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**ADDIS ABABA UNIVERSITY
SCHOOL OF LAW**

**The African Regional Economic Integration Agenda, the African
Continental Free Trade Area (AfCFTA), and the Future of the
Regional Economic Communities (RECs)**

By

Hanan Abebe

October 2020

ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW

The African Regional Economic Integration Agenda,
the African Continental Free Trade Area (AfCFTA),
and the Future of the Regional Economic
Communities (RECs)

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The undersigned declare that this thesis is my original work and that all sources of
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ACRONYMS

AB	Appellate Body
ABC	African Business Council
ACP	African, Caribbean And Pacific Group of States
AEC	African Economic Community
AfCFTA	African Continental Free Trade Area
AfDB	African Development Bank
AGOA	African Growth and Opportunity Act
AIDA	Accelerated Industrial Development of Africa
AMOT	African Union Ministers of Trade
AMU(UMA)	Arab Maghreb Union.
APCI	African Productive Capacity Initiative
ARPF	Africa Renewable Power Fund
ATO	African Tax Outlook
AU/Dec	Africa Union /Decision
AUC	African Union Commission
BIAT	Boosting Intra-African Trade
CAMoT	Conference of African Ministers Of Trade
CEMAC	Central African Economic and Monetary Community
CEN-SAD	Community of Sahel-Saharan States
CGE	Computable General Equilibrium
CIF	Cost, Insurance, Freight
COMESA	Common Market for Eastern and Southern Africa
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSB	Dispute Settlement Body
EAC	East African Community
ECA	Economic Commission for Africa
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EPA	Environmental Protection Agency
EPAs	Economic Partnership Agreements

EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HATC	High-Level African Trade Committee
IGAD	Intergovernmental Authority on Development
JBPs	Joint Border Posts
LAPSSET	Lamu Port-South Sudan-Ethiopia-Transport
LDCs	Least Developed Countries
MFN	Most-Favored-Nation
MIP	Minimum Integration Programme
NEPAD	New Partnership for Africa's Development
NTBs	Non-Tariff Barriers
OAU	Organisation of African Unity
OSBP	One Stop Border Post
PIDA	Programme for Infrastructure Development In Africa
RECs	Regional Economic Communities
RTAs	Regional Trade Agreements
SAATM	Single African Air Transport Market
SACD	South African Development Community
SACU	Southern African Customs Union
SACU-UK	South African Development Community- United Kingdom
SDGs	Sustainable Development Goals
TDCA	Trade, Development and Cooperation Agreement
TFTA	Tripartite Free Trade Area
UNCTAD	United Nation Commission on Trade and Development
UNECA	United Nations Economic Commission for Africa
WAEMU.	West African Economic and Monetary Union
WTO	World Trade Organization

Abstract

This paper aims to analyze the AfCFTA agreement and RECs' future with the establishment of the AfCFTA. The Abuja Treaty is the benchmark for economic integration in Africa; it lists six steps for forming the AEC. The study's findings show that the AfCFTA is an independent legal instrument from the Abuja Treaty with its institutional structure; however, it is in line with and facilitates the objectives of the Abuja Treaty. The AfCFTA states it has the objective of resolving multiple and overlapping memberships, yet it provides for the RECs' existence after the formation of the AfCFTA. Since the RECs have an independent personality, there is no legal ground for termination of the RECs, with that state parties should consider having a protocol of merger. The development of African countries is different, and they have a low level of manufacturing capacities. Therefore, to utilize the benefits of the AfCFTA by every member state, there is a need to have a strategic shift in production and address NTBs that hinder intra-African trade.

Chapter One

Introduction

This chapter will be an introductory part of the study, which gives a general insight into the research. It contains the background, statement of the problem, the objectives, and research questions highlighting the research topic. Additionally, it provides the methodologies employed by the researcher as well as limitations.

1.1 Background to the Research

Africa's economic integration was one of the objectives of the Organization of African Unity (OAU). As part of the economic integration agenda, member states of the OAU agreed to coordinate and harmonize their economic policies.¹ This agreement has led to the establishment of different Regional Economic Communities (RECs). In 1991 the African Heads of States adopted the treaty establishing the African Economic Community (Abuja Treaty)² to create Africa's common market. RECs are the building blocks of continental integration, which will evolve into a continental common market through successive stages.³

African economic integration has continued to be a key priority for the African Union (AU), which replaced the OAU in 2002. The relation between RECs and AU is defined based on the AU Constitutive Act⁴ and the Abuja Treaty and the Protocol on Relation between RECs and AU.⁵ The AU considers RECs an integral part of the union and a building block for Africa's integration.⁶

The Eighteenth Assembly of AU Heads of States held in 2012 has, among other things, decided on Boosting Intra-African Trade (BIAT). A vital element of that decision was to fast track the

¹ Organization of the African Unity *Charter of the Organization of African Unity*, Addis Ababa, Ethiopia, 25th day of May 1963 (OAU Charter) art 2(II)(b)

² Treaty Establishing the African Economic Community, Abuja, Nigeria on the 3rd of June 1991(AEC Treaty)

³ Ibid art 6

⁴ Constitutive Act of the African Union Adopted By the Thirty-Sixth Ordinary Session Of The Assembly of Heads Of State and Government 11 July, 2000 - Lome, Togo (AU Constitutive Act)

⁵ Protocol on Relation Between the African Union (AU) and the Regional Economic Communities (RECs) [July 2007] Accra Ghana (Protocol on Relation Between AU & RECs)

⁶Regional Economic Communities (RECs) available at <https://au.int/en/organs/recs>, accessed at February, 01 2019.

African Continental Free Trade Area (AfCFTA) establishment to operationalize it in 2017.⁷ Since WTO's establishment, the AfCFTA will be one of the largest free trade areas, covering a market of more than 1.2 billion people with a GDP of more than US\$3.4 trillion.⁸ In 2018 the agreement establishing the AfCFTA was presented to the AU Heads of States for signature in Kigali, Rwanda. As of May 2020, only Eritrea is not a signatory of the agreement, and 30 state parties ratify it.⁹ On July 7, 2019, the Extraordinary Summit held in Niamey, the operational phase of the AfCFTA, was launched.¹⁰

The Abuja Treaty has envisaged the establishment of the African Economic Community.¹¹ The RECs will serve as pillars to build a continental framework.¹² There are eight RECs that are recognized by AU; the Economic Community of West African States (ECOWAS), Economic Community of Central African States (ECCAS), Arab Maghreb Union (UMA), South African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA), Intergovernmental Authority on Development (IGAD), Community of Sahel-Saharan States (CEN-SAD), and East African Community (ECA).¹³ They were established in 1975, 1983, 1989, 1992, 1993, 1996, 1998, and 1990.¹⁴ The RECs in Africa is the pillar of economic integration throughout the continent. With the establishment of the AfCFTA, they will help manage the process with their members since the negotiation between 55 members is a complex one.¹⁵

⁷ Assembly of the Union Eighteenth Ordinary Session 29 – 30 January 2012 Addis Ababa, Ethiopia Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area (Doc. Ex.Cl/700(Xx)) (Assembly of the Union Eighteenth Ordinary Session's Decision) para 4

⁸ African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents www.tralac.org accessed in February 16 2019

⁹ Towards the African Continental Free Trade Area available at <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> accessed on May 1 2020 (Towards the AfCFTA)

¹⁰ Ibid

¹¹ AEC Treaty (n 2) preamble para 12

¹² Sanoussi Bilal (ed), GREAT Insights, ECDPM (Volume 5 - Issue 4) [July/August 2016] (Bilal) 5

¹³ FROM REGIONAL ECONOMIC COMMUNITIES TO A CONTINENTAL FREE TRADE AREA: Strategic tools to assist negotiators and agricultural policy design in Africa (UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT) [2017] (Strategic tools to assist negotiators and agricultural policy design in Africa) 5

¹⁴ Ibid

¹⁵ Assessing Regional Integration in Africa (ARIA V): Towards an African Continental Free Trade Area by the Economic Commission for Africa, 2012 (ARIA V) 30

1.2 Statement of the Problem

Integration in Africa was one of the OAU aspirations following the independence of the African countries from colonialism. However, the aspiration has not been fully operative.¹⁶ Given the various socio-economic status and different development levels of African countries, the first step was to start with regional integration. To that end, different RECs are operating on the continent. In 1991 the Abuja Treaty provided for six stages to establish the African Economic Community (AEC).¹⁷ In the Abuja Treaty, the integration at the continental level was planned to commence in the fourth stage to establish Continental Custom Union.¹⁸ However, this raises a question on the decision of Heads of State at the eighteenth AU summit for the establishment of AfCFTA¹⁹ since having a Continental free trade was not in the framework of the Abuja Treaty. Having that in mind, the first problem that comes to picture when considering AfCFTA is whether or not the Abuja Treaty foresaw it. In this respect, some claim the decision has a gap-filling role for the Abuja Treaty and helps achieve the treaty's goals.²⁰ Some authors' argument goes even to the extent that the AfCFTA should be a protocol for the Abuja Treaty. Additionally, others consider AfCFTA an independent instrument from the treaty because it does not stipulate the Continental Free Trade Area establishment.²¹

When we think of economic integration in Africa, RECs' status and future is an unavoidable issue. Among the objectives of AfCFTA, one is to resolve multiple and overlapping memberships.²² Accomplishing this will help to have harmonized standards in the continent. However, the AfCFTA Treaty did not provide how multiple memberships can resolve since it considers RECs' existence after the establishment of AfCFTA.²³ There are RECs that are already in place with conflicting disciplines and benefits, and they apply different strategic rules in the given region like

¹⁶ Building The African Continental Free Trade Area: Some Suggestions On The Way Forward (A Policy Paper By UNCTAD Advanced, Unedited Version) [2015] (Building the AfCFTA) 1

¹⁷ AEC Treaty (n 2) art 6

¹⁸ Ibid art 6(d)

¹⁹ Assembly of the Union Eighteenth Ordinary Session's Decision (n 7) para 4

²⁰ F. Fajana, Preparedness of the Different AU-recognized Regional Economic Communities (RECs) for the Continental Free Trade Area (CFTA) (F. Fajana) available at <https://unctad.org/meetings/en/Presentation/ditc-ted-09032016-accra-paper-Fajana.pdf>, accessed 20 February 2019 (F. Fajana) 1

²¹ Jacob Kotocho, The CFTA Negotiation and the Issue of Coherence, 20 September 2017 www.ictsd.org , accessed 23 January 2019 (Kotocho)

²² Agreement Establishing The African Continental Free Trade Area, Kigali, 21st day of March 2018. (AfCFTA Agreement) art 3(h)

²³ How will the AfCFTA co-exist with other African Trade Arrangements? 22 March 2018 www.tralac.org accessed 01 February 2019

the rule of origin (RoO). The performance level of the RECs is different; some achieved Custom Union and Common Market. The AfCFTA did not stipulate the status of RECs, which are beyond FTA. If they can negotiate as a Customs Union or individual member is not clearly articulated in the agreement. The AfCFTA has a gap with RECs' role if they can serve their purpose with overlapping activity.²⁴

As noted earlier, 30 countries have ratified the agreement, and it is expected to be operational in January 2021²⁵ There are variations in the development status of member states and the level of performance by the RECs.²⁶ Additionally, the Intra African trade is minimal; it only amounts to 16% of the continent's total trade volume.²⁷ Five countries mainly dominate trade within Africa; Algeria, Cote d'Ivoire, Egypt, Nigeria, and South Africa, which amounts to 67% of Intra African trade.²⁸ In this regard, it is essential to address timing if the continental framework is too ambitious.

1.3 Literature Review

The AfCFTA is a new development in Africa that has not yet been operationalized, and the literature in the area is limited. Most of the limited literature provides a general background of the AfCFTA. The economic integration of Africa has been examined in different perspectives. Mainly the issue of AfCFTA vis-à-vis the Abuja Treaty was examined by authors such as Gerhard Erasmus, Sebahizi, Berthelot, F. Fajana, and other scholars. Therefore, this section will review some of the literature of some scholars.

Most of the literature accepts the AfCFTA has departed from the procedures provided in the Abuja Treaty. Erasmus. G has stated the AfCFTA has not included the processes provided under the Abuja Treaty.²⁹ He notes that the treaty provides for a framework of different process, yet, the accomplishment of the objectives is dependent on the performance of member states on their

²⁴ AU, RECs coordination underpin successful Implementation of AfCFTA, 11 September 2018 www.tralac.org accessed 01 February 2019

²⁵ Towards the AfCFTA (n 9)

²⁶ Kotocho.J (n 21)[2019]

²⁷ Souhir Mzali, How Effective Will Africa's Continental Free Trade Area Be? [23 Apr 2018] available at <https://oxfordbusinessgroup.com> accessed 01 February 2019 (Mzali)

²⁸ From RECs to a Continental FTA: Strategic tools to assist negotiators and agricultural policy design in Africa, 16 February 2018 www.tralac.org. accessed on 23 January 2019

²⁹ Erasmus, G. 2015. How the CFTA could advance the Framework of the Abuja Treaty. Stellenbosch: tralac. (Erasmus G 2015) 6

particular RECs.³⁰ The RECs are not moving with the expected pace, and there is an urgency with the implementation of the BIAT and having a modern and comprehensive continental trade arrangement.³¹ To achieve that, Erasmus believes the AfCFTA will be a way to attain the stages laid down in the Abuja Treaty and advance its aims.

Additionally, the AfCFTA will not replace the frameworks and institutions laid down to implement the AEC in the AU system.³² From this, it can be perceived that Erasmus has considered the AfCFTA to advance the implementation of the Abuja Treaty. However, it one of the stages in the Abuja Treaty. Additionally, Sebahizi stress that the AfCFTA is not a departure from the Abuja Treaty; instead, it is required before phase four.³³ Additionally, the decision of Heads of States to have AfCFTA shows their commitment to having continental market integration.³⁴ Whether AfCFTA is in the Abuja Treaty plan has also been addressed by a journal published by ECA.³⁵ The writing mainly addresses the issues as the AfCFTA has a gap-filling role.³⁶ The Abuja Treaty stipulates the establishment of AEC by using RECs. However, RECs' status varies; it has believed that having AfCFTA is a way to avoid this problem and serve as a bridge to fill this gap.³⁷ The AfCFTA's approach to recognizing trade liberalization at the continental level seems unconventional with the stipulation under the Abuja Treaty.³⁸ However, the approach in the AfCFTA may be considered an amendment to the procedures in the Abuja Treaty.³⁹

The same journal published by ECA provides the Abuja Treaty should be modernized to address the 21st century problems.⁴⁰ The Abuja Treaty needs to be revised to assess how much it has come to achieve its goals.⁴¹ The AfCFTA will open new ways to achieve integration in Africa by taking

³⁰ Erasmus, G. 2019. The AfCFTA as a strategy and Design, tralac Working Paper No. US19WP04/2019. Stellenbosch.tralac. (Erasmus G 2019) 6

³¹ Erasmus G 2015 (n29) 6

³² Ibid 7

³³ Prudence Sebahizi, Fast-tracking the Continental Free Trade Area: Regional Economic Communities (RECs) as Building Blocks (Sebahizi) para 13

³⁴ Ibid para 32

³⁵ Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About [October 2017] ECA Printing and Publishing Unit, Addis Ababa (Bringing the Continental Free Trade Area About)

³⁶ Ibid

³⁷ Ibid 2

³⁸ Ibid 12

³⁹ Ibid

⁴⁰ Ibid 3

⁴¹ Ibid 119

the last two decades' achievements and challenges rather than hiding behind the Abuja Treaty.⁴² However, regarding the AfCFTA institutional framework, the writer stresses that it should be based on the Abuja Treaty platform for its implementation at the continental level.⁴³ Using the Abuja Treaty as a backbone for the institutional formation and developing already existing African integration plans is essential for the formation of AfCFTA.⁴⁴ The transformation of AfCFTA to custom union with adopting standard policy will be among the Abuja Treaty's achievements.⁴⁵

Once more in the journal published by ECA, it provides the different advancement of RECs beyond FTA while the rest are struggling to have FTA.⁴⁶ The RECs' performance with FTAs and their trade even within the REC restricted by different NTB like internal taxes and sensitive goods.⁴⁷ It also assesses that when Heads of State decided to have AfCFTA, they provide that there should be the preservation of *acquis* by the AfCFTA.⁴⁸ In that, it stresses, "...considerable care must be taken to balance the desire to retain the existing RECs to rationalize the REC FTAs into a consolidated trading area. If mishandled, the CFTA may merely add an FTA layer and miss an opportunity for rationalizing and simplifying trade in Africa."⁴⁹ Additionally, F. Fajana perceives the complication of building on RECs since they have different rules and procedures.⁵⁰ However, since they serve as building blocks for AfCFTA, it should incorporate their experience and best practices.⁵¹

As noted by Sebahizi, by assessing the current status of the AfCFTA; it will be established before all RECs fully attain Custom Union.⁵² Therefore, there is a risk of individual states' tariffs, and those who have Custom Union will be divergent.⁵³ However, the author suggests that RECs prioritize the AfCFTA in their negotiations to establish the AfCFTA to consolidate other FTAs into it by resolving multiple and overlapping memberships.⁵⁴

The co-existence of RECs with the AfCFTA is addressed in different pieces of literature. In writing by Gerhard Erasmus about the future of the RECs upon the establishment of the AfCFTA, he

⁴² Ibid

⁴³ Ibid 7

⁴⁴ Ibid

⁴⁵ Ibid 119

⁴⁶ Ibid 55

⁴⁷ Ibid

⁴⁸ Ibid 123

⁴⁹ Ibid 56

⁵⁰ F Fajana (n 20) 5

⁵¹ Ibid

⁵² Sebahizi (n 333) para 43

⁵³ Ibid

⁵⁴ Ibid para 42

provides that though the AfCFTA has the objective of resolving multiple memberships of RECs, he states that this may not be visible in the short term with the stipulation provided under article 19 of the AfCFTA.⁵⁵ According to him, since there are RECs with advanced integration levels, they are expected to co-exist with the AfCFTA.⁵⁶ Since there is no specific plan as to how to achieve the objective of having a single market, he suggests that with different rounds of negotiations, the RECs and their members have to agree with the new arrangement in which, if implemented accordingly, it may also dissolve their existence.⁵⁷ However, he emphasized that RECs' dissolution will not be applied now as provided in the AfCFTA article 19; those with deeper integration can maintain their higher integration level.

Additionally, he notes that the RECs can also continue to deepen their integration afterward.⁵⁸ Finally, he stated that it will not be possible to speculate the relationship between the RECs and the AfCFTA until the service negotiations are complete.⁵⁹ Their co-existence is expected until they later achieve better integration than the RECs.⁶⁰ Afterward, the RECs cannot co-exist with AfCFTA because it will defeat its purpose.⁶¹ Nevertheless, those RECs that have achieved custom union "will remain islands" because they are better integrated than AfCFTA.⁶² A journal published by the United Nations advises the AfCFTA to have a policy space for AfCFTA plus status. They will pave the way for the Continental economic community.⁶³

Concerning its implementation, Berthelot states, the implementation of AfCFTA should be timely by considering RECs' performance, especially those in the Sub-Saharan region.⁶⁴ Having a relatively similar development level with RECs and individual member states should be the primary concern for integration at the Continental level.⁶⁵ If these issues are not well addressed,

⁵⁵ What happens to the RECs once the AfCFTA is in force? Gerhard Erasmus, 17 May 2019, available at <https://www.tralac.org/blog/article/14051-what-happens-to-the-recs-once-the-afcfta-is-in-force.html> accessed 10 August 2019

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Bringing the Continental Free Trade Area About (n 35) 123

⁶² Ibid 124

⁶³ African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods [2016] United Nations (Policy and Negotiation Options for Trade in Goods) 30

⁶⁴ Jacques Berthelot, The folly of the Africa's Continental Free Trade Area (CFTA) [September 4, 2017] (Berthelot)

1

⁶⁵ Ibid

it will eventually make the AfCFTA's goals idealistic.⁶⁶In another writing, this issue is examined so that though continental integration has been an ambition of African for the past five decades, rushing it will not make it useful.⁶⁷ It is highly unrealistic for the AfCFTA to be effective because of other development and readiness levels between RECs and individual members.⁶⁸ Therefore, priority should be given for strengthening the RECs and expanding FTAs between them.⁶⁹In the writings reviewed, it is highly stressed that the application of integration in the Continental level will lead to disaster if rushed without due consideration.⁷⁰Berthelot also suggests that AfCFTA should go beyond mere liberalization of trade and recognize the continent's development status to achieve its objectives.⁷¹ However, if the launch of integration at the continental level is disregarding the continent's status, it will not bring actual economic integration for Africa.⁷²

Generally, the literature available in AfCFTA assesses the issue in different dimensions. The writers touched the relation of AfCFTA with the Abuja Treaty and RECs. However, the literature fails to assess the problems raised in a more detailed manner like how state parties who are members of custom unions negotiate, as individuals or not. Whether or not the AfCFTA has a legal framework of resolving multiple and overlapping memberships. Additionally, in most writings, they show the gaps in the AfCFTA; however, they fail to provide a way to address the issue. For example, most literature accepts RECs beyond the free trade area, yet they fail to address their future. Since the essence of this research is to examine the future of RECs upon the establishment of AfCFTA by analyzing various literature and legal instruments governing the matter in the continent, this research will have a gap-filling role to the existing literature.

1.4 The objective of the Research

1.4.1 General Objective

This study's general objective is to examine the AfCFTA in light of the Abuja Treaty and REC's future.

⁶⁶ Ibid

⁶⁷ Yao Graham & Cornelius Adedze, African Agenda, Which Way Africa's CFTA? ISSUE Vol. 19 No.2 2016TWN Africa (Graham & Adedze) 6-7

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Bringing the Continental Free Trade Area About (n 35) 12

⁷¹ Berthelot (n 64) 12

⁷² Ibid

1.4.2 Specific objectives

The following are the specific objectives of the study:

- To determine whether or not the AfCFTA is part of the Abuja Treaty's plan for Africa's economic integration;
- To evaluate the timing of the establishment of the AfCFTA in light of the status of RECs and Intra African trade;
- To examine if the AfCFTA can eliminate the problem of multiple memberships to RECs;
- To analyze the role of RECs in the establishment and operation of the AfCFTA; and
- To show how the RECs and AfCFTA co-exist.

1.5 Research Question

To achieve the above objectives, the study will address the following questions;

1. What is the legal basis for the establishment of AfCFTA?
2. Is it time for Africa to establish the AfCFTA?
3. Can AfCFTA avoid multiple memberships to RECs?
4. What is and will be the status of RECs vis-à-vis the AfCFTA?
5. What will be the future of RECs, especially those that have gone beyond FTA?

1.6 Methodology of the Research

The type of research used in this study is doctrinal research, in which it will be conducted by analysis of legal rules. In addressing the research questions, the researcher will locate mainly legal rules governing economic integrations in Africa. Additionally, different scholars' writing will be well examined to draw a clear theoretical understanding of the research questions. The researcher will gather information mainly from legal instruments. Furthermore, books, journals, articles, different media outlets, and the internet will gather the information needed to attain the research objectives. Afterward, the researcher will employ a qualitative method to clarify concepts and to examine the information gathered.

1.7 Significance of the Research

The AfCFTA is new, and research in the area is limited. This research will evaluate the AfCFTA treaty with other legal documents governing trade in the continent and address gaps. Additionally, the issues explored in this research are not well examined by other literature; therefore, it will have a gap-filling role by identifying the problems, giving analysis or interpretation, and further recommend possible solutions to the problems identified.

1.8 Limitation of the Research

The AfCFTA is a new development on the continent. While the agreement establishing the AfCFTA has technically entered into force, it has not yet been operationalized. This makes it challenging to look into the practice. Hence, this paper's analysis will be primarily based on the normative framework in the different treaties on regional integration and other RECs experiences.

1.9 Organization of the Research

This study will be composed of five chapters, including the introductory part, Chapter one. Chapter two will provide a general overview of economic integration in the continent by assessing its status and intra-African trade, particularly within the RECs. The third chapter is mainly about what the AfCFTA is all about; its relation with the Abuja Treaty, and the status of RECs vis-à-vis the AfCFTA. There will be a legal analysis of the AfCFTA Agreement and its protocols vis-à-vis the Abuja Treaty and the different treaties establishing the RECs in the fourth chapter. Finally, the last chapter will be the conclusion and recommendations.

Chapter two

General background on the African economic integration

In this chapter, there will be an overview of economic integration in Africa to have better insight into the establishment of the AfCFTA. There will be an overall review of other literature concerning the status of intra-Africa trade, the development of economic integration in Africa, and the RECs. Assessing these issues will help to grasp the level of economic integration to address if the continent is ready for this mega continental arrangement. It will also help to understand the RECs' achievements and weaknesses for better implementation of the AfCFTA.

2.1 Intra-African trade and it's status

Africa is a continent with highly diversified countries together. There are differences in size and GDP from big to small, location from landlocked to small islands, and different market and economic structures. Africa is a region with a significant disparity in income between countries. Six island nations of the continent collectively contribute to 1% of the GDP, while only three countries Egypt, South Africa, and Nigeria, contribute to more than 50% of Africa's GDP.⁷³ For proper implementation of the AfCFTA, this arrangement has to address the disparity.

Nevertheless, most economically strong countries do not have a high integration level in their respective RECs except for South Africa in SADC and Kenya in EAC.⁷⁴ For example, Nigeria, Algeria, and Egypt account for about half of the region's GDP.⁷⁵ However, these countries are not integrated well and have limited share in the integration.⁷⁶

South Africa, Cote d'Ivoire, Kenya, Nigeria, and Morocco represent most of intra-African trade. South Africa has a trade relationship with 96% of the intra-African trade network. Out of 54

⁷³ Landry Signé and Colette van der Ven Keys to success for the AfCFTA negotiations (AFRICA GROWTH INITIATIVE) [May 2019] (Signe & Ven) 8; List of African countries by GDP, International Monetary Fund World Economic Outlook [October 2019] available at <http://statisticstimes.com/economy/african-countries-by-gdp.php> accessed on March 20 2020; Who are the winners and losers in Africa's Continental Free Trade area? Available at <https://www.weforum.org/agenda/2018/10/africa-continental-free-trade-afcfta-sme-business> accessed on May 15 2020/

⁷⁴Africa Regional Integration Index Report (United Nations Economic Commission for Africa) [2016] (ARIIR 2016)18

⁷⁵REGIONAL ECONOMIC OUTLOOK: SUB-SAHARAN AFRICA Recovery Amid Elevated Uncertainty, Chapter 3. IS THE AFRICAN CONTINENTAL FREE TRADE AREA A GAME CHANGER FOR THE CONTINENT? [April 2019] (Regional Economic Outlook) 42

⁷⁶Ibid

countries, it trades with 53 of them.⁷⁷ Furthermore, some countries will benefit more, and some benefit less based on their intra-African trade level.⁷⁸ With that, Eritrea, Lesotho, South Sudan, Namibia, and Botswana are countries that will benefit less from the AfCFTA.⁷⁹

Informal cross-border trade is not as developed as it should have been because of security, corruption, lack of access to finance and market, other related reasons.⁸⁰ Informal trade is the core income generation way, especially for vulnerable groups of Africa.⁸¹ In South Africa, 70% and in West and Central Africa, 60% are women involved in informal cross border trade.⁸² It is responsive regarding food crises because it is conducted by officially unemployed and micro, small, and medium enterprises.⁸³ In COMESA and SADC, informal cross-border trade contributes to 40% and 30-40% of total intra-regional trade, respectively. If an allowance is given to informal trade in Africa, intra-African trade accounts for 20%; however, Europe, North America, and ASEAN have 60, 40, and 30 percent intra-regional trade, respectively.⁸⁴ 14% of the global population is from Africa, but it only accounts for less than 3% of the global GDP and only receives 3% of foreign direct investment.⁸⁵ The share of Africa in global trade is insignificant, which is about 3%.⁸⁶

Service has played a significant role in the global and African market than other sectors. It accounts for 71% of global GDP in 2010, and Africa; about 55% comes from this sector.⁸⁷ ⁸⁸ When we see Africa's products with other developing countries mining and utilities play a significant role in total value-added products.⁸⁹ Africa's share of manufacturing and its growth rate is low compared with other developing countries.⁹⁰ However, in Africa, agriculture plays a vital role than any

⁷⁷ Strategic tools to assist negotiators and agricultural policy design in Africa (n 13) 12

⁷⁸ Ibid 11; Who are the winners and losers in Africa's Continental Free Trade area? Available at

<https://www.weforum.org/agenda/2018/10/africa-continental-free-trade-afcfta-sme-business> accessed on May 15 2020/

⁷⁹ Ibid

⁸⁰ ASSESSING REGIONAL INTEGRATION IN AFRICA (ARIA IX) Next Steps for African Continental Free Trade Area (United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Conference on Trade and Development) [2019] (ARIA IX) 84

⁸¹ Ibid

⁸² Ibid

⁸³ Ibid

⁸⁴ STATUS OF INTEGRATION IN AFRICA (SIA IV), African Union Commission, 2013 (SIA IV) 2

⁸⁵ Ibid

⁸⁶ Ibid 155

⁸⁷ Signe & Ven (n 73) 5-6

⁸⁸ Patrick N. Osakwe, TRADE AND POVERTY PAPER SERIES No. 1 Transformative Regionalism, Trade and the Challenge of Poverty Reduction in Africa, May 2015 (Osakwe) 3

⁸⁹ Ibid

⁹⁰ Ibid

developing country.⁹¹Therefore, in Africa, low manufacturing inputs, weak infrastructure, poor access to finance, lack of diversification, tariffs, and non-tariff barriers have hindered intra-African trade in the continent.⁹²

Most of the African economies share similar features. They have limited manufacturing products that are owned by foreigners with foreign direct investment.⁹³ Most of them export primary products and import manufactured and capital goods.⁹⁴ The private sector is highly involved in informal and small businesses.⁹⁵ African exports are mainly on Europe's primary products, which were about 71.9% of the total export.⁹⁶ With China's recent development of a trading partner, this number shows a decline to 31%.⁹⁷Still, in 2010 it shows that Europe dominates 47% of imports and 57% of exports.⁹⁸Africa's trade for the world is mainly primary products that are not manufactured or with little manufacturing.⁹⁹In Africa, FDI has been a significant source of foreign currency after 1990.¹⁰⁰ However, the continent imports manufactured products from the rest of the world. This cycle has no help and hope for Africa's development.

However, intra-African trade is more diversified than Africa's export to the rest of the world.¹⁰¹ It involves manufactured products, and it has value-added products.¹⁰²In 2007-2017 manufactured goods were about 40%, minerals for 44%, and agricultural products for 16%, in the same year when Africa's export to the rest of the world was minerals for 75% and 16% manufactured goods.¹⁰³Compared with minerals, manufactured goods has less focus.¹⁰⁴ There is also a lack of

⁹¹ Ibid

⁹² Ibid

⁹³ International Trade Centre. A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva, [2018] (A business guide to the AfCFTA) 11

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ ARIA V(n 15) 33

⁹⁷ Ibid; Africa-EU - international trade in goods statistics [April 2020] available at

[https://ec.europa.eu/eurostat/statistics-](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=AfricaEU_international_trade_in_goods_statistics#:~:text=The%20largest%20export%20and%20import,African%20countries%20(13%20%25).)

[explained/index.php?title=AfricaEU_international_trade_in_goods_statistics#:~:text=The%20largest%20export%20and%20import,African%20countries%20\(13%20%25\).](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=AfricaEU_international_trade_in_goods_statistics#:~:text=The%20largest%20export%20and%20import,African%20countries%20(13%20%25).) accessed on May 15 2020

⁹⁸ ARIA V (n 15) 33

⁹⁹ Ibid 89

¹⁰⁰ Ibid 64

¹⁰¹Regional Economic Outlook (n 75) 39

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid 43

value chain creation. It is less-processed and low-technology products compared with other regions in the world.¹⁰⁵

The regional arrangements in Africa have near-zero tariffs; however, 75% of intraregional trade took place in five RECs from which SADC has half of the trade flow.¹⁰⁶ However the level of intraregional is limited which shows that there are significant NTBs that hinder trade in the regions of the continent.¹⁰⁷

Most countries use trade as an instrument to lift from poverty, and they achieve rapid and sustainable growth. However, because of its size, structure, and direction, Africa has failed from utilizing trade to achieve developments.¹⁰⁸ To avert that currently, Africans have established the AfCFTA. For the AfCFTA to promise, there should be a realization of current plans to speed up its implementation.¹⁰⁹ For example, the Programme for Infrastructure Development in Africa (PIDA), the Accelerated Industrial Development for Africa (AIDA) Initiative, African Productive Capacity Initiative (APCI), and the Action Plan for Development of Science and Technology.¹¹⁰ These are some of the many initiatives and programs that are useful to foster the application of AfCFTA.

2.2 Economic Integration in Africa

After independence, the establishment of regional organization in Africa with the founding principle of non-intervention into domestic affairs, sovereignty development, and aligning regimes is democratic or authoritarian.¹¹¹ Having regional integration for African has been a priority since the establishment of OAU.¹¹² In the 1963 OAU Consecutive Act and African leaders' further actions, they showed their commitment to implementing the regional integration agenda.¹¹³ Economic integration was recognized as of priority for Africans' by the AU and its predecessor, OAU. Regional integration in Africa has shifted to more economic integration in the

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ SIA IV (n 84) 155

¹⁰⁹ San Bilal and Jan Vanheukelom, Regional dynamics in Africa: High stakes for development (No. 174 25 March 2015) (Bilal & Vanheukelom) 5

¹¹⁰ Ibid

¹¹¹ Bilal (n 12) 13-14

¹¹² SIA IV (n 84) 15

¹¹³ Bilal (n 12) 5

1980s.¹¹⁴ Different instruments address on how to make Africa self-sustaining and economically independent. For example, the 1980 Lagos Plan of Action, backed by the OAU, creates a self-sufficient Africa by minimizing its western links and maximizing Africa's resource, as provided in the preamble. The other example is the NEPAD Charter having a primary objective of eradicating poverty, promoting sustainable growth and development, integrating Africa in the world economy, and enhancing women's empowerment.¹¹⁵

The Abuja Treaty has envisaged the establishment of the African Economic Community. The Abuja treaty has stages in which it will be completed after six phases. The RECs will serve as pillars to build a continental framework.¹¹⁶ This plan has been confirmed by the treaties of RECs and the AU constitutive act as well.¹¹⁷ There are eight RECs recognized by AU; however, there are fourteen RECs in Africa.¹¹⁸ When we discuss the future of the RECs it only implies those that are recognized by the AU however, there is a need as to how the remaining RECs that are not recognized by AU will be accommodated in the continental framework.

The Protocol on Relations between the African Union and AEC was adopted in 2007.¹¹⁹ AU has adopted the protocol on the African Court of Justice in 2008.¹²⁰ These two protocols are significant for economic integration.¹²¹ The Protocol on Relations between AU and RECs has the objective of having cooperation and coordination among the RECs and with the AU as well.¹²² The other protocol on establishing the African Court of Justice is to have jurisdiction over cases arising out of the treaty establishing the AEC.¹²³

¹¹⁴ Patrick N. Osakwe, TRADE AND POVERTY PAPER SERIES No. 1 Transformative Regionalism, Trade and the Challenge of Poverty Reduction in Africa, May 2015 (Osakwe) 1

¹¹⁵ New Partnership for Africa's Development (NEPAD) available at <https://au.int/en/organs/nepad> accessed on September 1 2020

¹¹⁶ Bilal (n 12) 5

¹¹⁷ ARIA V (n 15) 11

¹¹⁸ Osakwe (n 114) 1

¹¹⁹ RICHARD FRIMPONG OPPONG, THE AFRICAN UNION, THE AFRICAN ECONOMIC COMMUNITY AND AFRICA'S REGIONAL ECONOMIC COMMUNITIES: UNTANGLING A COMPLEX WEB [2010] (OPPONG) 92

¹²⁰ Ibid

¹²¹ Ibid

¹²² Protocol on Relations Between the African Union (AU) and the Regional Economic Communities (RECs) (Protocol on AU & RECs) art 3

¹²³ Ibid

At the 18th AU Summit in Kigali, the protocol to the Abuja Treaty relating to the Free Movement of Person, Right of Residence, and Right of Establishment was open for signature.¹²⁴ The protocol envisages the free movement of a person, the right of residence, and other rights, which will pave the way for AEC's implementation.¹²⁵ It intends to abolish visas, have an African Passport, and have mutually recognized academic, technical and professional qualifications among member states.¹²⁶ African leaders are taking different acts for the realization of better integration in the continent which is essential for development. African Regional Economic Communities

The RECs in Africa is the pillar of economic integration throughout the continent. Even if there are eight RECs that are recognized by AU, there are more than that. With the establishment of the AfCFTA, the AUC considers RECs' involvement and assistance since they have a better experience.¹²⁷ They will help manage the process with their members since the negotiation between 55 members is complex.¹²⁸

UMA, CEN-SAD, and IGAD are still at the cooperation stage between member states.¹²⁹ The ECCAS though it has challenges for implementation it has launched its FTA. SADC, COMESA, EAC, and ECOWAS have operational FTA.¹³⁰ ECOWAS and EAC have a customs union. Additionally, the EAC launched its Common Market in 2010 after having a Customs Union for five years.¹³¹

From the RECs, COMESA, EAC, and SADC have a more advanced list of liberalized schedules with a service agreement.¹³² SADC is also negotiating pro-competitive regulatory disciplines for national treatment and market access.¹³³ The sub-region of ECOWAS has an agreement on market access commitments on dental, medical, accounting, legal, architectural, telecommunication, and

¹²⁴ A business guide to the AfCFTA (n 93) xi

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Ibid 40

¹²⁸ Ibid

¹²⁹ SIA IV (n 84) 10

¹³⁰ United Nations Economic Commission for Africa, African Union and African Development Bank, ASSESSING REGIONAL INTEGRATION IN AFRICA VIII (ARIA VII)

¹³¹ Ibid

¹³² Andrew Crosby (ed) ,BRIDGES AFRICA Trade and Sustainable Development News and Analysis on Africa(VOLUME 5, ISSUE 4 – MAY 2016) (BRIDGES AFRICA May 2016) 9

¹³³ Ibid

transport services.¹³⁴ The sub-region of ECCAS though it does not address market access issues, has an agreement on infrastructure development.¹³⁵

One of the tools for trade facilitation is One-Stop Border Post (OSBP).¹³⁶ The OSBP was first implemented between Zimbabwe and Zambia at the Chirundu, and it was successful.¹³⁷ This concept mainly reduces the lengthy border by installing an inspection of the countries to make a joint inspection.¹³⁸ There will be only one stop of all traffics in each direction.¹³⁹ Now the OSBP is adopted by COMESA, EAC, ECOWAS, SADC, and ECCAS.¹⁴⁰

There are some measures taken by the RECs to address the issue of non-tariff barriers (NTBs). There are National Committees provided by ECOWAS to deal with NTBs, and there is a compliant border desk where members put the problem they face.¹⁴¹ The Joint Task Force, composed of the Director-General of Customs and representative of the Finance Ministers for the two concerned countries, will address the complaint.¹⁴² The tripartite arrangement between COMESA, EAC, and SADC adopted an internet-based system where stakeholders from member states can report for NTBs and follow the process of their removal.¹⁴³ Only the TFTA member countries and ECOWAS have established a system for removing NTBs but no other RECs.¹⁴⁴

The RECs have a low level of implementation of their action plans to achieve economic transformation.¹⁴⁵ It is mainly due to multiple and overlapping memberships with different ambitions and unrealistic goals.¹⁴⁶ The commitments cover broad areas that bring low adherence to it. There are multiple memberships of parties on different RECs. One country is a member of four RECs, 10 are members of three RECs, 31 are members to two RECs, and 12 countries are a

¹³⁴ Ibid

¹³⁵ Ibid

¹³⁶ SIA IV (n 84) 3

¹³⁷ Ibid

¹³⁸ Ibid

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Ibid 3, 31-32

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ Ibid 32

¹⁴⁵ JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES [2011] (GATHII) 2

¹⁴⁶ Ibid

member of one REC.¹⁴⁷The commitment of every country towards a RECs may be overlapping or even contradictory therefore there is a need to resolve overlapping membership.¹⁴⁸

The RECs have a pre-established system and better integration among themselves; however, they also have divergent integration priorities.¹⁴⁹ Therefore, working through them may harm the general integration plan.¹⁵⁰ Additionally, most of the regional economic communities are working more on promoting peace and security in their regions.¹⁵¹The regional initiatives, including AU, take peace and security, political, and governances as priorities and pillars.¹⁵² For example, IGAD, ECOWAS, and SADC are good examples to show this.¹⁵³The RECs fail to consider the root cause for low intra-regional trade, NTBs, structural transformation, and productive capacities.¹⁵⁴ However, they focus on trade and market liberalization as they "put the cart before the horse."¹⁵⁵ With that, the struggle of the RECs having a strategic transformation and development has not been fruitful.

Most African RTAs are intergovernmental institutions rather than supranational; they give ample space for their member states' sovereignty.¹⁵⁶ States are not politically willing to give their sovereignty for the regional organizations.¹⁵⁷ Except for some RECs like COMESA¹⁵⁸ there is flexibility with the laws as they are coordination rather than rules to be employed appropriately.¹⁵⁹That is why these organizations are not as strong as other RTAs like European or North American RTAs.¹⁶⁰ It is the will and commitments of its members which makes them weak institutions.¹⁶¹ The RTAs in Africa have not resolved the problem of coordination and association

¹⁴⁷ ARIA V (n 15) 78

¹⁴⁸ Alan Matthews, Regional Integration and Food Security in Developing Countries (TCAS Working Document No. 50) [April 2003] (Matthews) 78

¹⁴⁹ Bilal (n 12) 11

¹⁵⁰ Ibid

¹⁵¹ Osakwe (n 88) 1

¹⁵² Bilal & Vanheukelom (n 109) 6

¹⁵³ Ibid

¹⁵⁴ Osakwe (n 88) 14

¹⁵⁵ Ibid

¹⁵⁶ GATHII (n 145) 3

¹⁵⁷ Matthews (n 148) 72

¹⁵⁸ POLYTOL PAINTS & ADHESIVES MANUFACTURERS CO. LTD vs THE REPUBLIC OF MAURITIUS, IN THE COMESA COURT OF JUSTICE FIRST INSTANCE DIVISION LUSAKA, ZAMBIA, REFERENCE NUMBER 1 OF 2012

¹⁵⁹ GATHII (n 145) 2

¹⁶⁰ Ibid 3

¹⁶¹ Ibid

with domestic policies.¹⁶² The regional organizations have different weaknesses starting from lack of follow up of decisions by ministries.¹⁶³ There should be a proper enforcement mechanism and dispute settlement method.¹⁶⁴ Too many regional organizations with too many political appointments need finance; however, countries fail to pay their obligation.

The RTAs also did not change Africans' behavior as to alarm them to the cost of noncompliance.¹⁶⁵ The existence of these institutions does not put much into compliance with legal obligations by countries.¹⁶⁶ The implementation of protocols of the RECs for FTA and customs unions are not as attractive as those in the documents.¹⁶⁷

Furthermore, most RECs decisions are by the summits of Heads of States which makes the decision-making process complex.¹⁶⁸ Most African RECs fail to establish jurisprudence; they only provide for the existence of a court or tribunal for dispute resolution among member states and interpretation of the treaty.¹⁶⁹ Only COMESA, EAC, ECOWAS and WAEMU allow domestic courts to refer cases to the regional enforcement mechanism.¹⁷⁰

The free movement of people helps the economy of both the country of destination and the country whose national travels.¹⁷¹ It can be for education, tourism, or business. The free movement of people will benefit countries to have skill and economic development.¹⁷² The removal of the restriction on the work permit and visa will bring rapid development.¹⁷³ It is mainly because sharing of skills that will fill the gaps.¹⁷⁴ There will be an exchange of innovations and entrepreneurs.¹⁷⁵ It will have gains on time and resources by supporting more competitive businesses and economies.¹⁷⁶ The ambition to have a "borderless Africa" is still in progress and with different gaps.¹⁷⁷ There are different dialogues on how to make it a reality. African leaders

¹⁶² Ibid 1

¹⁶³ Matthews (n 148) 72

¹⁶⁴ Strategic tools to assist negotiators and agricultural policy design in Africa (n 13) 22

¹⁶⁵ GATHII (n 145) 1

¹⁶⁶ Ibid

¹⁶⁷ Bilal (n 12) 11

¹⁶⁸ Ibid

¹⁶⁹ Bilal & Vanheukelom (n 109) 7

¹⁷⁰ Ibid

¹⁷¹ ARIIR 2016 (n 74) 34

¹⁷² Ibid

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Ibid

must commit to enhancing Africans' free movement in Africa with just an African passport only.¹⁷⁸ They can start by giving positive reciprocity with countries that they have visa-open relation.¹⁷⁹ Nevertheless, there are different challenges for the poor implementation of people's free movement within the RECs. Some countries invoke the issues of security for its low implementations.¹⁸⁰ Additionally, infrastructure, especially for road transport, is very high roadblocks by security forces, insecurity in the roads, and illegal barriers are considered a reason for the delayed implementation of people's free movement.¹⁸¹ There is progress by different RECs to have better integration, but their progress is different from one REC to another.¹⁸² For example, the CEN-SAD exempts visas for all holders of diplomatic passports about free movement of people.¹⁸³ In COMESA, Zambia waives visas for all COMESA members.¹⁸⁴ In ECOWAS, the free movement of people is with an ECOWAS passport for 90 days.¹⁸⁵ The EAC recognizes its member citizens' free movement with a passport and recognizes national identification cards as valid travel documents.¹⁸⁶ Rwanda and Ethiopia put the only visa on arrival for all African citizens. Kenya and Rwanda also waived work permits for EAC members.¹⁸⁷ To ease cross-border movement and problems associated with it, ECOWAS is on the way to build Joint Border Posts (JBPs).¹⁸⁸ The JBP between Togo and Ghana at Noepe was open on November 3, 2014.¹⁸⁹

It has been a challenge on a meeting of targets assigned by different programs in RECs as well as AU.¹⁹⁰ To harmonize economic indicators, five RECs have set macroeconomic and monetary convergence targets in place.¹⁹¹ Nevertheless, this target has not been met by all members with different levels of performance by countries.¹⁹² There is some improvement in the integration of

¹⁷⁸ Ibid

¹⁷⁹ Ibid

¹⁸⁰ SIA IV (84) 6-7

¹⁸¹ Ibid

¹⁸² Bilal (n 12) 5

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Ibid

¹⁸⁷ Ibid

¹⁸⁸ ECOWAS quickening integration with joint border posts [10/12/2014] available at <https://www.ecowas.int/november-2014-the-checkpoint-juxtaposed-ccp-of-noepe-is-on-service/> accessed in May 15 2020

¹⁸⁹ Ibid

¹⁹⁰ ARIA IX (n 80) 2

¹⁹¹ Ibid

¹⁹² Ibid

financial and macroeconomic areas.¹⁹³ Currently, three monetary unions are operating in Africa.¹⁹⁴ They are the West African CFA franc in West Africa francophone countries, the Central African CFA franc with six countries in Central Africa¹⁹⁵, and the Common Monetary Area in South covering Eswatini, Lesotho, Namibia, and South Africa.¹⁹⁶ However, this arrangement is not according to the Abuja Treaty, instead of individual countries' effort in their distinct REC.

Effective financial institutions can decrease the costs of doing business and benefit small and medium-sized enterprises and companies.¹⁹⁷ If capitals flow more freely in Africa, it will help allocate finance to be more productive.¹⁹⁸ It will also bring high investments with the investors getting a high return.¹⁹⁹ There is a path with some landlocked countries and island nations on the financial service.²⁰⁰ The smooth flow of finance in cross-border will fasten the growth of small sizes industries in the continent.²⁰¹ It will also promote knowledge and technology transfer.²⁰² However, from the global financial crises, the capital connection has a risk.²⁰³ With that, many RECs have not made their currencies convertible.²⁰⁴ A monetary union is a crucial move for the integration of Africa in the Abuja Treaty.²⁰⁵ By improving the regulatory system, one can build confidence among financial institutions. Regional finance has a great potential for the rapid development of the continent, and will "light up Africa's financial future."²⁰⁶ Regional finance can be achieved with different serious actions like joining up inflation policy and others.²⁰⁷ Financial and macroeconomic integration has the lowest application among all RECs at about 0.381.²⁰⁸

The AfCFTA can use the experiences of RECs and can promote health integration approaches with different methods.²⁰⁹ Regulatory Centers of Research Excellence provide research, development,

¹⁹³ Bilal (n 12) 5

¹⁹⁴ ARIA IX (n 80) 2

¹⁹⁵ Bilal (n 12) 5-6

¹⁹⁶ ARIA IX (n 80) 2; Bilal (n 12) 6

¹⁹⁷ ARIIR 2016 (n 74) 36

¹⁹⁸ Ibid

¹⁹⁹ Ibid

²⁰⁰ Ibid 37

²⁰¹ Ibid

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ Ibid

²⁰⁵ Ibid, AEC Treaty (n 2) art 6

²⁰⁶ Ibid

²⁰⁷ Ibid

²⁰⁸ Ibid 36

²⁰⁹ ARIA IX (n 80) 27

and practical professional learning in medical disciplines.²¹⁰ It enhances and develops capacities on regional health works.²¹¹

There is a move toward mining development with SADC, COMESA, ECOWAS, and EAC through the Regional Mining Vision initiative.²¹² This project supports other projects on the continent.²¹³

Another initiative taken by RECs for a higher integration level is the Tripartite Free Trade Area (TFTA). The COMESA, EAC, and SADC establish the TFTA. The TFTA will be an enormous economic community which will have 27 countries as its members. It will cover from the north through the eastern part till South Africa, from "Cape to Cairo."²¹⁴ In 2008 October the heads of states of these 26 countries agreed for the establishment of the TFTA.²¹⁵ The number of participants in the TFTA has increased to 27, with South Sudan joining the EAC in April 2016.²¹⁶ The TFTA, composed of the three RECs, represents 60% of AU's GDP and population.²¹⁷ Market Integration, Infrastructural Development, and Industrial Development are the three pillars of the TFTA.²¹⁸ On June 12, 2011, in Johannesburg, the Heads of States and Governments signed Declarations.²¹⁹ The Declaration is to launch negotiation for the establishment of the TFTA.²²⁰ It is the adoption of the Roadmap for the Establishment of the TFTA.²²¹ They also adopted the TFTA Negotiating Principles, Processes, and Institutional Frameworks.²²² This initiative is a move forward for a better integration that other RECs should copy.²²³ Twenty-two countries have signed the TFTA

²¹⁰ Ibid

²¹¹ Ibid

²¹² Ibid 28

²¹³ Ibid

²¹⁴ Ron Sandrey | Hans Grinsted Jensen | Nick Vink | Taku Fundira | Willemien Viljoen Trade Law Centre for Southern Africa, National Agricultural Marketing Council., Cape to Cairo - An Assessment of the Tripartite Free Trade Area [2011] (Cape to Cairo - An Assessment of the Tripartite Free Trade Area) i

²¹⁵ Ibid

²¹⁶ SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents, Launch of the Tripartite FTA available at <https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html>, accessed on April 8, 2019

²¹⁷ Andrew Crosby(ed) BRIDGES AFRICA Trade and Sustainable Development News and Analysis on Africa(VOLUM E 3, ISSU E 9) [NOVEMBER 2014] (BRIDGES AFRICA NOVEMBER 2014) 5

²¹⁸ SIA IV (n 84) 10

²¹⁹ Ibid

²²⁰ Ibid

²²¹ Ibid

²²² Ibid

²²³ Ibid

out of the 27.²²⁴ As of January 2020, eight countries have ratified the instrument with the remaining six ratifications for it to come into force.²²⁵

The TFTA is a bold move towards greater integration in Africa; it is a stepping stone for establishing the AfCFTA.²²⁶ The AU was expecting it to be operational by 2016²²⁷, but that has not happened until now. The negotiation has to be concluded by 2014; however, the negotiation is still ongoing.

The slow progress of the TFTA phase I negotiation has lagged the negotiation of phase II as well. On June 18, 2018, in Cape Town at the seventh Tripartite Sectoral Ministerial Committee, the Ministers agreed to proceed with the Phase II negotiation.²²⁸ In this meeting, they see the progress made on the Phase I negotiation, especially on rule of origin and tariff reduction.²²⁹ They also ask member states to ratify the TFTA by 2019.²³⁰

²²⁴ SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents, Launch of the Tripartite FTA available at <https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html>, accessed on April 8, 2019)

²²⁵ More Countries Ratify Tripartite Free Trade Area Agreement [January 17, 2020] available at <https://www.comesa.int/more-countries-ratify-tripartite-free-trade-area-agreement/> accessed on May 15 2020

²²⁶ BRIDGES AFRICA May 2016 (n 132) 9

²²⁷ BRIDGES AFRICA NOVEMBER 2014 (n 217) 3

²²⁸ A business guide to the AfCFTA (n 93) 1

²²⁹ Ibid

²³⁰ Ibid

Chapter Three

A general overview of the African Continental Free Trade Area

This chapter will briefly discuss the AfCFTA as what it is and why it was formed. In doing so, there will be an overview of the institutional and legal setting of the AfCFTA. Based on the previous chapter and other supporting literature, there will be assessments of what the AfCFTA ought to bring. With that, the main rules and principles in the AfCFTA, like the MFN principle, will be assessed.

3.1 The institutional and legal framework

The AfCFTA is a regional free trade area with a vision of creating a single liberalized market for goods and services, facilitated by persons' movement to strengthen the continent's economic integration.²³¹ There will be a successive round of negotiation for the elimination of tariffs and NTBs in goods. It will also bring progressive liberalization of trade-in service.²³² The AfCFTA will cooperate in all trade-related areas, customs matters, and implementation of trade facilitation measures.²³³ The AfCFTA also provides a dispute settlement mechanism for managing disputes arising out of the treaty.²³⁴

The AfCFTA has three layers designed to create a rule-based legal system to eliminate trade barriers and provide common ground for addressing trade-related issues.²³⁵

The first one is the general framework for objectives, definitions, scope, institutional framework, administration and transparency procedures, and other guiding principles.²³⁶ The second layer comprises six protocols in which trade in goods, service, and rules and procedures on dispute settlement are covered under phase one while the protocol on investment, competition policy, and intellectual property rights are in the second phase.²³⁷ It is the central substantive and operative

²³¹ AfCFTA Agreement (22) art 3

²³² Ibid

²³³ Ibid

²³⁴ Ibid art 4

²³⁵ ARIA IX (n 80) 44

²³⁶ Ibid 43

²³⁷ Ibid; African Continental Free Trade Area [Fresh fields Bruckhaus Deringer available at https://www.lexology.com/library/detail.aspx?g=72730a2c-e77d-4953-b24c-d814a952ad26](https://www.lexology.com/library/detail.aspx?g=72730a2c-e77d-4953-b24c-d814a952ad26), accessed at April 10 2019

part of the AfCFTA; they contain an objective, exception, intention, and institutional provisions.²³⁸ The last layer contains guidelines, lists, annexes, and schedules to the protocol. It provides for the exact schedule commitments provided in the protocol in a more detailed manner; it may even provide appendices.²³⁹ The six protocols are an integral part of the agreement, and they also have several annexes attached to them.²⁴⁰ The Protocols under the AfCFTA have different committees composed of Member States representatives to implement the agreement better.²⁴¹ With that, there are also sub-committees for facilitating the application of the annexes in the specific protocol.²⁴² It has to be considered if the issue of e-commerce should be included in the AfCFTA.²⁴³ The time frame has been provided in the African Union Ministers of Trade (AMOT) meeting at Cairo that the deadline for concluding the second phase of negotiation to be December 2020.²⁴⁴ There are additional setups provided by the AfCFTA for its implementations. The first is the African Trade Observatory (ATO), which facilitates information in the continent through the portal for enhancing intra-African trade.²⁴⁵ It will include exchange rate, service trade, competitiveness indicators, internal tax data, and foreign direct investment data.²⁴⁶ This information will be available for the market players and governmental and non-governmental organizations.²⁴⁷ The other is AfCFTA Online Mechanism for Reporting, Monitoring, and Elimination of NTBs to resolve NTB with online reporting or SMS.²⁴⁸ The notification will be received by the reporting country focal point and the AfCFTA Secretariat.²⁴⁹ The system allows for information exchange between the concerned parties to see the removal of the NTBs.²⁵⁰

²³⁸ African Continental Free Trade Area [Freshfields Bruckhaus Deringer available at https://www.lexology.com/library/detail.aspx?g=72730a2c-e77d-4953-b24c-d814a952ad26](https://www.lexology.com/library/detail.aspx?g=72730a2c-e77d-4953-b24c-d814a952ad26) accessed at April 10 2019)

²³⁹ ARIA IX (n 80) 43-44

²⁴⁰ The Institutions of the African Continental Free Trade Area [13 Sep 2019] available at <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> accessed on February 18 202, 4

²⁴¹ Ibid 8

²⁴² Ibid

²⁴³ ARIA IX (n 80) 64

²⁴⁴ Ibid

²⁴⁵ The Institutions of the African Continental Free Trade Area [13 Sep 2019] available at <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> accessed on February 18 202, 9

²⁴⁶ Ibid

²⁴⁷ Ibid

²⁴⁸ Ibid

²⁴⁹ Ibid

²⁵⁰ Ibid

The AfCFTA is a regional arrangement that is open for all African countries. As defined in the AfCFTA Treaty, it defines member states as member states of the AU.²⁵¹ Additionally, the same article qualifies it by stating that those who ratify the treaty and are party to the AfCFTA agreement are called state parties.²⁵²

The decision-making system in the AfCFTA is taken by consensus.²⁵³ Failing to reach consensus, the Committee of Senior Trade Officials shall refer for consideration by the Council of Ministers, and the Council of Ministers shall refer the matter to the Assembly.²⁵⁴ A simple majority shall determine decisions on procedures and decisions to determine if it is a procedure.²⁵⁵ The decision shall be adopted even there is abstention of a state party.²⁵⁶

AfCFTA's institutional framework is composed of four main groups for its proper implementation and enforcement. These are the Assembly, the Council of Ministers, the Committee of Senior Officials, and the Secretariat.²⁵⁷ The Assembly of AU is the highest body that provides political and strategic guidance by acting as an oversight body.²⁵⁸ The Assembly of AU is not the highest organ in the AfCFTA only but also AU. Having this arrangement shows that the AfCFTA institutions are deeply rooted within the AU institution.²⁵⁹ Additionally, giving the highest power for the Assembly, which may extend to the participation of non-members, shows that all AU members will eventually be members of the agreement.²⁶⁰

The Council of Ministers is the second-highest organ which is composed of only members of AfCFTA.²⁶¹ It is the primary decision-making institution mandated to establish and supervise the AfCFTA Secretariat and committees.²⁶² It will issue directives and regulations for the agreement and propose legal, financial, and structural decisions for the Assembly.²⁶³ Its task may extend from the AfCFTA like to assessing Africa's position in the WTO negotiations.²⁶⁴

²⁵¹ AfCFTA Agreement (n 22) art 2(q)

²⁵² Ibid art 2(v)

²⁵³ Ibid art 14 (1)

²⁵⁴ Ibid 14 (1)

²⁵⁵ Ibid art 14 (3) & (4)

²⁵⁶ Ibid art 14 (5)

²⁵⁷ Ibid art 9

²⁵⁸ ARIA IX (n 80) 44

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ Ibid 45-46

²⁶² Ibid

²⁶³ Ibid

²⁶⁴ Ibid

The Committee of Senior Officials has two functions; first, it supervises the implementation of sub-committees' council decisions.²⁶⁵ The second is that it serves as a "clearinghouse" for the council's technical decisions—this organ reports to the Council of Ministers.²⁶⁶

A secretariat body will be established by the Assembly, which will be autonomous.²⁶⁷ It will be under the AU system with the same status as other organs of the union.²⁶⁸ It will have the independence to make administrative and operational decisions, including its human resource management, which has to conform with the AU rule since its budget.²⁶⁹ The Secretariat's decision-making power will be with the committees' hierarchy, and it will remain intergovernmental.²⁷⁰ The committees may authorize a permanent representative to the Committee of Senior Trade Officials, delegate decision making authority to the RECs representative, or extend some decision for the Secretariat.²⁷¹

3.1.1 Level of liberalization that ought to come with the AfCFTA

Member states have five years to liberalize tariffs on non-sensitive products and ten years for sensitive products.²⁷² However, longer time is provided for seven LDC countries, namely, Djibouti, Ethiopia, Madagascar, Malawi, Sudan, Zambia, and Zimbabwe.²⁷³ These LDCs have ten years for non-sensitive and 13 years for sensitive products to be liberalized after the agreement comes into force.²⁷⁴ Concerning the four RECs with a customs union, the RECs will determine the 10% identification as excluded and sensitive.²⁷⁵ Countries that are not a member of a customs union will determine the product lists individually.²⁷⁶ The AfCFTA provides a liberalization of 90% of tariffs on goods from 5-13 years.

²⁶⁵ Ibid 46

²⁶⁶ Ibid

²⁶⁷ Ibid

²⁶⁸ Ibid

²⁶⁹ Ibid

²⁷⁰ Ibid

²⁷¹ Ibid

²⁷² African Continental Free Trade Area Toolkit Towards the finalization of modalities on goods, Economic Commission for Africa, June 2018 (African Continental Free Trade Area 2018) 14

²⁷³ Ibid 4

²⁷⁴ Ibid

²⁷⁵ Ibid 8

²⁷⁶ Ibid

Tariff can be liberalized with two approaches tariff line and double qualification approaches. The UNECA has provided two approaches to prepare for tariff offer; the tariff line approach and the double qualification approach.²⁷⁷ In the tariff line approach, 90% of the non-sensitive products will be fully liberalized according to the time frame provided for LDCs and non-LDCs.²⁷⁸ Under the tariff line approach, the remaining 10% will be divided into sensitive products, which will be liberalized over a more extended period will be 9%, and the remaining 1% will be excluded product.²⁷⁹ With the double qualification approach, the liberalized product will be 90% of the tariff line and not less than 90% of an import's total value.²⁸⁰ The remaining 10% will be classified into sensitive products of 7% and excluded products consisting of 3%.²⁸¹ The AfCFTA has adopted the second approach. Tariff line liberalization may not bring the expected level of liberalization even if it is 99% because the remaining 1% may bring a low level of market access for that country.²⁸² With that, it has a low effect compared with the double qualification approach.²⁸³ Application of a double qualification approach will improve policy coherence and compliance, and it will bring more significant benefits and less distortion for African countries.²⁸⁴

The classification of products as sensitive and excluded will be based on food security, fiscal revenue, livelihood, and industrialization.²⁸⁵ It was provided that the remaining 10% will be divided as 7% of sensitive and 3% of the excluded product.²⁸⁶ Additionally, the excluded 3% will be subject to double qualification, so it will not be any more than 3% of the tariff line and not more than 10% of the value of import from African countries.²⁸⁷ There is still a gap in determining the excluded products by this may exclude cotton, petroleum, and others that dominate Africa's

²⁷⁷ Ibid 1

²⁷⁸ Ibid

²⁷⁹ Ibid

²⁸⁰ Ibid

²⁸¹ Ibid

²⁸² Ibid 15

²⁸³ Ibid

²⁸⁴ Ibid 16

²⁸⁵ African Union, ASSEMBLY OF THE UNION Thirty-Second Ordinary Session Assembly/AU/4(XXXII) [10 – 11 February 2019] Addis Ababa, ETHIOPIA (AU Assembly February 2019) para 8(b) & para 42(iv)

²⁸⁶ Ibid

²⁸⁷ Ibid

market.²⁸⁸ Still, it gives much space for countries' discretion because the future of continental integration also depends on it.²⁸⁹

3.1.2 Trade-in Service in the AfCFTA

“The AfCFTA Protocol on Trade in Services is a first endeavor to liberalize intra-African trade in services. For several States, the task at hand is a novel one.”²⁹⁰ There are five priority services sectors that state parties agreed to.²⁹¹ They are financial services, communication, transport, tourism, and business services.²⁹² Member states are negotiating on these areas to have specific commitments. Article 1(p) of the protocol defines what trade-in service means by providing modes of supply, such as a supply of service from one state party to another state party's territory.²⁹³ It has the objective of creating a single liberalized market for trade-in service.²⁹⁴ It has different principles enshrined with it. One of the principles is transparency in which state parties are required to publish any measures that affect the operation of the protocol.²⁹⁵ Under article 10 of the protocol, it provides for mutual recognition with AfCFTA state parties.²⁹⁶ It is more of permissivity than authoritative.²⁹⁷ The protocol guarantees state parties to regulate the service sector so long as it

²⁸⁸ Signe & Ven (n 73) 5

²⁸⁹ Ibid

²⁹⁰ Gerhard Erasmus, What is the AfCFTA Approach to the Regulation of Trade in Services? 26 Oct 2019 available at <https://www.tralac.org/blog/article/14289-what-is-the-afcfta-approach-to-the-regulation-of-trade-in-services.html> accessed on October 5, 2020

²⁹¹ Trade in services in the AfCFTA, Tralac | October 2019 available at <https://www.bilaterals.org/?trade-in-services-in-the-afcfta#:~:text=The%20AfCFTA%20Protocol%20on%20Trade,intra%2DAfrican%20trade%20in%20services> accessed on October 5, 2020

²⁹² Ibid

²⁹³ Agreement Establishing The African Continental Free Trade Area, Protocol on TRADE-IN Service Annex 2 (AfCFTA Protocol on Trade in Service) [2018] art 18(2) art 3

²⁹⁴ Ibid

²⁹⁵ Gerhard Erasmus, What is the AfCFTA Approach to the Regulation of Trade in Services? 26 Oct 2019 available at <https://www.tralac.org/blog/article/14289-what-is-the-afcfta-approach-to-the-regulation-of-trade-in-services.html> accessed on October 5, 2020, Art 5 of the protocol

²⁹⁶ Gerhard Erasmus, The AfCFTA Approach to Mutual Recognition 26 Oct 2019 available at <https://www.tralac.org/blog/article/14291-the-afcfta-approach-to-mutual-recognition.html> accessed on October 5, 2020

²⁹⁷ Ibid

does not impair its operation.²⁹⁸ It qualify it by stating that it has to administer in an objective, transparent, impartial, and reasonable manner, there has to arrangements to review decisions and remedies, state parties have to give an objective and impartial review, and authorities have to inform the applicant within a reasonable time the status and decision of the application.²⁹⁹ The liberalization process is based on progressive liberalization with successive rounds of negotiations. State parties are expected to set out schedules of specific commitments that show the terms and conditions of market access, the qualification on national treatment, undertaking with other commitments, and the time frame for its implementation.³⁰⁰ The Council of Ministers will establish a Committee on Trade in Service to follow implementation, monitoring, and evaluation.³⁰¹

3.1.3 Dispute Settlement in the AfCFTA

The dispute settlement of the AfCFTA is to accord security and predictability in the regional trading system.³⁰² While interpreting, there will be an application of the general rules of interpretation applied by public international law.³⁰³ It is defined as a disagreement between state parties with the interpretation and application of the AfCFTA agreement and its protocol, annexes, and appendixes.³⁰⁴ The jurisdiction of the protocol lies in disputes between state parties; it does not include the private sector, the Secretariat, and other AfCFTA institutions to enforce the AfCFTA rules.³⁰⁵ However, as it can be perceived from experience, “this is a safe bet; the African States never litigate against each other over trade-related matters.”³⁰⁶ African statues failure to

²⁹⁸ AfCFTA Protocol on Trade in Service (n 299) art 8

²⁹⁹ Ibid art 9, Gerhard Erasmus, What is the AfCFTA Approach to the Regulation of Trade in Services? 26 Oct 2019 available at <https://www.tralac.org/blog/article/14289-what-is-the-afcfta-approach-to-the-regulation-of-trade-in-services.html> accessed on October 5, 2020,

³⁰⁰ Ibid Art 22

³⁰¹ Ibid Art 26

³⁰² Agreement Establishing The African Continental Free Trade Area, PROTOCOL ON RULES AND PROCEDURES ON THE SETTLEMENT OF DISPUTES (AfCFTA Protocol on Settlement of disputes) [2018] art 4(1)

³⁰³ Ibid art 30

³⁰⁴ Gerhard Erasmus, **Dispute Settlement in the African Continental Free Trade Area**, 11 Jul 2019 available at <https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html> accessed on October 05 2020

³⁰⁵ Gerhard Erasmus, **What Disputes could be heard by the AfCFTA Dispute Settlement Mechanism?** 28 Jul 2020 available at <https://www.tralac.org/blog/article/14802-what-disputes-could-be-heard-by-the-afcfta-dispute-settlement-mechanism.html> <https://www.tralac.org/blog/article/14802-what-disputes-could-be-heard-by-the-afcfta-dispute-settlement-mechanism.html> accessed on October 5, 2020

³⁰⁶ Ibid

bring trade disputes is attributed to a lack of technical expertise.³⁰⁷ Therefore, to better implement the AfCFTA, the Secretariat may provide legal advice and organize a particular training course.³⁰⁸ The Dispute Settlement Body (DSB) is composed of representative of state parties with different authorities like the formation of the Dispute Settlement Panel (Panel) and the Appellate Body (AB).³⁰⁹ The decision in the DSB is made with consensus.³¹⁰ The first step in the dispute settlement process is the consultation to resolve the dispute amicably; however, the party's failure to reach an agreement will notify the DSB for the formation Panel.³¹¹ The consultation has to be confidential and shall not affect any state party's rights in further proceedings.³¹² The number of panelists' maybe three or five depending on the number of disputing parties.³¹³ Unless there is a notification by a state party regarding an appeal to the panel's decision or a decision by the DSB by consensus not to adopt the report, it has to be adopted by the DSB within 60 days after the report of the Panel.³¹⁴ The panel's appeals will be entertained by the AB composed of seven members for a four-year term.³¹⁵ The AB's report has to adopt by the DSB within 30 days unless there is a contrary decision by the DSB.³¹⁶ After their findings, the AB and Panel will recommend state parties to comply with the agreement and the ways to do it.³¹⁷ If the recommendation of the DSB is not applied within a reasonable time, there could be other remedies for the aggravated party like compensation.³¹⁸

³⁰⁷ Gerhard Erasmus, Dispute Settlement in the African Continental Free Trade Area, 11 Jul 2019 available at <https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html> accessed on October 05 2020

³⁰⁸ Ibid

³⁰⁹ AfCFTA Protocol on Settlement of disputes (n 308) art 5

³¹⁰ Ibid 5(6)

³¹¹ Ibid 6 (1)&(2)

³¹² Ibid 7(7)

³¹³ Ibid 10(9)

³¹⁴ Ibid 19(4)

³¹⁵ Ibid 20

³¹⁶ Ibid 22 (9)

³¹⁷ Ibid 23

³¹⁸ Ibid 25

Chapter Four

The legal status of the AfCFTA in light of the Abuja Treaty and its implication with regards to RECs

In this chapter, the legal regimes concerning economic integration in Africa will be assessed. This chapter will focus mainly on the AfCFTA Treaty to see its compatibility with the Abuja Treaty by analyzing different agreements' provisions. Additionally, there will be an assessment of RECs' status and future with the establishment of the AfCFTA by evaluating instruments concerning the issue. This chapter will see the RECs' status by referring their constitutive acts and other legal instruments that provide the RECs status. Identifying their status will help if the existence of the RECs will continue or cease after the AfCFTA. Additionally, it will address a legal regime that can fill the gap of the AfCFTA concerning the future of the RECs and see if it can be applied.

4.1 The AfCFTA vis-a-vis the Abuja Treaty

4.1.1 The AfCFTA's legal framework in light of the Abuja Treaty

The Abuja Treaty is a continental framework concerning economic integration, which will lead to political unification. This arrangement has provided a way or path for the establishment of the AEC. The Abuja Treaty lays down six stages, and with that, it accepts the establishment of the continental framework at the fourth stage with the formation of the continental customs union.³¹⁹ There are different arguments if the AfCFTA is under the framework of the Abuja Treaty. Some claim the AfCFTA is not under the Abuja Treaty framework by stating that it does not follow the steps. On the other hand, it is perceived as an arrangement that facilitates the objectives under the Abuja Treaty. This section will assess the Abuja Treaty and the AfCFTA to see if the latter is in line with the former.

Africa has not utilized the benefits in the international trading arena. To avert that, African Heads of States decided to have the AfCFTA to have it in line with that Abuja Treaty timeframe³²⁰ even though the RECs' development or progress does not go as envisaged by Abuja Treaty.³²¹ However, the Abuja Treaty is "not cast in iron" because Africans need to move fast in any means possible to

³¹⁹ AEC Treaty (n 2) art 6

³²⁰ Bilal & Vanheukelom (n 109) 1

³²¹ Ibid

cope up with those who has a more advanced trading systems.³²² According to the Abuja Treaty, the establishment of a continental framework is after the RECs have a customs union, and their progress is not as predicted by the treaty.³²³ Having a continental modern and comprehensive trade framework has become an essential issue for Africa.³²⁴

The framework of the Abuja Treaty goes beyond trade and economic integration. It includes social and cultural development to maintain economic stability and to have a peaceful relation between states. The Abuja Treaty will raise the standard of living in united Africa.³²⁵ The first phase for the formation of the AEC will be completed within five years of establishing new RECs and strengthening the existing one.³²⁶ The second is creating coordination in the RECs with tariff liberalization and removal of NTBs in eight years.³²⁷ The third stage is to have FTAs and customs unions in the RECs within ten years.³²⁸ At the fourth stage, they will harmonize and coordinate the RECs progress to create a continental customs union in two years.³²⁹ Fifth, in four years, there will be setting up of African common market, and finally, at the last stage, there will be the establishment of the AEC with the African Monetary Union and Pan-African Parliament, which takes five years.³³⁰

After the successful completion of the six stages provided in the agreement, the AEC will be formed. Afterward, there will be AEC, which will form an integral part of the OAU, and the treaties and protocols of this Community will be an integral part of the OAU as well.³³¹ As stated in the Abuja Treaty, it aims to create a well-developed Africa by having an economic integration in the continent.³³² One is harmonizing and coordinating policies to establish AEC with different RECs from the many objectives listed in that treaty.³³³ It requires member states to create a favorable

³²² Ibid

³²³ Gerhard Erasmus, How the CFTA could advance the Framework of the Abuja Treaty [10 Sep 2015] available at <https://www.tralac.org/publications/article/8046-how-the-cfta-could-advance-the-framework-of-the-abuja-treaty.html> accessed on August 19 2020 (Erasmus 2015) 1

³²⁴ Ibid

³²⁵ Erasmus 2015 (n 29) 1

³²⁶ AEC Treaty (n 2) art 6(2)(a)

³²⁷ Ibid art 6(2)(b)

³²⁸ Ibid art 6(2)(c)

³²⁹ Ibid art 6(2)(d)

³³⁰ Ibid art 6(2)(e)(f)

³³¹ Ibid Preamble and art 98, 99

³³² Ibid art 4(1)(a)

³³³ Ibid Art 4(1)(d)

condition for the Community's formation and avoid any acts that may hinder its performance.³³⁴ It has provided six stages for establishing the Community³³⁵ in that it obliges member states to establish and strengthen the already existing RECs.³³⁶ Different protocols are expected to be concluded for fast-tracking the establishment of the AEC. Mainly protocols on people's free movements, the relation between the AEC and RECs, harmonizing air transport, and ensuring food security by developing agricultural and food production can be considered the major ones.

The Abuja Treaty states that there will be seven organs with different mandates and duties.³³⁷ Among them, one is the Court of Justice³³⁸, which will be mandated for settlement of disputes and which will have the final decision regarding the matter. The Abuja Treaty has different principles, like the MFN principle and special and preferential treatments.³³⁹ Different measures have to be done to meet their objectives. They are listed in Article 4 of the Agreement, in which they are illustrative, as it is stated under the same article paragraph two (p) "Any other activity that the Member States may decide to undertake jointly to attain the objectives of the Community." This article implies acts done for facilitating objectives of the Community is deemed to be under the treaty.

The decision to have the AfCFTA is mainly to boost intra- African trade. The AfCFTA Treaty in its preamble states the negotiation is in line with the Abuja Treaty; furthermore, it is to facilities the treaty's objectives, and it will build upon on the rights and obligation in there.³⁴⁰ It requires member states to work toward the Abuja Treaty's objectives for the realization of the AEC.³⁴¹ There is a discrepancy with the integration level in the RECs in which some are straggling to have FTA, and others are well integrated. The design of the Abuja Treaty to have a different step is to create a more favorable situation for the Community's formation. It means that having economic integration on a small scale at a regional level is more attainable than having it at the continental level at once. Afterward, it is expected to develop into a continental framework because it will not be burdensome for countries to have more integration if it was experienced, and other factors that

³³⁴ Ibid art 5(1)

³³⁵ Ibid art 6

³³⁶ Ibid art 28(1)(2)

³³⁷ Ibid art 7

³³⁸ Ibid art 7(1)(e); art 8z

³³⁹ Ibid art 37 and 79

³⁴⁰ AfCFTA Agreement (n 22) Preamble para 2 and 3

³⁴¹ AfCFTA Protocol on Trade in Service (n 299) art 18(2)

hinder integration will be addressed in the process. However, the Abuja Treaty's time frame is not fulfilled because of different factors like infrastructure, security, lack of commitments, and other related factors. Nevertheless, there is a need to have better economic integration on the continent. It is necessary to have the AfCFTA in line with the framework of the Abuja Treaty.³⁴² It is estimated that by 2020 Africa's GDP growth will be 5% of the global GDP.³⁴³ As stated in AU Agenda 2063, it aims to build "The Africa we want" since the continent can realize that.³⁴⁴ The AfCFTA is expected to boost the realization of the AEC.³⁴⁵ In order to accomplish that, the AfCFTA has to resolve the main problem of regional integration, which is multiple and overlapping memberships.

Having that in mind, the AfCFTA though it is not explicitly provided as one of the steps provided in Article six of the Abuja Treaty to have a continental FTA, one can say the act of African leaders to have the AfCFTA is in the legal framework of the Abuja Treaty. As it was provided, there are different tasks or measures in the Abuja Treaty for attaining its objectives.³⁴⁶ While providing different tasks to be performed, the acts listed are not exhaustive; in the last subparagraph, it provides any activity to attain this objective. To attain the objective of the Community, African leaders have taken different measures; however, this act does not necessarily have to be expressly listed under the Abuja Treaty so long as it is for facilitating the objectives of the treaty. The AfCFTA is mainly to catalyze the establishment of the AEC since RECs' performance is lagging. In addition to facilitating the Abuja Treaty's objectives, the AfCFTA is expected to align with the Abuja Treaty's legal and institutional arrangements.

4.1.2 Institutional arrangement of the AfCFTA and AEC

The institutional arrangement of the AfCFTA is composed of four organs. The Assembly of AU is the highest body that provides political and strategic guidance by acting as an oversight body.³⁴⁷ The Council of Ministers is the second-highest organ which is composed of only members of AfCFTA.³⁴⁸ It is mandated with multiple functions listed under Article 11 (3) of the AfCFTA

³⁴² Bilal and Vanheukelom (n 109) 4

³⁴³ Ibid

³⁴⁴ Kenneth T Tanyi, Assessing Africa's Two Billion Populated Market by 2063: The Facts and Fallacies of a Continental Free Trade Area (CFTA), *Business and Economics Journal* [2015] (Tanyi) 8

³⁴⁵ Ibid

³⁴⁶ AEC Treaty (n 2) art 4(2)

³⁴⁷ AfCFTA Agreement (n 22) art 10(1)

³⁴⁸ Ibid art 11(1)

Treaty to establish and supervise the AfCFTA Secretariat and committees. It will issue directives and regulations for the agreement and propose legal, financial, and structural decisions for the Assembly. The Committee of Senior Officials has different mandates listed under Article 12; it has two primary functions; first, it supervises the implementation of the council decisions by sub-committees, and it serves as a "clearinghouse" for the council's technical decisions.³⁴⁹ In this committee, the RECs have to be represented with advisory capacity.³⁵⁰ The Assembly will establish a secretariat body³⁵¹, and it will be under the AU system with the same status as other organs of the union. It will have the independence to make administrative and operational decisions, including its human resource management, which conforms to the AU rule.³⁵²

The AEC has seven organs that have different tasks.³⁵³ The Assembly in the Community is the highest organ, and it is mandated with different functions enshrined under Article 8 of the Abuja Treaty. From the mandates of the assembly, some are approval of the secretariat's organizational structure,³⁵⁴ preparation of rule of procedure,³⁵⁵ etc. The other organ is the Council of Ministers of the AEC, which is the same as the OAU council of ministers.³⁵⁶ Its primary function is assisting the assembly and guiding the subordinate organs.³⁵⁷ The Economic and Social Commission of the AEC is also the OAU's Commission, in which it is mandated with different functions for attaining the establishment of the AEC, and the RECs have to participate in its meetings.³⁵⁸ The Pan-African Parliament is another organ for the African people's involvement in the economic integration process.³⁵⁹ The AEC also has the Court of justice, which is mandated with dispute settlement and giving advisory opinions.³⁶⁰ The AEC's last organ is the Secretariat, which will be the legal representative of the Community and mandated with different tasks as provided in the provision.³⁶¹

³⁴⁹ ARIA IX (n 80) 46

³⁵⁰ AfCFTA Agreement (n 22) art 12(5)

³⁵¹ Ibid 13(1)

³⁵² ARIA IX (n 80) 46

³⁵³ AEC Treaty (n 2) art 7(1)

³⁵⁴ Ibid 8(3)(e)

³⁵⁵ Ibid 8(3)(f)

³⁵⁶ Ibid 11(1)

³⁵⁷ Ibid 11(3)

³⁵⁸ Ibid 15 and 16

³⁵⁹ Ibid 14

³⁶⁰ Ibid art 18

³⁶¹ Ibid art 22

Comparing the institutional arrangement of the AEC and AfCFTA, first, the number of the organ in the two treaties are different. Second, the organs' functions differ; for example, the Assembly's function in the AEC is detailed, and it is the main decision-making organ concerning the AEC; however, in the AfCFTA, the Council of Ministers is mandated with this task. Additionally, the Council of Ministers in the AfCFTA is composed of only member states. In addition to the discrepancy or difference in the number of organs, the dispute settlement organ may contradict the two arrangements. Since the AEC provides the Court of Justice to be a dispute settlement body, this has been formed under the AU system. However, under the Protocol of the AfCFTA, it has formed its own dispute settlement body for settling disputes that arise with the treaty and other integral legal instruments of the treaty. It is not clear if the AfCFTA is in contradiction with the institutional arrangement provided under the Abuja Treaty by forming its own dispute settlement body. It can be argued in two ways; first, it can be considered an amendment to the Abuja Treaty provisions. Second, the Abuja Treaty provision can be interpreted as the Court of Justice's use upon AEC's formation since the AfCFTA is an FTA, it does not contradict with the existing framework of the Abuja Treaty. This interpretation may bring another question, the dissolution of the DSB of the AfCFTA upon forming the AEC. Therefore, since the AfCFTA is creating a pan-African FTA to realize the Abuja Treaty, there has to be a legal framework to solve these treaties' discrepancies.

However, there are minor discrepancies in the institutional arrangements of the two protocols. The Abuja Treaty did not provide an FTA arrangement under the continental level, yet one can still say the AfCFTA is under the Abuja Treaty's legal framework. It is mainly because the Abuja Treaty provides an arrangement in a broad scope and even goes more than an economic integration; nevertheless, states' steps are steps to attain its objectives. Therefore if countries agree that there could be a better way of achieving this goal and having an FTA in the continent, there should be no way of considering that as an infringement from the Abuja framework.

4.2 The relation between the African Economic Community (AEC) and RECs

The first argument is that the AEC should have an independent personality from OAU/AU to give more emphasis for economic integration. ³⁶² The AEC treaty's drafters did not give it an

³⁶² OPPONG (n 119) 98

independent personality as it is stated under Article 98(1) as it will form an integral part of the OAU.³⁶³ Additionally, the AEC Treaty provides under Article 99 that the treaty and protocols adopted under it will be an integral part of the OAU Charter.³⁶⁴ Still, the AU constitutive act did not address this issue.³⁶⁵ RECs have been established to fasten regional integration in the continent and serve as building blocks for establishing the AEC.³⁶⁶ Though they have the same objective, the RECs have an independent legal personality of their own.³⁶⁷ The pace of their integration is different; while some fail to achieve the minimum requirement provided under the Abuja Treaty; others have gone beyond it.³⁶⁸ Some gaps have not been addressed in the Protocol of Relations with regards to AEC and RECs.³⁶⁹ Since the RECs have their independent legal personality and the RECs are not a party to the Abuja Treaty, it is vague how the merger's implementation will be applied.³⁷⁰ There is a need to address a legal ground that can force a merger upon the RECs with the AEC formation.³⁷¹ The AEC Treaty assumes membership of all African countries, so it does not have a membership provision for RECs.³⁷² If RECs were members of the AEC Treaty, it would help harmonize and coordinate laws and activities in the continent, enabling the AEC to enforce its laws.³⁷³ The Protocol in Relation fails to address complicated issues on RECs' relation with the AEC and themselves.³⁷⁴ The different RECs have their legal personality, and their legal system is different too. Therefore, their relationship has to be clarified.³⁷⁵

The AfCFTA does not have a legal personality as it was provided for the RECs; instead, institutional arrangements are provided.³⁷⁶ In the institutional framework, the AU Assembly has the highest power.³⁷⁷ It is not also clear if it is an independent FTA of a flagship project for Agenda

³⁶³ Ibid

³⁶⁴ Ibid

³⁶⁵ Ibid

³⁶⁶ ARIA IX (n 80) 1

³⁶⁷ Ibid

³⁶⁸ Ibid

³⁶⁹ OPPONG (n 119) 94

³⁷⁰ Ibid

³⁷¹ Ibid

³⁷² Ibid 97-98

³⁷³ Ibid

³⁷⁴ Ibid 96

³⁷⁵ Ibid

³⁷⁶ The Institutions of the African Continental Free Trade Area [13 Sep 2019] available at <https://www.tralac.org/blog/article/14238-the-institutions-of-the-african-continental-free-trade-area.html> accessed on February 18 2020, 6

³⁷⁷ Ibid

2063.³⁷⁸ Most RECs are founded after the Abuja Treaty; however, they fail to stipulate the REC's future when the AEC is established.³⁷⁹ Treaties of EAC and ECOWAS are good examples.

Nevertheless, in the COMESA Treaty, it provides that the COMESA will be an organic entity of the AEC. The COMESA anticipates for the termination of its existence upon the formation of the AEC.³⁸⁰ Termination of COMESA will be with the decision of Heads of States and Governments of the organization.³⁸¹ Most REC's treaty fails to address the issue with the AEC.³⁸² Nevertheless, since their formation is with a treaty, they can be dissolved with the state parties' will.³⁸³ Therefore, in the move to form the AEC, the merger issue should be addressed well.³⁸⁴

The formation of the AEC seems complicated because it aims to merge different RECs with different disciplines to form this economic Community.³⁸⁵ As provided in the Abuja Treaty, the establishment of AEC will be completed after six rounds.³⁸⁶ Therefore, the RECs are expected to the merger for the formation of the AEC.³⁸⁷ However, there are RECs at a different level of performance; it is questionable if they will be willing to merge with less development.³⁸⁸

It is better to start a protocol on merger negotiation for facilitating the relation with the formation of the AEC.³⁸⁹ The protocol should address the status of RECs which are not recognized by AU like the SACU.³⁹⁰ Additionally, the protocol has to provide which RECs are expected to the merger if they differ with their performance level if it is voluntary or not, and its enforcement.³⁹¹ Their assets and liability with their personnel have to be addressed well.³⁹² There is a need to have "legal imagination, economic thought, and strong institutional and political will."³⁹³ The RECs have

³⁷⁸ Ibid

³⁷⁹ OPPONG (n 119) 94-95

³⁸⁰ Martha Belete Hailu, Regional Economic Integration in Africa: Challenges and Prospects, MIZAN LAW REVIEW, Vol. 8, No.2 [December 2014] (Martha) 322-323

³⁸¹ Ibid

³⁸² Ibid 95

³⁸³ Ibid

³⁸⁴ Ibid

³⁸⁵ Ibid 93-94

³⁸⁶ Ibid

³⁸⁷ Ibid

³⁸⁸ Ibid

³⁸⁹ Ibid 95

³⁹⁰ Ibid

³⁹¹ Ibid

³⁹² Ibid

³⁹³ Ibid 96

difficult relations accompanied by multiple memberships, which complicate the relationship between the RECs, and it will be an obstacle with the relation they will create with the AEC.³⁹⁴ The AEC needs to adopt another protocol on a "one country-one community membership."³⁹⁵ This protocol will help realize the AEC better, and countries will choose the REC that best suits their economic interest.³⁹⁶ It is a means that needs to be taken for the common good, not infringement in countries' sovereignty.³⁹⁷ Having such a protocol is under the legal framework of the Abuja Treaty Article 5, which obliges state parties to create favorable conditions for harmonizing their policies.³⁹⁸ Therefore it is clear that multiple and overlapping memberships are an infringement of Article 5 of the Abuja Treaty.³⁹⁹

4.3 The future of RECs with the establishment of the AfCFTA

The vision of having AEC was sought in the early time like the Monrovia Declaration⁴⁰⁰ and with the Lagos Action Plan, which was is for the implementation of the strategies in the declaration also address the issue and require members to take action to implement the Action Plane at the national sub-regional and continental level.⁴⁰¹ The Final Act of Lagos considers the first act to establish and strengthen RECs on the continent to integrate agriculture, transport, energy, etc.⁴⁰² Additionally, it provides for having coordination and harmonization with the regional groups.⁴⁰³ In the second phase, it expects deeper integration and harmonization of different policies and strategies of RECs on major areas to establish the African Common Market, which will lead to the formation of the AEC.⁴⁰⁴ These documents and constitutive instruments in the continent regarding

³⁹⁴ Ibid

³⁹⁵ Ibid

³⁹⁶ Ibid

³⁹⁷ Ibid

³⁹⁸ Ibid

³⁹⁹ Ibid

⁴⁰⁰ ASSEMBLY OF HEADS OF STATE AND GOVERNMENT Sixteenth Ordinary Session
MONROVIA DECLARATION OF COMMITMENT OF THE HEADS OF STATE AND GOVERNMENT, OF
THE ORGANIZATION OF AFRICAN UNITY ON GUIDELINES AND MEASURES FOR NATIONAL AND
COLLECTIVE SELF-RELIANCE IN SOCIAL AND ECONOMIC DEVELOPMENT FOR THE
ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER, AHG/ST. 3 (XVI) Rev.1 Monrovia
Liberia [17 to 20 July 1979] (MONROVIA DECLARATION) para 5

⁴⁰¹ Lagos plan of action for the economic development of Africa 1980-2000 Annex II Resolution on the Lagos Plan
of Action (Resolution on the Lagos Plan of Action)para 1

⁴⁰² Lagos plan of action for the economic development of Africa 1980-2000 Annex I Final Act of Lagos (Final Act
of Lagos) 2nd section on the implementation of the Action Plan, sub B(1)

⁴⁰³ Ibid

⁴⁰⁴ Ibid 2nd section on the implementation of the Action Plan, sub B(2)

Africa's integration; the RECs have been considered the main component for forming a continental framework.

The treaties of different RECs also recognize that they have an immense role in integrating the continent. For example, in the SADC Treaty, it recognizes the previous legal instruments like the Lagos Plan of Action, the Final Act of Lagos, the Abuja Treaty, and the AU Constitutive Act.⁴⁰⁵ The COMESA Treaty's objectives contribute to the establishment of the AEC and the realization of its objectives.⁴⁰⁶ It also provides the provision of the treaty conforms to the Abuja Treaty.⁴⁰⁷ The COMESA Treaty states that it is inspired by Article 28 of the Abuja Treaty to form the AEC.⁴⁰⁸ The treaty establishing the ECOWAS is also mindful of the previous legal instruments for forming the AEC.⁴⁰⁹ The EAC Treaty also provides that it will help establish the AEC and Political union in the continent.⁴¹⁰

The RECs recognize the establishment of the AEC and provide that they will contribute to its realization. However, first, the RECs' status has to be addressed, as it can be inferred from the constitutive acts they are an independent international organization with their legal personalities.⁴¹¹ The AfCFTA has the ambition of fulfilling the plan of a united Africa provided in the Abuja Treaty and a prosperous Africa, as stated under Agenda 2063.⁴¹² The AfCFTA has to realize a deeper integration that has been a dream of African leaders. By including all RECs, it is expected to create a single African free trade area.⁴¹³ The RECs are the building blocks for establishing the AEC, and now they are also considered building blocks for the AfCFTA. The RECs are expected to contribute to the formation of the AfCFTA; however, the RECs' future after the formation of a continental framework is not clear if they will continue to exist or not. The provisions of the AfCFTA agreement do not address how it will solve the issue of multiple memberships, and the faith of the RECs will be, especially those with a lower or similar level of integration with the

⁴⁰⁵ The Consolidated Treaty of the South African Development Community [2014] (SADC Treaty) Preamble

⁴⁰⁶ Ibid art 3(f)

⁴⁰⁷ Ibid art 6

⁴⁰⁸ Treaty Establishing the Common Market for Eastern and Southern Africa amended by Council Meeting [2009] (COMESA Treaty) Preamble

⁴⁰⁹ Treaty of the Economic Community of West African States (ECOWAS) Concluded on 28 May 1975 (ECOWAS Treaty) Preamble

⁴¹⁰ Treaty for the Establishment of the East African Community, as amended in the 14th December 2006 and 20th August 2007 (EAC Treaty) Preamble p.4

⁴¹¹ COMESA Treaty (n 416) art 186(1); SADC Treaty (n 413) art 3

⁴¹² Mesut Saygili, Ralf Peters & Christian Knebel, African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions, UNCTAD Research Paper No. 15 [February 2018] (Saygili, Peters & Knebel) 5

⁴¹³ ARIA IX (n 80) xiii

AfCFTA. Is there even a legal ground that gives the authority for the AfCFTA to decide on the future of the RECs which are independent?

As we stated above though the establishment of AfCFTA is not d under the Abuja Treaty, it can be inferred from the Abuja Treaty's objectives that its establishment is under its framework. With that, we can assess and interpret legal documents about economic integration, mainly the RECs Treaties, the Abuja Treaty, the AfCFTA Treaty, and other Protocols that guide the relation with these organs. The RECs, which are considered building blocks for the continent's economic integration, suffer from multiple and overlapping memberships and the NTB. They become stumbling stones rather than a building block for attaining the objectives of the Abuja Treaty.

When we see the treaties of different RECs, they accept and provide their instruments to form a continental framework, and they intend to realize that. However, concerning their future, it seems they intend to co-exist with the continental framework. For example, the COMESA treaty provides that it will contribute to the formation of the AEC, and with that, it adds by stating that it will be an organic entity in the AEC.⁴¹⁴ Additionally, a similar expression is in the ECOWAS Treaty that the organization will be an essential component of the AEC.⁴¹⁵ From this, one can understand the RECs envisioned a continental framework, not upon their dissolution. The dissolution of the RECs will only with state parties' will that forms them under their instruments.

As stated in the AU Assembly's decision, the Continental Free Trade Area's establishment consolidates FTAs in the continent.⁴¹⁶ The AfCFTA will enhance the liberalization of trade among countries on the continent.⁴¹⁷ However, since the integration level is different in the RECs, those with a deeper integration can maintain that integration.⁴¹⁸ This arrangement will not resolve the challenge associated with multiple and overlapping memberships under article 19 that allows for RECs with deeper integration to be islets so they will co-exist with it.⁴¹⁹ Four RECs have deeper integration than the AfCFTA; EAC, ECOWAS, COMAS, and SADC.⁴²⁰ This integration level shows that RECs will continue after establishing the AfCFTA to coordinate their region's

⁴¹⁴ COMESA Treaty (n 416) art 178

⁴¹⁵ ECOWAS Treaty (n 417) art 78

⁴¹⁶ African Continental Free Trade Area, Questions & Answers, Compiled by the African Trade Policy Centre (ATPC) of the Economic Commission for Africa (ECA) in association with the African Union Commission (African Continental Free Trade Area, Questions & Answers) 8

⁴¹⁷ Ibid

⁴¹⁸ Ibid

⁴¹⁹ ARIA IX (n 80) 52

⁴²⁰ Ibid

implementation.⁴²¹ They will also have an advisory capacity with their seat in the AfCFTA Committee of Senior Trade Officials.⁴²²

With the formation of the AfCFTA, one of the objectives is to harmonize policies by resolving multiple and overlapping memberships.⁴²³ In the AfCFTA, the principle of preserving *acquis* is reflected in the agreement. The negotiation guiding principle also provides that it will use RECs as building blocks and preserve their *acquis*.⁴²⁴ Furthermore, the AfCFTA provides that it has the principle of preserving *acquis* and RECs' best practice.⁴²⁵ Under Article 19(1), the AfCFTA agreement provides the supremacy clause that expects other conform laws. However, the exception to this rule is those RECs that have deeper integration than the AfCFTA will remain until the later reaches a better level of integration.⁴²⁶ This exception is under the Protocol on Goods of the agreement in which RECs that have a higher level of elimination on customs duties and trade barriers have to maintain it and, if possible, improve upon it.⁴²⁷

Those advanced experiences of the RECs will build up in the continental framework. For example, ECOWAS's advancement in people's free movement, COMESA, EAC's Simplified Trade Regimes and COMESA's Digital FTA facilitation mechanism, and the EAC's deep level of integration. While negotiating and implementing the AfCFTA, their experience will be included, and countries' commitments may continue within the RECs.⁴²⁸ The AfCFTA is designed to be compatible with the RECs rather than compete with them.⁴²⁹ It is provided as a fundamental principle of the agreement as to preserving the existing *acquis*.⁴³⁰

The role of RECs in the negotiation was limited to more of observer status.⁴³¹ They have the right to attend meetings, and if requested by negotiating institutions, they can make oral or written

⁴²¹ African Continental Free Trade Area, Questions & Answers (n 424) 8

⁴²² *Ibid*

⁴²³ AfCFTA Agreement (n 22) Preamble and art 3(h)

⁴²⁴ *Ibid*

⁴²⁵ *Ibid* art 5, AfCFTA Protocol on Trade in Service (n 399) art 18(2)

⁴²⁶ AfCFTA Agreement (n 22) art 19(2)

⁴²⁷ Agreement Establishing The African Continental Free Trade Area Protocol on TRADE-IN Goods Annex 1 (AfCFTA Protocol on Trade in Goods) [2018] art 8(2)

⁴²⁸ A business guide to the AfCFTA (n 93) 8

⁴²⁹ *Ibid* 12

⁴³⁰ *Ibid*

⁴³¹ ARIA IX (n 80) 48-49

presentations.⁴³² Their say is limited through the AfCFTA Continental Taskforce or with the regional consultations held on the negotiation side.⁴³³

However, RECs' co-existence with the AfCFTA has different problems; first, the AfCFTA assumes tariff concessions be dealt with RECs or State Parties that belong to different RECs.⁴³⁴ It is because it is based on preserving RECs to protect the RECs from extra REC competition.⁴³⁵

There are difficulties in addressing how tariff concessions will be made regarding the continent's four customs unions.⁴³⁶ The first problem with this is that members of customs unions are not all members of AfCFTA.⁴³⁷ For example, in CEMAC, two countries ratify it leaving four out; in EAC, three countries ratified it, leaving two; in ECOWAS, nine countries ratified it, two remains, and in SACU, three countries are members while two remain out.⁴³⁸ There are two possible ways to resolve this problem. The first is by delaying the implementation of the AfCFTA until all parties to a customs union ratify the instrument.⁴³⁹ Delaying it means the ratification of 22 countries do not weight for it to come into force.⁴⁴⁰ The other option is going forward with applying the AfCFTA in which parties will provide preferential treatments. In this case, the performance of the customs union will be affected.⁴⁴¹ Second, there are LDCs in these unions entitled to a more extended liberalization period according to special and differential treatment.⁴⁴²

To explore RECs' future, we need to assess the matter in the Abuja Treaty. The aim of forming the RECs and strengthening them was to have the ultimate goal of having a more united and economically interdependent Africa. With that, the Abuja Treaty requires states to harmonize their RECs' policies and strategies since their formation is for realizing the AEC.⁴⁴³ This treaty also provides that the decision of the Assembly is binding on members and RECs.⁴⁴⁴ With this provision, since the Assembly of the OAU is that of AUs, it could mean the Assembly's decision can determine the RECs' future.

⁴³² Ibid

⁴³³ Ibid

⁴³⁴ Signe & Ven (n 73) 6

⁴³⁵ Ibid

⁴³⁶ Ibid

⁴³⁷ ARIA IX (n 80) 62

⁴³⁸ Ibid

⁴³⁹ Ibid

⁴⁴⁰ Ibid

⁴⁴¹ Ibid

⁴⁴² Signe & Ven (n 73) 6

⁴⁴³ AEC Treaty (n 2) art 88

⁴⁴⁴ Ibid art 10(2)

Additionally, if we see the amended protocol on the relation between AEC and RECs and the subsequent protocol on the relation with the AU and RECs, they require RECs to revise their treaty to show that they will be absorbed with the formation of the AEC.⁴⁴⁵⁴⁴⁶ With this, even if the protocols provide for the RECs' absorption upon the AEC, two arguments can be raised. The first one is while concluding the protocols, and the plan was the performance of the RECs would be per the Abuja Treaty, so the establishment of a continental framework in the form of FTA was not foreseen. With that, even if the protocol is for the realization of the AEC, the formation of the AfCFTA has the same effect. Therefore, the protocol's interpretation has to extend its application to the continental framework laid down under the AfCFTA for fast-tracking the formation AEC can be one way of solving this legal lacuna. The opposing argument with this is the provision states or provides for the formation of AEC, to not be applied to AfCFTA by analogy. The articles specifically provide for the formation of AEC, not even a continental customs union or common market; therefore, anything less than the formation of the AEC will not force the RECs to be absorbed.

With the previous paragraph's arguments, it has to be noted as to the AEC's legal status, AfCFTA, and RECs. The AEC is an integral part of the OAU⁴⁴⁷, and the treaties and protocols with it will also be an integral part of the OAU laws.⁴⁴⁸ The AEC does not have an independent legal personality, and it also does not have the RECs as its members; therefore, there seems to be no legal ground that the AEC can force the RECs which have an independent personality to be absorbed. So with this argument, there is no ground for the AfCFTA to effect the RECs' dissolution.

The other issue concerning RECs status compared with AEC and AfCFTA concerns those RECs that are not recognized by AU. From the RECs in Africa, only eight are recognized by the AU and AfCFTA⁴⁴⁹. However, the specification of eight RECs is not provided on the Protocol on Relations; it only considers them any regional groups formed with a treaty to form a legal entity for social or economic integration that is recognized under this instrument.⁴⁵⁰ Having this disparity

⁴⁴⁵ PROTOCOL ON RELATIONS BETWEEN THE AFRICAN ECONOMIC COMMUNITY AND THE REGIONAL ECONOMIC COMMUNITIES (Protocol on AEC & RECs) art 5(c)

⁴⁴⁶ Protocol on AU & RECs(n 5) art 5(1)(d)

⁴⁴⁷ AEC Treaty (n 2) art 98(1) and Preamble

⁴⁴⁸ Ibid art 99

⁴⁴⁹ AfCFTA Treaty (n 22) art 1(t)

⁴⁵⁰ Protocol on AU & RECs (n 5) art 1

in the scope they cover with these two instruments, the RECs' absorption is not apparent as to its application scope. This may lead to the absorption of RECs in the continent, which is about 14, while only eight RECs are recognized in the AfCFTA Treaty. This disparity will create a problem of the remaining six RECs' status if the AfCFTA absorbs the RECs recognized under its instrument.

Nevertheless, even if the AfCFTA has the objective of resolving multiple and overlapping memberships, it does not provide how that will be achieved. It even rather provides a situation where the co-existence of RECs with the AfCFTA will be considered. Besides, there is a gap with the RECs' status and role, which are not provided in the instrument. Identifying these problems even if there is a legal gap as to how multiple memberships can be solved, what the future of RECs will be etc...the researcher tries to find legal grounds to fill this lacuna with other legal documents in the continent. However, as it can be seen from the above arguments with even analogizing the fact the AfCFTA is a continental framework, it has to govern with rules laid on the Protocol on Relations. The substance of the provision and the REC, AfCFTA, and AEC's legal status will not make the argument sound. With the analysis made in this paper, there is no legal document that can determine the future or dissolution of RECs upon the formation of the AfCFTA. There is a need to develop other instruments to resolve this gap and provide a solution with determining the RECs' faith. It can also be based on the will of member states that have formed the RECs, in which the member states of each RECs will apply the dissolution procedures laid down in the constitutive acts of the RECs. If countries take neither of the solutions, the AfCFTA will be just a mere addition of another FTA layer that cannot fulfill its objectives as it should have done.

Chapter Five

Conclusion and Recommendations

5.1 Conclusion

Africa has envisaged having an integrated economy after independence. With that, there were multiple acts or framework for the realization of this dream. The Abuja Treaty is the main framework for the formation of an integrated Africa. In the treaty, the establishment of AEC has specific steps to follow. The plan in the Abuja Treaty was to enhance the level of integration by establishing and strengthening RECs with a specific time frame. Afterward, it will evolve to a continental framework with continental Customs Union. The establishment of AfCFTA is not one of the stages that are in the treaty. However, having an FTA at the continental level is not in article six of the Abuja Treaty. The fact that it is not clear does not mean it contradicts the Abuja Treaty's objectives. In the treaty, apart from providing certain stages to be taken by states, it obliges states to take any necessary acts to form the AEC. With the development and status of the integration level in Africa by following the steps provided under the treaty, one can say the decision to have the AfCFTA is a way for fast-tracking the AEC establishment. African leaders, while deciding to have the AfCFTA they are trying to facilitate the formation of AEC by taking any act which they deemed necessary as it is under article 4 of the treaty. However, the discrepancy in the Abuja treaty's intuitional arrangement and the AfCFTA shows the latter is not compatible with the former in its institutional arrangement. The AfCFTA is essential to realize the AEC. However, it is not in the legal framework of the Abuja Treaty.

The status of Africa in the world economy, mainly trade, is insignificant. Primary products mainly dominate their trade to the international market. Though many countries benefited from trade, African countries fail to utilize this. On the other hand, even if there are different integration arrangements in the continent on regional or bilateral arrangements, the intra-African trade level is still low compared with others like Europe, Asia, and Latin America. As was discussed in chapter two of this study, most intra-African trades go within the RECs.

Additionally, the intra-African trade products are more manufactured goods than Africa's exports to the rest of the world. The difference in trading products implies having a more favorable trade environment will enhance intra-African trade and value chain creation. However, this does not

mean most African countries' situation is suitable for implementing the AfCFTA. There is a need to enhance infrastructure, administrative procedures, countries' commitment, security, corruption, and other factors that hinder intra-African trade. If the problems are not addressed accordingly to having the AfCFTA will be a mere addition of another arrangement in the already existing multiple systems.

Nevertheless, leaders' commitment to the signing and ratification of the AfCFTA and recent acts of countries to enhance the free movement of goods and persons shows African's commitment to have a more integrated system. Different tasks in Africa needs a new way of coping with the rest of the world; from different methods, one can be having an integrated economy. The AfCFTA is an arrangement which has an immense potential to change Africa's capacity if implemented well.

The main problem of integration in Africa has multiple and overlapping memberships in the RECs. From the objectives provided in the AfCFTA is solving this problem to have a more harmonized system. However, this instrument does not provide how to achieve it. Countries are members of multiple RECs, and these RECs are at a different level of integration in which some are beyond FTA. Even with FTA or less, the AfCFTA Treaty does not provide anything apart from the supremacy clause. The AfCFTA even if it has the objective of resolving multiple and overlapping memberships, there is a gap on how to implement it.

The RECs issue after the formation of the AfCFTA is controversial mainly because their futures and role or status have to determine. The AfCFTA under article 19 provides for supremacy clause and for those RECs which have better integration to maintain that integration. However, this does not determine if the RECs will cease to exist after forming the AfCFTA. Instead, it implies their co-existence to some extent. On the other hand, the RECs are independent organizations with independent legal personalities; there is no legal ground for the AfCFTA to determine the RECs' future. The RECs have an advisory role in the Committee of Senior Officials as provided under article 12 of the treaty. The instruments of the RECs accept the formation of AEC. However, they consider their existence afterward as an essential component of the AEC. If the RECs consider existing after establishing the AEC, it is highly unlikely to expect their dissolution after the formation of the AfCFTA. The AfCFTA, also in its instrument, does not provide what the RECs future will be. It states for resolving multiple and overlapping memberships, yet there is no legal ground for resolving it.

To conclude, AfCFTA is a continental framework with the immense power of changing Africa's status in the world economy. Every African country needs the commitments to address the challenges that hinder integration in the past; the infrastructural, security, and administrative procedures that make intra-Africa trade costly need improvement. The AfCFTA instrument is for the facilitation of the AEC. Therefore, it has to be compatible and in line with the Abuja Treaty's legal and institutional arrangement. Finally, one of the significant problems of African integration is multiple and overlapping memberships. This instrument needs to provide a way to resolve problems and address the RECs; if not, it will be another layer of arrangement in the continent.

5.2 Recommendations

The implementation of the AfCFTA has to improve from the past integration plans of the continent. Different reasons cause a low level of effectiveness of integration agendas. There are some legal and technical recommendations for that in this section.

There is a need to have a Protocol on a merger. This protocol has to address the contradicting issues, first regarding the dissolution or co-existence of RECs and in what manner. It has to clarify the future of RECs with the establishment of the AfCFTA. It should also have to address how to solve multiple memberships, and the issue regarding RECs not recognized by the AU and AfCFTA has to be clarified.

There has to be another legal instrument or protocol that clarifies the relationship between the AfCFTA and the Abuja Treaty. The legal and institutional setup of these two treaties has to be addressed, especially regarding the organs. Therefore the legal instrument has to clarify the legal basis for the formation of the AfCFTA

The decision power in AU and RECs lies with the Heads of States. The individual capacity and leadership quality of leaders will make them influential. Leaders' capacity will affect shaping the organizations, and it will affect the implementation of regional agendas. Having a regional hub may have its advantage for better implementation of the AfCFTA

There is a need for the regions to remove bottlenecks, utilize their productive capacity, and encourage investment in every sector. All regions and individual countries must give priority in tackling NTBs. Otherwise, having the AfCFTA without resolving the NTBs will be meaningless.

There should be the private sector's involvement and other stakeholders to have a public trust to implement the AfCFTA better and remove NTBs.

The level of development in the continent has significant disparity. There needs to be caution for fair distribution of benefits as well as protection of LDCs.

There should be a proper enforcement mechanism by strengthening dispute settlement mechanisms because Africa has abundant laws; somewhat, it lacks enforcement, so there should be a robust dispute settlement mechanism for strong integration.

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