each other the requisite and necessary checks and balances.

the judicial organs of the SADC, EAC and COMESA are largely moribund institutions whose jurisdictional competence and authority are of dubious merit. The judges who sit in the respective courts and tribunals of these RECs are hand-picked by the summit of Heads of Sates and governments of the various RECs.[158] Similarly, the appointment of members of the Dispute Settlement Body of the TFTA is also the function of the executive organ of the TFTA.[159] This inherently undermines the independence of the Court or tribunal and goes against the very basic principle of governance of separation of powers.

Demonstrably, and as an escalated consequence of the forgoing trend, the observance and execution of decisions of the AEC Court of Justice is in doubt, if the experiences of the EACJ and SADC tribunals are anything to go by.

A case in point poignantly illustrates this point. The sanctity of the EACJ's decisions came into sharp focus in the aftermath of the case of *Prof P. Anyang Nyong'o and the Attorney General of the Republic of Kenya et al.*[160] The EACJ had agreed with the Applicants and ruled against the Republic of Kenya to the effect that Kenya's mode of nominating members to the EALA was inconsistent with the EAC treaty.[161] The Republic of Kenya, a member state and a subject of the Court, together with other member states, resisted the decision of the EACJ.

As a result, the constitution, jurisdiction, and juridical value that the EACJ adds to the integration of East African states has been the subject of intellectual discussion particularly in light of the *Prof Nyong'o case*.[162.] It has been concluded

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[158] See parts 3.3 3.4 and 3.5 of this article for a detailed discussion of the institutional structure of the COMESA Court of Justice, EACJ and SADC Tribunal.

[159] Annexe 13 to the TFTA Agreement. See the full text at www.tralac.org/images/Recourses/Tripartite_FTA/FTAT Annexe 13 Dispute Settlement Revised Dec 2010.pdf.accessed on 1st July 2016.

[160]Judgment of 30th March 2007, Ref.Nr.1 of 006 available at http://www.eac.int/en/judgments.html. Accessed on 1st July 2016.

[161] A Similar decision was reached by the same court in the case of *East Africa Law Society et.al v The Attorney General of Kenya et.al* Judgment of 8th September 2008, Ref.Nr.3 of 2007, available at <http://www.eac:int/en/judgments.html> Accessed on 1st July 2016.

[162] See for instance Van der Mei A.P. "Regional Integration: The Contribution of the Court of Justice of the East African Community" ZaoRv 69(2009), 403-425.Also see Gathii J "Mission Creeper for Relevance: The East African Court of Justice is Human Rights

that despite well intentioned institutions and bold provisions in treaties and protocols, institutional independence is yet to be achieved by EAC organs, particularly the EACJ, despite adulations earned by EAC as being the most deeply integrated REC in Africa.[163] National interest and preferences of heads of states and governments seem to always override those of RECs and their organs. This is a patent threat to the integration of Africa.

Another litmus test to the independence of regional courts arose in the case *of Mike Campbell (PVT) Ltd v Zimbabwe*.[164] This was a case that brought into sharp focus the judicial supremacy contest pitting regional courts/tribunals, on the one hand, and national courts, on the other. The case also demonstrated the lack of independence of REC organs over the overbearing summit of head of states and governments and by implication the deficiency of the rule of law in the management of affairs of RECs in Africa.

In the *Mike Campbell* case, the SADC tribunal had awarded the Applicant, a company owned, by majority shareholding, by a South African Citizen against the government of Zimbabwe. The Applicant moved the Zimbabwean High Court to enforce the tribunal's decision but this was rejected. The Zimbabwean High Court disallowed Mr. Campbell's prayers on the ground that the land reforms upon which Mr. Campbell lay his claims was public policy and therefore for public good. The applicant had brought an action against the government of Zimbabwe following his forceful eviction from his land following its seizure through a state sanctioned policy that allowed its independence war veterans to do so. The Zimbabwean government first resisted the jurisdiction of the SADC tribunal over the matter, and upon failure on this ground absconded appearing before the tribunal. The Zimbabwean government was found by the SADC tribunal to be in contempt of the tribunal's orders and in multiple breach of the SADC treaty. The applicant thereafter successfully sought to enforce the decision

strategy.*" Duke Journal of Comparative and International law* Vol. 24:249 and Ojienda T "The East Africa Court of Justice in the Re-established East African Community: Institutional Structure and Function in The Integration Process" 2005 *East Peace & Hum Rts* 220-240.

[163]Van der Mei A. P, note 162 above at 424 and 425.

[164] [2008] SADCT 2 (28 November 2008) SADC Tribunal (SADC).

of the tribunal through diplomatic protection in South Africa and subsequently moved to attach the assets of Zimbabwe in South Africa.[165]

Both the South Africa supreme court of Appeal and Constitutional court rejected Zimbabwe's appeals after the South African High Court at Pretoria had allowed the seizure of Zimbabwe assets. Zimbabwe, through its Justice Minister then wrote purporting to withdraw from the SADC Tribunal Protocol. In May 2011, in an extraordinary summit of Heads of States and governments of SADC held in Namibia, all the SADC tribunal members were replaced and/or not reappointed rendering the tribunal suspended. That decision by the SADC summit of Heads of States and Governments came under sharp criticism as it undermined not only the SADC tribunal's authority as an institution but also SADC as a REC.[166] SADCs credentials as a REC governed by the rule of law and its members' commitment to that ideal were seriously cast in doubt.

Credit should be given where it is due. The *Mike Campbell* case is celebrated for two firsts.[167] Firstly, as the first case in which assets/property of a state were seized in compensation for human rights violations by a state. Secondly, because it marked a triumph for both the SADC tribunal in flexing its muscles on its independence and the South Africa Court's resilience, in the face of internal and external political pressure, in upholding human rights, judicial independence and finality of the decision of the SADC tribunal.

Platitudes for the SADC tribunal and EACJ for rising to the occasion and striking a blow for judicial independence, have not been few.[168] Both EACJ and SADC tribunal have demonstrated their ability to underscore their independence from

[165] Diplomatic protection is a principle developed in international law which allows one to invoke the diplomat assistance of one's state against another to enforce rights recognised in international law.

[166] Zongwe D "The Contribution of *Campbell v Zimbabwe* to the Foreign Investment on Expropriations" *Osgoode Hall Law School CLP Research Paper* 51/2009 Vol. 05 No. (09 2009) available at http//digitalcommons.osgoode.yorku.ca/clpe.Nd/oru N.P. Also see "A moment of Truth for the SADC Tribunal" SADC Law Journal Volume 1-2011.Both SADC Lawyers' Association and international commission of jurists (ICJ) Africa office and the Pan African Lawyers Union roundly criticized the suspension of the SADC tribunal and sought the intervention of the African Court on Human and Peoples' Rights.

[167] *Ibid.*

[168] *Ibid.*

national influences and regional politics. However, by the very architecture of these institutions, the control of judicial organs by the executive arm of the RECs (namely the summit of heads of states and council of ministers), exercised through the appointment mechanisms, funding and enforcement of their decisions, has the unfortunate effects such as the suspension or dissolution of strong judicial organs, always as a lingering possibility.

Again, not many national judicial organs and courts have the ability or wherewithal to be as independent of political pressure and mechanisations as was demonstrated by South African courts in the *Mike Campbell case.* In fact, most national or municipal judicial organs in the TFTA countries are so beholden to or subservient to the executive heads of those states that their lack of independence and inability to enforce an unpopular decision of the TFTA judicial tribunal is a foregone conclusion. A case in point is the Zimbabwean High court in the *Mike Campbell* case where the court acted and pronounced itself to the whim of the state.

In the TFTA matrix, one therefore meets the reluctant converts such as Zimbabwe and the EAC members, on the one hand, and the progressives such as South Africa, on the other hand. What that portends to the TFTA is a situation akin to that in the *Mike Campbell* case, which will potentially foment disharmony and inevitably clogs the wheels of integration in the TFTA. Such situation provides a real threat to the march towards the AEC.

4.2.3 Inability to observe agreed timelines

There is also an inability to keep to the implementation timelines agreed to. Protocols which are time bound in implementation are observed more in breach than otherwise. Member states are always seeking extensions to timelines set in protocols and protection of markets. For instance, the EAC market union was envisaged to have been fully achieved by the year 2010.[169] It is still yet to be achieved with the movement of capital, labour and services still restricted by barriers within the member states. A similar situation abounds for COMESA. The Customs Union was scheduled to be in place by the year 2004. Twelve years later, this is still yet to be achieved with a myriad of barriers erected within the

[169] See the COMESA market strategy available at www.comesa.int/comesa-strategy. Accessed on 5th July 2016.

trading bloc's members. The SADC monetary union that was, under the RISDP, to be achieved by the year 2016 is also still a pipe dream.

Fagbayibo observes that there is a strong nexus between the effective implementation of integration initiatives and the autonomy of regional institutions.[170] In essence, he opines that the implementation of integration initiatives cannot be left to the conveniences, vagaries or the goodwill of heads of states or the vicissitudes of national or regional politics.[171] Implementation of the TFTA should, therefore, be left in neutral hands. The peril of leaving the grand task of implementation of integration in the hands of heads of states and governments comes with the risk of collapse of the integration process when such political goodwill ebbs or wanes. An example of this is to be seen in the demise of the EAC in 1977 following disagreement between Presidents Julius Nyerere and Idi Amin, of Tanzania and Uganda respectively.[172] Recent history has also shown that the momentum in the New Partnership for Africa's Development (NEPAD) has dissipated following the exit from the political scene of its principal architects, Presidents Olusegun Obasanjo and Thabo Mbeki.[173]

4.2.4 Differences in Legal Systems and Philosophies

Yet another institutional impediment that belies the harmonious integration of the COMESA, SADC and EAC into the TFTA is to be found in the different legal systems subscribed to by their various member states. While the majority of the states are largely common law English speaking, some such as Rwanda and Burundi are francophone civil law jurisdictions. South Africa, on the other hand, takes a Roman – Dutch approach. The approaches to legislation and legal practice in these three legal systems materially differ and could pose challenges in their harmonisation.[174]

This problem is even more sorely felt when it comes to interpretation of treaty rights and obligations before national courts on the premise of RTAs. Writing in

[170] Fagbayibo B, note 57 above.49.
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.*
[174] Kariuki F "Challenges Facing the Recognition and Enforcement of International Arbitral Award within the East African Community", (2016) 4(1) *Alternative Dispute Resolution* P.64 at 89.

the context of enforcement of international Arbitration Awards, Kariuki' s views are critical to consider particularly with respect to what the differences in legal systems and philosophies portend for the TFTA. He notes that differences in procedural rules and practices, evidentiary laws and significant differences in public policy considerations pose challenges to the predictability and consistency in application of legal norms. [175]

It is this writer's considered view that a transnational *sui generis* approach that evolves a uniquely African approach which borrows from the best practices of the aforementioned more established legal systems should hence be explored.

The problem of implementation and enforcement of decisions of international Courts and tribunals has always dogged international judicial bodies, both in the realm of civil and human rights claims and the TFTA Disputes Settlement Body will not be an exception.[176] There is no silver bullet solution to this problem but a ray of hope is perhaps seen in the OHADA harmonisation of the business laws including a common arbitration law for its member states and a provision of intelligibility, simplicity and ease in the execution of foreign arbitral awards and judgments emanating from OHADA member states.[177]

4.2.5 Political Instability, Poor Governance and Lack of Respect for Human Rights

Democracy, human rights and good governance are now accepted principles that transcend political unions, to include matters economic. African states have made significant strides towards achieving these ideals although much remains to be done. Sadly, to date despotic regimes and armed conflict are still common place in Africa. As Fagbayibo rightly puts it, supranational organisations can only

[175] *Ibid* at p.89.
[176] Writing on the African Court on Human and Peoples Rights (ACHPR). Pityana B.N. "Reflections on the African Court on Human and Peoples Rights" at p. 3 and 4 available at www.unisa.ac.za/contents/about/.../, Prof Pityana elucidates the resistance of African states to be bound by the Court particularly on matters concerning human rights hence the reluctance by a significant number of members to ratify the ACHPR Protocol. Also see Kenyariri C, *"Dispute Resolution within the East Africa Community: an Examination of the East African Court of Justice and its Jurisdiction" UNISA* 2008 Unpublished Dissertation.
[177] See generally, Fagbayibo B "Towards the Harmonisation of Laws in Africa: Is OHADA the way to go?" 2009 CILSA 309-322.

assert their influence in a stable climate.[178] Transnational commerce cannot thrive in one democratic state while the state contiguous thereto is averse to principles of good governance.

The TFTA agreement and indeed all the treaties of COMESA, SADC and EAC recite the commitment of its members to democratic ideals and respect for human rights.[179] The AU Act equally echoes similar sentiments. However the reality on the ground falls short of the stated principles. As Gathii notes, most states do not enter into RECs as evidence of their commitment to respect human rights and will often resist human rights standards imposed by RECs which they do not domestically subscribe to.[180] Human rights reports and indicators still place most sub-Saharan African states, most of which are members of the TFTA, at the foot of the human rights observance pyramid.[181] This makes a mockery of most African states' subscription to the observance of human rights and democratic ideals on paper, while engaging in the exact opposite in deeds.

The lack of democratic credentials by most African States coupled with their poor human rights records spell an existential threat to economic advancement of the TFTA. As shown in practice, economic development, foreign direct investment and infrastructure can neither be attracted to nor reside in areas plagued by constant conflict, instability and wars.[182]
Fagbayibo suggests disciplinary sanctions at the regional level against despotic regimes.[183] Although he proffers no suggestions on the manner and nature of disciplinary powers to be invoked at the regional level, it is doubtful that any such measures could be meted out by regional bodies whose apex decision making

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[178] Fagbayibo, note 57 above at 58.
[179] See preambles to the TFTA agreement, SADC, COMESA and EAC treaties.
[180] Gathii, note 106 above at 250.
[181] See for example the Amnesty International 23rd February 2016 Human rights report 2015/2016 available at https://www,.amensty.org/en/latest/research/2016/ann. Accessed on 5th July 2016.
[182] Luiz, J and Charalabous, H,"Factors Influencing Foreign Direct Investment of South African Financial Services Firms in Sub –Sahara Africa" March 27 , 2009 *Working Paper, University of the Witwatersrand* at p. 11 cites governance and political risk as an important consideration affecting FDI into Sub- Sahara Africa. Available at www.econrsa.org/system/files/publications/working_papers/wp118.pdf.Accessed on 4th October 2016.
[183] Fagbayibo, note 57 above at p.57.

organ is populated by bedfellow tyrants and autocrats. They are more likely than not to contemptuously veto such efforts even if coming from judicial organs of the REC as has been demonstrated on several occasions discussed in the earlier parts of this article.

4.2.6 Poor Implementation of the Linear Market Integration Model

The linear market integration model or paradigm, according to Hartenzberg, is favoured by most RECs in Africa and is characterised by "stepwise integration of goods, labour and capital, markets and eventually monetary and fiscal integration".[184] In other words, African RIAs are inspired by an aspiration to evolve over time into a single economic unit, some even into a political federation.[185]

Hartzenberg however criticises this model on two fundamental grounds. First, that supply side constraints may be more significant than the linear integration model. She opines that a deeper integration agenda that encompasses services, investments, competition policy and other behind-the-border issues can address the national level supply side constraints better effectively as compared to an agenda which focuses exclusively on border measures.[186]

Another criticism Hartzenberg levels upon African RIAs is that the continent itself is not only geographically and politically but also economically fragmented and marginalized. Hartenzberg observes that Africa continues to engage on the periphery of the global economy and its share of the world trade continues to shrink.[187]

[184]Hartenzberg, note 41 above at 1.
[185] For example the EAC treaty has as one of its objectives, its evolution into a political federation. See also Bachinger, and Hough J "New Regionalism in African of Integration" 2009. *Africa Insight* Vol. 3912 at p. 43-44 A similar aspiration is shared by the African Union through the African Economic Community for an envisaged African Government. For insights into the economic –political aspirations and the transitional problems. See also, Forere, note 12 above.
[186] Hartzenberg, note 41 above.
[187] *Ibid.*

Hartzenberg blames this sad state of affairs to the low per capita income levels and small populations which result in small markets[188]. Most of the countries produce similar primary agricultural good or raw materials without value addition. This, therefore, makes trade among them unviable. Many sub-Saharan African economies are also landlocked hence contributing to high costs of doing business. These facts are true for most countries comprising the TFTA. Intra-regional trade has remained low.

Empirical data is demonstrative of this fact. More than 80 percent of Africa's exports are still destined for outside markets with the EU and the United States of America (USA) forming more that 50% of this total.[189]Asia and China are the other significant markets. On the other hand, Africa imports more than 90 per cent of her goods from outside the continent.[190] Statistics indeed paint a grim picture. In 2008, 12 Sub-Sahara Africa (SSA) states had populations of less than 2 million while 19 had a GDP of less than US 5 billion, six of which had a GDP of less than US $1 billion. In sub-Sahara Africa, there exists Low per capita densities of rail and road transport infrastructure which in colonial times was designed to transport primary products to ports, poorly developed cross country connections are the outcome. [191]

Hartzenberg concludes by questioning the appropriateness of the linear integration model in addressing the real problems that inhibit regional and global trade performance. In light of the above problems, she notes that the proliferation of RTAs in sub Saharan Africa has done little to promote intra-regional trade or indeed to enhance the global trade performance of African countries.[192]

4.2.7 Inherent Discrimination

RECs /RTAs such as the TFTA are agreements only binding among state parties. It therefore follows that they are by nature discriminatory and are thereby in

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[188] Hartzenberg, note 41 above at 3. Further empirical data can be seen in the analysis by Gibb, R "The State of Regional Integration: The intra and inter regional dimensions in Regional Integration in Southern Africa" in Clampman C. 2001. *Regional Integration in Southern Africa*. Johannesburg. South African Institute of International Affairs.
[189] *Ibid.*
[190] *Ibid*, 9-12.
[191] *Ibid.*
[192] *Ibid.*

conflict (though this conflict is legally permissible) with the non-discrimination principle under Article 1 GATT 1994 (most favoured nation treatment). Geographically discriminating arrangements also find place in RTAs and tend to be designed so as to increase regional rather than global trade and hence welfare. It has been argued that in fact such geographical arrangements are often of minimal economic benefit and may actually cause more economic harm than benefit[193]. This can be said to be true for the TFTA which is geographically discriminatory in favour of member states of the COMESA, EAC and SADC.

4.2.8 The "Spaghetti Bowl" problem

This is a term coined from the works of Bhagwati and Panagariya.[194] They argue that the multiple membership of countries in RECs has resulted in overlapping of tariff regulations, objectives, divided loyalty and other obligations with the undesirable effect of "a limb and spoke"[195] system of RECs with complex and multiple regulation. This has in turn led to the weakening of the global trade system. It equally creates an enforcement nightmare to customs officials and observance difficulties to traders. This is a situation whose consequences even the WTO secretariat has warned of.[196]

Bachinger and Hough observe that today every African country is a member of averagely four different trade blocs, creating the famous spaghetti bowl of RIAs and that the plan of the AU is to integrate the various RIAs into one large economy with the ultimate goal of unifying the continent and creating a United States of Africa by 2030.[197]

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193 *Ibid*, at 3.

194 In J Bhagwati and A Panagariya (Eds,) *The Economics of Preferential Trade Agreements (*Washington DC: AE: press, 1996) at 8-27.

195 This is Gantz's description of the "spaghetti bowl" problem. See Gantz, note 19 above at p. 244. Bachinger, K and Hough, J., *"New Regionalism in Africa; Waves Integration"* 2009. *Africa Insight* Vol. 39/2 at 43-44.

196 *Ibid.*

197 Bachinger, K and Hough, J., "New Regionalism in Africa; Waves Integration" 2009. *Africa Insight* Vol. 39/2 at P.43-44. The AU Agenda 2063 is an ambitious plan for a prosperous Africa building on the African RECs based on a 25, 10, 5 year and short term plan for integrating the continent. The agenda envisages political Unity of the Africa will be culmination of the Economic and Political integration process characterised by a continental government and institutions by 2030.

In the TFTA context, for instance, most SADC members are also parties to an Economic Partnership Agreement (EPA) with the European Union (EU) through the Southern African Customs Union (SACU). [198] South Africa is also a party to a free trade agreement with the EU which four other member states of SACU have not accepted. The parties to SADC are also members of the COMESA, while some members of the EAC are also members of the SADC and COMESA[199]. The EAC, on its own, also has trade agreements with the EU.[200] This complex web of a multiplicity of multilateral trade agreements, not to mention bilateral ones, involving the very same parties has been a source of not only divided loyalty, expensive engagements for poor African economies to maintain, confusion for transnational business people as to the applicable regime, but also encouraged trade deflection and negatively affected the attainment of multilateral trade in Africa, and as a ripple effect consequence, on the global plane as well.

A further layer of multilateral trade integration in the form of the TFTA while maintaining the old allegiances and fidelities to COMESA, EAC and SADC as is proposed in the TFTA Agreement may end up complicating and entangling the "spaghetti bowl" even further, so that one may not be able, at the end of the day, to tell the true existence or value of any of the four RECs from each other. They will all be lost in the complex web and drowned in the swamp of treaties and the myriad of protocols attendant thereto at both the TFTA level and its constituting RECs.

The maintaining of parallel REC structures while developing the TFTA may have been well meaning so as to seamlessly transition at the end of the integration process. However, in the intervening period the existence of several organs pulling in different directions in terms of policies and peculiar individual objectives does not augur well for the timeous infusion and integration of the merging RECs into the TFTA.

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[198] R. Kirk and M Stern. "The New South African Customs Union. Agreement 2005." *The World Economy 28(2) 169.*

[199] For Example Zambia, Tanzania and Zimbabwe are members of both SADC and COMESA. Tanzania is also a member of EAC

[200] Economic Partnership Agreement between the EU and the EAC, available at www.trade.ec.europa.ed/doc/lib/docs/2009/january/tradoc_.142194.pdf. Accessed on 5th July 2016.

Articles 4(2) (a), 6 (2) (a) of the AEC treaty and the preamble TFTA Agreement expressly encourage the continued existence of and establishment of *"future*" RECs. Yet, the essence of the TFTA Agreement and AEC treaty is to build a multilateral trading and economic system that cuts across the entire continent, as opposed to sub regional trading blocs. It is therefore tempting to conclude that in their attempt sell the idea of the AEC and the TFTA, the drafters of both instruments sought to appease states' fixations, investment (in time, money and systems) and sentimental attachment to their respective RECs. The TFTA and AEC may have found acceptance but at the same time sacrificed and undermined the very objectives for which they were set up.

To allow and actively encourage the setting up of new sub regional trading blocs will, invariably, regress the realisation of both the AEC and TFTA. This is tantamount to taking three steps forward and two backwards so as to allow the new RECs to catch up with the integration process. In the end, the process will inevitably stall or run on the spot. The permissive language used in the AEC treaty and the TFTA with respect to maintaining the existing and establishment of *future* RECs is injudicious, misconceived and inconsistent with their overall integration objectives.

The cost of administering trade agreements is another significant hurdle. All the TFTA members belong to at least 4 RECs, excluding bilateral and multilateral trade arrangements.[201] These arrangements require administration both internally (within the state), at the REC level and at the WTO level. Attendant to these administrative costs is the need to fund the operational costs of the trade arrangements, its secretariats and the bureaucracies attendant thereto. Looked at in the context of frail foreign aid weaned and dependent sub Saharan states which form the bulk of the TFTA, and which have to juggle their priority expenditure with the meeting of its many subscription obligations arising from the multiple trade arrangement memberships, the choice seems obvious. Consequently, many states are serial and chronic defaulters in meeting their treaty subscription obligations and as a result the integration organs are poorly funded

[201] Bachinger and Hough, note 197 above.

hence slowing down the integration process. This is a reality which may face the TFTA Agreement.

4.2.9 Negotiating Imbalances

It has been advanced that there is a dearth of capacity within developing nations with regard to negotiations with the cost of negotiating RECs outweighing the benefits of training large and well qualified trade bureaucrats to conduct complex negotiations simultaneously at both WTO and REC levels.[202] This has led to unbalanced negotiations with a bias towards the well-funded and better prepared larger states.

The state members of the TFTA are at different stages of development and economic prosperity. South Africa, for instance, is the highest ranked economy in sub-Sahara Africa, has a sea port and a relatively large population[203]. Its institutions are more advanced or developed[204]. Most of its partners in SADC, and in this context in the TFTA, comprise of land locked nations with low populations, low GDP and low per capita incomes[205]. Obviously, the result is an uneven negotiating playing field, with South Africa seemingly engaging to draw advantage in its favour. Invariably therefore, in trade negotiations, countries with larger and stronger economies always benefit most from integration agreements.[206]

4.3 Prospects of the TFTA Agreement

Rathumbu identifies the goals of regional integration as improvement and development of both the economies and lives of the residents of the party states.[207] His view is one that can be said to be socio-economic. According to Mirus and Rylska, economic theory suggests that free trade on a worldwide basis

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[202] Gantz, note 19 above at p.244.
[203] See Hartzenberg, note 68 above at 13 for a detailed comparison of the economies of sub-Sahara Africa and which form the TFTA.
[204] *Ibid.*
[205] *Ibid.*
[206] *Ibid.*
[207] Rathumbu, I.M, 2008. *Regional Economic Integration and Economic Development in Southern Africa.* Unpublished Master's Thesis (UNISA).

should ultimately be the best outcome for economic integration as it best guarantees greater world output and social welfare.[208]

However, despite the gloomy picture painted by commentators, prospects for the TFTA integration process exist and hence there is reason to remain optimistic. Gantz advances that RTAs may provide "a depth of international trade reform" and achieve free-trade at a much faster rate than agreements reached among the entire membership of the WTO which numbers 153.[209] According to Gantz, following frustrations in achieving free global trade, particularly after the stalling of the Doha Development Agenda[210] round of talks under the WTO, more states are of the thinking that trade liberalization may be achieved abit easier in a sub-global level. This, to him, is the real motivation for the proliferation of RTAs in what is generally referred to as the new regionalism, a concept he suggests has emerged and manifested itself particularly after the GATT 1994. It was indeed noted in the 2003 World Trade Report[211], that the conclusion of RTAs may be driven by the search for access to larger markets, which might be easier to engineer at the regional or bilateral level, particularly in the absence of a willingness among WTO members to liberalize further on a multilateral basis.[212]

Gantz acknowledges that debate still persist on whether by entering into a RTA, and a state thereby being required to make internal legislative and policy adjustments such as to its tax regime, whether such state is less likely to adopt protectionist policies since that would trigger retaliatory acts or requests for dispute settlement by other parties. He however is optimistic that although pessimists criticize RTAs as a claw-back to the doctrine of state sovereignty and

[208] Mirus and Rylska, note 51 above at p.2.
[209] Gantz, note 19 above at p.241.
[210] Also referred to as the Doha Development Round, is the current multilateral trade-negotiation round of the World Trade Organization (WTO) which commenced in 2001 and whose objective is to lower trade barriers around the world and hence facilitate increased global trade.
[211] *World Trade Report* (Geneva: WTO, 2003).
[212]Cottier and Foltea, note 13 above at p. 45; WTO Secretariat, *Regional Trade Agreements Section* , Trade Policies Review Division ,The Changing Landscape of RTAs, November 2003 paras 22-4.

its exercise, entering into RTAs would discourage protectionist internal policies of member states and would be good for free global trade[213]

One other benefit of RECs such as the TFTA is that it gives an opportunity to negotiating states to learn from that experience in readiness for global trade negotiations. It acts as an incubation laboratory for ideas on free trade with the ultimate intention of escalating that experience same to the global platform. [214]
RECs in Africa were conceived on a pan African platform and are said to espouse an aura of comradeship and strength in numbers to emerging economies particularly in multilateral negotiations with bigger and better economically endowed trading partners such as the EU, USA and within the context of the WTO[215]. Forere argues that pan African sentiment influenced the formation of most RIAs in Africa shortly after most African states gained independence and that perhaps this explains the motivation behind the AEC treaty and the ultimate aspiration of an Africa Union government. The quest for economic and political integration of Africa has always been founded on the continent's ambition for self-reliance and economic independence (from their imperial or colonial masters) by newly independent states. Forere, however warns that this sentiment does not help absolve the continent and its RIAs from the chronic ailments that restrict its achievement of a true free global trade. Beyond inspiration, Forere opines, pan African sentiment offers little solution to the real issues that hold back intra Africa trade.[216]

Apart from economic integration and its attendant socio-economic development, three other prospects of the TFTA integration efforts abound. Firstly, the TFTA builds on the pan-African sentiment to enable the state parties to speak with one voice and accord in multilateral trade fora such as the WTO. This it is hoped will attract favourable trade concessions for its members. Secondly, the TFTA members can leverage on their large consolidated population and common market to negotiate better investment terms with large and better established countries and markets at a bilateral level such as the EU, USA and China. The TFTA presents an opportunity to develop a *sui generis* or uniquely African legal system

[213] Gantz, note 19 above at p.242.
[214] Gantz, note 19 above at p. 244.
[215] Forere, note 27aboveatp. 29-54.
[216] *Ibid.*

that borrows from the best practices of the various shades of legal systems that obtain from its member states.

4.4 Summary

This part has highlighted the various political, economic and social problems and challenges that are likely to undermine the achievement of the goal of integration of the African continent through the TFTA and ultimately the AEC. The likely benefits of integration leading to achieving faster economic growth and multilateral global trade have also been discussed.

The next part will draw conclusions and offer recommendations.

5.0 Conclusion and Recommendations

5.1 Introduction

In order to achieve its economic and political integration aspirations, Africa has employed RECs as the preferred instrument. In terms of economic integration, the realisation of the Africa Economic Community (AEC) is the ultimate goal. The TFTA agreement is, therefore, an important and indispensable building block towards the realisation of the integration of Africa under the AEC.

This work has provided an analysis of the TFTA Agreement and proceeded to interrogate its place in Africa's progression towards the AEC as envisaged in the Abuja Treaty.

Conclusions drawn from the foregoing discussion and recommendations that flow therefrom now follow

5.2 Conclusions

This discourse commenced by highlighting the various regional economic integration typologies. These were classified into three categories based on their objectives and characteristics. The first level entails modest integration by means

of an agreement to apply symmetric preferential treatment of imports and assign supporting functions and instruments to jointly operated institutions.[217]
The second level of economic integration entails the harmonisation of instruments over which the parties retain control, and through which, due to different national approaches, obstacles to a common market exist. This could be the case in the area of migration of workers, competition policy and production standards. More co-operation and supranational institutions, such as a joint tribunal on competition policy, are also characteristic of this second level.[218]

The third and highest level of economic integration adds coordination of national policies and the creation of further supranational bodies which entail not only economic but increasingly political integration. Examples here are the creation of a common currency and central bank, even a supranational parliament as in the case of the EU and as envisaged in the Abuja treaty establishing the AEC.[219]

The problems and prospects of the TFTA are also discussed. Key among these include the institutional weakness of the TFTA structure; lack of political stability in many member states; poor democratic and human rights records; multiple membership to various RECs with similar or near similar objectives, and thus a duplication of efforts and inefficient use of resources; chronic poverty; production of similar unfinished largely agricultural raw products which reduces intra-regional trade; weak administrative structures which leads to proliferation of cheap products (dumping) and trade deflection; a problematic implementation of the linear progression mode; a high dependency on aid and imports from Europe and Asia; and poor infrastructure.

The African Economic Community was envisioned to be fully set up and running by the year 2030.The plan was predicated upon a 34 year period from the conclusion of the Abuja treaty in 1991. Now, 14 odd years to the year 2030, many of the milestones, some set for its first and second phase and which should have been completed more than a decade ago, are yet to take off. Most of its organs remain moribund. At this rate, to achieve the six stages of the AEC's implementation in the remaining 14 years seems like a herculean mission. It is,

[217] Mirus and Rylska, note 51 above at p .2.
[218] *Ibid.*
[219] The structure of the AEC is discussed in detail in Chapter 3 of this work.

therefore, increasingly looking likely that a fully functioning AEC cannot be achieved by the year 2030 as was anticipated during its conceptualisation and in 1991.
In the short term, the establishment and implementation of TFTA is unlikely to be a panacea to the problems that bedevil integration in Africa. It is also not the desired silver bullet. However, this larger bloc of African states represents a significant and conscious effort by a majority of African States to progress into a multilateral economic system or community encapsulated in the Abuja Treaty. The TFTA is an affirmation that the dream of a United States of Africa remains alive and well, and that while the integration story of Africa is yet to be fully written, new chapter has just unfolded.

5.3 Recommendations

It is clearly evident in TFTA Agreement that RECs are the chosen vehicles to drive the African continent into the desired horizon of economic and ultimate political integration. Currently, the three merging RECs manage the TFTA integration process through a task force consisting of the secretariats of the three RECs. This arrangement has the potential to frustrate the expeditious realisation of the TFTA integration. The implementation of such an important and weighty task should be a full time engagement.

This shortcoming may lead to two potential problems. Firstly, the joint secretariat may not be fully committed throughout the implementation of the TFTA, with greater attention paid to their respective RECs. Secondly, the divided loyalty has the effect of undermining or slowing down the implementation of the TFTA Agreement, since the very persons charged with this responsibility are also implementers of their various RECs strategic programmes. The net effect this situation may potentially result in a clash in priorities, objectives, split focus and general “sibling rivalry” between the three merging RECs.

It is, therefore, suggested that the TFTA’s implementation should be a full time engagement, with its own fully fledged secretariat with full time implementers of the Agreement. This will expedite the transition from the merging RECs to the TFTA. This will also underscore the member states’ commitment to the full

integration of the TFTA as opposed to the retaining residence in the RECs while giving the TFTA a lukewarm or half-hearted commitment.

It is also recommended that the dissolution of the three merging RECs - COMESA, EAC and SADC - into the TFTA be undertaken without any further ado. Formation of new or future RECs at the sub-regional level should not be allowed or even encouraged. This will spur expeditious integration instead of adopting a route which favours a parallel development of the TFTA organs simultaneously, with the retention of existing RECs. Implementation of this recommendation will eliminate suspicion, foster competition and obliterate divided loyalty between members of the TFTA. It will also focus attention on the TFTAs growth and strengthening, and will draw the African continent one step closer to the true realisation of AEC and ultimate federation.

The TFTA will not achieve its desired goals if its most economically vulnerable members remain on the periphery of economic development. For purposes of ensuring inclusivity, it is proposed that economic affirmative action in favour of least developed economies, landlocked and islands member states be undertaken. As it is now, within the contexts of the three merging RECs, countries like South Africa in SADC and Kenya in the EAC have remained dominant economies, thus leading to reluctance by other smaller economies to fully embrace economic integration and free intra-bloc trade.

Deliberate road, rail and power projects targeted at opening up the least developed countries to trade with preferential terms of trade and temporary protection of such countries' markets should be stipulated in the TFTA agreement. This will encourage trade and spur economic growth in the least developed, land-locked and island member states of the TFTA, leading them to fully embracing economic integration.

Strong independent institutions are imperative for the integration process. It is, therefore, recommended that the principle of separation of powers in the governance organs of the TFTA be entrenched. For instance, it's judicial or dispute resolution organ should be distinct and independent of influence from the executive organs thereof. The appointment of Judges or third party neutrals should be removed from the summit of heads of states and government. Rather,

they should be competitively recruited from the rank of experts within member states. The recruitment should be independently undertaken by a panel of eminent persons knowledgeable in matters of regional integration and international law. Thereafter, the candidates can be vetted by the council of ministers and formally appointed for a fixed term of office. This will obviate the institutional independence difficulties faced by the SADC tribunal and the EAC Court of Justice discussed above. It will also ensure that the Courts and tribunals are strong enough to address questions of governance and human rights.

The successful implementation of the TFTA, and indeed the AEC integration effort, largely depends on the institutional strengths within the member states. It is, therefore, an inexorable basic requirement that the internal systems of state members adhere to fundamental democratic and governance standards. These include transparent and accountable systems of governance that are devoid of corruption. It also implies the efficiency, predictability and consistency of laws, and their guaranteed implementation and enforcement. Free, fair and peaceful elections, which guarantee an environment that is secure to investments is one other indispensable and imperative minimum. Adherence to principles of good governance and democracy will allow for effective implementation of the TFTA, and any other agreements or protocols that may be concluded by the bloc.

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