

**INTERNATIONAL TRADE & INVESTMENT LAW:**

**MERGING REGIONAL TRADE AGREEMENTS: ITS IMPLICATIONS**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT FOR THE DEGREE OF  
MASTERS OF LAWS IN THE UNIVERSITY OF NAIROBI, FACULTY OF LAW**

**BY:**

**KIBET JETHRO CHEBOI**

**REG. NO. G62/75752/2014**

**PREPARED UNDER THE SUPERVISION & GUIDANCE OF MR. YASH VYAS**

**28<sup>TH</sup> SEPTEMBER, 2015**

## **DECLARATION**

I **KIBET JETHRO CHEBOI**, do hereby declare that this is my original work and has not been submitted for examination for the award of a degree at any other university.

**Signed:** \_\_\_\_\_

**KIBET JETHRO CHEBOI**

**(Student Reg. No. G62/75752/2014)**

**DATE:** \_\_\_\_\_

**This thesis has been submitted for examination with my approval as University Supervisor.**

**Signed:** \_\_\_\_\_

**YASH VYAS  
DEPARTMENT OF PUBLIC LAW  
UNIVERSITY OF NAIROBI**

**DATE:** \_\_\_\_\_

## **DEDICATION**

**This thesis is dedicated to all men and women of goodwill who cherish the lofty principle of the rule of law founded on the concept of fairness.**

**I also dedicate this thesis to my parents and siblings for their continuous and unrelenting support and encouragement.**

## **ACKNOWLEDGMENTS**

**I am indebted to a number of people without whom this research would not have been possible.**

- **Mr. Yash Vyas my teacher and supervisor and Dr. K. Obura for their incisive comments and guidance which shaped this study.**
- **My family and friends for their moral support.**
- **To the almighty God for giving me strength, courage, good health and knowledge to be able to undertake this project.**

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## **LIST OF ABBREVIATIONS**

<b>AEC</b>	African Economic Community
<b>AFTA</b>	ASEAN Free Trade Area
<b>AG</b>	Attorney General
<b>ASEAN</b>	Association of South East Asian Nations
<b>AU</b>	African Union
<b>CEPT</b>	Common Effective Preferential Tariff
<b>CET</b>	Common External Tariff
<b>COMESA</b>	Common Market of Eastern and Southern Africa
<b>CU</b>	Customs Union
<b>EAC</b>	East African Community
<b>EALA</b>	East African Legislative Assembly
<b>EC</b>	European Communities
<b>ET</b>	External Tariff
<b>EU</b>	European Union
<b>FDI</b>	Foreign Direct Investment
<b>FoB</b>	Freight on Board
<b>FTA</b>	Free Trade Area
<b>GATT</b>	General Agreement on Trade and Tariffs
<b>GE</b>	General Exceptions
<b>GDP</b>	Gross Domestic Product
<b>GNP</b>	Gross National Product

<b>GHG</b>	Green House Gas
<b>ICT</b>	Information and Communication Technology
<b>IL-FT</b>	Inclusion List-Fast Track
<b>IL-N</b>	Inclusion List-Normal
<b>ITO</b>	International Trade Organization
<b>MFN</b>	Most Favored Nation
<b>MoU</b>	Memorandum of Understanding
<b>NAAEC</b>	North American Agreement on Environment Cooperation
<b>NAFTA</b>	North American Free Trade Area
<b>NGO</b>	Non-Governmental Organization
<b>PTA</b>	Preferential Trade Area
<b>REC</b>	Regional Economic Communities
<b>SADC</b>	Southern African Development Community
<b>SDT</b>	Special but Differentiated Treatment
<b>SL</b>	Sensitive List
<b>TEL</b>	Temporary Exclusion List
<b>TFTA</b>	Tripartite Free Trade Area
<b>TRIPS</b>	Trade Related aspects of Intellectual Property Rights
<b>UN</b>	United Nations
<b>US</b>	United States
<b>USD</b>	United States Dollars
<b>WTO</b>	World Trade Organization

## **ABSTRACT**

With the vast number of existing and emerging trade arrangements in developing states particularly in Africa, through entering into bilateral and regional trade agreements without due regard to the implications appurtenant to such arrangements leads to failure in achieving its objectives and goals and ultimately collapse. This has been necessitated by various reasons including the overlap of membership in various trade bodies, uncertainty and confusion. If countries in developing world realize the benefits of trade bodies then it will highly benefit since regional trade agreements (RTA) present opportunities for controlling technical barriers to trade.

The non-committal by states parties to trade agreements and economic bodies has resulted to the trade agreements being mere paperwork and the trade blocs being more of a stumbling block rather than stepping blocs towards attaining economic development through trade. In order therefore to cure the problem most states have decided to explore options of merging existing bilateral trade agreements and trade bodies or blocs to form a single unified trade bloc, to regulate and oversee trade among member states and thus expanding the market for trade and reaching a huge population target.

The research will explore existing trade agreements in developing countries particularly in Africa, examine the effectiveness of the agreements whether they have lived up to its purpose by opening free trade between member states and if the same have led to economic development through fostering trade among the member states in the agreements. A comparative analysis will be conducted with other trade bodies outside Africa, most particularly American and Far East trade bodies.

The case study in this research work will be the East African Community (EAC), Common Market of East and Southern Africa (COMESA), and Southern Africa Development Community (SADC) and its proposal to merge and form one unified trade body. The study will try to come up with a detailed analysis of the said trade blocs, their achievements and failures and try to make assumptions on whether merging of the bodies will in real sense boost trade among member states or the same becoming a stumbling block towards free trade and movement of goods between member states

# **CHAPTER I**

## **INTRODUCTION**

### **1.0. INTRODUCTION**

Regional Trade Agreements (RTA's) are agreements entered into between two or more countries under which participants agree to reduce tariffs, quotas and other restrictions on trade between them. They are further defined as groupings of countries which are formed with the objective of reducing barriers to trade between member countries. The member states may not necessarily belong to the same geographical region, for example Kenya has entered into various trade agreements with the following partners: Argentina, Bangladesh, Bulgaria, Canada, China, the former Czech and Slovak Republic, Denmark, Djibouti, Egypt, Ethiopia, India, Iran, Lesotho, Malawi, Nigeria, Norway, Pakistan, Poland, Romania, Rwanda, Republic of Korea, Sudan, Sweden, Tanzania, Thailand, United Kingdom, USA, European Union, former USSR, former Yugoslavia, Zambia and Zimbabwe.

These agreements are generally meant to expand market access and investments for Kenya and its partners in the areas of mutual trade relations. Thus, the agreements can be considered as instruments for promoting not only trade relations but improving both economic and political relations between the parties as well.<sup>1</sup> The agreements cover trade in goods, services and other issues such as protection of intellectual property.<sup>2</sup>

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<sup>1</sup> Promoting Win-Win Bilateral Free Trade Agreements Perspective from Kenya, CUTS Africa Resource Centre, 2012, accessed at, <http://www.cuts-geneva.org/pacteac>. visited on 26/03/2015

<sup>2</sup> L.B. Allen. *Et Al.* "Bilateral and Regional Trade Agreements" Advocates for International Development, 2010.

RTAs can be divided into five categories;<sup>3</sup>

Preferential Trade Agreements (PTAs) is a union in which member states impose lower trade barriers on goods produced within the union, with some flexibility for each member country on the extent of reduction. Free Trade Agreements (FTAs) is where member states completely abolish trade barriers (both tariff barriers and non-tariff barriers) for goods within the member states. However member states don't completely abolish trade barriers particularly to sensitive sectors.

Custom Unions (CUs) this category provides deeper integration where member states are free to maintain their individual level of tariff barriers for goods imported from non-member states, in a CU member countries also apply a common external tariff on goods imported from outside countries.

Common Markets and Economic Unions is where member states attempt to harmonize some institutional arrangements and commercial and financial laws and regulations among themselves, it entails free movement of factors of production.<sup>4</sup>

Trade agreements have focused on limiting or eliminating discrimination against foreign trade by regulating governmental measures that impose competitive disadvantages on foreign goods vis-à-vis domestic goods with which they compete, these measures have been promulgated by the

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<sup>3</sup> I.V. Neumann, "Regional Trade Agreements and the WTO", MEB- 7<sup>th</sup> International Conference on Management, Enterprise and Benchmarking, 2009.

<sup>4</sup> *ibid*

coming into force of GATT and later WTO.<sup>5</sup> The General Agreement on Tariff and Trade (GATT) was established in 1947, this came after the UN member states negotiations to enter into an international trade agreement for the reciprocal reduction of tariffs and trade in goods.<sup>6</sup> However GATT was intended to be a provisional arrangement until the establishment of an International Trade Organization (ITO).

The ITO was agreed in Havana in 1948, but was not ratified, thus GATT governed international trade until 1995 when the World Trade Organization was established.<sup>7</sup> The GATT rests on a handful of clear and simple principles;<sup>8</sup> first being restrictions on international trade should be minimized (but not eliminated) and should be transparent, the second is trade concessions are multilateralized i.e. a state party must apply its tariffs to all other contracting parties on a Most Favored Nation (MFN)<sup>9</sup> basis.<sup>10</sup>

The MFN clause embodies the norm of non-discrimination, prohibiting discrimination between trading partners, the principle provides that any special treatment given to a product from one trading partner must be available to all like products.<sup>11</sup>

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<sup>5</sup> R.E. Hudec, *"Science and 'Post Discriminatory' WTO Rules"*: Boston College International and Comparative Law Review, Vol. 26, 2003, Pg. 187.

<sup>6</sup> The Bretton Woods Agreement was signed in July 1944 by delegates from 44 nations, the delegates met to discuss how to rebuild world economy following World War II. The result was the creation of the Bretton Woods system to govern monetary relations between nations. Two institutions were also established; the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank) although it was not within the remit of negotiations at Bretton Woods, the delegates identified the need for an institution to facilitate free trade among nations which would complement the IMF and the World Bank.

<sup>7</sup> Supra Note 2.

<sup>8</sup> M. Dixon *et-al*, *"Cases and Materials on International Law"* 5<sup>th</sup> Ed, Oxford University Press, 2011, pg. 219.

<sup>9</sup> GATT Article 1.

<sup>10</sup> V. Lowe, *"International Law"*, Oxford University Press, Clarendon Law Series, Oxford, 2007, pg. 217.

<sup>11</sup> Supra Note 8. pg. 485

The World Trade Organization (WTO) was set up through the Uruguay Round in 1994<sup>12</sup> to liberalize international trade on the principle of non-discrimination and to eliminate trade barriers through multilateral negotiations, and also bridging the gap between developing and developed states by use of Special and Differential Treatment (SDT).<sup>13</sup> Its scope is to provide the common institutional framework for the conduct of trade relations among its members in matters relating to the agreements and associated legal instruments.<sup>14</sup> According to WTO rules, member states that are within RTA can trade among themselves using preferential tariffs and easier market access conditions than what is applicable to other WTO member states.<sup>15</sup>

Today regionalism is acknowledged as one of the two pillars of international economic order, together with multilateralism, many countries which traditionally relied on the multilateral trade regime are increasingly joining regional agreements to promote trade. The question however is whether regionalism may be a faster way to reach multilateralism and whether regional integration arrangements are “building blocks” or “stumbling blocks” or rather “stepping stones towards multilateralism.”<sup>16</sup> This research will therefore examine the implications of merging of trade agreements and a move towards regionalism and bring into perspective whether regionalism and merging of trade agreements thereof are a building blocks or stumbling blocks towards trade growth and eventually economic growth in affected member states.

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<sup>12</sup> Supra Note 10, pg. 223

<sup>13</sup> *ibid*

<sup>14</sup> Article II of World Trade Organization Agreement

<sup>15</sup> *ibid*

<sup>16</sup> I.V. Neumann, “Regional Trade Agreements and the WTO”, MEB- 7<sup>th</sup> International Conference on Management, Enterprise and Benchmarking 2009. In J. Bhagwati. “*Regionalism versus Multilateralism*”, The World Economy, 1992, pg. 15.



## 1.1. BACKGROUND

In the past forty years Africa has witnessed a positive move by African countries, encouraged through the African Union forum to join their efforts in various initiatives, most notable the formation of regional economic groupings which was seen as a more practical step towards the more ambitious dream of statesmen like Kwame Nkrumah and Mwalimu J.K. Nyerere to create a United States of Africa.<sup>17</sup>

In meeting the goal of regional economic groupings and in order to foster economic growth and regional integration, most states in African belong to more than one regional trade bloc, particularly in East and Southern Africa this is despite the WTO rules that a country has to belong to one Customs Union (CU).<sup>18</sup> The structure for each regional economic community varies, but they all share a common objective, which is to reduce trade barriers among member states through creation of common large economic space. However the multiplicity and overlapping of membership in various trade blocs raises problems for policy and program coordination and harmonization.

The multiplicity of regional economic communities has drawbacks which include; fragmented economic spaces and approaches to regional integration, increased cost of membership, unhealthy rivalry for donor funds, contradictory obligations and loyalties for member states, inconsistent objectives and conflicting operational mandates, duplicated efforts and reduced ability for regional

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<sup>17</sup> B. Lunongelo, *et-al*, “ *Convergence of COMESA-SADC-EAC Regional Frameworks*”, The Economic and Social Research Foundation, 2009, (ESRF), <http://www.esrf.or.tz> visited on 31/10/2014

<sup>18</sup> *ibid*

economic communities to pursue coherent and effective integration programs.<sup>19</sup> The number of bilateral and regional trade agreements has increased enormously over the last two decades and is expected to number some four hundred. These agreements have a substantial and increasing impact on national economies, employment, gender and development. At the same time the involvement of trade unions through monitoring, consultation and engagement in these bilateral trade agreements is often lacking.<sup>20</sup>

A tripartite summit on the integration of the EAC<sup>21</sup>-COMESA<sup>22</sup>-SADC<sup>23</sup> was held on 22<sup>nd</sup> October 2008 at Kampala Uganda, with a move towards deepening and widening integration between the three economic bodies.<sup>24</sup> It agreed on a program of harmonization of trading arrangements amongst the three regional economic communities (RECs), this include; free movement of business persons, joint implementation of inter-regional infrastructure program and institutional arrangements to foster cooperation. The main objectives of the integration are to establish an FTA on a tariff-free, quota-free and exemption-free basis.<sup>25</sup> The summit also approved the expeditious establishment of a FTA with a common goal establishing a single customs union.<sup>26</sup>

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<sup>19</sup> Meyer, N. *et al*, “Bilateral and Regional Trade Agreements and Technical Barriers to Trade: An African Perspective”, OECD *Trade Policy Working Papers*, No. 96, OECD Publishing, 2010.

<sup>20</sup> A Trade Union Guide, Trade Unions and Bilaterals; Do’s and Don’ts, International Trade Union Confederation, 2008

<sup>21</sup> East Africa Community

<sup>22</sup> Common Market of Eastern and Southern Africa

<sup>23</sup> Southern Africa Development Community

<sup>24</sup> P. Shayanowako, “Towards a COMESA, EAC and SADC Tripartite Free Trade Area” Trade and Development Studies Issue No. 40, 2011, <http://www.tradescentre.org.zw> visited on 31/10/2014.

<sup>25</sup> *ibid*

<sup>26</sup> *ibid*

## **1.2. STATEMENT OF THE PROBLEM**

For centuries it has been the believe of many states that in order for a state to grow economically, it has to partner with other states and enter into trade agreements meant to reduce trade tariff's, movement of persons and goods, however despite entering into these agreements most African states registered none or minimal economic growth, for example Kenya which has entered into a number of trade agreements in order to meet its trade policy objectives which include moving towards a more open trade regime, strengthening and increasing overseas market access for Kenyan products, especially processed goods, and further integration into the world economy. This has led Kenya to implement a great deal unilateral liberalization and entered into multilateral, regional, bilateral and preferential trade arrangements. Consequently, Kenya is a signatory to the World Trade Organization (WTO), the Cotonou Partnership Agreement with the European Union (EU), the African Economic Community (AEC), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), and the Inter-governmental authority on Development (IGAD).<sup>27</sup>

With the coming into place of various trade agreements, the question that is being posed is whether these trade agreements are building blocks or stumbling blocks towards economic growth in the affected member states. Most of these trade agreements are just but in paper, most of them have not lived to meet its objectives and goals mainly of fostering trade among the member states.

The big question to be determined is whether merging of these various trade agreements into one single trade bloc will cure the problems faced by the existing trade agreements. This research will

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<sup>27</sup> Promoting Win-Win Bilateral Free Trade Agreements Perspective from Kenya, CUTS Africa Resource Centre, 2012, accessed at, <http://www.cuts-geneva.org/pacteac>. visited on 26/03/2015

focus on the tripartite agreement between COMESA, EAC and SADC, which is estimated will cover over 500 million persons and trade in over 600 billion dollars which is the estimated GDP of the member states.

However due to the limitation and implications of the existing trade agreements, the success of the merging hangs on the balance, thus merging of trade agreements which have been termed ineffective, will result in formation of a huge trade block which will not live up to its goals and objectives thus being a stumbling block towards economic growth.

This project therefore will seek to examine with reference to other regional trade agreements that grew out of mergers of small trade agreements whether merging these three trade agreements to form one impeccable trade region will be the cure to foster trade growth among member states and ensure economic development, or the merger will be a failure due to merging of trade agreements which already were not ineffective.

### **1.3. OBJECTIVES**

The overall objective of this research is to examine those issues that constitute an obstacle in the legal address of mergers of regional trade agreements (RTA), as a guide to understanding the current possible implications. From a completely global perspective, it thus seeks to analyze and ascertain the issues affecting regional trade bodies and the consequences of merging the same.

These objectives include;

- a) To identify the legal lacuna on merging of trade bodies and to suggest on ways to fill the gaps.
- b) To determine whether merging of trade blocs would foster trade and improve economies of member states.
- c) To ascertain effectiveness of existing Regional Trade Agreements in economic development in member states.
- d) To establish whether trade blocs are stumbling blocks or stepping blocks towards economic development among member states.
- e) To examine implications of overlapping of membership in trade blocs.

#### **1.4 RESEARCH QUESTION**

From the introduction and the background, it clearly emerges that the doctrine of merger of trade bodies is the cornerstone of boosting trade and improving of economic conditions among member states and in particular in third world countries.

There are five formidable questions that beg for answers;

- a) What are the applicable legal principles and rules with regard to merging of trade bodies?
- b) What are the implication that arises in merging trade bodies?
- c) Are the existing trade bodies effective enough in boosting trade among member states and in general globally?

- d) Are trade blocks acting as a stepping stone or stumbling block towards improvement of trade among member states and eventually boosters of economic growth?
- e) Is overlapping of membership in more than one trade bodies advantageous or disadvantageous and if so will merger of such trade bodies help in healing the mischief?

This paper seeks to examine the law that regulates trade bodies and how it has helped to ensure that member states achieve economic growth and also fostering strong political relations. The paper further examines what are the implications of merging the existing trade bodies to form one body that will cover a vast area which will in turn create opportunities for trade among member states.

## **1.5 THEORETIC FRAMEWORK**

This research delves on a number of theoretical aspects, which include the theory of regionalism, economics theory and the trade cost and creation theory.

### **1.5.1. Regionalism**

There are two important aspects of regionalism which include; international trade and the current trading systems and regional trade agreements. Formation of Regional Trade Agreements is primarily based on the theory of comparative advantage which was developed by David Ricardo, where he argued that the relative factor of endowment would make advantageous for all countries to trade.<sup>28</sup> According to the theory, countries will have comparative advantages in the production

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<sup>28</sup> R.J. Ruffin, "David Ricardo's Discovery of comparative Advantage", History of Political Economy, (2002), Vol 34, No. 4 p.727-748.

of particular goods and international trade will arise as countries use these advantages to trade with each other regardless of any country having an absolute advantage or not.<sup>29</sup>

The main objective of forming regional trade agreements is the fewer internal restrictions, according to Whalley (1996) RTA's can be formed based on strategic considerations i.e. need to strengthen domestic policy reforms through commitment to a multilateral agreement, less exposure to future reversals of domestic policy reforms and improvement of access to foreign member markets.<sup>30</sup> Through ASEAN, East Asian developing countries received favorable access to the growing Chinese market due to their joint negotiations position.<sup>31</sup>

A well-functioning local and regional markets are important steps on the road towards greater integration in the global economy and there is great potential in liberalizing regional trade. Increased regional integration will create larger domestic markets and increase the competitiveness of the regions in the global markets.<sup>32</sup> A key question raised by the formation of regional trade agreements is whether it will make members countries better off. According to Viner (1950)<sup>33</sup> he postulates that regionalism does not improve member's welfare. The preferential removal of tariffs may lead to trade diversion, where imports shift away from the most efficient supplier to the

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<sup>29</sup> M. Easgersen, "Regional Trade Agreements in the Development World", Aarhus School of Business, Aarhus University, Msc Thesis, 2011.

<sup>30</sup> J. Whalley, "Why do Countries Seek Regional Trade Agreements?" NBER Working Paper, (1996), No. 5552, Cambridge University.

<sup>31</sup> Supra Note 29.

<sup>32</sup> Danish International Development Corporation (DANIDA 2010:18) accessed at <http://um.dk/en/danida-en/> on 5<sup>th</sup> August 2016.

<sup>33</sup> J. Viner, "*The Custom Union Issue*. Carnegie Endowment for International Peace," New York, (1950).

country receiving preferential treatment, this eventually generates an inefficiency in world production which is harmful to bloc members.<sup>34</sup>

### **1.5.2. Economic Theory**

Economic theory postulates that international trade should be based on a free market principle which will permit scale economies, promote international competition and increase world welfare. The main objective of this framework is to discuss the theory of economic integration which is a process of eliminating trade costs to increase countries welfare.<sup>35</sup> As is with any market system, legal rules and institutions are required to promote beneficial exchange by establishing certain legal rights and entitlements and encouraging compliance with obligations.<sup>36</sup>

Economic integration's main objective is to increase welfare, it is a process that involves removal of trade discrimination between different states. Increased regional economic integration will create larger domestic markets thereby increasing the potential for specialization and economic growth as well as enhancing the region's competitiveness on the global markets. Both international and regional economic integration are therefore important measures for improved growth prospects.<sup>37</sup> Liberalization of trade among developing countries at a regional level will be expected to increase the intraregional trade among developing countries as well as increase their integration into the global trading system.<sup>38</sup>

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<sup>34</sup> C. Freund, "Regional Trade Agreements," London School of Economics", World Bank Publication, accessed at [www.worldbank.org](http://www.worldbank.org) on 5<sup>th</sup> August 2016.

<sup>35</sup> J. Wamcymer, "International Economics, Finance and Trade", Legal Issues in Trade & Investment, Vol II, 3125, Deakin University, accessed at [www.eolss.net](http://www.eolss.net) on 4<sup>th</sup> August 2016.

<sup>36</sup> *ibid*

<sup>37</sup> Danish International Development Corporation (DANIDA 2005:20) accessed at <http://um.dk/en/danida-en/> on 5<sup>th</sup> August 2016.

<sup>38</sup> *Supra* Note 29.



### 1.5.3. Gravity Equation Model

Gravity model is one way of examining pattern of trade more carefully since it is the foundation for empirical analysis of regional trade for almost fifty years. Gravity equation approximates the size of bilateral trade flows between any two countries, this is through the analogy with the Newtonian theory of gravitations.<sup>39</sup> Just as planets are mutually attracted in proportion to their sizes and proximity, countries trade in proportion to their respective GDP's and proximity.<sup>40</sup> An example of the theory's equation is where a mass of goods or labour or other factors of production supplied at origin  $i$ ,  $Y_i$ , is attracted to a mass of demand for goods or labour at destination  $j$ ,  $E_j$ , but the potential is reduced by the distance between them,  $d_{ij}$ . Strictly applying the analogy, gives the predicted movement of goods or labour between  $i$  and  $j$ ,  $X_{ij}$ .<sup>41</sup>

$$X_{ij} = Y_i E_j / d_{ij}^2$$

The model was further propounded by Tinbergen (1962)<sup>42</sup> where he argued that the bilateral trade volume between two trading partners could be explained by the economic size of the partner countries and the distance between them, Leamer and Stern (1970)<sup>43</sup> offered three theoretic explanations for the gravity equation: one based on physics, the other based on exogenous demand and supply side variables including income and population and the last explanation based on a probability model.<sup>44</sup>

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<sup>39</sup> J. Tinbergen, "Shaping the World Economy. Suggestions for an International Economic Policy", The Twentieth Century Fund, New York, (1962).

<sup>40</sup> Accessed at <http://vi.unctad.org/tpa/web/docs/ch3.pdf> on 10/08/2016

<sup>41</sup> J. Anderson, "The Gravity Model", Boston College and NBER, Annual Review of Economics, Vol III, 2011.

<sup>42</sup> Supra Note 39

<sup>43</sup> E. Leamer and R. Stern, "Quantitative International Economics", Aldine, Chicago, (1970).

<sup>44</sup> Supra Note 29.

## **1.6. HYPOTHESIS**

This study is undertaken on the following hypothesis or assumptions.

The first assumption is that merging of trade bodies is the main way of boosting international trade among member states. With the merging in place, the affected member states will enjoy better trade with reduced tariff and barriers and also open boundaries to movement of persons and goods freely, this will therefore improve economic relationships between states and to reach a huge population thus in the end improve a countries GDP and economic position.

The second assumption is with the failure of existing regional agreements to achieve its objectives due to either small market area, political, bias, poor governance, transparency etc. the assumption is that with merging of these trade agreements will cure the challenges since it will create a large market area, system of governance will be done differently from the localized trade agreements, proper structures will be in place with a main aim of boosting trade, political interference will be minimized and equality will be ensured.

The third assumption is merging of trade bodies will amount to being a stepping block and not a stumbling block towards trade among member states and free movement of persons which will foster good relations.

The fourth assumption is that merging of trade bodies will have a positive effect towards economic growth and political relations, however in political terms, the ineffective nature of the trade agreements has been mostly linked to lack of commitment in adhering or implementing the

programs for regional trade liberalization and also the member states inability to put regional goals ahead of national ones.<sup>45</sup>

The other assumption with regards to merging of trade blocs, and in particular the EAC SADC and COMESA blocs, will result to expansion of trade market in particular with the enlarged area to conduct trade and movement of business persons and goods. The objectives of the merging are; promotion of rapid social and economic development of the region through job and wealth creation and the elimination of poverty, hunger and disease through building skills, innovativeness and hard and soft infrastructure; and through improving the location of factors for sustainable generation of national, regional and foreign investment and trade opportunities, to create a large single market with free movement of goods and services and business persons and eventually to establish a custom union, to resolve the challenges of multiple membership and expedite the regional and continental integration processes, to build a strong people-based tripartite free trade area and to promote close cooperation in all sectors of economic and social activity among the Tripartite Member States.<sup>46</sup>

## **1.7. JUSTIFICATION**

The study raises several issues in the realm of international law in particular trade law. It investigates whether merging of regional trade bodies is regulated and or exists in law. It investigates whether the existing trade bodies have adequately met their objective in boosting trade among the member states. It investigates how trade has been regulated internationally apart from the agreements entered by states vis-à-vis General Agreement on Tariffs and Trade and World

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<sup>45</sup> Supra Note 17.

<sup>46</sup> Article 3 of the Draft Agreement Establishing the COMESA, EAC and SADC Tripartite Free Trade Area (2010)

Trade Organization rules and guidelines. It seeks to answer the question on whether merging trade bodies in particular East Africa Commission (EAC), Common Market of East and Southern Africa (COMESA) and Southern Africa Development Corporation (SADC) will be a stepping stone or a stumbling stone towards economic development, growth and sustainability among member states. It focuses on the implications and benefits of international trade among states and formation of trade blocks with an aim of fostering trade.

## **1.8. LITERATURE REVIEW**

International trade has been the cornerstone for economic growth among member states, without it there would be less or nothing to fathom about on matters relating to economics. Each state relies on international trade for its day to day survival. International trade has for decades been left at the dictates of individual member states since the regulations has been farfetched hence leaving states with the option to dictate which agreements to enter into. The issue of regulation of merging of trade bodies are novel and little has been written about and they are complex in nature, there is a dearth of published work on international trade and specifically on merging of trade bodies.

Ethier (1998)<sup>47</sup> and Freund (2000a)<sup>48</sup> view regional initiatives as a consequence of the success of multilateralism. Ethier asserts that RTAs intensify world investments and create incentives for economic reforms in less developed countries. Freund on the other hand finds that deeper multilateralism provides greater incentives to form RTAs. She argues that where external tariffs are low the loss from trade diversion is small. Freund shows that since tariffs are constrained they

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<sup>47</sup> W. Ethier, "Regionalism in a Multilateral World", *Journal of Political Economics* 106:1214-45 (1998).

<sup>48</sup> C Freund, "Multilateralism and the Endogenous Formation of Free Trade Agreements", *Journal of International Economics* Vol. 52 pg. 359-76 (2000).

lower the gain from deviating from an RTA hence making it easier to sustain. Baldwin (2006)<sup>49</sup> propounds a juggernaut effect where reciprocal liberalization lowers tariffs which then leads to an expansion of the export sector and decline in the import sector which in turn changes the structure of production thus enables the facilitation of trade liberalization which can either be regional or multilateral.

Lowe (2007)<sup>50</sup> in regional economic arrangements, states that there is much and more often visible activity on a regional level, he states that regional organizations have more confined functions; but several of them have ambitious programs of regional integration. Lowe notes that there is no doubt that a significant degree of overlap and consequent inefficiency among international organizations, as there is in every sphere of human activity, this inefficiencies have not been adequately addressed since the same has resulted in failing of trade agreements. Lowe uses the quote of more lucid analyses in recent British foreign policy “*where there are no rules, the rich and powerful bully the poor and the powerless*”. He further postulates that the international rules in this case GATT and the WTO are reasonable successful attempts to lubricate the wheels of international trade and the international economy however the same rules have failed to perfectly align international trade towards the direction of improving the welfare and economic conditions of member states.

Jakobeit *et-al* (2005)<sup>51</sup> states that there is overlap of membership among Regional Economic Communities, in the Eastern and Southern African region to an extent unparalleled anywhere else

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<sup>49</sup> R. Baldwin, “Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade”, NBER (2006).

<sup>50</sup> Supra Note 10, at pg. 231-233.

<sup>51</sup> C. Jakobeit, *et-al*, “Overlapping Membership in COMESA, EAC, SACU and SADC, Trade Policy Options for the Region and EPA Negotiations”, 2005, <http://www.gtz.de/trade> visited on 31/10/2014.

in the world. This has a bearing on the costs and benefits of integration, and more fundamentally it has implications for the process of deeper integration that large parts of the region have embarked on. According to Jakobeit, The need therefore of merging regional trade bodies would thus be of benefit to member states due to boosting of trade which will in turn result to economic growth amongst member states, in particular to the Tripartite FTA.

Shawanowako (2011)<sup>52</sup> in his article discussing merging of COMESA EAC and SADC points out the benefits of establishing a tripartite FTA. A well negotiated and crafted comprehensive tripartite agreement should provide its contracting parties with numerous benefits, not only in the area of trade but in many associated areas, these benefits include; enlarged market and increased access for products, he states that the three REC's have a combined population of over 500 million people and a combined gross domestic product (GDP of USD 624 billion. The 26 countries in the three RECs constitute half of the African Union (AU)'s membership and their combined population constitutes 57% of the AU's total population.<sup>53</sup> Hence the tripartite will create an enlarged market for both producers and traders in the member states.

Shawanowako further postulates other benefits emanating through the establishment of the Tripartite FTA which include; creation of potential to increase economic growth arising from the larger regional market. With the overlapping of membership, the tripartite agreement will assist to address the challenge by advancing the ongoing harmonization and coordination initiatives of three organizations to achieve convergence of programs and activities. The tripartite FTA would also help improve investment climate in the whole tripartite region and thus attract new investors in

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<sup>52</sup> Supra Note 24.

<sup>53</sup> *ibid*

fields such as agriculture, mining, forestry, manufacturing, financial services, telecommunications and energy which are key for the economic development of the tripartite region.

He further states that the tripartite agreement will be a stimulant for increasing industrialization, thus motivate business through seeking of partnerships with foreign investors to expand their production capacities, the agreement will also improve competitiveness of products through elimination of import duties particularly the necessary raw materials from Africa, and this in turn reduces costs of production. The agreement will also facilitate exploitation of untapped natural resource, given the region is endowed with numerous valuable natural resources. Lastly the tripartite agreement will lead to development of good infrastructure.<sup>54</sup>

Nordstrom (1995)<sup>55</sup> finds that regional trade agreements might provide trading blocs with stronger incentives to pursue multilateral trade liberalization since establishing these types of agreements allows small countries to more effectively deal with large trading blocs.

Perroni and Whalley (1996)<sup>56</sup> indicate that recent regional trade agreements generally take the form of Free Trade Associations in which member countries can choose their external tariff rates freely. In contrast to Krugman's<sup>57</sup> findings, this new form of regionalism does not increase the monopoly power of newly established trading blocs and does not necessarily imply higher external trade barriers between the emerging trading blocs. They conclude that increasing regionalism is not a threat to the multilateral trading system.

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<sup>54</sup> *ibid*

<sup>55</sup> Nordstrom, H., Customs unions, regional trading blocs and welfare, in R. Baldwin, P. Haaparanta, and J. Kiander (eds.), *Expanding membership of the European Union*, Cambridge University Press, 1995, pg. 54-78.

<sup>56</sup> Perroni, C. and J. Whalley, *The new regionalism: trade liberalization or insurance?*, NBER WP Number 4626, 1994.

<sup>57</sup> Krugman, P. , , *Is bilateralism bad?*, in E. Helpman and A. Razin, eds., *International Trade and Trade Policy*, Cambridge, MIT Press, 1991.

Campa and Sorenson (1996)<sup>58</sup> also employ Krugman's framework, but they consider an infinitely repeated tariff setting game. Their results suggest that global free trade equilibrium can be sustainable if the small economies form a trading bloc since the integration of small countries can undermine the market power of the larger trading blocs.<sup>59</sup>

However with the outlined advantages of merging of regional trade bodies, there is a fair share of downfalls as it has been observed by Lunongelo and Mblinyi (2009)<sup>60</sup> where they identify the reasons for ineffectiveness of regional cooperation in trade, which include but not limited to; the intra-regional trade as a share of total foreign trade has been low in comparison to other regions. Most African states have suffered from severe macroeconomic disequilibria, foreign debt service burdens, overhauled currencies, lack of trade finance and a narrow tax base, with custom duties forming a substantial source of government revenue. The existence of regulations restricting trade such as licensing, administrative foreign exchange allocation, special taxes for acquiring foreign exchange, advance import deposits etc. the design of African integration schemes around inward looking industrialization meant that the economic costs of participation for member states are often immediate and concrete while the economic benefits are long term and uncertain and are often unevenly distributed among member state.

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<sup>58</sup> Campa, J. M., and T. L. Sorenson, Are trade blocs conducive to free trade?, *Scandinavian Journal of Economics* 98, 1996, pg. 263-273.

<sup>59</sup> R. Riezman, "Can Bilateral Trade Agreements help Induce Free Trade?" CSGR Working Paper No. 44/99, 1999.

<sup>60</sup> *Supra* Note 17.



The dominance of a few countries and huge disparities in size among members of regional groupings led to concern about the distribution of benefits, this is due to the difficulty to address the equitable distribution of gains and losses from integrations and also absence or ineffective compensation scheme to the less developed members of groupings. The dependence of many African countries to their former colonial powers i.e. commonwealth, Franco-African and Agro-African links has tended to work against viable regional groupings. Regionalism has been driven from above by public sector organizations and has lacked the support and involvement of the private sector and the general public.

Interestingly, some researchers paint a completely different picture about the implications of bilateral trade agreements. According to Viner (1950)<sup>61</sup> he shows that RTAs does not necessarily improve members' welfare, he states that removal of tariffs may lead to trade diversion. This generates an inefficiency in world production which is harmful to non-members to trade blocs. In contrast if the RTA leads to greater imports from the efficient suppliers within the bloc, consumer gains would outweigh the costs from production inefficiency and thus the agreement will improve members' welfare. On the other hand Kemp and Wan (1976)<sup>62</sup> show that if external tariffs are adjusted so that the formation of a customs union does not affect trade with outsiders, the union is necessarily welfare-improving. This logic indicates that if tariffs are such that external trade is constant any additional trade between members must be to create trade.

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<sup>61</sup> Supra Note 33

<sup>62</sup> M. Kemp & H. Wan, "An Elementary Proposition Concerning the Formation of Customs Unions", J Int. Econ. 6:95-98, (1976).

## **1.9. RESEARCH METHODOLOGY**

In the nature of the subject of this research, the research methodology will be desktop research this is due to the nature of the study and further on the grounds that the research in question is something alien and few regions have in the past merged hence resulting to yet to minimal or no public knowledge on the topic.

### **1.9.1. Data Sources**

The mode of data collection will be primarily secondary data collection. Data will be mainly be collected from publications both in government and private sectors, technical documents, journals, content analysis of newspapers and periodic literature and articles whose sources will be mainly from libraries and internet. It will also cover very many different sources including books, journals, articles and reviews.

Secondary sources will also help in cross checking of official information, learning about major events, technical detail, historical aspects and main organization players and roles.

## **1.10. SCOPE OF THE STUDY**

The scope of the research is more-or-less unlimited as the legal issues raised are examined from a global perspective. However, much is made to the African context and in particular East and Southern Africa region. This is so because there are three major regional trade agreements within this region and in most of them there is an overlap of membership by member states whereby one state is party to either the three trade bodies or two of them for example Kenya is a member of COMESA and EAC. Also the reason for the scope is the intentions by the three trade bodies to

merge and form one trade bloc on the grounds of promotion of trade and development among member states, however this research aims at deciphering the objectives and to ascertain whether merging will either be a stepping stone or a stumbling block given the current negative issues that mar the three trade bodies.

### **1.11. LIMITATIONS**

The main limitation to this study is the scarcity of information, this is due to the unavailability of accurate data, whereas available data are dependent on state records which are not easily accessible.

With regards to case law, there is limited substantive case law which is of relevance to the research question, this is dully attributed to the fact that disputes are of international nature and also on the fact that Kenyan courts do not entertain as such international disputes unless the rules touching on the issues at hand have been domesticated.

The other limitation is with regards to resources to enable the research to be done in particular to institutions and states outside Kenya, this poses a challenge since the research is based on trade relationships between states.

Time is also another factor which will limit this research, this is due to the limited period of time given to conduct the research and compile the same. Based therefore on the aforementioned limitations there are a few authorities and resources which will support and enable this research work bear fruits.

## **1.12. CHAPTER BREAKDOWN**

This research is organized into five chapters.

Chapter one constitutes a background introduction to International Trade in particular regional trade agreements (RTA) and outlines the implications of merging the trade agreements to form one trade bloc to foster trade and development among state parties. The chapter outlines the scope, aims and objective, limitations as well as the method of writing.

Chapter two examines the institutions and legal framework in place which is a key foundation of international trade covering both regional and bilateral trade agreements. The chapter discusses the various forms of international, legal and institutional framework with an aim of establishing the legality of the intention of merging COMESA, EAC & SADC vide a tripartite agreement.

Chapter three expounds on the existing regional trade agreements focus being on three African trade bodies being COMESA EAC and SADC which are slated for merging. The chapter examines the advantages as well as the disadvantages of merging of these trade agreements, it also highlight the issues of overlapping of trade agreements in which one state is a party to more than one trade agreements which in one way the agreements may have conflicting objectives and provisions.

Chapter four aims at conducting a comparative analysis with other existing trade agreements which have been successful. These trade bodies include North America Free Trade Area (NAFTA) and ASEAN Free Trade Area (AFTA) focusing on its formation, legal and institutional structures, its

achievements and failures. This is with an aim of borrowing a leaf from them to our soon to be formed Tripartite Free Trade Area in order to ensure its success.

Chapter five concludes the research on the implications of merging regional trade agreements and brings forth sound recommendations and way forward.

## **CHAPTER II**

### **REGULATION OF TRADE AGREEMENTS**

#### **2.0. BILATERAL AND REGIONAL TRADE AGREEMENTS**

##### **2.1. Introduction**

This chapter delves to bring forth a comprehensive background on trade agreements whose main purpose is to boost trade relations between contracting states, it further examines the forms of trade agreements entered by states with a sole purpose of showing the salient differences and features. These forms of trade agreements include but not limited to Customs Unions, Free Trade Areas and Preferential Trade Agreements. The chapter further examines the rules and regulations in place which regulates international trade and which helps in the formation and running of the various trade agreements in place to ensure that they achieve the main purpose of promotion of economic development among the contracting states. These rules and regulations include the GATT (General Agreement on Tariffs and Trade), and World Trade Organization Agreement.

##### **2.2. Background to Trade Agreements**

In the recent past, countries have increasingly embraced trade agreements at both country-to-country (bilateral) level and amongst groupings of multiple countries (regional level) with the main purpose of creating a free trade agreement (FTA), FTA's is a formal undertaking between signatory countries to eliminate or reduce trade barriers, including tariffs and quotas/quantitative restrictions on goods and services traded within the signatory countries.<sup>63</sup> Free trade has in decades

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<sup>63</sup> L. Obradovic, "The Role of Bilateral and Regional Trade Agreements in the Modernization of Taxation and Revenue Policy in Developing Economies", World Customs Journal, Volume 6 No. 2, accessed at [www.worldcustomsjournal.org/media/wcj/-2012/2/Obradovic.pdf](http://www.worldcustomsjournal.org/media/wcj/-2012/2/Obradovic.pdf) on 19/05/2015

become a generally accepted principle and is the concept that underlies the multilateral trading system enabling global production of goods and services in the most effective and efficient way possible. Free trade generally provide and overall benefit in the big picture and that they are not necessarily seen as at a more local level.<sup>64</sup>

The underlying purpose of these agreements is to reinforce trade relations between member states. In this age of globalization, the world trading order is based on the World Trade Organization (WTO) Agreement which has membership of 161 countries as at April 2015.<sup>65</sup> Many bilateral and regional trade agreements have been concluded within the WTO framework to offer additional trade benefits and privileges to the contracting parties this is in line with the broad principles set out in the WTO Agreement.<sup>66</sup>

In the last few decades there have been an explosion of trade agreements either local, within regions, others stretching across regions, some have even involved deep integration going beyond the WTO while others have been quite light and superficial.<sup>67</sup> As at 2015 there are over 600 trade agreements and the number is still growing at an alarming rate.<sup>68</sup> This proliferation of regional and bilateral trade agreements has created a spaghetti bowl of crisscrossing arrangements, with little attention to coherence among agreements or to the implications of so many regimes for trade costs,

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<sup>64</sup> L. Brownswell, Allen & Overy, "Bilateral and Regional Trade Agreements", Advocates for International Development, 2012.

<sup>65</sup> <http://www.wto.org> visited on 19<sup>th</sup> May 2015

<sup>66</sup> J.S. Mo, "Bilateral and Regional Trade Agreements", 2002, accessed at [www.oxfordbibliographies.com/view/.../obo-9780199796953-0019.xml](http://www.oxfordbibliographies.com/view/.../obo-9780199796953-0019.xml) on 19/05/2015

<sup>67</sup> R. Baldwin & P. Low, "Multilateralizing Regionalism; Challenges for the Global Trading System", World Trade Organization, Cambridge, 2009, accessed at [http://www.wto.org/english/res\\_e/publications\\_e/multila\\_region\\_e.htm](http://www.wto.org/english/res_e/publications_e/multila_region_e.htm) on 19/05/2015

<sup>68</sup> Accessed at [https://www.wto.org/english/.../region\\_e.htm](https://www.wto.org/english/.../region_e.htm) and <http://rtais.wto.org/UI/publicsummarytable.aspx> on 19/05/2015

efficiency and the conditions of competition in global markets,<sup>69</sup> these issues will be covered in this research at a later stage.

Bilateral and regional trade agreements therefore are agreements entered between two or more countries to reduce tariffs, quotas and other restrictions on trade between the contracting states, the agreement covers both trade in goods and trade in services and also on issues relating to intellectual property. Bilateral agreements are bilateral in nature, while regional agreements are entered generally into by a number of countries from a particular region or different regions. Bilateral and regional trade agreements are sometimes referred to as preferential trade agreements due to the fact that they are only beneficial to the particular states or countries to which they relate. These agreements can further be divided into various categories, however there is a thin distinction between the categories which include; customs union, free trade areas and Preferential Trade Area.<sup>70</sup>

Customs Unions refer to agreements entered between two or more countries to remove tariffs and other restrictions on trade among themselves, but apply a common external tariff to trade with any other countries.<sup>71</sup> Customs unions can also be defined as a form of trade agreement under which certain countries preferentially grant tariff free market access to each other's imports and agree to apply a common set of external tariffs to imports from the rest of the world or non-member states. Customs unions enter into a Free Trade Agreement and apply a common external tariff (CET) schedule to imports from non-members. CU's involve a relatively large number of geographically

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<sup>69</sup> Supra Note 46.

<sup>70</sup> *ibid*

<sup>71</sup> Supra Note 43.



contiguous countries and take longer to negotiate and implement than Preferential Trade Agreements and they entail a certain loss of policy making autonomy.<sup>72</sup>

Under Article XXIV; 8(a) of General Agreement on Tariff and Trade (GATT) defines customs union as a single customs territory substituting for two or more customs territories and having two characteristics being; duties and regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all trade in products originating in such territories. The other characteristics are regulation of commerce is applied by each of the members of the union to the trade of territories not included in the union.

Free Trade Areas (FTA) is where two or more countries enter into an agreement to remove tariffs and other restrictions on trade among themselves, but each of the countries continues to determine the tariffs that apply to trade with any other country.<sup>73</sup> Article XXIV; 8(b) of GATT defines FTA's to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Other definitions of FTA's include a group of countries that have few or no price controls either in the form of tariffs or quotas. This allows the member states to focus on comparative advantages and produce goods that are comparatively more efficient at making hence increase in the efficiency

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<sup>72</sup> S. Andrianamanjara, "Customs Unions", accessed at [siteresources.worldbank.org/INTRANETTRADE/.../C5.pdf](http://siteresources.worldbank.org/INTRANETTRADE/.../C5.pdf) on 18/05/2015

<sup>73</sup> *ibid*

and profitability of member states. An example of established and largest FTA in the world is the Northern American Free Trade Agreement NAFTA between North American countries which include United States of America, Mexico and Canada; this agreement encourages and boosts trade between North American Countries.<sup>74</sup>

In developing FTA's, parties must develop rules for how the FTA will operate, what customs procedures will each country have to follow, what will be the costs, how will participating countries resolve disputes emanating from trade in the area, how will goods be transported, how will intellectual property rights be established and managed. The pertinent goal is to create a trade policy agreeable by all member states.<sup>75</sup>

FTA's benefits include; increased access to less expensive and/or higher quality foreign goods, reduction of prices of commodities, reduced or elimination of tariffs, expanded markets, encourage economic development in member states as a whole and benefits the citizens of member states through increased living standards.<sup>76</sup>

Preferential Trade Agreements (PTA's) are agreements among a set of countries involving preferential treatment of bilateral trade between two parties to the agreement relative to their trade. Preferences however need not extend to all trade between the two countries and the coverage could depend on the type of the PTA's. Customs Unions and Free Trade Areas are a common form of PTA's. Members of PTA's belong to a well-defined geographical area, for example European

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<sup>74</sup> Accessed at [http://www.investopedia.com/terms/f/free\\_trade\\_area.asp](http://www.investopedia.com/terms/f/free_trade_area.asp) on 20/05/2015

<sup>75</sup> *ibid*

<sup>76</sup> *ibid*

Union (EU) and North America Free Trade Area (NAFTA). Hence regional PTA's are also referred to as Regional Trade Agreements.<sup>77</sup>

There is no shortage of explanation on the reasons why countries form PTA's. In order to understand proliferation of PTA's, the domino theory,<sup>78</sup> expounds on proliferation of PTA's based on political economy model focusing on the cost in terms of trade diversion of being excluded from PTA's, the other point is that states may aim to lock in domestic reforms, strengthen their position in multilateral negotiations, pursue import substitutions policies at the regional level, address security concerns or merely sign the PTA's as a reaction to other agreements.<sup>79</sup> The other reason is based on the role of economic size and the need to expand.

The Preferential Trade Area for Eastern and Southern Africa is a classical example, it lays down the objectives which include; Promotion of cooperation and integration covering all areas of economic activity, particularly trade and customs, industry, transport and communications, agriculture and monetary affairs. Raise the standards of living of the people of the region by fostering closer relations among member states. Creation of a common market in order to allow the free movement of goods capital labor within sub-region and to contribute to the progress and development of all other African countries.<sup>80</sup>

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<sup>77</sup> T.N. Srinivasan, "Preferential Trade Agreements with Special Reference to Asia", accessed at [www.econ.yale.edu/~srinivas/PrefTradeAgreements.pdf](http://www.econ.yale.edu/~srinivas/PrefTradeAgreements.pdf) on 19/05/2015.

<sup>78</sup> B. Richard, "A Domino Theory of Regionalism", Paper No. 4465, 1993. accessed at <https://www.wto.org> on 20<sup>th</sup> May 2015

<sup>79</sup> R. John, "Regionalism", in J. Ravenhill (ed.), *Global Political Economy*, Oxford University Press, Oxford, accessed at <https://www.wto.org> on 20<sup>th</sup> May 2015.

<sup>80</sup> Accessed at <http://www.fao.org/docrep/w5973e/w5973e06.htm> visited on 20/05/2015

The PTA also lays strategy for attainment of its objectives which include but not limited to; reduction and elimination of trade barriers on selected goods traded within the area, cooperation in customs through simplification and harmonization of customs procedure and regulations, introduction of rules of origin to determine which goods will receive preferential treatment, granting of transit rights to all transporters when coming from or entering member states or third countries, clearing and payments arrangements to promote trade in goods and services within the sub-region, simplification and harmonization of trade documents and procedures in the area and interventions to assist the least industrialized member states.<sup>81</sup>

### **2.3. Regulation of Trade Agreements**

#### **2.3.1. General Agreement on Tariffs and Trade (GATT)**

The International Conference on Trade and Employment was held at Havana in 1946 where a proposal for the establishment of International Trade Organization (ITO) was made with the general objective of augmenting and maintaining world trade and employment. The ITO was designed as a sort of international trade constitution; however it was not translated into practice due to various difficulties and lack of common agreement. Relaxation of trade restrictions being one of the issues of the Havana Charter led to the incorporation of General Agreement on Tariffs and Trade (GATT) concerned only with tariffs and trade restrictions related to international matters, with the objectives of increasing world production by ensuring full employment in the participating nations, developing and utilization of world resources and raising standards of living of the world community as a whole. The GATT rules were adopted based on the principles that

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<sup>81</sup> Ibid.

trade should be conducted in a non-discriminatory way, the use of quantitative restrictions should be condemned and disagreements should be resolved through consultations.<sup>82</sup>

GATT was signed in 1947 and came into operation in 1948 its original intention was to create a third institution to handle the trade side of international economic cooperation, joining the two “Bretton Woods” Institutions comprising of the World Bank and the International Monetary Fund. Its creation also came as a response to the post war period where restrictive and discriminatory trade blocs of the 1930’s which had exacerbated the economic slump and contributed to the Second World War.<sup>83</sup> GATT has been enormously successful in reducing tariff and other trade barriers among an ever-increasing number of countries until it was replaced by the World Trade Organization in 1995.<sup>84</sup>

GATT has been successful through fostering dramatic increases in worldwide trade; this is through its founding principles of reciprocity and nondiscrimination. Reciprocity refers to the practice that occurs in GATT negotiating rounds whereby one country offers to reduce a barrier to trade and a second country reciprocates by offering to reduce one of its own trade barriers. Nondiscrimination on the other hand refers to offering of the same tariff concession to all GATT members and not to a particular country i.e. when one country has offered tariff concessions to another GATT member it has to offer the same to tariff reduction to all GATT members. Thus nondiscrimination extends

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<sup>82</sup> Accessed at <http://www.yourarticlelibrary.com> on 22<sup>nd</sup> June 2015

<sup>83</sup> World Trade Report, “ Historical Background and Current Trends” 2011

<sup>84</sup> M.A. Crowley, “An Introduction to the WTO and GATT” 4Q/2003 Economic Perspectives accessed at <https://www.chicagofed.org> on 19<sup>th</sup> June 2015.

the benefits of a reciprocal tariff reduction beyond the two parties that initially negotiated it to all GATT members.<sup>85</sup>

GATT through its practice of reciprocal tariff reductions provided the necessary mechanism for countries to commit mechanism to commit to free trade. This is where countries which have reduced their import tariffs would experience a net gain since their trading partners would simultaneously reduce their import tariffs in all countries, the relocation of labor and capital away from protected import competing firms and towards export sectors thus generate real efficiency gains.<sup>86</sup>

#### 2.3.1.1. **Overview of the GATT Treaty**

##### 2.3.1.1.1. **Principles and Objectives of the Treaty**

The GATT Treaty is guided by its preamble which provides that; contracting parties through recognizing of their relations in the field of trade and economic endeavor should be conducted with a view of raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.

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<sup>85</sup> ibid

<sup>86</sup> ibid

#### 2.3.1.1.2. **Most Favored-Nation Treatment**

The Treaty provides for Most Favored-Nation Treatment this is with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports and with respect to the method of levying such duties and charges and with respect to all rules and formalities in connection with importation and exportation. Any advantage, favor privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product origination in or destined for the territories of all other contracting parties.<sup>87</sup>

#### 2.3.1.1.3. **Concessions**

The Treaty provides for a schedule for concessions under Article II where each contracting party shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the Treaty. The Article further provides that no contracting party shall alter its method of determining dutiable value or converting currencies so as to impair the value of any of the concessions provided for in the appropriate schedule. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate schedule, it shall bring the matter directly to the attention of the other contracting party.

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<sup>87</sup> Article 1 of the GATT Treaty

#### 2.3.1.1.4. **National Treatment on Internal Taxation Regulation**

Article III of the Treaty provides for National Treatment on Internal Taxation Regulation, where contracting parties recognize that internal taxes and other internal charges, laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of products and internal quantitative regulations requiring the mixture processing or use of products in specified amounts or proportions should not be applied to imported or domestic products so as to afford protection to domestic production. Hence the product of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly to like domestic products.

The Article further provides that the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin apart from internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

In *Japan-Taxes on Alcoholic Beverages II*<sup>88</sup> the appellate body reported that the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically the purpose of Article III is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production. The article obliges members of the WTO to provide equality and competitive conditions for

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<sup>88</sup> WT/DS8/AB/R WT/DS11/AB/R adopted 11<sup>th</sup> November 1996



imported products in relation to domestic products. The issues therefore to be examined in this case is an analysis of whether the imported and domestic products are directly competitive or substitutable products, whether they are not similarly taxed and whether the dissimilar taxation affords protection to domestic production. The appellate body confirmed the GATT practice that like products need to be construed narrowly and on a case by case basis. This was also the case in *Canada-Periodicals*<sup>89</sup> where it was held that there were two distinct questions that needed to be examined. Whether imported and domestic products are like products and whether imported products were taxed in excess of the domestic products.

Further in the *Asbestos case*<sup>90</sup> the appellate body confirmed that the general principle contained in Article III that there must be consonance between the objectives pursued by the Article. The court held that the determination of likeness under Article III is fundamentally a determination about the nature and extent of a competitive relationship between and among products. The Body stated that Article III plays a critical role in the delineation of the scope of the national treatment obligation as it confirms that the overall purpose of this legal obligation is to constrain protectionism in the use of national taxes and regulations.<sup>91</sup>

#### 2.3.1.1.5. **Freedom of Transit**

Article V provides for freedom of transit where goods including baggage and also vessels and other means of transport shall be deemed to be in transit across the territory of a contracting party when the passage across such territory with or without trans-shipment, warehousing, breaking bulk

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<sup>89</sup> WTO/DS31 21<sup>st</sup> October 1998

<sup>90</sup> European Union-Measures Affecting Asbestos and Asbestos Containing Products WT/DS135/AB/R, 12 March 2001

<sup>91</sup> Supra Note 8 at pg. 487.

or change in the mode of transport is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. The Article further provides that there shall be freedom of transit through the territory of each contracting party via the routes most convenient for international transit for traffic in transit to or from the territory of other contracting parties.

#### 2.3.1.1.6. **Marks of Origin**

Each contracting party shall accord to the products of the territories of other contracting parties' treatment with regard to marking requirements no less favorable than the treatment accorded to like products of any third country. Contracting parties should permit required marks of origin to be affixed at the time of importation whenever it is administratively practicable to do so. The laws and regulation on marks of origin of a contracting party shall be to permit compliance without seriously damaging the products or materially reducing their value or to increase their costs. No special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.<sup>92</sup>

The Treaty under Article IX further provides that contracting parties shall co-operate with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation and that each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other

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<sup>92</sup> Article IX of the GATT Treaty

contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

#### 2.3.1.1.7. **General Elimination of Quantitative Restrictions**

Trade restrictions should be in the form of duties, taxes and other charges and that no prohibitions or restrictions other than duties, taxes or other charges whether effective through quotas, import and export licenses and other measures, ultimately requiring tariffication of all quantitative restrictions shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.<sup>93</sup>

Any contracting party applying restriction on the importation of any product shall give public notice to the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. In determining the proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.<sup>94</sup>

Article XIII further provides for nondiscriminatory administration of quantitative restrictions in that no prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product

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<sup>93</sup> Article XI of the GATT Treaty

<sup>94</sup> *ibid*

of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted. In the case in which import licenses is issued in connection with import restrictions, the contracting party applying for the restriction shall provide upon the request of any contracting party having an interest in the trade in the product concerned all relevant information concerning the administration of the restrictions and import license granted. In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. With regards to quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value to the various supplying countries and shall give public notice thereof.<sup>95</sup>

There are exceptions with regard to the rule of Non-discrimination; this is through a contracting party temporarily deviating from the provisions of the GATT Treaty in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.<sup>96</sup> A party shall not be precluded by the Treaty from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviating from the provisions of the Treaty. Also a group of territories having a common quota in the International Monetary Fund shall not be precluded from applying against imports from other countries but not

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<sup>95</sup> Article XIII of the GATT Treaty

<sup>96</sup> Article XIV of the GATT Treaty

among themselves provisions of the Article XII and Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.<sup>97</sup>

#### 2.3.1.1.8. **Subsidies**

Any contracting party wishing to grant or maintain subsidy including any form of income or price support, which operates directly or indirectly to increase exports of any product from or to reduce imports of any product into its territory shall notify the contracting parties in writing of the extent and nature of the subsidization of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. When it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall upon request discuss with the other contracting party granting the subsidy shall upon request, discuss with the other contracting party or parties concerned or with the contracting parties the possibility of limiting the subsidization.<sup>98</sup>

Contracting parties should therefore seek to avoid the use of subsidies on the export of primary products. If however a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product account being taken of the shares of the contracting parties in

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<sup>97</sup> *ibid*

<sup>98</sup> Article XVI of the GATT Treaty

such trade in the product during a previous representative period and any special factors which may have affected or may be affecting such trade in the product.<sup>99</sup>

#### 2.3.1.1.9. **Exemptions**

The Treaty provides for exemption measures which a contracting party may take with regards to necessary to protect public morals; protection to human, animal or plant life or health; measures relating to importation or exportation of gold or silver, measures necessary to secure compliance with laws or regulation which are not inconsistent with the provisions of this agreement including those relating to customs enforcement, enforcement of monopolies, protection of patents, trademarks and copyrights and the prevention of deceptive practices; measures relating to the products of prison labor; measures imposed for the protection of national treasures of artistic, historic or archaeological value; measures relating the conversation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; measures undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved; measures involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan and measures essential to the acquisition or distribution of products in a general or local short supply.<sup>100</sup>

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<sup>99</sup> *ibid*

<sup>100</sup> Article XX of the GATT Treaty

In *United States-Standards for Reformulated and Conventional Gasoline*<sup>101</sup> the case concerned a US measure designed to limit pollution from the combustion of gasoline. Acceptable levels of pollution were calculated by reference to 1990 levels, referred as baselines which could be determined using two methods: one permitting refiners to establish individual baselines and the other was a statutory baseline based on average US levels. Foreign refineries were not able to use the statutory baseline which was claimed to be discriminatory in violation of the national treatment obligation. The appellate body determined that the heads of exceptions in Article XX concern the design or character of the measure in question whereas the chapeau is concerned with the application of that measure hence the provisions of the chapeau cannot logically refer to the same standards by which a violation of a substantive rule has been determined to have occurred.<sup>102</sup>

In another case involving *United States-Import Prohibition of Certain Shrimp and Shrimp Products*<sup>103</sup> the US in an attempt to reduce the death of sea turtles associated with shrimp harvest imposed an import ban on any shrimp harvested using fishing technology not in accordance with specific requirements set out in a US Law and that could adversely affect certain species of sea turtles listed as endangered under US legislation. The Appellate Body and the Panel found that the US Law in question despite falling within Article XX constituted arbitrary and unjustifiable discrimination and did not therefore satisfy the chapeau of Article XX.<sup>104</sup>

The Treaty further provides for security exemptions where a contracting party shall not be required to furnish any information of which it considers contrary to its essential security interests or to

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<sup>101</sup> WT/DS2/AB/R, 29<sup>th</sup> April 1996 World Trade Organization Report by Appellate Body

<sup>102</sup> Supra Note 8 at pg. 489-490

<sup>103</sup> WT/DS58/AB/R, 12<sup>th</sup> October 1998, WTO Appellate Body Report

<sup>104</sup> Supra Note 8.

prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests relating to fissionable materials or the materials from which they are derived; relating to the traffic in arms, ammunitions and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; action taken in time of war or other emergency in international relations and to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.<sup>105</sup>

#### **2.3.1.1.10. Territorial Application, Frontier Traffic, Customs Unions and Free Trade Areas**

The Treaty provides for territorial application, frontier traffic, customs unions and free trade areas, provisions of which applies to the metropolitan customs territories of the contracting parties and to any other customs territories and thus treated as a contracting party. The Treaty defines a customs territory to mean a territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories and it shall not be construed to prevent advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic and advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War. The purpose of a customs union or of a free trade area therefore to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties.<sup>106</sup>

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<sup>105</sup> Article XXI of the GATT Treaty

<sup>106</sup> Article XXIV of the GATT Treaty



In *Turkey-Restrictions on Imports of Textile and Clothing Products*<sup>107</sup> the Appellate Body stated that “...we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions, however in a case involving the formation of a customs union, this defense is only available when two conditions are fulfilled. First the party claiming the benefits of this defense must demonstrate that the measure at issue is introduced upon the formation of accustoms union that fully meets the requirements of sub-paragraph 8(a) and 5(a) of Article XXIV and that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again both these conditions must be met to have the benefit of the defense under Article XXIV.”<sup>108</sup>

A customs unions is understood to mean the substitution of a single customs territory for two or more customs territories so that duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories and also that same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union. For the formation of a customs union or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement.<sup>109</sup>

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<sup>107</sup> WT/DS34/AB/R, 22<sup>nd</sup> October 1999, WTO, AB Report

<sup>108</sup> Supra Note 8 at pg. 492.

<sup>109</sup> *ibid*

A free trade area means a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories. With regards to the formation of a free trade area or an interim agreement leading to the formation of a free trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area or the interim agreement as the case may be.<sup>110</sup>

#### 2.3.1.1.11. **Tariff Negotiations**

The Treaty provides for tariff negotiations by contracting parties, parties thus negotiate on a reciprocal and mutually advantageous basis directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities and conducted with due regard to the objectives of the Treaty and the varying needs of individual contracting parties are of great importance to the expansion of international trade. Negotiations may be carried out on a selective product by product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. The negotiations may be directed towards the

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<sup>110</sup> *ibid*

reduction of duties, binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels.<sup>111</sup>

Negotiations therefore shall be conducted on a basis which affords adequate opportunity to take into account: the needs of individual contracting parties and individual industries; the needs of less developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes and all other relevant circumstances including the fiscal development, strategic and other needs of the contracting parties concerned.<sup>112</sup>

The negotiations of tariff preferences are also to be premised on the development standards of parties such as the developing countries. In *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*<sup>113</sup> India brought a complaint against the European Communities (EC) for granting Tariff Preference to certain developing countries based on an EC Regulation which contained various tariff preference schemes including one arrangement that foresaw preferential tariffs for states engaged in drug combat. This arrangement only applied to 12 predefined developing countries where India was not one of them. India challenged the consistency of this arrangement with the GATT provisions under Article I, whereas the EC argued that the arrangements were consistent with the GATT provisions. The Appellate Body addressed the relevance of the enabling clause within the WTO system which encourages members to deviate

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<sup>111</sup>Article XXVIII of the GATT Treaty

<sup>112</sup> ibid

<sup>113</sup> WT/DS246/AB/R, 7<sup>th</sup> April 2004 WTO, AB Reports

from GATT Article I in the pursuit of differential and more favorable treatment for developing countries.<sup>114</sup>

#### 2.3.1.2. **Did GATT achieve its Objectives?**

GATT success over 47 years in which it was in operation in promoting and securing the liberalization of world trade is incontestable. GATT was able to achieve this through continual reduction in tariff which helped spur high rates of world trade growth during the 1950's and 1960's at the rate of approximately on average 8% a year. The momentum of trade liberalization helped ensure trade growth consistently out-paced production growth.<sup>115</sup>

During the Uruguay Round the rush of new members demonstrated that the multilateral trading system was recognized as an anchor for development and an instrument of economic and trade reform.<sup>116</sup>

However with the successes, GATT experienced some downfalls which the Tokyo Round attempted to solve the problems but its achievements were limited. GATT's success in reduction of tariffs to such low levels combined with series of economic recessions drove governments to devise forms of protection for sectors facing increasing foreign competition which led to high rates of unemployment and constant factory closures led the Northern governments to seek bilateral market sharing arrangements with competitors and to embark on a subsidies race to maintain their holds. Both the changes undermined GATT's credibility and effectiveness.<sup>117</sup>

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<sup>114</sup> Supra Note 8 at pg. 494

<sup>115</sup> Accessed at <http://www.wto.org> on 3<sup>rd</sup> July 2015

<sup>116</sup> *ibid*

<sup>117</sup> *ibid*

By early 1980's GATT was clearly no longer as relevant to the realities of world trade as it had been in the 1940s-1960s this is due to the complexity of world trade, globalization of the world economy, trade in services was not covered by GATT rules and international investment expanded. GATT institutional structure and its dispute settlement was causing concern, this and other factors convinced GATT members that a new effort to reinforce and extend the multilateral system ought to be attempted, and this led to the Uruguay Round, the Marrakesh Declaration and consequently the formation of the World Trade Organization.<sup>118</sup>

In a nutshell, GATT did achieved its objectives, however this was for a limited period of time which lasted in the 1940's-1960's upon which it failed to adequately regulate trade due to changes in trade systems caused by various factors which were not covered in the Agreement. This was caused by the fact that the drafters of the Agreement did not foresee the future development of trade and how to tackle the same, hence towards the 1980's the Agreement was outdated and did not adequately addressed trade matters thus causing confusion and economic recession in most of the world economies which entirely rely on trade.

### **2.3.2. WORLD TRADE ORGANIZATION (WTO)**

The World Trade Organization is not a product of just one idea, however, or even one school of thought; it instead represents the confluence of and sometimes the conflict between three distinct areas of theory and practice. Law, economics and politics have each inspired and constrained the

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<sup>118</sup> ibid

capacity of countries to work together for the creation and maintenance of a rules-based regime in which power work together to reduce barriers to trade.<sup>119</sup>

The WTO came into being in 1995, through an agreement between members being an outcome of the Uruguay Round negotiations which included major revision to the GATT which is currently the WTO's principle rule-book for trade in goods. The Round also created new rules for dealing with trade in services, relevant aspects of intellectual property, dispute settlement and trade policy reviews these new rules were not covered under GATT. WTO it is arguably one of the youngest of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade which was established in the wake of the Second World War contents of which have been discussed.<sup>120</sup>

WTO is the most important international organization that governs world trade; it has over 145 members and 31 observer governments and members' represents over 95% of the world trade. The agreements which are administered by the WTO cover a broad range of goods and services trade and apply virtually all government practices that directly relate to trade for example tariffs, subsidies, government procurement and trade related intellectual property rights. The coverage of the agreement is growing at a steady rate through negotiations.<sup>121</sup>

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<sup>119</sup> C. Vangrasstek, "The History and Future of World Trade Organization", WTO Publications, 2013, accessed at <http://www.wto.org> on 22<sup>nd</sup> June 2015

<sup>120</sup> World Trade Organization Publications (2014), "World Trade Organization in Brief", accessed at <http://www.wto.org> on 4<sup>th</sup> July 2015

<sup>121</sup> L. Sek, "The World Trade Organization; Background and Issues", CRS Report for Congress, 2003.

The preamble of the Agreement establishing the WTO provides that; relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand and expanding the production of and trade in goods and services while allowing the optimal use of the world's resources in accordance with the objective of sustainable development seeking both to preserve and protect the environment. It recognizes the need for positive efforts designed to ensure developing countries and especially the least developed among them secure a share in the growth in international trade commensurate with the needs of their economic development. Contributing to those objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade regimes. Resolved to develop an integrated, more viable and durable multilateral trading system which encompass the GATT, the results of past trade liberalization efforts and all of the results of the Uruguay Round of Multilateral Trade Negotiations. Lastly the parties are determined to preserve the basic principles and to further the objectives underlying this multilateral trading system.

Since 2001, the WTO members have been engaging in a broad round of multilateral trade negotiations known as the Doha Round which is the latest round of trade negotiations amongst members of WTO. The round is based on the principle of 'single undertaking' meaning that nothing is agreed until everything is agreed. The principle objective of the Doha Round is to place development at the head of the world's trade system, through strengthening developing countries capacity to benefit from gains in international trade.<sup>122</sup> The main aim of Doha Round is to achieve

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<sup>122</sup> "The European Union and the World Trade Organization", accessed at [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_6.2.2](http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.2.2), on 4th July 2015

major reforms of the international trading system through introduction of lower trade barriers and revised trade rules. The Round is also known as the Doha Development Agenda since its fundamental objective is to improve the trading prospects of developing countries.<sup>123</sup> The Doha Development Agenda is based on three pillars being market access for agriculture products for industrial goods and for services, rules on trade facilitation and anti-dumping and lastly development.<sup>124</sup>

#### 2.3.2.1. **Functions of WTO**

Article III of the WTO Agreement provides for the functions of the WTO which include facilitating the implementation, administration and operation and furtherance of the objectives of the WTO Agreement and of the Multilateral Trade Agreements; Providing forum for negotiations amongst members concerning their multilateral trade relations and for furtherance of negotiations amongst members concerning their multilateral trade relations and a framework for implementation of the results of such negotiations as may be decided by the Ministerial Conference; Administering the understanding on rules and procedures governing settlement of disputes to this agreement and administration of the trade policy review mechanism and cooperate as appropriate with the International Monetary Fund and with the International Bank for reconstruction and development.

The functions of WTO can be further described as it provides a substantive code of conduct directed at the reduction of tariff and other barriers to trade and the elimination of discrimination in international trade relations. Secondly it provides the institutional framework for the

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<sup>123</sup> Accessed at <http://www.wto.org> on 6<sup>th</sup> July 2015

<sup>124</sup> “The European Union and the World Trade Organization”, accessed at [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_6.2.2](http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.2.2), on 4<sup>th</sup> July 2015



administration of the substantive code. It also provides a forum for dispute settlement in international trade matters and conducts surveillance of national trade policies and practices in order to prevent disputes and contribute to increased transparency and efficiency, it also acts as a medium for the conduct of international trade relations amongst member states both bilaterally and multilaterally.<sup>125</sup>

The object and purpose of GATT 1994 and the WTO Agreement is the promotion of economic development through trade and a desire to deter states from resorting to environmental reasons for protectionist measures.<sup>126</sup> This was the decision of the Appellate Body in *Brazil-Measures Affecting Imports of Retreaded Tires*.<sup>127</sup>

#### 2.3.2.2. **Structure of the WTO**

The structure of the WTO consists of Ministerial Conference which is composed of representatives of all members, which shall meet at least once every two years. The Ministerial Conference carries out the functions of the WTO and takes necessary action to effect the functions. It also consists of the General Council which is composed of representatives of all the members, it meets as and when it is appropriate, its functions are assigned by the Agreement. The Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body and those of Trade Policy Review Body.<sup>128</sup>

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<sup>125</sup> A. Qureshi & A. Ziegler, "International Economic Law", Sweet & Maxwell, 3<sup>rd</sup> Edition, London, 2011, pg. 321-322.

<sup>126</sup> Supra Note 8 at pg. 490

<sup>127</sup> Appellate Body December 2007.

<sup>128</sup> Article IV of the WTO Agreement.

The WTO also consist of Council for Trade in Goods, Council for Trade in Services and a Council for Trade Related Aspects of Intellectual Property Rights. The Council for Trade in Goods oversees functioning of the Multilateral Trade Agreements, the Council for Trade in Services oversees functioning of the General Agreement on Trade in Services (GATS) the Council for TRIPS oversees functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Councils carry out functions assigned by their respective agreements and by the General Council and has power to establish rules of procedure subject to the approval of the General Council.<sup>129</sup>

The WTO also consists of the Secretariat headed by Director-General who is appointed by the Ministerial Conference; the Director-General appoints the staff of the Secretariat and determines their duties and conditions of service in accordance with the regulations adopted by the Ministerial Conference. The responsibilities of the Director-General and of the staff of the Secretariat are exclusively international in character.<sup>130</sup>

### **2.3.3. Achievements of WTO**

the WTO has made considerable achievements, these achievements include freeing of global trade by lowering tariffs and reducing nontariff barriers thus ushering in unprecedented prosperity and growth among the member states and in particular the developing countries who are members of WTO. However this impact on trade is basically placed on what members can sell to the world but not what they can buy from it thus it favors only exports and not imports.<sup>131</sup> Reduction in trade

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<sup>129</sup> Ibid.

<sup>130</sup> Article IV of the WTO Agreement.

<sup>131</sup> C. Balding, "Joining the World Trade Organization: What is the Impact?" Review of International Economics Vol. 18(1), 2010, accessed at [http:// www.pkusz.edu](http://www.pkusz.edu). On 11<sup>th</sup> July 2015.

barriers is the hallmark of the WTO and its predecessor GATT.<sup>132</sup> WTO membership on the other hand has fostered regional trade integration among developing countries at the expense of more distant trade.<sup>133</sup>

The other achievement of the WTO is the consolidation of its dispute settlement body; the body has the power to rule on trade dispute and to enforce its decisions. The body is non-bias and deals with case to case basis regardless of member's political weight or economic clout. The dispute mechanism reduces the unilateral defense mechanism that countries had previously tended to adopt, many of which provoked retaliatory reactions by the targeted countries and sometimes led to fully fledged trade wars. The dispute settlement mechanism guarantees that stronger members do not prevail over weaker ones and provides clear rules on retaliatory measures.<sup>134</sup>

In *Kodak-Fuji Case*,<sup>135</sup> it illustrates the success of the dispute settlement mechanism in inducing the state parties and particularly the US to move away from unilateral to a multilateral approach to resolution of trade controversies. If the US had acted on its own to impose sanctions against Japan, as its domestic law arguably authorized, it would have severely undermined the Uruguay Round bargain concerning dispute settlement and Japan could have brought a proceeding against the US asserting violation of Articles that might have been violated by the sanctions.<sup>136</sup>

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<sup>132</sup> T. Eicher and C. Henn, "In search of WTO trade effects: Preferential Trade Agreements Promote Trade strongly but unevenly", University of Washington, Journal of International Economics, Vol. 83, Washington, 2011.

<sup>133</sup> Ibid.

<sup>134</sup> "The European Union and the World Trade Organization", accessed at [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_6.2.2](http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.2.2). On 4th July 2015.

<sup>135</sup> Japan-Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R 31<sup>st</sup> March 1998.

<sup>136</sup> A. Lowenfeld, "International Economic Law", Oxford University Press, New York, 2<sup>nd</sup> Edition, 2008, pg. 198.

#### 2.3.4. Challenges Facing WTO

There are quite a number of challenges that face WTO as the broadening of the scope of its rules and rise in membership, however it is arguably the most successful international organization dealing with economic relations among nations. The challenges therefore include; work overload, dissatisfaction by member's particularly developing ones, impact of WTO rules on domestic economies and social conditions, claims of exceeding of authority by the dispute settlement panels and appellate body, constant pressure from non-governmental organizations and strongly held differences in viewpoints between developed and most developing countries.<sup>137</sup>

The overload of work at the WTO basically emanates from the periodic rounds of multilateral negotiations and handling of day to day matters arising. In comparison with GATT tasks were much simpler since there were fewer members involved in the rounds of negotiations and in settling ongoing trade disputes than today.<sup>138</sup>

Dissatisfaction of the Developing Countries with the WTO system poses a challenge to WTO since most developing countries find it most difficult to handle increased and more complex work load associated with the extension of WTO rules into new economic areas the Rounds exceeded the economic and social costs involved in implementing the rules. The fact that if a number of developing countries conclude that the WTO system is not providing net benefits, the consequence therefore could be damaging to the achievement of the basic goals of WTO.<sup>139</sup> The move to regionalism for purposes of achieving trading objectives by developing countries is imminent; a

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<sup>137</sup> Robert E. "Key Challenges Facing the World Trade Organization", University of Wisconsin-Madison, accessed at <http://www.kanjiuwong.com> on 10<sup>th</sup> July 2015.

<sup>138</sup> *ibid*

<sup>139</sup> *ibid*

case in point is the Tripartite Trade Agreement between COMESA SADC and EAC which is being discussed in detail in the next chapter.

Application and implementation of domestic economic and social consequence of the WTO Rules creates a major challenge. The WTO rules and procedure that significantly affect economic and social matters of concern to various domestic interest groups who did not fully recognize their consequences and were not necessarily consulted in the international decision making process. As per the developing countries, the rule making in the WTO unduly favors the economic interests of large corporations and foreign direct investors at the cost of the weakening traditional equity oriented domestic economic and social programs of their governments.<sup>140</sup>

Tensions between WTO and NGOs have increased as a consequence of the very different agenda being pursued by the WTO and the NGOs. Most NGOs on the other hand do not agree with the general objectives of WTO, since most of them are concerned with economic and social conditions faced by particular groups within both developed and developing countries. Thus the reduction of tariffs and barriers to trade may contribute to the economy in the national level but ends up worsening economic and social conditions of the poorest and most disadvantaged domestic groups. Hence as per the view of the NGOs the WTO ought to ensure that trade liberalization does not harm these marginalized groups and should support restrictive trade practices in order to help these groups. The other concern by NGOs is lack of transparency in the WTO decision making process and its insufficient responsiveness to the views of important sectors of civil society. The NGOs

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<sup>140</sup> *ibid*

thus demand for meetings of WTO and its dispute settlement panels and Appellate bodies be open to the public to enhance transparency.<sup>141</sup>

#### **2.3.4. Salient Differences between WTO and GATT**

There are a number of salient differences between GATT and WTO, it is noteworthy that WTO is an improvement of GATT since it was created with the main purpose of being a stronger and having more frameworks and to supervise and liberalize international trade; however WTO still uses GATT rules.

The major differences between the two include; difference involving institutional structure where WTO is a membership organization while GATT was a trade accord serviced by a professional secretariat. WTO provides greater legal coherence amongst its wide ranging rights and obligations, including a unified dispute procedure and establishes a permanent forum for consultation and negotiation. Politicians are also given a chance to provide useful direction to the work of the WTO unlike in GATT where meetings of the world's trade ministers were few and far between and also arranged on an ad hoc basis.<sup>142</sup>

The other difference lies in the membership of the organization where in WTO more countries have joined or are seeking membership in the organization than the one that signed onto the GATT

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<sup>141</sup> Ibid.

<sup>142</sup> J. Scott, "Challenges Facing the World Trade Organization", Institute of International Economics/ accessed at <http://www. iie.com>. on 8<sup>th</sup> July 2015.

and also that more countries now participate than during the GATT regime.<sup>143</sup> Currently there are over 161 members in the WTO.<sup>144</sup>

Another difference is with regards to single undertaking of the WTO agreement where WTO members must accept all of the obligations of GATT and its corollary agreements with a few exceptions negotiated in the Tokyo and Uruguay Rounds. The single undertaking commits members to automatically make trade obligations than previously required under the GATT regime.<sup>145</sup>

With the Dispute Settlement Mechanism the WTO has consolidated various dispute provisions while GATT accords it into a unified dispute mechanism and therefore precludes forum shopping and overlapping cases that occurred in GATT. The WTO dispute settlement mechanism also remedies other basic flaws of GATT rules and its procedure operates under strict time limits and countries cannot veto judgments against them.<sup>146</sup>

In a nutshell, it is noteworthy that WTO improves over GATT in terms of the content of rights and obligations conferred on member countries, number of countries participating and the ability to promote trade negotiations and to determine trade disputes amongst its members.<sup>147</sup>

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<sup>143</sup> *ibid*

<sup>144</sup> This statistics is as at 26<sup>th</sup> April 2015, information accessed at <http://www.wto.org> on 8<sup>th</sup> July 2015

<sup>145</sup> *Supra* Note 120.

<sup>146</sup> *ibid*

<sup>147</sup> *ibid*

## 2.4. Conclusion

With the various forms of bilateral and regional trade, there is need for proper regulation in order to ensure that trade is liberalized and promoted so as to foster growth between member states and also to build positive relations which at the end contribute to stability and prosperity among nations.

The chapter has delved in depth the major areas pertaining to international trade which include customs unions, free trade areas and preferential trade areas which work hand in hand in ensuring that trade amongst member states is promoted through movement of goods, services and of persons.

The chapter has also looked at how trade is being regulated internationally from the days of GATT to the World Trade Organization, this has been achieved through examining the various laws in particular the GATT Rules and the WTO Agreement focus has also been made on the Rounds being the Uruguay Round and the Doha Round which have contributed enormously towards the development of International Trade. The chapter has also examined the challenges and achievements of both GATT and WTO and outlaid a comparative of the two.

The regulation of trade from GATT to WTO is significant and has improved trade tenfold, however there are a lot of improvements to be made to ensure that international trade achieves its objectives to the fullest by facilitating trade among member states through articulating individual members and not to discriminate between the developed and the developing countries which form the membership of WTO.



## **CHAPTER III**

### **TRIPARTITE TRADE AGREEMENT BETWEEN COMESA, EAC AND SADC**

#### **3.1. INTRODUCTION**

With the proposal to form a Tripartite Region encompassing the merger of EAC, COMESA and SADC the merging will be a game changer towards the goals and objectives of the African Union of integration of trade bodies to promotion trade and economic development of African countries.

This chapter will therefore delve to examine the three trade bodies ascertain its strengths and challenges and further examine the legal and institutional frameworks. The chapter will then delve in detail the merger of the three bodies through examining the legal framework set in place towards the merger, also the chapter will examine the prospects, challenges of merging the trade bodies and also provide to do's and pertinent issues to be addressed in order to ensure that the merging will be successful and worth to be emulated worldwide by other trade bodies and also to set precedent.

#### **3.2. OVERVIEW OF EAC, SADC & COMESA**

##### **3.2.1. EAST AFRICAN COMMUNITY (EAC)**

###### **3.2.1.1. Background**

Initially there was a Customs Union between Kenya and Uganda in 1917 which Union was later joined by Tanganyika in 1927; thereafter the East African High Commission was formed in 1948 the Commission was operational until 1961 after which it was dissolved after which the East African Common Services Organization was established in 1961 which also was in operation until

1967 which paved way for the formation of the East African Community in 1967 it was later dissolved in 1977. However after the dissolution of the EAC, the member states negotiated a mediation agreement for the division of Assets and Liabilities which agreement was signed in 1984. Following the Mediation, the three states agreed to explore areas of future co-operation and to make concrete arrangements for such co-operation this led to the formation of the East African Co-operation in 1993 this was through the establishment of Permanent Tripartite Commission for East African Co-operation between Kenya, Uganda and Tanzania.<sup>148</sup>

Full East African Co-operation operations started on 14<sup>th</sup> March 1996 when the Secretariat of the Permanent Tripartite Commission was launched at the Headquarters of the EAC in Arusha, Tanzania. However considering the need to consolidate regional co-operation, the EAC Heads of Stated at their 2<sup>nd</sup> Summit in Arusha on 29<sup>th</sup> April 1997 directed the Permanent Tripartite Commission to start the process of upgrading the Agreement establishing Permanent Tripartite Commission for East African Co-operation into a Treaty. The Treaty-making process, which involved negotiations among the Member States as well as wide participation of the public, was successfully concluded within three years.<sup>149</sup>

The Treaty for the Establishment of the EAC was signed on 30<sup>th</sup> November 1999 in Arusha, however the treaty did not enter into force immediately but it was until 7<sup>th</sup> July 2000 following the conclusion of the process of its ratification and deposit of the instruments of Ratification with the

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<sup>148</sup> Accessed at <http://www.eac.int> on 21<sup>st</sup> May 2015

<sup>149</sup> *ibid*

Secretary General by all the three partner states. Upon entry into force of the Treaty, the East African Community came into being.<sup>150</sup>

Upon the establishment of the EAC, institutions were formed to cement the integration, these institutions include, EAC secretariat, the East African Court of Justice and the East African Legislative Assembly which was put in place to increase good governance in the region. In 2005 the Customs Union was realized and two years down the line two other member states joined the EAC, these states include; Burundi and Rwanda.<sup>151</sup> In 2008, a tripartite summit between EAC-COMESA-SADC was held in Kampala to discuss single Free Trade Area and merger of the three regional blocs, this was followed by a second summit held in Johannesburg, South Africa on June 2011 where parties agreed to start negotiations for a Grand Free Trade Area among the three bloc's. In 2010 a common market allowing free movement of goods, services, labor, capital and people was introduced. The EAC Anthem was adopted in 2010 by the EAC Summit Heads of State. On November 2013 a Protocol for the establishment of the EAC Monetary Union was signed.<sup>152</sup>

The relatively faster pace at which the EAC is progressing can be attributed to a number of factors which include but not limited to its size, the fact that the founding members enjoy relatively stable and democratic political structures, the strong bond that existed between the member states from colonial times and the days of the old East African Community.<sup>153</sup>

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<sup>150</sup> Ibid.

<sup>151</sup> Accessed at [www.fes-tanzania.org](http://www.fes-tanzania.org) on 21/05/2015.

<sup>152</sup> Accessed at <http://www.eac.int> on 21<sup>st</sup> May 2015.

<sup>153</sup> R. Oppong, "Legal Aspects of Economic Integration in Africa", Cambridge University Press, New York, 2011, pg. 25.

#### 3.2.1.2. **Objectives**

Article 5 of the East African Community Treaty provides for the objectives of the Community which include; developing policies and programs aimed at widening and deepening cooperation among the Partners States in a political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs for their mutual benefit. In pursuance of the said objectives, the parties undertake to establish among themselves and in accordance with the provisions of the Treaty, a customs Union, a Common Market, a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructure, cultural, social, political and other relations of the Partner States for the attainment of accelerated, harmonious and balanced development and sustainable expansion of economic activities, the benefits of which shall be equally shared.

Currently the Community has achieved some of its objectives which include; the formation of a Customs Union established under Article 75 of the EAC Treaty and which became operational in 2005 and took effect in 2010, formation of a Common Market Protocol in 2010 under the provisions of Article 76 of the EAC Treaty, and subsequently signing of a Protocol for the establishment of a Monetary Union in 2013.<sup>154</sup>

#### 3.2.1.3. **Principles**

The fundamental principles of the Community governing the achievement of the objectives of the community by the Partner States include; mutual trust, political will and sovereign equality; peaceful co-existence and good neighborliness; peaceful settlement of disputes; good governance

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<sup>154</sup> Accessed at <http://www.eac.int> on 21<sup>st</sup> May 2015

including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, equitable distribution of benefits and co-operation for mutual benefit.<sup>155</sup>

The operational principles of the Community are also set out under Article 7 of the EAC Treaty which include; people-centered and market driven co-operation, establishment of an export oriented economy which there shall be free movement of goods, persons labor, services, capital, information and technology, principle of subsidiary with emphasis on multilevel participation and the involvement of a wide range of stake-holders in the process of integration, principle of variable geometry allowing for progression in co-operation among groups within the progression in co-operation among groups within the community for wider integration schemes in various fields and at different speeds, principle of equitable distribution of benefits accruing or to be derived from the operations of the community and measures to address economic imbalances that may arise from such operations; principle of complementarity and the principle of asymmetry. The partner States also undertake to abide by the principles of good governance including adherence to the principles of democracy, rule of law, social justice and maintenance of universally accepted standards of human rights.

#### 3.2.1.4. **Organs and Institutions**

The Organs and Institutions of the Community are set out under Article 9 of the EAC Treaty, these Organs plays a pivotal role in ensuring that the objects of the Community are met. The Organs and

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<sup>155</sup> Article 6 of the EAC Treaty 1999.

Institutions of the Community shall perform the functions and act within the limits of the powers conferred upon them by or under the EAC Treaty. The main organs are;

#### 3.2.1.4.1. **The Summit**

The Summit which consist of the Head of States or Government of the Partner States and its functions as per Article 10 which include giving general directions and impetus as to the development and achievement of the objectives of the community, consider annual progress reports, review state of peace, security and good governance within the Community and the progress achieved towards the establishment of a political federation of the Partner States, appointment of judges to the East African Court of Justice, Admission of new members and assent to Bills.<sup>156</sup>

#### 3.2.1.4.2. **The Council**

The Council consists of the Ministers responsible for regional co-operation of each Partner State and such other ministers of the partner stats as each partner state may determine.<sup>157</sup> The Council's functions include being the policy organ of the community, promotion, monitoring and keeping under constant review the implementation of the programs of the community and proper functioning and development of the community in accordance with the Treaty, make policy decisions, initiate and submit bills to the Assembly, make regulations, issue directives, submit annual progress reports to the Summit and implement the decisions and directives of the Summit as may be addressed to it.<sup>158</sup>

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<sup>156</sup> Article 11 of the EAC Treaty.

<sup>157</sup> Article 13 of the EAC Treaty.

<sup>158</sup> Article 14 of the EAC Treaty.

#### 3.2.1.4.3. **The Co-ordination Committee**

The Co-ordination Committee on the other hand consist of the Permanent Secretaries responsible for regional co-operation in each Partner State and such other Permanent Secretaries of the Partner States as each partner state may determine.<sup>159</sup> The functions of the Co-ordination Committee include submit from time to time reports and recommendations to the council, implement the decision of the Council as the Council may direct, receive and consider reports of the Sectoral Committees and co-ordinate their activities, request sectoral Committee to investigate any particular matter.<sup>160</sup>

#### 3.2.1.4.4. **The Sectoral Committees**

The Sectoral Committees on the other hand recommends to the Council the establishment, composition and functions of such sectoral committees as may be necessary for the achievement of the objectives of the Treaty.<sup>161</sup> Its functions are to monitor and keep under constant review the implementation of the programs of the Community with respect to its sector, submit from time to time reports and recommendations to the co-ordination committee and to be responsible in the preparation and implementation program and the setting out of priorities with respect to its sector.<sup>162</sup>

#### 3.2.1.4.5. **The East African Court of Justice**

The East African Court of Justice is established under Article 23 of the EAC Treaty it constitutes not more than six judges who are appointed by the Summit from among persons recommended by

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<sup>159</sup> Article 17 of the EAC Treaty.

<sup>160</sup> Article 18 of the EAC Treaty.

<sup>161</sup> Article 20 of the EAC Treaty.

<sup>162</sup> Article 21 of the EAC Treaty.

the Partner states and their tenure is not more than seven years. The role of the court is to ensure adherence to law in the interpretation and application of and compliance with this Treaty. Jurisdiction of the Court is premised over interpretation and application of the EAC Treaty and shall also have original, appellate, human rights and other jurisdiction as will be determined by the Council.<sup>163</sup> The court relies heavily on international law, this was as per a recent judgment of the court on the consistency of amendments to the treaty in *East African Law Society vs. AG of Kenya*.<sup>164</sup>

#### 3.2.1.4.6.      **The East African Legislative Assembly**

The East African Legislative Assembly is provided for under Article 48 of the EAC Treaty, it comprises twenty seven elected members and five ex-officio members consisting of; the minister responsible for regional cooperation from each Partner State, the Secretary General and the Counsel to the Community. The Assembly shall have committees which shall be constituted in the manner provided in the rules of procedure of the assembly. The functions of the Assembly are to liaise with the National Assemblies of the Partner States on matters relating the community, debate and approve the budget of the Community, consider annual reports on the activities of the Community, annual audit reports of the Audit Commission, discuss all matters pertaining to the community and make recommendations to the Council, establish any committee or committees for such purposes as it deems necessary and make its rules of procedure and those of its committees.<sup>165</sup>

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<sup>163</sup> Article 27 of the EAC Treaty.

<sup>164</sup> [2008] 1 East Africa. LR 95.

<sup>165</sup> Article 49 of the EAC Treaty.



The nomination of the EALA members should be done in an open and transparent manner as per the objectives of the EAC Treaty. In *Peter Anyang Nyongo vs. AG of the Republic of Kenya*<sup>166</sup> where the applicants contended the process by which Kenyan representatives to the EALA were nominated contravening Article 50 of the EAC Treaty since no elections were held to elect the representatives. The Court held that elections under Article 50 of the Treaty should involve a voting procedure. The purpose of the Article is to constitute each national assembly into an electoral comprising the peoples representatives. It was thus concluded that the Kenya's election rules infringed Article 50 of the Treaty since they did not provide that the National Assembly should elect members to the EALA but rather a list be of nominated candidates should be submitted to the House Business Committee.<sup>167</sup>

#### 3.2.1.4.7. **The Secretariat**

The Secretariat is established under Article 66 of the EAC Treaty, it is the executive organ of the Community, and it includes the office of the Secretary General, Deputy Secretary General, Counsel to the Community and such other offices as may be deemed necessary by the Counsel. The functions of the Secretariat shall be responsible for initiating, receiving and submitting recommendations to the council and forwarding of Bills to the Assembly through the Co-ordination Committee, initiation of studies and research related to, and implementation of programs for the most appropriate expeditious and efficient ways of achieving the objectives of the Community, strategic planning, management and monitoring of programs for the development of the Community, undertaking either on its own initiative or otherwise, of such investigations, collection of information or verification of matters relating to any matter affecting the community,

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<sup>166</sup> [2008] 3 KLR 397.

<sup>167</sup> Supra Note 131.

co-ordination and harmonization of the policies and strategies relating to the development of the Community through the Co-ordination Committee, submission of reports on the activities of the community to the council, general administration, finance management and mobilization of funds from development partners and custody of the Community properties.<sup>168</sup>

#### 3.2.1.5. **Challenges**

The EAC has since its inception met most of its objectives, however it has also faced some challenges which include global, political, social, economic and financial.<sup>169</sup>

Economic challenge is one of the main challenges facing the Community, it is also one of the reasons for the collapse of the Community in 1977, this was due to the perception of disproportionate sharing of economic benefits accruing from regional markets this was also compounded by the lack of a formula for ensuring equitable distribution of resources. The Treaty provides safeguard measures under Article 88 of the Treaty that a partner state may take to remedy any adverse economic effects arising out of the application of provisions on trade liberalization and co-operation.<sup>170</sup>

The other challenge facing the Community is global challenge which exists in the world of global competition this is due to the fact that the Community does not exist in isolation. Hence in order for the Community to withstand the challenges of globalization, the Community needs to unite and participate in the World Trade Organization as a block. Also for the Community to benefit from

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<sup>168</sup> Article 70 of the EAC Treaty.

<sup>169</sup> D.B. Kamala, "The Achievement and Challenges of the New East African Community Co-operation" Hull Business School, 2006, accessed at <http://www.hull.ac.uk/hubs/research/memoranda> on 22/05/15.

<sup>170</sup> Ibid.

globalization and enhance capacity to withstand forces of globalization, it has to improve supply conditions, deliberate efforts to reduce cost of doing business, ensure availability of business services and improvement of infrastructure which include the ports, road and railway network.<sup>171</sup>

Political challenges is also a factor affecting the Community's achievement of its objectives, which include establishment of a federation, the challenge then arises out of fear of loss of sovereignty in that as a federation, the nation states would cease to have meaningful powers. In order therefore for the Treaty to be properly implemented there should be successful negotiations of a number of protocols and need of political goodwill, this will help shape economic, political and social integration and eventually the establishment of a political federation.<sup>172</sup>

### **3.2.2. SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC)**

#### **3.2.2.1. Background**

The history of Southern Africa Development Community (SADC) began with the formation of Southern Africa Development Coordination Conference (SADCC) which established in 1980 in terms of the 'Lusaka Declaration: Southern Africa: Towards Economic Liberation', it was in essence, a politically motivated response and defensive mechanism by the Front Line States to the PW Botha government in South Africa's idea of a 'constellation of states in the region.'<sup>173</sup>

SADCC was formed to advance the cause of national political liberation in Southern Africa and to reduce dependence particularly on the then apartheid era in South Africa. This was through

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<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> M. Schoeman, "From SADCC to SADC and Beyond: The Politics of Economic Integration", accessed at <http://www.alternative-regionalisms.org> on 23/05/2015.

effective coordination of utilization of the specific characteristics and strengths of each country and its resources. The objectives of SADCC went beyond just dependence reduction to embrace basic development and regional integration, these objectives include reduction of dependence, forging of linkages to create genuine and equitable regional integration, mobilization of member states resources to promote the implementation of national, interstate and regional policies and concerted action to secure international cooperation within the framework of the strategy for economic liberation.<sup>174</sup>

With the existence of SADCC there was immense growth in the number of projects under SADCC Program of Action, the organization over time changed or modified its approach to cooperation and it initiated a move away from specific projects towards the coordination of sectoral plans and programs and from the development of infrastructure to measures intended for the promotion of investment and production.<sup>175</sup>

The 1992 Windhoek Treaty saw transformation of SADCC to SADC. This was after a declaration by the Heads of State of Southern Africa at Windhoek Namibia affirming their commitment to establish a development community in the region. The transformation was economically oriented with emphasis on economic liberalization, increased bloc formation and globalization than political and security considerations that underlay the earlier establishment of SADCC.<sup>176</sup>

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<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

The SADC Treaty is the founding document for the establishment of SADC signed by Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe. This is in pursuance of the principles towards a Southern African Development Community. The Treaty outlines the principles, objectives and general undertaking of the community, areas of Cooperation and relations with some other states and organizations. The Treaty also touches on resources and funds, immunities and privileges, disputes, sanctions amendments and sanctions. Currently SADC has fourteen Member States which include Angola, Burundi, Lesotho, Seychelles, Congo, Madagascar, Mauritius, Malawi, Namibia, Swaziland, South Africa, Tanzania, Zambia and Zimbabwe.<sup>177</sup>

#### 3.2.2.2. **Objectives**

SADC has various objectives which include; to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; evolve common political values, systems and institutions; promote and defend peace and security; promote self-sustaining development; achieve complementarity between national and regional strategies and programs; promote and maximize productive employment and utilization of resource and strengthen and consolidate the long standing historical, social and cultural affinities and links among people of the region.<sup>178</sup>

For the objectives to be achieved, there is need to harmonize political and social economic policies and plans of Member States; create appropriate institutions and mechanisms for the mobilization

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<sup>177</sup> Accessed at <http://www.sadc.int> on 23/05/2015.

<sup>178</sup> Article 5 of the SADC Treaty.

of requisite resources for the implementation of programs and operations of SADC and its Institutions; develop policies aimed at progressive elimination of obstacles to the free movement of capital and labor, goods and services, and the peoples of the region generally among Member States; encourage people of the region and their institutions to take initiative to develop economic, social and cultural ties across the region; promote development of human resources; improve economic management and performance through regional cooperation and promotion of coordination and harmonization of the international relations of Member States.<sup>179</sup>

### 3.2.2.3. **Organs and Institutions**

The Institutions and Organs of SADC are established under Article 9 of the SADC Treaty, the institutions are; The Summit of Heads of State; the Council of Ministers; Commissions; The Standing Committee of Officials; The Tribunal and other institutions which will be established as and when necessary.

#### 3.2.2.3.1. **The Summit**

The Summit consists of Heads of State or Government of all Member States and it is the Supreme policy-making institution of SADC. It is responsible for the overall policy direction and control of the functions of SADC, it is also responsible for the adoption of legal instruments for the implementation of the provisions of the Treaty provided that it may delegate the authority to the Council or any other institution of SADC as it may deem fit and appropriate. It decides also on the creation of Commissions, institutions, committees and organs as need arise.<sup>180</sup>

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<sup>179</sup> Ibid.

<sup>180</sup> Article 10 of the SADC Treaty.

#### 3.2.2.3.2. **The Council**

The Council on the other hand consists of Ministers from each Member States, preferably one who is responsible for economic planning or finance. The Council's functions include; overseeing the functioning and development of SADC; overseeing implementation of the policies and proper executions of its programs; advising the Summit on matters overall policy and efficient and harmonious functioning and development of SADC; approve policies, strategies and work programs; direct, coordinate and supervise the operations of the institutions of SADC subordinate to it; create its own committees and convene conferences and other meetings as appropriate for purpose of promoting the objectives and programs of SADC.<sup>181</sup>

#### 3.2.2.3.3. **The Commission**

The Commission is constituted to guide and coordinate cooperation and integration policies and programs in designated sectoral areas. The powers, composition, functions, procedures and other matters relating to each commission shall be prescribed by an appropriate protocol approved by the Summit.<sup>182</sup>

#### 3.2.2.3.4. **The Standing Committee**

The Standing Committee under Article 13 of the SADC Treaty is a technical advisory committee to the council in that it is responsible and reports to the Council. The Committee comprises of one permanent secretary or any official of equivalent rank from each member state preferably from a ministry responsible for economic planning or finance.

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<sup>181</sup> Article 11 of the SADC Treaty.

<sup>182</sup> Article 12 of the SADC Treaty.

#### 3.2.2.3.5. **The Secretariat**

The Secretariat is the principle executive institution of SADC, its vision is to be a reputable, efficient and responsive enabler of regional integration and sustainable development and it also has a mission which is to provide strategic expertise and co-ordinate and harmonization of policies and strategies to accelerate regional integration and sustainable development.<sup>183</sup> The Secretariat's mandate include; strategic planning and management of the programs of SADC; implementation of decisions of the Summit and of the Council; organization and management of SADC meetings; financial and general administration; representation and promotion of SADC and coordination and harmonization of the policies and strategies of Member States.<sup>184</sup> The Secretariat is headed by the Executive Secretary who shall be responsible to the council and liaise with the Commission and other institutions and guide, support and monitor the performance of SADC.<sup>185</sup>

#### 3.2.2.3.6. **The Tribunal**

The Tribunal under Article 16 of the Treaty is constituted to ensure adherence to and proper interpretation of the provisions of the Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it. It shall give advisory opinions on such matters as the Summit or the Council may refer to it.

The tribunal has in the past handled some cases and one of the main one is the *Mike Cambell (Pvt) Ltd vs. Republic of Zimbabwe*<sup>186</sup> where the Applicant challenged the compulsory acquisition of their agricultural lands in Zimbabwe by the Respondent. The Applicants alleged that the

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<sup>183</sup> Accessed at <http://www.sadc.int> on 23/05/2015.

<sup>184</sup> Article 14 of the SADC Treaty.

<sup>185</sup> Article 15 of the SADC Treaty.

<sup>186</sup> SADC (T) 2/2007 (SADC Tribunal, 2008).



acquisition were inconsistent with Article 4(c and 6(2) of the SADC Treaty which articles obligated member states to act in accordance with human rights, democracy and the rule of law and prohibited them from discriminating them against any persons. The Tribunal identified issues for determination which included; jurisdiction to entertain the application, the Tribunal held that given the terms of Article 4(c of the SADC Treaty, the Tribunal had jurisdiction. The Tribunal further held that in accordance with international law, fair compensation was due and payable to the applicants by the respondent.<sup>187</sup>

#### 3.2.2.4. **Challenges**

SADC has faced some challenges since its inception. These challenges are basically challenges which more or less face the individual Member States individually. They include; economic, health, diplomatic, defense, security, political challenges, existence of different product standards and tariff regime, weak customs and lack of proper infrastructure. Most of the challenges cannot be tackled effectively by individual members.<sup>188</sup>

### 3.2.3. **COMMON MARKET FOR EAST AND SOUTHERN AFRICA (COMESA)**

#### 3.2.3.1. **Background**

The Common Market for East and Southern Africa COMESA was formed in December 1994 vide the COMESA Treaty to replace the former Preferential Trade Area (PTA). It was established as an organization of free independent sovereign states which agreed to co-operate in developing their natural and human resources for the good of all their people. Its main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers faced by

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<sup>187</sup> Supra Note 131 at pg. 139.

<sup>188</sup> Accessed at <http://www.mea.gov.in> on 23/05/2015.

individual states. COMESA is guided by a vision of being a fully integrated, internationally competitive regional economic community with high standards of living for all its people ready to merge into an African Economic Community. Its Mission on the other hand is to endeavor to achieve sustainable economic and social progress in all member states through increased co-operation and integration in all fields of development particularly in trade, customs and monetary affairs, transport, communication and information, technology, industry and energy, gender, agriculture, environment and natural resources. COMESA currently has 19 member states with a population of over 396 million and annual import bill of around 32 billion United States dollars, an export bill of over 82 billion US dollars. It forms a major market place for both internal and external trading due to its area on the map of Africa which covers a geographical area of 12 million square kilometers.<sup>189</sup>

#### 3.2.3.2. **Objectives**

Article 3 of the COMESA Treaty sets out the objectives and aims, these objectives include; to attain sustainable growth and development of the member states by promoting a more balanced and harmonious development of its production and marketing structures; to promote joint development of its production and marketing structures; to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programs to raise the standard of living of its peoples and to foster closer relations among its member states; to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development; to co-operate in the promotion of peace, security and stability among the member

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<sup>189</sup> Accessed at <http://www.comesa.int> on 23/05/2015.

states in order to enhance economic development in the region; to co-operate in strengthening the relations between common market and the rest of the world in the adoption of common positions in international fora and to contribute towards the establishment, progress and the realization of the objectives of the African Economic Community.

In order for the objectives and aims to be met, COMESA undertakes that states shall; establish a customs union, abolish all non-tariff barriers to trade among themselves, establish a common external tariff; adopt a common customs bond guarantee scheme; establish rules of origin with respect to products originating in the member states; simplify and harmonize trade documents and procedures; foster co-operation to facilitate the production of goods and facilitate trade in goods and services and the movement of persons; make regulations for facilitating transit trade within the common market; eliminate rigidity in the structures of production and manufacturing in order to provide goods and services that are of high quality and competitive in the common market; co-operate in the field of industrial development; adopt common standards, measurements systems and quality assurance practices in respect of goods produced and traded within the common market; provide an enabling and secure investment climate; co-operate in monetary and financial matters and gradually establish convertibility of their currencies and a payment union as a basis for the eventual establishment of a monetary union; co-operate in the agricultural development through adoption of a common agricultural policy and enhancing food sufficiency; harmonize methodology of collection, processing and analysis of information required to meet objectives of the Common Market; promote the accelerated development of the least developed countries and economically depressed areas through implementation of specific programs and projects in various fields of economic development; remove obstacles for the free movement of persons, labor and

services , right of establishment for investors and right of residence within the common market and to take such other steps as are necessary for further the aims and objectives of the Common Market.<sup>190</sup>

### **3.2.3.3. Organs and Institutions**

The organs and institutions of the Common Market include; the Authority, the Council, the Court of Justice, the Committee of Governors of Central Bank, the Intergovernmental Committee, the Technical Committee, the Secretariat and the Consultative Committee.<sup>191</sup>

#### **3.2.3.3.1. The Authority**

The Authority is established under Article 8 of the Treaty, it consists of the Heads of State or Government of the Member States. The Authority is the supreme policy organ of the common market and is responsible for the general policy, direction and control of the performance of the executive functions of the Common Market and the achievement of its aims and objectives.

#### **3.2.3.3.2. The Council of Ministers**

Article 9 of the Treaty establishes the Council of Ministers, which consists of ministers designated by each member states. The Council's functions include; monitoring and keeping under constant review to ensure proper functioning and development of the Common Market; make recommendations to the Authority on matters of policy aimed at the efficient and harmonious functioning and development of the Common Market; make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of the

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<sup>190</sup> Article 4 of the COMESA Treaty.

<sup>191</sup> Article 7 of the COMESA Treaty.

Treaty; considering and approving budgets of the Secretariat and the Court; designate economically depressed areas of the Common Market and exercise such other powers and perform such other functions as vested or conferred in the Treaty.

#### **3.2.3.3.3. The Intergovernmental Committee**

The Intergovernmental Committee is established under Article 14 of the COMESA Treaty, it consists of Permanent or Principal Secretaries designated by each member state. Its functions include being responsible for the development of programs and action plans in all sectors of co-operation except in the finance and monetary sector, monitor and keep under constant review and ensure proper functioning and development of the Common Market, oversee implementation of the provisions of the COMESA Treaty.

#### **3.2.3.3.4. The Technical Committee**

Article 15 of the Treaty establishes the Technical Committee , which is composed of the Committee on Administrative and Budgetary Matters, Committee on Agriculture, Committee on Comprehensive Information System, Committee on Energy, Committee on Finance and Monetary Affairs, Committee on Industry, Committee on Labor, Human Resource and Social and Cultural Affairs, Committee on Legal Affairs, Committee on Natural Resources and Environment, Committee on Tourism and Wildlife, Committee on Transport and Communications and Committee on Trade and Customs. The functions of the Technical Committee include; preparation of a comprehensive implementation program and a time table prioritizing the programs with respect to its sector; monitor and keep under constant review the implementation of co-operation

programs with respect to its sector; submit reports and recommendations to the Intergovernmental Committee and have such other functions as are assigned by the Treaty.

#### **3.2.3.3.5. The Secretariat**

The Secretariat is established under Article 17 of the Treaty, it is headed by the Secretary General of the Common Market who is appointed by the Authority. The Secretary General is the chief executive officer of the Common Market and is tasked to submit reports in consultation with the Intergovernmental Committee on the activities of the Common Market to the Council and the Authority, responsible for the administration and finance of the Common Market, submit budget of the Common Market to the Intergovernmental Committee, act as a secretary to the Authority and ensure that the objectives of the treaty are attained.

#### **3.2.3.3.6. The Court of Justice**

The Court of Justice is established under Article 7 of the Treaty, its paramount function is to ensure the adherence to law in the interpretation and application of the Treaty,<sup>192</sup> issue advisory opinions regarding questions of law arising from the provisions of the Treaty affecting the Common Market to the Authority, the Council or a Member State.<sup>193</sup> The Court is composed of seven judges appointed by the Authority and one appointed by the Authority to be the President of the Court. The jurisdiction of the Court is to adjudicate all matters which are referred by member states,<sup>194</sup> natural or legal persons<sup>195</sup> and the Secretary General<sup>196</sup> to it pursuant to the Treaty.<sup>197</sup> The Court

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<sup>192</sup> Article 19 of the COMESA Treaty.

<sup>193</sup> Article 32.

<sup>194</sup> Article 25.

<sup>195</sup> Article 26.

<sup>196</sup> Supra Note 173.

<sup>197</sup> Article 23.

considers itself as the guardian of the limits of institutional competence under the COMESA Treaty.<sup>198</sup> The decisions of other courts are not bound by COMESA Court but are nonetheless of enormous persuasive value, this was the sentiments of the Judge in *Muleya vs. Common Market for Eastern and Central Africa*<sup>199</sup> where he was seeking guidance from the rich jurisprudence of ECJ on an ambiguous point on pleadings.<sup>200</sup>

#### 3.2.3.4. **Challenges**

Most regional economies face challenges COMESA included, these challenges are either internal or external challenges. One of the challenges is involvement of the state in nearly all the aspects of production, distribution and marketing hence leaving the private sector to play a minor role in economic development. This challenge caused inefficiencies and decline in the economy of COMESA region through fall in gross domestic investment, increase in external debt, decline of share of exports from sub-Saharan Africa in world export and decline of industrial output as a result of entrenched structural rigidities, weak inter-industry and physical structure.<sup>201</sup>

Globalization is one of the external challenges facing COMESA and other regional economies. It draws its motive from two mutually reinforcing sources; the unrelenting revolution in information and communication technology (ICT) and triumph of market principles over command economics. ICT revolution has led to the redefinition of the concept of time and distance and given new meaning to the term comparative advantage. This has led to information being a new factor of production hence anyone who can access information has an advantage. The adoption of the

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<sup>198</sup> Eastern and Southern Africa Trade and Development Bank vs. Ogang [2001] East Afr. LR 46 at 51

<sup>199</sup> [2003] 1 East Afr. LR. 173.

<sup>200</sup> Supra Note 131 at pg. 155.

<sup>201</sup> Accessed at <http://www.comesa.int> on 23<sup>rd</sup> May 2015.

market economy as the economic model of choice by many nations across the globe has resulted in greater liberalization of trade and finance. Financial globalization poses a threat to emerging economies due to its high elasticity to huge ‘mood swings’ which can leave economies in ruins. In micro-economics globalization is creating a new corporate dynamic through a growing wave of mergers and acquisitions hence creating giant economies which it at the end dwarfs emerging economies. These challenges pose special challenge especially to Africa economies in general and the COMESA region in particular.<sup>202</sup>

The other challenge is noncompliance and non-enforcement of the COMESA treaty and its Rules by state parties. In the Kenyan case of *Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Ltd*<sup>203</sup> the applicant argued that the respondents’ decision to detain its sugar consignment was illegal and contrary to the COMESA Free Trade Area Rules and COMESA Treaty, to which Kenya is party. The consignment had been detained with a view to imposing duties that the applicant wanted to avoid. The Court had to determine whether section 27 of the Kenya’s Sugar Act No10/2001 which vested power in the Kenya Sugar Board to control importation of sugar was consistent with the COMESA Treaty. The court held that the Treaty applied to the quota that had been imposed and held that the Sugar Act did not contravene them. The court further reasoned that the measures taken by the respondent were an articulation of the national interest in the allocation of quota for sugar imports and were safeguards aimed at protecting local industry, and in its opinion such measures did not violate COMESA Treaty.

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<sup>202</sup> Ibid.

<sup>203</sup> [2004]2 KLR 530 at 539-540.



### 3.3. COMESA, EAC AND SADC TRIPARTITE

The Tripartite is an Umbrella organization established in 2005, consisting of three Africa's Regional Economic Communities (REC's) Common Market for East and Southern Africa (COMESA), East Africa Community (EAC) and the Southern Africa Development Community (SADC). The Tripartite Task Force is headed by the Secretary Generals of the three regions. The main focus of the Tripartite is the harmonization of REC programs in the areas of trade infrastructure and development.<sup>204</sup>

The Tripartite comprises of 26 countries with a combined population of nearly 600 million people and a total Gross Domestic Product (GDP) of approximately 1 trillion US Dollars. Its main objective is strengthening and deepening economic integration of the southern and eastern Africa region.<sup>205</sup>

The Vision of the Tripartite Agreement is in line with the Africa Union's vision of "An integrated, prosperous and peaceful Africa driven by its own citizens and representing a dynamic force in the global arena" this is envisioned in the Lagos Plan of Action and the Abuja Treaty of 1991. The resolution of the African Union Summit held in Banjul, Gambia in 2006 directed the African Union Commission and the Regional Economic Communities to harmonize and coordinate policies and programs of regional economic communities as important strategies for rationalization and to put in place mechanisms to facilitate the process of harmonization and coordination within and among the Regional Economic Communities.<sup>206</sup>

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<sup>204</sup> Accessed at <http://www.eac.int> on 27<sup>th</sup> May 2015.

<sup>205</sup> Accessed at <http://www.sadc.int> on 27/05/2015.

<sup>206</sup> Ibid.

The Tripartite Vision is “to improve the economic and social welfare of the citizens of the three parties namely COMESA-EAC-SADC through promoting regional economic growth by creating a conducive environment for foreign trade to take place. For the Tripartite to achieve its vision, it will focus mainly on nurturing strong working relationships between the Secretariats of COMESA, EAC and SADC with the Tripartite Task Force providing leadership.”<sup>207</sup>

In 2007 the Task Force recommended a Summit Heads of State and the Government of COMESA, EAC and SADC to be convened. The recommendation was accepted and the Tripartite Summit was convened at Kampala Uganda. <sup>208</sup>

The Kampala Communiqué of the Tripartite Summit of 22<sup>nd</sup> October 2008 made a milestone towards the realization of the Tripartite, this is after the Heads of State and Government representing the three regional economic regions agreed that the regions should merge into a single Customs Union beginning with a Free Trade Area.<sup>209</sup>

Another meeting of the Heads of State and Government of the three regions met on June 2011, where they signed a declaration for the establishment of the COMESA-EAC-SADC Free Trade Area (FTA).<sup>210</sup>

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<sup>207</sup> Accessed at <http://www.eac.int> on 27<sup>th</sup> May 2015.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Accessed at <http://www.sadc.int> on 27/05/2015.

### 3.3.1. COMESA-EAC-SADC Memorandum of Understanding (MoU)

The MoU underpins the legal and institutional framework for the Tripartite process and establishes the Tripartite Co-ordination Mechanism under Article 6 of the MoU which consists of the following; Tripartite Summit consisting of the Heads of State and/or government of COMESA, EAC & SADC, the Summit is the highest organ of the Tripartite arrangement; Tripartite Council of Ministers; Tripartite Sectoral Ministerial Committee on Trade, Finance, Customs, Economic Matters and Home/Internal Affairs; Tripartite Sectoral Ministerial Committee on Infrastructure; Tripartite Committees of Senior Officials and of Experts and Tripartite Task Force of the Secretariats of the three Communities.

The MoU provides under Article 1 the areas of Co-operation in enhancing integration, the cooperation between the parties shall relate but not restricted to; trade liberalization and customs co-operation generally and the establishment of a Free Trade Area; development of programs to enhance movement of business persons labor and services; development of joint infrastructure programs, financing and implementation; development of joint programs for agriculture development and food security and maintenance of close collaboration in preparation of common regional positions and strategies in multilateral and international trade fora.

The MoU stipulates each party to establish a permanent unit within its Secretariat for the Coordination of Mechanism for the harmonization of the agreed programs.<sup>211</sup>

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<sup>211</sup> Ibid.

### **3.3.2. Draft Agreement Establishing COMESA, EAC & SADC Tripartite Free Trade Area**

The revised Draft Agreement and annexes was finalized in 2010. The Preamble of the Agreement gives a detailed rationale of the establishment of the Tripartite Free Trade Area by; recognizes the Tripartite Memorandum of Understanding; cognizant of the provisions establishing free trade areas in the COMESA Treaty, EAC Customs Union Protocol and the SADC Protocol on Trade; determined to build upon the success and best practices achieved in trade liberalization within the three Regional Economic bodies; considers that trade in goods and services, infrastructure and cross-border investment should be major areas of cooperation; determined to take necessary measures required for reducing the costs of doing business and creating an environment that is conducive for private sector development; recognize that development of trade and investment is essential to the economic integration of the region; its mindful of the different levels of economic development of the Member States; its committed to improving competitiveness of Tripartite Member States at enterprise, industrial and regional levels and recognize the progress made by the regional economic communities in establishing the communities as single investment areas.<sup>212</sup>

#### **3.3.2.1. Objectives**

The General Objectives of the Tripartite Free Trade Area as set out under Article 3 of the Draft Agreement include; promotion of rapid social and economic development of the region through job and wealth creation and elimination of poverty, hunger and disease through building skills, innovativeness and hard and soft infrastructure and through improving the location of factors for sustainable generation of national, regional and foreign investment and of trade opportunities; to create large single market with free movement of goods and services and business persons and

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<sup>212</sup> Accessed at <http://www.bilaterals.org> on 27/05/2015.

eventually the establishment of a Customs Union; resolving challenges of multiple membership and expedite the regional and continental integration processes; building a strong people based Tripartite Free Trade Area (TFTA) and promotion of close cooperation in all sectors of economic and social activity among the Member States.

The specific objectives of the Tripartite Free Trade Area under the Agreement are; elimination of all tariffs and non-tariffs barriers to trade in goods; liberalization of trade in services and facilitate cross-border investment and movement of business persons; harmonization of customs procedures and trade facilitation measures; enhancing cooperation in infrastructure development; establishing and promotion of cooperation in all trade related areas among member states; establishment and maintaining an institutional framework for implementation and administration of the Tripartite Free Trade Area and eventually Customs Union; adoption and implementation of policies in all sectors of economic and social life that promote and consolidate an equitable society and social justice; building of competitiveness and undertake cooperation in other areas to advance objectives of the agreement.

#### **3.3.2.2. Liberalization of Trade in Goods**

Part III of the Draft Agreement provides for liberalization of trade in goods. This is through elimination of import duties as provided for under Article 8 of the Agreement whereby Member States agree to eliminate all import duties and charges of equivalent effect on goods originating in the Member States. Member States shall not impose new import duties or charges of equivalent effect except as provided for under this agreement. Imposing of export duties within the territories of the Tripartite Member States is prohibited under Article 9 except as provided for under the

Agreement. Members States shall eliminate non-tariff barriers to trade with each other and shall not impose new ones as per Article 10 of the Agreement. The Agreement also provides for eligibility of goods for preferential treatment if they are originating from member states in accordance with the criteria provided for under the Agreement this is as per Article 12 of the Agreement.

Trade facilitation is one of the key pillars in the realization of the Free Tripartite Trade Area, this is provided for under Part V of the Agreement. Article 15 provides that Member States shall undertake to initiate trade facilitation programs aimed at; reducing costs of processing documents and the volume of paper work required; ensuring that nature and volume of information required in respect of trade within the free trade area does not adversely affect economic development; adoption of common standards of trade procedures within the free trade area; ensuring coordination between trade and transport facilitation; collecting and disseminating information on international development regarding trade facilitation; promoting the development of common solutions to problems in trade facilitation and promoting establishment of one-stop border post.

#### **3.3.2.3. Organs for Implementation of the Tripartite Free Trade Area**

The Organs for the Implementation of the Tripartite Free Trade Area are provided for under Part VII of the Agreement. Article 37 provides for the Tripartite Committees on Trade and Customs are divided into three Committees including; Ministerial, Senior Officials and Technical Experts Committees.

The Ministerial Committee is established to oversee the implementation of the Tripartite Free Trade Area, its functions include; regularly reviewing of status of the Tripartite Free Trade Area and make appropriate recommendations; indicate policy analysis on key issues affecting the Tripartite Free Trade Area; receive and consider reports on trade, trade related and customs matters referred to it by Tripartite Member States; implement and monitor closely measures taken to promote trade within the Tripartite area and to decide on new annexes and to amend existing annexes and regulations that may be required to facilitate implementation of this Agreement.

The Senior Officials Committee oversees and guide the overall technical work required facilitating the implementation of this agreement while the Technical Experts Committee is responsible for undertaking all the technical work associated with the implementation of this agreement and reports to the Committee of Senior Officials.

### **3.4. Prospects of Merging EAC, SADC & COMESA**

The prospects of merging the three communities offers enormous prospects as a vehicle to fast track formation of a Grand African Free Trade Area, this is due to the fact that the merging will bolster trade between the three bodies, facilitate movement of goods, services and persons, reduction of tariffs, relaxation of domestic laws pertaining to movement of persons, goods and services within the Tripartite region the prospects of the merger include;

#### **3.4.1. Creation of larger market**

The gradual synthesis of state units into sub regional, regional and a single continental unit will arithmetically build up the number of trade partners and thereby enlarge the market. With the

merging of the three trade bodies being EAC, SADC and COMESA the market for trade in goods, services and movement of persons will be enlarged. This is due to the number of member states which is involved in the Tripartite Agreement. The Tripartite encompasses twenty six countries with a combined population of about five hundred and twenty seven million people. In a 2011 study, it suggests that the tripartite region has a total Gross Domestic Product (GDP) of roughly six hundred and twenty four billion US dollars and GDP per capita of one thousand one hundred and eighty four US Dollars. The region also makes up nearly half of African Union (AU) membership of fifty four countries and contributes over 58% of the Continent's GDP and also accounts for 57% of the total African Union population.<sup>213</sup>

#### **3.4.2. Enhance Economies of Scale and Specialization**

The creation of a larger market will engender to create economies of scale in the demand and supply of goods and services and will enhance the degree of specialization in both primary and industrial production of tradable products. Specialization in turn will improve the efficiency of production and distribution of goods and services, quality of products, the price of finished product, income earnings for producers will be improved and also a dramatic increase of national income for Tripartite Member States.<sup>214</sup>

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<sup>213</sup> UN Economic Commission for Africa, "Report on the Establishment of Inter-REC's Free Trade Areas in Africa; Drawing on Lessons from the COMESA-SADC-EAC FTA Experience" UNECA, Addis Ababa, Ethiopia, 2011 accessed at <http://www.uneca.org> on 26<sup>th</sup> May 2015.

<sup>214</sup> Ibid.



### **3.4.3. Trade Liberalization**

Trade Liberalization is one of the greatest potential in the formation of the Tripartite Region, this is due to the fact that some of the three communities already had customs unions and also monetary unions, based on this it will be easier to liberalize trade in the new merged region.<sup>215</sup>

### **3.4.6. Infrastructure Development**

This is the most instrumental and strategic for the regional integration. There have been numerous projects undertaken so far to realize this, these projects include, the trans-regional transport network in roads, airways, railways and waterways including also information and communication. The South Corridor Program has inter-related projects that address road infrastructure, road transport facilitation, rail infrastructure and the improvement of port infrastructure. The North South Corridor is a Pilot Aid-for-Trade Program in the COMESA-SADC-EAC Tripartite Region. Currently the project has started in East Africa with the expansion of Ports, improvement of rail transports and road network.<sup>216</sup>

### **3.4.7. Addresses the Issue of Multiplicity and Overlapping of Membership**

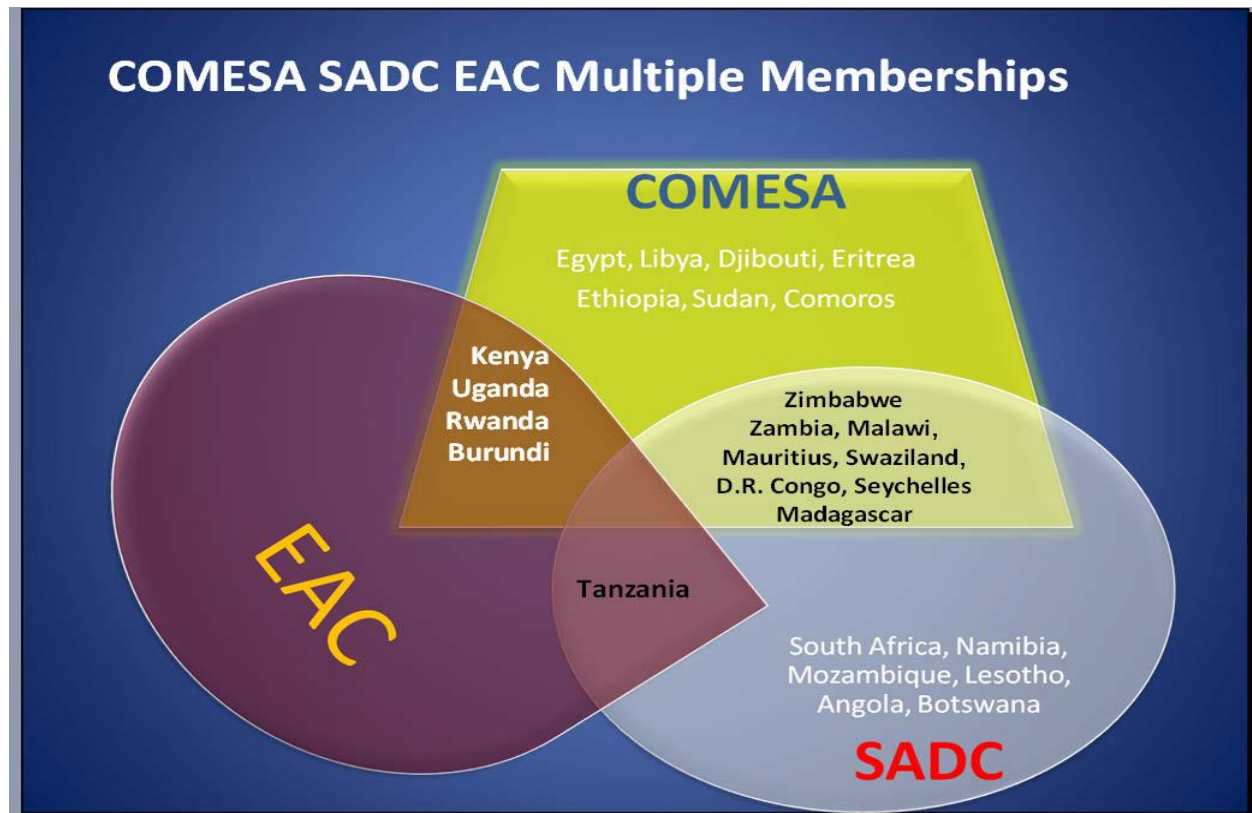
Other prospects of the formation of the Tripartite region is to address the multiplicity of membership in more than one trade region thus violating the World Trade Organization rules that a country is supposed to belong to one Customs Union. Overlapping of membership has resulted into multiple membership problems thus imposing undue administrative economic and financial cost on member states, difference in the timing and speed and speed of trade liberalization; tariff

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<sup>215</sup> Ibid.

<sup>216</sup> UN Economic Commission for Africa, “Report on the Establishment of Inter-REC’s Free Trade Areas in Africa; Drawing on Lessons from the COMESA-SADC-EAC FTA Experience” UNECA, Addis Ababa, Ethiopia, 2011 accessed at <http://www.uneca.org> on 26<sup>th</sup> May 2015.

structures; customs documentation requirement and the rules of origin. Currently some of the Member States in the Tripartite Region belong to two or all of the three regional economic communities as per the chart below;



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### 3.4.8. Harmonization of Rules, Procedure

With the formation of the Tripartite Region, the numerous trade rules and procedures adopted by the three trade bodies and also others from the individual member states with regards to trade in goods and services and movement of persons and goods within the region. The other benefit of harmonization of rules and procedures will help in avoiding duplication of resources due to involvement of many rules and procedures, and will also eventually lead to joint programs such as

<sup>217</sup> Supra Note 17.

infrastructure development. The harmonization leads to the implementing of agreed program jointly where possible<sup>218</sup>

#### **3.4.9. Enhancing Economic Cooperation**

This is through promoting inter regional investments, development of capital markets, development of commodity exchange and coming up with an efficient and effective financial payment systems that will facilitate trade and investment in the Tripartite region.<sup>219</sup>

### **3.5. Challenges of Merging EAC, COMESA & SADC**

The formation of the Tripartite Region has its share of general and specific challenges; The intra-regional trade in Africa has been low compared to other regions; Most African states have suffered from severe macro-economic disequilibria, foreign debt service burdens over valued currencies, lack of trade finance and narrow tax base with custom duties forming a substantial source of government revenue; Regulations restricting trade is one of the general challenges facing trade in Africa this is through licensing, administrative foreign exchange allocation, special taxes for acquiring foreign exchange, advanced import deposits etc. the other challenge is the dominance of a few countries and the huge disparities in size among members of regional groupings which eventually leads to the concerns of distribution of benefits; The other factor is dependence of most African countries on their former colonial powers i.e. Commonwealth countries and Franco-African, Agro-African links may have distracted commitment from intra Africa Groupings. Regionalism also has lacked support and involvement of the private sectors and the general public

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<sup>218</sup> Supra Note 194.

<sup>219</sup> ibid

while on the other hand cooperation has been seen as involving and bloated by expensive bureaucracies and not opportunities for growth and development through trade.<sup>220</sup>

Low Level of Technology is another challenge facing the formation of a Tripartite Region, this include problems pertaining to energy, infrastructure and lack of productive capacity based on value chain limited or virtually non-existent value adding mechanism in production for example agricultural produce which are exported from the region without any value addition in specific Kenya is cited as a typical example where both technical and economic efficiency standards are low in terms of sugar production.<sup>221</sup>

Multiplicity and overlapping of membership in regional bodies and customs unions has been discussed earlier, however this is largely seen as significant obstacles to regional integration in Africa since it hinders harmonization and normalization as well as the enforcement of rules of origin. The multiple membership pose a big challenge and problem in the negotiation process that will lead to the final outcome of Regional Integration.<sup>222</sup>

The other challenge is with regards to varying stages of economic integration. It is problematic and difficult in negotiating FTA agreements between countries that are at different levels of integration in trade. Some Communities practice different levels of trade liberalization which cannot be matched by other Communities which are intended to be merged together. For example EAC is already a Customs Union with its Common External Tariff arrangements while the other

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<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

Communalities that is COMESA and SADC might not have definitive Customs Union then it will cause a problem in harmonization of the Communities towards the formation of a Tripartite Region.<sup>223</sup>

The other challenge is multiple and undifferentiated product. Africa is widely dispersed geographically with multiplicity and diversity in product types that receive minimal form of improvement and value addition. There is also vagaries in the degree of technical know-how and technological advancement in the production, processing, consumption and trade on the products. Limitation in skilled manpower and technological advancement keep African economies at varied levels of underdevelopment and compel them to export primary unprocessed products at very unattractive prices unlike other regions where there is specialization in the production and supply of goods and services based on comparative and competitive advantages.<sup>224</sup>

Political will is also one of the challenges facing the formation of Tripartite Region. The lack of political will and serious commitment from some of the Member States of the Communities, the reluctance to cede power to a supra-national body and failure to implement commitments made at the Communities level is a common error some of the participating countries in the Tripartite Region's negotiations. Some of the Member States also fail to implement agreed regional commitments and are also absent in regional meetings deliberating on the integration this signifies lack of political commitment. The difference in level of awareness and capability make a case for

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<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

the application of the variable geometry principles whereby countries can join when they are fully aware and prepared.<sup>225</sup>

Limited human capacity is also one of the challenges in the formation of the Tripartite Region, to start with the thinness of staff on the ground as well as scarcity of staff with adequate skills and expertise in the specialized areas required in the integration program has led to the delay in the formation of the Tripartite Region.

Financial constraints hinders the realization of the Tripartite Region, this is due to the capital intensive nature of establishment of the Tripartite Region. The reason for this is due to the fact that most of the member states are financially weak and fall in the category of least developed countries. The lack of adequate finance hinders setting up of necessary trade related infrastructure such as roads, water way, airways, information and communication technology and provision of adequate human capacity and for addressing compensation and adjustment costs arising from revenue and income losses due to the establishment of the Tripartite region. The Tripartite Task Force is reported to have undertaken several initiative to mobilize funds for the tripartite activities through discussions with the African Development Bank, the World Bank and the European Union.<sup>226</sup>

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<sup>225</sup> Supra Note 194

<sup>226</sup> Ibid.

### 3.6. Implications of the formation of Tripartite Region

The major implication towards the formation of a tripartite region comprising EAC, COMESA and SADC include costs, benefits, fears over distribution of integration gains and revenue implications.

The fear among Member States on the discretionary effects following integration process where integral process is the equitable distribution of the gains from integration between member states this may be through location effects which may not be avoided in the Tripartite Region. Another factor is that the poorest countries in the region are more concerned that the removal of trade barriers may cause industries possessed by them to migrate to industrially more advanced countries in the region thus losing on revenue.<sup>227</sup>

The costs associated with the establishment of the Tripartite Region are both short and long term and also direct and indirect in nature. With the short term costs it encompasses all the costs of setting up the Tripartite Region for example hiring additional and specialized staff needed to set up the program. The long term costs include providing trade infrastructure such as buildings transport facilities and information and technology services. On the other hand the indirect short term costs include possible revenue losses from removal of tariffs and duties on goods traded duty free, job losses from closures and mergers or relocating of factories and industries. In indirect long term costs there will be routine costs due to contributions from member states for the administering the regional FTA(s) and for maintaining the trade facilities such as infrastructure and customs services. Other costs include costs resulting from ceding some level of sovereignty and authority

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<sup>227</sup> Ibid.

to the regional organization, these costs could asymmetric and might make even the poorest countries worse off and the richest better off hence the call for the winners to compensate the losers in the integration program.<sup>228</sup>

The implication of unequal distribution of benefits of integration and fears of polarization of the process are not adequately addressed in the regional integration hence the failure leads to no compensation mechanism for losses in government revenue arising from trade liberalization schemes.<sup>229</sup>

The legal and political implication for the formation of the Tripartite Region is imminent. Member states will be compelled to abandon their own set of rules and submit to that of the regional body. By doing so a state accepts a set of agreements and endorses such agreements as binding before being admitted into the membership. After the signing of the agreement the state does not exist as a separate entity but as an integral part of the Region with relative not absolute rights. Thus any misdemeanor is viewed as a violation of the terms of the agreement for which it can be prosecuted or punished in any way the organization might deem fit. The rights of the member states are entitled to the rights and privileges accorded to other member states. The privileges include the right to membership and to be voted for or to vote, right to move and do business in the region, right to own property and the right to use the facilities of the region including all trading instruments.<sup>230</sup>

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<sup>228</sup> Supra Note 194.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.



The other implication is the automatic conceding of power on trade matters to the supra-national body. The states delegate rather than relinquish authority to a higher order institution thus benefit of forming and using the Tripartite Region will be appreciated. The advantages of one large and strong trade body with better political muscle negotiating for and on behalf of a region or the continent is enormous and cannot be overstressed. A regional entity is better placed to negotiate for its members than for the members themselves to negotiate individually this is due to the strength in unity.<sup>231</sup>

The other implication concerns revenue, thus getting the rules of origin will reduce loss of revenue from tariffs, duty and taxes that might arise from trade distortion and trade malpractices. Member states should monitor what products enter the country and what percentage of the products have come from member states which duty will not be charged and which ones have come from outside. The amount of revenue gains and loss incurred with the integration will vary with the factor and resource endowments, the extent and volume of involvement in trade, degree of industrialization and the infrastructural development including the information and communication technology situation in the country. Industrialization contributes to value adding and to import and export of finished or semi-finished products in which duties will be charged based on the prevailing rules of origin.<sup>232</sup>

### **3.7. To do's (The Way Forward)**

There are various things to do before the enjoyment of the integration of the three Communities including EAC, COMESA and SADC. These to do's include putting in place a number of policy

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<sup>231</sup> Supra Note 194

<sup>232</sup> Ibid.

instruments through harmonization of trade policies, process and procedures, a common definition of rules of origin, agree on custom documents for exports and imports, health and safety standards, import and export procedures, how to eliminate non-tariff barriers and how to apply Common External Tariff (ET) on imported goods.<sup>233</sup>

The Rules of Origin which is the criteria needed to determine the national source of product. Its importance is from the fact that duties and restrictions depend upon the source of imports hence the need to define local products in order for the product to be considered to originate from the member states and that the product must be at least forty percent of the Freight on Board (FOB) value of the goods. The exporters must therefore obtain a certificate of origin from the government attesting that the goods have met the percentage requirements the certificate must be presented to the customs authority of the importing government to qualify for the Common External Tariff rates.<sup>234</sup>

There is also the need of defining and agreeing on the administration process of the Tripartite Region. The secretariat formed should have an authority to monitor and ensure compliance with the Region's measure and also the secretariat need to have a legal authority to enforce and ensure compliance.<sup>235</sup>

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<sup>233</sup> Supra Note 194.

<sup>234</sup> *ibid*

<sup>235</sup> *ibid*

The other factor to be done by the region is for the establishment of a dispute resolution mechanism, this may be done by the secretariat in the meantime which should be given legal mandate to resolve such disputes until and when a court or tribunal will be formed.<sup>236</sup>

Trade facilitation is a paramount factor towards the establishment of the tripartite region. The policy towards trade facilitation ought to be discussed and agreed by the parties and set in place clear rules, procedures, documentations, regulations, institutions and infrastructure. The region also need to agree on the size of micro economic variable then a stage by stage harmonization of monetary and fiscal policies need to be done to support the process in order for this to be achieved, legal and institutional frameworks need to be formed.<sup>237</sup>

### **3.8. Constraints to be addressed**

There are also some constraints to be addressed by the parties to the Tripartite, this include tackling infrastructure and food and security problems. The issues that have been responsible for the poor record include; non complementary trade structure and low industrialization degree this is due to the fact that the main products traded in the region are primary or simple manufactured products hence lack of industrial development and product complementarities indicate only limited potential for expanded intra-regional trade; low purchasing power and low macroeconomic convergence of member states, thus tackling the challenges relating to poverty should be given ultimate weight.

Unfavorable macroeconomic environment which include lack of public infrastructure, low labor and industry productivity, poor health and house provision, missing export market information and

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<sup>236</sup> ibid

<sup>237</sup> ibid

missing backward and forward linkages in production need to be addressed; protectionist trade regimes and high dependency on trade taxes has been contributed by high import tariffs to protect domestic industries and to secure income sources this limits trade within the region and constraint for forming an effective Tripartite region hence member states need to be more committed to liberalizing trade despite the costs attached to this move; increasing trade imbalances, polarized development and lack of political commitment this has resulted due to lack of complementary trade structures and trade divertive effects that benefit the higher developed economies at the expense of the less developed ones hence when these differences are added to the long existing list of lack of political commitments by member states then the possibility to form a regional bloc becomes a night mare and lastly the remaining non-tariff barriers need to be removed the region needs to work jointly to harmonize the procedures and eliminate the existing trade barriers.<sup>238</sup>

### 3.9. Conclusion

This chapter has undertook to examine the formation of the Tripartite Region comprising of EAC, SADC and COMESA through detailed examination of the three Trade bodies through the examining the laws forming the trade bodies, the institutional framework and considering the emerging challenges facing the bodies.

This chapter has further went forth to examine the Tripartite Region formation through examining the laws intended to form the region which include the draft treaty and the Memorandum of Understanding, these laws lays some basic foundation towards the attainment of the merging, however the said laws and rules are insufficient and need to be further amended to ensure that the

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<sup>238</sup> Supra Note 194.

tripartite region meets the objectives goals and aspirations set in the preamble of the draft agreement and the MoU.

This chapter has also delved in examining the prospects of the merger of the three trade blocs and explained the same in details, the chapter has also examined the challenges facing the formation of the Tripartite region, the challenges are a lot but manageable, hence the member states and the parties ought to address the said challenges in order to ensure that the tripartite reaches its maturity. This chapter has also went further to provide to do's in order for the tripartite to be successful and has also provided the implications and constraints to be addressed. Once all of the above are taken into consideration then the tripartite will stand a high chance of meeting its objectives, goals and aspirations as set out in the draft treaty and also under the Memorandum of Understanding.

## **CHAPTER IV**

### **4.0. COMPARATIVE ANALYSIS**

#### **4.1. Introduction**

This chapter aims at conducting a comparative analysis of to be established Tripartite Free Trade Area with other established and operational Free Trade areas. The study will aim at examining the objectives, structures, goals, challenges and also the prospects of the Free Trade Areas and conclude on what is to be borrowed from the established trade areas to the to be formed Tripartite Free Trade Area, which will in turn ensure that it reaches its objectives by being a stepping bloc towards free trade and development of the region through trade and not a stumbling bloc.

The areas to be compared with the to be established Tripartite Free Trade Area include the North America Free Trade Area (NAFTA) which is recognized as one of the best trade region in the world due to its well laid structures, rules and procedures. NAFTA came into force in 1994 vide an agreement signed by the United States of America, Canada and Mexico to form a trilateral rules-based trade bloc in North America.

The other trade bloc to be examined and compared with, is the ASEAN Free Trade Area (AFTA), this is an agreement by the Association of Southeast Asian Nations signed in 1992 in Singapore its members include, Indonesia, Malaysia, Philippines, Singapore, Thailand, Vietnam, Myanmar, Cambodia and Brunei. The primary objective of AFTA is to increase ASEAN's competitive age in production through elimination of tariffs and non-tariff barriers and to attract foreign direct investment to the region.

#### 4.2. North America Free Trade Area (NAFTA)

NAFTA is established by the Northern America Free Trade Area Agreement of 1992,<sup>239</sup> as per the provisions of Article XXIV of the General Agreement on Tariffs and Trade.<sup>240</sup> NAFTA comprises of the Government of Canada, the Government of the United Mexican States and the Government of the United States of America.

The parties under NAFTA resolved as per the Agreement's Preamble to; strengthen the special bonds of friendship and cooperation among their nations, contribute to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation, create an expanded and secure market for the goods and services produced in their territories, reduce distortions to trade, establish clear and mutually advantageous rules governing their trade, ensure a predictable commercial framework for business planning and investment, build on their respective rights and obligations under GATT and other multilateral and bilateral instruments of cooperation, enhance the competitiveness of their firms in global market, foster creativity and innovation and promote trade in goods and services that are the subject of intellectual property rights, create new employment opportunities and improve working conditions and living standards in their respective territories, undertake each of the preceding in a manner consistent with the environmental protection and conservation, preserve their flexibility to safeguard the public welfare, promote sustainable development, strengthen development and enforcement of environmental laws and regulations and to protect, enhance and enforce basic workers' rights.<sup>241</sup>

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<sup>239</sup> B. Carter, "International Law Selected Documents", Wolters Kluwer Law & Business, ASPEN Publishers, 2007-2008 ed, pg. 143.

<sup>240</sup> Article 101 of NAFTA Agreement 1992.

<sup>241</sup> Preamble of the Northern America Free Trade Area Agreement 1992.

The NAFTA Agreement to some extent has retrospective effect in acts that were done before entry into force of the agreement in particular acts that had continuing character in that they started before the treaty's entry into force but persists thereafter. In *Mondev vs. United States*<sup>242</sup> the dispute had arisen already before the entry into force of the NAFTA. It was beyond doubt that NAFTA is not retrospective in effect. The Tribunal found that conduct committed prior to the treaty's entry into force might continue in effect after the date. It stated "...an act, initially committed before NAFTA entry into force might in certain circumstance continue to be of relevance after NAFTA entry into force therefore becoming subject to NAFTA obligations...."<sup>243</sup>

#### 4.2.1. Objectives of NAFTA

The objectives of NAFTA as set out under Article 102 include but not limited to; elimination of barriers to trade in and facilitate the cross-border movement of goods and services between the territories of the parties, promotion of fair competition in the free trade area, increase of investment opportunities in the territories of the parties, provision of adequate and effective protection and enforcement of intellectual property rights in each party's territory and creation of effective procedures for the implementation and application of NAFTA Agreement for its joint administration and for the resolution of disputes and finally establishment of a framework for further trilateral and multilateral cooperation to expand and enhance the benefits of this agreement.

With the elimination of tariffs, no party may increase any existing customs duty or adopt any customs duty on an originating good except as otherwise provided for in this agreement. Parties

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<sup>242</sup> Award 11<sup>th</sup> October 2002, 42 ILM 85 (2003), 6 ICSID Report para 167.

<sup>243</sup> R. Dolzer & C. Schreuer, "Principles of International Investment Law", Oxford University Press, London, 2008, pg. 40.



shall consult to consider accelerating the elimination of customs duties and that an agreement between two or more parties to accelerate elimination of a customs duty on a good shall supersede any duty rate. Each party may adopt or maintain import measures to allocate in quota imports made pursuant to a tariff rate quota, provided that such measure do not have trade restrictive effects on imports additional to those caused by the imposition of the tariff rate quota.<sup>244</sup> On imports and export restrictions no party may adopt or maintain any prohibition or restriction on the importation of any good of another party or on the exportation or sale for export of any good destined for the territory of another party except in accordance with Article XI of GATT.<sup>245</sup>

#### 4.2.2. Rules of Origin

The rules of origin are used by NAFTA for three main reasons; to discourage free riders to the agreement and to encourage investment in certain sectors of the NAFTA member countries, the other reason is to protect the relative position of the NAFTA suppliers of components. These rules of origin require that a substantial portion of inputs originate in the NAFTA countries.<sup>246</sup>

Under this head, a good shall originate in the territory of a party where the good is wholly obtained or produced entirely in the territory of one or more of the parties or the good is produced entirely in the territory of one or more of the Parties exclusively from origination materials or the good is produced entirely in the territory of one or more of the parties but one or more of the non-originating materials provided for as parts under the harmonized system that are used in the production of good does not undergo a change in tariff classification provided that the regional

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<sup>244</sup> Article 302 of the NAFTA Agreement 1992.

<sup>245</sup> Article 309 of NAFTA Agreement.

<sup>246</sup> J. Morgan, "Choice at the Crossroads: Regionalism and Rules of Origin", International Law Journal, Georgetown University Law Center, Vol. 27, No. 4, 1996, pg. 985.

value content of the goods is not less than 60% where the transaction value method is used or is not less than 50% where the net cost method is used.<sup>247</sup>

A certificate of origin is a certificate that main purpose is to certify that a good being exported from the territory of a party into the territory of another party qualifies as an originating good. Parties may require a certificate of origin for a good imported into its country be completed in a language that is required under its law. Each party shall require an exporter in its territory to complete and sign a certificate of origin for any exportation of a good for which an importer may claim preferential tariff treatment on importation of the good into the territory of another party.<sup>248</sup>

In order to determine whether a good imported into a territory of a party qualifies as an originating good, a party may through its customs administration conduct a verification through written questionnaires to an exporter or a producer in the territory of another party, visit the premises of an exporter or a producer in the territory of another party to review the records and observe the facilities used in the production of the goods.<sup>249</sup>

Each party shall require an importer in its territory that claims preferential tariff treatment for a good imported into its territory from the territory of another party to make a written declaration based on a valid certificate of origin that the good qualifies as an originating good.<sup>250</sup>

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<sup>247</sup> Article 401 of NAFTA Agreement 1992.

<sup>248</sup> As per Article 501 of the NAFTA Agreement.

<sup>249</sup> Article 506 of NAFTA Agreement.

<sup>250</sup> Article 502 of NAFTA Agreement.

#### 4.2.3. National Treatment and Non-Discrimination

NAFTA Parties shall accord treatment to goods of another party to the suppliers of such goods and to service suppliers of another party treatment which is not less favorable than the most favorable treatment that the party accords to its own goods and goods and suppliers of another party. No party may treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership or discriminates against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are goods or services of another party.<sup>251</sup>

Parties shall ensure its entities do not in the qualification and selection of suppliers, goods or services in the evaluation of bids or the award of contracts consider, seek or impose offsets. Offsets are conditions imposed prior to or in the course of its procurement process that encourage local development or improve its party's balance of payment accounts by means of requirement of local content, licensing of technology, investment, counter trade or similar requirements.<sup>252</sup>

With regard to investment, parties shall accord investors of another party treatment no less favorable than it accords in like circumstances to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. No party may impose on an investor of another party a requirement that a minimum level of equity in an enterprise in the territory of the party be held by its nationals other than nominal qualifying shares for directors or incorporators of corporations or require an

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<sup>251</sup> Article 1003 of NAFTA Agreement.

<sup>252</sup> Article 1006 of NAFTA Agreement.

investor of another party by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the party.<sup>253</sup>

Parties shall accord to investment of investors of another party treatment in accordance with international law including fair and equitable treatment and full protection and security. And that parties shall accord to investors of another party and to investments of investors of another party nondiscriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.<sup>254</sup> Parties also are required to act in good faith by creating reasonable and justifiable expectations to investors, this was the case in *Thunderbird vs. Mexico*<sup>255</sup> where the Tribunal stated that “having considered recent investment case law and the good faith principle of international customary law, the concept of legitimate expectations relates within the context of the NAFTA framework, to a situation where a contracting party’s conduct creates reasonable and justifiable expectations on the part of an investor or investment to cut in reliance of the said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor to suffer damages.”<sup>256</sup>

With regards to service providers of another party, each party shall accord treatment no less favorable than it accords in like circumstances to its own service providers. The treatment accorded by a party is with respect to state or province treatment no less favorable than the most favorable treatment accorded in like circumstances by that state or province to service providers of the party

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<sup>253</sup> Article 1102 of NAFTA Agreement.

<sup>254</sup> Article 1105 of NAFTA Agreement.

<sup>255</sup> Award, 26 January 2006.

<sup>256</sup> Supra Note 221 at pg. 106.

of which it forms part.<sup>257</sup> Each party shall accord to service providers of another party treatment no less favorable than that it accords in like circumstances to service providers of any other party or of a nonparty.<sup>258</sup>

Parties shall accord financial institutions of another party and to investments of investors of another party in financial institutions treatment no less favorable than that it accords to its own financial institutions and to investments of its own investors in financial institutions in like circumstances with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of financial institutions and investments.<sup>259</sup>

#### **4.2.4. Institutional and Dispute Resolution Framework**

##### **4.2.4.1. Institutional Framework**

The institutional framework for NAFTA includes the Secretariat and the Free Trade Commission. The Free Trade Commission is established under Article 2001 of the Agreement, it comprises cabinet-level representatives of the parties or their designees. The functions of the Commission are to; supervise the implementation of the NAFTA Agreement, oversee the Agreement's further elaboration, resolve disputes that may arise regarding its interpretation or application, supervise the work of all committees and working groups established under the NAFTA Agreement and consider any other matter that may be affect the operation of the NAFTA Agreement. The Commission may also; establish and delegate responsibilities to ad hoc or standing committees working groups or expert groups; seek the advice of non-governmental persons or groups and to

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<sup>257</sup> Article 1202 of NAFTA Agreement.

<sup>258</sup> Article 1203 of NAFTA Agreement.

<sup>259</sup> Article 1405 of NAFTA Agreement.

take such other action in the exercise of its functions as the parties may agree. In conducting its operations, the Commission shall establish its rules and procedures and all decisions of the Commission shall be taken by consensus except as the commission may otherwise agree. The Commission shall convene at least once a year in regular session which shall be chaired successively by each party.

The Secretariat comprises national sections; parties shall establish permanent office of its section, responsible for the operation and costs of its sections, responsible for the remuneration and payment of expenses of panelists and members of committees and boards and designate an individual to serve as a Secretary for its section who shall be responsible for its administrative and management. The functions of the Secretariat shall be to provide assistance to the Commission, provide administrative assistance to panels and committees established under the Agreement in accordance with the established procedures and support the work of other committees and groups established under the Agreement and otherwise facilitate the operation of the Agreement.<sup>260</sup>

#### 4.2.4.2. **Dispute Resolution Framework**

Where there is a dispute between parties, parties shall make every attempt through cooperation and consultation to arrive at a mutually satisfactory resolution of any matter that might affect its operation.<sup>261</sup> Dispute settlement procedure shall apply with respect to avoidance or settlement of all disputes between the parties regarding the interpretation or application of the Agreement or

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<sup>260</sup> Article 2002 of NAFTA Agreement.

<sup>261</sup> Article 2003 of NAFTA Agreement.

wherever a party considers that an actual or proposed measure of another party is or would be inconsistent with the obligation of the agreement.<sup>262</sup>

A party may request in writing consultations with any other party regarding any actual or proposed measure or any other matter that it consider might affect the operation of the agreement. The consulting parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under the Agreement. The consulting parties shall provide sufficient information to enable a full examination of how the actual or proposed measure or other matter that might affect operation of the Agreement and treat any confidential or proprietary information exchanged in the course of consultation on the same basis as the party providing the information and to seek to avoid any resolution that would adversely affect the interest under the Agreement of any other party.<sup>263</sup>

If the consulting parties fail to resolve a matter within 30 days of delivery of a request for consultation, 45 days of delivery of such request if any other party has subsequently requested or has participated in consultation regarding the same matter, 15 days of delivery of a request for consultation in matters regarding perishable agriculture goods or any other time that may be agreed by parties any such party may request in writing a meeting of the Commission. A party may also request in writing a meeting with the commission where it has initiated dispute settlement proceeding under GATT. The Commission shall convene within 10 days of delivery of the request and shall endeavor to resolve the dispute promptly. The Commission may call on such technical advisers or create such working groups or expert groups, or have recourse to good offices,

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<sup>262</sup> Article 2004 of NAFTA Agreement.

<sup>263</sup> Article 2006 of NAFTA Agreement.

conciliation, mediation or such other dispute resolution procedures or make recommendations as may assist the consulting parties to reach a mutually satisfactory resolution of the dispute.<sup>264</sup>

If the Commission has convened and the matter has not been resolved within 30 days thereafter or 30 days after the commission has convened in respect of the matter most recently referred to it or such other period as the consulting parties may agree, any consulting party may request in writing the establishment of an arbitral panel and on delivery of the request, the commission shall establish an arbitral panel.<sup>265</sup> The Panel comprises five members, the disputing parties shall agree on the chair of the panel within 15 days and if they are unable to agree the disputing party chosen by lot shall select within 5 days as chair an individual who is not a citizen of that party.<sup>266</sup> The Panel shall present to the disputing parties a final report including any separate opinions on matters not unanimously agreed within 30 days of presentation of the initial report unless the disputing parties otherwise agree. After which the disputing parties shall transmit the final report to the commission which shall be published 15 days after it's transmitted to the Commission.<sup>267</sup>

With regards to alternative dispute settlement, each party shall to the maximum extent possible encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area and that each party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.<sup>268</sup>

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<sup>264</sup> Article 2007 of NAFTA Agreement.

<sup>265</sup> Article 2008 of NAFTA Agreement.

<sup>266</sup> Article 2011 of NAFTA Agreement.

<sup>267</sup> Article 2017 of NAFTA Agreement.

<sup>268</sup> Article 2022 of NAFTA Agreement.



#### 4.2.5. Achievements and Challenges facing NAFTA

As per the objectives of NAFTA<sup>269</sup> which include; promotion of trade and investment, increase employment and improve working conditions and living standards, manage trade relations and disputes, strengthen and enforce labor and environmental laws and regulations and cooperate in regional and multilateral trade forums. With these objectives at hand, NAFTA has belabored to achieve them. However with the limited objectives of NAFTA, it was not designed to cure many of the ills of each state which are rampant in the region, these ills include high level of immigration, trafficking of illegal drugs, and growing income disparities within countries for example the income disparities between northern and southern Mexican states are particularly pronounced.<sup>270</sup>

NAFTA has made significant contribution towards economic growth both in output and employment in the region over the recent past. NAFTA like any other trade agreement is a small driver of national growth, for example the US and Canadian economies have performed well since the inception of NAFTA growing by an average annual rate of 3% and 3.1% respectively on the other hand Mexico's real GDP growth has averaged only 2.9% per annum since 1994 well below its capacity. NAFTA has also contributed to substantial growth in trade, total trilateral merchandise trade rose sporadically since 1993, North America's two way merchandise trade with the rest of the world has also increased three fold since the inception of NAFTA. The total foreign direct investment (FDI) inflows to all NAFTA countries grew rapidly during the 1990's, relative to GDP, the FDI stock almost doubled from 8% to 15%.<sup>271</sup>

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<sup>269</sup> Article 102.

<sup>270</sup> J. Schott, "The North American Free Trade Agreement" Time for a Change?", 7<sup>th</sup> Annual North American Regional Meeting, The Trilateral Commission, Peterson Institute of International Economics, (2008). Accessed at <http://www.iie.com> on 19/07/2015

<sup>271</sup> Ibid.

With regards to employment, NAFTA overall employment was up in all three countries, US employment rose from 120 million in 1993 to 148 million in 2008 and in Canada from 12.8 million to 17.2 million. While in Mexico, jobs in the formal sector increased from 31.3 million to 43.8 million. Despite the overall employment picture, concerns about job losses have been a part of the NAFTA landscape from the beginning and will undoubtedly grow. The US economy displaces approximately 17.5 million jobs and creates about 18.3 million new jobs, however the positive net result there are clearly winners and losers. Politicians oversold the original NAFTA deal based on the mantra that it would create “jobs, jobs, and jobs.” In addition to the job losses, concerns have also been raised about the impact of increased North American integration on the price of labor. With labor and environmental side accords, the former president of US Bill Clinton postponed ratification of NAFTA until new labor and environmental side accords were negotiated and appended to the NAFTA text.

The North American Agreement on Environmental Cooperation (NAAEC) has made significant improvements in labor and environmental policies in the three countries. NAAEC has also established databases that improve the comparability, reliability and availability of data and information and conducted environmental assessment to promote better understanding about trade-environment linkages. Although NAAEC has made tremendous progress to data pales, there has been concern towards the scarcity of water and the burden of pollution, hence there being a mismatch between the depth of the regions environmental problems and the resources devoted to mitigate them,<sup>272</sup>

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<sup>272</sup> Ibid.

On security concerns, just as the border fronts were adjusting to the economic changes due to free trade, there was issues of terrorist attacks in particular the 9/11 attack which resulted in another significant policy shift both nationally and internationally hence new security concerns took priority over the facilitation of trade in the NAFTA region.

Given NAFTA commitment to economic integration, the challenge that their respective governments faced was how to simultaneously achieve both secure and efficient trade and travel across the border. This led to the signing of Smart Border Accord between the US and Canada in 2006. Which agreement contains a 32 point action plan designed to concurrently enhance security at the border while facilitating the legitimate flow of people and goods.<sup>273</sup>

With transportation and border improvement policies, the passage and success of the free trade agreements contained direct implications for transportation. Unfortunately NAFTA was simply written and considered as economic policies with no real adjustment provisions for the resulting impacts on other related policy areas such as transportation, security or immigration. This is evident with the border congestion and delays and the need to better facilitate the trade and tourism that were developing in the region. However in transportation policies and planning each country worked independently with little thought towards coordinating efforts examples include the Intermodal Surface Transportation Efficiency Act (ISTEA) which was passed by the US in 1991 the Act provided funding for studies on border congestion and identification priority projects and

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<sup>273</sup> S. Bradbury and D. Turbeville, "From NAFTA to 9/11: Challenges and Dilemmas Facing Western Canada-US Border Towns", *Journal of Rural and Community Development*, Vol. 4,1 (2009) 34-50.

infrastructure improvements to overcome operations deficiencies near the borders between the US-Canada and US-Mexico border.<sup>274</sup>

#### 4.2.6. **Future of NAFTA**

There are three main areas in which NAFTA need to put its focus on in order to be successful, these areas include; inclusion of some items that were excluded from NAFTA coverage for example some farm products, energy investment in Mexico rules on dumping and migration concerns. Some of NAFTA's provisions were weakly constructed and thus need to be amended. The changing conditions on the global environment in which NAFTA operates were not the radar screen of the original drafters. Hence there is still a lot of work to be done by NAFTA members in order to address new economic and political challenges that threaten to impede future benefits from regional economic integration, this is despite the progress made so far by the NAFTA partners.<sup>275</sup>

With energy, the NAFTA members are energy interdependent with substantial cross-border flows of petroleum, natural gas and electricity. Canada is the largest and most secure supplier of oil and natural gas to the US, where electricity grids are substantially integrated between the US and Canada but not between the US and Mexico. Due to this there was removal of tariffs and quantitative restrictions on energy trade between US and Canada, however the rules do not extend to Mexico. This is due to the fact that investment in Mexico's energy sector proscribed by its

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<sup>274</sup> Ibid.

<sup>275</sup> Supra Note 248.

constitution was not covered by NAFTA's obligations. NAFTA on the other hand does not go far enough to ensure energy security.<sup>276</sup>

Climate change presents a challenge for the NAFTA members on the ground that it's home to approximately 7% of the world's population but is responsible for 25% of global emissions. On this note the member states are taking the lead in developing regulatory regimes to seek to reduce greenhouse gas GHGs, with this there exists friction between states and federal policies and the competitive concern threatens to spill over the NAFTA borders. NAFTA partners should consider therefore several avenues for cooperation which include adoption of carbon taxes, innovate ways to extend technical and financial assistance to help developing countries reduce GHG emissions. In short term basis, NAFTA should agree to a "peace clause" this is by not instituting new trade restrictions based on carbon footprint of imports for several years so as not to create obstacles to the negotiations of a global post-Kyoto regime.<sup>277</sup>

In a nutshell, despite the involvement of NAFTA members in economic initiatives, the lacking element is a forward looking initiative. With hemispheric competitiveness on the rise and regional free trade promotion unmatched around the world NAFTA needs to step up or risk being left lagging behind thus NAFTA cannot afford to remain your grandma's free trade agreement since there is need for major improvements and amendments to be put in place to ensure that it keeps up with the current trade trends and other pertinent areas including but not limited to security and environment concerns. The forward for NAFTA include several viable options which range from an intra-agreement reevaluation of NAFTA's goals to member states and the push for inclusion of

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<sup>276</sup>ibid

<sup>277</sup> ibid

all three member states this will thus ensure NAFTA's competitiveness in the context of our increasingly dynamic world.<sup>278</sup>

#### 4.3. **ASEAN Free Trade Area (AFTA)**

The Association of Southeast Asian Nation (ASEAN) came into being in 1967 by the founding member countries being; Indonesia, Malaysia, Philippines, Singapore and Thailand which was later extended to include the remaining Southeast Asian Countries which is Brunei in 1984, Laos and Myanmar in 1997 and Cambodia in 1999. The paramount objectives which led to the establishment of ASEAN was to accelerate economic growth, social progress and cultural development within the region and also to reduce historical conflicts and foster regional peace and stability without interventions in domestic affairs.<sup>279</sup>

During the fourth ASEAN Summit in Singapore in 1992, ASEAN members signed the Singapore Declaration and the framework Agreement on Enhancing Economic Cooperation which subsequently resulted in the formation of the ASEAN Free Trade Agreement, its strategic objective was to increase the ASEAN regions competitive advantage as a single production unit and elimination of trade barriers among member states.<sup>280</sup>

The AFTA agreement was signed by Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand. It consists of a schedule of preferential tariff reduction to be implemented progressively

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<sup>278</sup> Accessed at <http://www.csis.org> on 19/07/2015

<sup>279</sup> S. Thangavelu and A. Chongvilaivan, "Free Trade Agreements, Regional Integration and Growth in ASEAN", National University of Singapore, 2009. Accessed at <http://www.paftad.org> on 14/07/2015

<sup>280</sup> Accessed at <http://www.intl.econ.cuhk.edu.hk> on 14/07/2015.

until the year 2008.<sup>281</sup> Goods were divided into five categories including List-Fast Track (IL-FT); Inclusion List Normal (IL-N); Temporary Exclusion List (TEL); Sensitive List (SL) and General Exceptions (GE).<sup>282</sup>

AFTA has proved to be a deep free trade agreement, this is due to the fact that AFTA's coverage is comprehensive, liberalization program is very ambitious, ultimately requiring free/near free trade within the area for the large majority of products and most importantly AFTA members have stuck to their goal of reaching near free intra-bloc trade unlike other members of many developing countries trading blocs. In parallel to the broader tariff negotiations, there are other specific sectoral liberalization programs which include information technology products and automobile industry were implemented by ASEAN members.<sup>283</sup> It also should be noted that the economic cooperation and integration based on initiatives from the business circles of ASEAN countries is well established and enjoys a certain degree of institutional presence within the ASEAN framework.<sup>284</sup>

#### **4.3.1. ASEAN Free Trade Agreement (AFTA) 1992**

The Preamble set out in the AFTA reaffirms the commitment to the ASEAN declaration of 1967, the Declaration of ASEAN Concord of 1976, the Treaty of Amity and Co-operation in Southeast Asia of 1976, the 1977 Accord of Kuala Lumpur and the Manila Declaration of 1987. The Agreement is desirous to enhance intra-ASEAN economic cooperation to sustain the economic growth and development of all Member states which are essentially to the stability and prosperity

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<sup>281</sup> Later postponed to 2010.

<sup>282</sup> H. Calvo-Pardo et-al, "The ASEAN Free Trade Agreement: Impact on Trade Flows and External Barriers", Centre for Economic Performance, CEP Discussion Paper No. 930, London School of Economics and Political Science, 2009.

<sup>283</sup> *ibid*

<sup>284</sup> A. Horacio & N. Grigera, "Sovereignty and Regionalism", *International Law Journal*, Georgetown University, Vol 27, No. 4, 1996 pg. 1091.

of the region. The agreement further reiterates the commitment to the principles of GATT and recognizes that tariff and non-tariff barriers are impediments to intra ASEAN trade and investment flows and that existing commitments to remove these trade barriers could be extensively improved upon.

The Agreement notes the significant unilateral efforts made by member states in recent years to liberalize trade and promote investments and the importance of extending such policies to further open up their economies given the comparative advantages and complementarity of their economies. It recognizes that member states have different economic interests and could benefit from sub-regional arrangements. It is conscious of the rapid and pervasive challenges in the international political and economic landscape as well as both challenges and opportunities yielded thereof which need more cohesive and effective performance of intra ASEAN economic cooperation. It mindful of the need to extend the spirit of friendship and cooperation among Member States to other regional economies as well as those outside the region which contribute to the overall economic developments of member states and finally it recognizes the importance of enhancing other fields of economic cooperation such as science and technology, agriculture, financial services and tourism.<sup>285</sup>

#### 4.3.1.1. **Principles of AFTA**

The AFTA is based on principles which include that Member States shall; Endeavour to strengthen their economic cooperation through an outward-looking attitude so that their cooperation contributes to the promotion of global trade liberalization. Abide by the principle of mutual benefit

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<sup>285</sup> Preamble to the ASEAN Free Trade Agreement (AFTA) of 1992.



in the implementation of measures or initiatives aimed at enhancing ASEAN economic cooperation and participate in intra-ASEAN economic arrangements, however in the implementation of these economic arrangements, two or more members' states may proceed first if other member states are not ready to implement these arrangements.<sup>286</sup>

#### 4.3.1.2. **Areas of Cooperation in AFTA**

Co-operation in trade where all members agree to establish and participate in the ASEAN Free Trade Area (AFTA) within 15 years from the date of coming into force of the AFTA Agreement.<sup>287</sup>

The Common Effective Preferential Tariff (CEPT) Scheme shall be used as the main mechanism for the AFTA, for products not covered in CEPT Scheme the ASEAN PTA or any other mechanism may be used.<sup>288</sup> Members shall reduce or eliminate non-tariff barriers between and among each other on the import and export of products as specifically agreed upon under existing arrangements or any other arrangements arising out of the AFTA Agreement<sup>289</sup> and that, members shall explore further measures on border and non border areas cooperation to supplement and complement the liberalization of trade.<sup>290</sup>

Cooperation in industry, minerals and energy, where members agree to increase investments, industrial linkages and complementarity by adoption of new and innovative measures as well as strengthening existing arrangements in ASEAN region.<sup>291</sup> Members shall also provide flexibility for new forms of industrial cooperation and ASEAN shall strengthen cooperation in the

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<sup>286</sup> Article 1 of AFTA Agreement.

<sup>287</sup> Article 2 A(1) of AFTA Agreement.

<sup>288</sup> Article 2 A(2) of AFTA Agreement.

<sup>289</sup> Article 2 A(3) of the AFTA Agreement.

<sup>290</sup> Article 2 A(4).

<sup>291</sup> Article 2 B(1).

development of minerals sector.<sup>292</sup> Member states shall also cooperate in the field of energy including energy planning, exchange of information, transfer of technology, research and development, manpower training, conservation and efficiency and the exploration, production and supply of energy resources.<sup>293</sup>

cooperation in finance and banking is also another area where Members states shall strengthen and develop further ASEAN economic cooperation in the field of capital markets as well as find new measures to increase cooperation in this areas<sup>294</sup> also member states shall encourage and facilitate free movement of capital and other financial resources including further liberalization of the use of ASEAN currencies in trade and investments, taking into account of the Members respective national laws, monetary controls and development objectives.<sup>295</sup>

The members also agree to strengthen regional cooperation in food, agriculture and forestry through development, production and promotion of agricultural products for ensuring food security and upgrading information exchanges in ASEAN.<sup>296</sup> Members agree further to enhance technical joint cooperation to better manage, conserve develop and market forest resources.<sup>297</sup>

Lastly members agree to cooperation in transportation and communication specters by agreeing to further enhance regional cooperation for providing safe and innovative transportation and communications infrastructure network<sup>298</sup> and continue to improve and develop the intra-country

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<sup>292</sup> Article 2 B(2).

<sup>293</sup> Article 2 B(3).

<sup>294</sup> Article 2 C(1).

<sup>295</sup> Article 2 C(2).

<sup>296</sup> Article 2 D(1).

<sup>297</sup> Article 2 D(2).

<sup>298</sup> Article 2 E(1) of AFTA Agreement.

postal and telecommunication system to provide cost-effective, high quality and customer oriented services.<sup>299</sup>

The other areas of cooperation include research and development, technology transfer, tourism promotion, human resource development and other economic related areas.<sup>300</sup>

#### 4.3.1.2. **Governing Structure**

The responsibility of monitoring the progress of any arrangement arising from this agreement is bestowed upon the ASEAN Secretariat and the Member states shall cooperate with the ASEAN Secretariat in the performance of its duties.<sup>301</sup> The ASEAN Secretariat is established by the Protocol Amending the Agreement on the Establishment of the ASEAN Secretariat of 1992 in order to enable the restructuring of the ASEAN Secretariat in accordance with the Singapore Declaration of 1992. The Secretariat comprises the Head of the Secretariat known as the Secretary-General.<sup>302</sup> The Secretary General shall be deputized by the Deputy Secretary General and the Bureau of Directors.<sup>303</sup>

The functions and powers of the Secretary General shall be responsible to the heads of government meeting and to all meetings of ASEAN Ministers when they are in session and to the chairman of the standing committee. Take charge of the secretariat and be responsible for the discharge of all the duties and responsibilities entrusted to the secretary general by the heads of government

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<sup>299</sup> Article 2 E(2) of AFTA Agreement.

<sup>300</sup> Article 3 of AFTA Agreement.

<sup>301</sup> Article 7 of the AFTA Agreement.

<sup>302</sup> Article 2 of the 1992 Protocol Amending the Agreement on the Establishment of the ASEAN Secretariat of 1992.

<sup>303</sup> Article 5 of the Protocol.

meetings, ASEAN ministerial meeting and the standing committee. Have the authority to address communications directly to the contracting parties. Initiate advice coordinate and implement ASEAN activities. Serve as spokesperson and representative of ASEAN on all matters. Conduct consultations with the contracting parties, private sector and NGO's and other constituencies of ASEAN. Ensure that all the ASEAN committees and other similar bodies are informed of the directives of the standing committee and on relevant current developments in the activities of ASEAN. Administer funds established by ASEAN cooperation. Ensure organizational discipline in the Secretariat and have authority to recruit, terminate or promote staff. Exercise administrative and financial powers vested in the secretary general. Present drafts of staff regulations, financial regulations and security regulations for the secretariat to the standing committee for approvals and propose amendments to such regulations for approvals.<sup>304</sup>

#### 4.3.1.3. **Dispute Settlement**

In the event of any differences between the member states concerning the interpretation or application of the AFTA Agreement or any arrangements arising there from shall as far as possible be settled amicably between the parties. Whenever necessary an appropriate body shall be designated for the settlement of disputes.<sup>305</sup> The ASEAN Tribunal has been on the forefront in determining various aspects affecting the AFTA Agreement. For example the Tribunal has interpreted the issue of investment in the case of *Young Chi OO Trading PTE Ltd vs. Government of the Union of Myanmar*<sup>306</sup> it stated that "...the definition of ASEAN investor in Article I refers to a person making an investment in another member state to which certain conditions apply this

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<sup>304</sup> Article 2 of the Protocol.

<sup>305</sup> Article 9 of the AFTA Agreement.

<sup>306</sup> ASEAN I.D. Case No. Arb/01/1.

is equivocal but might be taken as referring only to persons making investment in future. On the other hand there are provisions which may clearly point the other way Article II of the agreement cover all direct investment. The Agreement under Article III encourages free flow of capital skilled labor, professionals and technology amongst member states...”

#### 4.3.2. **Achievement of AFTA**

In order to ascertain the achievement of AFTA there is need to check on the objectives of AFTA, which include; to speed up the slow progress of trade liberalization activities among ASEAN member states under the Preferential Trade Agreement, to have responsive strength towards the EU, NAFTA and the WTO, to have appropriate responsive strength in line with the trend of world economy which has been moving towards the formation of regional trade blocs, to strengthen the responsive and adjustable ability in line with drastically changing economies of ASEAN member states, to have better rational allocation of resource within the member states of ASEAN, to strengthen ASEAN competitiveness in world trade, to maintain and accelerate the inflow of foreign direct investment and to promote the intra and extra regional trade of ASEAN.<sup>307</sup>

AFTA has grown out of the ASEAN which political instability and regional security issues in the ASEAN region were primary driving force. While economic cooperation was one of the declared objectives of ASEAN, it never became part of the ASEAN's Agenda until the formation of the ASEAN PTA in 1977. The AFTA is considered not only as an important achievement of the

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<sup>307</sup> M. Lwin, “The Achievements and Outlook of ASEAN Free Trade Area: an Overview”, Kumamoto Gakuen University”, (2001), accessed at <http://www.kumagaku.ac> on 19<sup>th</sup> July 2015.

ASEAN regional cooperation but also a significant development in the international trading system.<sup>308</sup>

Prior to the establishment of AFTA, the ASEAN undertook extensive domestic policy reforms by opening up their economies through trade liberalization. To be able to participate in regional economic integration and face regional competition, a country must have domestic industries that are efficient and competitive. AFTA fostered domestic efficiency where resources are allocated according to a country's comparative advantage, the unilateral liberalization policies prepared the ASEAN members for regional as well as global competition.<sup>309</sup>

With the openness of market within the ASEAN area, AFTA minimizes the potential trade diversion effects. This is through the Common Effective Preferential Tariff (CEPT) scheme which allows not only intra-ASEAN liberalization but also liberalization on a most favored nation (MFN) basis. The CEPT Scheme seeks to establish a common effective preferential tariff within the region and it does not raise trade barriers against non-ASEAN economies hence consistent with the GATT's principles. Thus AFTA shows that a free trade area only makes sense in a market environment since it is compatible and consistent with the broader market-oriented policies of each individual ASEAN members.<sup>310</sup>

The framework of AFTA has contributed towards its success. The free trade area as a form of economic integration works best for the ASEAN as the counties have a deep commitment to

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<sup>308</sup> M. Austria, "ASEAN Free Trade Area: Lessons Learned and Challenges Ahead", De La Salle University, College of Business and Economics, Series 2004-01, (2001).

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

preserving the sanctity of their national sovereignty. The gradual approach of expanding the scope of AFTA is another aspect of its success since it is best to start with a scope which is workable and feasible among the members and proceed with the more difficult and sensitive areas as issues are addressed along the integration process. The other aspect is the phasing in the tariff reduction of products by categories, this allowed flexibility in dealing with difficult and sensitive sectors. The process allowed products and sectors not accustomed to market driven competition to be exposed first to domestic competition before being included into the regional integration scheme. The AFTA looked beyond tariff reduction and elimination of other barriers, CEPT came in a package together with other measures which include harmonization of standards, reciprocal recognition of tests and certification of products, customs procedures, competition policy and liberalization of investment and services.<sup>311</sup>

There is a strong political commitment with the ASEAN leaders who have accelerated the deadline of the AFTA not only once but twice. The response of not backtracking on the AFTA has showed to the outside world that ASEAN was not slowing down on its intra-regional liberalization commitment but was even bent on maintaining its commitment to regional economic integration. AFTA has helped national governments deal with vested interests in their countries against the AFTA, while helping locked in trade liberalization process going in the individual ASEAN members.<sup>312</sup>

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<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

#### 4.3.3. **Challenges Facing AFTA**

There are various challenges that face ASEAN Free Trade Area, these challenges include but are not limited to;

##### 4.3.3.1. **Diminishing Marginal Returns to Economic Integration**

Although there have been growth in intra ASEAN trade over the past few years, the increase has been less significant in the later years. This has been attributed to the small size of the ASEAN market compared to other trade areas and also in comparison to the percentage of intra-regional trade with other blocs.<sup>313</sup>

##### 4.3.3.2. **Importance of Non-tariff Barriers to Trade**

Even though AFTA has effectively reduced tariff rates of ASEAN members, this effort has limited impact on increasing trade flows within the region. The main factor contributing to the limited impact is the presence of non-tariff barriers to trade. Hence large decrease in tariff rates both income and trade rise by very insignificant amounts.<sup>314</sup>

##### 4.3.3.3. **Rivalry between ASEAN Members**

Given the small market ASEAN has unlike other regions it limits the members to trade between themselves, thus creation of rivalry due to the scrambling of minimal resources available to trade in. This is the reason that ASEAN constantly looks towards extra-ASEAN trade for its economic growth, the problem with this is that members states and not ASEAN as a whole is involved in

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<sup>313</sup> Supra Note 257.

<sup>314</sup> Ibid.



external trade, hence the extending its ties with external relations as whole rather than as individual members in order to capitalize on trade.<sup>315</sup>

#### 4.3.3.4. **Lack of Leadership**

ASEAN lacks a strong leader capable of coordinating the integration efforts of the region and in further promoting the region this has led to the rivalry between members and also lack of economic growth through trade in goods and services and their differences in terms of levels of development despite sharing common cultural and historical background, hence with different levels of income and development the ASEAN members differ in their motivation and interests which might diverge from each other. If there was to be proper leadership then ASEAN would be able to reduce the limitations to a large extent, the divergent of interests would be reconciled which will in turn promote greater integration within the region.<sup>316</sup>

#### 4.4. **Conclusion**

In conclusion, this chapter has done a comparative study on the two well established Free Trade Areas which include the Northern America Free Trade Area (NAFTA) and the ASEAN Free Trade Area (AFTA). The chapter has examined how they were formed, examining its legal structures which include the formation agreements, governing structures, dispute settlement procedures, principles and objectives of the FTA's. The Chapter has also examined the achievements made by the discussed FTA together with the challenges and their futures.

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<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

Given the outstanding achievements made by the discussed FTA's through promotion of trade and investment, increase in employment and improve of working conditions and living standards, management of trade relations and disputes and also considering the limitations faced. The soon to be formed Tripartite Free Trade Area between EAC-COMESA-SADC ought to borrow a leaf from the discussed FTA's in order to carve its own niche in the world trade spectrum and also to stand as an example of to be emulated FTA's like NAFTA and AFTA which have been discussed in detail in this chapter.

## **CHAPTER V**

### **5.0. CONCLUSION AND RECOMMENDATIONS**

#### **5.1. Introduction**

This chapter entails a conclusion of the key findings made in the entire study, it also makes necessary recommendations for the effective and success of the to-be formed Tripartite Free Trade Area encompassing EAC, SADC and COMESA.

#### **5.2. CONCLUSION**

With the proliferation of regional agreements, it has created a spaghetti bowl of crisscrossing arrangements with little attention to coherence among agreements or to the implications of so many regimes for trade costs, efficiency and the conditions of competition in global markets. Against the assumption that today's international trading arrangements are far from optimal, it is important to answer more precisely the notion of regionalism. In considering this, it is also natural to ask only how regionalism itself might evolve into something different, but also what role the WTO might play in promoting a more inclusive and coherent trading system, freer of economic distortions.<sup>317</sup>

Currently there is a surge towards establishing of a single economic space, in the entire continent, this is under the aegis of the African Union (AU) previously known as the Organization of African Unit. The Union has agreed to establish the single economic space by the year 2027 as per the Lagos Plan of Action adopted by the Heads of States of AU countries; this was buttressed by the

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<sup>317</sup> Supra Note 46 at pg. 2.

Abuja Treaty signed in 1991. It recognizes that regional communities (RECs) including SADC, EAC and COMESA are building blocks to the AEC.<sup>318</sup>

The soon to be established Tripartite Free Trade Area between EAC, SADC and COMESA is considered as a positive inter-regional initiative and the merging of the three REC's serves as a building block towards the realization of a single economic space under the African Union.<sup>319</sup> The arrangement is premised on the understanding that the three REC's implement similar trade, customs and infrastructure programs. Central to the objectives of the proposed arrangement is the need to overcome the challenge of overlapping membership where almost two thirds of the member states entailing the three REC's are either already in a customs union and participating in negotiating alternative customs unions to the one they belong to or are in the process of negotiating two separate customs unions.<sup>320</sup>

This research has delved immensely to elicit discussion on the process of regional integration in Eastern and Southern Africa. It has discussed in depth the stages and status of integration among the three REC's being EAC, SADC and COMESA, by analyzing its structures, history, governing laws and institutions, it has further discussed current trends and developments in cooperation and harmonization of programs among the REC's, challenges facing the RECs have also been discussed as well as the achievements which are immense on the areas of promotion of trade in goods and services and also on the movement of persons and goods within the member states of the said REC's. The paper has also discussed the basics of international trade, including the various

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<sup>318</sup> Supra Note 300 at pg. 5.

<sup>319</sup> Ibid.

<sup>320</sup> Ibid.

forms of trade, the regulation of international trade by looking deeply into the GATT Treaty and the WTO which has played a vital role in regulation of international trade since 1947 to date. The research has further done a comparative study of established REC's in the world being ASEAN and NAFTA by examining the founding treaties, governing structures and institutions, achievements and challenges that have bedeviled them with a view of trying to borrow a leaf to enable our REC's and further the soon to be formed Tripartite Free Trade Area.

Finally, the question that emerges is what are the implications of merging regional trade bodies? The answer to this question as it has been elaborated in previous chapters boils down to the examination of existing regional trade agreements in this case EAC, SADC, COMESA and to the larger extent NAFTA and AFTA this examination will therefore reveal the achievements as well as the challenges that face the day to day running of such trade bodies, as discussed the trade bodies have been successful in facilitation of trade in goods and services by increase in market area, promoted movement of persons and goods within member states with little or no restrictions and has also contributed largely in building the members states economy and development.

Despite all the positive achievements, the trade bodies have had its fair of downfall, which include resource allocation where it has been done in a biased manner, lack of political will, interference with legal and institutional structures of member states, lack of transparency, poor governance among other factors.

These negative impacts have threatened the main existence of the trade bodies to the extent that some such as the EAC had initially collapsed before being resuscitated. After considering all of

the above, it is fair to say that merging of trade bodies will bring with it both negative and positive impacts towards promotion of trade and integration in this case the EAC, SADC and COMESA Tripartite Free Trade Area will have to borrow a lot from other well established trade bodies and also consider and rectify all the failures that each trade body had faced and as well as incorporating the recommendations that are set in this research, this will ensure a success and eventually being a stepping stone rather than a stumbling block towards trade liberalization and improvement of economic development to its member states.

### **5.3. RECOMMENDATIONS**

In order for the Tripartite Free Trade Area encompassing the EAC, SADC and COMESA and any other regional trade body to succeed the following recommendations need to be adhered to.

#### **5.2.1. Political Will**

Political will plays a vital role to the success of any regional trade body or agreements, this is due to the political nature of such agreements since it involves political organs of a member state. Hence for a successful Tripartite Free Trade Area there need to be immense lobbying and consideration of the political will between member states this is in consideration of the fact that the to be merged trade bodies had challenges which mostly emanated from political will of parties to participate in their respective trade bodies. For example the East African Commission had numerous challenges of lack of political will which almost led it into total collapse. This has been the case to date of the competition between Kenya and Tanzania where trade in goods and services and movement of persons and goods is limited.

The main feature to ensure political will among member states is to create incentives whose benefits will cut across the entire spectrum of the member states government and brings benefits to the population. This will come into a reality because of the widening of the markets which will in turn improve trade and thus increase economic growth and development.

There has to be a pairing of mutual concession and complementarity of interest for trade liberalization to gain political credibility. In a context where there does not seem to be much trade policy shift in areas such as services in developing countries, there will hardly be any interest for developing countries to make further liberalization concessions in key areas where developing countries could reap benefits.<sup>321</sup>

#### **5.2.2. Equitable Distribution of Resources**

One of the main factors that lead to failure of established trade bodies is the distribution of resources, with the widening of market there comes vast resources which need to be shared in an equitable manner across the member's states. There are instances where a member state amasses resources of the trade body to the extent that the other members run at losses this will lead to the collapse of the trade body.

With the joining into force of various countries, there is the capability of increased in resource gains from the market and also through trading with other bodies in other parts of the world. The issue that arises forthwith is on the modality of distributing these resources to the member states in an equitable manner, this is after considering the contribution of each state to the achievement

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<sup>321</sup> P. Krugman, "The Move Towards Free Trade Zones", in J. Hole, "*Policy Implications of Trade and Currency Zones*", Federal Reserve Bank of Kansas City, 1993, pg. 69.

of the said resources this is with due regard of the fact that the members may be having different economic strength. In order therefore to attain equitable distribution and also to ensure the longevity of the trade body, there is need for equitable allocation of resources.

### **5.2.3. Embrace Globalization**

Globalization refers to the growing interdependence of countries resulting from the increasing integration of trade, finance, people and ideas in one global market place. International trade and cross-border investment flow as are the main elements of this integration. With globalization developing countries benefit from the new technologies that spill over to it from its trading partners. These spill overs are particularly important since they give the developing countries a chance to catch up with the developed world in terms of trade and productivity. A way of measuring the extent of the progress of globalization is the ratio of a country or a region's GDP and GNP, by this measure globalization has doubled on average since 1950.<sup>322</sup>

In order to ensure the success of the Tripartite Free Trade Area, there is need to embrace globalization which entails meeting up with the current trends in terms of technological advancement, ICT, developmental aspects and other forms which brings the trade body to the same level as well as other well established trade bodies for example NAFTA and the European Union. The purpose of globalization is on the fact that trade is not conducted locally only but international and when a less advanced trade body wants to compete with advanced bodies, the less advanced one is destined for a fall, this is due to the fact that they are not equal in very many measures.

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<sup>322</sup> Accessed at <http://www.worldbank.org> on 24/09/2015.



Therefore in globalization the trade body will stand a chance of competing with other bodies and becoming a stepping and not a stumbling block.

#### 5.2.4. **Governance**

Good governance lies at the heart to both the effectiveness and legitimacy of collective decision making.<sup>323</sup> Good governance entails, repetitiveness by all member states, accountability where policy makers act in the public interests of all the member states, rationality where governance founded on careful consideration of relevant facts and good analysis is likely to stand over time, efficacy it is based largely on results, efficiency, neutrality, clarity, stability, power sharing, fairness and participation and due process.<sup>324</sup>

Leadership in any institution is a core factor to its development and meeting its objectives, therefore in order for any institution to succeed there ought to be laid down rules and procedures on how to best lead the said institution. Trade bodies are not left behind, there need to be strong sense of leadership, with well laid down institutions and bodies to ensure that the leadership is strong and eventually will be able to ensure that the trade body meets its objectives which in essence is to promote trade and improve economy and development among member states.

For the Tripartite Free Trade Area, the treaty that will eventually establish it, should be well structured to ensure that the provisions of leadership are well structured and articulated to ensure that the running of the trade area is done in a manner that it promotes trade and fairness. Given the vast number of member states it will be prudent to have a council encompassing all the member

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<sup>323</sup> W. Davey and J. Jackson, "The Future of International Economic Law", Oxford University Press, 2008, pg. 71.

<sup>324</sup> Ibid.

states so as to ensure that no state is discriminated against most particularly in decision making and also allocation of resources.

#### **5.2.5. Transparency**

Transparency is key to running of any institution or trade body, parties have to be assured of transparency in any activity in order to instill faith in their participation. The issue of transparency cuts across a wide spectrum of aspects which include leadership, allocation of resource, decision making and any other aspect of day to day running of the trade body.

For a successful trade body in this regard the Tripartite Free Trade Area, there is need for maximum transparency, since lack of it will lead to its collapse before even attaining its objectives.

#### **5.2.6. Legal and Institutional Framework**

The legal and institutional framework of the trade body should not interfere with the ones of the member states. One of the main reason why most states do not wish to participate in such trade bodies is the fear of losing their sovereignty and as well as their institutional and legal framework this is due to the perception that once the member states enters into a treaty the sovereignty and its legal and institutional framework will be interfered with to pave way for the trade body. International economic law in some way challenges some concept of state sovereignty and territorial integrity as well as also being part of the process of globalization.<sup>325</sup>

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<sup>325</sup> Supra Note 8 pg. 479.

This perception is not necessarily correct given the main objectives of the formation of a trade body is the promotion of trade through expansion of market and movement of goods and persons within the region. Some of the member states laws will have to be done away with in order to ensure meeting of the said objectives, this will however not necessarily interfere with the sovereignty of the member state.

In drafting therefore of the treaty for the formation of the Tripartite Free Trade Area, there should be clear provisions which will ensure that member states sovereignty, legal and institutional structures will not be interfered with and if the same will be interfered it should provide for remedies for the said interference such as compensation and ways in which to bridge the said interference.

#### **5.2.7. Unity of Vision**

The unity of vision among the member states and in particular the major economies are a must in order to ensure that the Tripartite FTA is to become successful. There must be a unity of vision on the objective and finality of a regional agreement among the major economies in the three REC's as well as other member states. This unity of vision must be present at the beginning of the process and must be maintained until the end of the process and also by extension throughout the existence of the Trilateral FTA so as the objectives and goals of the Trilateral FTA are to be met.<sup>326</sup>

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<sup>326</sup> T. Disenyana, "Towards an EAC, COMESA and SADC Free Trade Area: Issues and Challenges", SAIIA African Perspectives Global Insights, 2009, pg. 25.

#### **5.2.8. Targeting an Achievable Outcome**

In order for the Trilateral FTA to be successful, the targets in the agenda should not be overly ambitious for example in the area of services and investment, the more advanced regional members may need to consider a more nuanced approach in terms of service and investment commitments thus derailing the process of integration. Reaching a region-wide agreement among many widely divergent economies certainly will prove to be challenging.<sup>327</sup>

An integral component of the trilateral FTA need therefore to entail a strong trade capacity building program which would be designed to assist those less advanced economies in reaching the necessary levels of institutional sophistication that would allow them to assume the new FTA disciplines. The issue of time frame also should be discouraged since the same would pile pressure on the least developed economies to participate fully in the Trilateral FTA.<sup>328</sup>

#### **5.2.9. Minimal Interference by Other Regional Trade Negotiations**

For any positive outcome to be observed from the to-be formed Trilateral FTA, there should be minimal distractions from outside or from other negotiating efforts. For this to be achieved, there need to be a standstill agreement at the outset to cease negotiating other regional trade agreements during the formation of the Trilateral FTA since these discussions or negotiations will generate a parallel impact from the one to be achieved by the Trilateral FTA similarly negotiating leverage of large trading partners with smaller ones in bilateral trade agreements could take away their ability to be full participants in the trilateral FTA negotiating process. Therefore to avoid this distraction a clause should be included in the Treaty in order to clarify the status of existing or

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<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

previous-negotiated trade agreements and their relationship the future region wide agreement. This clause will clarify the fact that once the Trilateral FTA is finalized and put in place would prevail over all previous agreements unless the disciplines of these preexisting trade agreements were deeper and went beyond the Trilateral FTA.<sup>329</sup>

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<sup>329</sup> Ibid.

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