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Variable Geometry of African integration and its implication on AfCFTA

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DECLARATION

I declare that this mini-dissertation which is hereby submitted for the award of Masters' of philosophy (MPhil) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution. Other works referred to are accordingly acknowledged.

Sewagegnehu Dagne Taye



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I would like to thank Dr Oyeniyi Abe, without him my endeavour to this journey would have been very difficult.

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Acronyms

AEC-	African Economic Community
AfCFTA-	African Continental Free Trade Area
AMU -	Arab Maghreb Union
AU/OAU-	African Union/ Organization of African Union
CBI -	Cross Border Initiative
CEMAC -	Central African Economic and Monetary Community
CEN-SAD -	Community of Sahel-Saharan States
CFTA-	Continental Free Trade Area
COMESA -	Common Market for Eastern and Southern Africa
EAC-	East African Community
ECCAS -	Economic Community of Central African States
ECGLC -	Economic Community of the Great Lakes Countries
ECSC-	European Coal and Steel Community
ECOWAS	Economic Community of West African States
EEC-	European Economic Community
EFTA-	European Free Trade Area
EMU-	European Monetary Union
EU-	European Union
IGAD-	Intergovernmental Authority for Development
IOC-	Indian Ocean States
LAP-	Logos Action Plan
MRU -	Mano River Union



NAFTA-	North America Free Trade Area
NAI-	New African Initiative
NEPAD-	New Partnership for African Development
RTA-	Regional Trade Agreements
SACU -	Southern African Customs Union
SADC -	Southern African Development Community
TFTA-	Tripartite Free trade Area
UNECA-	United Nation Economic Community for Africa
WAEMU -	West African Economic and Monetary Union
WTO-	World Trade Organization

List of Instruments and Treaties

Treaty establishing the African Economic Community entered in to force in 1994

Treaty Establishing the African Continental Free Trade Area entered in to force 30 May 2019

Treaty Establishing the Arab Maghreb Union

Organization of African Union charter, 25 May 1963

Constitutive Act of the African Union

Treat Establishing Central African Economic and Monetary Community (CEMAC)

Treaty Establishing the Community of Sahel-Saharan States (CEN-SAD)

Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA)

Treaty Establishing East African Community (EAC)

Treaty Establishing the Economic Community of Central African States (ECCAS)

Treaty establishing the Economic Community of the Great Lakes Countries

Revised treaty of ECOWAS

European Union and the European Monetary Union treaty

Agreement establishing the Indian Ocean States (IOC)

Logos Action Plan of 1980

New Partnership for African Development agreement signed in 2000

Southern African Customs Union agreement of 1910, 1961 & 2000

Treaty Establishing the Southern African Development Community

Treaty Establishing the Tripartite Free trade Area (TFTA)

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Abstract

Variable geometry is an approach in regional integration, which allows member states to be flexible and choose differentiated speed towards integration. The idea is well known and implemented in the European integration experience. Now, it becomes the establishing principles for the African continental free trade area (AfCFTA), which is the biggest continental initiative to create a customs union and common market in Africa. Since Africa is a big and diverse continent achieving integration with the same speed and similar terms are proved difficult. So, endorsing variable geometry is not a choice for Africa. It is the most feasible way forward for the continent to achieve its goals of integration. However, the application of variable geometry and flexibility in the present sense will further complicate the already complicated integration experience of the continent. The present variability in the continent lack structure. Integration in the regional and continental level is totally flexible in which countries implement agreement when they want and does not when some obstacle happens. For AfCFTA to work the continental body should find a way to limit the level of geometry in the implementation. The research also recommends that bring onboard all countries in Africa should be the first task for the continental initiative. For the initiative to achieve a lasting effect, it should secure the championship of big economies of the continent.

Key Words; variable geometry, regional integration, AfCFTA, special and preferential treatment, consensus decision making, differentiated integration, Regional trade agreement, Africa

Chapter One

Introduction

1.1. Background of the Research

On 2 April 2019, 22 African states ratified the African Continental Free Trade Area (AfCFTA) Agreement, establishing the continent's largest free trade area.¹ The fulfilment of the 22nd ratification which is the threshold to implement the biggest continental free trade area (CFTA) has been accepted with many appreciations and hopes from different sides of the continent and international organizations, who support the initiative beginning from the inception. Even if the agreements essential parts, the Protocol on Trade in Goods which include the schedule of tariff concession, rule of origin, and the schedule of specific commitments on trade in service negotiations are still ongoing, the ratification of the state of the Gambia as the 22nd country makes AfCFTA ready to take off.²

When we track the trend, this initiative to create a continental-wide free trade area dated back to the Abuja treaty of 1991 which established the African economic community (AEC). The Abuja treaty is a long term plan to promote economic, social and cultural development and the integration of Africa by promoting cooperation in all fields of human endeavour, by policy harmonization and developing peaceful relation.³ It also contains a roadmap to create an African economic community with a time frame of not more than 34 years, with six sequential steps each divided into specific tasks and time frames of implementation.⁴ As the third step in the African economic community agenda of integration, the assembly of the head of states and governments eighteenth ordinary session in 2012 agreed to establish the Continental Free Trade Area (CFTA).⁵ In the session, the states and governments recognized the importance of promoting inter African trade for achieving sustainable development, employment generation and effective

¹ Rudi hartenberg & Gerhard Erasmus 'AfCFTA is officially in force — now the real work begins' 30 May 2019 Business Daily. Available at <https://www.businesslive.co.za/bd/opinion/2019-05-30-afcfta-is-officially-in-force--now-the-real-work-begins/>

² Thomas Kendra 'Free trade takes a step towards reality' 15 April 2019 African Law & Business. Available at https://www.africanlawbusiness.com/news/9370-free-trade-takes-a-step-towards-reality_ (accessed on 25 September 2019)

³ Article 4(1) of Abuja treaty establishing African Economic Community.

⁴ Article 6(1) of the Abuja treaty

⁵ Article 6(2) (c) of the Abuja treaty

integration of Africa into the global economy and decided to establish a continental free trade area (CFTA) by 2017.⁶

With an only one-year delay, on 21 March 2018, the agreement establishing AfCFTA was signed in Kigali, Rwanda, by 44 heads of states and governments of the African Union (AU) member states. By July 2019 except Eritrea, the other 54 member states of AU signed the agreement.⁷

In addition to the AEC target to create a free trade area, AfCFTA is one of the flagship projects for the African Union (AU) to create an integrated continent by 2063. This flagship project aims to significantly accelerate the growth of intra-African trade and use trade more effectively as an engine of growth and sustainable development. It has a short-term plan of doubling intra-African trade by 2022, strengthen Africa's common voice and policy space in global trade negotiations and establish the necessary financial institutions which will support the initiative within agreed upon time frames.⁸

The implementation of AfCFTA will be based on 12 principles including of Variable Geometry, flexible and special and differential treatment of member states.⁹ In the multilateral trade agreement, usage of variable Geometry as a central principle is an uncommon approach. Flexibility, special and differential treatment is the most common approach that we know in the WTO trading system and the other regional trade agreements which gives preferential terms and additional time for developing and least developed countries so that they able to adjust themselves before they open their market for external competitors.¹⁰

Variable geometry, on the other hand, is an addition to special and preferential treatment. It is a concept which has different definitions from different people. Peter L. defines variable geometry as a strategy in a multilateral trade agreement, which gives flexibility for countries to move in different speed to integration. It's a situation that will happen when one or more particular issues lead to an agreement that is not binding on all of the parties to the agreement and it works as an

⁶ Assembly/AU/Dec.394(XVIII)

⁷ African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents available at <https://www.tralac.org/resources/by-region/cfta.html> (accessed by April 20, 2019).

⁸ International Trade Centre (ITC)'A business guide to the African Continental Free Trade Area Agreement' Geneva (2018) 4.

⁹ Article 5 of the treaty establishing the African Continental Free Trade Area.

¹⁰ Annex A-E of the General Agreement on Trade and Tariff contains list of countries and situations for preferential treatment.

alternative to strategies that require all parties to be bound by all of the terms agreed in complex many countries many issue negotiations.¹¹

In the African context, Gathii defines variable geometry as:

“a rule, principle and policies adopted in trade integration treaties that gives member states particularly the poorest members: (i) policy flexibility and autonomy to pursue at slower paces timetabled trade commitment and harmonization’s objectives; (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of regional wide liberalization commitments and policies aimed at the equitable distribution of the institutions and organizations of regional integration to avoid a concentration in any one member; and (iii) preferences in industrial allocation among members in an RTA and preferences in the allocation of credit and investment from regional banks.”¹²

According to Gathii variable geometry is a concept applicable to multilateral agreements which contain countries with different levels of economic development. The rationality is to minimize the fraction of non-agreement by leaving countries who are not in the position to accept specific provisions or whole treatise on specific topics. The existence of differences in views among nations and the unequal benefits from the integration that is primarily focused on trade liberalization makes moving at the same speed and uniform standards difficult¹³.

Tino, on the other hand, defines variable geometry as a form of differential cooperation between member states of a specific agreement. This implies that all member states are bound only by provisions originally set by the founding treaty, while the implementation statutory provisions adopted by different rules and acts are binding only for those states who are willing to accept it.¹⁴

When we bring the above three definitions together and interpret in our case study, AfCFTA member states are only obliged to accept the Kigali Declaration of 2018 establishing the AfCFTA. The negotiations on the liberalization of trade in goods and services, rules and procedures for the settlement of dispute, competition policy and intellectual property right will

¹¹ Peter Lloyd ‘The variable Geometry approach to International Economic Integration’ 2008 presented to the 7th APEF conference in Iran, University of Malborne at 6- 8.

¹² James T Gathii ‘African Regional Trade Agreements as Legal Regimes’ (2011) at 35.

¹³ James T. Gathii (n 12) at 36-37.

¹⁴ Elisa Tino ‘The variable geometry in the experience of regional organizations in developing countries’ 2014 The Spanish Yearbook of International Law at 141-143.

be open for countries who are in the position to implement them without obligation. Countries who agreed to implement the agreement will go forward without waiting for the others to agree. Even countries who signed the establishing agreement will have the right to decide to accept or not to accept agreements follow the statutory agreement. Based on Gathii's definition, if all countries want to move by the same speed there should be compensation mechanisms for those countries who will lose from the trade liberalization and other agreements. Countries that are reluctant to become part of any of these two packages will still have the right to ignore the agreements and become members for part of the agreement only.

So variable geometry is an addition to the traditional special and preferential agreement which gives wide space for flexibility. For AfCFTA accepting this principle will have specific consequences. This research is then a study of the effect of variable geometry on AfCFTA by relating it with historical trends of integration in Africa because regional trade agreements (RTA) are the direct reference points to study integration trends in Africa. It is a fact that RTA in Africa fails to fulfil most of their target by far.¹⁵ Since AfCFTA is based on the existing RTA it is worth to begin from them. In addition, the highest decision-making organs (head of states) of the RTA and the AfCFTA are the same organs and the trend shows that they are reluctant to implement agreements. Adding flexibility and variable geometry on this reluctance they are showing to open their door for their neighbour's will defiantly implicate itself in the continental initiative and can result in multiple challenges for the success of AfCFTA.

In big integration endeavour, success often demands more than the mere desire of small countries to create economies of scale through the expansion of trade and link themselves together. To be successful, there are important questions regarding the choice of integration and cooperation strategy that enables to avoid past mistakes and fasten the integration process. The design of the integration process, the structure and implementation as well as the scope and coverage of the agreement should be clear and applicable.¹⁶

In this regard, different regions choose different approaches to integration. The history of integration experience in Europe and US which are examples of a successful integration process was found to include some specific structures, which was applicable in the European Union (EU)

¹⁵Babatunde Omilola 'To what extent are regional trade arrangements in Africa fulfilling the conditions for successful RTAs?' (2011) 3(6) *Journal of African Studies and Development* at 212.

¹⁶ T. Ademola Oyejide 'policies for regional integration in Africa' (2000) 62 *African development bank, economic research papers*, University of Ibadan at 25.

and North American Free Trade Agreement (NAFTA). From their perspective integration is regarded as necessarily destined to proceed on a linear path where tariff and non-tariff barriers are progressively eliminated. The trade regime of member countries is linked together so as to create fiscal and monetary policy harmonization. In addition to the linear path, trade integration has been the result of serious treaty commitments that also created a supranational organization to which the states surrender a certain level of authority.¹⁷ On the other hand, the integration process of Africa in light of those agreements is flexible without any reputational consequence of noncompliance.¹⁸ The existence of the regional trade rule and the institution has not done much to change the behaviour of African countries. Looking at it in this mirror, variable geometry in the form of flexibility or not to implement agreements was also a practice of the RTA in Africa, even if many RTAs did not accept it as a principle as AfCFTA did.¹⁹

In AfCFTA agreement, variable geometry will give countries the flexibility to opt-out and opt into different parts of the agreement which have a wide range of scopes including the agreement on trade in goods and services, intellectual property, protocol on investment, protocol in competition policy as well as procedures in dispute settlement. When finding common ground becomes difficult, countries have the right to go forward with their own agenda of more liberalization or they should find a way to compensate countries that will be affected negatively by the agreement. On the other side, countries also will have the right to opt-out from the agreement which they think they are not better off.

1.2. Statement of the problem

Africa is a diverse continent with different levels of development, different economic size and large numbers of countries. Creating an integrated Africa with harmonized rules of trade and other economic relation is not a simple task. The decades of integration experience in regional and continental level shows that integration in Africa is more complex and difficult than integration elsewhere.²⁰

Regional trade agreements (RTA) in Africa operate without strict adherence to rules, which gives them the flexibility in implementing the trade agreement. When countries sign an agreement, it

¹⁷ James T. Gathii (n 12) 1.

¹⁸ C. Lipson 'Why Are Some International Agreements Informal?' (1991) 45(5) *International Organization*, World Peace Foundation and the Massachusetts Institute of Technology at 495.

¹⁹ S. Krasner (ed) 'Structural cause and regime consequence; regimes as intervening variables' in S. Krasner (ed.), *International Regimes* (1983) Cornell University press at 5-10.

²⁰ Trudi Hartzenberg 'Regional integration in Africa' 2011 Trade Law Centre for Southern Africa (Tralac) at 5.

doesn't show a full commitment to the initiative. When signing those agreements, the leaders don't understand the treaties as a punitive sanction in a situation of noncompliance. In relation to the eagerness of the leaders to accept and sign the treaties, their compliance for the treaty, taking responsibility for noncompliance and surrendering certain competencies for the organization created by the treaty is very low.²¹

The lack of commitment attributed to several daunting problems that developing countries face in integration exercises, two of which are associated with differences in the size and level of development of the participating countries which results in a cost for the economy²². The fear of unequal benefit pushes the integration process to accept the flexible way of implementation.²³ Since variable geometry in the form of flexibility is designed to accommodate less well of or unwilling members of the RTA that are concerned about the economic and political cost of liberalization for themselves in the short run, this approach of flexibility and variable geometry limits more ambitious trade liberalization goals,²⁴

In addition to the effect resulted in the integration exercise, variable geometry is the least explained concept in a regional trade agreement. Because of this, the scope of the implementation is not bounded by any specific arrangements which can guide the level of geometry. Elisa, in her research on 'The Variable Geometry in the Experience of Regional Organizations in Developing Countries,' argues that variable geometry can be applied in every aspect of regional agreements beginning from the negotiation of founding treaty up to the negotiation of the executing agreements and implementation of those agreements.²⁵ On the other hand the Treaty Establishing the East African Community (EAC) used variable geometry as "the principle of which allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds;"²⁶ and the high court of EAC interprets it as a principle applicable only in the implementation of agreements.²⁷

²¹ James T. Gathii, (n 12) 1-2.

²² Colin L. McCarthy 'Regional Integration of Developing Countries at Different Levels of Economic Development: Problems and Prospects' (1994)14 *Transnational Laws & Contemporary Problems* at 10-11.

²³ James T. Gathii (n 12) 35.

²⁴ James T. Gathii (n 12) 35

²⁵ Elisa T. (n 14) 143-144

²⁶ Article 7(1) The Treaty establishing The East African Community.

²⁷ The East African Court of Justice 'The Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion' 2008 (1).

The other issue related to variable geometry is its possible effect for the success of trade agreements at the regional and multilateral level is not clear. A paper presented for United Nation Economic Commission for Africa (UNECA) about variable geometry concluded that the implementation of variable geometry in Africa's RTAs would lead to the fragmentation to a sub-regional space by instituting difference in the integration scheme. Since the coordination and rationalization of integration institutions and the harmonization of activities are indispensable to the building of the African economic community, variable geometry will fragment the already progressed steps in harmonization.²⁸

On the other side, variable geometry has advocated in many places including the WTO. After the fall of the Doha round of negotiation, the idea of using variable geometry as a principle for the WTO is getting attention.²⁹ Philip Levy, in his article on "alternatives to consensus at the WTO", concludes that;

"The persistent ill-health of the Doha trade talks poses a serious risk to the global trading system and justifies exploration of new and potentially radical remedies. Of the two discussed here, the variable geometry option of strong plurilateral agreements under the WTO seems the most promising. Such an approach has its own share of problems but may be preferable to waiting and hoping that a consensus will finally spring up among the 153 nations of the WTO."³⁰

The idea of variable geometry gets momentum after the failure of the Doha round of negotiation, which triggers few writers to write on the applicability and the impact of variable geometry in the WTO trading system and its history of applicability under EU integration. The outcomes of these researches are very diverse, and it is difficult to get enough pictures of variable geometry. In the case of Africa, research around available geometry and its applicability are very limited. The data from the perspective of EU and WTO is difficult to use because the WTO is a more advanced and more diverse than the African trading arrangement, while the EU has a different

²⁸ United Nation Economic Commission for Africa 'On the general scheme for coordinating and harmonizing integration activities in Africa: a critique of the principle of variable geometry' (1993) Seventh joint EAC/UNDP/African NGOs/ United Nations specialized agencies meeting in Addis Ababa at 9.

²⁹ Doha Round is a multilateral trade negotiation launched by the WTO in 2001, which is still ongoing because of the disagreement between different countries.

³⁰ Philip Levey 'Alternative for consensus at the WTO' 2010 available at <https://voxeu.org/article/alternatives-consensus-wto>, (accessed 20 April 2019)

structure of integration.³¹ In addition, the goal of African integration is more than creating a free trade area. Since AfCFTA is in the inception stages the effect of applying variable geometry and flexibility will be different from mature organizations like the WTO.

So, this lack of agreement on the ways variable geometry can be applicable, little research on the consequence of applying variable geometry in multilateral trade arrangement and nonexistence of research in the case of Africa are the main issues why this research is necessary. Based on these facts on the ground, this paper covered three aspects of variable geometry in the AfCFTA trading system and RTAs in Africa that includes rationality of applying the idea of variable geometry, possible way of applying variable geometry and the potential consequences of variable geometry for the successful implementation of AfCFTA.

1.3. Research questions

In the quest to understand variable geometry of integration in AfCFTA and African RTAs the research used the following research question.

1. How the flexible characteristics of the AU will affect AfCFTA?
2. What are the consequences of utilizing variable geometry of integration in the adoption, ratification and implementation of treaties?
3. What is the role of the flexibility of treaties for the slow implementation of agreements in Africa?
4. What are the possible consequences of applying variable geometry in the AfCFTA trading system?
5. How variable geometry will work side by side with consensus decision making?

1.4. Objectives of the study

Generally, this study explored the legal and structural issues of the AfCFTA, and the applicability, the possible consequence as well as the rationales of applying variable geometry under the AfCFTA trading arrangement. In particular, this paper tried to;

1. Explore the experience of AU treaty adoption, ratification and implementation and its implication to AfCFTA.

³¹Egeberg, M. &TrondalJ. 'Differentiated integration in Europe: The case of EEA country, Norway' (1999) 37 (1) Journal of Common Market Studies at 133–142.

2. Explore implementation experience of their RTAs in Africa, the reason for their variability in progress and its implication on AfCFTA.
3. Explore the experience of the European Union in implementing variable geometry.
4. Evaluate the possible ways and consequence of applying variable geometry in AfCFTA and,
5. Gave recommendations on how AfCFTA will be able to use variable geometry without compromising the success of the project.

1.5. Hypothesis

The AfCFTA is a big opportunity for Africa, however, the application of variable geometry in the present form and too much flexibility in the implementation process will further complicate the already complicated integration experience of the continent.

1.6. Significance of the study

The concept of variable geometry is a concept overpassed by scholars of regional integration and international trade researchers, which makes the availability of books and researches about variable geometry and its effect as well as its applicability in regional economic integration very low. In addition to the lack of availability, the existing articles focused only on the variable geometry of EU integration and a few articles on the possibility of applying variable geometry of the WTO trading system. Researches on the variable geometry of African RTAs is almost none. So, this research mainly targeted to contribute some resources on flexibility and variable geometry of RTAs in Africa and its possible implication for AfCFTA.

The AfCFTA agreement is in the inception stage of implementation. This means this research is useful to give some overview of the possible effects and applicability of variable geometry in the AfCFTA. Since AfCFTA accepts variable geometry as a principle in the implementation of the continent's integration, this research tried to shed some light on the issue and initiate research on the issue.

1.7. Literature review

The term “variable geometry” is directly related to the language of mathematics and mechanical engineering. In flying the aircraft wing that may be swept back and then returned to its original position during flight, allows the pilot to select the correct configuration for either high or low speed and they call this variable geometry. In the language of aerospace, variable geometry is the notion of adaptability, flexibility and different speeds for changing circumstances which help in flying.

The concept of variable geometry in regional integration and international trade is almost the same with the flying of an aircraft, which enables countries to use a flexible as well as the opt-in and opt-out approach in their journey to integration. The idea first arises at the EU integration and later on, it becomes the centre of a debate on the WTO after the breakdown of the Doha round.³² To talk about variable geometry and integration in Africa there are only a few articles and almost none in the case of African RTAs and the AfCFTA. The already existing piece of literature revolves around the history of the application of variable geometry in the EU integration process and the possibility of using variable geometry for WTO negotiation. So, this review begins with some articles about ACFTA, variable geometry and continues to its historical application in the EU integration process. It also included the scholars thought of its applicability in the WTO trading system and the variable geometry of RTAs in Africa.

One of the first articles about AfCFTA has been written by Andrea Coelice, which analysis the opportunities and challenges of CFTA. He begins with how Africa became a billion people market and how big market it will create if CFTA achieves a continent-wide realization. He divides the benefits of AfCFTA as a short term that will benefit small and medium enterprises throughout Africa and long-term benefits that will entertain all African citizens and young peoples who will get Job opportunity when the effect reaches in attracting investment and development of the industry sector. He also stressed on the potential of AfCFTA in helping to increase the negotiation capacity of the continent as the potential benefit of AfCFTA. So, to make AfCFTA work he suggested the adoption of a win-win approach, setting up of multilevel management and strengthen of interlinkage between human rights and trade liberalization. The

³² Peter Lloyd (n 10) at 6.

conclusion of the article is interesting which he said, “realization of an African free trade area has an intrinsic political rather than an economic nature.”³³

A GIZ-AU briefing paper presented a case on the labour market effect of AfCFTA. The paper concludes that AfCFTA will have the potential to significantly impact the livelihoods of African peoples by increasing inter African trade and consequential employment opportunities in the integrated African labour market. The employment opportunity comes from the capacity of AfCFTA for generating net real income and more domestic investments. The paper also emphasized on the trade-related labour standards and positive effects of inter Africa trade to increase decent labour. This employment effect and decent labour of AfCFTA will be dependent on the political will of leaders to progress in the integration and the level of liberalization the leaders are ready to accord to each other.³⁴ However, the article only emphasized on the one side analysis of labour market and emphasized on the importance of inter Africa trade and domestic investment for employment and denounced the potential impact of AfCFTA as a tool to facilitate foreign direct investment (FDI) in the manufacturing sector and its consequential employment opportunities.

Daniel Idibia is one of the pessimists about the future of AfCFTA’s success. In his article, he analyzed the potential of AfCFTA to solve African trade problems in the global market and expressed the AfCFTA as new wine in an old wine bottle which calls for caution.³⁵ To justify his conclusion he began by asking about the difference of AfCFTA inter Africa trade agreement from the existing regional trade cooperation’s and agreements. To him, the rationales for the organization of RTA in Africa is to shelter from the challenge of competition in the international market and the challenges WTO principles of the most favoured nation and national treatment poses in the international trade competitiveness of Africa. Then he continues with the challenges the regional trade agreements face in different parts of the continent and he argues that the potential of the AfCFTA is exaggerated with unrealistic analysis. Finally, he is hopeful about the integration process. However, he listed out an overwhelming list of issues that should be

³³ Andrea Cofelice ‘African Continental Free Trade Area: opportunities and challenges’ (2018) 3 The federalist debate Year XXXI at 32-35

³⁴ Lungu, Ioana ‘A fresh chance for Africa’s youth: Labor market effects of the African Continental Free Trade Area (AfCFTA)’ (2019) GIZ-AU Briefing Paper at 1-3

³⁵ Daniel Idibia ‘The quest for Africa’s trade growth: Inter-African trade and the proposed African Continental Free Trade Area (AfCFTA): A commodification of old practice or maintenance of new order?’ (2019) 6 (2) World Journal of Innovative Research at 42-43.

addressed to make the AfCFTA work which includes addressing the conflicting natures of RTAs, conflicting trade rules, cross-border issues, infrastructure problems and others.³⁶

In addition to the above articles, AfCFTA has been one of the big news and the source of many debates in different news media. The proponents of the initiative present it as an instrument to averse the past failures of the integration initiative. Whereas the others on the opposite side are very sceptical about the prospect of AfCFTA because many of the challenges of integration are still there and their suggestion emphasizes on the need to address problems of past integration initiatives before rushing to launching another project.³⁷

When we jump to our main topic on variable geometry, the first example we get is the EU. The EU is both the origin of the strategy of variable geometry in integration and has some clear examples of variable geometry application in its historic progress from coal and steel association to a monetary union. The term has been described by various terms including “variable geometry”, “two speed Europe”, “closer cooperation” and “enhanced cooperation”. Even if all these terms have been treated as synonyms, Peter L. in his article about “variable geometry and international economic integration” argues that these terms have subtle differences and he defines variable geometry differently.³⁸

Cattaneo Carla and Velo wrote about the historic development of variable geometry in integration experience in the EU integration history. According to them, variable geometry emerges in the inception stages of EU integration. The process of European integration begins with the creation of the European Coal and Steel Community (ECSC).³⁹ Already with the creation of ECSC, the two typical economic philosophies have been clearly identified. The first was continental Europe aiming at the edification of a union-oriented community and the second one led by Great Britain being interested in diluting the project in a much simpler free-exchange zone. This resulted in a different view on how Europe will manage itself in the future and

³⁶ Daniel Idibia (n 35) at 44-48

³⁷ Adekeye Adebajo ‘New African Free Trade Accord Oblivious to Past Failures’ The Sun, south Africa 25 March 2019. Available at <https://www.uj.ac.za/newandevents/Pages/New-African-free-trade-accord-oblivious-to-past-failures.aspx> (accessed on 29 September 2019)

³⁸ Peter Lloyd (n 11) at 52.

³⁹ *Cattaneo Carla and Velo Dario* ‘Variable Geometry Europe: An Interpretation of the European Integration Development’ (2008) at 1. Available at <http://aei.pitt.edu/6908/>, [accessed on 26 April 2019]

becomes the beginning of variable geometry Europe.⁴⁰ For Peter, however, variable geometry emerges in the latter stages of the union's evolution. He states the Schengen Agreement and the Economic and Monetary Union (EMU) as the notable examples of the beginning of applications of variable geometry in the EU integration.⁴¹

When he expresses what happened in both agreements, the 1985 Schengen Agreement was an initiative for the free movement of people among the signatories. This free movement of people agreement gave every citizen in the Schengen area to move freely in the continent without restriction and states agreed to establish common control among member. They also agreed to establish common control at their external borders and adopted a common visa policy. In the negotiation, it turns out that Ireland and the United Kingdom become unwilling to remove their border control. When the negotiation fails, they got the right to retain their national border control on the movement of the citizens of EU member states. On the other hand, the EMU agreement was an initiative for the adoption of a common currency and a common monetary policy administered by a common central bank. At the time of its formulation, 12 out of the 15 member states opted in whereas the United Kingdom, Ireland and Denmark opted out from the agreement. An opt-out has happened the same way in 1991 when the social policy agreement of the EU was negotiated. The agreement which sets out the employment and working conditions and other social policies were signed by 11 of the 12 EU members. He then concludes these three as the notable examples of variable geometry application in the EU.⁴² In the above case, the disagreement of some of the members led to the members opting-out from the agreement while retaining their membership in the EU. This opt-out from some of the agreements is called a variable geometry in the integration.

In addition to its historical application, scholars have theorized about the problems, prospects and challenges of variable geometry. Robert H. on "problems and prospects of variable geometry in EU" stated that variable geometry results in structural and judicial variability.⁴³ Structural variability includes variation across policy sectors, with different balances of supranational and intergovernmental mechanisms, the roles of Member States as administrative agents of the Community and the broad latitude given to national governments in the application of

⁴⁰Cattaneo Carla and Velo (n 39) at 2.

⁴¹ Peter Lloyd (n 11) at 53.

⁴² Peter Lloyd (n 11) 54-55.

⁴³ Robert Harmsen 'A European Union of variable geometry: Problem and perspective' (1994) 4 (2) North Ireland Legal Q. at 110-118.

Community norms. Whereas judicial variability is institutional arrangements which permit the differential participation of member states in certain policy areas. Then he concluded with two interesting ways.⁴⁴ First, the strong concentric circle with a differentiated level of progress in the integration when moving from the centre to the periphery helped the EU to progress into the integration quickly. Second, variability helps to progressively integrate countries who are not in an equal level of development in the concentric circle. In addition, variability will create challenges in the legitimacy and the practical functionality of institutions.⁴⁵

Fabrizio Tassinari is one of the few who did research about variable geometry and Europe after the EU included the 10 eastern countries in 2004. The objective of the research has been on how to extend variable geometry for neighbouring countries of the EU to include them in the integration to create a wider Europe.⁴⁶ The integration of central and Eastern Europe in the EU showed that further integration in Europe is challenging and the EU should balance enlargement with the deepening of integration. The article pointed out the importance of putting necessary conditions for extending variable geometry and the benefits of understanding the neighbours for the EU to continue as a successful integration experience.⁴⁷

The recent study on the variable geometry in Europe is by Bruno De Witte, about the future of variable geometry in a post-Brexit European Union.⁴⁸ The article revolves around the historic flexibility of EU for United Kingdom especially in the Treaty of Maastricht, in which the UK got an opt-out right from the EMU which makes the UK out of the monetary union permanently. It also includes the opt-out UK got from the free movement of peoples and the recent flexibility given for it from the treaty of Lisbon about police cooperation and criminal justice. In all these, the UK got flexibility from the EU, but it ends up with the ceding of the UK from the EU. However, despite this effect of flexibility, he argues that variable geometry is still the only way for EU future integration because of two reasons. First lack of flexibility will push countries who are in distrust of the EU to follow the UK's way and second there are countries in the core

⁴⁴ Robert Harmsen (n 43) at 126-129

⁴⁵ Robert Harmsen (n 43) at 132-136

⁴⁶Fabrizio Tassinari 'Variable geometries: mapping ideas, institutions and power in the wider Europe' (2006) 254 CEPS Working Document at 2- 4

⁴⁷Fabrizio Tassinari (n 46) at 29-32

⁴⁸ Bruno De Witte 'The future of variable geometry in a post-Brexit European Union' (2017) 24 (2) Maastricht Journal of European and Comparative Law at 153-154.

Europe who wants to progress further in the integration. Then variable geometry will fulfil the interest of both groups.⁴⁹

The Economist report in the EU 60th years of anniversary of EU also stressed the importance of variability by saying “EU must embrace greater differentiation or face potential disintegration.”⁵⁰

A more differentiated Europe, based around the idea of variable geometry, a range of speeds or concentric circles, would be a good way to ease the tensions and problems that afflict the present, overly rigid EU.⁵¹ In addition, a clear statement about the future of Europe was postulated as: ‘We will act together at different paces and intensity where necessary, while moving in the same direction as we have done in the past, in line with the treaties and keeping the door open to those who want to join later.’⁵²

In the case of WTO, variable Geometry is not widely applicable like in the EU. Talks of variable geometry as alternative begins with the breakdown of the Doha round of negotiation. After the collapse of world trade talks in July 2008, various WTO members indicating their desire to move from the single undertaking procedure, where nothing is agreed until everything is agreed, which was used as the governing principle of the Doha round of negotiation.⁵³

The Doha round was a trade negotiation launched by the WTO in 2001 to further increase the advantage of free trade for developing countries and to further expand the world trade liberalization process. Because the majority of WTO Members are developing countries, the Doha round was a plan to place their needs and interests at the heart of the WTO negotiation.⁵⁴ However, the negotiation was overwhelmed by suspicion and contradiction before it progresses long.⁵⁵

⁴⁹ Bruno De Witte (n 48) 155-156

⁵⁰ The Economist ‘Special report on the future of the European Union, “The Case for Flexibility”’ (2017) available at <http://www.economist.com/news/special-report/21719188-it-marks-its-60th-birthday-european-union-poor-shape-itneeds-> at 15. (accessed on 25 April 2019)

⁵¹ The Economist (n 50) at 16.

⁵² ‘The Rome Declaration: Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission’ (2017) available at <http://www.consilium.europa.eu/en/press/press-releases/2017/03/25-romedeclaration/>. (accessed on 25 April 2019)

⁵³ Rafael L. Arcas ‘The fragmentation of international trade law: is now the time for variable geometry?’ (2011) 145 Journal of World Investment and Trade at 176

⁵⁴ World Trade Organization ‘MINISTERIAL DECLARATION, WT/MIN(01)/DEC/1’ (20 November 2001) available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm at par. 2 (accessed on 24 May 2019)

⁵⁵ B. S. Chimni ‘The World Trade Organization, democracy and development: A view from the South’ (2006) 40 Journal of World Trade at 5-36

Agnes Ghibutiu analyzed what is happening at the WTO after the Doha round of 2014. In his article “The Variable Geometry of the World Trading System”⁵⁶ points out two main challenges of the multilateral trading system. First, numerous developing countries from East Asia and the BRICS (Brazil, Russia, India, China and South Africa) emerges as the main participants of the international trade which has a profound implication for international trade cooperation and global leadership. Second, the world system shifted from the traditional way of production and selling to a globally integrated production chain. Summed with rapid information technology the WTO rules are not equipped to deal with issues related to supply-chain trade as they have been designed to facilitate traditional trade. This issue increased the call to move to a more efficient model of negotiation, involving a smaller number of countries, but willing to engage in negotiation on a limited set of issues so-called “plurilateral agreements.”⁵⁷ The article also listed out the plurilateral agreements concluded under the WTO trading system and argue that plurilateral agreements concluded under the remit of the WTO prove to be nevertheless a viable way to ensure progress in market opening in certain sectors. But it admitted the departure from the fundamental single undertaking principle of the WTO, which requires any package of liberalization measures should be adopted by all member states as a unique action and its contradiction with MFN treatment, which is another cornerstone of the WTO.⁵⁸

Peter L. in his article takes the origin of variable geometry in the WTO to the Tokyo round of negotiation in 1979. In the round, there were irreconcilable differences among the contracting parties in specifically three fields of negotiation, which includes, The Agreement on Bovine Meat, The International dairy agreement and The Agreement on Civil Aircraft. These agreements resulted in an opt-in agreement (open for interested signatories) which were open for every member and the commitment in these areas were only restricted to signatories to the agreement. In addition, in the Marrakesh round of negotiation, the Agreement on Government Procurement also came as a plurilateral agreement which does not need the signature of all members to enter into an agreement. These four supplementary agreements are out of the WTO’s single undertaking which are binding to all members and whose benefits are limited to signatories.⁵⁹

⁵⁶ Agnes Ghibutiu ‘The Variable Geometry of the World Trading System’ 2nd International Conference ‘Economic Scientific Research - Theoretical, Empirical and Practical Approaches in Rome, 13-14 November 2014

⁵⁷ Agnes Ghibutiu (n 56) at 423-425

⁵⁸ Agnes Ghibutiu (n 56) at 426-427

⁵⁹ Peter Lloyd (n 11) at 56-57

The Information Technology Agreement was also one of the agreements which were outside of the single undertaking with opt-in preference. In this agreement, countries were negotiated based on “critical mass” which means the agreement enters into force when countries containing 90 percent of trade signs the agreement. However, this agreement does not discriminate against non-signatories who are equal beneficiaries based on the principle of MFA. Because on a nondiscriminatory nature of this agreement, Peter L. argues it is out of the scope of variable geometry even if it has an opt-in preference for countries who are not interested in the agreement.⁶⁰

To apply variable geometry as a formal decision-making tool in the WTO, Robert Z. Lawrence suggests a club of states approach which enables countries to negotiate trade liberalization based on their level of development. He accepts the criticism of WTO about forcing developing countries to sign agreements of GATS and TRIPS which have negative consequences for countries. So, he suggests open club negotiation with free entrance for countries who are interested to progress on specific issues. The club of club’s approach does have some deficiencies. It could reduce the ability of some members to obtain agreements by packaging them in a single undertaking. It could also reduce the power of retaliation as an enforcement mechanism for certain obligations. Other call this approach as Plurilateral agreements.⁶¹

“The future of WTO, which addresses the institutional challenges in the new millennium”⁶² was a report produced by a consultative body which contains 9 experts. The report contains a chapter about decision making and variable geometry. The chapter looks at the mechanisms of the negotiations and decision making, whether the WTO structural and procedures are optimal, including whether the consensus rule should be modified. After analyzing the challenges of consensus, they come up with two recommendations. First, they recommend further study on the problem of consensus in light of possible distinctions that could be made for certain type of decision and second to adopt declaration that a member considering blocking measures which

⁶⁰Peter Lloyd (n 11) at 57-58

⁶¹ Robert Z. Lawrence ‘Towards a More Effective WTO; the role of variable geometry’ (Newsletter for the month of June 2008) East Asian Bureau of Economic Research available at <https://piie.com/commentary/speeches-papers/toward-more-effective-wto-role-variable-geometry> (accessed on 25 April 2019)

⁶² P. Sutherland and others ‘The Future of the WTO: Addressing Institutional challenges in the new millennium: Report by the consultative board to the Director-General Supachai Panitchpakdi’ 2004, available at http://archive.ipu.org/splz-e/wto-symp05/future_WTO.pdf (accessed on 25 April 2019)

otherwise has very broad consensus support shall only block such consensus if it declares in written with reasons included that the matter is one of vital national interest to it.⁶³

When they come to the issues of applying variable geometry in the way of a plurilateral agreement the consultative body is very sceptical. They believe variable geometry in the form of a plurilateral approach would enable sets of WTO members wishing to negotiate more ambitious members to do so. However, it would enshrine a multiclass membership structure and it could take the multilateral trading system backwards rather than forward. They supported their reasoning with the trend of lack of many plurilateral agreements signed in the WTO framework. So, they recommend reexamining of this approach by giving particular sensitive attention to the stated problems.⁶⁴

Variable geometry is not a concept for EU and WTO only, rather RTA in developing countries also embrace it and some of them formally included in their founding treaty. The pioneer of these RTAs is the EAC which included as the main founding principle of the community. Gathii in his book “African RTAs as a Legal Regime”⁶⁵, pointed out that the reason for variable geometry in Africa is unequal gain from trade liberalization. Then variable geometry is solely the mechanism to adjust the cost and benefits of integration. Different from the other scholars which define variable geometry as opt-in or opt-out strategy for countries in negotiation, he included special and preferential treatments like a longer time frame for adjustment given for LDCs, preference for FDI in free trade area, the allocation of the head offices of institutions of RTAs, and compensations for the loss of tariff income because of trade liberalization as the actions of variable geometry.⁶⁶ This is the widest definition of variable geometry different from in the WTO and EU system. This might be because of no direct cost compensation for loss of tariff income loss in the EU and WTO system. In RTAs like ECOWAS, compensation is applicable for the loss of tariff income because of the liberalization of import to the member countries.⁶⁷

Gathii’s work concludes that variable geometry is a visible part of RTAs in Africa. However, it slows down trade liberalization, variable geometry involves paying off countries that loss gains

⁶³ P. Sutherland & others (n 62) at 61-64.

⁶⁴ P. Sutherland & others (n 62) 65-67

⁶⁵ J. Gathii (n 12) 1-78.

⁶⁶ J. Gathii (n 12) 36-61

⁶⁷ Peter Walkenhorst ‘Compensating Lost Revenue in regional Trade Agreements’ (2008) 12279 Munich Personal RePEc Archive at 2.

made by other countries and giving other preferences. So, he argues that variable geometry is useful only to encourage countries to sign membership other than deeper trade integration.⁶⁸

In general, variable geometry is mostly an opt-out strategy for the EU, opt-in strategy for the WTO in the form of plurilateral agreement and a wide range of opt-out opt-in and compensation strategy for RTAs in Africa. In the EU, variable geometry was implemented mainly in the EMU, Schengen Visa Agreement, Police and Security agreement with Great Britain and some Scandinavian countries as the centre of the variable geometry and ends up with Brexit. For the WTO, variable geometry has been applied before the Tokyo Multilateral Agreement as a form of plurilateral engagement and decreased its application after the Marrakesh Agreement. With the breakdown of the Doha Development Agenda, the issues of variable geometry as a supporting decision-making mechanism are under consideration by many even if the WTO is sceptical to introduce it as an alternative decision-making tool. For the RTAs in Africa, variable geometry is applicable as a means of flexibility in their implementation of agreements. But still, there is a limited study about its effect on the success and failure of RTAs. To apply variable geometry in the AfCFTA trading system understanding it from the perspectives of the EU, the WTO and different RTAs is very important.

Variable geometry offers new possibilities as a general strategy in negotiations leading to greater integration of global markets. But, the experience of both the EU and the WTO have shown that the design of workable variable geometries is complex, difficult and also risky if we relate it directly with what happened with Brexit. As a way forward AfCFTA should have a clear roadmap on how variable geometry can be implemented and a limitation on the level of differentiation. To prepare the roadmap the experience of differentiation and variable geometry in regional and continental level should be analyzed properly.

1.8. Delineation and limitation

This study focused on the variable geometry applicability, consequence, and rationality when it becomes applicable in the AfCFTA. In literature, there is no clear line which divides flexibility like special and differential treatment with variable geometry. So, for this research the variable geometry of the AfCFTA will include three specific issues which are first, the right for states to opt-out from specific agreement in AfCFTA, second, the right to opt in to specific agreement and

⁶⁸ Peter Walkenhorst (n 67) at 62-64.

third different types of compensations except technical assistance and training given for states to move in the same speed with the integration.

The main limitation of this study was the work in progress nature of the AfCFTA which makes it difficult to get the data about the negotiation progress and strategies as well as the whole structure of the agreement. In addition, the principle of variable geometry has attracted the attention of only a few writers, which makes the availability of information very limited.

1.9. Research methodology

This paper is mainly of a desktop and library-based research. Extensive literature review and analysis have been done to explain the problem statement under study. The research gave emphasis on treaties establishing AfCFTA, protocols adopted by the AU, other agreements of RTAs in Africa and different theories of regional integration.

Also, the data basket includes books and articles by scholars in the field of international trade law, regional integration, international politics, and related disciplines. Different studies about the variable geometry of EU, WTO, and RTAs in Africa and other researches done by different scholars have been used as a base to draw insight on the variable geometry of African integration and its implication on AfCFTA.

1.10. Organization of the chapters

To effectively address the whole research problem, the research comprised of six chapters. The first chapter contains the introduction about AfCFTA and the general concepts of variable geometry, problem statement, the literature review and the general framework on how the research will be executed. This chapter also gives the general idea of the research and the significance of the research.

The second chapter introduces AfCFTA in a glance. The chapter highlights the history of AU and the experience of the OAU/AU in treaty adoption, ratification and implementation. It also presented AfCFTA and its relationship with the previous initiatives of OAU/AU like ECA and New Partnership for African Development, the possible lessons it can take from previous initiatives and some of the challenges of the initiative.

The third chapter is about the variability and a flexibility regime of RTAs in Africa. The chapter covers short history on how RTAs in Africa come into existence as well as challenges of implementing their agreements, the difference of countries in implementing the agreements of the outcome of that process which created different layers of integration. The fourth chapter is a

comparative analysis of the variable geometry experience of the EU and the AfCFTA which enables to predict the practice and potential consequences of variable geometry in the AfCFTA. Chapter five covers the different possible ways of applying variable geometry in the implementation of AfCFTA. Chapter six concludes the thesis and provides some recommendations.

Chapter Two

The flexibility of the AU and its Implication on AfCFTA

2.1. Introduction

The quest for integration in Africa has a long history. The call for unity begins from the black Pan-Africanist movement in the USA and other countries to emancipate Africans and Afro-descendants from exploitation, marginalization and oppression. Kwame Nkrumah took the cause home by calling an immediate action to dissolve national border for the sake of creating a united continent and to create one-state for black people as a whole.⁶⁹ To institutionalize this call and to guide the cooperation of the continent, the OAU (the present AU) emerged in 1963 as the first continental body which included the whole independent countries of the continent.⁷⁰

OAU comes into existence between young states emerging from their colonial experience, to defend their newly-won sovereignty, and to extend the emancipation movement into the unliberated areas of the continent.⁷¹ When OAU came into existence, the main problem was colonization and the OAU fought it in its capacity and succeeded in its primary mission of liberating the continent from the aftermath of colonialism when Apartheid was dismantled in South Africa in 1994.⁷²

This effort is the only major success for the continental body. It is agreed that except fighting colonialism the AU fails in to contribute in solving the continent's problem. Many initiatives that have been initiated to make the cooperation and integration of the continent a reality like the New Partnership for Africa's Development (NEPAD) and the African Economic Community (AEC) clearly lacks the resources and capacity to develop the continent. The Pan-African Parliament remains only a talking parliament, while the Economic, Social, and Cultural Council has failed to provide genuine civil society participation in the AU's institutions. Judgments of the

⁶⁹ Timothy Murithi 'The African Union Pan-Africanism, Peacebuilding and Development' (2005) 3.

⁷⁰ Colin Legum 'The Organization of African Unity-success or failure?' (1975) 51 (2) Royal Institute of International Affairs at 208.

⁷¹ Colin Legum (n 70) at 209.

⁷² Timothy Murithi (n 69) at 4

African Court on Human and Peoples' Rights is still routinely ignored by the African leaders and no one is asking them to comply with it⁷³

Despite the continuous failure to address the cause of the continent the OAU/AU continues launching initiatives which believed to solve the multifaced problem of the continent. The most recent of these initiatives is the AfCFTA which is believed to create a free trade area and a single market between 55 countries of the continent.⁷⁴

The document prepared by International Trade Center (ITC) as a guide to AfCFTA put the objectives and the assumptions of the initiative as 'the initiative that will cover 55 countries with a total population of 1.2 billion and a total GDP of the \$2.5 trillion, that will boost inter African trade by 52.3 percent and double the amount of trade by 2022 if fully implemented.'⁷⁵ By gradually eliminating of tariff from the 90 percent of the tariff lines within five up to fifteen years based on the developing and least-developed classification of countries and by minimizing non-tariff barriers AfCFTA will make inter African trade easier and competitive.⁷⁶

Liberalization of trade will mainly benefit the industry sector to diversify production and free market access in the continent. The export out of the continent which is dependent on the extractive and agricultural commodities are believed to be substituted by the manufacturing sector. This will be possible because AfCFTA has the potential to push the total manufacturing sector of the continent to \$1 trillion by 2030 from its \$500 billion total productions in 2015.⁷⁷ This is also believed to solve the rising unemployment problem by shifting the trade from the less labour-intensive extractive sector to the more labour-intensive manufacturing sector. If the AfCFTA is implemented fully, it will create 14 million well-paid jobs throughout the continent. The opportunities for small and medium enterprises which controls most of the business in the continent is also high by creating an accessible market and making them part of the value chain system of the manufacturing sector.⁷⁸ If it becomes successful, the advantage doesn't end here. It

⁷³ Adekeye Adebajo 'Prophets of Pan-Africanism: From the OAU to the AU' (26 May 2013) 255 The Sunday Independent, Available at <http://www.ccr.org.za/index.php/media-release/in-the-media/newspaper-articles/item/129-prophets-of-pan-africanism-from-the-oau-to-the-au?tmpl=component&print=1>

⁷⁴ Article 3 of the 'Agreement establishing the African Continental Free Trade Area (AfCFTA)'

⁷⁵ International Trade Center (ITC), 'A Business Guide to the AfCFTA', Geneva, 2018, at IX

⁷⁶ African Trade Policy Center (ATPC) & the African Union Commission 'African Continental Free Trade Area Questions and Answers' 2018, P. 1

⁷⁷ Bughin, Jacques & others 'Lions on The Move II: Realizing the Potential of Africa's Economies' (2016) McKinsey Global Institute. At 6-7.

⁷⁸ Bughin, Jacques & others (n 77) at 2.

will also create a golden opportunity for women who control 70 percent of informal border trade in the continent by minimizing the challenges they are facing in the cross-border trade like harassment, violence and confiscation of goods.⁷⁹

AfCFTA gets attention from different stakeholders and expressed by many as a golden opportunity for Africa, a project which will result in a concrete impact for the citizens of Africa,⁸⁰ a key strategy for African competitiveness in the manufacturing sector.⁸¹ These show that many people do not have an issue about the possible impact of the project. However, many people are not optimistic about the commitment of the political leaders to clarify everything needed to be sacrificed to make it happen. Daniel Idibia, in his article, calls the agreement as “nothing but a new wine in an old wine bottle which calls for caution as it may be commodification of an old order which will not result in a new practice to bring growth to African trade.”⁸²

Even the main proponents of the project also expressed their fear of potential lack of effective implementation on the launching program of the AfCFTA. Paul Kagame of Rwanda, who chairs the AU since 2017 while this agreement was negotiated expressed his concern as “a crisis of implementation of decisions of the AU” and call for leaders to commit themselves for this one.⁸³ The Chairperson of the African Union Commission Moussa Faki Mahamat also sympathized with the peoples who are not hopeful about the commitment of the leaders when he addresses the tenth extraordinary session of the assembly of the union of the AfCFTA, by saying ‘they have seen so many proclamations remain a dead letter, so many commitments without practical execution that they have come to doubt the strength of our commitment.’⁸⁴

This failure in the adoption and implementation of agreements is not a case for fewer initiatives rather it is a case in almost all treaties brought into a table by the continental body. Many of the

⁷⁹ Bughin, Jacques & others (n 77) at 3.

⁸⁰ International Trade Center (n 75) at iii.

⁸¹ Landry Signe & Chelsea Johnson ‘The Potential of Manufacturing and Industrialization in Africa: Trends, Opportunities and Strategies’ (2018) Center of African Studies at Brookings at 2.

⁸² Daniel Idibia (n 35) at 42.

⁸³ H.E. Paul Kagame ‘The imperative to strengthen our Union: Report on the proposed recommendation for the institutional reform of the African Union’ (2017) Assembly/AU/Dec.606 (XXVII) at 4 . available at http://www.rci.uct.ac.za/sites/default/files/image_tool/images/78/News/FInal%20AU%20Reform%20Combined%20report_28012017.pdf

⁸⁴ The 10th Extraordinary Session of the Assembly of the Union of the AfCFTA, Statement of the Chairperson of the African Union Commission , Moussa Faki Mahamat Kigali, Rwanda, 21 March 2018, Available at: https://au.int/sites/default/files/speeches/34028-sp-kigali.cfta_.21.march_.18.final_.pdf

treaties initiated by the AU secured a very different level of adoption, ratification and implementation which creates a wide level of variability in the endeavour to unity. This poses a question on the culture of the AU, which gives unchecked flexibility to adopting treaties and protocols. This flexibility is been also formally and explicitly extended to the AfCFTA in the form of variable geometry as the central principle to its application. By taking this concern the next part will try to draw experience from AU especially in its adoption, ratification and implementation of treaties for the successful implementation of AfCFTA and understand the African scenario of variable geometry. It includes the potential impact of this variability on the prospects of the AfCFTA and future integration initiatives in the continent.

2.2. The beginning of Unity in Africa

Shortly after the independence of many African countries, the idea of Pan-Africanism which was only an idea for a long time gets a chance to be implemented as a way forward for Africa. The common past of colonization and operation by the European power and a plan to avert the situation from happening again and to progress as a free continent, unity have been taken as the best way for the continent. The fragmented nature of the continent and the conflict here and there was also making the moment anxious for the newly born states and leaders, which motivated them to organize the continents first vehicle for integration, the Organization of the African Unity (OAU).⁸⁵

Even if unity was accepted by everyone as the only way for Africa to deal with its problems, the speed and modality of unity divide countries into Monrovia, Casablanca and the Brazzaville Twelves. The radical groups under the leadership of Kwame Nkrumah of Ghana with followers including Ben Bella of Algeria, Sekou Touré of Guinea, Modibo Keita of Mali, Julius Nyerere of Tanzania opted for an immediate unity of the continent.⁸⁶ On the opposite side the Monrovia groups which including Ethiopia, Peoples Republic of Congo, Nigeria, Sierra Leone, Liberia, Togo, Gabon, Somalia and others preferred progressive integration. The choice of the Brazzaville group was also the Monrovia progressive integration. When agreement became difficult, the Casablanca group agreed to create the OAU with the idea of their opponents with

⁸⁵Zdenek Cervenka 'The Unfinished Quest for Unity' (1977) Julian Friedman Publishers Ltd. London, at IX-XIII

⁸⁶ Adekeye Adebajo (n 62).

the hope that they would gradually be able to influence the others to come to their terms of African unity.⁸⁷

The outcome of this fight rendered the OAU's executive and administrative branches ineffective by according them only limited powers. Resolutions of the OAU Assembly were not legally binding, and the body lacked implementation mechanisms. The organization's Commission of Mediation, Conciliation, and Arbitration was also not a judicial organ and did not have any powers of sanction.⁸⁸ The hard truth was that this difference endured years. This antagonism and enduring difference highly affected its progress to create a united Africa and the organization fails to fulfil the purpose it aimed to achieve. Paul Kagame puts it as 'a dysfunctional organization in which member states see the limited value, global partners find little credibility, and our citizens have no trust'.⁸⁹

The difference in ideology created a rivalry and disagreement between different leaders which created the main challenges which hinder the OAU to perform as expected by the initial plan.⁹⁰ The fight between the Brazzaville groups which were called less pan-African and the Casablanca group which was called the militant Pan-Africanists was also intense.⁹¹ The other situation the rivalry created was a situation in which OAU represented "a largely negative agreement – not to move too much to the left nor too far to the right."⁹² Even if this balance was believed to be the main reason for its survival, it makes the organization to fail in addressing burning issues of the continent including human right abuse and worst form of Genocides.⁹³

Here two things are clear. First, all countries who were independent agreed to come into the same organization, even if they have a very big irreconcilable difference because the criteria for membership was only being free from colonization and to exist in the territory of the continent.⁹⁴ Second, they didn't have an agreement on the end goal of the union. The Casablanca group becomes a member "with the hope that they would gradually be able to convince the others to come their way and shift the Organization to a unity of greater depth and closer co-operation

⁸⁷Manelisi Genge & others 'Formation of the African Union, African Economic Community and Pan-African Parliament' (200) African Union and Pan-African parliament: Working papers at 1-4

⁸⁸ Adekeye Adebajo (n 62)

⁸⁹ Paul Kagame (n 83)

⁹⁰Ehimika A. Ifidon 'Africa's Political grouping and voting on Cold War Issues in the United Nation General Assembly, 1960-1962' (2011) Journal of Inter-Africa Studies at 16-17

⁹¹ Merton A. Kaplan 'The Revolution in World Politics' (1962) at 149-150.

⁹²Zdenek Cervenka(n 85) at ix.

⁹³ Selassie, "OAU and Regional Conflicts "at 63

⁹⁴ Article IV of the OAU Charter.

than that offered by the loose provisions of its Charter.”⁹⁵ While the members of the Monrovia groups were established monarch like the Ethiopian Emperor Haile Selassie and their concern was on facilitating decolonization and socio-economic integration rather than the idea of superficial OAU.⁹⁶

The situation manifested itself in its treaties and protocols initiated by the continental body. The AU adopted or proposed 66 treaties in its journey from the OAU chapter up to the AfCFTA on 21 March 2018. From these 66 treaties, only 32 has been able to secure the minimum level of ratified and entered in two force by May of 2019.⁹⁷ From the 66 treaties, 23 treaties were adopted by the OAU while the rest 43 is the outcome of the AU after it officially replaced the OAU on 2002. In its four decades journey, the OAU manages to propose 23 treaties and able to secure minimum ratification for only 14 treaties which entered in to force.⁹⁸

The 23 treaties that have been proposed in the OAU fourth years of journey able to secure a very diverse adoption rate. Some countries adopted many of the treaties, the others lag behind, and few countries adopted only a few of the treaties. The first treaty of the OAU, which is the ‘OAU charter’ has been adopted by all member countries. This is related from the fact that the adopting of the OAU charter was the initial criteria to become a member, which obligated the adoption of the charter while they enter into the agreement.⁹⁹ The other treaty which gets full adoption is the Constitutive Act of the AU, which was a big initiative to restructure the OAU to fit the integration needed of the continent in the 21st century.¹⁰⁰ Next to the above two, the Treaty Establishing the African Economic community has been able to secure 54 adoptions of its founding treaty.¹⁰¹ These three treaties are big initiatives and founding treaties. Treaties like

⁹⁵Zdenek Cervenka (n 85) at ix-X

⁹⁶Luwam G. Dirar ‘Rethinking and theorizing regional integration in South Africa’ (2014) 28 Emory International Law Review at 130.

⁹⁷ See the website of AU which lists the status of treaties adopted and ratified until the present day. The last treaty to be adopted is “Status of the African Charter on human and Peoples Rights on the Rights of Persons with Disabilities in Africa” and the last treaty to be ratified is “Agreement Establishing the African Continental Free Trade Area”, <https://au.int/en/treaties>

⁹⁸ See the website of the AU which lists the states of treaties. The first treaty Adopted under OAU was the “the OAU Charter” while the last treaty adopted and ratified was the “OAU Convention on the Prevention and Combating of Terrorism,” <https://au.int/en/treaties>

⁹⁹ Article 28 of the OAU Charter.

¹⁰⁰ ‘A Digest of OAU-AU Treaties, Conventions, and Agreements, 1963-2014’ A contribution at the African Capacity Building Foundation to the 50th Anniversary of the OAU-AU at Viii,

¹⁰¹ A Digest of OAU-AU Treaties (n 83) at 97 or see also

https://au.int/sites/default/files/treaties/7775-sl-treaty_establishing_the_african_economic_community.pdf
(accessed on 25 May 2019)

these which establish a fundamental institution enjoy not only a higher level of adoption but also ratification. These are few situations which emanate from the consensus that African countries share on the need for strengthening unity in the field of economy, politics, security and peace by creating those structures.¹⁰²

The rest 20 treaties of the OAU have different levels of adoption with the highest adoption of the “Protocol Relating to the Establishment of the Peace and Security Council of the African Union” with 53 adoption to the lowest adoption of the “Inter-African Convention Establishing an African Technical Cooperation program” with only 29 adoptions despite its 44 years since it becomes open for adoption by 1975.¹⁰³ Between the highest and the lowest adoption rate, the other six treaties got less than 40 and more than 30 adoptions while the rest 10 treaties have secured adoption rate of between 40 and 52 member states. Two treaties which are “Phyto-Sanitary Convention for Africa” and the “Cultural Charter for Africa” have never got any adoption by any member states.¹⁰⁴ In the adoption process, almost all member states have treaties in which they are not part of which makes the variability of treaty adoption by OAU/AU member states very hard to track. Countries opt-out from treaties they feel not helpful for their cause and accept whenever they are ready.¹⁰⁵

Most treaties enter into force not only by the adoption of the negotiated text rather they need ratification by the country’s responsible organ.¹⁰⁶ The treaties of the OAU/AU do not provide for their entry into force upon definite signature alone. Only five treaties offered an exception which provides for their entry into force either immediately, upon adoption or upon signature alone.¹⁰⁷ All the other treaties required ratification by the local legislative and executive organ of the

¹⁰²Tiyanjana Maluwa ‘Ratification of African Union Treaties by Member States: Law, Policy and Practice’ (2012) 13 Melbourne Journal of International Law at 655.

¹⁰³ See the website of AU at <https://au.int/en/treaties> which contains the details of treaties. The “Inter-African Convention establishing an African technical Cooperation program” was signed on 1975 but yet to be implemented.

¹⁰⁴ See (n 86) even if there is no adoption by any member states both treaties entered in to force after long time since they were opened for adoption.

¹⁰⁵A Digest of OAU-AU Treaties (n 83) at 97-133. See also the website of AU for updates on adoption of treaties after 2014. <https://au.int/en/treaties>.

¹⁰⁶ Article 2(l)(b), 14(1) of Vienna Convention. The term 'ratification' is used in this part of the discussion in its broader sense to include 'accession'.

¹⁰⁷Tiyanjana Maluwa (n 102) at 642. Five of the treaties which entered in to force without ratification are ‘Constitution of the African Civil Aviation Commission (‘Civil Aviation Constitution’),’ ‘Constitution of the Association of African Trade Promotion Organizations,’ ‘Agreement for the Establishment of the African Rehabilitation Institute,’ ‘African Maritime Transport Charter,’ and ‘Constitution of the African Civil Aviation Commission’ (‘Revised Civil Aviation Constitution’)

government based on the state law. Until May 2019, from the 23 treaties of the OAU, only the OAU Charter and the Constitutive Act of the African Union got full ratification from member states. The other treaties have different level of ratification with the lowest ratification for ‘Inter-African Convention Establishing an African Technical Cooperation program’, ‘Convention for the Establishment of the African Center for fertilizer development’ and the ‘African Civil Aviation Commission Constitution (AFCAC),’ with eight, and ten ratifications to the highest ratification of the ‘African Charter on Human and Peoples’ Rights’ with 54 ratification by member states. The ‘Treaty Establishing the African Economic Community’ and the ‘Protocol Relating to the Establishment of the Peace and Security Council of the African Union’ is the other treaties able to secure 50 and 52 ratifications, respectively, from the 55 member states of the African Union. The rest 16 treaties adopted by the time of OAU have diverse levels of ratifications of between 12 to 49 ratifications.¹⁰⁸ This shows us that compared with the adoption of treaties ratification is lagging far behind. This makes the variability wider and pulls down the continents action towards economic and political integration

The third issue which shows variability in the OAU/AU is the amount of time the treaties needed to come in to force by getting the minimum level of ratification. When we see the 23 treaties adopted by the OAU time, some treaties never entered into force while the others secured the minimum level of ratification after decades and some of them secure immediate ratification. Three treaties of the OAU, which are ‘Inter-African Convention Establishing an African Technical Cooperation program’, ‘Establishment of the African Center for fertilizer development’ and ‘African Maritime Transport Charter’ never get a minimum level of ratification to enter into force. Treaties like ‘African Civil Aviation Commission Constitution (AFCAC)’ took four decades to get the minimum level of ratification and to enter into force. The ‘Constitution of the Association of Trade Promotion Organization’ and ‘Phyto-Sanitary Convention for Africa’ needed 38 and 25 years to secure the minimum level of ratification to enter into force. While the other nine treaties take between 5 up to 14 years to enter into force. Finally, the rest treaties come into force with less than 5 years. From them, most of them are statutory treaties like the OAU Charter, the Constitutive Act of the African Union and the Treaty

¹⁰⁸ A Digest of OAU-AU Treaties (n 83) at 97-133. See also the website of AU for updates on ratification after 2014. <https://au.int/en/treaties>

Establishing the African Economic Community which do not result from direct responsibility and fulfilment of a specific task for the member countries.¹⁰⁹

This reluctance of members accepts what the OAU proposed and many other problems resulted from the organization to go downward with time and reach the level in which its contribution becomes insignificant with the fast-changing of the world economic, social and political environment. In the 1990s and in the wake of the new millennium dire need of solutions to its critical problems motivates propels and leaders to ask for change and progress. In the 90s, the notion of Pan-Africanism was also born again, which is the result of the liberation of South Africa from apartheid that helped back to life.¹¹⁰ On the other hand, the economic and political unity of the world and the deepening of globalization was showing a sign leaving the continent behind the world's economic train. The dynamics in the globalized world faced with higher competition in trade and other economic aspects and the advance of the other world in their own cause reinforced that the African countries need to defend or advance their own cause.¹¹¹ This resulted in the change of the OAU to AU that occurred during the Fourth Extraordinary Session of the OAU Assembly in Libya on September 6, 1999. By the time of the Fifth Extraordinary Summit on March 2, 2001, the OAU declared the establishment of the Union, and all fifty-three Member States of the OAU had signed the founding treaty of the AU.¹¹² On July 2001, barely one year after its adoption, forty Member States ratified the Treaty and also deposited the instruments of ratification with the General Secretariat,¹¹³ The seminal assembly of the African Union held in July 2002 in South Africa officially closed the chapter of the existence of the OAU for around 40 years and officially opened the door for the new continental body.¹¹⁴

The change of the OAU into AU has had created a big expectation and it was manifested by the statement of Sule Lamido, Nigerian Foreign Minister. He has said:

¹⁰⁹TiyanjanaMaluwa (n 85) at

¹¹⁰Jackie Cilliers, 'Towards the African Union' 2001 (10)2 African Security Review at. 115-119

¹¹¹Adejo, A.M. 'From OAU to AU: New Wine in Old Bottles?' 2001 (4) 1&2 African Journal of International Affairs at . 125-133

¹¹²See the AU website on treaties status:https://au.int/sites/default/files/treaties/7758-sl-constitutive_act_of_the_african_union_2.pdf. Based on art. 28 of the constitutive act, the Act shall enter into force thirty 30days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU therefore. Nigeria was the 36th Member State to deposit its instrument of ratification, on April 26, 2001.

¹¹³ Report of the Secretary General on the implementation of the Sirte Decision on the African Union, (2004) OAU Council of Ministers, EAHG/DEC.I (V), CM/2210 (LXXIV), para. 13,

¹¹⁴Adejo, A.M. 'From OAU to AU: New Wine in Old Bottles?' (2001) 4 (1) African Journal of International Affairs at 134-38

“Arising from the realization in today’s world order, we Africans are essentially on our own, the leaders had to re-think. We have to look inwards to try to create a stronger, more effective process of continental interaction, something more integrative, merging our economies, markets, and capacity. We have to bring our potentials so that our partners will be forced to engage us.”¹¹⁵

As stated in the objective, the AU Constitutive Act articulated an objective which targets to promote cooperation in all fields of human activity to raise the living standard of African peoples.¹¹⁶ All fields of social activity include Economic, Social, Political, and other aspects of cooperation which needs the adoption of different protocols and treaties to manage the cooperation process in specific terms. AU then introduced consecutive protocols and treaties. However, the results show that the leaders are still in a hard time to walk the talk. The promises and the result fail to go hand in hand.¹¹⁷

In its seventeen years of journey, the AU Adopts 43 different treaties beginning from ‘Protocol Relating to the Establishment of the Peace and Security Council of the African Union’ in 2001 to ‘Agreement Establishing the African Continental Free Trade Area’ in March 2018.¹¹⁸ In addition, nine treaties have been transferred from the OAU, which haven’t been able to fulfil the minimum level of ratification. The adoption rate of these treaties continues to vary but the variation rate shows some improvement compared with the time the OAU. Many of the treaties secured the adoption rate of at least more than 40 countries.¹¹⁹ But still there are treaties which have been adopted before 2010 like , ‘Charter for African Cultural Renaissance’¹²⁰ and ‘Protocol on the Statute of the African Court of Justice and Human Rights’¹²¹ adoption by 32 countries only, ‘Protocol on the African Investment Bank’¹²² adopted by 22 countries only and

¹¹⁵SuleLamido ‘Nigeria has no Reservation on African Union’ This Day, (Lagos) April 8, 2001 at 21.

¹¹⁶ Article 3 of Constitutive Act of the African union, Available at <https://au.int/sites/default/files/treaties/7758-treaty-0021 - constitutive act of the african union e.pdf>

¹¹⁷A Digest of OAU-AU Treaties (n 83) at 84.

¹¹⁸A Digest of OAU-AU Treaties (n 83) at VIII. See also the website of AU for updates on ratification after 2014.<https://au.int/en/treaties>

¹¹⁹A Digest of OAU-AU Treaties (n 83) at 97-133. See also the website of AU for updates on adoption rate after 2014.<https://au.int/en/treaties>

¹²⁰See <https://au.int/sites/default/files/treaties/7791-sl-charter for african cultural renaissance.pdf>(accessed on 26 May 2019)

¹²¹<https://au.int/sites/default/files/treaties/36396-sl-protocol on the statute of the african court of justice and human rights.pdf>(accessed on 26 May 2019)

¹²²<https://au.int/sites/default/files/treaties/36414-sl-Protocol%20on%20the%20African%20Investment%20Bank.pdf>(accessed on 26 May 2019)

‘Agreement for the Establishment of the African Risk Capacity (ARC) agency’¹²³ adopted by 33 countries only. Treaties adopted after 2010 also have a lot of variability in adoption. But it is difficult to judge on its variability even if more than nine years have passed, the time is short compared with the other treaties.

Better adoption does not mean the continental body has improved after it changed its name to AU because the rate of ratification of treaties is still very low. The change of name doesn’t result in any significant change in motivating countries to ratify treaties. From the 43 treaties adopted by the AU and nine treaties adopted before the change of name for ratification, only 18 of them managed to secure the minimum level of ratification and entered into force.¹²⁴ The number of ratifications of each treaty is also so diverse and many of them secure only less than half of the AU 55 members.¹²⁵

To change the culture of this variation the AU have tried different mechanisms. In 1998 the Secretary-General prepared a report on the status of treaties based on the request of the 67th Ordinary Session of the Council of Ministers.¹²⁶ The report takes note of the delay of ratification and emphasized on the need for member States to be reminded of the status of signatures and ratification every time. The report also expressed the behaviour of member states who have ratified international treaties without giving due attention to the continental equivalents. For example, the African Charter on the Rights and Welfare of the Child has not been ratified beyond 8 member states, whereas the UN Convention on the Rights of the Child, which was adopted only six months before the African Charter, has been ratified by all OAU member states except one (Somalia) which shows low concern for OAU treaties. The general secretary appealed to member states to exert the same efforts and concern for treaties of the OAU and ratify all the treaties.¹²⁷

In the coming years, a lot of discussion and workshop has been also conducted to facilitate signature and ratification. But the workshop and the appeal has failed to change the momentum of the ratification. In Dakar, Senegal the status of the treaties was discussed by the Executive

¹²³ https://au.int/sites/default/files/treaties/7800-sl_agreement_for_the_establishment_of_the_african_risk_capacity_arc_agency.pdf (accessed on 26 May 2019)

¹²⁴ <https://au.int/en/treaties> and also see A Digest of OAU-AU Treaties (n 83) at 97-133.

¹²⁵ <https://au.int/en/treaties> (accessed on 26 May 2019)

¹²⁶ <https://au.int/en/decisions-67> (accessed on 26 September 2019)

¹²⁷ ‘Report of the Secretary-General on the Status of OAU Treaties’ (1998) 10 African Journal of International & Comparative Law at 522.

Council at its 5th Ordinary Session Held from 30 June to 3 July 2004 calling upon all members that had not signed or ratified the treaties of AU to do so as soon as possible.¹²⁸ The appeal also continues in the Fourteenth Ordinary Session of the Head of States and Government held between 26-30 January 2009 on the Status of Signature and Ratification of the OAU-AU Treaties and Harmonization of Ratification Procedures. The decision appeals member states to urgently sign and ratify all treaties within one year.¹²⁹ Because of the failure off all the initiatives to facilitate ratification and adoption, the Chairperson of the AU commission again expressed its frustration in discussions on AU/OAU treaties in 2012 at Maluwa by saying ‘it is worrying to note the slow pace of signature and ratification by member states, bearing in mind the process of integration that the member states had embarked on’.¹³⁰

Three mechanisms were also used by the AU to facilitate adoption and ratification. First, the AU Commission has maintained and strengthen the practice of OAU General Secretariat on submitting a biennial report on the status of treaties to the Executive Council to enable member states to assess the progress of ratification.¹³¹ Second, the AU commission posts the status of the treaties in the AU website to facilitate the access of information to the member states. Third, the AU Commission holds a ‘Treaty Signing Week’ once a year to transmit information on the importance of adoption and signing of a treaty.¹³²

These efforts seem failed to result to change the adoption, ratification and entry into force of the treaties adopted by either the AU or OAU. The status of the 43 treaties adopted by the AU continues to fail to get the necessary level of adoption and ratification.¹³³ These make the AU the most variable organization while aspiring to create a united continent in every aspect of economic, social and political activities. Seeing it based on the definition of variable geometry opting out from treaties and opt into treaties the OAU/AU practice is a chaos. First, opting out from treaty is a common practice visible in every specific treaty of the OAU/AU except the OAU

¹²⁸ ‘Decision of the Executive council fifth ordinary session’ (2004) Decision and declaration of the Executive Council, Addis Ababa at 25.

¹²⁹ See Decision on the Status of Signature and Ratification of OAU/AU Treaties and the Harmonization of Ratification Procedures, EX CL Dec 459 (XIV), 14th session, Agenda Item 7, AU Doc EX.CL/458(XIV).

¹³⁰ ‘Summary Report of the Meeting of Experts on the Review of the OAU/A U Treaties’ (2004) AU Doc OAU/AU Treaties/Exp-PRC/Rpt. (I) Rev. I, at 10.

¹³¹ ‘Decision on the status of signature and ratification of OAU/AU treaties’ (2011) AU Doc. EX.CL/664(XIX).

¹³² Tiyanjana Maluwa (n 102) at 671- 2.

¹³³ See <http://www.africaunion.org> (accessed on 26 May 2019)

charter all other 65 treaties have at least one opt-out¹³⁴. On the other hand, the practice of opt-in is not common in the OAU/AU treaty.¹³⁵ Once a treaty fails to secure adoption, it continues to fail to secure enough acceptance.

These results a question on the system of the OAU/AU itself. First, the treaties itself allowed countries the variable geometry right to sign or not to sign, ratify or not ratify the treaties. This right might not have been written explicitly but it is implicitly given when the AU puts the signature of two-third of ratification is enough for the treaty to enter in to force.¹³⁶ For a parallel organization with almost the same goal with the AU, the EU have different practices in many treaties, like a treaty entered into force when the ‘first day of the month following the deposit of the instrument of ratification by the last signatory State.’¹³⁷ Second, it resulted in a question in the effect of adopting and ratifying a treaty with lobbying and different forces coming from the AU. It will affect the implementation by countries. This resulted in the signing of treaties they will never ratify and ratification of a treaty they will never be implemented.¹³⁸ These systematic problems of allowing variability geometry in the treaty and too much lobbying will create another flexibility in the quest for implementation of agreements.

2.3. Ratification does not mean implementation

In the history of the continent’s quest to integration, there have been treaties which got almost full adoption and ratification with great enthusiasms from the member states. However, their full adoption and ratification failed to guarantee their implementation and success.¹³⁹ Big initiatives of the AU taken so far have a common denominator, that is the popular enthusiasm which preceded the coming of them into being and the lack of political will to translate them into reality. All those different initiatives, which were supposed to give fresh impetus to the continent’s integration process have produced mediocre results in their implementation.¹⁴⁰ Good examples for this are the treaty which establishes the African Economic Community and the New Partnership for African Development. In addition, the new initiative of Africa which is

¹³⁴ See <https://au.int/en/treaties>(accessed on 26 May 2019)

¹³⁵ Article 28 of the Constitutive Act of the African Union. see also Article 101 of the treaty establishing AEC.

¹³⁶ Article 28 of the Constitutive Act of the African Union.

¹³⁷ Title VII, article R of the treaty on the European Union.

¹³⁸ Tiyanjana Maluwa (n 102) at 664

¹³⁹ Adekeye Adebajo (n 62)

¹⁴⁰ Rene N’Guettia Kouassi ‘The Itinerary of the African Integration Process: An Overview of the Historical Landmarks’ (2007) 1 (2) African Integration Review at 20.

AfCFTA also got great acceptance from the member states that it has been signed by all member states except Eritrea as well as it gets the minimum level of ratification within few months.¹⁴¹ The failure of both NEPAD and AEC while they have got acceptance results a question on the prospects of AfCFTA to help the continent integrate into trade and other economic activities. To get on insight on what happened on big initiatives like AfCFTA this next part covers AEC and NEPAD.

2.3.1. The African Economic Community

In the 1980s, Africa as a whole was conscious of the need for and urgency of regional and continental integration which considers as a prerequisite for meeting the aspirations of the people and the demands of global economic dynamic change. What remains to be done, was to translate this enthusiasm into action by designing an integration plan that can work for the African perspective.¹⁴²

To fulfil this aspiration, the OAU, at its 27th Ordinary Session, held in Abuja, Nigeria, June 1991, adopted the AEC Treaty as ‘an integral part of the OAU to create an African Economic Community by 2025.’¹⁴³ These aims were to achieve it in-part by the liberalization of trade through the abolition of customs duties on imports and exports and non-tariff barriers in order to establish a free trade area. And also, by the adoption of a common trade policy against a third States, by the harmonization of national policies in agriculture, industry, transport and communications, energy, trade, money and finance, and science and technology.¹⁴⁴

The AEC divides the plan of the continent’s integration with six levels with variable duration over an implementation period of not more than 34 years beginning from 1994, in which the treaty has been targeted to enter in to force.¹⁴⁵ Different activities which were intertwined to create the community has been listed out in the six-step process.¹⁴⁶ Based on the planned six-step journey the first stage of the journey which contains a period of five years was allocated to

¹⁴¹‘African Continental Free Trade Area (AfCFTA) questions and answers’ Tralac (2018) 1 available at <https://www.tralac.org/documents/resources/faqs/2377-african-continental-free-trade-area-faqs-june-2018%20update/file.html>(accessed on 23 May 2019) at 2.

¹⁴² Rene N’Guettia (n 140) 20.

¹⁴³Gino J. Naldi & Konstantinos D. Magliveras ‘The African Economic Community: Emancipation for African States or Yet Another Glorious Failure’ (1999) North Carolina Journal of International law and Commercial regulation at 601

¹⁴⁴Bela Thompson ‘Economic Integration Efforts in Africa’ (1993) 5 Ind. Int’l & Comp. L. Rev. at 747 - 8.

¹⁴⁵ Article 6 (1) of Treaty Establishing the AEC, 1991.

¹⁴⁶Art. 6 (2) of the treaty Establishing the AEC, 1991.

strengthen the existing RECs and to establish one in regions which do not have any representative. The second stage contains eight years. In this time a lot of things was targeted including the determination of a time table for gradual liberalization of trade within the RTAs and inter-regional level, the harmonization of custom duties in trade with a third state, the strengthening of sectoral integration, mainly in trade, agriculture, finance, transport and communication, industry and energy as well as harmonization and coordination of RECs activities. For the third stage, ten years was allocated and the main target was to establish Free Trade Area and a Customs Union at the level of each REC. In the fourth stage, two years were allocated mainly to harmonize and coordinate the tariff and non-tariff barriers among all RECs to progress into the establishment of a continental-wide Free Trade Area and Customs Union. The fifth stage was allocated to the establishment of the African common market and four years was allocated to achieve it. The last and the six-stage was a time of strengthening the African Common Market by including free movement of peoples and factors of production in the continent, creation of a single domestic market, Monetary Union, Central Bank as well as a single African Currency.

Based on these objectives, member states signed and ratified the agreement with great enthusiasm and motivation. The agreement secured 54 adoptions and 50 ratifications from the member states.¹⁴⁷ The implementation, however, shows that Africa is yet to find a way to integrate into the continental level. Under the AEC integration experiment, the regional economic organizations have proliferated and steadily fractionalized or decimated into several subgroups. This leads to overlapping or multiple memberships of countries in the RECs and the regional economic integration in Africa has been seriously undermined by overlapping memberships, numerous sub-groupings and proliferation of regional economic blocs.¹⁴⁸

This experience shows that integration requires each constituent party to have clearly defined national plans and strategies to achieve it. Such plans are lacking in the continent. The African leaders also lack the commitment to face the challenges of integration. Many leaders have been unable to make changes that will sustain the growth and development of integration.¹⁴⁹ While the

¹⁴⁷https://au.int/sites/default/files/treaties/7775-sl-treaty_establishing_the_african_economic_community.pdf

¹⁴⁸Okeke and others 'Economic regionalism and dependency in Africa: a study of African Economic Community (EAC)' (2012) 1 (11) Oman Chapter of Arabian Journal of Business and Management Review at i.

¹⁴⁹Malcolm F. McPherson & Arthur A. Goldsmith 'Africa: On the Move?' (1998)28 SAIS REV. at 153.

others are not willing to subordinate immediate national political interests to long-term regional economic goals or to cede essential elements of sovereignty for the regional institutions.¹⁵⁰

The member States formulate big policies at the continental level and then retreat into their domestic camps, leaving the policies to no one. In Africa, lessons are quickly forgotten, mistakes are repeated, and follow-through is lacking.¹⁵¹ Policy reversals and economic retrogression are the norms in Africa. Each succeeding government starts by dismantling the economic policies of its predecessor that may have been laboriously put together. It then lays its own economic foundation that it might not finish constructing before another Government takes over.¹⁵² This is becoming visible in the continental organization when we see the continuity of initiatives.

Another problem is the manifest dissimilarities among African countries in the areas of politics, culture, and economy. The idea of integration looks like the marriage of two incompatible couples. Even in countries speaking the same language such as French-speaking West Africa, progressing to achieve integration agenda in trade and other aspects showed very little progress. To make matters worse, most countries in North Africa consider themselves to be either part of Europe or the Middle East.¹⁵³

In another hand, the AEC project appeared from the start to be an over-ambitious initiative, given the OAU's record in pushing the integration agenda through respecting and implementing the substance of former treaties.¹⁵⁴

The other challenge proven to be solved was the overlapping memberships of the RECs have additionally worked against the overall objective of the AEC plan of the integrated continent.¹⁵⁵ The sum total result of all this is a continent that lags behind the international trading system. The continent's economy shows only little change and the share of the continent in the

¹⁵⁰Economic Commission for Africa (ECA) 'Annual Report on Integration in Africa 2002' (2002), at 7. Available at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN002810.pdf> (accessed on 26 May 2019)

¹⁵¹Nsongurua J. Udombana 'A harmony or a cacophony – the Music of Integration in the African Union treaty and the New Partnership for Africa's Development' (2002) 185 (13) *Indiana International & Comparative Law Review* at 202.

¹⁵²Nsongurua J. Udombana (n 151) at 202.

¹⁵³Jerry Gbardy 'What to Make of the New African Union? 'The perspective' (July 18, 2001). available at <http://www.theperspective.org/africanunion.html> (accessed on 26 May 2019) 2002).

¹⁵⁴Economic Commission for Africa (ECA) annual report (n 150) at 4.

¹⁵⁵Economic Commission for Africa (ECA) annual report (n 150) at 6.

world trade is continuously decreasing and consequently. It is becoming invisible to the global economy.¹⁵⁶

Greater economic integration at the global level has led to the further marginalization of those countries that are unable to compete effectively. Thus, the inability of African states to effectively integrate, coupled with bad governance, has resulted in a record of economic and political performance that competes very unfavorably with the rest of the developed world. It has also impeded the effective mobilization and utilization of scarce resources into productive areas of activity in order to attract and facilitate domestic and foreign investment.¹⁵⁷

2.3.2. New Partnership for African development

The New Partnership for African Development (NEPAD) was born on 23 October 2001, in Abuja, Nigeria which was first adopted as the New African Initiative (NAI). The main objective of it was to give momentum to African development by bridging gaps between the continent and the developed world.¹⁵⁸ In the initiative, leaders agreed to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and act as one in world politics. The original document of NEPAD seeks to extricate Africa "from the malaise of underdevelopment and exclusion in a globalizing world."¹⁵⁹ There is an implicit presumption here that poverty and backwardness of Africa are partly the outcomes of the marginalization of the continent from global trade and globalization.

In the 90s the African economies were struggling to recover from their stagnating economy. This effort needed mutual effort between countries and this consensus eventually crystallized into NEPAD, whose origin dates to 1999 when Olusegun Obasanjo of Nigeria, Abdelaziz Bouteflika of Algeria, and South African Thabo Mbeki, were the Chairmen of the G-77, OAU, and the Non-Aligned Movement respectively at the same time. These leaders used the opportunity of their unique positions in different institutions to address the problems of the continent¹⁶⁰. Abdoulaye

¹⁵⁶Organization of African Unity (OAU) 'Assembly of Heads of State and Government, Declarations, Resolutions and Decision. Yaoundé Declaration (Africa preparing for the 21st Century)' (July 8 - 10, 1996) , Yaoundé, AHG/Decl.3 (XXXII) at 16. Available at https://au.int/sites/default/files/decisions/9541-1996_ahg_res_247-257_xxxii_e.pdf (accessed on 27 May 2019).

¹⁵⁷Nsongurua J. Udombana (n 151) at 206.

¹⁵⁸Nsongurua J. Udombana (n 151) at 214.

¹⁵⁹Nsongurua J. Udombana (n 151) at 215.

¹⁶⁰ Nsongurua J. Udombana (n 151) at 216.

Wade of Senegal and Presidents Hosni Mubarak of Egypt were also the other active leaders of NEPAD.¹⁶¹ Since he was one of the masterminds of the idea President Obasanjo was elected as the Chairperson of the implementation committee containing the head of states. Then by 2002 NEPAD has been organized by containing secretariat.¹⁶²

NEPAD acknowledged the inept, mercenary, and corrupt leadership at both the national and continental levels in the establishing document. It emphasized Africa's impoverishment by slavery, colonialism, corruption and economic mismanagement, and its continuing problems of different forms.¹⁶³ Then NEPAD calls for a new relationship of partnership between Africa and the international community, especially the highly industrialized countries, to overcome the development challenge that has widened over centuries of unequal relations.¹⁶⁴ It puts the importance of using foreign investment, not merely aid and loans as a base for a relationship. It makes it clear the intention of Africans, as not dependency through aid, or for marginal concessions. Instead, NEPAD planned to determine Africa's destiny through bold and imaginative leadership that is genuinely committed to a sustained human development effort and the eradication of poverty and by harnessing all available capital, technology, and human skills.¹⁶⁵

To achieve these initiatives, NEPAD identifies several priority sectors requiring particular attention and action, including: physical infrastructure, especially roads, railways and power systems linking neighboring countries, information and communications technology, human development, focusing on health and education, including skills development, agriculture, and promoting diversification of production and exports, with a focus on market access for African exports to industrialized countries.¹⁶⁶ NEPAD also developed a mechanism of peer review known as the African Peer Review Mechanism (APRM), which was targeted to be used by

¹⁶¹L. Aluko-Olokun, 'The New Partnership for Africa's Development' (2002) available at http://www.uneca.org/eca-resources/Speechcs/2002-speeches/030702presentation-nepad_amb_aluko_olokun.htm (accessed on 24 May 2019)

¹⁶² Ravi Kanbu, 'The New Partnership for Africa's Development (NEPAD): An initial commentary' (2002) 29 (1). Available at <https://www.tandfonline.com/doi/abs/10.1080/0258934022014944352> at 87 (accessed on 27 May 2019).

¹⁶³New Partnership for African Development (NEPAD) (October 2001) at 13. available at http://www.uneca.org/eca-resources/Speechcs/2002-speeches/030702presentation-nepad_amb_aluko_olokun.htm (accessed on 27 May 2019)

¹⁶⁴ New Partnership for African Development (NEPAD) (n 163) at 2.

¹⁶⁵ New Partnership for African Development (NEPAD) (n 163) at 10.

¹⁶⁶ New Partnership for African Development (NEPAD) (n 163) at 20.

Member States of the AU for the purpose of self-monitoring, and is aimed to foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration in the continent.¹⁶⁷

When we come to implementation of NEPAD, its journey in the last sixteen years is full of many ups and downs. The initiative has been struggling because of several structural, socio-economic and political constraints and the problems account for its failure in engineering Africa's rebirth.¹⁶⁸

The outcome of this vibrant plan of NEPAD, however, failed in fulfilling many of its promises due to a number of reasons, including, non-interference in a member's internal affairs, differences over the major political issues confronted Africa, and the ideological divide between the countries and groups over the pace and objectives of regional cooperation.¹⁶⁹

If we try to find some success on NEPAD, it should be credited, at least partially, for placing democracy and good governance at the centre of Africa's development agenda and placing Africa's development challenges at the centre of the EU's external relations agenda.¹⁷⁰ In addition, the other modest success is in conceiving the APRM, which, despite criticism and implementation challenges, remains an innovative mechanism for building democracy and good governance. The APRM has been described as 'Africa's premier home-grown governance and accountability tool.'¹⁷¹

After a lot of swings and criticism, the AU downgraded NEPAD into the Commission, and it became AU development agency, with few responsibilities, aligned with the agreed priority areas and underpinned by an enhanced results-monitoring framework.¹⁷² A continent wide-body aspired to solve the socio-economic and political problem of the continent ends up to become just a development agency which is a disappointing result. When it comes into force NEPAD

¹⁶⁷Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD), OAU Assembly of Heads of State and Government' 38th Ord. Sess., Durban, South Africa (July 8, 2002) ASS/AU/Decl.1(1) at 6, available at <http://www.africaunion.org/en/commpub.asp?ID=106> (accessed on 24 May 2019).

¹⁶⁸Obonye Jonas 'The quest to achieve African renaissance: Reflections on NEPAD' (2012) (3) The Journal of Pan African Studies at 83.

¹⁶⁹Kufuor, K. 'The Collapse of the Organization of African Unity: Lessons from Economics and History' (2005) 49 (2) *Journal of African Law* at 134

¹⁷⁰H L Ottosen 'NEPAD's contribution to democracy and good governance in Africa' (2010) International Institute for Democracy and Electoral Assistance Available at http://www.idea.int/resources/analysis/nepads_contribution.cfm (accessed on 24 May 2019).

¹⁷¹<http://www.europafrica.net/2010/08/04> (accessed 05/ May 2019)

¹⁷²Paul Kagame (n 83).

was conceived by an African leader who at the time appeared to be very different from almost all that had gone before. However, given events on the continent since the formation of NEPAD, it is just a terrible disappointment.¹⁷³

2.4. Lessons for AfCFTA

Classical international economic law recognizes four levels of economic integration.¹⁷⁴ The first and lowest level is a free trade area, which provides for the free movement of goods and services and a minimal amount of policy harmonization.¹⁷⁵ It then continues as a customs union, common market, monetary union and political integration. After a lot of wonders and trial from 1963 up to now the AU is beginning integration from the lowest level by using AfCFTA which should have happened a long time ago.

However, even if it began from the lowest level of integration it is still difficult to say it secured a consensus from all the member states. Even if the agreement enjoys adoption by almost all countries, the agreement has been ratified by 23 countries when entered into force. This means the agreement is entering in to force with less than half of the countries of the 55 member states of the AU. It will leave the other countries including the continents biggest economy, Nigeria¹⁷⁶. This is the first characteristics the AfCFTA inherits from OAU/AU treaties which is full of variability in adoption ratification and implementation. Article 23 of the treaty establishing the AfCFTA puts the conditions for entry into force ‘thirty (30) days after the deposit of the twenty-second (22nd) instrument of ratification’.¹⁷⁷ This is the beginning of the variability geometry in the endeavour to create the biggest free trade area. Then article five officially puts variable geometry as the main principle of the AfCFTA.¹⁷⁸ This makes the AU an organization which operates like UN while its objectives are to move towards unity by harmonizing the economic, political and social aspects of the continents like the EU.¹⁷⁹

¹⁷³ Mike Gunn ‘NEPAD a disappointment’ News24 (13 June 2007). available at <https://www.news24.com/MyNews24/YourStory/Nepad-a-disappointment-20090713> (accessed on) 27 May 2019)

¹⁷⁴ Raworth ‘The theory of economic integration (1973) Journal of Economic Law at 28.

¹⁷⁵ Raworth (n 174) at 29.

¹⁷⁶ African Liberty ‘with 22 ratification Nigeria is in its own’ available at <https://www.africanliberty.org/2019/04/14/with-the-afcfta-now-ratified-by-22-countries-nigeria-is-on-its-own/> (accessed on 30 May 2019)

¹⁷⁷ Article 23 of ‘The Treaty Establishing the AfCFTA’

¹⁷⁸ Article 5 of ‘The Treaty Establishing the AfCFTA’

¹⁷⁹ Colin Legum (n 70) at 210. Most of the treaties of the UN enters in to force when they fulfil the minimum level of ratification sated on the treaty. on the other hand, treaties like the WTO has been drafted based on the agreement of member states who were negotiating the agreement.

On the other side, the adoption and ratification of AfCFTA are highly dependent on lobbying of different parties and exaggerated targets. Kagame, who led the visionary technocrat, leads the agreement in a top-down to make this free trade area a reality.¹⁸⁰ For Adebajo, the main expert in African integration, AfCFTA is the same with other big initiatives which have been failed because of a lack of political leadership and the continuing weaknesses of Africa's sub-regional bodies. Worse than AfCFTA lacks a public centric way of organizing it. According to Adebajo, this is a "big bang" approach to integration and seems doomed to failure.¹⁸¹

To much lobbying and flexible clauses push for countries to accept treaties they don't believe. Adding the culture of African countries in non-fulfilling of their responsibility of implementing treaties they adopted and ratified result questions on the possibility of AfCFTA success. Which includes why countries will implement this one while they fail to do so in other treaties after they ratified them? Is there any punishment for countries who fail to implement the agreement after they ratified it? even if AU wants to control implementation, does it have a mechanism to do so? These are issues that haven't answered by AU when it launched AfCFTA and ask countries to sign and ratify it.

When AfCFTA entering in to force the negotiation in the main aspects tariff concession and rule of origin are ongoing¹⁸². These are negotiations that will result in the real responsibility for member countries. Signing of the treaty before the detailed agreement is determined shows empty enthusiasm which will not last in the implementation process. This will also force us to question the potential implementation problems, it will possibly create.

The other issues of variable geometry which will have a consequential effect is leaving countries behind. Many countries only sign the agreement. Almost half of the members of AU are showing reluctance to ratify it. While the initiative is laudable, it will suffer a set back because the outcome of integration will be dependent on how large market the agreement will create. Why AfCFTA becomes important is because the large market is believed to create economic scale and competitiveness in the continent.¹⁸³

¹⁸⁰ Adekeye Adebajo (n 62).

¹⁸¹ Adekeye Adebajo (n 62)

¹⁸² <https://www.tralac.org/resources/by-region/cfta.html>

¹⁸³ Mwai C. 'How CFTA Will Boost Intra-African Trade' (2018). Available at <http://www.newtimes.co.rw/section/read/230886/> (Accessed on 24 May 2019)

2.5. Conclusion

AfCFTA is a big opportunity for Africa to increase inter-continental trade by reducing tariff and non-tariff barriers. The agreement plans to eradicate tariff from the 90 percent of tariff lines in five up to fifteen years based on the countries level of development. However, many are sceptical about its implementation. They question the political will of many countries by referring to previous treaties the AU have adopted and failed to progress in its implementation.

Treaty adoption, ratification and implementation history of the AU show that there are chaos and too much flexibility in doing so. AU member countries sign treaties they want and leave the other treaty they believe are not compatible with their national interest. This creates a problem in the progress of integration in the continent. The lack of obligation to adopt the treaties ends up with every country becoming a participant in non-adopting of agreements. Treaties which don't have a signature in the first few years also end up with a low level of adoption in their lifetime.

This variability is in one part, the outcome of the institutional structure of the AU, developed from a divergent understanding of the end goal of the African unity and the lack of capacity of the AU to influence and sanction countries to adopt and implement agreements. This resulted in an opt-out type of variable geometry from every treaty presented by the AU in every treaty including the main treaties of the AU. In addition, adoption and ratification do not guarantee a successful implementation of agreements. This was visible in NEPAD and AEC which have been able to secure full acceptance but failed to be properly implemented.

The fate of AfCFTA will not be different if AU fails to learn from the previous initiatives. The culture of unchecked flexibility and non-implementation of treaties they officially ratified, by creating different barriers will continue in the future journey of the AfCFTA. The acceptance of variable geometry without a detailed boundary for its implementation as a principle will formalize the previous non-implementation which happened in NEPAD and AEC. The higher the cost of trade liberalization in the form of tariff loss and the possible effect on domestic industries compared with other treaties of the AU will further increase the chance that countries will hesitate to implement the AfCFTA. So, AfCFTA should reach a point in which the majority of members will accept and try to progress at the same speed as much as possible. Whereas signing the founding agreement without knowing the real responsibility of the signature and leaving half of the continent will have a significant effect on the moral and market opening capacity of AfCFTA.

Chapter Three

Variable Geometry of RTAs in Africa and Lessons for AfCFTA

3.1. Introduction

Based on Lagos Action Plan (LAP) and Abuja Treaty which established the African Economic Community (AEC), Regional Trade Agreements (RTA) are the building block of African integration mainly in trade and also in other economic, social, political and cultural aspects of cooperation.¹⁸⁴ The practice of integration using regional and sub-regional arrangements in Africa is old which dates back to 1960s when independent African countries tried to create countries with mutual assistance. This groups even saw the arrangement as a way for the continent's progressive unity rather than diving into a continental level of integration by abandoning borders among countries as some Pan-Africanists proposed. These efforts in the 1970s then culminated in the 1980s LPA, that stimulated African countries to establish regional economic blocs.¹⁸⁵ The LPA was an initiative of the Organization of African Union (OAU) which was adopted in April 1980 which gives direction on the continent's future and ways of cooperation between member countries.¹⁸⁶ Before and especially following LPA, organizing RTA became a practice throughout the continent. In addition, it becomes a culture for countries to become a member of all RTA in their region. These fast proliferation of RTAs in Africa makes its structure flexible without any strong commitment to compliance even if the treaty commitment still exists. This is related in one hand with the characteristics of agreements which includes a broad array of the social economic and political objective without giving strong priority to any of the objectives. On the other hand, RTAs in Africa are incorporated with a treaty which gives them flexibility in their commitment as their central points of incorporation.¹⁸⁷ As an outcome, multiple memberships also accompanies flexibility in the RTAs.¹⁸⁸ After ten years since LPA was agreed in 1991, the Abuja treaty has been signed and continental

¹⁸⁴ Article 4 of Treaty Establishing the AEC and also see Lagos Action Plan at 99.

¹⁸⁵ Sylvanus Kwaku Afesorgbor & Peter A.G. van Bergeijk 'Multi-membership and the effectiveness of regional trade agreements in Western and Southern Africa A comparative study of ECOWAS and SADC' 2011 (520) international Institute of Social Studies working paper at 9.

¹⁸⁶ Organization of African Union 'Lagos plan of action for the economic development of Africa 1980-2000' available at <https://www.merit.unu.edu/wp-content/uploads/2015/01/Lagos-Plan-of-Action.pdf> (accessed on 10 August 2019).

¹⁸⁷ James T. Gathii (n 12) at 21.

¹⁸⁸ James T. Gathii. (n 12) at 573.

integration which begins from regions become official. The Abuja Treaty includes an action plan which lasts for 34 years to create an integrated continent.¹⁸⁹

When AEC came in to force in 1991, three regional and all the sub-regional organization have already existed in different parts of the continent.¹⁹⁰ After AEC was signed, RTAs has been proliferated and they reached more than fifteen regional trade agreements in Africa. From them, the AU chooses eight of them as the building blocks of the continents integration which are Intergovernmental Authority for Development (IGAD), Southern African Development Community (SADC), Arab Maghreb Union (AMU), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD).¹⁹¹

The fact is the ground shows the proliferation of RTAs is not contributing much for the integration agenda, in terms of harmonization of rules and liberalization of tariff and minimizing non-tariff barriers.¹⁹² RTAs which are supposed to be the building block of integration in Africa are becoming one of the main challenges of integration. The overlapping nature of regional integration, a varying level of progress across regional agreements and the fragmentation due to competing interest's nature of RTAs are becoming another hindrance for the continent's integration.¹⁹³

In addition, the main objective of these initiatives which is facilitating intra-regional trade remains very low, only sixteen percent of the continents total trade.¹⁹⁴ In addition, the continent's integration through trade is being challenged by lack of complementarity of traded goods,

¹⁸⁹ Article 6 of the Abuja Treaty Establishing the AEC.

¹⁹⁰ The three regional trade agreements are ECOWAS, PTA and ECCAS which comes in to existence in 1975, 1981 and 1983 respectively.

¹⁹¹ The whole 15 regional trade agreements in Africa are; Intergovernmental Authority for Development (IGAD), Mano River Union (MRU), Southern African Customs Union (SACU), Southern African Development Community (SADC), and the West African Economic and Monetary Union (WAEMU), Arab Maghreb Union (AMU), Central African Economic and Monetary Community (CEMAC), Cross Border Initiative (CBI), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of the Great Lakes Countries (ECGLC), Economic Community of West African States (ECOWAS), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD)

¹⁹² Steve Kayizzi-Mugerwa & others 'Regional Integration in Africa: An Introduction' 2014 (26) 1 African Development Review at 1.

¹⁹³ Rodrigo Tavares & Vanessa Tang 'Regional economic integration in Africa: impediments to progress' 2011 (18) South African Journal of International Affairs at abs.

¹⁹⁴ Rasul Shams 'The drive to economic integration in Africa' 2005 (316) HWWA Discussion Paper at 2.

ineffective infrastructure, too much bureaucracy in the border and other challenges.¹⁹⁵ With all these challenges the continent launched African Continental Free Trade Area (AfCFTA), the largest initiative of integration with a plan to create a single market in the continent. AfCFTA is the initiative which plans to break the challenges of inter Africa trade by harmonizing the existing RTA and progressive liberalization of trade in goods, service and investment activities.¹⁹⁶

When AfCFTA came into existence, it includes the principle of variable geometry which is the main focus of this research in addition to the traditional special and preferential treatment.¹⁹⁷

Variable geometry is a differential speed integration which gives countries an opt-in and opt-out flexibility from accepting and implementing specific agreements in a treaty.¹⁹⁸ While we are saying open membership and lack of commitment of countries to implement treaty obligations in RTAs are one of the challenges of integration in the continent, accepting variable geometry is like legalizing non-commitment for treaty implementation. This thesis will explain integration in Africa by using the principle of variable geometry. This is a common practice in the integration of Africa even if they are not included in treaties, except in some regional trade agreements. The thesis will further explain the potential consequence of the continuation of this integration trend on AfCFTA.¹⁹⁹

In the integration experience of the European Union (EU), variable geometry is a situation which happens when some members of the EU fail to agree on agreements like Schengen visa which created a common external boundary for member states and the European Monetary Union (EMU) which created the Euro.²⁰⁰ Countries which failed to agree have been given the right to opt-out from those specific agreements while keeping their membership in the EU. This created a different speed in Europe with layers as central Euro Area with most advanced integration with the same currency. Next to the Euro area, countries with the Schengen area as the second

¹⁹⁵ Trudi Hartzenberg 'Regional integration in Africa' 2011 Trade Law center for South Africa (tralac) at 7.

¹⁹⁶ Rudi hartzenberg & Gerhard Erasmus 'AfCFTA is officially in force — now the real work begins' 30 May 2019 Business Daily. Available at <https://www.businesslive.co.za/bd/opinion/2019-05-30-afcfta-is-officially-in-force--now-the-real-work-begins/>

¹⁹⁷ Article 5 of the treaty establishing AfCFTA.

¹⁹⁸ Elisa Tino (n 14) at 142

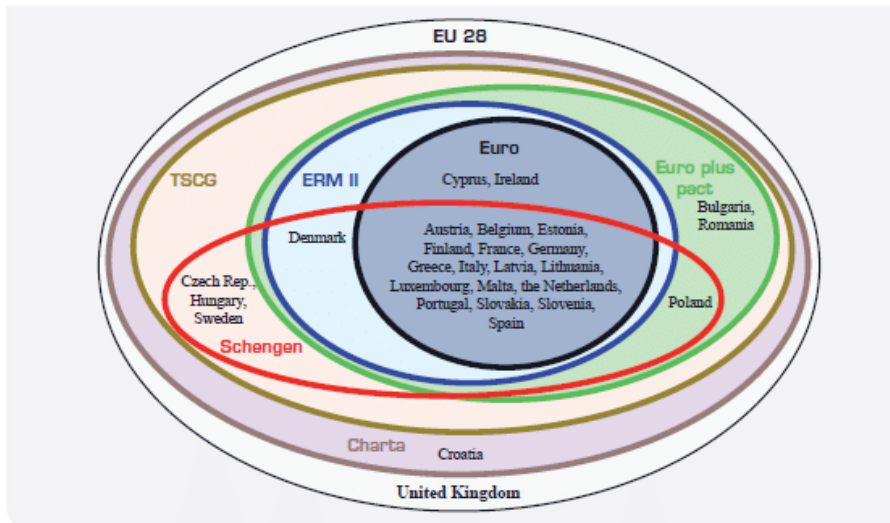
¹⁹⁹ James T. Gathii 'Africa regional trade agreement as a flexible legal regime's' 2010 (35) 3 North Carolina Journal of International Law and Commercial Regulation at 608. See also article 5 of the treaty establishing AfCFTA and article 7 of the treaty establishing EAC which accepts variable geometry as a principle of integration.

²⁰⁰ Peter Lloyd (n 11) 54-55.

advanced layer, Euro plus integration as the third layer and a fourth layer which includes free trade area with neighbouring countries of EU like Turkey.²⁰¹

This approach of opt-out and the right to become a member of some treaties while not signing the other creates the variable geometry of Europe. When we put it in a diagram it gives us the following picture, in which countries in the centre accepted almost all initiatives, while countries like the UK accept only some of them.

Map One; EU variable geometry



Source: Begg (2015) adapted from Tekin (2012)

Even if variable geometry means different things for different people, the EU type of variable geometry existed in the integration initiatives of Africa which come into existence for a different reason. For Africa, these layers are the outcome of continuous fresh initiatives of integration. Rather than capitalizing on the existing one, big RTAs in Africa come into existence by swallowing the existing small sub RTAs while they keep their secretariat and function with little harmonization for their activities.

In addition, most of these multiple and overlapping membership which is becoming another challenge of integration in the continent has been existing mainly because of continuous fresh initiatives to integration. Variable geometry in African integration is not opt-out arrangement from existing organizations agreement rather it is creating additional organization by swallowing the existing RTA and adding some additional countries. This creates layers of integration in the form of one regional trade agreement over the other. It begins from small Sub-regional trade

²⁰¹Carlos Closa 'Flexibility mechanisms in the Lisbon Treaty' 2015 Spanish National Research Council at 9.

agreements then RTA, sub-continental trade agreement over it and now the continental trade agreement. what differentiated between layers in the same region is;

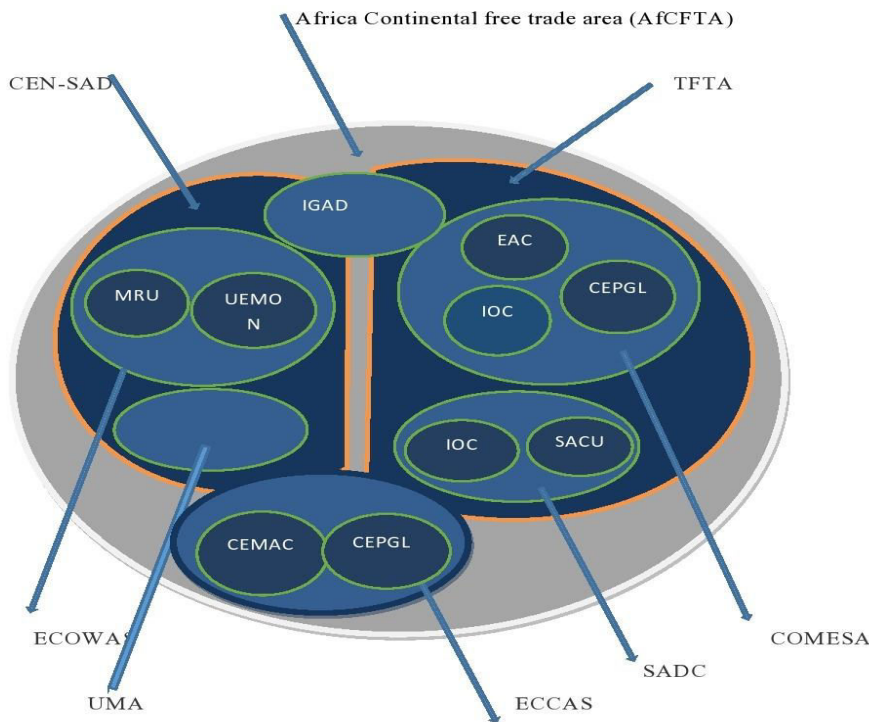
1. the time the regional trade agreements come into existence,
2. the existence of one regional group inside another regional group while protecting its own secretariat and activities and,
3. the size and the geographical coverage of the RTA.

These layers are visible in every region of the continent, but it is not sometimes a perfect overlap of one region group inside the other regional group.

Map Two: Layers of integration in Africa

The picture tries to depict the continents overlap of different trade agreements one over the other which created a layer. For example, in eastern Africa, there is EAC, then there is COMESA including members of EAC and other states. Then there is the TFTA which include the whole COMESA and other countries. Now AfCFTA is coming by including TFTA and all other countries in Africa.

Variable geometry of integration in Africa

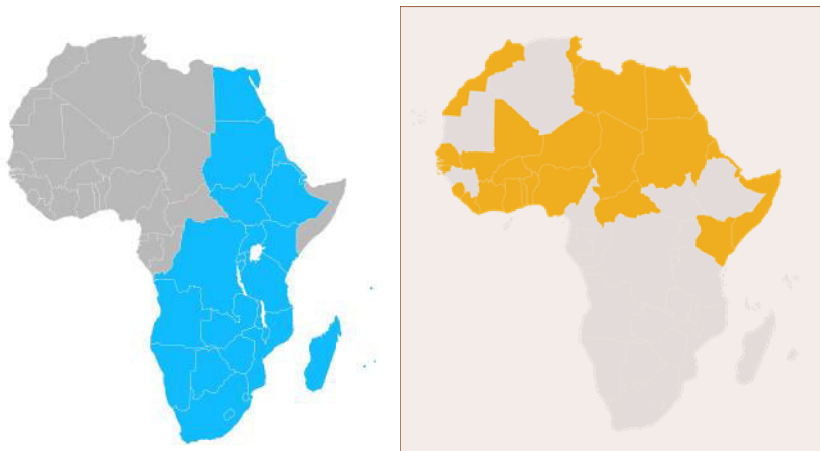


Based on these criteria, the integration initiative of the continent has four layers. The **first layer** or inner layer includes old and small six RTAs which comes into existence before 1982 which

are found inside other RTAs while protecting their own sub-regional organization. These are Mano River Union (MRU), West Africa Economic and Monetary Union (UEMON), Economic Community of Great Lake Region (CEPGL), Economic and Monetary Community of Central Africa States (CEMAC), East African Community (EAC), South African Customs Union (SACU) and Indian Ocean Community (IOC).²⁰² This layer is the core of the integration process in every region which founds inside other regional agreements.²⁰³

The **second layer** includes regional trade agreements which cover each region of the continent and comes into existence between 1975 to 1996.²⁰⁴ The second layer includes ECOWAS, ECCAS, SADC, COMESA, IGAD and UMA. These six regional agreements are found inside two subcontinental initiatives which created the **third layer**. But in here, the membership is not absolute. These two subcontinental arrangements extend from west to Northeast and north to south. In east Africa, they overlap created another complication in the overlapping of membership, while both overpass many central African countries from the third layers of integration.²⁰⁵

Map Three: Members of TFTA & CEN-SAD



²⁰²Democratic republic of Congo, Burundi and Rwanda are members of the CEPGL, and they all are member of COMESA and ECCAS. see also ECA 'Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area' 2017 at p. 16.

²⁰³Babatunde Omilola (*n 15*) at 18-21. see also http://www.uneca.org/sites/default/files/PublicationFiles/arii-report2016_en_web.pdf.

²⁰⁴ ECOWAS come in to existence in 1975 while IGAD in 1996. The others come in to existence in between of this time,

²⁰⁵ Economic Commission for Africa (ECA) 'Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area' 2017 at 16-21. Available at https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (last accessed on 17 June 2019) see also http://www.uneca.org/sites/default/files/PublicationFiles/arii-report2016_en_web.pdf. See also <https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html/>

Tripartite Free Trade Area (TFTA) (left) & Community of Shale and Sahara states (CEN-SAD) (right)

The fourth layer is the AfCFTA which entered in to force by 30 May 2019 with 22 ratifications from the different corners of the continent.²⁰⁶

3.2. The First layer of the integration

The first layers which include CEMAC in central Africa, CEPGL in great lake region comprise of three great lake region countries, IOC grouping of five Indian ocean countries, MRU which contain three west African countries, UEMOA comprising eight members, and SACU, consisting of five members of southern Africa.²⁰⁷ These sub RTAs are icebreakers of integration in their regions, while SACU is the first in the continent.

The long history of integration in Africa begins with one of these first layer's sub-RTA which is SACU. This oldest integration initiative celebrated its 100 years of anniversary in 2010. Since 1910, SACU endured all the ups and downs of Southern Africa history and still exists as one of the regional integration in Africa with meaningful levels of progress in its initiatives.²⁰⁸ SACU has its origins as a colonial construct designed to integrate Botswana, Lesotho and Swaziland (BLS) states into what then-Prime Minister of South Africa, General Smuts, referred to as a 'Greater South Africa'. The treaty which was signed in 1910 officially launched the SACU.²⁰⁹ With the joining of Namibia after the independence, SACU now has five member states which are South Africa, Botswana, Lesotho, Swaziland and Namibia.

Within its one hundred and ten years, SACU was manipulated by the white-minority regime in Pretoria to be an effective apartheid construct, used as a vehicle to obstruct sanctions and highlight 'white' South Africa's links with wider Africa. source? However, notwithstanding its problems, the historical role of SACU in promoting economic, social and political stability within and among member states, is difficult to underscore. From inception, the interest of the

²⁰⁶ Brooking 'AfCFTA agreement officially entered into force'. Available at <https://www.brookings.edu/blog/africa-in-focus/2019/06/01/africa-in-the-news-afcfta-enters-into-force-south-africa-and-senegal-tackle-climate-change-and-presidents-inaugurated-in-nigeria-and-malawi/>

²⁰⁷ O. J. Nnanna 'Economic and Monetary integration in Africa' 2005 A Paper presented at the G24 meeting in Singapore on September 14, 2006 at 20.

²⁰⁸ Richard Gibb & Karen Treasure 'SACU at centenary: theory and practice of democratizing regionalism' 2011 South African Journal of International Affairs at 1.

²⁰⁹ BLS states comprised Botswana, Lesotho and Swaziland until Namibia officially joined SACU on independence in 1990, when they became BLNS states. However, Namibia had been a de facto member of SACU since 1920, when South Africa undertook administration of South-West Africa under the terms of Article 22 of the Covenant of the League of Nations.

then South Africa government to sustain its dominance in the region helped SACU to sustain and pass difficult times. After the independence of member states, the treaty establishing SACU was revised in 1969 and in the revised treaty, the South African based government continues as an institutional structure to manage the custom union. The newly innovative tariff sharing agreement and compensation plan for other member countries in the 1969 agreement helped SACU to sustain with minimal complain from member countries.²¹⁰

Until the 1994 democratic election, SACU continued with two purposes of obstructing sanction on the apartheid regime and helping the stability of members states. After 1994, radical action was taken to democratize SACU between all member's states even if the progress is still questionable. On the other hand, the treaty in 2002 gives SACU a legal personality to make a decision without interference from member countries.²¹¹ However, the agreement of 2002 comes up with its challenges by disordering the historic relationship of countries which was based on South Africa's dominance and free market access to member countries. The other countries questioning of South Africa's dominance which is the main reason why SACU survived its long history of turbulence and the interest of South Africa to negotiate external tariff with third countries which have a significant effect on the revenue source of other member states become the challenge SACU should pass through to keep through its journey.²¹²

Despite the continuous challenges resulting from the structural problems, lack of institutional framework and a need of South Africa to negotiate trade agreements with other parts of the world (in which South Africa did by breaking the rule of the customs union) SACU is one of the successful sub RTA with fully implemented Customs Union in Africa²¹³. As a first layer it is found inside SADC and member states are an active participant in SADC.²¹⁴

The other first layer Sub-regional group which has a history which dates through the times of colonialism and one of the oldest in the integration experience is the central African CEMAC. Prior to gaining independence from French colonial rule, the Union Douanière Équatoriale (UDE) was formed in 1959 by the Central African Republic, the Republic of Congo, Gabon and

²¹⁰ Richard Gibb & Karen (n 208) at 4-9.

²¹¹ SACU Secretariat, Southern African Customs Union Agreement 2002. Windhoek: Southern African Customs Union Secretariat, 2003, Article 4(1).

²¹² Rod Alence 'SACU and the political economy of regionalism: Towards deeper and broader integration?' 2006 (12) South African Institute of International Affairs Trade Policy Briefing at 1.

²¹³ Economic Commission for Africa (ECA) (n 205) at 35.

²¹⁴ The Treaty establishing SADC.

Chad.²¹⁵ The objectives of these organizations were as a managing tool for the currency of West African countries who were using French currency and who continues to use the currency.²¹⁶

When these countries gain independence from France, the UDE remained as a functioning institution to manage the currency union of countries. Cameroon joined the currency arrangement in 1962. By using the common currency arrangement as a base of integration, member states of the UDE meet in Brazzaville to establish the Union Douanière et Économique de l'Afrique Centrale (UDEAC) on December 8, 1964. The main objective of UDEAC was to create a customs union and free trade arrangement among themselves.²¹⁷ Since this agreement was signed in 1964 up to 1975, they tried to implement the free trade and the customs union, but it failed to progress mainly because of disagreement among members. To improve the lagging of implementation they revised the treaty in 1975 and entered into an agreement with France and the World Bank to get help in the process of implementation.²¹⁸ Gabon also joined in 1983 which makes the total member states six.²¹⁹

When the initiatives failed to progress again as a customs union or a free trade area the member states agreed to jump to a monetary union with the use of the Central Africa CFA franc as the single currency. The monetary union was possible because of the fact that members have been using the same currency backed by the French treasury. As a result of this, in March 1994, the UDEAC has been replaced by CEMAC in N'Djamena, Chad, in line of the agreement of the continent to move forward to integration by using regional arrangements.²²⁰ Following its ratification and adoption of an action plan under the Malabo Declaration, CEMAC officially came into existence in 1999.²²¹

The overall outcome of the integration of CEMAC is disappointing, except being recognized as a monetary union. With a lot of effort and introduction of a monetary union the inter CEMAC trade in 2011 was only 0.8 percent of the total trade of countries. The area CEMAC achieved

²¹⁵ Leke, Sydonie K 'Economic integration and the internal governance of member states: a case study of CEMAC and Cameroon' 2012 MA thesis, University of the Witwatersrand at 69 -71.

²¹⁶ Zafar, Ali and Keiko Kubota 'Regional Integration in Central Africa: Key Issues' 2003 (52) Africa Region Working Paper Series 2003 at 5.

²¹⁷ Leke, Sydonie K 'UDEAC and the progress of integration in Central Africa' 1996 AFR. J. INT'L & COMP. L. at 75

²¹⁸ Mytelka, L. 'Competition, Conflict and Decline in l'Union Douanière et Économique de l'Afrique Centrale (UDEAC)' 1984 Cambridge, Cambridge University Press, at 132

²¹⁹ Zafar, Ali and Keiko Kubota (n 216) at 2.

²²⁰ Treaty establishing CEMAC. [available at: <http://www.worldtradelaw.net/fta/agreements/cemacfta.pdf> (accessed on 19 June 2019)

²²¹ Leke, Sydonie K (n 217) at 77

some progress is in the free movement of peoples by some members even if Visa is still necessary to enter into Gabon and Equatorial Guinea.²²² The challenge to increase regional trade and other integration objectives, however, didn't affect their interest to peruse integration in other integration initiatives. As of 2017, all CEMAC countries are a member of ECCAS while the Central Africa Republic and Chad are members of the continuous expanding CEN-SAD.²²³

In West Africa, two first layer initiatives have a long history of integration with eight and four members. UEMOA and MRU are the two sub-regional groups which make up the first layer of integration in Western Africa in which both are members of ECOWAS in a regional arrangement.²²⁴ The history of UEMOA traced back from West Africa Monetary Union (UMOA) which comes in to existence in 1962 by including Benin, Burkina Faso, Côte d'Ivoire, Mali, Mauritania, Niger, Senegal and has been operated as custom union of Western Africa states (UDEAO) until 1966. In 1973, it changes its name to Communauté des États de l'Afrique de l'Ouest (CEAO) without changing its objectives and goals.²²⁵ Even if the UMOA and CEAO have been organized as a customs union and free trade area they never achieved it. They have been only a preferential free trade area. CEAO only introduced free trade for raw materials in 1973 by incorporating a compensation mechanism for countries with lost income because of the arrangement.²²⁶

Again in 1994 it changes its name to UEMOA and got its present shape. Eight member states which include members of UMOA (From previous member states Mauritania become out which didn't want to become part of the new arrangement), Guinea Bissau and Togo.²²⁷ All of the members of UEMOA are a member of ECOWAS in the second layer. Despite all its failure in facilitating trade, it is a good example of a monetary union in Africa.²²⁸

The other first layer sub-regional arrangement in West Africa, MRU comes into existence by Mano River Declaration between Sierra Leone and Gambia in 1973 with the main objective of

²²² Economic Commission for Africa (ECA) (n 205) at 62.

²²³ Economic Commission for Africa (ECA) (n 205) at 79

²²⁴ Treaty establishing ECOWAS, 1975.

²²⁵ Ernest Aryeetey 'Regional integration in West Africa' 2001 (170) OECD Development center Working Paper at 15.

²²⁶ Sheila Page & Sanoussi Bilal 'regional integration in Western Africa' 2001 Report prepared for and financed by the Ministry of Foreign Affairs, The Netherlands at 2.

²²⁷ Ernest Aryeetey (n 225) at 15.

²²⁸ Economic Commission for Africa (ECA) (n 205) at 136.

creating a customs union.²²⁹ In 1980 Guinea joined MRU, Cameroon joined in 2008 and the member states increased to four. Because of lack of progress and little activity, it doesn't have that much to say about it other than complicating the operation of the regional trade agreement of the region. Since all of them are members of ECOWAS and CEN-SAD it complicated the effort to progress in the free trade agreement and the customs union. In addition, the troubled history of the Civil war was the main challenges to progress in the country's economy as well as their economic interaction with neighbouring countries.²³⁰

The other small regional group in the first layer is the Economic Community of Great Lake Region (CEPGL) It comprises of three central African former Belgian protectorates of Burundi, Rwanda and DRC. CEPGL comes into existence in 1975 with the support of the United Nations (UN) to remove all barriers to the free movement of peoples and goods among the member countries, to undertake common development project like joint infrastructure projects, to use internal and donor's resources together for their development.²³¹

Like MRU, the troubled political situation of the region hinders economic activities and development for a long time. After the implementation of CEPGL, the percentage share of intra-regional trade in total trade of the region in two decades was consistently below 1.0 per cent which is very low even in African standard. In numerical term, the total trade among countries was only US\$19.1 million in 2004 which is insignificant if we measure the role of the agreement.²³² To improve the situation in 2007, member countries re-launched CEPGL but the last 10 years after it was launched again shows that this sub-regional integration is the worst in its performance without any progress in all aspects of integration. Opposite to this, Rwanda and Burundi are active members of EAC with a significant level of trade with members. In addition, they are members of other regional initiatives including COMESA and ECCAS.²³³

One of the sub-regional trade agreement which passes through troubled history and achieved some success in its progress of integration is the East African Community (EAC). The economic integration of Eastern Africa started in 1890 when a customs collection centre for Uganda was established in the port of Mombasa. The common colonizer and the building of Kenya- Uganda

²²⁹ Piero Pennetta 'Mano River Union' 1996 AFR. J. INT'L & COMP. L. at 403-406.

²³⁰ Piero Pennetta (n 229) at 5-7.

²³¹ Faezeh Foroutan 'Regional Integration in Sub-Saharan Africa: Experience and Prospects' 1992 (1992) World Bank Policy Research Working Paper at 8.

²³² O. J. Nnanna (n 207) at 20.

²³³ Economic Commission for Africa (ECA) (n 205) at 16.

railway shifted the trade from Tanganyika (present-day Tanzania) to port Mombasa which then fasten the integration process.²³⁴ Then a common Currency Board was organized to issue currency for Uganda and Kenya which leads to the establishment of a Uganda-Kenya customs union in 1917, with Tanganyika joined in 1922. By following the customs union, a high commission was established in 1948 which was followed by common service companies including East African Postal and Telecommunications, East African airways and air aviation service, East African Railways, and East African Development Bank. After independence, the first Community is then established with a treaty signed by the three states in 1967.²³⁵

The setting up of common service institutions was one of the heights of integration in Africa. However, they fail to sustain the agreement and crises and disagreements followed. The claim of unequal advantage leads to the collapse of the community in 1977 and the following asset division. The main reasons which resulted into collapse of one of the model examples of integration initiatives in the continent were unequal benefits and costs from integration, ideological difference, poor governance and corruption, external parties influence and lack of a mechanism to address disagreement with negotiation in which members failed to find a common solution.²³⁶ After a long negotiation, the community divided the resources of the community. But the history of EAC doesn't end in the division of the asset. Member states renegotiated and signed a tripartite agreement 1993 to reestablish the community. The treaty establishing the EAC then signed in 1999 and entered in to force on 7th July 2000.²³⁷

With a functioning free trade agreement and a customs union, the EAC is one of the few successful sub-regional trade agreements in the region. In addition, the share of trade between member's states from their total trade is the largest in the continent next to SACU.²³⁸ This shows that the EAC has used its previous integration experience and it got its lessons from past failure. In addition, EAC member states are also active participants in COMESA, some in Intergovernmental Authority for Development (IGAD) and others in SADC.²³⁹

²³⁴ UNEP/UNDP/Dutch 'Development and harmonization of environmental law' 1999 Joint project on environmental law and institutions in Africa: The East African sub-region project, Volume 1 at 97.

²³⁵ Kiraso & Beatrice 'EAC integration process and enabling peace and security architecture' 2009 The East African Community EAC IRC Repository at 2.

²³⁶ Kiraso & Beatrice (n 235) at 2-3.

²³⁷ UNEP/UNDP/Dutch (n 195) at 81.

²³⁸ Economic Commission for Africa (ECA (n 205) at 35-36

²³⁹ Economic Commission for Africa (ECA (n 205) at 1. see also <https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html> (accessed on 22 June 2019).

The sixth and the latest sub-regional organization in the first layer is the Indian Ocean Community (IOC), an intergovernmental initiative that comes into existence in 1982 and institutionalized in 1984 by the Victoria Agreement. IOC has five member countries in the Indian Ocean, which are Comoros, Reunion (French oversee territory), Madagascar, Mauritius and Seychelles. In the past, many years since it existed, IOC focuses on four major areas of intervention, which are first, diplomacy and political cooperation, second, environment and sustainable management of natural resources, third, human development and fourth, economy and trade. It changed its focus after the beginning of the new millennium, and now it works on promotion and defence of Small Island States issues and interests and regional economic integration.²⁴⁰ Being an organization regrouping only island states, the IOC has usually championed the cause of small island states in regional and international forums.²⁴¹ Because of their location as an island, they agreed to commonly develop and integrate their aviation and maritime transport.²⁴² In their effort to connect with the mainland of the continent they are also members of SADC and COMESA.²⁴³

In general, first layer sub-regional integration which appeared throughout the continent has been mainly the outcomes of the colonial legacy, mostly based their integration from their common colonial history. Both monetary unions in West Africa, UEMOA and CEMAC were French colonies. Their commonality is the French language, a common currency backed by France and the continuous help from France is the main reason for their survival. On the other hand, the CEPGL member countries were under Belgium rule while the history of EAC dates back to the British empire in eastern Africa. On the other hand, SACU is the outcome of the Pretoria based apartheid regime. This similarity is what bonds them together even if the integration of many of them haven't resulted in additional economic benefit. The other unique characteristics these arrangements are that these sub RTAs are mostly closed from expansion to other countries in the region, which don't have a common history. Opposed to the culture of the continent's integration in which countries are active in applying to become members of ever new integration initiative,

²⁴⁰ Indian Ocean Commission 'Placing the Indian oceanic region on the world map' 2015 at 4. available at http://www.commissionoceanindien.org/fileadmin/resources/Partenaires/Booklet_IOC_English_nov13-GR.pdf (accessed on 3 June 2019)

²⁴¹ Eduard Marinov 'Economic Integration in Africa – Overview, Progress and Challenges' 2014 Economic Research Institute at 49.

²⁴² Indian Ocean Commission (n 240) at 12.

²⁴³ Economic Commission for Africa (ECA (n 205) at 15.

these sub-regional agreements are systematically closed for countries who have a different colonial history. But still, it is difficult to generalize why they are not expanding to other member states. Because some of the sub-RTA like SACU is a progressed integration which is difficult for bordering countries to open their market with that level, IOC is an association of islands which doesn't attract other countries, agreements in West Africa have a common currency which is not acceptable by others.

3.3. The Second Layer of Integration

The first layer of integration project has been completed in 1982 when the IOC project becomes operational. Next to that, the continent endeavours into giant regional blocks. Most of the second layers of integrations are more ambitious projects which comprise of member countries from 5 up to 21.²⁴⁴ In terms of timing, these regional arrangements come into existence with a time frame of between 1975 which is when the ECOWAS came into force up to 1996 in which the IGAD comes in to force.²⁴⁵ Agreements we can include in this layer are ECOWAS, UMA, ECCAS, UMA SADC and IGAD which represent each region of the continent while COMESA represents Eastern and Southern Africa.

In terms of scope of integration projects, most of them have a comprehensive objective which includes social, economic, political and cultural aspects as well. For example, the SADC treaty comprises of objectives which cover cooperation in the area of health, development, trade, security, economic, cultural as well as all other possible aspects of cooperation.²⁴⁶ The treaty establishing COMESA covers cooperation in the field of economic development, trade, peace, security, as well as investment and macroeconomic policy harmonization.²⁴⁷ The objectives of UMA and ECCAS are also the same with very few difference in the detail explanation of the agreements. The objectives of ECCAS contains harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity, particularly in the fields of industry, transport and communications, energy agriculture, natural resources, trade, customs,

²⁴⁴ Economic Commission for Africa (ECA (n 205) at 15.

²⁴⁵ Babatunde Omilola (n 15) at 18-21.

²⁴⁶ Article 5 of the treaty establishing SADC.

²⁴⁷ Article 3 of the treaty establishing COMESA

monetary and financial matters, human resources, tourism, education, further training, culture, science and technology and the movement of persons.²⁴⁸

Like COMESA and ECCAS, ECOWAS also has a broad objective in its agreement. The treaty mainly covers on harmonization and coordination of national policies and the promotion of integration programs, projects and activities, establishment of common market as well as the promotion of joint ventures by private sector enterprises, the integration of the private sectors, establishment of an enabling legal environment, promotion of balanced development of the region and promotion of the flow of information.²⁴⁹ In 1993, ECOWAS further broadens its objective in its revised agreement to cover Co-operation in Political, Judicial and Legal Affairs, regional Security and Immigration, cultural, social as well as other aspects deemed necessary for the region.²⁵⁰

These second layer agreements and their broader objective are the outcomes of the continuous search for the enduring economic, social and political problems of the continent facilitated by Lagos Action Plan (LAP) which was adopted in 1980 by the organization of African Union (OAU).²⁵¹ With the adoption of the LAP, RTAs has been decided as the main tools for the creation of an integrated continent.²⁵²

Based on the direction seated in LAP head of states of members of the OAU gave the responsibility to the OAU to prepare a document which establishes AEC which becomes a road map for the integration of the continent. In addition, they give a direction to strengthen the existing regional economic communities and establish other economic groupings in the other regions of Africa, RTA doesn't exist, so as to have a representative RTA in every region of the continent.²⁵³ By the time LAP was signed, the only region which already have a regional trade agreement was ECOWAS in West Africa.²⁵⁴ In the other regions, only small sub-RTA existed.

As the first RTA, ECOWAS came into existence in 1975 which is five years before the OAU officially decided to use regional initiatives as a building block. However, ECOWAS wasn't the first trade agreement in the continent. All the first layer sub-RTA except IOC have existed. In

²⁴⁸ Article 4 of the treaty establishing ECCAS.

²⁴⁹ Article 3 of the treaty establishing ECOWAS.

²⁵⁰ The Revised treaty of ECOWAS.

²⁵¹ Preamble of Lagos plan of action for the economic development of Africa 1980-2000

²⁵² Abuja Treaty which established The African Economic Community in 1991.

²⁵³ Lagos plan of action for the economic development of Africa 1980-2000 at 4 & 99.

²⁵⁴ COMESA has been existed since 1975, five years before LPA.

West Africa itself, UEMOA and MRU have long existed before ECOWAS. Rather than capitalizing of the existing arrangements west African countries prefer a new initiative which includes all West African states.²⁵⁵ This becomes the beginning of multiple memberships in African in an endeavour for integration. It seems the AEC also supported the ECOWAS approach of integration which has been the ice breaker of multiple and overlapping memberships. The fact that the OAU accepts only ECOWAS as a building block and used it as a model for other regions showed that we created overlapping membership by treaty.

The LAP gives direction for the OAU to support countries to create regional arrangements in the East, North, South and Central Africa.²⁵⁶ It was following the recommendation of the LPA to expand intra-Africa trade, the Economic Commission for Africa (ECA), set up five sub-regional Multinational Programming and Operational Centers (MULPOC's) with the objective of facilitating the formation of RTAs. These centres were for Eastern, Southern, West, Central Africa and the Great Lakes Community. It was recommended that preferential trade areas with similar arrangements be established within each MULPOC area not later than December 1984. Based on this recommendation, the PTA which later changed into COMESA comes into existence in 1981 and Economic Community of Central Africa States (ECCAS) comes into existence in 1983.²⁵⁷

COMESA, which is the biggest RTA, has 20 member states beginning from the northern African Egypt up to the Southern African Madagascar. It covers a sub RTAs of EAC, CEPGL, IOC as well as IGAD in which they all found inside COMESAs geographic coverage. In addition, it includes many members of SADC and UMA. This makes COMESA the most complex RTA in Africa.²⁵⁸

When PTA came into existence in 1981, the existing sub RTAs were in the difficult situation themselves, which makes them worthless to use them as a base for integration. In 1981, the EAC was under crises in which the countries were negotiating to share the common resource after the collapse of the arrangement.²⁵⁹ The IOC was in negotiation by itself which comes into existence

²⁵⁵ Before 1975, in the existing sub regional trade agreements, there have not been any country that has member of more than one regional trade agreement have been.

²⁵⁶ Lagos plan of action for the economic development of Africa 1980-2000 at 4 & 99

²⁵⁷ The preferential Trade Area of Eastern and Southern Africa. Available at <http://www.fao.org/3/w5973e06.htm> (accessed on 28 June 2019). See also The Treaty Establishing ECCAS.

²⁵⁸ Economic Commission for Africa (n 205) at 15.

²⁵⁹ Kiraso & Beatrice (221) at 2.

in the following year by 1982 in spite of their participation in the PTA as a founding member.²⁶⁰ The only existing sub-regional arrangement existed by that time was the CEPGL which comes in to force by 1976. Despite its existence, CEPGL didn't have a meaningful operation and activity which worth consideration to create a regional trade arrangement out of it.²⁶¹ Because of factors like these, all member countries of these sub-regional groups end up being member states of COMESA while keeping their own arrangement and sub-RTA. What is remarkable is that despite the similarity of purposes of liberalizing regional trade and achieving other forms of co-operation the level of cooperation among themselves is still very low. When we see the overlap of activities, it is also surprising that member countries found it necessary to maintain a multiplicity of institutions.²⁶²

In the other side of the continent, the way ECCAS comes into force is not different from COMESA. In central Africa, UDEAC which changed its name to CEMAC long existed before ECCAS. But when ECCAS come into existence in 1983 it rather chose a fresh initiative by including members of CEMAC, CEPGL, and Sao Tome and Principe rather than expanding from the existing sub-RTA.²⁶³ The explanations for this is the same for the ECOWAS case too which is called 'French factor' i.e. the desire of successive governments in Paris to support organizations grouping their formal colonies in the region as well as a lack of confidence by individual countries in the capacity of such institutions to protect their interests.²⁶⁴ In addition, the timing these regional agreements came into existence has its own influence. In addition to external influence, the newly established RTAs didn't try to use the already existing sub-RTAs as a base and to capitalize on it because of computation and suspicion between themselves.

These trend has been strengthened and continued after the signing of the treaty establishing AEC in 1991 in Abuja and adopted by almost every member by 1994.²⁶⁵ With the adoption of the AEC treaty, using regional blocks as a building block for the integration of the continent was

²⁶⁰ Treaty establishing the Preferential Trade area (PTA). IOC member countries of Comoros, Madagascar and Mauritius are founding members of PTA.

²⁶¹ Faezeh Foroutan (n 216) at 8.

²⁶² Bundu A. 'ECOWAS and the Future of Regional Integration in West Africa; Regional Integration and Co-operation in West Africa, A Multidimensional Perspective' edited by Réal Lavergne 1997 Africa World Press and IDRC, Ottawa at 10

²⁶³ Bundu A. (n 262) at 15.

²⁶⁴ Bundu A. (n 262) at 10

²⁶⁵ Article 6 of the treaty establishing AEC.

followed by the establishment of regional integration in North Africa (UMA), South Africa (SADC) as well as IGAD.

SADC first comes into existence as South Africa Development Cooperation Conference (SADCC) which was not a market integration arrangement; the front-line states constituting the arrangement adopted a broad development mandate. The main goals for the Member States were to avert the economic influence of apartheid South Africa and to introduce programs and projects which would influence the Southern African countries and the region.²⁶⁶ However, when it changed its name to SADC in 1992, it came to an integration arrangement based on a linear model of integration. The strategic plan articulates the roadmap for SADC's integration and provides for the establishment of a free trade area by 2008, a customs union in 2010, a common market in 2015, monetary union in 2016 and the introduction of a single currency in 2018.²⁶⁷ However, all these were not achieved, and by 2017, SADC is only a fragmented free trade area, which hasn't been implemented by all member states. Even if it fails to progress in its agreement, SADC is the most progressive agreement in terms of the share of regional trade among members. The existence of South Africa and its developed manufacturing sector makes trade between countries possible than any region in the continent.²⁶⁸

In general, second layers of integration initiatives are large regional groups with wider socio-economic, political and cultural cooperation agreements which comes into existence with the direction of AEC to create an integrated continent. In addition to lack of progress to achieve their objective, the main similarity of these agreements is containing sub-RTA inside their arrangement and any of them tried to capitalize from them while their objective is almost the same with sub RTAs, like trade liberalization, reducing barriers to trade. In addition, integration initiatives of the second layer are always open for countries who want to join the RTA which contributed to the multiple and overlapping membership. Because of its openness, RTAs like COMESA is reaching from north to south as well as the central parts of Africa.²⁶⁹ This is a behaviour not existed in sub RTAs, who are closed from new members to join. In terms of

²⁶⁶ History and treaty. available at <https://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed on 4 July 2019).

²⁶⁷ Erasmus, G. 2011. Deeper Regional Integration in SADC. Will EPAs undermine the process? Working Paper, Trade Law Centre for Southern Africa. See also Trudi Hartzenberg 'regional integration in Africa' 2011 World Trade Organization Economic Research and Statistics Division working paper at 7.

²⁶⁸ Economic Commission for Africa (n 205) at 15.

²⁶⁹ COMESA has 21 members including EGYPT, Swaziland (Eswatini) and DRC.

progress, many of them are free to trade areas while some of them like COMESA and ECOWAS are in the initial stages of implementing customs union.²⁷⁰ Most of all, they end up creating double membership for many countries and triple membership for a few countries. The continuous expanding characteristics to different direction of the continent is also complicating the integration process of the continent.

3.4. The third layers of integration

The approach the AEC followed to bring the continent into integration, created a lot of multiple and complicated memberships of countries which with time becomes conflicting for countries to implement the integration agreement. The RTAs which emerged from the scratch by swallowing small sub-RTA and their open-door policy of for any country to join their organization becomes additional challenges while the continent is struggling to solve the main problems of integration, like lack of complementariness of export, low level of industrialization and lack of infrastructure.²⁷¹ This induces countries and the AU to think of remedies which come out as harmonization of the activities and policies of RTAs as a first step to jump to a continental free trade area. This resulted in the Tripartite Free Trade Area (TFTA) as a tool to harmonize policies and regulation of COMESA, EAC and SADC.²⁷²

TFTA is an agreement which covers the whole eastern parts of the continent which extends from Cairo to Cape.²⁷³ The idea first emerges in the tripartite summit of COMESA, SADC and EAC in Kigali in October 2008. After a long negotiation, three parties agreed to establish the tripartite agreement in 2015 as a building block as a first step to create A continental Free Trade Area (CFTA). The agreement is a tripartite initiative between SADC, COMESA and ECA to create an FTA and a CU by taking the best practice of RTAs. It includes a plan to progressively solve the overlapping membership of the three RTA which contains 26 countries in which many of them overlaps in these three RTAs.²⁷⁴ The TFTA area currently has a total population of 683 million

²⁷⁰ UNECA 'COMESA - Trade and Market Integration' available at <https://www.uneca.org/oria/pages/comesa-trade-and-market-integration> (accessed on 27 September 2019)

²⁷¹ Rasul Shams 'The drive for economic integration in Africa' 2005 (316) *Hamburgisches Welt-Wirtschafts-Archiv (HWWA)*, Hamburg Institute of International Economics at 3-5.

²⁷² Preamble of the treaty establishing the TFTA.

²⁷³ Andrew Mold & Rodgers Mukwaya 'Modelling the economic impact of the tripartite free trade area: Its implications for the economic geography of Southern, Eastern and Northern Africa' 2016 (57) 84 *Journal of African Trade* at 57.

²⁷⁴ Treaty establishing TFTA.

people and a combined Gross Domestic Product (GDP) of USD 1.2 trillion at market exchange rates of 2015 (World Bank, 2016). This represents more than half (54.3%) of Africa's total GDP, and 58% of Africa's population.²⁷⁵

The other agreement in Africa which becomes the third layer, CEN-SAD was established on 4th February 1998 following the Conference of Leaders and Heads of States held in Tripoli. The treaty establishing CEN-SAD was first signed by Libya, Burkina Faso, Mali, Niger, Chad and Sudan. During the first Summit of the organization held in Sirte in April 1999, Central African Republic and Eritrea joined the Community. Senegal, Djibouti and Gambia joined during in 2000. Other countries joined later and now CEN-SAD becomes a subcontinental agreement containing 25 countries of Northern, Western, Central and Eastern Africa countries and still, more are in the process of joining the Organization.²⁷⁶

The aims of CEN-SAD are to preserve and consolidate peace, security and stability; promote political dialogue and fight cross-border organized crime which includes drug trafficking and arms movement. Because of the location of the states fight against desertification, drought and climate change through the conservation of natural resources and research and development of renewable energy are the other main objectives. Other objectives are cooperation in economic, trade, scientific and socio-cultural cooperation, infrastructure development as well as the promotion of free movement of people, goods and services. One aspect which makes CEN-SAD different is, its approach on developmental plans that was planned to be integrated into the national development plans of the member states even if it failed to materialize.²⁷⁷

CEN-SAD as a third layer of integration covers half of the continent which includes the whole ECOWAS, UMA except Algeria, IGAD except Ethiopia, some portion of COMESA, and half of ECASS. However other than trying to harmonize the objectives of this RTAs it comes up with its own purpose of creating integration with fresh initiatives. In its more than twenty years of existence however, it even failed to implement the first stage of Free trade area which makes its importance for the integration of the continent questionable.²⁷⁸ Since it contains many RTA and

²⁷⁵ Andrew Mold & Rodgers Mukwaya (n 273) at 58.

²⁷⁶ NEPAD agency of the African Union capacity development division 'strengthening the institutional capacity of the community of Sahel and Saharan states' 2015 at 2. available at <https://www.nepad.org/publication/strengthening-institutional-capacity-community-sahel-saharan-states> (accessed on 5 July 2019)

²⁷⁷ Article 3 of Treaty Establishing Community of Sahel and Sahara States.

²⁷⁸ NEPAD (n 276) at iii.

sub RTAs, it can serve as a means to harmonize activities and policies between different RTAs. However, what happened in 2010 was that CEN-SAD, ECOWAS, ECCAS and AMU designed an initiative for the creation of another free trade agreement in line with the tripartite model.²⁷⁹ While CEN-SAD covers the whole area under consideration, creating new organization is one of the examples of the many meaningless integration initiatives in Africa in one hand and lack of meaningful progress of CEN-SAD to serve the purpose of harmonizing trade among other RTA in the region on the other hand.

Without a doubt, TFTA is struggling to enter into force. As of April 2019, only four countries have ratified the agreement from the 26 countries who have signed the agreement while fourteen ratifications are needed to enter in to force.²⁸⁰ The lack of progress in TFTA creates another question on the possibility of a single trading bloc in the whole continent, while individual sub-regional, regional and subcontinental ones have failed.²⁸¹

Agreement on the capacity of TFTA to solve harmonization problem of RTAs was there. Unfortunately, lack of political will to ratify the treaty and the lack of state capacity in several TFTA member-states make the implementation of the program out of attention.²⁸² One fact which makes TFTA similar to other initiatives is the way TFTA planned to solve the overlapping and multiple memberships, by creating another sub-continental agreement. Rather than helping RTA to harmonize their trade policy by creating a forum of negotiation, it planned to create an organization by itself with its own secretariat. Since it is organizing with its own free trade area with its own secretary, the probability it is going to end up as another layer of integration without significant value addition is very high.

So, both third layer agreements, in general, are sub-continental integrations which have 25 and 26 members and both of them are in the inception stages of integration. In terms of the direction where they are going, TFTA looks clear on the other hand CEN-SAD still calls itself an RTA which doesn't fit for it. It should embrace the TFTA system as a tripartite initiative between

²⁷⁹ NEPAD (n 276) at iv

²⁸⁰ Tralac 'Fresh push for states to ratify the Tripartite FTA as deadline draws near.' Available at <https://www.tralac.org/news/article/13999-fresh-push-for-states-to-ratify-the-tripartite-fta-as-deadline-draws-near.html> (accessed on 6 July 2019).

²⁸¹ Calestous Juma & Francis Mangeni 'The Benefits of Africa's New Free Trade Area' 2015 Harvard Kennedy School, Belfour center for Science and International Affairs. Available at <https://www.belfercenter.org/publication/benefits-africas-new-free-trade-area-0> (accessed on 6 July 2019)

²⁸² Hilary Matfess 'The tripartite free trade area agreement in Africa is bound to disappoint' 2015 Quartz Africa. Available at <https://qz.com/africa/424557/the-tripartite-free-trade-area-agreement-in-africa-is-bound-to-disappoint/> (accessed at 06 July 2019)

ECOWAS, UMA and ECCAS to fit its present situation. However, what is ironic is that overlapping of membership between TFTA and CEN-SAD is already expanding which will undermine the whole purpose of harmonization between the already existing initiatives. Many countries like Kenya, Djibouti, Eritrea, Egypt and many others already become a member of both sub-continental agreements.

These three layers of integration are what this thesis calls variable geometry of integration in Africa with the main character of many organizations in the same region and multiple memberships of countries in these organizations. For example, in eastern Africa, EAC has its own secretary with progressed integration. Over it, there is a COMESA secretary. The secretary of COMESA is now under the TFTA if it is able to enter into force. The agreement of AfCFTA also created another secretariat as the fourth secretariat for a single region. If we take Kenya for example, it is a member of all these four secretariats which has the same purpose or can be managed by a single secretariat with a differentiated level of integration among countries. So, the existence of multiple secretariats in a single region is the problem of the African variable geometry which does not exist in the other parts of the world. In the variable geometry of EU integration, the EU secretariat (EU commission) is the one in charge of the differentiated integration levels which includes the EU monetary union, the Schengen area, the EU as well as the free trade area with bordering countries.

3.5. The Other Dynamics of Variable Geometry

In addition to the variable geometry, which is expressed in terms of layers, there is another variability inside each sub-RTA and RTA as well as the sub-continental initiatives. This is expressed in the differentiation of progress in the implementation of the free trade area, Customs Union and other agreements like free movement of peoples among member countries of RTA. This is visible in every integration initiative on the continent. This is a scenario in small to big, progressed to stacked regional arrangements.

In better-progressed RTAs like EAC and COMESA, the progress of every country in the implementation is very diverse. For example, one of the big projects of COMESA was implementing the free trade area. since it enters in to force 15 countries managed to implement the FTA. In addition, the Democratic Republic of Congo is in the way to implement the agreement. The other five member countries of COMESA, however, are hesitating to bound by

the agreement. For those countries, COMESA gives the right to implement the agreement when they become ready.²⁸³

In the case of the other major regional groups like SADC and ECOWAS, the situation of variability inside the organizations in the signing and implementation of agreements is the same. SADC implemented the FTA in 2008 and it is progressing in the liberalization of many sectors. But still, three of its members are out of the FTA. Angola, Democratic Republic of Congo and Seychelles are out of the FTA arrangement and they are only cooperating in the other areas of integration.²⁸⁴ On the other hand, Malawi, Mozambique and Zimbabwe disagreed to reduce tariffs on South African goods, because the loss of potential tariff revenue was too high for them to accommodate.²⁸⁵ In Western Africa, ECOWAS upgraded itself as a customs union in July 2015. It also makes the tariff for 85 percent of the product lines to Zero and implemented common customs valuation mechanism to enforce it. When it comes into force ten out of the sixteen member's states endorsed and implemented the agreement. whereas the rest have been given the freedom to implement the agreement whenever they want and becomes ready for the agreement.²⁸⁶

In addition, all RTA have protocols in free movement of people, factor market integration, protocol in minimizing non-tariff barriers, trade facilitation, and common infrastructure projects. In all this initiative the variability of signing and implementing is deeper than the situation in FTA and customs union. In, ECCAS, for example, some of the members allowed free movement of peoples, some have simplified the process while others like Gabon and Equatorial Guinea have strict visa process.²⁸⁷ This uneven commitment inside RTA, on one hand, is the reflection of treaty adoption and implementation which is flexible for any country to sign and not sign which is developed from the AU long term practice. On the other hand, it shows the existence of different challenges for different countries to harmonize and come to the same terms.

3.6. Implication for AfCFTA

²⁸³ Economic Commission for Africa (n 205) at 37.

²⁸⁴ Ron Sandrey 'An analysis of the SADC free trade area' 2013 Tralac working paper at 1. Available at <http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf> (accessed on 6 July 2019).

²⁸⁵ Helen Suzman Foundation 'The African Continental Free trade Area III. Is Africa ready?' (June 10, 2018). available at <https://hsf.org.za/publications/hsf-briefs/the-african-continental-free-trade-area-iii-2013-is-africa-ready> (accessed on 7 July 2019)

²⁸⁶ Economic Commission for Africa (n 205) at 37-38

²⁸⁷ Economic Commission for Africa (n 205) at 41.

Africa contributed 8 percent to total world exports in 1948, this decreased to 6 percent in 1980 and 2.3 percent in 2000, before improving somewhat to 3.3 percent in 2010. It further decreases to 3.1 percent in 2017.²⁸⁸ Compared to the developing economies in general which have witnessed a growing trend over time contributed 29.5 percent to global exports in 1980, increased to 42 percent in 2010, shows continuous marginalization of Africa opposite to the other parts of the world.²⁸⁹

On the integration side, instruments which are deemed to facilitate trade in Africa, like the RTAs, increased from few to tens in the 1980s, and more than seventeen by 2015. This opposite movement between the number of RTAs and trade growth in Africa results concern on the ways of the continent's integration. Many scholars analysed many of the challenges like, multiple and overlapping memberships, lack of complementary products, lack of capacity to implement integration initiatives and infrastructural challenges. These problems have still existed and some of the challenges are complicating with time. With the existence of these problems, the continent launched AfCFTA.²⁹⁰ When coming in to force, rather than solving the problems which are hindrances to the integration, AfCFTA puts a higher emphasis on the liberalization of trade in goods and services and minimizing non-tariff barriers to trade in the continental level which failed to materialize in the regional level.²⁹¹

Given this fact in mind and when we follow the above history of integration in Africa, AfCFTA will end up with becoming the fourth layer of integration with little effect on the growth of trade. Iqbal, the former Chairman of the BRICS business council, in his speech about AfCFTA said, AfCFTA will take many years to translate this new policy into effective continental trade. According to him the most important thing now is that we have reached an agreement between the majority of African countries to achieve this'.²⁹² It will be true that the path to free trade in Africa is not going to be simple given the situation of large difference among member states. But

²⁸⁸ https://www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf

²⁸⁹ UNCTAD 'Africa's share in global trade' (July 2011). Available at <http://unctadstat.unctad.org/> (accessed on 25 June 2019)

²⁹⁰ Mesut Saygili Ralf & Peters Christian Knebel 'African Continental Free Trade Area: Challenges and Opportunities of Tariff Reductions' 2018, UNCTAD Division on International Trade in Goods and Services, and Commodities at 1.

²⁹¹ Preamble of the treaty establishing the AfCFTA

²⁹² IOL 'Continent's free trade deal a game-changer for Africa' 3 July 2018. available at <https://www.iol.co.za/capetimes/news/continents-free-trade-deal-a-game-changer-for-africa-15795779> (accessed on 07 July 2019)

the way the organizations are unfolding in Africa is creating a lot of organizations and complications in the integration process and AfCFTA might not be different.

Short-run losses are inevitable in some sectors and the distribution of benefits will not be uniform across the African continent.²⁹³ Taking this fact in mind, AfCFTA allowed flexibility and variable geometry for states to accommodate challenges is right in its sense.²⁹⁴ But when we follow the trend, AU jumped to AfCFTA like it did in the 80s when it decided to create RTA in every part of the continent and it decided to create TFTA to harmonize trade among RTAs.

In AfCFTA, a misleading impression has been also created. Which is, the message different media's are transmitting that signatory countries will soon enjoy the benefits of improved trade growth if they sign AfCFTA. Specifically, international organizations and the media were repeatedly citing the estimate that AfCFTA will lead to a 52.3% increase in intra-African trade by 2022 is now widely taken as a given. The African Union quotes this figure as if it was a fact, while the UNECA and UNCTAD suggest such an eventuality is "likely".²⁹⁵ These statistics have been repeated frequently by dozens of news outlets. This assumption has been based on 2010 baseline and full liberalization of trade by 2017 and full customs union by 2019 in which none of them have happened.²⁹⁶ Instead, 90% of goods will be liberalized over the course of 5-8 years; 7% of goods will be classed as sensitive and liberalized over 10-13 years, and 3% of goods will be exempt from free trade entirely. Therefore, it is not clear on where AfCFTA will begin to result in an impact in the trade of the continent given the challenge of the previous integration initiatives of the continent continued to exist in AfCFTA.²⁹⁷ Giving such facts or information for countries might make them sign the agreement but when we come to implementation, the possibility it will become a source of frustration is very high.

The AfCFTA also appears to have ignored some of the historical reasons for the failure of past regional integration efforts on the continent. Adedeji had famously noted that it is politics rather

²⁹³ Helen Suzman Foundation 'The African Continental Free Trade Area III. Is Africa ready' available at <https://hsf.org.za/publications/hsf-briefs/the-african-continental-free-trade-area-iii-2013-is-africa-ready> (accessed on 7 July 2019)

²⁹⁴ Article 5 of treaty establishing AfCFTA

²⁹⁵ UNCTAD 'African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods' 2016 UNCTAD/WEB/DITC/2016/7 at 14.

²⁹⁶ Simon Mevel & Stephen Karingi 'Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union' 4 October 2012 Selected paper for Presentation at the 7th African Economic Conference Kigali, Rwanda at 17.

²⁹⁷ Archie Matheson 'The AfCFTA is laudable, but its imminent benefits are overstated' African Argument, 26 June 2019 <https://africanarguments.org/2019/06/26/the-afcfta-is-laudable-but-its-imminent-benefits-are-overstated/>

than economics that will ultimately determine the success of regional integration efforts in Africa. ²⁹⁸This political decision should include doing something about RTA which are becoming challenges of integration rather than adding value for the continent, which is not happening in the continent. In the long-term, AfCFTA is still likely to have a markedly positive impact on the intra-African trade of goods and services. It is also recognition that in the next few years, and perhaps further into the 2020s, its impact will likely not be as pronounced as suggested by some of its proponents. It is vital that expectations of governments and businesses are managed, and that signatories have the patience to deliver a project over what will be a long-time period. ²⁹⁹

3.7. Conclusion

In Africa, overlapping membership is the outcome of continuous fresh initiatives to integration which become a culture in the integration of the continent. Rather than capitalizing on the existing RTAs, countries always come up with fresh organization with its own secretariat, while protecting the existing regional trade organization in the region. This situation created a variable geometry of African integration in the forms of layers. Up to AfCFTA, African integration has four layers.

What differentiated these layers is the time they come into existence, their size and their existence inside the coverage of another RTA. Based on this, the first layer includes sub-RTA of SACU, EAC, MRU, UMOA, IOC, ECPGL which comes into existence before 1982, containing mostly countries with the same colonial history and language. They are better in the progress of integration compared to the other and they are found inside big RTA. Then, the second layer includes big RTA of ECOWAS, COMESA, SADC, IGAD, UMA and ECASS. Most of them come with the direction of LAP to have representative RTA in every region of the continent. These RTA created the first overlapping of membership and they are complicating integration of the continent because of their limitless expansion throughout the continent. The third layer includes the subcontinental agreement of TFTA (which comes into existence to harmonize the existing RTA of COMESA, EAC and SADC) and CEN-SAD (comes into existence with few countries and expanded to 26 countries with short time). What is ironic is that these

²⁹⁸Adeyeye Adebajo 'New African Free Trade Accord Oblivious To Past Failures' *Business Day (South Africa)* 25 March 2019 available at <https://ipatc.joburg/new-african-free-trade-accord-oblivious-to-past-failures/>

²⁹⁹ Archie Matheson (n 297)

organizations which come in to force to harmonize RTAs becomes another complication and they are adding another multiple membership even among themselves.

Following the above trend, AfCFTA comes in to force as a new organization and a fourth layer. When we follow this trend the probability AfCFTA will end up as the fourth layer of integration without contributing significantly like the others is very high. This is because rather than using the existing RTAs as a building block it came a fresh initiative like the previous one. AfCFTA is beginning from scratch like the second- and third-layer initiatives. Harmonizing the existing RTAs might be difficult but the trend shows that harmonization is the most important thing in the integration of the continent.

In the other dimension which is the variable geometry within the existing RTAs which gives flexibility for countries to progress in different speed is being widely implemented in many RTA. This aspect of variable geometry is making countries to arbitrarily choose an agreement to implement and not to implement. This has happened in treaties which were proposed to implement tariff concession, free movement of peoples and others.

In the case of AfCFTA, it accepts variable geometry as the main principle because the needs for flexibility is very high. Because of a large number of member countries, a wide difference among countries in their economy and income, and diverse level of industrial development make the need to implement variable geometry. But the problem of African experience is that it is random in which any country can decline to implement free trade agreements and customs unions without resulting any consequence and sanctions.

Chapter Four

Variable geometry of EU and lessons for the integration of Africa

4.1. Introduction

Comparing the integration of the European Union (EU) with Africa's experience focuses on how linear approaches of EU integration influence the African experience. Especially after the Organization of the African Union (OAU) changed its name into the African Union (AU) by following the EU example, many criticisms on the suitability of linear approach of integration for Africa has been aired.³⁰⁰ Many scholars believe that the European way of integration is not a good example for Africa. In any case, the EU is one of the successful integration experiences in the world. In addition, the goal of AU is similar to that of the EU in many aspects. So, taking lessons from it is still a way to understand the reasons for the failure of the integration experiment in Africa.³⁰¹

This chapter is one of those types of comparison. However, the comparison is totally different from comparing the linear approach of integration or criticism. In this chapter, the comparison is not on the principles of the integration, rather it focuses on the comparison of organizational structure in which the integration experience resulted and analyzing the journey by standing on the endpoint of the journey which is the organization that integration experience created. To give the general overview of the organizational structure of integration, variable geometry, a principle which is famous in the integration experience of the EU, but little known in the integration

³⁰⁰ Trudi Hartzenberg 'Regional integration in Africa' 2011 Trade Law center for South Africa (Tralac) at 1-24.

³⁰¹ Article 3 of the constitutive act of the AU points out objectives from A-N.

- 3 (A) says the objective of the AU is to Achieve greater unity and solidarity between the African countries and the propels of Africa. And Article
- 3(C) accelerate the political and socio-economic integration of the continent, Article
- 3 (j) promote sustainable development at the economic, social and cultural level as well as the integration of African economies,
- 3 (K) promote co-operation in all field of human activity to raise the living standard of African peoples.

Article 3 of the consolidated text of the EU treaties as Amended by the treaty of Lisbon points out the objective of EU as;

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

4. The Union shall establish an economic and monetary union.

experience of African has been used. Variable geometry is a term coined in the European integration to explain the differentiated and different speed integration experience of the EU.³⁰² In Africa too flexible and differentiated integration is the main character of integration even if the usage of the term is not widely found in academics and treaty documents³⁰³ After depicting the organizational structure resulted from differentiated integration (Variable Geometry) the chapter points out the implication of those structures on the progress of integration and how differentiation becomes a challenge for African integration and a success factor for EU integration.

Variable geometry has been used because it enables to create the general picture of the integration experience and its resulting organizational structure in both continents. It begins with how the organizational structure of the two continents integration comes into existence by using variable geometry. Variable geometry has been used to depict all differentiations and flexible ways of integration in both continents and try to get a lesson from the EU integration success for Africa's endeavour to create a successful integration through AfCFTA.

4.2. The variable geometry of Europe and Africa Integration

The parallel expansion of the EU in terms of geographical coverage and the deepening of integration by adding different aspects of integration provoked increasingly the unwillingness and the inability of member states to move to integration in the same speed. As a response, flexibility replaces the trend of homogeneity. Flexibility has been implemented in the way that decisions and policies do not apply to all member states or the application doesn't happen at the same time.³⁰⁴ This flexibility has been the topic of many debates and got many names from different scholars and treaty documents the EU signed.³⁰⁵ The terms commonly used by scholars mainly expressed flexibility, but they have slight differences. The first of this name used was 'Core, Nucleus, Vanguard or Pioneers group.'³⁰⁶ The core is a common reference for six founding members of European Steel and Coal Community, which accepts all initiatives of the EU and serve as a gravitational force for the other countries. This also has geographical

³⁰² Usher, J. 'Variable Geometry or Concentric Circles Patterns for the European Union' 1997 (46)2 International and Comparative Law Quarterly at 244

³⁰³ James T. Gathii (n 12) at 36-42

³⁰⁴ Carlos Closa (n 201) at 6.

³⁰⁵ http://europa.eu/legislation_summaries/glossary/variable_geometry_europe_en.htm

³⁰⁶ Jacques Delors 'Europe needs an avant garde, but not a Constitution' October/November CER Bulletin No. 14 available at <http://www.cer.org.uk/publications/archive/bulletin-article/2000/europe-needs-avant-garde> (accessed on 28 September 2019)

characteristics of countries found in the centre of Europe and are the fixed and constant structure of the EU who are willing and committed for further integration. These countries are also called Pioneers of EU integration because of their commitment to closer integration.³⁰⁷

The concentric circle is the other mainly used name for differentiated integration, which is becoming the main term to depict the EU integration among itself and the other countries around Europe. The main idea here is a hierarchical system with a single power centre in the European Commission level, whose influence progressively decreases the more the system moves from the core to the periphery, in a concentric-circle sort of arrangements.³⁰⁸

À la carte Europe is also the other non-uniform method of integration which gives flexibility for member countries of the EU. À la carte, gives a minimum number of common objectives for countries to adopt from the total initiative by the European Commission. When countries fulfil the minimum number, they have given the flexibility to select policies they will involve themselves and policies they can opt-out from. In addition, they have been given the right to determine on implementation aspects of these specific treaties.³⁰⁹

Different speed Europe and variable geometry is the other common name used to depict the flexible and differentiated approaches of EU integration. Different speed or multi-speed is a depiction of the fact that some members states advance to integration faster than the others depending on their capacity and willingness to do so. In here, every one of the members agreed on the importance of implementing some agreement to further the integration agenda but differ on the speed countries should fulfil that specific agreement. Based on multi-speed Europe, countries have been able to choose their pace towards implementing the agreement.³¹⁰ Variable geometry is the same with multi-speed Europe except for the addition of the permanent disagreement between a group of member states on the importance of some provisions. In addition, to different speed integration, variable geometry accommodates a situation in which some member countries have been able to withdraw themselves permanently from specific

³⁰⁷ Jacques Delors (n 306).

³⁰⁸ Zielonka, Jan, 'How New Enlarged Borders will Reshape the European Union' 2001 (39) 3 Journal of Common Market Studies, at 507-536.

³⁰⁹ Carlos Closa (n 201) at 11.

³¹⁰ Foreign Minister of the Federal Republic of Germany 'From Confederacy to Federation – Thoughts on the finality of European integration' Speech at the Humboldt University in Berlin on 12 May 2000. Available at <http://federalunion.org.uk/joschka-fischer-from-confederacy-to-federation-thoughts-on-the-finality-of-european-integration/> (accessed on 28 September 2019)

agreements like United Kingdom from the European Monetary Union (EMU).³¹¹ This means variable geometry is the highest level of flexibility.

These terms used to depict flexibility in the EU integration is not a onetime outcome rather they have been developed with long time and different situations. Professor Carla Cattanio and Dario Velo clearly articulated the developments of these concepts on their research “Variable geometry of Europe: an interpretation of the European integration development”.³¹² Based on them the naming is a present phenomenon but variable geometry or multi-speed Europe dates back to the ending of the Second World War. The integration of Europe begins in 1949 when the council of Europe was established in London to facilitate the integration and development of the continent. The Council has been established with ten countries and expanded to fourteen by including many of European countries which were the main actors of the Second World War. To take the integration to further six members states of the European Council established the European Coal and Steel Community (ECSC) by using the council’s platform, which becomes the first stage of integration for the continent. When the ECSC comes to existence, it has contained rights and obligations of member states and other regulation which becomes the founding principle of the European Economic Community (EEC).

When the ECSE comes into existence, its main goal has been to control the instruments of war by making common management of Coal and Steel industries which have been the main tools to produce war equipment. Since the beginning, France and Germany became the champion of the initiative and endorsed by many countries. However, the then time superpower of Europe, Great Britain opposes the initiative and proposed a simple Free- exchange Zone rather than a complex continental integration. This resulted the beginning of disagreement and friction between them which resulted multi-speed Europe or variable geometry because Great Britain and some others refused to become a member. When the integration further developed into EEC in 1959, Great Britain again disagreed to join the economic agreement. Parallel to the EEC, Great Britain created the European Free trade area (EFTA) in 1960 with six other countries. This created a concentric circle construction, EEC surrounded by EFTA in which the EEC rule is the governing rule and EFTA members gradually become members of EEC. In addition to the difference with Great Britain, it becomes difficult among member countries and new entrants to move in the

³¹¹ Carlos Closa (n 201) at 11.

³¹² Cattaneo Carla and Velo Dario (n 39) at 1-5

same speed to adopt new policies and regulations. This resulted variable geometry within the EEC members itself.

In those times there wasn't a term used to express these differentiated arrangements until the 1965 Treaty of Brussels when the EEC adopted a Europe à la carte. À la carte is an arrangement which makes countries free to join or not to join any initiative beyond the original treaty. After ten years in 1975 the idea of two speeds Europe was launched which was designed to allow countries to progress fast when some countries hold back to progress at the same speed. In 1980 the term further developed to variable geometry which allows countries to permanently ignore some integration aspects in addition to different speed which allows Great Britain to become permanently out of the monetary union and Schengen area arrangement.³¹³

The applicability of this derogation, flexibility and geometry got constitutional acceptance by the Treaty of Maastricht allowing some Member States not to participate at all, or in limited ways, in crucial areas of Community law such as the Economic and Monetary Union (EMU). The Treaty of Maastricht got acceptance mainly because of the differentiation arrangement it allowed for member states. The Maastricht Treaty thus established the legal model for the way in which variable geometry becomes applicable and the role of the commission when states invoke variable geometry in some arrangements. The structural differentiation exists between the Member States both at the time of lawmaking and at the time of its application and the institutional machinery of the Union is made available to a selected group of Member States.³¹⁴

This resulted in integration with differentiated speed among countries in which the depth of integration decreases when moving from the core to the periphery. A dynamic of integration which makes the EU increasingly resemble a multilayer onion. This European Onion is the ultimate depiction of governance in European segmented integration.³¹⁵ The integration with the differentiated approach which created a layered type of structure is the outcome of a deliberate outcome which has been included in the treaty in one hand after Treaty of Amsterdam and an informal development because of difficult realities as a result of enlargement of the community and difficulty to agree on the scope of integration.

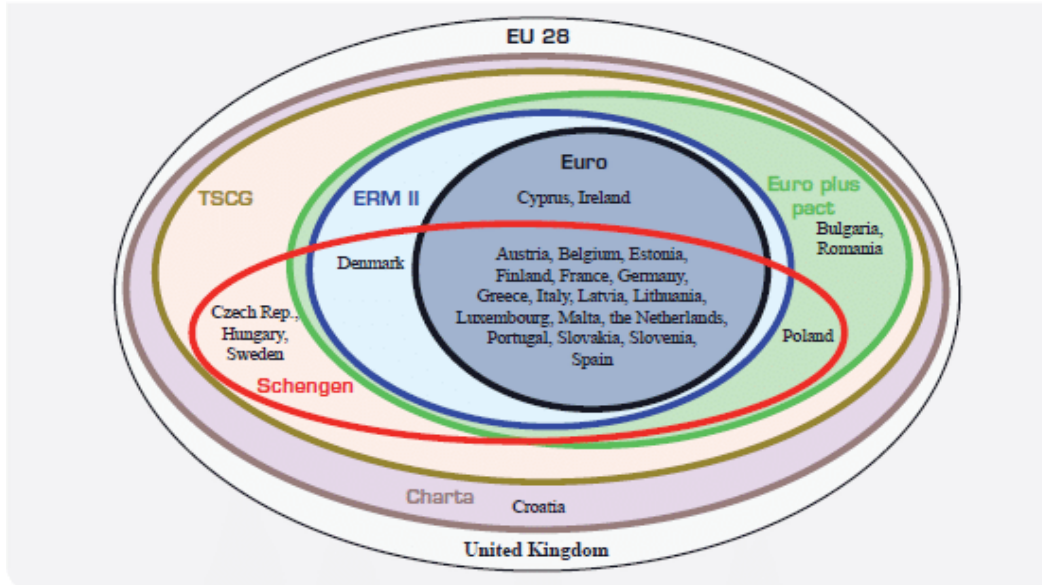
³¹³ Cattaneo Carla and Velo Dario (n 39) at 1-5.

³¹⁴ Bruno De Witte (n 48) at 153-157

³¹⁵ Jan-Emmanuel De Neve 'The European Onion? How differentiated integration is reshaping EU' 2007 (29)4 John F. Kennedy School of Government, Harvard University, Cambridge, USA at 503-505.

The outcome of this deliberate and informal development of differentiation and flexibility created an organization which looks like the following figure.

Map: 4.1.



Source: Begg (2015) adapted from Tekin (2012)

On the other hand, the flexible integration in Africa has not got any name as the EU even if differentiated integration and flexibility is a norm since the inception of the OAU and in the level of regional trade agreements. After independent of many countries in 1960, the idea of Pan-Africanism takes hold in the continent and many began advocating for united Africa. The plan was to organize a continental body which can strengthen the continent in a way that colonization will never happen again, help other countries to get their independence as soon as possible and strengthen the social, economic and political environment of the continent.³¹⁶ Among countries, there was consensus on the importance of the continental body which enables countries to cooperate to solve the problem of the continent. This consensus of solving the problem of the continent through cooperation resulted a series of events from 1958 up to 1963 which ends up with the establishment of the OAU in 1963.³¹⁷

In May 1958, the independent states of Africa met at Accra to find a way to achieve both greater unity and the liberalization of the whole continent. The conference was attended by leaders of

³¹⁶ Timothy Murithi (n 69) at 3-6.

³¹⁶ Colin Legum (n 70) at 270.

³¹⁷ Gianluigi Rossi 'The OAU: Results of a decade' 1973 (4) 4 International Journal of Politics at 15.

eight independent African countries which included Ghana, Libya, Liberia, Morocco, Sudan, Egypt, Ethiopia and Tunisia. This meeting was the first experiment of cooperation among independent states of Africa towards greater unity. The conference adopted several political resolutions like ending of colonization in the whole continent and coordination of policies of independent countries towards the future of the continent. They have also agreed to hold a conference of foreign ministers and other representatives of African states to discuss common problems.³¹⁸ As a first step, the attainment of the broad objective of an African commonwealth the independent states agreed on the amalgamation of themselves into a group on the basis of geographic proximity, economic interdependence and cultural affinity. Informally it was divided to use five regions of the continent as a first tier for full continental unity.³¹⁹

The second important meeting which leads to the unity of the continent was held in Addis Ababa in 1960. But prior to the meeting in Addis two significantly different groups took shape on the route the continent should follow to create the African unity. The first group which have been called the Casablanca group and it has been led by Nkrumah. This group advocated for the formation of a supranational government and parliament while the second group supported by the majority of countries which belongs to the Monrovia group advocated for an organization that would not compromise the sovereignty of states which have already existed.³²⁰ The 1960 meeting in Addis Ababa was a conference attended by foreign ministers of eleven African countries and delegates of several dependent territories. The eleven countries were Ethiopia, Cameroon, Ghana, Guinea, Libya, Morocco, Liberia, Tunisia, Sudan, Tunisia, Togoland, Congo, Nigeria, Somalia and Algeria. In the conference, Ghana proposed the establishment of African Organizations including a community of independent Africa states, a council of economic cooperation, a scientific and cultural council and a customs union. On the other hand, representatives of Nigeria and some others disagreed by saying it is a premature stage to jump into such a big initiative in a top-down approach. Despite these disagreements, they agreed on the issue of helping countries struggle for independence in any means. They have also suggested the establishment of a council of African economic cooperation to organize a joint African commercial bank and advise other cooperative means. The resolution on political unity of the continent expressed the view that cooperation among states was essential for the maintenance of

³¹⁸ <https://encyclopedia2.thefreedictionary.com/Conferences+of+Independent+African+States>

³¹⁹ Clyde Sanger 'Toward Unity in Africa' 1964 (42) 2 Foreign Affairs, at 271.

³²⁰ Gianluigi Rossi (n 317) at 16.

their independence but differed on the issue of any specific plan for unity.³²¹ To make their action concrete they had experimented with Organization for Coordination in Economic Matter and the Union Africaine et malgache {UAM} which was the cooperation of jet airliner of Air Afrique fleet was able to display the commitment of member countries of fourteen states.³²²

After the Addis Ababa meeting in 1960, both groups tried to progress on their agenda. The Casablanca group attempted a political union of Ghana, Guinea and Mali union announced in December 1960. However, it failed to progress because of many reasons. In addition to the failure, the Casablanca group of seven states had further drifted apart after their meeting in 1961 because of the following reasons. First Morocco lost its battle against Mauritania when it gained acceptance as a member of the UN. Second, avowed hostility to Israel as an instrument of imperialism and neo-colonialism by Casablanca member states had not inhibited Ghana from close economic tie which disappointed other Casablanca member countries. Third, the agreement to foster unity in political, economic and cultural and joint high command failed to show significant progress except setting up of a defence headquarter in Ghana. On the other side, the Monrovia group had been more successful because of their pragmatic approach for the unity of Africa. In their meeting of May 1961, they got another seven adherents including Nigeria. They approved the Lagos charter in 1962. In the charter, they planned an organization very much the same as the organization of American States.³²³

In 1963 these two groups of countries (the Casablanca and Monrovia) and the newly emerging group which included French West Africa countries (the Brazzaville) meet in Addis Ababa to decide the fates of the continent. With a great compromise of the idea of radicals like Nkrumah and the Casablanca, the OAU came to existence in the way that doesn't have any interference in the sovereignty of member states in any means. The Monrovia group portrays the OAU in the way it suits their conservative ideology and the radicals agreed to join the group with the hope that they will influence it with time and create a united continent with different steps.³²⁴ This deep division in the inception stage and continued conflict in the continent which resulted in hostility among different countries increased the divergence of views in different issues presented by the OAU. Adding noninterference in the internal affairs of sovereign countries, the

³²¹ Carol A. Johnson 'Political and regional groupings in Africa' 1962 (16) 6 *Journal of International Organization* at 426-429.

³²² Clyde Sanger 'Toward Unity in Africa' 1964 (42) 2 *Foreign Affairs*, at 270.

³²³ Clyde Sanger (n 322) at 271- 272.

³²⁴ Zdenek Cervenka (n 85) at IX- X

OAU lost any compelling power to influence countries to move in the same direction towards unity. The conflicts, coup d'état and assassination of leaders, unfinished effort of decolonizing the continent especially in the southern part of the continent shadowed the idea of unity in the continent.³²⁵ These multifaceted challenges on the other side resulted in a lack of motive for countries to adopt new initiatives presented by the OAU. In the beginning, all member countries adopted and ratified the organizing charted of the OAU. But the fate of the preceding initiatives became totally flexible and random based on the interest of the countries.³²⁶ As we have seen in chapter two the number of treaties adopted ratified and implemented by countries for each country is totally based on their will and the continuous effort of the AU failed to increase the level of ratification of treaties and protocols by countries. This flexibility creates the EU type variable geometry in the integration of Africa but in Africa, the flexibility is random and hard to depict it in the form of a diagram. Flexibility and variability of the AU don't result in the EU type of enhanced integration like an onion with deep integration in the centre and shallow when we move to the peripheries. The variability and flexibility are random without a central core which has a pulling effect like the Core of Europe have for enhancing integration initiative.

In 1980, the OAU added another decision in the integration of the continent which added another actor in the integration of the continent. By acknowledging the lack of progress in the continental level, OAU decided to use regional Approach. The LPA puts it thus:

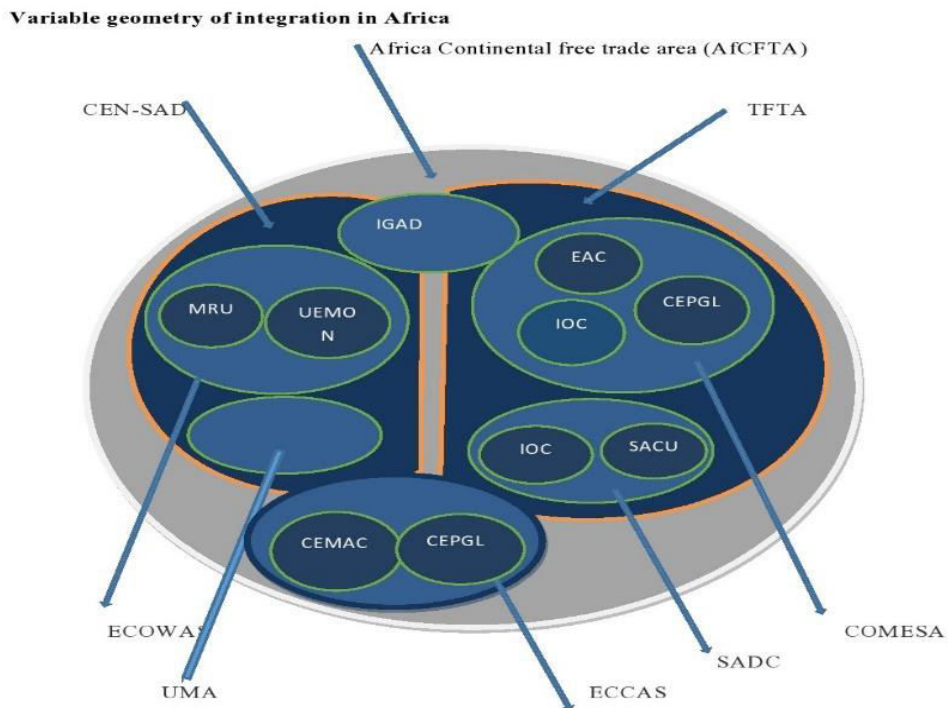
“...unfulfilled promises of global development strategies have been more sharply felt in Africa than in the other continents of the world. Indeed, rather than result in an improvement in the economic situation of the continent, successive strategies have made it stagnate and become more susceptible than other regions to the economic and social crises suffered by the industrialized countries. Thus, Africa is unable to point to any significant growth rate, or satisfactory index of general well-being, in the past 20 years. Faced with this situation and determined to undertake measures for the basic restructuring of the economic base of our continent, we resolved to adopt a far-reaching regional approach based primarily on collective self-reliance.”³²⁷

³²⁵ Gianluigi Rossi (n 317) at 15-23

³²⁷ Preamble of Logos Action Plan for the economic development of Africa 1980-2000

As explained in chapter three, the decision of the Lagos Plan of Action and the Treaty Establishing the African Economic Community resulted in a proliferation of RTA in different parts of the continent. The proliferation of RTA always follows a pattern of a continuous new initiative with new organization and plan of action rather than using the existing small sub-RTA as a base and capitalize from them because of different challenges. Sometimes, some sub-regional agreements were nothing than a name to capitalize on them. This includes sub-regional groups like ECPGL. Others existed with the influence of western countries like French which pushes away other countries from joining then and expanding them to achieve integration objectives. Some sub-RTA like EAC were in the stage of destruction because of disagreement. This resulted in more than one RTA in each region of the continent with little harmonization among themselves. This unique type of integration experiment resulted in four layers of integration in the continent with many countries being a member of three and more RTAs. But the layers are different from the type of EU union layer in the same core. The layers of African integration have many cores and expand from these cores to the continental level of integration. Like as it explained in the chapter the outcome of the integration looks like the following diagram.

Image:2



4.3. Management of variable geometry in EU and AU

The flexibility models of integration in the EU have been developed mainly in two different ways. The first is the outcome of a random undertaking which happened before the treaty of Brussels in 1965. In those situations, the ECSC and the EEC progressed in the way it excludes countries who disagreed to sign agreements like the UK and other members of the EFTA. The second way was a deliberate action by including flexibility in treaties. In the treaty of Brussels, the EEC included À la carte Europe which is a non-uniform method of integration which allowed member States to select policies from a menu and involve themselves fully in those policies. But there was still be a minimum number of common objectives.³²⁸

The differentiated integration which has happened in the early stages of the EU integration most of them happened outside of the treaty is what we have covered in the topic when we tried to trace the source of variable geometry. The other which is the deliberate development of differentiated integration after the treaty of Brussels is what is covered extensively in the next few pages. The differentiated integration developed after the treaty of Brussels is a deliberate way of applying differentiated integration which has happened within the EU treaties or outside of them which have linkage with the EU treaties.³²⁹ The following differentiated integration mechanisms in the EU are what professor Carlos Closa extensively included in his research about ‘flexibility mechanism in Lisbon treaty.’³³⁰ He divided differentiated integration in the EU into two as differentiation included within a treaty of EU and differentiation agreements which are not explicitly included in the EU treaty but related with it in some way.

4.3.1. Differentiated integration within the EU treaty,

In different treaties of the EU, there are provisions which allow countries to adopt differentiated integration by giving the freedom not to adopt specific protocols or some provisions from the protocol. According to Carlos they have the following forms:

- **Optout from specific agreements:** This sometimes-called treaty derogation and it is the highest level of differentiated integration. Optout from an agreement allows member states to be out of primary legislation (Treaties) which are usually formalized in

³²⁸ Carlos Closa (n 201) at 12.

³²⁹ Carlos Closa (n 201) at 13.

³³⁰ Carlos Closa (n 201) at 1-37

protocols. In the EU this happened in many protocols and its applicability is growing with the geographic expansion of the EU.

The Protocol and Agreement on Social policy (1991): This was the treaty of Maastricht part of the agreement which extended the competence of the European Community (EC) in the field of employment and social right. In this agreement, the UK disagreed to bound by the initiative and UK got derogation of the whole protocol while the rest signed the agreement, which makes UK out of the total agreement on the social policy of EC.

Making Euro a national currency: This was one of the biggest of EUs progress which created common currency (EURO) for European countries. In this agreement, three countries including the UK, Denmark and Sweden became reluctant to accept the agreement. To accommodate this, the EU gave an opt-out for the UK and Sweden from accepting Euro as their national currency, while it allowed derogation of some provisions of the treaty establishing the European Monetary Union for Denmark based on request. This helped the EU to progress in adopting the common currency by interested member countries.

Schengen Area Agreement opt-out: Schengen was an agreement for the establishment of common external border control and common visa requirements between member states of the EU. In this agreement, opt-out has been given for UK, Ireland and Denmark. The Treaty Establishing the Schengen area have given Denmark six months to decide on the opt-out or opt-in while it gave an immediate opt-out for the UK and Ireland because they insisted on it. It also included a way for the UK and Ireland to be able to apply to become a member at any time in the future. In the Lisbon agreement, however, the EU made the Schengen area agreement compulsory for any country who wants to become a member of the EU and there is no more Schengen area opt-out in the EU treaty.

In addition, opt-out has been applied in agreement for Judicial Cooperation when the UK, Denmark, and Ireland requested for it. On agreement on Defense at the treaty of Amsterdam Denmark obtained a right to derogate agreements related to defence. Poland and the UK also have got partial derogation from the Charter of Fundamental Rights.³³¹

As of protocol 30 of EU Treaty, the Charter does not extend the ability of the Court of

³³¹ Protocol (no 30) on the application of the charter of fundamental rights of the European Union to Poland and to the United Kingdom

Justice of the European Union, or any court or tribunal of Poland or the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

- **Policy participation conditioned to the fulfillment of specific criteria:** This form of differentiation is more related to two-speed integration rather than permanent derogation by opt-out from treaties and protocols. This is related with fulfilling some criteria countries should fulfil to become a member of the Monetary Union (i.e. inflation rate, public deficit, public debt and interest rate) and Schengen area application standard (i.e. air, land and sea) requirements. When countries fulfil these criteria, they become full members and they have given to achieve that based on the speed they want rather than specific mandatory time plan like special and differential treatment in WTO and other agreements.
- **Differentiated governance of the Euro and provisions specific to Euro members.** The right to opt-out gives some countries not to accept the Euro as their currency. This created a different level of governance for countries in the Euro and outside the Euro. For issues related to the single currency which involves the commission and European central bank the ministers of member state whose currency is the Euro meet informally. For issues related to the Euro only countries that use Euro have a voting right but works in collaboration with other committees of the EU commission like an economic and fiscal committee. Based on the Treaty of European Union countries whose currency is Euro will have specific provisions for the coordination of economic policy.³³² These provisions apply exclusively to member states of the Euro as their single currency. These provisions have four regulations which set different requirements in the macroeconomic policies of Euro and non-Euro countries.
- **Enhanced cooperation and Accelerator:** These are a clear notion of variable geometry. In a situation when the agreement contains some sensitive issues in which some or many countries are unable to agree on, countries in the agreement have the right to go with the agreement by leaving the others behind. In this situation agreement implemented in the

³³² (EU) No 1024/2013 'Council Regulation of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions'.

form of enhanced cooperation and it will be applicable only on participating countries. The other Member State could not oppose the establishment of enhanced cooperation as originally allowed by treaty. But the treaty of Lisbon sets a limit on the areas of application of enhanced cooperation, participants, conditions for initiating enhanced cooperation and procedures for enhanced cooperation. The European Commission also has a clear role and responsibility in managing enhanced cooperation. Accelerator, on the other hand, is a form of enhanced cooperation implemented when at least nine member states agree to form some forms of enhanced cooperation. This time they only need to inform the European Council. But still, there are restrictions on issues for using the accelerator. The agreement should be related to security, freedom and Justice.

In addition to the above issues, there are many differentiated integration mechanisms included in different treaties of EU which gives member countries the flexibility in the adoption and implementation of treaties. Constructive abstention gives a right to abstain from a vote on some foreign policy issues and not implementing it. Permanent structural cooperation enables countries to work closely in the matter of military without a binding commitment for the agreement. The Open Method Coordination (OMC) enables to bypass the EU legislation and develop common policies in areas of Employment, social policy, education and training. The EU-Plus Act enables voluntary basis cooperation in some areas with 6 non-euro countries (Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania) in issues specified by the EU.

4.3.2. Differentiated integrations outside of the Treaty

Like what is included in the treaties of the EU there are flexibility mechanisms which are not explicitly included in the treaty of EU but directly related to some treaties. Professor Carlos Closa in the same research “flexibility mechanisms of EU integration” covered flexibility mechanisms outside of the EU treaties.³³³ According to him differentiated integration outside of the treaty of EU is the outcome of situations in addition to lack of willingness to accept some treaties, some member states want to avoid the rigidity and demand of EU decision-making procedures by allowing the flexibility that is not included in the EU treaty. Differentiated integration with an agreement outside of the EU system by member countries individual

³³³ Carlos Closa (n 201) at 24-30.

initiative has helped countries to achieve some integration objectives. The following are some of the main differentiation integration outside the EU treaty:

- Schengen agreement (1985) This is an agreement between the French Republic, the Federal Republic of Germany and The Benelux Economic Union on the gradual abolition of checks at the common borders in 1985. The agreement first has been initiated by member countries outside of the EU and latter it has been included in the EU law in the treaty of Amsterdam in 1997.
- Prum Convention (2005) This was an agreement between seven member states of EU including Belgium, Germany, Spain, French, Luxembourg, Netherlands, and Austria on stepping up of cross border cooperation in matters of combating terrorism, illegal migration and cross border crime.³³⁴ This agreement enables members to cooperate in matters stated above outside of the EU arrangement. In 2008 a decision by the council incorporated some parts of the convention into the EU law.³³⁵
- Treaty on the European Stability Mechanism (TSCG) (2012) This is a treaty including members of Euro and other non-members negotiated and signed outside of the Treaty of EU. This created the Financial Compact which offers a complete menu of flexibility among formal instruments. In this agreement the UK opt-out, Hungary, Sweden and Poland only bound by Title V, Bulgaria wave Title III from the application, and it also created the Euro summit and a fund to be used to assist Euro member states parallel with other EU mechanisms.³³⁶
- Agreement on the Transfer and Mutualization of Contribution to the Single Resolution Fund (2014): The resolution fund has been created by EU legislation. However, after its creation, the provision of funds has happened via an external agreement and the resolution regulation applies to Euro states and others in a voluntary basis.³³⁷
- Agreement on a Unified Patent Court (UPC) (2013): It is an agreement which created a court of the first instance, arbitration and mediation centre by 25 states which are a

³³⁴ <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280263b7b>

³³⁵ <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8402>

³³⁶ http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf

³³⁷ Following article 7 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:287:0063:0089:EN:PDF>

member of EU and non-members. This arrangement was meant to enhance cooperation, but it has been done outside of the EU arrangement.³³⁸

In addition to flexibility which was divided into agreements included in the EU treaty and others outside the treaty of EU, there are some flexibilities categorized as flexible participation of third parties in the EU agreements. This includes:³³⁹

- Inclusion of Norway, Iceland and Switzerland in the Schengen agreement.
- The inclusion of Norway in the Prum Convention.
- Inclusion of Norway, Iceland and Lichtenstein in the Economic Community Area (EEA).
- European Neighborhood partnership, Customs agreement with Turkey and Bilateral relationships with Switzerland.

These arrangements created a concentric circle type of integration within the EU and with its neighbouring countries. Inside the EU too, this flexibility being applied in many mechanisms depending on the needs of the time were the main reasons for the progress of the integration effort. In many instances, many of the countries who have used opt-out and other flexibility mechanisms become members in the latter time. This makes variable geometry and differentiated integration a natural phenomenon given the difference of countries in their interest and willingness.³⁴⁰

When we come to the management of integration in Africa, differentiated integration, flexibility in adopting and implementation of treaties in the AU and RTA level is not only flexible, it is random. Since the inception stage of the OAU and its change to the AU, the goal is always the same, to create a united continent which can solve its economic social and political problems by uniting its people and resource.³⁴¹ The instruments created by the AU like the AEC has been created to help the continental body to achieve these goals in a structured and pragmatic way. The RTAs created by the direction of AEC are other arms of the integration of the continent in the lower segment, to come together from different regions as a united and create and merge at

³³⁸ <http://www.unified-patent-court.org/images/documents/upc-agreement.pdf>

³³⁹ Lavenex, Sandra (2015) 'The external face of differentiated integration: third country participation in EU sectoral bodies' 2010 (22)6 Journal of European Public Policy at 836-853.

³⁴⁰ Yves Bertoincini 'Differentiated integration and the EU: The variable geometry legitimacy' 2017 international institutional affairs at 2-4.

³⁴¹ Preamble of the OAU charter.

the continental level.³⁴² When the AU outsources the task of integration to regions, it should have had the power to direct and control all the activities and initiatives of integration in the continent. However, the reality is that in different level of integration, that is in the continental and regional level, the control and the authority the AU has been very loose.³⁴³

On the other hand, the flexibility of integration in Africa at the continental and RTA level is the outcome of noncompliance to agreements signed by countries. Noncompliance is the main behaviour in the continent, and it doesn't have any consequence and reputational risk for the country. In many RTAs, internal trade barriers have not been eliminated, free movement of factors remains a largely unrealized dream while poor infrastructure and other constraints continues even if countries signed different agreement to eliminate them. This makes intra-regional transactions costs among African countries to remain very high.³⁴⁴

The other effect of this loose power of the AU and noncompliance on the integration effort is the creation of a total flexible legal regime in many aspects of integration in Africa. According to Gathii, flexibility is built on by allowing RTAs functionally specific objectives and incorporating the principle of variable geometry in the way that doesn't result in any punishment for not fulfilling and treaty responsibility.³⁴⁵

But flexibility and differentiation are not the problems rather the way it has been handled is the issue. What strengthens this argument is the research of Gathii and T. Ademola Oyejide. Ademola Oyejide in his research on "Policies of regional integration in Africa" concludes that the principles of variable geometry and subsidiarity could be usefully applied in this more pragmatic modality for defining the functions and powers of the various layers of the new regional co-operation institutions. The principle of variable geometry permits integration to proceed based on progressive steps, allowing smaller sub-groups to move faster than the whole group while providing that many decisions be made by the majority rather than by consensus.³⁴⁶

Gathii in his book "African Regional Trade Agreements as Legal Regimes" argues that integration of the continent with the same speed and situation has proved difficult in Africa and

³⁴² Article 4-6 of the Abuja treaty establishing the African Economic Community.

³⁴³ The OAU/AU relationship with RTA created by Abuja treaty is been managed by the Protocol on Relationship Between the African Economic Community and Regional Economic community. In the protocol the role of AEC on RTA is limited in participation on meetings of RTA and other few powers in directing and Controlling RTAs.

³⁴⁴ T. Ademola Oyejide 'Policies for Regional Integration in Africa' 2000 (6) African Development bank Economic research paper at 10.

³⁴⁵ James T. Gathii (n 199) at 577.

³⁴⁶ T. Ademola Oyejide (n 336) at 3.

these have pushed the continent to flexible and variable geometry approach for integration. He listed three ways variable geometry has been implemented including:

1. Policy flexibility and autonomy to pursue at slower paces timetabled trade commitment and harmonization's objectives;
2. Mechanisms to minimize distributional losses by creating opportunities for compensation for losses arising from the implementation of regional wide liberalization commitments;
3. Preferences in industrial allocation among members in an RTA and preferences in the allocation of credit and investment from regional banks.³⁴⁷

The introduction of measures such as restriction in the amount of export from some members and the equitable allocation of industries which were planned to rebalance the inequities, undermined the primary purpose of integration under a market-based model of free competition among the most efficient producers. Notwithstanding the questionable efficacy of the efforts to equalize gains, the treaties establishing many RTAs in Africa provide ways of solving problems of unequal gains.³⁴⁸

The problem is that the flexibility, compensation as well as variable geometry haven't resulted in a market-based solution for the challenge of unequal advantage which hinders integration. These pushes us to say that the structure of the integration of Africa with the principle of variable geometry and differentiation follows inefficient approach concentrated on balancing short-term disadvantage of liberalization of trade which totally defeated the main goal of comparative advantage in trade.

On the other hand, it is difficult to use the EU type of variable geometry in Africa mainly because First, the existence of RTAs as the actors of integration makes the process complicated. In the EU the continental organ and countries are the only actors. In Africa, there are treaties and protocols initiated at the AU level and at the RTAs level. These treaties and protocols are supposed to have been complimentary. However, the reality is that many of them are repetitions and some conflicting. This reality in one hand calls for effective structuring of agreements by using variable geometry in which different RTA can go for continental integration on different speed and differentiated integration, on the other hand, it shows the complication of harmonizing rules between RTAs.

³⁴⁷ James T. Gathii (n 12) at 35.

³⁴⁸ James T. Gathii (n 199) at 615-619.

Second, the powers the AU has on the activity and decision of RTA is limited. The African Economic community, an organ of the AU is responsible for controlling the Activity of RTA. The power and responsibility of the AEC on RTA is been given by the “Protocol on Relationship between the African Economic Community and Reginal Trade Agreements.”³⁴⁹ The Protocol contains detail provisions on how the AEC coordinate the activities of the RTAs and allowed differentiated speed in the progress of different RTAs in the way it enables to achieve article six of the AEC.³⁵⁰ But on the ground rather than deepening integration by implementing free trade area, and customs union RTAs are busily expanding horizontally which creates additional complication on the integration process by creating a lot of layers. This shows how much AEC fails to properly implement the protocol to direct RTAs to progress towards deepening of integration rather than horizontal expansion.

Third, the integration in Africa lacks a centre or keen actors like the EU which serves as a magnate and a pointing star on the direction the integration should go. In the EU integration, the core countries are always keen to progress new initiatives and to progress ahead in the integration process by taking the challenges.³⁵¹ They clearly show the road to integration and the other follows the process. In the case of Africa, it is difficult to find countries who can become leaders after the failure of the Casablanca group and Nkrumah plan of a united continent.

The main lesson of differentiation of integration from EU is that, agreements like AfCFTA accepting variable geometry and differentiation as a principle of integration should have a detailed procedure on the application of flexibility and clearly show the power of the secretariat to allow and prohibit differentiated initiatives by countries. The other lesson is artificial mechanisms to solve the non-equal advantage of liberalization like compensation of tariff loses proved to be unsuccessful. If AfCFTA is to be successful it should develop market approach mechanisms to solve challenges imbalance gain from the liberalization of trade.

³⁴⁹ Article 3 of The Protocol on relationship between the African Economic Community and Reginal Trade Agreements

³⁵⁰ Article 4 (4) of The Protocol on relationship between the African Economic Community and Reginal Trade Agreements. Article 6 of the AEC is the detailed action plan of implementation of the AEC agreement.

³⁵¹ In EU core countries are Germany France and other founding member of ECSC which are also called Guardian of EU integration.

4.4. Conclusion

EU integration has been used as a role model for successful regional integration. For Africa too, the EU model has been used as the main role model. It includes changing the name and the structure of the continent's integration to the EU model. This chapter compared the differential integration experience of EU and AU/RTAs in Africa to get lessons for AfCFTA.

In the EU differentiated integration has been implemented since its inception because of the disagreement between countries on the issues of integration and speed of implementing them. This differentiation has been implemented informally before the Treaty of Brussels and deliberately by including into treaties after the Treaty of Brussels. This enables the EU integration to progress from the free trade area to Monetary Union. It enabled to progress by leaving countries who are not willing and able to progress to the integration with the same speed. The biggest success for it is that it happened in a structured and central managed way.

In Africa too, differentiation in integration is a norm since the inception stage of the OAU. The disagreement between the Casablanca and the Monrovia group resulted in an organization structure which does not have the power to influence countries to adopt treaties and implement it based on the initial plan. Different from the EU, the African variable geometry and differentiation is not the result of an unwillingness to adopt treaties or inability to progress in the same speed, rather it is mainly the outcome of lack of proper and timely implementation of treaties countries signed and ratified. In addition, the tools used to manage unequal advantage, like compensating a country who loss tariff income from liberalization defeated the principle of comparative advantage, which is why integration is important.

This differentiated integration in the EU resulted in a concentric circle type of integration with a core, which accepts all initiatives and a periphery with lesser progress in the integration. However, in Africa, it created a totally flexible regime in which countries have a veto power to accept and not to accept treaties and protocols which resulted into complex integration outcome in the regional and continental level. So, the lesson Africa should learn from its experience is that when implementing variable geometry and differentiation the mechanisms should be market-based tools which promote the utilization of comparative advantage of trade. The other lesson is that differentiation should be managed effectively and when countries and RTAs want to implement differentiation the higher organ should have the right to approve and deny the initiative depending on its importance for the continents long-term benefit.

Chapter Five

Applying Variable Geometry on AfCFTA

5.1. Introduction

In African, unity in all aspects of human endeavour and facing the challenges of underdevelopment together is always an agenda for meetings. Since the OAU charter, the one thing which always has a consensus by leaders is the importance of continental unity and cooperation. However, the experience shows unity is a tough issue for the continent. In the first two decades of OAU history, unity was used in a general term without having a clear road map to achieve it. With time, the OAU understood the lack of a roadmap to make unity and integration reality and agreed on Lagos Action Plan (LAP) to structure integration in real terms by creating African economic community (AEC).³⁵²

Article 6 of the treaty establishing AEC outsourced the responsibility of integration to the regional economic communities with little supervision from the central organ of OAU/AU. The AEC got the right to help and organize RTA by the agreement on The Relationship between the African Economic Community and Regional Trade Agreement signed with the AEC treaty.³⁵³ By using this protocol, the AU tried to direct the integration forward but the outcome shows that geographical expansion of RTA is more common than deepening of integration by solving barriers to trade. In many parts of the continent, integration through RTAs is struggling to walk the talk and achieve what was planned in article six of the treaty establishing AEC.³⁵⁴

Even if integration stuck to progress in many regional levels the AU jumped to create continental level integration through AfCFTA in the agreements adopted in 2012. The reason was that the AU believed that facilitating continental integration is a fundamental factor for sustainable economic development, employment generation and effective integration of Africa into the global economy.³⁵⁵ To make that real, the general assembly in 2012 directed for the finalization of tripartite free trade area between COMESA-EAC and SADC by 2014 and doing the same arrangement for other RTAs. The General assembly in 2012 then decided to create the

³⁵² Preamble of Lagos Action Plan for the economic development of Africa 1980-2000.

³⁵³ Article 3 of The Protocol on relationship between the African Economic Community and Regional Trade Agreements.

³⁵⁴ Economic Commission for Africa (ECA) (n 205) at 1-47

³⁵⁵ Assembly/AU/Dec.392(XVIII). Available at https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf (Accessed on 28 August 2019).

AfCFTA by 2017. The TFTA was supposed to become the initial point for the creation of AfCFTA.

However, the TFTA has failed to secure the minimum level of ratification and some other RTA also failed to achieve free trade area and Customs union among themselves. The challenges which hinder the progress of integration in RTA haven't been addressed. The Regional agreements such as ECOWAS, EAC, SADC and other arrangements shows us that apart from COMESA, none of the trade organizations had accounted for the growth of international trade in the region since their establishment.³⁵⁶ The inter Africa trade in 2016 was able to reach only 18 percent of the total trade which was around 62 billion. while other continents like Europe reached 69 percent and Asia 59 percent.³⁵⁷ Despite the slow progress, the AU launched the AfCFTA in March 2018 in Kigali. Since then, the agreement has been adopted by almost all countries in the continent except Eritrea and secured the minimum level of ratification to enter into force.³⁵⁸

There is consensus on the importance of AfCFTA in improving the inter African trade but sadly the realities on the ground show that there is no magic which makes AfCFTA successful while it is challenging to integrate at the Regional level. The main bottleneck of liberalization and growth of trade in Africa which is a fear of unequal benefit from liberalization (which is a reality), underdeveloped infrastructure, cumbersome border procedures, high cost of transaction, non-complementariness of products, corruption and other problems are still unresolved.³⁵⁹

In AfCFTA, the initiative acknowledges the challenges of implementing integration with the same speed and the challenge of unequal benefit from liberalization which makes AfCFTA to accept differentiated integration by making variable geometry as a central principle of implementing the AfCFTA.³⁶⁰ However, the agreement doesn't include a roadmap on how to apply variable geometry and differentiation and how it will complement with consensus. Then this chapter covers what is AfCFTA, its challenges, possible scenarios variable geometry will be

³⁵⁶ Daniel Idibia (n 35) at 43.

³⁵⁷ UNCTAD 'The African Continental free Trade Area: the day after the Kigali summit' May 2018 (67) A policy brief at 2.

³⁵⁸ The East African 'Nigeria's President Buhari fulfils promise, signs AfCFTA agreement' JULY 7 2019. AVAILABLE AT <https://www.theeastafrican.co.ke/business/Nigeria-President-Buhari-signs-AfCFTA-agreement/2560-5186604-13upwhpz/index.html> (accessed on 17 September 2019)

³⁵⁹ Linus Unah 'Can African Free trade Agreement transform the continent' 11 July 2019 TRTWORLD. Available at <https://www.trtworld.com/magazine/can-africa-s-free-trade-agreement-transform-the-continent-28176> (accessed on 17 September 2019).

³⁶⁰ Article 5 of the treaty establishing AfCFTA

applicable in AfCFTA based on experience of RTAs in Africa and its compatibility with consensus decision making.

5.2. African Continental Free Trade Area.

AfCFTA is a continental-wide integration initiative to create a free trade area, customs union as well as a common market in Africa. It is based on the Abuja treaty establishing the AEC and the plan of the AU to create the Africa we want in 2063.³⁶¹ The Chairperson of the AU calls AfCFTA as the fourth ambitious integration initiative of the continent in which he puts it equal with AEC, AU and NEPAD.³⁶² AfCFTA aims to eliminate tariff from 90 percent of goods, reduce non-tariff barriers of trade in the continent and create a predictable market for investment. Based on article 3 of the agreement, AfCFTA has the following main objectives.

1. Creating a single continent-wide market for goods and services, by accompanying it with free movement of businesspersons and investments.
2. Expanding inter-Africa trade across the RECs and the continent in general.
3. Enhance competitiveness and support economic reform and industrial development.
4. Resolve the challenge of multiple and overlapping memberships and expedite integration in the continent.³⁶³

To achieve these objectives, the Agreement has been structured to cover Trade in Goods, Trade in Service, Protocol on Investment, Intellectual Property Rights and Protocol on Competition Policy. The Protocol on Trade in goods and the Protocol on Trade in services have many annexes under them which supports the implementation. On the other hand, the negotiation of these protocols and Annexes of the agreement is divided into two phases. The first phase includes the Protocol on Trade in Goods, Trade in Services and Protocol on Dispute Settlement. While the second phase will include the Protocol on Investment, Competition Policy and Intellectual Property Rights.³⁶⁴ The general overview of the agreement looks like the following diagram

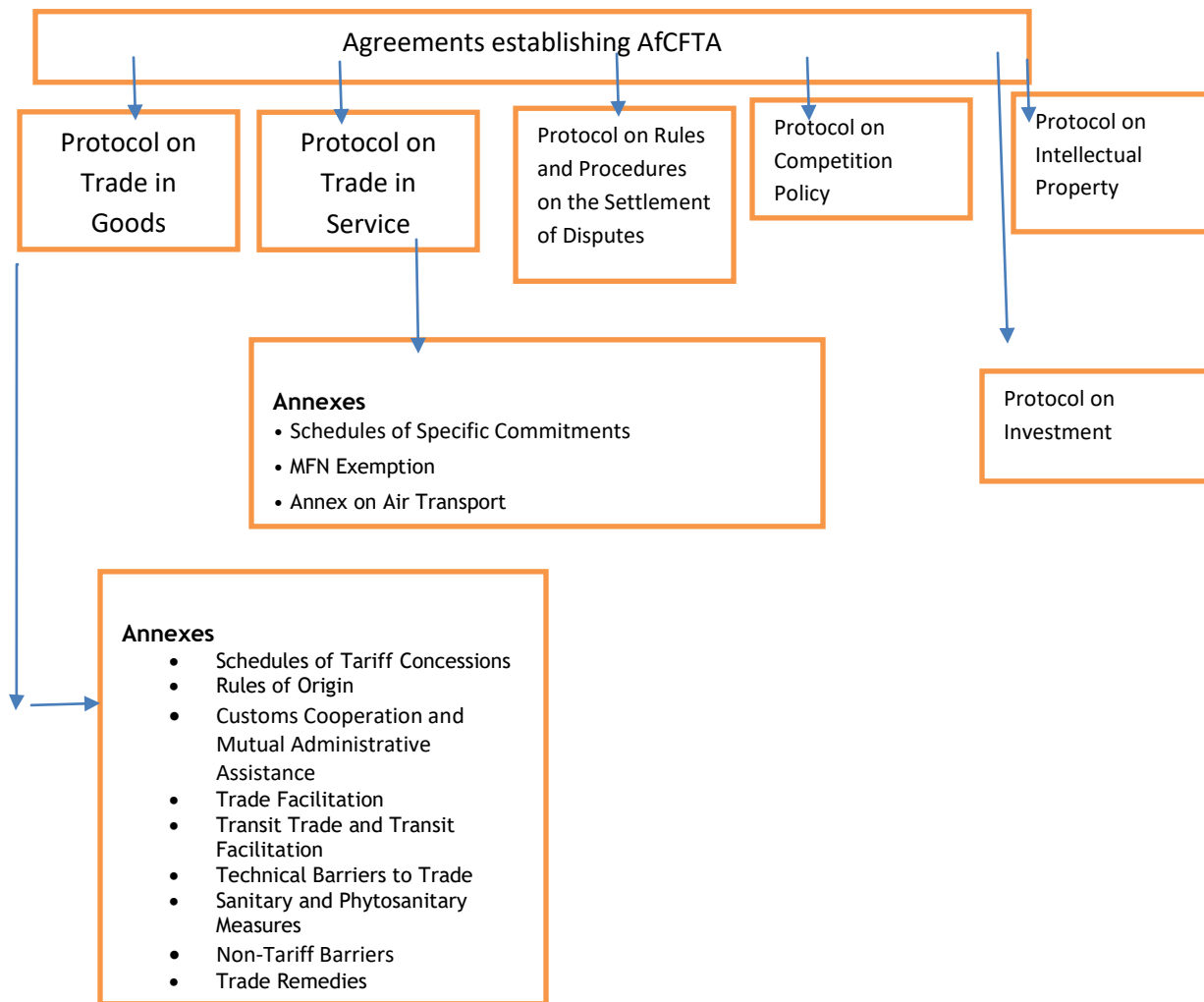
³⁶¹ Preambles of the agreement establishing AfCFTA.

³⁶² The 10th Extraordinary Session of the Assembly of the Union of the AfCFTA, Statement of the Chairperson of the African Union Commission, Moussa Faki Maham at Kigali, Rwanda, 21 March 2018, Available at: https://au.int/sites/default/files/speeches/34028-sp-kigali.cfta_.21.march_.18.final_.pdf

³⁶³ Article 3 of the treaty establishing AfCFTA.

³⁶⁴ Trade Law Center (Tralac) 'A tralac Guide for the AfCFTA August 2018. Available at <https://www.tralac.org/documents/resources/booklets/2878-afcfta-a-tralac-guide-5th-edition-june-2019/file.html> (accessed on 28 August 2019)

which shows what protocols are included in the first and second phase of the negotiation and the different Annexes included in each protocol.³⁶⁵



The first three protocols which are Protocol on Trade in Goods, Service and Protocol on Rules and Procedures on the Settlement of Disputes have been adopted by member countries as an integral part of the Treaty Establishing the AfCFTA. Two annexes; Schedule in tariff concessions and Rule of Origin are a very important part of the negotiation because of their direct effect in cost for countries and they are yet to be completed. To facilitate their completion the 32-Ordinary Meeting of the Assembly of the African Union requested the Ministers responsible for trade to submit the Schedules of Tariff Concessions, and Schedules of Specific

³⁶⁵ Trade Law Center 'African Continental Trade Area; A Tralac guide' 2018. Available at <https://www.tralac.org/documents/resources/booklets/2878-afcfta-a-tralac-guide-5th-edition-june-2019/file.html> (accessed on 28 September 2019)

Commitments on Trade in Services in line with agreed modalities to July 2019 and January 2020 Sessions of the Assembly, respectively, for adoption.³⁶⁶

Countries have also agreed that tariff from 90 percent of tariff lines of trade in goods will be eliminated. From the remaining 10 percent, 7 percent are designed as a sensitive product while the remaining 3 percent of the tariff line will be excluded from tariff liberalization. For the liberalization process, the agreement gives special and differential treatment for developing and least developed countries.³⁶⁷ For non-least developed countries tariffs barriers on Non-Sensitive Products (the 90% tariff line) will be eliminated after 5 years and 10 years by least developed countries. Tariffs on Sensitive Products to be eliminated after 10 years by non-least developed countries and 13 years for least developed countries. A group of seven countries ('Special Needs' or 'G7') has additional flexibility to liberalize 85% of tariff lines in 10 years and the other 5% of tariff lines and for Non-Sensitive Products 15 years.³⁶⁸

The second phase of the negotiation which includes the Protocol on Investment Competition Policy and, Intellectual Property Right has been also launched in November 2018. The AU assembly gives direction to make ready the draft legal text for those protocols by January 2021 for the assembly's adoption.³⁶⁹

In the process up to date, the journey for the AfCFTA is progressing well. Getting full ratification of the agreement is the first challenge and it is becoming visible in the continents biggest free trade initiative. According to Vera Songwe, under-secretary-general of UN, unequal benefit between more industrialized and less sophisticated countries and infrastructure challenges as the prime problems making countries to hold back. Kwesi Quartey, deputy chairperson of the AU Commission also stressed that the effects of liberalization on local industries will affect the

³⁶⁶ Key decision of the 32nd Ordinary Session of the Assembly of the AU (February 2019). Available at https://archives.au.int/bitstream/handle/123456789/2754/2019_February%20Summit_keyDecision_E.pdf?sequence=1&isAllowed=y (accessed on 30 August 2019)

³⁶⁷ Willemien Viljoen 'Rules of origin, tariffs and the AfCFTA' 17 may 2019 TralacBlog. Available at <https://www.tralac.org/blog/article/14063-rules-of-origin-tariffs-and-the-afcfta.html> (accessed on 30 August 2019)

³⁶⁸ Peter Lunenburg 'Phase 1B' of the African Continental Free Trade Area (AfCFTA) negotiations' July 2019 (63) South Center policy brief at 4. Available at https://www.southcentre.int/wp-content/uploads/2019/06/PB63_Phase-1B-of-the-AfCFTA-negotiations_EN-1.pdf

³⁶⁹ IISD 'AfCFTA enters into force; Phase II on investment, competition, IPRs to last through 2020–2021' June 27, 2019. Available at <https://iisd.org/itn/2019/06/27/afcfta-enters-into-force-phase-ii-on-investment-competition-iprs-to-last-through-2020-2021/> (accessed on 30 August 2018)

implementation.³⁷⁰ Based on UNCTAD study, the tariff loss from liberalization of trade from AfCFTA under different levels of liberalization ranges from 7.1 to 9.1 percent. However, the effect is uneven from country to country, some countries will loss over 20 percent of their tariff income.³⁷¹

Withstanding all these challenges, effective implementation of AfCFTA will help to create an effective and integrated market for the African continent. It will also enable producers' benefit from economies of scale, enable the creation of regional value chain and integration with the global value chain, access of cheap products for consumers, effective allocation of resources to the productive sector, improve inflow of capital to the continent, catalyze structural transformation and other benefits related with technology transfer and innovation.³⁷²

5.3. Managing challenges of unequal benefit in AfCFTA

Regional integration or cooperation for Africa has a lot of advantage like a structural transformation of the continents economy and to nurture a competitive market in the global arena. However, these are the long-term benefit of integration. In the short term, the benefit and cost among countries are diverse and the cost is bigger than the benefit for some countries. Countries with a developed manufacturing sector will get a higher share of the pie while countries with a difficulty to create structural change as fast as possible will suffer the most.³⁷³ This reality continues to become a challenge for the progress of the integration in the continent.

In the integration of Africa through AfCFTA, this problem becomes bigger than the RTAs. Because with the larger member of countries the higher the diversity in their level of development, economic size and industrialization. This will make countries to repeat the culture of slow implementation of RTAs into AfCFTA agreement.

Here there are two contradictions. First, the benefit AfCFTA will generate for member countries will be determined by the depth of integration and by the inclusion of as many countries as

³⁷⁰ Lyu Tianran, Frank Kanyesigye & Mohammed M. Mupenda 'what are the challenges facing Africa's "historic" free trade agreement' 22 March 2018, Xinhua. Available at http://www.xinhuanet.com/english/2018-03/22/c_137055614.htm (Accessed on 28 September 2019)

³⁷¹ Mesut Saygili & others 'African Continental free Trade Area: challenges and opportunities of tariff reduction' 2018 (15) UNCTAD Research Paper, UNCTAD/SER.RP/2017/15 at 15.

³⁷² Mesut Saygili and others (n 371) at 5.

³⁷³ Mesut Saygili and others (n 371) at 10-20.

possible.³⁷⁴ Depth means countries should eliminate tariff and mainly non-tariff barriers which will make trade among African countries to be simpler than with the third party. The depth of integration will also be determined by the inclusion of as much tariff lines as possible in the liberalization and by adopting of other complementary measures related to investment and creating an African value chain. Second, the fact in the ground shows that the benefit of liberalization will have winners and losers at the list for a short period of time. The more the depth of integration the more the cost for countries in terms of loss of tariff income and deindustrialization of infant industries.³⁷⁵ To progress, countries should absorb these costs for their long-term advantage. Then the questions are, will African countries have the willingness to absorb the cost? and do they have the capacity to absorb the cost?

The answer is not likely. The experience in RTA and the AU level shows that this scenario results in delay or non-implementation of agreements they adopted and ratified by creating different barriers mostly non-tariff barriers. So, what shall the AfCFTA secretariat do to handle unequal benefit and unwillingness from member countries? To answer this question, we will see the experience of RTAs in managing unequal advantage in Africa and what outcomes it resulted. Apart from special and preferential treatment which is common in many trade agreements, AfCFTA included flexibility, differential and variable geometry in the agreement establishing the agreement.³⁷⁶ Variable geometry is one step ahead of the flexibility of special and differential treatment which gives a right to withdraw from a specific protocol of the agreement and choose once own speed to the integration. When we look for experience few notable examples of variable geometry are found in African RTAs. In ECOWAS it was done by giving financial compensation for the loss of tariff from liberalization. On the other side, variable geometry in COMESA and EAC gives member states the right to progress slowly while giving the others to move forward without affecting the other which is the same as the EU variable geometry.³⁷⁷

To solve the challenges of the unequal advantage of the customs union, SACU used different mechanisms. It used a financial strategy in the form of tariff income subsidy and non-financial

³⁷⁴ Simon Mevel & Stephen Karingi 'Deepening Regional Integration in Africa: A Computable General Equilibrium Assessment of the Establishment of a Continental Free Trade Area followed by a Continental Customs Union' 2012 Selected paper for Presentation at the 7th African Economic Conference Kigali, Rwanda, 30 October - 2 November 2012 at 28.

³⁷⁵ Mesut Saygili and others (n 371) at 14-16

³⁷⁶ Article 6 of the treaty establishing AfCFTA.

³⁷⁷ In EAC variable geometry is been included in the treaty establishing AEC.

redistribution policy targeting the allocation of key industries to disadvantaged countries to solve the gravitation of investors to the already developed market. The other mechanisms have been making sure the countries get an equal share of the projects and their benefits of the integration process, credit access for less developed countries and access for development funding.³⁷⁸ In ECOWAS, the prime way used to solve unequal advantage was establishing “Fund for Co-operation, Compensation and Development of the Community” which became a tool to compensate member states for the loss of income because of liberalization of trade.³⁷⁹ For ECOWAS, equal advantage from the integration process is one of its principles. In addition to compensation, the fund assists member states suffered from loss of tariff, provide finance for development activity, promote development projects in less developed member states of ECOWAS.³⁸⁰

However, there are debates on the outcome of this approach for the progress of integration. Some scholars argue this approach positively contributed to the integration development and balance. They argued that accepting market-based integration in regions with a wide difference like ECOWAS would have affected poor countries economy.³⁸¹ On the other side, integration in a non-market approach which is based on compensation and financial assistance will not result in significant progress for integration. Financial assistance for the loss of income defeats the purpose of trade liberalization to create a competitive market and shift of factors to the more competitive sector. The market-based approach is also difficult because of a large difference among countries. To manage this, Ademola suggested cooperation in development as the first stage of trade liberalization and applying variable geometry in different layers rather than financial compensations for the loss of tariff.³⁸²

In EAC, variable geometry has been implemented in almost the same as the EU variable geometry. EAC included variable geometry in the founding treaty and it has been a source of disagreement in its implementation. The treaty establishing EAC defines variable geometry as:

³⁷⁸ Oliver S. Saasa (ed.), ‘Economic Cooperation and Integration Among Developing Countries, in joining the future economic integration and cooperation in Africa’ 1991 Nairobi, Africa Centre for Technology Studies at 20.

³⁷⁹ Article 21 &48 of the Revised Treaty of the Economic Community of Western Africa States.

³⁸⁰ Article 4 of the revised treaty of ECOWAS

³⁸¹ Peter Robson ‘Integration, Development and Equity: Economic Integration in West Africa 2011 (55) 1 Cambridge University Press at 119.

³⁸² T. Ademola Oyejide (n 336) at 32

“Principle of variable geometry means the principle of flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds”.³⁸³

Because of the lack of experience in applying variable geometry in decision making, it became a problem when countries invoke the issue in the time of disagreement. When the EAC was negotiating for a common market, it becomes difficult to reach an agreement, mainly because, Tanzania disagreed on the labour law the community wants to adopt and land right for citizens from other countries. Consequently, the Council of Ministers asked the EAC Secretariat to seek an advisory opinion on the application of the principle of variable geometry. Because, according to the Council, interpreting variable geometry will permit progression of the different activities, projects, and programs at different speeds to leave Tanzania behind and continue to adopt the proposed common market.³⁸⁴

The council of minister asked the East African Court of Justice;

1. The Application of the Principle of variable geometry;
2. The Application of the Principle of variable geometry vis-à-vis the requirement for consensus in decision-making.
3. Whether the requirement of consensus in decision-making implies unanimity of the Partner States.³⁸⁵

Before the advisory decides, member countries submitted their argument on application of variable geometry. Rwanda argued that the principle of variable geometry is in harmony with the requirement of consensus in decision making in that, the principle of variable geometry governs progression in the integration activities for some groups within the community to engage in other activities outside the Community.³⁸⁶ Burundi, on the other hand, argues the existence of a controversy between the application of the principle of variable geometry and the principle of decision making by consensus by all Partner States. Accordingly, Burundi argues

³⁸³ Article 7 of the treaty establishing the EAC.

³⁸⁴ James T. Gathii (n 199) at 626-627

³⁸⁵ The East African Court of Justice ‘In the matter of a request by the council of ministers of the east African Community for an advisory opinion’ Application No. 1 of 2008 at 9.

³⁸⁶ The East African Court of Justice (n 385) at 11.

the two principles are not in harmony as far as practice is concerned and suggested to have a category of issues addressed by consensus and variable geometry³⁸⁷

For Kenya, the principles of variable geometry and requirement of consensus in decision making can operate together if the scope of where each principle applies is clearly defined and there is no conflict in scope, otherwise, the two cannot be in harmony with each other. It maintained that the principle of variable geometry can guide the integration process notwithstanding the requirement of consensus in decision making, provided the scope of the policy areas in which each will apply are defined.³⁸⁸

Tanzania was against applying variable geometry and stressed on consensus decision making and its clearly in accord with reality on account of member states commitment to have a single voice, notwithstanding their variables in terms of sizes or stages of development. Tanzania argued that the only mechanism that may afford members and sub-groups with varying levels of developmental ability to forge a common voice is that of consensus in decision making.³⁸⁹

Uganda argued variable geometry cannot be put at part or side by side with consensus and consensus must decide on a policy or objective before arriving at variable geometry which must take account of practical realities in the different Partner States on the mode and speed of implementation of the policy.³⁹⁰

The East Africa Law Society (EALS) argued that consensus is not necessarily inconsistent with the principle of variable geometry. EALS also urged the Court to advise the East African Community to consider amending the Treaty and Protocols to provide for the application of the principle of variable geometry in specific areas of activity. By seeing the objectives of the community decision-making by application of variable geometry in regional organizations should be the exception rather than the norm.³⁹¹

After seeing the argument of different parties, the court decided that variable geometry is not in conflict with consensus decision making.³⁹² According to the Court, consensus, as applied in the treaty and protocols, is purely and simply a decision-making mechanism in Summit, Council and in the other executive organs of the Community while variable geometry is used therein is a

³⁸⁷ The East African Court of Justice (n 385) at 12

³⁸⁸ The East African Court of Justice (n 385) at 14- 16

³⁸⁹ The East African Court of Justice (n 385) at 16-18

³⁹⁰ The East African Court of Justice (n 385) at 21- 23

³⁹¹ The East African Court of Justice (n 385) at 27

³⁹² The East African Court of Justice (n 385) at 28

strategy for the implementation of the agreement.³⁹³ When the court frames the way forward it decides that the Partner States may agree on implementation at different speeds due to different readiness levels or different priorities. Some may choose or opt-out of implementation altogether due to national realities, yet others may decide to ‘opt-out’ and at a future time they will ‘opt-in’. But the end statement of the court decision, however, stress that these all will be agreed by the Partner States, by consensus.³⁹⁴

This shows that the responsiveness and sensitiveness of RTA in Africa for challenges of a prospected unequal benefit. In Africa, when countries are facing implementation challenges, and have some negative consequence either in short term or long term, they take a measure of not implementation. This makes integration in Africa totally controlled by the will of the country.³⁹⁵ Countries invoke flexibility and variable geometry when it becomes difficult for them to apply the agreement they adopted or adopt some protocols. In the case of AfCFTA, implementation will not be simple since it was proven to be challenging in the RTAs level. Opening a market for the whole continent will not be simple. This will push countries to find an excuse for not implementing it. For that, AfCFTA should develop a road map to implement variable geometry, which puts a boundary on protocols or provisions are open for differentiation.

5.4. Conclusion

AfCFTA is a continental-wide initiative comes into existence with the objective of creating a free trade area, customs union as well as a common market in Africa. The agreement establishing the AfCFTA has been adopted by 54 member countries of the AU except for Eretria even if big countries like Nigeria is yet to ratify it. This success has been praised by many international media’s and organizations around the world.

The agreement has a two-phase of negotiation with the first phase includes trade in goods, trade-in service and protocol in dispute settlement and a second phase which includes the protocol in investment, intellectual property right and investment. The main part of the agreement has a plan to eliminate tariff from 90 percent of tariff lines in the continent within five up to fifteen years based on the level of development of countries.

³⁹³ The East African Court of Justice (n 385) at 30

³⁹⁴ The East African Court of Justice (n 385) at 30

³⁹⁵ James T. Gathii (n 199) at 624.

If it is implemented as planned it has a capacity to help the continent to increase the low level of inter African trade. But the fact that the agreement will result in winners and losers will make the implementation process challenging. To manage this unequal benefit AfCFTA included variable geometry and flexibility as a principle of implementation. To postulate the capacity of variable geometry to solve unequal benefit, the chapter analyzed the experience of RTA in applying variable geometry. It found that variable geometry has been implemented in EAC when they failed to agree on the Common Market negotiation. Tanzania got an opt-out from the common market while the other member of EAC agreed to implement the agreement. In ECOWAS variable geometry has been implemented in the way that countries who lose income because of liberalization get financial and non-financial compensation. In SACU variable geometry has been implemented in the way least developed members get a better portion from the customs union tariff income.

However, applying variable geometry hasn't resulted in big progress in the integration rather than helping RTAs survive. The main reason scholars pointed out is that variable geometry in the form of financial compensation defeats the purpose of liberalization which includes bearing the cost and come out with some form of comparative advantage. So, the way variable geometry and differentiation will be implemented in AfCFTA should analyze the trend in RTA in Africa and it should come up with market-based variable geometry. The other lesson is that in the EAC countries invoke the right to use variable geometry when disagreement happened which created confusion. By taking the lesson from this, AfCFTA should explain variable geometry clearly and list out issues that can be addressed by variable geometry.

Chapter six

Conclusions and Recommendation

5.1. Conclusions

AfCFTA is continental initiative adopted by all member countries of the AU except Eritria and ratified by 25 countries as of September 2019. The agreement have the objective of creating free Trade Area, a customs union and common market in the continent by eliminating tariff from 90 percent of the tariff lines in the continent and progressively eliminating non-tariff barriers. The agreement has been structured by including six main protocols and many annexes. The negotiated of the agreement has two phases. The first phase of negotiation includes the Protocol on Trade in Goods, Protocol on Trade in Service and Protocol on the settlement of Conflict. While the second phase includes Protocols on Competition Policy, Protocol on Investment and Protocol on Intellectual Property Right. The Protocols contains many detailed annexes like Rule of Origin, Trade Facilitation, Anti-dumping, Customs Cooperation, Sanitary and Phytosanitary, Nontariff barriers and other general agreements.

Implementation of this agreement is believed to help the continent to increase inter African trade and help the continent to be competitive in the global trading system. But the experience in the level of RTAs shows that trade liberalization and integration through trade is not simple for the continent. Countries are afraid to open their market for others, because of many reasons. One of the main reasons is the unequal return of trade liberalization for countries who are found in different level of industrialization, economic development, economic size and other trade-related sophistications. This makes the endeavour to integration very challenging. By understanding this challenge, AfCFTA accepts variable geometry and differentiated integration as the main principle of implementing the agreement. Variable geometry is a way of differentiated integration which gives countries the flexibility to pursue integration in different speed and opt-out right from some protocols which are difficult for them to be part of. The AfCFTA accepts variable geometry and flexibility as the main principle of the agreement in the official document, unlike the other agreements. This is derived from the fact that the continent is diverse in economic development, size of the manufacturing sector and willingness in the integration process. Variable geometry will give countries the flexibility to progress at a different speed and accommodate difference among countries. In doing so AfCFTA should learn from past trends

and experience. when we see the history of integration in the continent flexibility and accepting variable geometry have different dimensions.

In the AU history flexibility has been the culture in adoption, ratification and implementation of treaties. Flexibility happened not only in small treaty agreements but also in big initiatives like the OAU, the AEC, NEPAD and now in the AfCFTA. In the AU history more than 62 treaty initiatives have been proposed since 1963. However, the adoption and ratification of these initiatives are very diverse. Only few initiatives secured full adoption and ratification by member states. Many of the treaties failed to secure minimum ratification to enter in to force. This is the first dimension of flexibility in the continent, which is the outcome of the lack of commitment of countries for the cause of the continental organ. The other dimension of flexibility is that countries do not effectively implement treaties they adopt and ratified. Full adoption and ratification are not a guarantee for effective implementation. Big initiatives that have been believed to solve the problem of the continent failed to be implemented effectively, while they secured full adoption and ratification. These agreements include mainly NEPAD and AEC. Different from the first dimension lack of progress is the African integration is the result of lack of capacity by countries to walk the talk, over-ambitious target, lack of resource, ineffective planning, possible higher cost for small country's economy, lack of effective leadership, dependency on foreign support for implementation, domestic economic and political problem, lack of punishment for noncompliance and many other problems.

The implication of these facts of the AU on the AfCFTA is that the possibility this culture of over flexibility to be extended to AfCFTA is very high. AfCFTA secured full adoption like the AEC and NEPAD, it is also expected that many countries will ratify it. But, in the implementation stage, the possibility it will fail like what happened for NEPAD and AEC is very high unless the continental body stops repeating mistakes of overambitious planning, ineffective controlling of implementation, lack of allocating the necessary resource and punishment for non-compliance. Because implementing AfCFTA will be more difficult than any initiative the AU has ever planned. This is related to the direct cost the continental-wide trade liberalization will result, in terms of tariff loss, deindustrialization of infant industries and other unequal benefit.

What strengthens the truth about over flexibility in Africa is the African RTAs. The agreements of RTAs are as flexible as the AU level. This is in one hand related to the way they come into

existence and the different layers and multiplied membership of countries it created. In Africa, there are more than fifteen RTAs. These RTAs created three layers of integration. The first layers are old small sub-RTAs, come in to force by countries having the same colonial past. The second layers are the outcome of LPA, which decided to begin integration from the regional level and become a building block to the continental level. Instead of capitalizing on the existing small sub-RTAs they preferred new initiatives in the region and these RTAs developed a culture of continuous geographic expansion and this complicated the integration. To harmonize this complication and as a first step to AfCFTA, the TFTA comes into existence, created a third layer of integration. This created African variable geometry in terms of layers. Now AfCFTA is becoming the fourth layer.

These layers are the outcome of continuous fresh initiatives when the old agreements fail to solve the problem of the continent. The main issue in Africa is harmonizing trade regulation. If it was possible, it could have happened at the level of RTAs. But continuously proposing new initiative is a waste of time. Liberalization of trade and harmonization of trade rules have short term costs. To tackle this problem RTAs in Africa used different tools including differentiated integration and variable geometry. Some RTA used purely market approaches of variable geometry while the others used a non-market approach in the form of financial compensation and other affirmative actions for less competitive countries. In SACU and ECOWAS, the initiatives used financial compensation for countries who lose income because of liberalization. While in EAC and COMESA, EU types of variable geometry which enables countries to opt-out from agreements that will hurt their economy. In both cases, the instruments failed to help to grow the share of inter-regional trade, to facilitate opening up and eliminate non-tariff barriers.

The failure of these tools to increase intracontinental trade and facilitate integration pushes us to draw experience from the EU which becomes successful by using the same tool. When integration becomes difficult because of many reasons, the EU used variable geometry which gives countries the right to opt-out from some agreements and opportunity to pursue integration at a different speed. These helped the EU to adopt big initiatives like the EMU by leaving behind countries like the UK. What makes the EU variable geometry work is that it was managed centrally by the European Commission and the level of flexibility is a last resort when progressing with the same speed becomes impossible. In Africa, countries invoke flexibility with

small and big problems which makes integration in Africa flexible without effect on noncompliance.

The AU is implementing variable geometry when it decides to let the AfCFTA enters in to force with 22 ratifications. This is giving other members of the AU a flexibility to the signing and ratification of AfCFTA when they become ready. Variable geometry can be implemented in the implementation stage also by giving countries additional flexibility other than given in special and preferential treatment. It can give additional time for trade liberalization when it became difficult for countries to apply based on the plan. It might also give some countries, an opt-out right from some protocols like Protocol on Competition Policy, protocol on Trade in Service. However, AfCFTA can't implement non-market approach variable geometry in the form of compensation of tariff loss like ECOWAS and SACU is doing.

Variable geometry can be consistent or inconsistent with a consensus decision tool of the AfCFTA. Like what was decided in EAC, variable geometry can be inconsistent with consensus if the issues covered by the two tools are not clearly demarcated. It will be consistent if the AfCFTA clearly defines the two concepts and their way of application by putting boundary for application of both issues. The AfCFTA should begin addressing these issues because it will popup when a problem like the EAC happens.

Since agreeing in every issue is difficult for a big continent with 55 countries, applying variable geometry is not a choice for the AfCFTA. It is necessary to progress in the integration. But the consequence of variable geometry will be determined by how much the secretariat is capable to control the implementation process. The trend told us that African countries will always find an excuse not to implement agreements which have a cost on the domestic economy. The cost AfCFTA will result is clear. So, AfCFTA should use it minimally and in a structured manner to accommodate only impossible situations, whereas it can become a source of failure.

5.2. Recommendation

Africa is a big continent with diverse level of economic development and size. The interest of countries to the AfCFTA is also diverse based on its effect on the domestic economy. This make finding a way to accommodate these differences important to progress in the integration. Special and differential treatment will not be enough to accommodate all countries because of diverse interest in the continent. Variable geometry can fill the shortcoming of special and differential treatment by accommodating difficult inconsistencies like lack of interest by some countries to adopt some protocols.

However, the way the AU implementing variable geometry in the continental and regional level is complicating the integration process. In the AU level, it created very diverse adoption, ratification and implementation. In the regional level, it created a very diverse level of progress in the implementation of treaties which reaches a level in which harmonization is very difficult. So;

- The AfCFTA should begin from securing full ratification from all members of the AU member states. Because it is the first condition to begin the journey differently from past initiatives. In Africa, there are RTAs like COMESA having more than 21 member states. Entering in two force with 22 countries will not do any good, RTAs haven't done yet. Besides, agreements failed to secure ratification in the first few years, continues to fail in the coming years. This is related to the success of agreements in the first few years. The success of AfCFTA to increasing inter-regional trade will be dependent on the depth of integration. Including of as many countries as possible and having as many tariff lines as possible is what will create the depth. When it enters with less than half of the countries of the continent it will not increase trade as expected. When it fails to do as expected the other countries will not have a reason to ratify it.
- Besides, AfCFTA is a tool to harmonize trade among RTAs. The membership of countries in RTAs is complicated. For example, Tanzania is a member of the EAC customs union, and a customs union negotiates tariff as one. The fact in the ground shows that EAC is negotiating tariff concession in AfCFTA, while Tanzania hasn't ratified the AfCFTA doesn't give sense. These means it will never enter in to force unless Tanzania withdrew itself from the EAC Customs Union or ratify AfCFTA. This is a situation in almost all parts of the continent, and it is more complicated for countries who are a

member of more than one customs union. The solution for these is having all countries onboard and negotiate the agreement as a country. This is where variable geometry is important to bring all countries on board because the present special and preferential treatment might not be enough to convince countries.

- Variable geometry can accommodate countries to ratify the agreement. The one way it can be done is by letting countries to decide their own time frame to implement tariff concession and other difficult agreement. Letting countries to decide their speed to decide their schedule might look a naïve suggestion but seeing the fact in the ground it is better to have all on board and negotiate until countries reach to a common ground than leaving half of the continent and fail before it begins.
- AfCFTA will fail if it failed to have all countries on board. The main reason for low inter African trade is non-tariff barriers resulting from problems in trade facilitation, border crossing, different documentation requirement, underdeveloped infrastructure and different standardization. If all countries don't come on board, border crossing still will continue to be challenging, different documentation and other issues will continue undermining the continents initiative because inter-African trade needs crossing the border of more than one country. So, bringing all countries on board will be very important to tackle non-tariff barriers more than tariff barriers which are more important for the continent. But still having all countries on board is not a guarantee of success. It only saves AfCFTA from failure before it is been launched.
- If the AfCFTA implemented like the other initiatives the probability it will end up as the fourth layers of integration in the continent is very high. So, it needs to find champions. Champions who can come in front when others hesitate to decide. These champions should be big economies. Ten big economies of Africa cover around 75 per cent of the continents GDP. But only five of them ratified the AfCFTA. If the continental initiative to work not only needs ratification from them, AfCFTA needs consensus and common objective among these countries. If these big countries can progress the other will follow. There is a lesson we can learn from the EU integration. Germany and France always come in the front line for every initiative.
- So, having full ratification from member countries by letting them choose their speed and putting some big countries in the front line can help the AfCFTA to progress well.

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