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UNIVERSITY OF CAPE TOWN



SECURING COMPLIANCE WITH AFRICAN ECONOMIC INTEGRATION TREATIES

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Declaration

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted has not been previously submitted by me for a degree at this or any other university, that it is my work in design and execution, and that all the materials contained herein have been duly acknowledged.

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Abstract

The absence of strong supranational institutions and the failure of states to comply with their integration obligations feature prominently in almost every discussion on economic integration in Africa. There seems to be a consensus that without strong supranational institutions to enforce compliance, economic integration in Africa may not succeed. This thesis takes a different approach to the discussion on compliance.

The thesis argues that the failure of African states to comply with their integration obligations is not necessarily a function of deliberate and blatant disobedience for the norms of economic integration. Rather, there are other systemic challenges which impede the ability of African states to comply with their obligation. To resolve these challenges and ensure compliance, the thesis suggests that African states need to continuously engage in a discursive process wherein the norms of economic integration are constantly iterated and given authoritative interpretation. Furthermore, institutional, technical and infrastructural capacity needs to be developed across the continent in order to create favourable conditions for the implementation of the norms of integration. To this end, more attention needs be paid at the regional and national level to initiatives which improve good governance and aid the internalisation of the norms of economic integration among African states.

Dedication

To Joseph, Veronica and Loveth

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Abbreviations

ACHPR	African Court on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
ADB	African Development Bank
AEC	African Economic Community
AMU	Arab Maghreb Union
APR	African Peer Review
APRM	African Peer Review Mechanism
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
CA	Constitutive Act
CARICOM	Caribbean Community
CENSAD	Community of Sahel-Saharan States
CM	Common Market
COJ	COMESA Court of Justice
COMESA	Common Market for Eastern and Southern Africa
CSO	Committee of Secretariat Officials
CU	Customs Union
EAC	East African Community
EACJ	East African Court of Justice
EBID	ECOWAS Bank for Investment and Development
ECCAS	Economic Community of Central African States
ECCJ	ECOWAS Court of Justice
ECOMOG	ECOWAS Monitoring Group

ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EU	European Union
FTA	Free Trade Area
IGAD	Intergovernmental Authority for Development
LDC	Least Developed Country
MMTZ	Malawi, Mozambique, Tanzania and Zambia
MOU	Memorandum of Understanding
NAFTA	North Atlantic Free Trade Area
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NTC	National Transition Council
OAU	Organisation of African Unity
ODA	Overseas Development Assistance
OECD	Organisation for Economic Cooperation and Development
PALU	Pan-African Lawyers Union
PRC	Permanent Representatives' Committee'
REC	Regional Economic Community
RISDP	Regional Indicative Strategic Development Plan
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SALC	Southern Africa Litigation Centre
SCA	Supreme Court of Appeal
SERAP	Socio-Economic Rights and Accountability Project
STC	Specialised Technical Committee

UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organisation
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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Chapter 1: Introduction

1.0 Background

Africa is one of the poorest continents in the world and is home to over two-thirds of the world's least developed countries.¹ Most African countries are plagued by various economic, political, social and development problems. These problems include a lack of basic infrastructure, poor national governance, non-adherence to the rule of law, political instability, poverty, a high infant mortality rate, fragmented markets, and low levels of formal intra-regional trade between African states.² These problems often spread beyond national boundaries and affect the entire continent. To resolve these problems, African states have decided to use regional integration³ as a means for collective action.⁴ Consequently, economic integration treaties (integration treaties)⁵ have been adopted to regulate the process of

¹ United Nations Development Programme *Regional Integration and Human Development: A Pathway for Africa* (UNDP, New York, 2011) 3. Of the 48 least developed countries worldwide, 33 are in Africa: United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS) *LDC Factsheet 2012*, available at http://www.unohrlls.org/UserFiles/File/UN_LDC_Factsheet_053112.pdf [accessed 23 December 2012].

² United Nations Economic Commission *Assessing Regional Integration in Africa* (United Nations Economic Commission for Africa, Addis Ababa, 2004) 33; Severine Rugumamu *Africa's Search for Regional Cooperation and Integration in the 21st Century* (ACBF Working Paper No 3, 2004) 1; Vinaye Ancharaz et al 'Impediments to regional trade integration in Africa' (2011) 2(11) *African Economic Brief* 1–8; Greg Mills 'Africa and regional integration: what works and why' (2004) 11(2) *South Africa Journal of International Affairs* 21–29.

³ Deji Olowu 'Regional integration, development, and the African Union agenda: challenges, gaps and opportunities' (2003) 13 *Transnational Law and Contemporary Problems* 211–253 at 214; John Akokpari 'Dilemmas of regional integration and development in Africa' in Akokpari et al (eds.) *The African Union and its Institutions* (Fanele, Auckland Park, South Africa, 2008) 85–110 at 85; European Centre for Development Policy Management (ECDPM) *Building the African Union Institutional Architecture* Background note for a multi-stakeholder seminar, 21 October 2009 (Nordic Africa Institute, Uppsala) 1–4 at 1.

⁴ Collective action refers to a situation where a group of actors with a common interest work together towards the attainment of a specific goal. See Elinor Ostrom 'Collective action and the evolution of social norms' (2000) 14(3) *Journal of Economic Perspectives* 137–158; Elinor Ostrom 'Collective action and proprietary rights for sustainable development: understanding collective action' *Focus 11, Brief 2 of 16*, February 2004, available at http://www.ifpri.org/sites/default/files/pubs/2020/focus/focus11/focus11_02.pdf [accessed 20 December 2012]; Mancur Olson *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, Cambridge, 1965) 1.

⁵ The phrase 'integration treaties' is used in this thesis in a generic sense to describe the constituent treaties establishing the African Union, the African Economic Community, the

integration. These integration treaties create normative practices which serve as coordination points for augmenting cooperation between African states and also facilitate the resolution of collective action problems.⁶ The integration treaties create an iterative process which enables African states to replace 'short-term calculations of [national] interest with long-term strategic analysis'.⁷ In other words, the integration treaties provide an enabling regulatory framework to manage the collective efforts to foster social and economic development on the continent.

Presently, economic integration in Africa is taking place at the regional and sub-regional levels. At the sub-regional level, the Regional Economic Communities (RECs) are responsible for economic integration. There are currently eight recognised RECs in Africa:⁸ the Community of Sahel-Saharan States (CENSAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), the Southern African Development Community (SADC), and the Arab Maghreb Union (AMU).⁹ At the regional level, economic integration is pursued by the African Union (AU)¹⁰ through the creation of the African

regional economic communities and any other subsidiary instrument adopted by these frameworks to promote economic integration.

⁶ S Sitaraman *State Participation in International Treaty Regimes* (Ashgate Publishing, Aldershot, 2009) 1. Collective action problems arise when actors within a collective action group tend to defect on the basis of the calculation of their short-term interest and consequently defeat the purpose of the long-term interest for which collective action was sort. Mancur Olson suggests that collective action problems arise where the private incentives of individuals dictate that their aggregate contributions to the production of collective goods will be insufficient to provide an optimal supply of goods. Therefore, he suggests that rational, self-interested individuals may not always act to achieve the common interest of the group unless externalities such as coercion or special incentives are used. See Mancur Olson *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, Cambridge, 1965) 2; Elinor Ostrom 'Collective action and the evolution of social norms' (2000) 14(3) *Journal of Economic Perspectives* 137; Russell Hardin 'Collective action as an agreeable n-prisoners' dilemma' (1971) 16 *Behavioural Science* 47281 at 473-474.

⁷ Jose Alvarez *International Organizations as Law-Makers* (Oxford University Press, New York, 2005) 339.

⁸ There are other regional arrangements in Africa but these eight RECs are the ones approved by the African Union to be the foundation for continental integration.

⁹ Membership of most of the RECs is largely region-specific, with the exception of COMESA, which has members from North, East and Southern Africa.

¹⁰ The African Union was established by the *Constitutive Act of the African Union* signed 11 July 2000, entered into force 26 May 2001, OAU Doc CAB/LEG/23.15. See *The Durban*

Economic Community (AEC). The AU, the AEC and the RECs are established by integration treaties that create the norms regulating the conduct of African states as it relates to achieving economic integration.

Despite the concerted efforts to adopt integration treaties to resolve some of Africa's socio-economic problems, a careful examination of the state of economic integration in Africa reveals that African states have difficulties complying with the obligations created under the integration treaties.¹¹ Issues such as multiple and overlapping memberships of RECs, an absence of political will to surrender sovereignty to regional institutions and implement the objectives of the integration treaties, divergence in the economic policies of African states, and the failure to streamline national policies with regional policies¹² all account for non-compliance by African states.¹³

Such non-compliance takes various forms. Although most integration treaties provide for some form of free movement of goods and persons, these conditions are almost non-existent in African states. There is little cooperation in the areas of agriculture, energy, infrastructure and other non-trade related sectors. Furthermore, there has been a consistent failure on the part of African states to adhere to the timetables for integration set by the integration treaties. For example, the Treaty Establishing the African Economic Community (Abuja Treaty) sets out six stages for achieving complete economic integration in the continent.¹⁴ The Abuja Treaty specifies

Declaration in tribute to the Organization of African Unity on the occasion of the launching of the African Union 41 ILM 1029 (2002).

¹¹ See generally African Union *Status of Integration* 2 ed (African Union, Addis Ababa, 2009); African Union Commission (AUC) *Minimum Integration Programme 2009-2012* (AUC Economic Affairs Department, Addis Ababa, 2010) 1.

¹² Chukwuma Agu 'Obstacles to regional integration: the human factor to trade facilitation and port reforms in Nigeria' (2009) 2(4) *International Journal of Private Law* 446.

¹³ Mothae Maruping 'Challenges for regional integration in sub-Saharan Africa: macroeconomic convergence and monetary coordination' in Jan Teunissen et al (eds) *Africa in the World Economy—The National Regional and International Challenges* (Fondard, The Hague, 2005) 146; A Aly *Economic Cooperation in Africa* (Lynne Rienner Publishers, Colorado, 1994) 68; UNECA 'Meeting the challenges of regional integration, intra-African trade and economic growth in Africa' 2007 *Policy Brief* 9.

¹⁴ Article 6 Abuja Treaty. The stages and timeframe for implementation are:

- a. Strengthening existing regional economic communities and establishing new regional economic communities in regions where they do not exist (5 years);
- b. Stabilising trade tariffs, customs duty and other barriers to intra-community trade, strengthening sectoral integration, coordination and harmonisation of

a timeframe for the completion of each stage and also states specific goals that need to be achieved in each stage of integration. However, the timelines for the completion of each stage have not been adhered to and not all the goals have been met.¹⁵

A careful examination of the factors that have increased the level of non-compliance with economic integration treaties reveals that while some of the factors (such as conflicting obligations arising from multiple memberships of RECs) are of a legal nature, other factors are non-legal (such as having divergent macroeconomic policies and poor infrastructure). The combination of legal and non-legal factors that affect compliance with African integration treaties complicates the discussion on compliance. However, since economic integration is pursued within a treaty framework, it becomes imperative to explore methods that can be used within the treaty framework to reduce non-compliance arising from both legal and non-legal factors.

1.1 The problem

Integration treaties in Africa cover several areas where collaboration is needed to resolve the collective challenges faced by African states. Such collaboration creates the need for some form of collective governance to ensure that African states conform to the set of norms that regulate their interactions in areas of common interest. This is because the norms created to resolve these problems have to be collectively implemented if the desired benefits of integration are to be realised. In regions like the European Union (EU), where regional integration has been achieved, the monitoring and

-
- c. the activities of the regional economic communities, and gradual harmonisation of customs duty for third countries (8 years);
 - c. Establishing free trade areas and a Customs Union at the level of each regional economic community (10 years);
 - d. Coordinating and harmonising tariff and non-tariff systems among regional economic communities with a view to establishing a continental Customs Union (2 years);
 - e. Establishing an African Common Market and the adoption of common policies (4 years);
 - f. Integrating all sectors of the African economy, establishing an African Central Bank and a single African currency, setting up an African Economic and Monetary Union and electing the first Pan African Parliament (5 years).

¹⁵ African Union Commission (AUC) *Minimum Integration Programme 2009-2012* (AUC Economic Affairs Department, Addis Ababa, 2010) 1-3.

enforcement process is carried out by supranational institutions such as the European Commission and the European Court of Justice. These institutions wield enormous powers over the member states of the EU and have played a vital role in ensuring that EU states comply with EU economic integration norms.¹⁶ In several instances these institutions have required member states of the EU to bring their actions into conformity with the EU integration norms.¹⁷ As a result of their ability to compel EU states to align their conduct with EU integration norms, these institutions are deemed to possess supranational authority.¹⁸ Before proceeding further, it is important to state that this thesis does not adopt a comparative approach in its study of economic integration in Africa. Rather, it examines African economic integration on its own terms.

In Africa, the approach to economic integration has been slightly different to the EU approach. While regional courts and Commissions or Secretariats have been created, they have not been as influential as their counterparts in the EU. The Commissions or Secretariats in Africa neither have the inherent powers to make decisions that are binding on African states nor do they have the powers to sanction African states that fail to implement the agreed integration norms.¹⁹ In other words, the Commissions

¹⁶ See Alec Stone Sweet and Wayne Sandholtz 'Integration, supranational governance, and the institutionalization of the European polity' in Wayne Sandholtz and Alec Stone Sweet (eds) *European Integration and Supranational Governance* (Oxford University Press, New York, 2008) 1-26; Neil Fligstein and Jason McNichol 'The institutional terrain of the European Union' in Wayne Sandholtz and Alec Stone Sweet (eds) *European Integration and Supranational Governance* 59.

¹⁷ *Costa v Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ Case 6/64 [1964] ECR 585.

¹⁸ For discussions of European supranational institutions, see Jonas Tallberg *European Governance and Supranational Institutions: Making States Comply* (Routledge, New York, 2003); Jonas Tallberg 'Delegation to supranational institutions: why, how, and with what consequences?' (2002) 25(1) *West European Politics* 23-46; Walter Mattli and Anne-Marie Slaughter 'The role of national courts in the process of European integration: accounting for judicial preferences and constraints' in Anne-Marie Slaughter et al (eds) *The European Courts and National Courts—Doctrine and Jurisprudence* (Hart Publishing, Oxford, 1998) 254-276; Liesbet Hooghe *The European Commission and the Integration of Europe: Images of Governance* (Cambridge University Press, Cambridge, 2004). The concept of having institutions outside the framework of the states making binding decisions on the states is referred to as supranationalism. It is defined as 'the development of authoritative institutions of governance and network of policy-making activity above the nation-state'. See Ben Rosamond *Theories of European Integration* (Macmillan Palgrave, Basingstoke, 2000) 204.

¹⁹ B Fagbayibo 'A supranational African Union? Gazing into the crystal ball' 2008 *De Jure* 493-503.

or Secretariats do not have supranational authority. The non-conferral²⁰ of supranational authority on the Commissions or Secretariats has been attributed to the unwillingness of African leaders to part with their sovereignty.²¹ This has also raised questions as to whether economic integration will succeed on the continent. These doubts are based on the assumption that, in the absence of institutions with supranational authority to enforce integration objectives, it is likely that African states will rarely comply with integration obligations.²² As logical as this assertion may sound, it is doubtful that the mere transfer of supranational authority to regional institutions will necessarily lead to compliance or effective economic integration. One reason for this doubt is that three of the eight RECs (namely, COMESA, EAC and ECOWAS) have regional courts which are in operation.²³ These courts have jurisdiction over all matters covered by the integration treaties and their decisions are binding on member states.²⁴ While these courts have given important judgments in human rights disputes and have created a robust jurisprudence in this area,²⁵ they have not been used

²⁰ For different methods through which states transfer sovereignty to international organisations, see generally Dan Sarooshi *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press, Oxford, 2005).

²¹ Severine Rugumamu *Africa's Search for Regional Cooperation and Integration in the 21st Century* (ACBF Working Paper No 3, 2004) 1; Nsongurua Udombana 'A harmony or cacophony?' *The music of integration in the African Union Treaty and the New Partnership for Africa's Development* (2002) 13 *Indiana International and Comparative Law Review* 202.

²² B Fagbayibo, (note 19) 501.

²³ The following RECs have functioning Courts: COMESA, the EAC, and ECOWAS. SADC has a Tribunal which has been temporarily suspended pending a review of its jurisdiction. The ECCAS Treaty provides for the creation of an ECCAS court of justice but it has not commenced operations.

²⁴ See chapter 5 for a discussion of the jurisdiction of the regional courts.

²⁵ In ECOWAS 15 of the 27 decided cases have been based on human rights violations: see http://www.courtecowas.org/site/index.php?option=com_content&view=article&id=114&Itemid=27&lang=en [accessed 1 March 2012]. In the EAC, of the 13 cases that have been decided either on appeal or in the court of first instance, six dealt with human rights issues: see <http://www.eacj.org/judgments.php> [accessed 1 March 2012]. In SADC, of 15 decided cases, seven were based on human rights issues: see <http://www.sadctribunal.org/pages/decisions.htm> [accessed 1 March 2012]. (The number of cases examined is based on the cases published on the websites of the courts as at 1 March 2012. For the purpose of this evaluation, cases are counted once even if listed twice. For example, a reported preliminary objection and the substantive decision are counted as one case.) Some important decisions by regional African courts include *Socio-Economic Right Accountability Project v The Federal Republic of Nigeria and the Universal Basic Education Commission* ECW/CCJ/APP/0808 (ECOWAS, 27 October 2009), *Hadidjatou Mani Koraou v The Republic of Niger* ECW/CCJ/APP/08/08 (ECOWAS, 27 October 2008); *Ruling on Preliminary Objection in Independent Medical Legal Unit v The Attorney General of Kenya and 4 Others* (Reference No 3 of 2010 First Instance Division); *The Honorable Attorney General of the Republic of Kenya and Independent Medical Legal Unit* Appeal No 1

as a forum for litigating disputes arising from non-compliance with economic integration norms. Therefore, the courts have not had the opportunity to shape or refine these norms. One may thus infer that the mere presence of a supranational court or commission may not necessarily bring about compliance with the applicable norms. Be that as it may, the failure of citizens to litigate issues pertaining to economic integration in the regional courts is significant to the discussion on compliance with integration treaties in Africa. This is because judging from the history of economic integration in the EU, some of its most defining moments were brought about by judgments of the European Court of Justice in cases instituted by legal persons.²⁶ The question is why this has not been the case in Africa.

While it is important to have institutions to monitor the process of economic integration, the absence of strong supranational institutions in Africa should not be viewed as spelling doom for economic integration. Rather, what is needed is a critical analysis of the existing framework with the goal of finding methods that would enhance the ability of member states to comply with norms of economic integration. Economic integration treaties are like any other treaty in international law, and international law (with a few exceptions) mostly lacks a central enforcement mechanism for securing states' compliance with their obligations. However, despite the absence of a central enforcement mechanism in international law, states generally comply with their international obligations.²⁷ Therefore, in the absence of institutions

of 2011 (Appellate Division) 7–13; *James Katabazi & 21 Others v EAC Secretary General & Attorney General of Uganda* Reference No 1 of 2007: Judgment of 1 November 2001; *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* SADC (T) Case No 2/2007. See also James Gathii 'The under-appreciated jurisprudence of Africa's regional trade judiciaries' (2010) 12 *Oregon Review of International Law* 245–283.

²⁶ It is important to note that the principles of primacy of community law and direct effect of community which shaped the jurisprudence of the EU were made popular through the judicial pronouncements of the European Court of Justice. See *Costa v Ente Nazionale per L'Energia Elettrica (ENEL)* *supra* (note 17); *Van Gend en Loos v Nederlandse Administratie Belastingen* ECJ Case 26/62 [1963] ECR.

²⁷ Andrew Guzman *How International Law Works: A Rational Choice Theory* (Oxford University Press, New York, 2008) 8; Louis Henkin *How Nations Behave* 2 ed. (Columbia University Press, New York, 1979) 47. In her book *The Power and Purpose of International Law* (Oxford University Press, New York, 2008) Mary O'Connell emphasises the role of enforcement mechanisms in the international legal order. This however does not detract from the fact that there are numerous treaties which do not have enforcement mechanisms but are complied with. HLA Hart, a leading positivist, also dispels the notion that the absence of sanctions or effective coercive mechanisms reduces the efficacy of international law. See HLA Hart *The Concept of Law* (Oxford University Press: Oxford, 1961) 217–218.

that enforce compliance, it is still possible for states to align their behaviour with the prescribed objectives of a treaty. Instead of constantly asserting that the failure of African states to cede authority to supranational institutions has led to the failure of economic integration in Africa, legal scholars should start to explore methods of securing compliance within the existing framework of economic integration in Africa.

In discussing such compliance, our understanding would be enriched if we proceed from the premise that, while the norms of economic integration have to be assimilated by African states, for economic integration to succeed, there also needs to be a collective effort by both state and non-state actors to assimilate these norms. On a continent where citizens often do not trust their governments, it is vital for us to explore methods that make citizens feel they have a stake in the integration process.

Why is it important for the integration process to be collective? We are quick to assume or posit that African leaders are unwilling to implement the objectives of economic integration at the national level, but we ignore the fact that decisions at the national level may be influenced by factors that are beyond the powers of the president or head of state. For example, in a country that is highly dependent on revenue generated from customs tariffs, a president trying to liberalise trade would have to explain to the national parliament why the country will have to lose its main source of revenue in order to comply with its economic integration commitments. Unless national parliaments are involved in the integration process from the onset, the outcome of the policies may largely depend on whether the president is able to gather enough support in parliament. Citizens may also be averse to the idea of opening up the borders of a country to 'foreigners'. The xenophobic attacks that occurred in South Africa indicate that some citizens may be opposed to the idea of granting Africans from neighbouring states easy access to South Africa's resources. All these systemic challenges have to be taken into consideration in any discussion of compliance with African integration treaties.

1.2 Research question

The central research question in this thesis is, in the absence of supranational institutions, ‘how can compliance with African integration treaties be secured, taking into account the legal and non-legal factors that may impact on the ability of states to comply with their integration obligations’. In answering this question, three sub-questions are posed. The questions are:

- (1) What factors generally lead to compliance and non-compliance with treaty obligations, and are these factors relevant in the context of African integration treaties?
- (2) What strategies can be adopted by African regional institutions to encourage compliance with African integration treaties?
- (3) What steps can African states take within their national domain to facilitate compliance?

1.3 On compliance

Before proceeding to discuss the above questions in the chapters that follow, it is vital to have a conceptual understanding of treaty compliance in international law, and its implications for the discussion of compliance with integration treaties in Africa. Defining treaty compliance poses some challenges because there are different opinions about what amounts to treaty compliance.²⁸ Kal Raustiala and Anne-Marie Slaughter define treaty compliance as ‘a state of conformity or identity between an actor’s behaviour and a specified rule’.²⁹ However, they are quick to acknowledge that treaty compliance is ‘not uniquely applicable to legal rules’.³⁰ Benedict Kingsbury

²⁸ Benedict Kingsbury ‘The concept of compliance as a function of competing conceptions in international law’ (1998) 19 *Michigan Journal of International Law* 345–346; Robert Howse and Ruti Teitel ‘Beyond compliance: rethinking why international law really matters’ (2010) 1(2) *Global Policy* 127–136.

²⁹ Kal Raustiala and Anne-Marie Slaughter ‘International law, international relations and compliance’ in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds.) *Handbook in International Relations* (Sage Publications, London, 2002) 539. See also Roger Fisher *Improving Compliance with International Law* (University Press of Virginia, Charlottesville, 1981) 20; Ronald Mitchell *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (MIT Press: Cambridge, 1994) 30.

³⁰ Kal Raustiala and Anne-Marie Slaughter (note 29) 539.

argues that the discussion on compliance often proceeds on the premise that there is 'a shared understanding that compliance is adequately defined as conformity of behaviour with legal rules'.³¹ Kingsbury challenges this notion of treaty compliance as simply being a 'correspondence of behaviour with legal rules', and argues that the '[c]oncepts of "compliance" depend upon understanding the relations of law, behaviour, objectives and justice'.³² These relations need be properly understood within the context of a theory or theories of international law in order to properly evaluate compliance.³³ Robert Howse and Ruti Tietel share Kingsbury's views, and suggest that when compliance is viewed merely from the perspective of the observance of rules, it obfuscates the understanding of the normative effects of international law.³⁴ They argue that an examination of international law in general 'through the lens of rule compliance leads to inadequate scrutiny and understanding of the diverse complex purposes and projects that multiple actors impose and transpose on international legality, and especially a tendency to oversimplify if not distort the relation of international law to politics'.³⁵

Taking a different approach to the meaning of compliance, Oran Young suggests that 'compliance can be said to occur when the actual behaviour of a given subject conforms to prescribed behaviour, and non-compliance or violation occurs when actual behaviour departs significantly from prescribed behaviour'.³⁶ Young's definition of compliance constitutes a more holistic approach to evaluating compliance because the prescribed behaviour may not always take the form of a legal rule or set of rules. In the same vein, Harold Jacobson and Edith Weiss suggest that compliance takes the form of adherence to specific obligations (procedural and substantive) of a treaty, as well as adherence to the spirit of the treaty.³⁷

³¹ Benedict Kingsbury 'The concept of compliance as a function of competing conceptions in international law' (1998) 19 *Michigan Journal of International Law* 345.

³² *Ibid* 346.

³³ *Ibid* 346, 368.

³⁴ Robert Howse and Ruti Teitel (note 28) 127.

³⁵ *Ibid*.

³⁶ Oran Young *Compliance and Public Authority* (Johns Hopkins University Press, Baltimore, 1979) 172.

³⁷ Harold Jacobson and Edith Weiss 'Strengthening compliance with international environmental accords: preliminary observations from a collaborative project' (1995) 1 *Global Governance* 123–125.

Situating the above discussion in the context of economic integration in Africa, one may question whether compliance can be achieved solely by relying on a state's conformity with legal rules. Should compliance mean merely a state's adherence to legal rules or would adherence to non-judicial rules also qualify as compliance? Legal rules in this context are those rules in a treaty that create core legally binding obligations on member states, such as a rule that mandates a member state to eliminate tariff and non-tariff barriers for the purposes of creating a customs union.³⁸ A non-judicial rule, on the other hand, is a rule that creates no legally binding obligation but is necessary for the attainment of the spirit of the treaty, for example, a rule that requires member states to take the necessary steps to maintain and rehabilitate the highways within their territory.³⁹ While both rules are provided for in the treaty, the normative character of the rules is different. The former rule is an essential legal requirement for the creation of a customs union, while the latter facilitates the proper functioning of a customs union. Therefore, maintaining good highways within a customs union is as important as removing tariff and non-tariff barriers. If a state adheres to the legal rule of removing tariff and non-tariff barriers but has deplorable roads its compliance should be called into question. Since compliance is a function of conformity with prescribed behaviour, it should invariably follow that rules other than legal rules may prescribe the acceptable behaviour.

Apart from definitional issues, the broad areas covered by economic integration in Africa obfuscate our ability to determine acceptable levels of compliance or gauge the extent to which states comply. Although it is not the focus of this thesis to measure the extent of compliance with African integration treaties, an illustration of this point is not out of place. For example, would a member state that has integrated only its trade and agricultural sectors be deemed to have attained an acceptable level of compliance? Or would implementing only the rule on the free movement of persons suffice? Given the diverse nature of the issues for which economic integration is being sought in Africa, an evaluation of compliance solely from the perspective of adherence to specified legal rules might obscure our

³⁸ Article 4(1) (a) COMESA Treaty.

³⁹ Article 84(a) COMESA Treaty.

understanding of African integration treaties and therefore Young's definition of compliance as 'conformity of actual behaviour with the prescribed behaviour' will be adopted in this thesis.

Young's definition also allows us to draw a distinction between treaty compliance, implementation and effectiveness.⁴⁰ Compliance, although closely related to 'implementation' and 'effectiveness', is distinct from both.⁴¹ Implementation occurs when an international agreement is domesticated through the passage of the requisite national legislation to create domestic rules and possibly enforcement mechanisms.⁴² While implementation may be a necessary step towards achieving compliance with the treaty, it does not in itself constitute compliance with the treaty. A state might not comply with international law even after implementing the required domestic legislation and, conversely, a state might comply with international law without implementing domestic legislation.⁴³ For example, an integration treaty that seeks to increase intra-regional trade may specify the elimination of tariff and non-tariff barriers within a regional bloc in order to boost intra-regional trade. In furtherance of this obligation, member states may pass domestic rules that prohibit the imposition of tariff and non-tariff barriers on goods originating from the region. However, the state may fail to observe the domestic laws it has passed. In this scenario, while the state has implemented the required legislation, it is not complying with the integration treaty. On the other hand, a state might refrain from imposing tariff and non-tariff barriers without passing domestic legislation to that effect.

Effectiveness goes beyond whether the state has complied with or implemented the treaty. It is directed at determining whether the norms of the treaty achieve the policy objective of the treaty.⁴⁴ A treaty may be complied

⁴⁰ Beth Simmons 'Compliance with international agreements' (1998) 1 *Annual Review of Political Science* 77.

⁴¹ See David Victor et al 'Introduction and overview' in David Victor, Kal Raustiala and Eugene Skolnikoff (eds) *The Implementation and Effectiveness of International Environmental Agreements* (MIT Press, Cambridge, 1998) 1-46.

⁴² Kal Raustiala and Anne-Marie Slaughter (note 29) 539; Beth Simmons (note 40) 77; Harold Jacobson and Edith Weiss (note 37) 123.

⁴³ Jose Alvarez 'Why nations behave' (1997-1998) 19 *Michigan Journal of International Law* 305.

⁴⁴ *Ibid.*

with but may be ineffective in meeting its stated goals.⁴⁵ Using the above example, while a state might implement and comply with the obligation of not imposing tariff and non-tariff barriers, intra-regional trade might still not increase if all the countries within the region produce similar primary goods and lack the capacity to process them into secondary goods. Therefore, the treaty will be ineffective in terms of meeting its policy objective, which is an increase in intra-regional trade. This distinction between implementation, effectiveness and compliance is germane to the discussion on economic integration in Africa because it helps us understand that merely domesticating the norms of integration may not lead to compliance with economic integration treaties.

Given these complexities, any evaluation based solely on how well a particular state(s) responds to a set of legal rules may not capture the true picture of compliance with African integration norms. Therefore, we must consider all the factors in order to develop the appropriate tools for securing overall compliance with African integration treaties.

1.4 Justification for this research

Why is it necessary to embark on this research? African states have committed themselves to economic integration through the adoption of binding integration treaties that create norms regulating the process of integration. Consequently, the norms created are intended to resolve the economic and development problems that most African states encounter. However, decades after the adoption of these integration treaties, enormous challenges still persist and compliance has been minimal. If we work from the premise that African states voluntarily entered into the integration treaties with the aim of resolving their economic and development challenges, it may be safe to assume that the failure to comply with their obligations under these treaties is not always deliberate and premeditated.⁴⁶ While there may

⁴⁵ Harold Jacobson and Edith Weiss (note 37) 124.

⁴⁶ This assumption is based on the premise that states have a general propensity to comply with their treaty obligations. See Abram Chayes and Antonia Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University

be a collective will to give effect to the obligations created by the integration treaties at the regional level, there may be inherent factors which prevent states from meeting their treaty obligations. Therefore, it is important to understand how these factors impact on the ability of African states to comply with their obligations. Furthermore, given the slow pace in economic integration, it is imperative to examine the integration process without necessarily reinventing the wheel to determine how African states can effectively pool their resources to achieve economic integration within the existing framework.

1.5 Definitions

The phrases 'regional integration', 'regional cooperation', 'regionalism' and 'regionalisation' are often used interchangeably in the discourse on regional development. These phrases describe the process of harmonising policies and developing strategies aimed at accelerating regional development among states.⁴⁷ Although these phrases may be used to describe the same process, they are technically distinct from each other.⁴⁸ Ernst Haas draws a distinction between regional integration and regional cooperation. He considers the study of regional integration as involving an explanation as to why states cease to be wholly sovereign by voluntarily mingling with their neighbours so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts between themselves.⁴⁹ Haas also describes regional cooperation to mean the steps taken in order to achieve the process of regional integration.⁵⁰ Asante suggests that regional integration may be deemed to be 'the terminal or resulting condition, the end state, or outcomes or consequences of regional cooperation activities'.⁵¹ Akokpari in his explanation of regional integration suggests that it may

Press, Cambridge, 1995); Louis Henkin *How Nations Behave* 2 ed. (Columbia University Press, New York, 1979).

⁴⁷ John Akokpari (note 3) 86.

⁴⁸ *Ibid.*

⁴⁹ Ernst Haas 'The study of regional integration: reflections on the joy and anguish of pre-theorising' (1970) 24(4) *International Organisation* 610.

⁵⁰ *Ibid.*

⁵¹ Samuel Asante *Regionalism and Africa's Development: Expectations, Reality and Challenges* (Macmillan, London, 1997) 21.

involve economic, market, social, political and security processes.⁵² In other words, the voluntarily mingling of states could involve any and all of these processes. For the purpose of this thesis, regional integration in Africa is examined in the context of economic integration.⁵³ Economic integration has been defined by John Rourke to mean 'a close degree of economic intertwining that, by formal agreement or informal circumstances, the countries involved begin to surrender some degree of sovereignty and act as an economic unit'.⁵⁴ In distinguishing between economic integration and economic cooperation, he defines economic cooperation to mean 'a process whereby sovereign states cooperate with one another bilaterally or multilaterally through IGOs (such as the IMF) or processes (such as the G-7 meetings)'.⁵⁵

Margaret Lee defines regionalism 'as the adoption of a regional project by a formal regional economic organization designed to enhance the political, economic, social, cultural, and security integration and/or cooperation of member states'.⁵⁶ Regionalism thus seeks to transform a geographical area into an identified social space.⁵⁷ Regionalisation is defined as 'the process by which state and non-state actors seek to enhance their economic, political, cultural, social, and security interaction with societal forces within a region through formal or informal structures'.⁵⁸ The distinction between regionalism and regionalisation lies in the fact that regionalism refers to a cognitive and state-centric aspect of the latter.⁵⁹ Regionalisation on the other hand, could be driven by non-state actors and thus not necessarily be a function of regionalism. The non-state actors that drive the

⁵² John Akokpari (note 3) 85, 86, 87.

⁵³ It is important to note that although the focus of the thesis is economic integration, economic integration in Africa also involves elements of market and social integration. See section 1.6.

⁵⁴ John Rourke *International Politics on the World Stage* (Dushkin Publishing Group/Brown & Benchmark Publishers, Guildford, Connecticut, 1995) 569.

⁵⁵ *Ibid.*

⁵⁶ Margaret Lee *The Political Economy of Regionalism in Southern Africa* (University of Cape Town Press, Cape Town, 2003) 8.

⁵⁷ Daniel Bach 'New regionalism as an alias: regionalization through trans-state networks' in Andrew Grant and Fredrik Soderbaum (eds) *The New Regionalism in Africa* (Ashgate Publishing, Aldershot, 2003) 22.

⁵⁸ Margaret Lee (note 56) 8.

⁵⁹ Daniel Bach (note 57) 22.

regionalisation include informal traders who are not necessarily driven by regionalist impulses.⁶⁰

1.6 Contextualising economic integration in Africa

Using regional economic integration to promote and consolidate economic and social development in Africa has been an integral part of the aspirations of African leaders.⁶¹ The initiative by African leaders to integrate the continent started in the early years of independence of African states.⁶² African leaders were of the opinion that concerted efforts were needed to improve the living conditions of the African people and to reduce the effects of Africa's balkanisation.⁶³ The adoption of regional economic integration was also necessitated by the fact that Africa needed to be globally competitive and therefore it was important to pool resources to become a formidable force in the international polity.⁶⁴ In this regard, economic integration was and is still viewed as mechanism for creating a stronger bargaining base in the global arena.⁶⁵ Furthermore, economic integration is seen as imperative if Africa is to become economically self-sustaining and consequently sever its ties of dependency that were a result of Africa's colonial history.⁶⁶ In

⁶⁰ John Akokpari (note 3) 87-88.

⁶¹ Teshome Mulat 'Multilateralism and Africa's Regional Economic Communities' (1998) 32(4) *Journal of World Trade* 115. See also United Nations Conference on Trade and Development (UNCTAD) *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development* (United Nations, Geneva, 2009) 1; United Nations Economic Commission for Africa (UNECA) *Assessing Regional Integration in Africa* (Economic Commission for Africa, Addis Ababa, 2004) 27.

⁶² UNECA *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (Economic Commission for Africa, Addis Ababa, 2010) 7. It is important to note that although regional economic integration on a continental scale traces its origin to the early days of independence, some integration efforts within various sub-regions in Africa are older in origin. Some early examples of attempts to integrate the economies of different sub-regions in Africa include the Southern African Customs Union (1910), the Southern Rhodesia Customs Union (1949), the Ghana-Upper Volta Trade Agreement (1962), and the Equatorial Customs Union (1962): UNECA *Assessing Regional Integration in Africa* (Economic Commission for Africa, Addis Ababa, 2004) 27.

⁶³ Rene N'Guettia Kouassi 'The itinerary of the African integration process: an overview of the historical landmarks' (2007) 1(2) *African Integration Review* 1.

⁶⁴ Peter Schraeder *African Politics and Society* (Bedford/St Martins, Boston, 2000) 307-308.

⁶⁵ Mothae Maruping 'Challenges for regional integration in sub-Saharan Africa: macroeconomic convergence and monetary coordination' in Jan Teunissen et al (eds) *Africa in the World Economy—The National Regional and International Challenges* (Fondad, Hague, 2005) 130.

⁶⁶ SKB Asante and David Chanaiwa 'Pan-Africanism and regional integration' in A Mazuri (ed) *General History of Africa: Africa since 1935* vol. 8 (UNESCO, Paris, 1993) 724-743; P Schraeder *African Politics and Society* (note 64) 307-308.

emphasising the need to adopt regional economic integration, Kofi Annan stated that:

The [African] continent continues to face numerous daunting developmental challenges. Economic growth is still far below what is needed to meet the millennium development goal of reducing poverty by half by the year 2015. Adult literacy for the majority of sub-Saharan Africa stands well below the developing-country average. And the rising incidence of AIDS is dramatically reducing life expectancy. Effective regional integration has a major role to play in helping African countries address these and other common concerns.⁶⁷

Regional economic integration treaties were therefore adopted to create a legal framework for cooperation between African states.⁶⁸

Regional integration is not a new concept in modern political and economic discourse and it is also not unique to Africa. Six countries in Europe set the precedent for modern regional economic integration with the formation of the European Coal and Steel Community (ECSC) in the 1950s.⁶⁹ The ECSC subsequently developed into the EU and now has 27 member states.⁷⁰ Over the years, there has been a global increase in the

⁶⁷ Kofi Annan *Message to the 9th Summit of the COMESA Authority* Kampala, Uganda, 8 June 2004, available at <http://www.un.org/News/Press/docs/2004/sgsm9353.doc.htm> [accessed 15 March 2010].

⁶⁸ Article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969 defines a treaty as 'an international agreement concluded between states in written form and governed international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. The territorial coverage of a treaty may be universal or limited to a particular region. See A Aust *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge, 2000) 15. Abram and Antonia Chayes note that treaties are no longer used solely for the purpose of recording political settlements and agreements. Rather they are now used as a means of addressing complex economic, political and social problems that require cooperative action between states. See Abram Chayes and Antonia Handler Chayes (note 46)) 1.

⁶⁹ The countries are France, Belgium, Germany, Italy, Netherlands and Luxembourg: *Treaty Establishing the European Coal and Steel Community* 18 April 1951, 261 UNTS 140. See Finn Laursen 'Theory and practice of regional integration' (2008) 8(3) *Jean Monnet/Robert Schuman Paper Series* 3.

⁷⁰ See generally, European Union *The History of the European Union*, available at http://europa.eu/about-eu/eu-history/index_en.htm [accessed 20 March 2010]; Erik Oddar Eriksen (ed) *Making the European Polity* (Routledge, New York, 2005); Martin Holmes *European Integration: Scope and Limits* (Palgrave, New York, 2001); Jeffery Stacey *Integrating Europe: Informal Politics and Institutional Change* (Oxford University Press, New York, 2010); Anne-Maire Burley and Walter Mattli 'Europe before the Court: a political theory

number of regional economic integration schemes, but the EU still remains the most successful and has in one way or the other influenced other regional attempts at integrating their economies.⁷¹ Africa has likewise been influenced by the EU. Some similarities do exist, although the approach to European economic integration and African economic integration is different. Two notable features of economic integration in Africa that are identical to those of EU integration are the creation of supranational institutions to oversee the integration process and the adoption of a market integration approach to economic integration. The difference in institutional approach is discussed briefly below, because the main distinguishing features were raised in section 1.1. The market integration comparison is discussed in detail.

With regard to supranational institutions,⁷² an attractive aspect of economic integration in the EU is the manner in which member states, which were deemed absolutely sovereign, came to share part of their sovereign attributes with EU institutions that operate outside the realm of authority of member states.⁷³ In this regard, the European Court of Justice, the European

of legal integration' (1993) 47(1) *International Organization* 41–76; Neil Fligstein and Alec Stone Sweet 'Institutionalizing the Treaty of Rome' in Alec Stone Sweet et al (eds) *The Institutionalization of Europe* (Oxford University Press, New York, 2001) 29–55; Andrew Moravcsik 'Negotiating the Single European Act: national interest and conventional statecraft in the European Community' (1991) 45(1) *International Organization* 19–56; *Treaty Establishing the European Economic Community* 25 March 1957, 298 UNTS 3; *Treaty Establishing the European Atomic Energy Community* 25 March 1957, 298 UNTS 167; *Treaty on European Union* 7 February 1992, 31 ILM 253; *Treaty of Amsterdam* 2 October 1997, 37 ILM 56.

⁷¹ Walter Mattli *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press, United Kingdom, 1999) 1. Other regions where economic integration has been undertaken include North America (NAFTA), the Caribbean (CARICOM) and Southeast Asia (ASEAN).

⁷² See section 1.1.

⁷³ Philippe Schmitter 'A revised theory of regional integration' (1970) 24(4) *International Organisation* 836. Different theories have emerged as to how and why economic integration in Europe has been successful. Over time, two schools of thought have become prominent: the neo-functionalism and the intergovernmentalism. The neo-functionalism school suggests that there are two sets of actors that operate at a level below and above the state. The actors that are below the level of the state include interest groups and political parties. The integrative process is created to protect the interests of these groups. The other actors, who operate at a level above the state, are the regional institutions that possess supranational authority. These supranational institutions promote integration by advancing the development of various interest groups within the state. These supranational institutions are independent and have the power to resolve disputes and make rules that define the regional polity. Neo-functionalists also posit that the creation of these supranational institutions results in a change of the expectations and behaviour of actors, who in turn divert part of their resources and policy efforts to the supranational level. At the middle of this interaction

Commission and the European Parliament have wielded enormous influence in the EU.⁷⁴ As stated earlier,⁷⁵ in Africa, member states have not necessarily

between actors lies the government in which political powers inhere. Neo-functionalism suggests that the government may either accept or reject the decisions of the supranational authority but a rejection might be unprofitable to the government if it sets a precedent for other governments. See generally Ernst Haas *The Uniting of Europe* (Stanford University Press, Stanford, 1958); Ernst Haas 'International integration: the European and the universal process' (1961) 15(3) *International Organization* 366–392; Ernst Haas 'The study of regional integration: reflections on the joy and anguish of pre-theorising' (note 49) 607–646; Philippe Schmitter 'A revised theory of regional integration' (1970) 24(4) *International Organization* 836–868; Joseph Nye 'Comparative regional integration: concept and measurement' (1968) 22(4) *International Organization* 855–880; Leon Lindberg *The Political Dynamics of European Economic Integration* (Stanford University, Stanford, 1963); Walter Mattli *The Logic of Regional Integration: Europe and Beyond* (note 70) 24–28; Wayne Sandholtz and Alec Stone Sweet 'Neo-functionalism and supranational governance' (2010) *Working Paper* 8, available at http://works.bepress.com/alec_stone_sweet/38 [accessed 10 April 2011]. For criticism of the neo-functional approach, see James Caporaso 'Regional integration theory: understanding our past and anticipating our future' (1998) 5(1) *Journal of European Public Policy* 1 at 8–9; Andrew Moravcsik 'Preferences and power in the liberal European Community: a liberal intergovernmentalist approach' (1993) 31(4) *Journal of Common Market Studies* 476.

The intergovernmentalist approach, on the other hand, suggests that European integration can be explained as a series of interstate bargains between leading members of the European Community. It suggests that heads of government, supported by Ministers, initiate and negotiate major initiatives in the European Council, and each government views the European Community through its own lens of policy preferences. As such, European Community politics is a continuation of domestic politics and, even when societal interests are transnational, the primary form of their political character remains national. This theory downplays the role of supranational institutions in driving the integration process, and rather emphasises that states avoid granting an open-ended authority to central institutions that might infringe on their sovereignty. Also, in order to safeguard their countries against future erosion of sovereignty, policymakers demand the unanimous consent of members to sovereignty-related reforms. Intergovernmentalism regards member states as rational actors that control the integration process and, as such, supranational institutions do not play a very important role in the integration process because major decisions are reached by member states and not by the supranational institutions. However, Moravcsik, a leading intergovernmentalist, concedes that sometimes member states delegate substantial independent authority to institutions in order to enforce incomplete contracts. See generally Finn Laursen 'Theory and practice of regional integration' (2008) 8(3) *Jean Monnet/Robert Schuman Paper Series* 8; Andrew Moravcsik *The Choice for Europe: Social Purposes and State Power from Messina to Maastricht* (Cornell University Press, Ithaca, NY, 1998); Andrew Moravcsik 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community' (note 70) 25; Andrew Moravcsik 'Preferences and power in the European Community: a liberal intergovernmentalist approach' (1993) 31(4) *Journal of Common Market Studies* 473–524; Paul Taylor *The Limits of European Integration* (Croom Helm, Beckenham, UK, 1983); Helen Wallace et al (eds) *Policy-Making in the European Communities* (Wiley, London, 1977).

One of the grounds on which intergovernmentalism has been criticised is that it *a priori* rules out the role of supranational institutions and transnational societies in promoting regional integration. See James Caporaso 'Regional integration theory: understanding our past and anticipating our future' (1998) 5(1) *Journal of European Public Policy* 11–12.

⁷⁴ Anne-Marie Burley and Walter Mattli 'Europe before the Court: a political theory of legal integration' (note 70) 41–42; Mark Pollack 'The engines of integration? Supranational autonomy and influence in the European Union' in Wayne Sandholtz and Alec Stone Sweet (eds) *European Integration and Supranational Governance* (Oxford University Press: New York, 1998) 217–249; Rachel Cichowski 'Judicial rulemaking and the institutionalization of European Union sex equality policy' in Alec Stone Sweet et al (eds) *The Institutionalization*

relied on the 'bureaucratic strictures and international rule-making or legislative processes of formal international institutions'.⁷⁶ While formal institutions have been created, they have not been at the centre of the decision-making process. The decision-making process still ultimately lies with the heads of state and governments, and therefore decisions are made at an inter-governmental level. While some scholars might argue that this is not the best way to achieve integration, the fact remains this is the reality we have to work with, unless states decide to change this approach.

1.6.1 Market integration

Over the years, the recurring question has been why all efforts to achieve economic integration in Africa have been relatively unsuccessful. This notion of failure has partly emanated from the fact that the economic integration process in Africa is largely viewed from the perspective of liberalising trade, whereby the free flow of goods and services is ensured. In the words of Jeffery Herbst, 'Africa is indeed littered with the carcasses of failed economic unions ... It is therefore easy to conclude that regional integration has failed because international cooperation has been too difficult in Africa.'⁷⁷

This notion of failure is not completely unfounded but it is inadvertently misconstrued. If we compare Africa with the EU, the achievement of trade liberalisation has been relatively unsatisfactory.⁷⁸ However, part of the

of Europe (Oxford University Press, New York, 2001); Alec Stone Sweet and Wayne Sandholtz 'Integration, supranational governance, and the institutionalization of the European polity' in Wayne Sandholtz and Alec Stone Sweet (eds) *European Integration and Supranational Governance* (Oxford University Press, New York, 2008) 1–26; Neil Fligstein and Jason Mcnicol 'The institutional terrain of the European Union' in Wayne Sandholtz and Alec Stone Sweet (eds) *European Integration and Supranational Governance* 59.

⁷⁵ See section 1.1.

⁷⁶ Tiyanjana Maluwa 'The move from institutions: examining the phenomenon in Africa (2006) 100 *American Society of International Law Proceedings* 294.

⁷⁷ J Herbst 'Crafting regional cooperation in Africa' in A Acharya and A Johnston (eds) *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge University Press, New York, 2007) 132.

⁷⁸ From the outset the European Union set out as its primary aim the creation of a common market through the elimination of restrictions on the import and export of goods between Member States. Article 3 of the 1957 Treaty of Rome lists activities that have to be undertaken to create a common market in the European Union. The activities include the elimination of customs duties and quantitative restrictions in Member States, the establishment of a common customs tariff and of a common commercial policy towards third countries, abolishing obstacles to freedom of movement for persons, services and capital, adopting a common policy for agriculture, adopting a common policy for transport, adopting a competition policy to avoid price distortion in the common market, the application of

reason why African economic integration is regarded as unsuccessful is that economic integration treaties are referred to as Regional Trade Agreements (RTAs), and therefore there is a reasonable expectation that they should effectively serve this purpose. However, the point that is often missed by critics is that while African economic integration treaties are referred to as RTAs, they are created to do much more than that.⁷⁹ Economic integration in Africa is much broader than efforts to simply liberalise trade.⁸⁰ A survey conducted by the Economic Commission for Africa shows that other than trade liberalisation, integration in the area of transport, communications, peace and security, energy and agriculture are all high priorities among RECs.⁸¹ In reality, it is incorrect to view African integration treaties as solely RTAs, because a closer look at African integration treaties shows that the creation of trade regimes is only one of the several objectives of these treaties. Integration in Africa is broadly based and embodies social, cultural, political, and economic considerations.⁸²

For example, at its inception the OAU sought to promote unity between African states, eradicate colonialism, defend the territorial integrity of African states, and promote cooperation to achieve a better life for African people.⁸³ Trade-related issues were incorporated into the mainstream agenda of the OAU only in subsequent years, through the adoption of the Lagos Plan of Action and the Treaty Establishing the African Economic Community. With the transformation of the OAU into the AU, the approach

procedures by which the economic policies of Member States can be co-ordinated and disequilibria in their balances of payments remedied, the approximation of the laws of Member States to the extent required for the proper functioning of the common market, the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living, and the establishment of a European Investment Bank.

⁷⁹ James Gathii 'African regional trade arrangements as flexible legal regimes' (2009–2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 572–579.

⁸⁰ United Nations Development Programme *Regional Integration and Human Development: A Pathway for Africa* (UNDP, New York, 2011) 3.

⁸¹ UNECA *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* (Economic Commission for Africa, Addis Ababa, 2006) 77.

⁸² SKB Asante *The Political Economy of Regionalism in Africa* (Praeger Publishers, New York, 1986) 8.

⁸³ Article II OAU Charter. The OAU focused on ensuring peace and security and intervened in numerous post-independence conflicts in the continent. It also played a pivotal role in the liberation struggle in southern Africa. See Colin Legum 'The Organisation of African Unity—success or failure?' (1975) 51(2) *International Affairs* 208–219; Festus Aboagye 'Towards new peacekeeping partnerships in Africa' (2001) 10(2) *African Security Review* 19–33.

towards integration remained multi-faceted, bearing in mind that peace, security, good governance and the protection of human rights are all essential aspects of economic integration. The objectives of the Constitutive Act of the AU include the promotion of political and socio-economic integration, peace, security and stability, democratic principles, good governance and popular participation.⁸⁴

The treaties establishing the various RECs also reflect the broad nature of African integration. For instance, the Treaty establishing the East African Community (EAC Treaty) specifically identifies its objectives as developing policies and programmes aimed at 'deepening co-operation among the [p]artner [s]tates in political, economic, social and cultural fields, research and technology, defence, security, and legal and judicial affairs, for their mutual benefits'.⁸⁵ Article 5 of the Treaty of the Southern African Development Community (SADC Treaty), as amended, includes in its objectives the promotion of sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhancing the standard and quality of life of the people of southern Africa and supporting the socially disadvantaged

⁸⁴ Article 3 Constitutive Act. The AU has put in place mechanisms such as NEPAD and the APRM to ensure that issues such as good governance, the protection of human rights, and economic governance are all given adequate attention and entrenched into the legal systems of African states. See chapter 4.

⁸⁵ Article 5 Treaty for the Establishment of the East African Community, 30 November 1999, 2144 UNTS 255. Regional integration in East Africa dates back to the colonial era with the formation of the Kenya Uganda Railway between 1897–1901, the Customs Collection Centre 1900, the East African Currency Board 1905, the Postal Union 1905, the Court of Appeal for Eastern Africa 1909, the Customs Union 1919, the East African Governors' Conference 1926, the East African Income Tax Board 1940, the Joint Economic Council 1940, the East Africa (High Commission) Orders in Council 1947-1961 and the Treaty for East African Co-operation 1967. With the dissolution of the Treaty for East African Co-operation in 1977, the East African Community officially came to an end until its resurrection in 1999. See the Preamble to the Treaty for the Establishment of the East African Community, as amended on 14 December 2006 and 20 August 2007. See also East African Community *Experts Report on the East African Political Federation: Addressing East Africa's Fears, Concerns and Challenges and Consolidating its Pillars* (EAC, Arusha, August 2010) 6; African Union *Status of Integration in Africa (SIA)* 2 ed (African Union, Addis Ababa, 2009) 96–97; Evarist Mugisa et al *An Evaluation of the Implementation and Impact of the East African Community Customs Union* Final Report (EAC, Tanzania, March 2009); Korwa Adar and Mutahi Ngunyi 'The politics of integration in East Africa since independence' in Walter Oyugi (ed) *Politics and Administration in East Africa* (Konrad Adenauer Foundation, Nairobi, 1992) 395–442; Ingrid Diomi Delupis *The East African Community and Common Market* (Longman, London, 1970); Joseph Nye *Pan-Africanism and East African Integration* (Harvard University Press, Massachusetts, 1965); Christian Potholm and Richard Fredland *Integration and Disintegration in East Africa* (University of America Press, Lanham, 1980).

through regional integration. The objectives also include promoting common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective. The objectives of almost all the RECs are couched in similar fashion.⁸⁶ Even ECOWAS, which expressly states its objective to be the creation of an economic union, has achieved its greatest success in the area of peace and security through the ECOWAS Ceasefire Monitoring Group (ECOMOG).⁸⁷

In standard neo-classical economic theory, economic integration or regional trade regimes proceed through a process of the removal of trade barriers, the liberalisation of the free movement of persons and the factors of production (such as labour and human capital), the harmonisation of the national policies of members of the integrating unit, and the complete

⁸⁶ Article 3 of the Treaty establishing the Common Market for Eastern and Southern Africa lists as its objectives the attainment of sustainable growth and development through the harmonious development of production and marketing structures, the promotion of peace and security to enhance economic development among member states, and contributing towards the establishment and realisation of the objectives of the African Economic Community. Article 4 of the Treaty Establishing the Economic Community of Central African States lists its objectives as including the promotion and strengthening of 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, monetary and financial matters, human resources, tourism, education, further training, culture, science and technology and the movement of persons, in order to achieve collective self-reliance, raise the standard of living of its peoples, increase and maintain economic stability, foster close and peaceful relations between member states and contribute to the progress and development of the African continent. Article 7 of the Agreement Establishing the Inter-Governmental Authority on Development lists as its objectives the promotion of joint development strategies and gradually harmonising macro-economic policies and programmes in the social, technological and scientific fields, harmonising policies with regard to trade, customs, transport, communications, agriculture, and natural resources, and promoting the free movement of goods, services, and people and the establishment of residence, creating an enabling environment for foreign, cross-border and domestic trade and investment, achieving regional food security, and encouraging and assisting the efforts of member states to collectively combat drought and other natural and man-made disasters and their consequences.

⁸⁷ Article 3 of the Treaty Establishing the Economic Community of West African States 1993, 35 ILM 660. See generally Jeremy Levitt 'Humanitarian intervention by regional actors in internal conflicts: the cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal* 333–376, Jeremy Levitt 'Pro-democratic intervention in Africa' (2006) 24 *Wisconsin International Law Journal* 785–834; Ademola Abass 'The implementation of ECOWAS' New Protocol and Security Council Resolution 1270: new developments in regional intervention' (2002) 10 *University of Miami International and Comparative Law Review* 177–216; Suyash Paliwal 'The primacy of regional organizations in international peacekeeping: the African example' (2010) 51/1 *Virginia Journal of International Law* 185, 206–214, Ademola Abass 'The new collective security mechanism of ECOWAS: innovations and problems' (2000) 5(2) *Journal of Conflict and Security Law* 211–229.

integration of the above processes.⁸⁸ This standard progression is based on Jacob Viner and Bella Balassa's idea of economic integration.⁸⁹ Market integration as a feature of economic integration was given prominence by Jacob Viner in his seminal work, *The Customs Union Issue*. He posited that markets within a region could be integrated through the creation of a customs union. In creating a customs union, members of the customs union eliminate trade barriers between each other and also adopt common external tariffs for imports from non-member states.⁹⁰ Viner indicated that the beneficial nature of a customs union is dependent on whether it creates trade or diverts trade. Trade creation occurs when real resources are saved by shifting production in the direction of comparative advantage, thereby giving consumers the benefit of lower prices. On the other hand, trade is diverted when there is a shift from a low-cost external producer to a high-cost regional producer.⁹¹ Therefore, economic integration is more beneficial and welfare-producing when trade is created rather than diverted.⁹²

Balassa expanded on Viner's theory by regarding economic integration as a whole to be a process and a state of affairs.⁹³ Balassa suggests that economic integration, as a process, 'encompasses measures designed to abolish discrimination between economic units belonging to different national states; viewed as a state of affairs, it can be represented by the absence of various forms of discrimination between national economies'.⁹⁴ According to Balassa, economic integration can take several

⁸⁸ Guy Martin 'Regional integration in West Africa: the role of the Economic Community of West African States (ECOWAS)' in E Hansen (ed) *Africa: Perspectives on Peace and Development* (Zed Books, London 1987) 172.

⁸⁹ Jacob Viner *The Customs Union Issue* (Carnegie Endowment for International Peace, New York, 1950); Bela Balassa *The Theory of Economic Integration* (RD Irwin, Homewood, Illinois 1961).

⁹⁰ Jacob Viner *The Customs Union Issue* (note 89) 8.

⁹¹ For a more detailed explanation of trade creation and trade diversion, see Dennis Appleyard et al *International Economics* 5 ed (McGraw-Hill/Irwin, New York, 2006) 375–382; Bela Balassa 'Trade creation and trade diversion in the European Common Market' (1967) 77(305) *The Economic Journal* 1–21.

⁹² Henry Mutai *Compliance with International Trade Obligations: The Common Market for Eastern and Southern Africa* (Kluwer Law International, Netherlands, 2007) 36; Margaret Lee *The Political Economy of Regionalism in Southern Africa* (University of Cape Town Press, Cape Town, 2003) 20.

⁹³ Bela Balassa (note 89) 1.

⁹⁴ *Ibid.* In describing economic integration, Balassa is quick to draw a distinction between 'integration' and 'cooperation'. He indicates that 'whereas cooperation includes actions aimed at lessening discrimination, the process of economic integration comprises measures

forms, each signifying varying levels of integration.⁹⁵ These varying levels of integration manifest in the form of free trade areas, a customs union, a common market, an economic union, and complete economic integration.

In a free trade area (FTA), countries within the economic unit eliminate tariffs and non-tariff barriers but retain different tariffs against non-members of the economic unit. In a customs union (CU), member states of the economic unit eliminate tariffs between each other and maintain a common external tariff with non-member states. In a common market (CM), tariffs are eliminated, a common external tariff is maintained, and restrictions on the movement of the factors of production are abolished. In an economic union, restrictions on commodities and factors of production are eliminated, and members of the economic unit harmonise national economic policies, in order to remove discrimination that was the result of disparities in these policies. Finally, Balassa points out that total economic integration presupposes the unification of monetary, fiscal, and social policies, and requires the establishing of a supranational authority whose decisions are binding on the member states.⁹⁶

Market integration as a feature of economic integration has been justified on the grounds that the creation of trade blocs causes an allocation and accumulation effect within the trade bloc.⁹⁷ The allocation effect is the result of the fact that, in a competitive economy, the demand for goods directs resources to the production of such goods. Conversely, the removal of tariff and non-tariff barriers between competitive economies is thought to increase efficiency in resource allocation between these competitive economies.⁹⁸ The accumulation effect suggests that, when regional markets

that entail the suppression of some forms of discrimination': Bela Balassa *The Theory of Economic Integration* (note 89) 2.

⁹⁵ Margaret Lee (note 56) 19.

⁹⁶ Bela Balassa (note 89) 2; Steven Radelet *Regional Integration and Cooperation in Sub-Saharan Africa: Are Formal Trade Arrangements the Right Strategy?* Development discussion paper No 592 (July 1997) 5, available on <http://www.cid.harvard.edu/hiid/592.pdf> [accessed 19 April 2009].

⁹⁷ Richard Baldwin 'Review of theoretical developments on regional integration' in Ademola Oyejide et al (eds) *Regional Integration and Trade Liberalisation in sub-Saharan Africa* vol 1 (St Martin Press, New York, 1997) 24–88.

⁹⁸ A subset of the allocation effect is the 'scale and variety effects'. The scale effect suggests that through resource allocation in a trade bloc, the protection of inefficient industries is reduced, thereby allowing room for efficient industries. This lowers the average cost of

are expanded, firms are given the opportunity to specialise and this reduces average production costs.⁹⁹

The benefits of market integration can be summarised as follows: (1) it increases production arising from specialisation according to comparative advantage, (2) it increases output arising from the better exploitation of scale economies, (3) it improves the terms of trade of the integrating unit with the rest of the world, and (4) it forces changes in efficiency arising from increased competition within the group.¹⁰⁰ To achieve the benefits of market integration, certain conditions are presumed to exist within the economic unit: (1) the existence of perfect competition in transport markets, (2) the free flow of capital and labour inside but not between countries, (3) lower transport costs, (4) tariffs as the only trade restrictions and balanced trade between countries, and (5) prices reflecting the opportunity costs of production and the existence of resources such as labour.¹⁰¹

Market integration has been adopted in Africa both at the sub-regional level (by RECs) and at the continental level (by the AEC). Some RECs like COMESA, ECOWAS and the EAC have adopted market integration as an integral part of their economic integration process.¹⁰² At the level of the AU, the Abuja Treaty also adopts a similar approach.¹⁰³ Scholars like Colin McCarthy have questioned the rationale behind African states adopting market integration on the grounds that African states do not possess the essential favourable conditions for trade creation and therefore economic

production and reduces consumer prices. The variety effect suggests that exposing a country's economy to a wider market gives the consumer the opportunity to access a variety of goods, which helps to increase welfare. It also enables firms to choose from a wider range of factors of production and this enables an increase in productivity. See UNCTAD *Economic Development in Africa Report 2009* (note 61) 5.

⁹⁹ Ibid.

¹⁰⁰ Margaret Lee 'Regionalism in Africa: a part of problem or a part of solution' (2009) 9 *Polis/R.C.S.P/C.P.S.R* 3.

¹⁰¹ Jens Haarlow *Regional Cooperation and Integration within Industry and Trade in Southern Africa: General Approaches, SADC and the World Bank* (Averbury, Aldershot 1997) 16.

¹⁰² See chapters XIII and IX Revised ECOWAS Treaty 1993, chapters six and seven COMESA Treaty 1994 and chapter eleven EAC Treaty 2007, as amended.

¹⁰³ Article 6 Abuja Treaty 1991. A six-stage approach to economic integration is adopted by the Abuja Treaty. The stages range from the creation of free trade areas to the adoption of an African economic and monetary union.

integration may not affect their pattern of trade.¹⁰⁴ Lee has also suggested that market integration has failed in Africa because the basic conditions which are presumed to exist in order to achieve market integration do not exist in Africa.¹⁰⁵

While the adoption of market integration by African states has been criticised, a thorough evaluation of the entire economic integration process in Africa reveals that, to some extent, the objectives of the RECs and the AU go beyond integrating the market economies of African states. The constituent treaties of the RECs and the AU indicate broad objectives that include creating infrastructure, promoting peace and security, enabling research in science and technology, agriculture, cultural development, and promoting political and social development.¹⁰⁶ Therefore, although the market-oriented approach has been the focus, efforts have been made to integrate other sectors. Economic integration in Africa thus promotes market integration and other sectors which are necessary for the overall well-being of the continent. The broad nature of economic integration in Africa distinguishes it from other integration initiatives across the world. In this regard, President Olusegun Obasanjo, presenting his keynote address at the National Seminar on the African Union, stated that:

Regional economic cooperation and integration can also make it possible for us to collectively build integrative infrastructures in transport, communications and energy which would otherwise be too costly for individual, small and fragmented African countries to undertake. Above all, in the ruthlessly competitive world of globalisation and liberalisation, cooperation and integration offers us the

¹⁰⁴ Colin McCarthy 'Regional integration in developing countries at different levels of economic development-problems and prospects' (1994) 4 *Transnational Law and Contemporary Problems* 1.

¹⁰⁵ Margaret Lee 'Regionalism in Africa: a part of problem or a part of solution' (2009) 9 *Polis/R.C.S.P/C.P.S.R* 4.

¹⁰⁶ Article 3 ECOWAS Treaty, article 3 AMU Treaty, article 3 COMESA Treaty, article 4 ECCAS Treaty, article 5 EAC Treaty, article 5 SADC Treaty, article 7 IGAD Agreement and article 4 Abuja Treaty.

only chance to be relevant and speak with one voice in international negotiations.¹⁰⁷

The above position basically summarises the objectives of the constituent treaties for economic integration and shows that market integration is just one aspect of economic integration in Africa. The objectives of the economic integration treaties are usually framed in a broad manner that permits a broader approach to economic integration. For example, article 4 of the Abuja Treaty lists as part of its objectives the promotion of:

economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development ... [t]o promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and the economic integration of the Continent.¹⁰⁸

A more apt description of economic integration in Africa would be one which depicts the integration process as development-oriented. In this regard, development integration should be seen as an integral aspect of economic integration in Africa. Development integration was developed as a response to the challenges associated with applying pure market integration in developing countries.¹⁰⁹ It works on the premise that integration encompasses economic and social development.¹¹⁰ Jens Haarlow suggests that development integration:

¹⁰⁷ Olusegun Obasanjo *Keynote Address at the National Seminar on the African Union, Organised by the Ministry of Cooperation and Integration in Africa Abuja, Nigeria, 14–15 May 2004.*

¹⁰⁸ Article 4 of the Abuja Treaty can be contrasted with the article of the Treaty of Rome which highlights its market-oriented approach to economic integration.

¹⁰⁹ Henry Mutai (note 92) 37; T Ostergaard 'Classical models of integration—what relevance for southern Africa?' in B Oden (ed) *Southern Africa after Apartheid: Regional Integration and External Resources* (Scandinavian Institute of African Studies, Uppsala, 1993) 34.

¹¹⁰ Margaret Lee (note 56) 4.

[i]s born out of the problems and dysfunction of the pure market integration approach, ... the market approach's static character, its sole focus on how trade creation and trade diversion will influence welfare, and its tendency to widen economic differences between lesser and more developed areas, when market forces are left to function on their own. The development integration approach's answer to this is to change the agenda in three areas: 1. the objective of the integration process; 2. the timing and level of interstate binding commitments; and 3. the distribution of cost and benefits of cooperation.¹¹¹

In addressing the weakness of market integration, development integration focuses on boosting the productive capacity of states in addition to the removal of tariff and non-tariff barriers.¹¹² Unlike market integration, which is largely driven by market forces, development integration requires the intervention of regional partners, and this promotes cooperation and interdependence.¹¹³

In a bid to equitably distribute the benefits of regional integration between regional partners, development integration implements redistributive measures that are of a compensatory and corrective nature. The compensatory measures could include financial and tax transfer mechanisms, while corrective measures could include reducing tariffs at a slower pace, planned regional industrial development, priority loans, and common fiscal incentives to invest.¹¹⁴ At a sub-regional level in Africa, the Southern African Development Community (SADC), the Southern African Customs Union (SACU) and the West African Economic and Monetary Union (WAEMU) have adopted some form of development integration. In addition to liberalising their markets, these sub-regional groups have tried to boost

¹¹¹ Jens Haarlow (note 101) 30.

¹¹² Stephen Karingi et al 'Implications of the COMESA Free Trade Area and proposed Customs Union: empirical evidence from five member countries using GTAP model and database' (2002) *Regional Integration Research Network Papers* 40; Tom Østergaard (note 109) 33–34.

¹¹³ Tom Østergaard (note 109) 34.

¹¹⁴ Margaret Lee (note 56) 24.

their production capacities by cooperating in a number of areas. At the regional level, the AU has, in addition to the Abuja Treaty, adopted the New Partnership for Africa's Development (NEPAD) document.¹¹⁵ However, as good as the development model of integration sounds, scholars have suggested that development integration is a difficult model to implement. The difficulty arises from the fact that a greater amount of commitment is needed from regional partners in order to implement the socio-economic policies required to boost productive capacities in member states.¹¹⁶ In other words, more commitment and positive effort is required from states in order to fully implement development integration.

To put this varied approach to economic integration into proper perspective, examples from the AU and SADC are illustrative. In the AU, in addition to the Abuja Treaty, which sets out the framework for market integration, member states have also adopted the New Partnership for Africa's Development (NEPAD) Policy Document. The NEPAD document seeks to address issues that hamper Africa's production and development capacity and at the same time inhibit Africa's access to global markets.¹¹⁷ NEPAD enunciates in general terms the principles of governance and state-building and also identifies structural economic issues for which it prescribes specific curative measures.¹¹⁸ In SADC, member states have adopted a Regional Indicative Strategic Development Plan (RISDP). The RISDP maps out strategies for attaining development in the SADC region through strategic intervention in areas such as human and social development, infrastructure,

¹¹⁵ See NEPAD Policy Document 2001, available at <http://www.dfa.gov.za/au.nepad/nepad.pdf> [accessed 10 February 2011]. Scholars like Akokpari argue that the NEPAD document puts capital and international markets at the centre of economic redevelopment. Though this position is to some extent valid, a careful reading of the NEPAD document shows that African states first commit to improving the socio-economic conditions which are necessary for development. African leaders argue that, if these socio-economic conditions are improved, Africa will be well placed to benefit from international capital. So what still lies at the heart for the quest to integration and development is the commitment by African leaders to ensure basic socio-economic conditions are met in order to enhance market access. See John Akokpari 'Dilemmas of regional integration and development in Africa' (note 3) 93–95.

¹¹⁶ Jens Haarlow (note 101) 35.

¹¹⁷ See chapter 4 for a discussion of NEPAD.

¹¹⁸ Maxwell Chibundu 'NEPAD and the rebirth of development theory and praxis' in Jeremy Levitt (ed) *Africa: Mapping New Boundaries in International Law* (Hart Publishing, Oregon, 2008) 261.

gender equality and science.¹¹⁹ The direct application of neo-classical economic integration theory to African integration has been challenged by Guy Martin on the basis that the theory assumes that in each national economy there is full employment, perfect competition, and perfect internal mobility of the factors of production.¹²⁰ These assumptions are not always true of African economies and therefore adopting a neo-classical economic integration approach without any variations may be counter-productive. In line with this argument, Bingu Mutharika has suggested that it is 'unrealistic to apply the term economic integration in the same sense as used in the developed countries'.¹²¹

The structure and pattern of economic integration in Africa has been designed in such a way that it reflects the peculiarities of the African continent and also accounts for the absence of the basic assumptions of the neo-classical theory. The justification for adopting a development and broad-based approach to integration lies in the fact that the basic conditions, such as the existence of perfect competition in transport markets, which are necessary in order to maximise the benefits of a market-oriented approach do not necessarily exist in Africa. Therefore, it is important to adopt a model which enhances the creation of these structures.¹²²

In explaining the versatile nature of African integration, James Gathii describes African RTAs 'as forums of integrated development and functionally specific projects'.¹²³ This description aptly and concisely depicts the true nature of African integration treaties. Thus African integration treaties tend to address several core issues, such as infrastructural

¹¹⁹ See Southern Africa Development Community (SADC) *Regional Indicative Strategic Development Plan 55–73*.

¹²⁰ Guy Martin 'Regional integration in West Africa: the role of the Economic Community of West African States (ECOWAS)' in E Hansen (ed) *Africa: Perspectives on Peace and Development* (Zed Books, London 1987) at 172.

¹²¹ B Mutharika *Towards Multinational Economic Cooperation in Africa* (Praeger Publishers, New York, 1972) 15.

¹²² Other conditions which need to exist in order to maximise the benefit of market integration include the free flow of capital and labour inside but not between countries, lower transport costs, tariffs as the only trade restrictions and balanced trade between countries, prices reflecting the opportunity costs of production and the existence of resources such as labour. See Margaret Lee (note 56) 1 at 4; Jens Haarlow (note 101) 16; Guy Martin (note 88) 172.

¹²³ J Gathii *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press, New York 2011) 19–24.

development, peace and security, good governance and human rights, the presence of which is essential to the creation of effective trade regimes. In West Africa, the creation of the ECOWAS Bank for Investment and Development (EBID) is another example of how RECs facilitate infrastructural development. EBID supports private and public sector development.¹²⁴ As at December 2010, EBID had, since its commencement in 2004, financed 107 projects in 14 West African states.¹²⁵ Sixty-six per cent of these projects were in the infrastructure sub-sector and they were implemented in rural communities.¹²⁶ The significance of the work of EBID is that it helps to foster some of the basic conditions necessary for achieving economic integration.

Economic integration in Africa may therefore be viewed as a means of coordinating and integrating markets and other non-market related sectors which are necessary for the overall well-being of the continent. This broad nature of economic integration in Africa distinguishes it from other integration initiatives across the world.

1.7 Organisation of thesis

This thesis consists of six chapters. Chapter 1 highlights the problems with economic integration in Africa. It states that the low level of compliance with the objectives of the integration treaties is the bane of economic integration in Africa. The chapter poses the research question which the thesis seeks to answer. An analysis of the meaning of compliance is also carried out. Finally, the chapter sets out the context in which African economic integration is presently occurring, noting that, while economic integration in Africa is to some extent similar to economic integration in the EU, the context in which it

¹²⁴ ECOWAS Bank for Investment and Development (EBID) *EBID in Brief 3*, available at http://www.ecowas.int/spot/en/china/ebid_in_brief.pdf [accessed 27 May 2012].

¹²⁵ James Gbeho 'Driving a People-centred Regional Integration' *Press Conference to Mark the 36th Anniversary of the Founding of ECOWAS 27 May 2007* (ECOWAS Commission, Abuja) 8.

¹²⁶ *Ibid.* Some of the projects that have been partly funded by the EBID are the Daoukro and Ouéllé-Ettrokro Local Agricultural Development Project (Cote d'Ivoire); the Akatsi-Aflao Road Project (Ghana); the Dakar Port Expansion Project (Senegal); the Benin Electricity Community / Transmission Company of Nigeria, and Electric Power Interconnection Project (Togo, Benin, Nigeria). See EBID *EBID Audit Report 2004–2009*, EBID *The Project Portfolio of EBID as at 31/12/2010*.

operates and its structure are significantly different. This difference in context and structure changes the dynamics of economic integration in Africa. Therefore, a direct comparison with the EU when seeking ways to resolve issues of compliance might not be completely beneficial.

Chapter 2 draws on the works of international law scholars to set a theoretical framework within which compliance with African integration treaties is examined in the thesis. The chapter works from the premise that, since economic integration in Africa is regulated by treaties, it is possible to find ways of improving the compliance rate of African states by examining methods for compliance which have been used in public international law. While drawing on several theories of compliance in international law, the chapter largely relies on the managerial approach to securing compliance with treaty obligations.¹²⁷ In this regard, it focuses on factors that influence compliance and non-compliance. It posits that three main factors, namely, ambiguity in the texts of economic integration treaties, a lack of technical and institutional capacity on the part of African states, and the timelines laid down for achieving integration all impact negatively on the rate of compliance with treaty obligations.

In resolving the factors that affect compliance, the chapter 2 suggests that, rather than relying solely on the use of enforcement mechanisms through supranational institutions, it is also important to advocate for methods that enable African states to entrench the norms of integration into their national legal systems. The chapter suggests that, through an iterative process of increased transparency and information sharing between African states, it is possible to achieve compliance. Furthermore, the participation of state and non-state actors is vital to the process of imbuing the norms of integration at the regional and national level. The discussion in chapter 2 lays down the theoretical foundation of the entire thesis.

In chapter 3, the role of the African Union (AU) in coordinating and facilitating economic integration in Africa is discussed. The chapter begins with the history of the process of integration in Africa to depict the efforts that

¹²⁷ Abram Chayes and Antonia Handler Chayes (note 46).

have been made by African states to achieve economic integration. Chapter 3 also draws on the managerial approach examining the role of the AU institutions in securing compliance with the integration treaties. The chapter argues that compliance could be increased if the AU institutions resolved the existing ambiguities in the relationship between the AU, the African Economic Community (AEC) and the Regional Economic Communities (RECs). Resolving these ambiguities is necessary to clearly identify the role of each of these institutions in the process of integration. It would also enable the institutions set out their areas of competence in order to avoid conflicting objectives and obligations. Finally, the chapter suggests that if all these issues are resolved, the institutions of the AU will be better placed to monitor compliance with integration objectives.

Chapter 4 focuses on initiatives of the AU, such as the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM), to shed light on how compliance with integration treaties can be monitored in the absence of strong supranational institutions. The chapter argues that although NEPAD and the APRM do not possess supranational qualities, they facilitate the process of compliance by identifying the areas where member states fail to comply with their obligations and helping to collectively boost compliance in those areas. These new initiatives represent a new direction in Africa's institutional drive towards monitoring compliance with the norms of economic integration. The chapter suggests that, if these initiatives are effectively used, the absence of strong supranational institutions in the continent will not foreclose compliance with the norms of economic integration.

Chapter 5 explores methods that could be used by African states to internalise the norms of economic integration in their national domain. The idea in this chapter is that the goal of achieving economic integration in the continent will not be achieved if states fail to give effect to the norms of integration at the national level. However, giving effect to the norms at the national level is a complex process which is affected by many factors. In order to ensure that the norms created at the continental level are accepted at the national level, states have to put in place a participatory framework

which ensures that all stakeholders participate in the integration process. The chapter suggests the creation of national focal points in each member state to ensure that adequate links are created between government departments, parliament, citizens, trade unions and other stakeholders, who are essential to the implementation of the norms of integration or whose interests would be affected by the integration process. Furthermore, the chapter suggests that proper links need to be created between regional courts and national courts to ensure that the norms of integration are internalised and given effect to at the national level.

Chapter 6 concludes the thesis by reviewing the entire discussion in the thesis and making the connections between the chapters. The primary argument discussed in this chapter is that a new direction is needed in the discussion on compliance with African integration treaties. The chapter suggests that legal scholarship in the area of economic integration in Africa needs to focus its attention on how and why African states respond to the norms of economic integration. To achieve this goal, an in-depth understanding of the factors that impact on compliance is necessary.

1.8 Conclusion

Economic integration in Africa is being undertaken to facilitate development at the regional and sub-regional levels. In order to accommodate the disparity in the levels of development in the 54 African states, economic integration treaties have been crafted in such a way that they are broad enough to address the development needs of all African states. The broad nature of these integration treaties, coupled with the large number of African states engaged in the integration process, makes compliance with the integration treaties complex. Therefore, any strategy which seeks to facilitate compliance with African integration treaties should take all these factors into account.

In engaging with the strategies for facilitating compliance with African integration treaties, this thesis takes into consideration the various legal and non-legal factors that impair the ability of African states to comply with their

integration obligations. The reason for this approach is that the norms that govern the integration process do not exist in the abstract. If these norms are to make an impact on the behaviour of African states, they must be applied in a way that takes cognisance of the peculiar nature of each challenge. Mechanisms that address issues of non-conformity that do not arise from a flagrant disregard for the norms of integration should be put in place.¹²⁸ While there is no specific method that can be adopted to resolve all the problems surrounding compliance, the impact of the causes of non-compliance can be mitigated if the process is managed properly.

¹²⁸ Also, in instances where non-conformity arises in development issues, coercion as a means of securing compliance may be ineffective because a state cannot be coerced to develop capacity it simply does not have. See Claire Kelly 'Enmeshment as a theory of compliance' (2005) 37 *New York University Journal of International Law and Politics* 303–356 at 303.

Chapter 2: Rethinking strategies for securing compliance with African economic integration treaties

2.0 Introduction

As stated in chapter 1, the focus of this thesis is not to gauge the extent to which African states comply with integration treaties; rather, the intention is to examine factors that impact on the ability of African states to comply and to suggest methods or areas that should be emphasised in order to secure compliance. This chapter therefore examines the factors that generally influence compliance and non-compliance with treaty obligations, and situates them within the context of African integration treaties.

Non-compliance with treaty obligations is not unique to African integration treaties; it occurs in international law in general. Non-compliance with integration treaties may never be completely resolved, but could be mitigated so that it does not constitute a major threat to the success of economic integration.¹ Generally, there is an assumption that when states become parties to a treaty, they intend to comply with the treaty norms and often comply.² Nonetheless, the reality is that there are always instances of non-compliance. Harold Jacobson suggests that:

It is obvious from what we know that the behaviour of some nations is closer to the international norms they have accepted than that of the others, that nations follow some norms more than they follow other norms, and that nations' behaviour with respect to international norms changes over time. Calibrating these variations is an essential step toward

¹ Peter van den Bossche 'In search of remedies for non-compliance: the experience of the European Community' (1996) 3 *Maastricht Journal of European and Comparative Law* 372.
² Louis Henkin *How Nations Behave* 2 ed (Columbia University Press, New York, 1979) 47.
Ljiljana Biukovic 'Compliance with international treaties: selective adaptation analysis' (2006) *The Canadian Yearbook of International Law* 451.

understanding better the causal mechanisms that produce them.³

Three vital points can be deduced from the above statement: (1) within a treaty regime, states might comply with some norms and yet fail to comply with others; (2) a state's attitude towards compliance with treaty norms may shift over time; and (3) in order to ensure a certain level of uniform compliance, it is necessary to investigate the factors that induce the non-compliant behaviour.

This chapter seeks to address these points. To achieve this goal, the managerial approach to treaty compliance is adopted and used in the entire thesis as the benchmark for the analysis of African integration treaties. However, two other international law theories on treaty compliance are discussed to justify the decision to adopt the managerial approach to treaty compliance.

The managerial approach to securing treaty compliance, as developed by Abram Chayes and Antonia Handler Chayes, is based on the assumption that, as a general rule, states wish to comply with the international agreements they sign and, in instances of non-compliance, management rather than enforcement is a better approach to adopt to secure compliance.⁴ The managerial approach to treaty compliance has three phases.⁵ The first phase is that states generally have the propensity to comply with their treaty obligations. This propensity to comply is fostered by efficiency, national interest and regime norms. Secondly, when non-compliance occurs, it often results from the ambiguity and indeterminacy of the treaty language, the limited capacity of states to give effect to their obligations, and the time limits within which they must perform their treaty obligations. Thirdly, in the event that non-compliance occurs, enforcement

³ HK Jacobson 'Afterward: conceptual, methodological and substantive issues entwined in studying compliance' (1998) 19 *Michigan Journal of International Law* 569 at 572.

⁴ Abram Chayes and Antonia Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, 1995) 4; Abram Chayes and Antonia Handler Chayes 'On compliance' (1993) 47 *International Organisation* 175. Henkin had previously argued that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.' See Louis Henkin (note 2) 47.

⁵ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 1–28.

through the use of sanctions will not yield the best results in aligning the actual behaviour of states with the prescribed behaviour under the treaty. Instead, an iterative process that combines the use of transparency, dispute settlement, capacity-building and persuasion is appropriate to secure compliance.

The managerial approach to securing compliance with treaty obligations is adopted in this thesis because it gives a satisfactory account of how to ensure better compliance with treaties designed to resolve coordination problems (such as integration treaties).⁶ African integration treaties have broad objectives, cover a plethora of areas, and involve a large number of states. In order to ensure that all states to a large extent align their practice with the stated objectives of the integration treaties, it is important to adopt a framework that ensures that the obligations of the states are clearly stated, that their capacity to meet the obligations is enhanced, and that states are given enough time to align their practices with the stated objectives. Furthermore, the managerial approach is also useful in the context of African integration because it does not place too much reliance on the use of sanctions or coercive measures. This approach is important in Africa, because the institutional framework for integration in Africa is not modelled on the presence of strong supranational institutions that can assert coercive authority in the integration process.

2.1 Factors that induce compliance

The managerial approach suggests that, since government leaders and ministers devote so much time to negotiating and drafting treaties, it is inconceivable that they put in so much effort 'except on the assumption that entering into a treaty commitment ought to and does limit their own freedom of action, and in the expectation that the other parties to the agreement will feel similarly constrained'.⁷ Therefore, the logical inference that can be drawn from the efforts made to create treaties is that states, as a general rule,

⁶ Andrew Guzman 'A compliance-based theory of international law' (2002) 90(6) *California Law Review* 1831.

⁷ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 3.

acknowledge that there is an obligation to comply with the provisions of the treaty.⁸ The managerial approach identifies three factors that lend credence to the inherent propensity of states to comply with their treaty obligations: efficiency, national interest, and regime norms.⁹

2.1.1 Efficiency

Efficiency as a factor for enhancing compliance is based on the fact that compliance saves transactions costs. In the absence of convincing evidence that circumstances have changed since the original decision to enter into the treaty was made, states try to comply with their treaty obligations in order to avoid the continuous recalculation of costs and benefits of non-compliance.¹⁰ This is because deploying governments' resources for policy analysis is expensive, and usually the resources are not readily available. It is therefore cheaper to comply so as to avoid the cost of non-compliance. The efficiency factor is influenced by standard economic analyses and assumes that states are rational actors that take into account the cost of their actions.¹¹

In other words, in the absence of factors that justify non-compliance, African states will most likely comply with their integration obligations since non-compliance will result in the continued existence of the economic and development challenges which they seek to resolve through the use of integration treaties. This point of view assumes that when African leaders collectively meet, either at AU level or RECs level, to discuss strategies for overcoming the continent's economic and development challenges, there is an inherent understanding that it will be economically beneficial for states to adhere to the collective agreements in order not to defeat the purpose for which the agreements were concluded. In this regard, the preambles of all the integration treaties usually re-emphasise previous collective efforts that have been made to achieve integration.¹²

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Henry Mutai *Compliance with International Trade Obligations: The Common Market for Eastern and Southern Africa* (Kluwer Law International, Alphen aan den Rijn, Netherlands, 2007) 12.

¹² See Preamble of the Treaty Establishing the African Economic Community (Abuja Treaty), signed 3 June 1991, 30 ILM 1241 (1991); Constitutive Act of the African Union

2.1.2 Interest

Interest plays a decisive role in enhancing a state's propensity to comply with its treaty obligations.¹³ States enter into treaties consensually. This raises an assumption that the process by which the treaty was formulated took into account the interest of the state parties.¹⁴ The treaty-making process usually involves a series of negotiations between the states during which each state tries to ensure that its interest is protected in the treaty. Consequently, consenting to the treaty serves to indicate that the interest of the state has been protected.¹⁵ The managerial approach admits that there may be instances where the negotiation process results in a treaty falling short of a state's expectations. In situations of this nature, compliance problems are likely to be manageable if the treaty is designed so that it takes into practical consideration the 'probable patterns of conduct and interaction' of the states.¹⁶ Furthermore, where issues of non-compliance are endemic, rather than as a result of deliberate defiance on the part of a state, it is most likely that the process of negotiating the treaty did not succeed in incorporating a broad range of states' interests.¹⁷

In applying the interest principle to economic integration at the regional level, one challenge is the design of the Abuja Treaty, which failed

(Constitutive Act); Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty), 5 November 1993, 33 ILM 1067; Revised Treaty Establishing the Economic Community of West African States (ECOWAS Treaty), 24 July 1993, 35 ILM 660; Treaty Establishing the East African Community (EAC Treaty), adopted 30 November 1999, entered into force 7 July 2000, 2144 UNTS 255; Treaty Establishing the Southern Africa Development Community (SADC Treaty), adopted and entered into force 17 August 1992, amended 14 August 2001; and Treaty Establishing the Economic Community of Central African States (ECCAS Treaty), 19 October 1983, 23 ILM 945 (1984).

¹³ Rational choice theorists suggest that states generally engage in international law to protect their interests. See Duncan Snidal 'Coordination versus prisoners' dilemma: implications for international and regimes' (1985) 79 *American Political Science Review* 923–942; Duncan Snidal 'The game theory of international politics' (1985) 38(1) *World Politics* 25–57; Kenneth Abbott 'Modern international relations theory: a prospectus for international lawyers' (1989) 14 *Yale Journal of International Law* 335–411; John Setear 'An iterative perspective on treaties: a synthesis of international relations theory and international law' (1996) 37 *Harvard International Law Journal* 139–230.

¹⁴ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 4.

¹⁵ Richard Bilder 'Beyond compliance: helping nations cooperate' in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, New York, 2000) 69. Oran Young *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press, Ithaca, New York, 1994) 24, 38–46, 81.

¹⁶ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 7.

¹⁷ *Ibid.*

to provide a platform for RECs to properly negotiate their interests. As will be discussed in detail in chapter 3, the RECs were not part of the negotiation process or the drafting process of the Abuja Treaty, yet the Abuja Treaty hinges the entire process of regional integration on the RECs.¹⁸ Not all the RECs had trade liberalisation as their primary goal, as provided for in the Abuja Treaty. The Intergovernmental Authority on Development (IGAD), for example, was created to combat drought, while the Community of Sahel-Saharan States (CENSAD) was more concerned with developing capacity in the agricultural sector. This variation in core areas of interests definitely plays a role in how well each REC complies with the obligations created in the Abuja Treaty. Although the RECs cannot be classified as states, their participation in the integration process is germane to African integration because the overall goal is to harmonise the activities of the RECs to create the African Economic Community (AEC). Therefore, it would have been ideal for the various RECs to participate in the treaty negotiation process in order to create a well-designed treaty which accounts for the interests of all the parties.¹⁹

2.1.3 Norms

The managerial approach suggests that the last factor that enhances the propensity of states to comply with their treaty obligations is the 'norm consideration'. Norms as used in the context of the managerial approach refers to principles, rules, directives, standards and any other prescriptive statements.²⁰ Norms are deemed to generate compliance based on the

¹⁸ Article 88 Abuja Treaty.

¹⁹ Two Protocols were subsequently adopted to incorporate the RECs into the plan of the Abuja Treaty but the Protocols covered only the responsibilities of the RECs towards the development of the AEC. The first Protocol adopted was the 1998 Protocol on Relations between the African Economic Community and the Regional Economic Communities (reprinted in (1998) 10 *African Journal of International and Comparative Law* 157. The 1998 Protocol has been replaced by the 2007 Relations between the African Union and the Regional Economic Communities (available at <http://www.afrimap.org/english/images/treaty/AU-RECs-Protocol.pdf> [accessed 24 January 2012]). See chapter 3 for a discussion of the relationship between the RECs, the African Economic Community and the African Union.

²⁰ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 113. Friedrich Kratochwil also uses norms and rules interchangeably but distinguishes between different forms of norms. See Friedrich Kratochwil *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, New York, 1989) 10, 69–129. See also Edna Ullmann-Margalit *The*

legally binding nature of treaties and the fundamental principle of '*pacta sunt servanda* – treaties are to be obeyed'.²¹ Once treaties are ratified by states they become legally binding and states have an obligation to obey the law.²² In the absence of strong countervailing conditions, the legal obligation to obey usually 'translates into a presumption of compliance'.²³ For the norm to induce compliance there has to be intersubjectivity among states as to the meaning of the norm.²⁴ Ota Weinberger suggests that '[t]he practical efficacy of a norm...is usually bound up with the intersubjective communication of norms. Such communication is a process in which as a rule several different people take part and which is carried on by means of linguistic utterances, the goal being that the recipients of the message understand the norm'.²⁵ If parties fail to understand the norm, compliance may be unlikely. This is because there would be a divergence of opinion as to the meaning of the norm.²⁶

For the norm to be clearly understood by states, it needs to be elaborated in order to identify behaviour which is either consistent or inconsistent with the norms. Once an acceptable level of behaviour is determined, there is an inherent understanding that the obligations are binding. Therefore, in instances where a state's behaviour is inconsistent with the acceptable behaviour, the state tries to justify its action either by arguing that the conduct in question does not fall within the ambit of the norm, or that the norm had not been properly interpreted.²⁷ This justificatory process that the non-compliant state embarks upon to defend its action indicates that the state is aware of its inherent obligation to comply.

Emergence of Norms (Oxford University Press, Oxford, 1977); HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) 2–3; Ronald Dworkin 'The model of rules' (1967) 35 *University of Chicago Law Review* 45; John Raz 'Legal principles and limits of law' (1972) 81(5) *Yale Law Journal* 823–854.

²¹ Article 26 Vienna Convention on the Law of Treaties (VCLT) 1969, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331. Every treaty in force is binding upon states and states must perform in good faith.

²² Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 8.

²³ *Ibid.*

²⁴ *Ibid.* 113.

²⁵ Ota Weinberger, 'The norm as thought and as reality' in Neil MacCormick and Ota Weinberger (eds) *An Institutional Theory of Law: New Approaches to Legal Positivism* (D. Reidel Publishing Company, Kluwer, Dordrecht, 1986) 34.

²⁶ See section 2.2.1 on the discussion on ambiguity.

²⁷ *Ibid.* 119.

The obligation to obey the norms created in African integration treaties is expressly provided for in almost all the African integration treaties. In article 5 of the Abuja Treaty member states undertake to refrain from unilateral acts that will impede the attainment of the objectives of the Treaty and they also undertake to take appropriate measures within their national territories to give effect to the Treaty. Article 5 of the COMESA and ECOWAS Treaties, article 8 of the EAC Treaty and article 6 of the SADC Treaty all have similar provisions that place an obligation on member states to give effect to the objectives of the treaties. This is a positive indication that member states do recognise that the norms created within these treaties are meant to be adhered to. In the absence of any reason that warrants a deviation from these objectives, it is likely that states will comply with these obligations because of the inherent normative content that is generated by the treaties.

This sense of obligation and inherent commitment to treaty norms may be adduced as the reasons why states usually do not blithely ignore treaty norms and, when they do, they often try to justify their actions. This indicates that states do not want to be viewed negatively by other parties to a treaty. The unwillingness of states to be classified as violators of treaty norms is exemplified by the Republic of Zimbabwe's conduct when it failed to comply with the SADC Tribunal's decision in the *Mike Campbell* case.²⁸ Zimbabwe's Government made frantic efforts to argue that the SADC Tribunal's decision was incorrect, and that the Zimbabwean government had not violated the norms of the SADC Treaty. This to a large extent signals that even when states violate a treaty norm, they rarely openly admit to such violation because of the inherent understanding that treaty norms are meant to be complied with.

It is a notorious fact that states do not always comply with their treaty obligations. This means that efficiency, interest and norms may not always severally or collectively induce compliance. However, these factors need to be identified to allow for a better understanding of the real problems of non-

²⁸ *Mike Campbell & Another v Zimbabwe* SADC (T) Case No 2/2007.

compliance and how they can be resolved.²⁹ To a large extent, an understanding of these factors that induce compliance also helps to reverse an implicit belief that states ignore their treaty obligations when it becomes inconvenient to uphold them.

Now that the factors that induce compliance have been identified, the various factors that warrant non-compliance are discussed in the next section.

2.2 Factors that warrant non-compliance

The managerial approach contends that non-compliance with treaty obligations rarely stems from the deliberate and flagrant violation of treaty obligations; instead, instances of such deliberate violations are exceptions rather than the general rule.³⁰ In explaining the prevalence of non-compliance, Chayes and Chayes identify three factors which they regard as the root causes of non-compliance: the ambiguity and indeterminacy of treaty language; limitations on the capacity of states to carry out their obligations; and the temporal dimension of the social, economic and political changes contemplated by treaties.³¹

2.2.1 Ambiguity in treaty language

The degree of specificity of any legal language usually varies,³² and this also applies to the language used in drafting a treaty.³³ Sometimes, the lack of specificity or ambiguity in the text of a treaty may be a deliberate act of the treaty drafters.³⁴ In instances where the ambiguity is deliberate, 'ambiguity is often based on the premise that vagueness is required to bring treaties to

²⁹ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 4.

³⁰ *Ibid* 9–10.

³¹ *Ibid* 10.

³² Ronald Dworkin (note 20) 14–16.

³³ Abram Chayes and Antonia Handler Chayes 'On compliance' (note 4) 175 at 189.

³⁴ This is often referred to as 'constructive ambiguity' and is attributed to Henry Kissinger. Constructive ambiguity is defined as 'the deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose.' See David Mitchell 'Cooking the fudge: constructive ambiguity and the implementation of the Northern Ireland Agreement, 1998-2007' (2009) 24(3) *Irish Political Studies* 322; Anthony D'Amato 'Purposeful ambiguity as an international legal strategy: the two China problem' in Jerzy Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, The Hague, Netherlands, 1996) 109–121.

closure and that the resulting ambiguity can be clarified at some time in the future'.³⁵ Other than instances of deliberate ambiguity, treaty drafters are usually unable to foresee all the possible contextual situations in which the treaty would be applied in the governance of the future conduct of states.³⁶ This invariably creates ambiguity in the text of the treaty and thus makes it difficult to ascertain precisely what conduct is permissible or prohibited.³⁷

Since treaty drafters cannot possibly foresee all the circumstances that may arise in the future, the treaty obligations are couched in broad terms to accommodate a variety of interpretations. While this might be good for the purpose of being able to cover the interests of all the parties involved, it may also be detrimental during the implementation of the treaty.³⁸ During implementation each party may interpret the treaty in a manner that is consistent with its interest. This may create a situation where the meaning of a particular provision becomes amorphous. The broader the language used in a treaty, the wider the scope of permissible interpretations to which it may give rise.³⁹ Inevitably, ambiguity may affect the rate of compliance with the treaty norms because states may adopt differing positions as to the specific meaning of a particular treaty norm.

In discussing the effect of indeterminacy or ambiguity in the language of a treaty, Thomas Franck suggests that 'indeterminacy ... makes it easier to justify non-compliance'.⁴⁰ This makes the treaty flexible and open to being manipulated to mean something far from what it was originally intended to mean.⁴¹ In domestic legal systems, such interpretation dilemmas are easily addressed through the use of judicial interpretation.⁴² In the international arena, more particularly in Africa, this is not always the case as formal adjudication is not as prominent as it is in the domestic arena. Unlike the

³⁵ Itay Fischhendler 'When ambiguity in treaty design becomes destructive: a study of transboundary water' (2008) 8 (1) *Global Environmental Politics* 111–136 at 111.

³⁶ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 10.

³⁷ Ibid. See chapter 3 for a discussion of ambiguity in the decisions of the African Assembly of Heads of State and Government and the ambiguity in the relationship between the African Union, the African Economic Community and the Regional Economic Communities.

³⁸ Itay Fischhendler (note 33) 112.

³⁹ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 11.

⁴⁰ Thomas Franck *The Power of Legitimacy among Nations* (Oxford University Press, New York, 1990) 54.

⁴¹ Ibid.

⁴² Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 11.

domestic legal system, which has efficient mechanisms to ensure that parties adhere to judicial interpretations, the international legal system often lacks such mechanisms. Situations of this nature may lead to a standstill in the treaty regime.

Although a plethora of international tribunals exist, most inter-state disputes between African states are settled through diplomatic means.⁴³ On one occasion when a disputed obligation was submitted to an international tribunal, the Republic of Zimbabwe contested the SADC Tribunal's interpretation of article 6 of the SADC Treaty and the validity of the Protocol on the SADC Tribunal in the *Mike Campbell* case.⁴⁴ Zimbabwe argued that the SADC Tribunal could not invalidate Zimbabwe's agrarian reform policy made pursuant to the Constitution of the Zimbabwe on the basis of its incompatibility with the SADC Treaty because SADC did not have Protocols on human rights or agrarian reforms.⁴⁵ Zimbabwe's arguments clearly stemmed from issues of interpretation of the relevant provisions of the SADC Treaty and the Protocol on the SADC Tribunal. In line with this reasoning, Solomon Ebobrah takes the view that the challenge to the legality, competence and legitimacy of the SADC Tribunal was warranted by certain ambiguities in the SADC Treaty and the Protocol on the Tribunal.⁴⁶ However, while these ambiguities are not fatal, an amendment of the treaties is necessary to avoid future challenges to the existence of the SADC Tribunal.

Although the SADC Tribunal might have rightly or wrongly held that Zimbabwe's act was in breach of its obligations under the SADC Treaty and that the Tribunal could exercise its jurisdiction over the dispute,⁴⁷ the

⁴³ Tiyanjana Maluwa 'The peaceful settlement of disputes among African States, 1963–1983: some conceptual issues and practical trends' (1989) 38 *International and Comparative Law Quarterly* 299–320.

⁴⁴ *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* (note 26).

⁴⁵ *Supra* 23.

⁴⁶ Solomon Ebobrah 'Tackling threats to the existence of the SADC Tribunal: a critique of perilously ambiguous provisions in the SADC Treaty and the Protocol on the SADC Tribunal' (2010) 4 (2) *Malawi Law Journal* 199–213.

⁴⁷ For discussions of the Campbell decision, see Precious Ndlovu 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal' (2011) 1 *SADC Law Journal* 63–79; Derek Matyszak *The dissolution of the SADC Tribunal* available at http://www.idasa.org/media/uploads/outputs/files/the_suspension_sadc_tribunal_final.pdf [accessed 25 January 2011]. Prof Ben Chigara argues in a succinctly articulated treatise that the SADC Tribunal failed to espouse a profound jurisprudence which takes into account the application of the prohibition on discrimination against communities in transition. He

subsequent suspension of the Tribunal, pending a review of its jurisdiction, by the SADC Summit of Heads of State seems to suggest that they concurred with Zimbabwe's position on the limits of the norms created under the SADC Treaty. Critics might argue that the decision of the Summit of Heads of State was unlawful and violated the SADC Treaty.⁴⁸ However, the inherent issue raised here transcends the lawfulness of the act of the Summit of Heads of State. It raises a fundamental question as to what the member states actually contemplated when the SADC Treaty was drafted and the failure to clearly express or limit those intentions in the text of the SADC Treaty. These issues would not arise if the wording of the SADC Treaty was clear and precise on the human rights jurisdiction of the SADC Tribunal.

The ambiguity and indeterminacy of treaty language may also go beyond issues of interpretation of treaty obligations. Sometimes ambiguity or lack of clarity results in the creation of unenforceable norms.⁴⁹ Where a treaty is drafted to include unenforceable norms the ability to regulate the conduct of states or even secure compliance is weakened. Baxter notes that a treaty 'may contain both provisions creating precise legal obligations and norms of such a vague and general character that it is clear that they were not intended to be enforced'.⁵⁰ He identifies some treaty norms that may not be enforceable in the event of non-compliance, for example, norms in political treaties in terms of which states agree to coordinate military action, hortatory treaties that merely call for cooperation between states, and

questioned the reasonableness of the Tribunal's resort to legal transplants from 'incongruous courts' when there was extensive jurisprudence from countries that had faced similar transitional challenges. See Ben Chigara 'What should a re-constituted Southern African Development Community (SADC) Tribunal be mindful of to succeed?' (2012) 81 *Nordic Journal of International Law* 341–377. See also Ben Chigara 'The Humwe principle: a social re-ordering grundnorm for Zimbabwe and Africa' in Robert Home (ed) *Essays in African Land Law* (Pretoria University Press, Pretoria, 2011) 113–133.

⁴⁸ Southern Africa Litigation Centre et al *Implications of the Decision to Review the Role, Functions and Terms of Reference of the SADC Tribunal*, available at http://www.cfuzim.org/index.php?option=com_content&view=article&id=1069:legal-opinion-on-implications-on-decision-on-sadc-tribunal&catid=44:legal-cases&Itemid=91 [accessed 31 December 2012].

⁴⁹ Unenforceable norms are legal norms that occupy a place in international law, even though they do not create rights or duties. See R Baxter 'International law in her "infinite variety"' (1980) 29 *International and Comparative Law Quarterly* 549. On the concept of hard and soft law, see Kenneth Abbott and Duncan Snidal 'Hard and soft law in international governance' (2000) 54 *International Organization* 421–456.

⁵⁰ R Baxter (note 47) 550–553.

treaties that call for further action (for example, a treaty calling for the future establishment of a common market or a free trade area).

If we look closely at the integration treaties in Africa it becomes evident that they all contain elements of unenforceable norms. This is largely because they cover such broad areas of endeavour that it may be impracticable to draw up concrete legal norms in each area. A few examples are in the area of integration of the non-trade sectors, such as agriculture, fishery, livestock and forestry. While member states agree to jointly cooperate to develop capacity and harmonise policies in these sectors, it is difficult to identify the core legal norms. In these areas integration may be achieved only through cooperation and not through the development of core legal norms. However, any cooperation in these fields of endeavour would be fulfilling part of the overall objectives of the integration treaty. Furthermore, it is doubtful that it can be argued that the failure to adhere to the timelines usually given for the completion of the various stages of integration will amount to the breach of an enforceable norm.

Another aspect where ambiguity is evident in African integration treaties is the manner in which the norms created by the treaties are incorporated into the legal system of member states. These treaties mandate states to take the necessary steps required by their national constitutions to give effect to the provisions of the treaties. Despite this straightforward position, ambiguity exists if one examines the 'necessary steps' required to domesticate the integration norms. For example, article 5 (2) of the COMESA Treaty requires member states to 'take steps to secure the enactment of and the continuation of such legislation to give effect to [the] Treaty and in particular':

- (a) To confer upon the Common Market legal capacity and personality required for the performance of its functions; and
- (b) To confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.

Article 8 (2) of the EAC Treaty has a similar wording with article 5 (2) of the COMESA Treaty in that both treaties require member states to confer the force of law on the treaty and subsequent regulations of Council.

Under the ECCAS and ECOWAS treaties, member states are only required to enact legislation necessary for the implementation of the provisions of the treaties.⁵¹ These treaties do not specifically require regulations to be given the force of law. However, the ECOWAS Treaty requires member states 'to abide by the decisions and regulations of the Community'.⁵² The AMU, IGAD and SADC treaties do not require member states to enact legislation to give effect to the treaties or regulations. Member states are only required to ratify the treaties.⁵³

The divergence in the manner in which the integration treaties are to be given the force of law in the member state paves a leeway for inconsistency in the approach taken by African states. While it may be argued that the absence of a provision requiring the states to domesticate the treaties does not necessarily preclude the states from performing their obligations under the treaty,⁵⁴ it reduces the chances of citizens being able to defend the rights created by the treaties at the national level. In states that have a monist approach to treaty implementation, the absence of a clear provision requiring domestication might not be fatal because ratified treaties automatically become part of the applicable body of laws in the state.⁵⁵ This is not the case in states that have a dualist approach because domestication is an essential requirement before the treaties can be enforced at the national level.⁵⁶ Since all the RECs are all working towards the goal of

⁵¹ Article 5 (2) of the ECCAS and ECOWAS Treaties.

⁵² Article 5 (3) ECOWAS Treaty. There is no similar provision in the ECCAS Treaty.

⁵³ Article 19 AMU Treaty, article 20 IGAD Treaty and article 41 SADC Treaty.

⁵⁴ States are bound by their treaty obligations at the international level and cannot justify non-performance on the grounds that it is in conflict with its national laws.

⁵⁵ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge, 2000)146. For discussions on the origin of monism and dualism, see JG Starke, 'Monism and dualism in the theory of International Law' (1936) 17 *British yearbook of International Law* 66-81

⁵⁶ Anthony Aust, (note 55) 150-151. Quite a significant number of African states regard international agreements as part of their national laws only upon domestication. See section 231 (4) Constitution of the Republic of South Africa, section 12 (1) Constitution of the Federal Republic of Nigeria, section 9 (4) of the Ethiopian Constitution, section 211 Constitution of the Republic of Malawi, section 2 (6) Kenya Constitution, section 144 Namibia Constitution, section 238 Swaziland Constitution, section 111B Zimbabwe

creating an African Economic community, there ought to be consistency in term of the manner in which the norms of economic integration are given the force of law.

The above discussion highlights some of the challenges that ambiguities might pose in the implementation of integration treaties in Africa. To ensure that the overall integration objectives are met, it is important to develop a process to resolve these ambiguities before they result in full blown disputes or outright non-compliance.

2.2.2 Capacity limitations

The managerial approach identifies capacity limitations as a factor that warrants non-compliance with treaty obligations.⁵⁷ Capacity constraints may arise when the treaty requires a positive or affirmative obligation on the part of a state.⁵⁸ Studies show that wealth countries with administrative capacity (such as having a properly trained bureaucracy with financial resources) are more likely to comply with their treaty obligations.⁵⁹ A lack of capacity has generally proven to be a serious problem for developing countries because they often lack the necessary technical, scientific, bureaucratic and financial resources to develop effective domestic mechanisms to give effect to their treaty obligations.

In the context of African integration, the absence of technical and bureaucratic capacity largely inhibits compliance with the obligations created under the integration treaties. Trade liberalisation is one aspect of economic integration in which the absence of capacity is particularly clear. All the African integration treaties envisage trade liberalisation occurring through the creation of Free Trade Areas and Customs Unions. In the case of a customs union, this invariably necessitates the removal of customs duties for goods traded within the region and the adoption of a common external tariff. Since many African states rely heavily on customs duties to generate revenue for

Constitution. See also PF Gonidec, 'The relationship of international law and national law in Africa' (1998) 10 *African Journal of International and Comparative Law* 244-249.

⁵⁷ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 14.

⁵⁸ *Ibid* 13.

⁵⁹ Edith Brown Weiss 'Rethinking compliance with international law' in Eyal Benvenisti and Moshe Hirsch (eds.) *The Impact of International Law on International Cooperation* (Cambridge University Press: New York 2004)143.

their economies, the removal of tariffs would impact on the revenue-generating capacity of African states and would result in revenue loss.⁶⁰

Therefore, a complex and efficient compensatory mechanism is required to cushion the effect of the revenue loss. However, the required technical and financial capacity to establish such compensatory mechanisms does not exist.⁶¹

Also, the creation of an effective Free Trade Area requires competent customs administration authorities to implement the rules of origin and other customs procedures adopted by member states. Not all African states have highly trained customs officials and this impacts on the efficiency with which goods are cleared at the border posts or ports. Furthermore, poor transport and ports infrastructure also impedes trade liberalisation efforts.⁶² Taking all these factors into account, if compliance in the area of trade liberalisation is to be achieved, it will be important to ensure that states that rely on customs duties, that lack efficient customs administration, and that have poor transport infrastructure have the adequate capacity to meet their obligations under the integration treaties.

If capacity is indispensable in ensuring that states fulfil their obligations, this means that legal norms alone are not sufficient to secure compliance with treaty obligations. Extra efforts are needed to establish structures that will create an enabling environment which facilitates adherence to legal rules. African integration treaties were entered into to resolve certain economic and development challenges. The existence of these challenges over time has inhibited the technical, financial and bureaucratic capacity of African states in so many areas. In order to ensure that the process of integration runs smoothly and that states comply with their obligations, adequate mechanisms need to be established to boost the

⁶⁰ See T Rajhi and JM Marchat *The Short Term Impact of a CET on the Manufacturing Sector in Nigeria: Preliminary Results From a Firm Level Analysis* (World Bank, Washington, 2003); C Soludo et al 'Potential impacts of harmonised UEMOA-ECOWAS common external tariff on revenue and trade balance in Nigeria' 2003 Research Report presented at the ECOWAS Committee on Integration Affairs, Abuja, Nigeria.

⁶¹ C Agu 'Obstacles to regional integration: the human factor challenge to trade facilitation and port reforms in Nigeria' (2009) 2 (4) *International Journal of Private Law* 447.

⁶² *Ibid* 447–457. N Limao and AJ Venables 'Infrastructure, geographical disadvantage and transport cost' (2000) 15 (3) *The World Bank Economic Review* 451–479.

capacity of m member states. If we fail to boost the capacity of African states both collectively and severally, compliance with the integration treaties might be elusive.

2.2.3 Temporal dimension of treaties

Time plays an important role in assessing compliance with treaty obligations.⁶³ Part of the reason for this is that it takes some time for the norms created by treaties to be internalised by member states,⁶⁴ and for the impact of changes which are required by the treaty to be felt. Furthermore, a treaty may be crafted so as to initiate a process which seeks to bring the actual behaviour of states in line with the prescribed behaviour, and therefore states may not instantly respond or adapt to the changing conditions necessitated by the treaty.⁶⁵ If all these conditions are taken into consideration, it becomes apparent that the impact of the treaties may be felt only after a long period of time.⁶⁶

The temporal dimension of treaties may explain why African states fail to adhere to the specified timelines for integration. Given that integration requires positive action by African states, the performance of which is dependent on multiple factors, one has to question how specific timelines were arrived at during the treaty-drafting process.

Other than the issue of adherence to timelines, African integration treaties create a plethora of norms, some of which are gradually being entrenched into the normative structure of member states. For example, the free movement of citizens of RECs has gradually become a norm that is being internalised by member states. In ECOWAS and the EAC, in particular, citizens of each of these RECs no longer require visas to travel within the respective RECs. In other RECs, like COMESA and SADC, varying levels of implementation of this norm are observed, because of the various integration initiatives geared at creating a single bloc in each of these regions. The fact that these citizens might not yet have the automatic right of establishment

⁶³ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 15.

⁶⁴ Ibid.

⁶⁵ Ibid 17.

⁶⁶ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 15.

within these RECs might not be sufficient to support the argument that the process of removing barriers to the freedom of movement of persons has not commenced. Therefore, a misleading conclusion may be reached if the state of compliance with the norm pertaining to the free movement of persons is assessed when this norm is still in the formative stage.

2.3 Securing compliance with African integration treaties

After identifying factors that warrant non-compliance, the next logical step is to resolve the challenges that arise from non-compliance. This is necessary if the objectives of the treaty are to be achieved. The managerial approach suggests that the use of sanctions as an enforcement mechanism to secure compliance is not always the best strategy because it often does not resolve the problem and in terms of political and economic costs, it may be too expensive to implement.⁶⁷ This position is particularly valid in the African context because there are instances where sanctions were imposed, and the use of sanctions did not necessarily lead to compliance.

Recently, Madagascar was suspended from the AU and SADC because there was an unconstitutional change of government.⁶⁸ Economic sanctions were also imposed in a bid to compel the unconstitutional government to hold democratic elections. So far the imposition of these sanctions has not resulted in the creation of a democratically elected government in Madagascar. Furthermore, other than in instances where an African state is sanctioned for an unconstitutional change in government,⁶⁹ sanctions have not been imposed for the violation of economic integration norms.⁷⁰

⁶⁷ Ibid 22.

⁶⁸ Mauritania and Guinea have also been previously suspended from the African Union on the same grounds.

⁶⁹ Greg Mills argues that regional integration in Africa seems to work best when there is threat to the security of the leadership of a member state or in defence of the status quo: Greg Mills 'Africa and regional integration: what works and why' (2004) 11 (2) *South African Journal of International Affairs* 26.

⁷⁰ The SADC Summit of Heads of State and Government did not sanction Zimbabwe for failing to comply with the decision of the SADC Tribunal. Rather, the Summit suspended the Tribunal and ordered a review of the Protocol on the SADC Tribunal. Interestingly, the Pan-African Lawyers' Union (PALU) and the Southern African Litigation Centre (SALC) has requested an advisory opinion from the African Court on Human Rights as to the legality of

The managerial approach suggests that transparency, dispute settlement, capacity building and persuasion should be applied to manage non-compliance. The significance of these strategies is that, if properly applied, they should prevent non-compliance from occurring. In other words, they secure compliance *ex ante*.

2.3.1 Transparency

In the context of securing compliance transparency is defined as the availability and accessibility of knowledge and information about '(1) the meaning of norms, rules, and procedures established by the treaty and practice of the regime, and (2) the policies and activities of parties to the treaty and of any central organs of the regime as to matters relevant to treaty compliance and regime efficacy.'⁷¹ Treaties facilitate transparency by providing mechanisms for monitoring the implementation of the treaty norms, resolving disputes and providing access to information to reassure a state that others are complying with the treaty norms, thereby reinforcing adherence to the rule of law.⁷² In the context of the World Trade Organisation, Robert Wolfe has suggested that transparency enables both civil societies and small states to participate in the multilateral process.⁷³

To ensure compliance through the use of transparency, the managerial approach draws from regime theory, economics and game theory to suggest that, in order to resolve collective action problems, generating and disseminating information about the requirements of the treaty and the

the decision of the SADC Summit to suspend the SADC Tribunal. See Southern Africa Litigation Centre 'African Human Rights Court asked to rule on legality of SADC Tribunal's suspension' *Online Press Release* 26 November 2012, available at <http://www.southernafricalitigationcentre.org/2012/11/26/press-release-african-human-rights-court-asked-to-rule-on-legality-of-sadc-tribunals-suspension/> [accessed 1 December 2012].

⁷¹ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 135.

⁷² Jose Alvarez *International Organizations as Law-Makers* 339; Ronald Mitchell 'Sources of transparency: information systems in international regimes' (1998) 42(1) *International Studies Quarterly* 109–130 at 110–113; Oran Young 'The effectiveness of international institutions: hard cases and critical variables' in JN Rosenau and EO Czempiel (eds) *Governance Without Government: Change and Order in World Politics* (Cambridge University Press, New York, 1991) 160–194; Ljiljana Biukovic 'Selective adaptation of WTO transparency norms and local practices in China and Japan' 2008 *Journal of International Economic Law* 4.

⁷³ Robert Wolfe 'Regulatory transparency, developing countries and the WTO' (2003) 2 *World Trade Review* 158.

performance of states under the treaty is essential to secure compliance.⁷⁴ In this regard, transparency enhances treaty compliance in three ways:

(1) It facilitates coordination converging on the treaty norms between independent actors.

(2) It reassures actors that they are not being taken advantage of when their compliance with the norms is contingent on similar action by other participants.

(3) It deters actors contemplating non-compliance.⁷⁵

A system that combines the coordination of treaty norms, reassures member states that each party to the treaty is fulfilling its obligations, and has the capacity to deter member states contemplating non-compliance is highly likely to influence the behaviour of the states.

To facilitate transparency the availability of data on the performance of states on key treaty norms is necessary. This data can be generated through a process of self-reporting and data collection by states.⁷⁶ Self-reporting is achieved by creating a means by which each state can frequently report to other member states the steps it has taken to implement the treaty norms. To ensure the authenticity of the data supplied, organs or institutions of the treaty regime can either verify the data themselves or use non-state actors such as non-governmental organisations to determine the authenticity and accuracy of the information provided.⁷⁷ The information gathered will also help member states to embark on strategic policy reviews and assessments of the treaty regime.⁷⁸ Engaging in policy reviews and assessments of the performance of member states is essential because such engagement

⁷⁴ See GJ Stigler 'The economics of information' (1961) 69(3) *Journal of Political Economy* 213–225; James Boyle 'A theory of law and information: copyright, spleens, blackmail and insider trading' (1992) 80 *California Law Review* 1413–1540 at 1443–1457; Elinor Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge, 1990) 96–97, 193–199; Robert Keohane 'The demand for international regimes' in Stephen Krasner (ed) *International Regimes* (Cornell University Press, Ithaca, New York, 1983) 161–167.

⁷⁵ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 135. See also Organization for Economic Cooperation and Development (OECD) 'Regulatory Policies in OECD countries from intervention to regulatory governance' PUMA/RE6 (2001) 10, 21 November 2001, 41.

⁷⁶ *Ibid* 154–173.

⁷⁷ *Ibid* 174–198, 271–285.

⁷⁸ *Ibid* 229–249.

enables states to actively discuss what works and what does not. It also creates a space for states to assess other states' performance with the aim of developing future strategies to improve overall performance. Furthermore, the engagement creates an enabling environment for non-state actors to engage with states in the process of review and assessments.⁷⁹

The African Peer Review Mechanism (APRM), which is discussed in detail in chapter 4, provides an opportunity for transparency to be used as a tool for securing compliance with African integration treaties, because it makes use of all the above-mentioned processes in evaluating the performance of African states. More interestingly, the APRM adopts a non-adversarial approach in its review and assessment of the extent to which African states comply with their treaty obligations. Additionally, the APRM process enables the participation of non-state actors in the process of objectively assessing the performance of states in all the sectors in which are reviewed. This gives it the added advantage of being able to obtain information not only on the extent to which states have implemented legislation to give effect to their treaty obligations, but also on the extent to which such treaty obligations have actually changed the behaviour of states.

Transparency as a strategy for managing compliance is beneficial for integration both at the AU level and the REC level. At the level of the RECs, the transparency strategy provides an opportunity for RECs to update each other about steps that are being taken to realise the formation of the African Economic Community. Establishing a forum of this nature would mean that each REC could learn about what strategies are being adopted by other RECs in each of the integration sectors. This will ensure that the RECs are not working at cross-purposes and that their policies fit into the broader picture of continental integration.

At the level of the AU, the African Union Commission could also utilise the transparency mechanism to coordinate the activities of the various RECs.⁸⁰ If the departments of the African Union Commission work closely with the various RECs in addressing the challenges faced in each of the

⁷⁹ Ibid 249.

⁸⁰ See chapter 3.

integration sectors, issues of coordination among the RECs would be easier to address. Such coordination would allow for direct interaction between the RECs and the African Union Commission. Since the RECs represent the member states this would also be a more efficient way of generating synergy between the AU and the member states. The departments of the African Union Commission would then serve to facilitate integration by collating the necessary information required for the exchange of ideas between the RECs and the AU.

An important aspect of the transparency strategy is that it takes into account the necessity of restating the norms of the treaty regime. Sharing of information among member states about the performance that is required, helps to clarify and reaffirm the content of the norms. At the level of the AU, a constant reaffirmation of the integration norms would help to imbue the integration norms into the policy framework of the RECs. A transparency process for instances which directly involve all the RECs would facilitate better coordination and implementation of the objectives of the Abuja Treaty. This process would enhance integration and enable each REC to identify areas where they have difficulty in meeting the objectives of the Abuja Treaty. Furthermore, in instances where non-compliance results from ambiguity in the language of the Abuja Treaty, the RECs in conjunction with the AU could make proposals to clarify such ambiguity through an amendment or an interpretation of the treaty. The transparency strategy would also enable the African Union, the RECs and member states to identify areas where capacity is lacking and to have a clearer picture of milestones that have been achieved in order to project realistic expected outcomes.

The same process could be replicated within each region: the Secretariats of the RECs could collectively meet with the representatives of member states to generate and disseminate information about steps that have been taken to achieve the integration objectives. At this level, member states would have the opportunity to report on their level of compliance and the necessary steps they have taken to secure compliance. In instances where they have been unable to comply as a result of lack of capacity or

ambiguity as to what is required of them, the Secretariat, in conjunction with the member states, can then develop strategies to resolve the challenges. If the non-compliance results from a lack of capacity, assistance could be provided in the relevant areas. Where non-compliance results from ambiguity, an interpretation of the ambiguous norm could be sought: the Secretariat or member states could request an advisory opinion from the regional court or any other available interpretative organ.

2.3.2 Dispute settlement

Disputes arise in any system; what is important is how these disputes are resolved. In a treaty regime, the treaty creates norms with which the states are expected to comply, but non-compliance may arise as a result of the ambiguous language of the treaty text. Where this occurs, it is important to have a dispute settlement mechanism that resolves the ambiguity and serves as an authoritative mechanism for the interpretation of the norms. The managerial approach suggests that, instead of using a conventional formal dispute settlement procedure like an international tribunal, it might be more effective to use a plenary body of the treaty regime, the secretariat, or another designated interpretative organ such as a legal committee.⁸¹

These informal dispute settlement bodies are less contentious and in many cases have a preventive or anticipatory value.⁸² This means that these bodies could be used to forestall the non-compliance. The non-adversarial nature of these bodies provides a favourable atmosphere for states to resolve their differences and reach an amicable solution.⁸³ Since this process is less contentious, having an institutionalised informal dispute settlement mechanism may be more attractive to member states. Unlike formal dispute settlement mechanisms, which are mainly concerned with the strict application of legal rules,⁸⁴ an informal dispute settlement mechanism is

⁸¹ Ibid 24, 209.

⁸² Ibid 24.

⁸³ Ibid 209.

⁸⁴ Julia Black posits that empirical and theoretical studies show the limitations of system statutory rules backed by sanctions. Julia Black *Rules and Regulators* (Clarendon Press, Oxford, 1997) 3.

more likely to effectively resolve issues that have a political, economic and social undertone— a common feature of economic integration treaties.

In the context of the ECOWAS Court of Justice, Kofi Kufuor suggests that the inflexibility of formal adjudicatory bodies makes them an unattractive mechanism for states to settle their disputes, because international disputes often have political and legal aspects and states would rather opt for face-saving negotiations.⁸⁵ If we consider the fact that the objective of having a dispute settlement mechanism is not necessarily to punish non-compliant behaviour but rather to ensure that states conform with the prescribed behaviour, then an informal dispute settlement mechanism might be an effective tool in achieving this goal since, at this level, both the political and legal aspects of the dispute can be properly addressed.

Also, a significant number of disputes between states are usually settled informally through negotiations and sometimes with the assistance of some form of intermediation.⁸⁶ This approach to dispute settlement could be of great significance to the integration process in Africa because African states have rarely used the existing regional courts or formal dispute settlement mechanisms on the continent to settle their inter-state disputes. Even when formal dispute settlement is provided for, it is suggested as the last resort. For example, the dispute settlement clause in article 32 of the SADC Trade Protocol, only suggests formal adjudication as the last resort in the event that mutual cooperation, consultations and referral to trade experts fail.

The poor record of the use of formal dispute settlement mechanisms by African states also strengthens the argument for the use of informal dispute settlement mechanisms. In the era of the OAU, the OAU Charter provided for the settlement of disputes through the use of a Commission on Mediation, Conciliation and Arbitration.⁸⁷ Tiyanjana Maluwa has observed that, in the first two decades of the existence of the OAU, no dispute was

⁸⁵ Kofi Kufuor 'Securing compliance with the judgements of the ECOWAS Court of Justice' (1996) 8 *African Journal of International and Comparative Law* 7.

⁸⁶ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 201.

⁸⁷ Article XIX Charter of the Organisation of African Unity 1963. 3 ILM 766 (1963).

submitted to the Commission on Mediation, Conciliation and Arbitration.⁸⁸ During this era, over 30 intra-African disputes were neither settled by the Commission nor was there an invocation of the dispute settlement clause of the OAU Charter.⁸⁹ Rather, African states resorted to political and diplomatic means, using ad hoc Committees to resolve these disputes. Similarly, the post-OAU era has not witnessed any formal adjudication between African states either at AU level or at REC level. This evidence undeniably strengthens the argument for the use of informal dispute settlement mechanisms.

Be that as it may, the call for informal dispute settlement mechanisms should not be regarded as a call for the eradication of formal adjudicatory mechanisms, nor does it mean that formal dispute settlement mechanisms serve no purpose or are ineffective. Formal dispute settlement mechanisms are still necessary, particularly because African integration treaties sometimes confer rights on private citizens that need to be protected. As will be shown in chapter 5, formal dispute settlement mechanisms play an important role in shaping and inculcating norms among member states and citizens alike. However, entrenching the habit of using informal dispute settlement mechanisms could also enable African states to settle disputes or to clarify the ambits of their integration obligations.

2.3.3 Capacity building

Where non-compliance stems from a deficit in technical and bureaucratic capability or a lack of financial resources, developing mechanisms to build capacity in these areas will enhance overall compliance.⁹⁰ The lack of technical know-how often affects the ability of a state to comply with its treaty obligations even when there is an earnest desire to meet the treaty obligations. A state might simply lack the basic technical know-how or the administrative capacity to meet the requirements of the treaty. In such instances, compliance may be increased if the treaty has a framework that

⁸⁸ Tiyanjana Maluwa (note 38) 307–308.

⁸⁹ Two of these disputes were brought before the International Court of Justice: *Continental Shelf (Tunisia v Libya) Case* [1982] ICJ Rep 18 and *Frontier Dispute (Burkina Faso v Mali) Case* [1986] ICJ Rep 554.

⁹⁰ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 25.

offers technical assistance to states in need. Most African states are plagued by technical, institutional, bureaucratic and human incapacity in various sectors. In order to improve the performance of states, strategies need to be put in place to develop competence. In this regard, initiatives such as the New Partnership for Africa's Development (NEPAD), which is discussed in chapter 4, can play an important role in building human, financial, institutional and infrastructural capacity to enable African states to reach their development goals and consequently achieve integration objectives.

2.3.4 Persuasion

Transparency, dispute settlement and capacity building may all be used to influence a state's behaviour through a process of discourse between states, the institutions created by the treaty, and other non-state actors.⁹¹ In this context, the concept of persuasion depicts an iterative process whereby states, institutions of the treaty, and the public are involved in a continuous discourse about acceptable levels of compliance.⁹² The essence of this discursive process is to facilitate an atmosphere whereby non-compliant behaviour can be mutually analysed and resolved rather than punished.⁹³ If states are periodically required to report on their policies and programmes pertinent to the attainment of the objectives of the treaty, the Secretariat could analyse the report and submit it to the member states for discussion. The state in question is given the opportunity to present and defend the report. The process of reviewing and assessing the performance of the state helps to specify the required behaviour.⁹⁴

Furthermore, the interactions between all the actors help to expound the meaning of the treaty norms by identifying the performance required in particular circumstances.⁹⁵ The treaty norms thus serve as coordination points around which states can harmonise their actions and the interactions about the content of the treaty norms provide leverage for securing

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid 26.

⁹⁴ Ibid 229–231.

⁹⁵ Ibid 110.

compliance.⁹⁶ The application of a combination of these strategies would induce compliance, and instances of non-compliance would be the exception rather than the rule.

2.4 Criticisms of the managerial approach

No theory of law is flawless and the managerial approach is no exception. The managerial approach has been criticised for the following reasons:

- (1) Its approach to enforcement is rather weak because it downplays the role of sanctions in inducing compliance.
- (2) It creates the impression that the managerial approach and the use of enforcement are two alternatives, rather than looking at them as complementary.
- (3) It does not examine how member states internalise the constraining norms which prevent non-compliance within their domestic constituencies.
- (4) It focuses too much on the process of compliance and thus pays too little attention to the substance of the rules that must be enforced.
- (5) It does not consider in sufficient detail the role of international institutions in securing compliance.
- (6) It does not discuss how to secure compliance when states deliberately flout their treaty obligations on the basis of national interest.⁹⁷

These criticisms are addressed in four categories in order to justify the application of the managerial approach and to show that the criticisms do not affect the validity of the use of the managerial approach in securing compliance with African integration treaties. The four categories are: (1) state interest and the internalisation of treaty norms in the domestic arena; (2) the value of enforcement through the use of sanctions; (3) emphasis on process

⁹⁶ Ibid.

⁹⁷ Harold Koh 'Why do nations obey international law' (1996–1997) 106 *Yale Law Journal* 2639–2641; Andrew Guzman (note 6) 1830–1833; Oona Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1955–1958; Henry Mutai (note 11) 12; George Downs et al 'Is the good news about compliance good news about cooperation?' (1996) 50 (3) *International Organization* 379–406.

rather than the substance of the rules; and (4) role of international institutions in securing compliance.

2.4.1 State interest and the internalisation of treaty norms in the domestic arena

As mentioned earlier, integration treaties in Africa are adopted to create norms that will enable African states to resolve their economic and development challenges and as such they address issues of common interest to all member states. It is therefore member state highly unlikely that violations of the treaty norms would be deliberate acts. Since integration treaties are meant to protect the interests of states and place an obligation on states to take the necessary steps within their national domain to give effect to the treaties, we can assume that states will internalise the integration norms in order to improve their overall position.

Furthermore, the direct process of internalising treaty norms may not be effectively regulated within the framework of the treaty because African states have different legal systems. However, with the creation of national focal points in each state, strategies for the internalisation of treaty norms can be achieved state by state.⁹⁸ In essence, the integration treaties serve as coordination points for creating the norms and place an obligation on the state to internalise the norms. The means by which the norms are internalised is left open to member States. A practical example is the obligation in article 5(3) of the ECOWAS Treaty, which requires member states to abide by the decisions and regulations of the Community. However, there is no direction as to how it should be internalised in a member state's national domain. Therefore, a member state is free to decide whether it will enact domestic legislation that will give effect to such decisions or regulations, or whether such decisions will be incorporated through judicial pronouncements. The most important thing is complying with the decisions.

⁹⁸ See the discussion of national focal points in chapter 5.

2.4.2 The value of enforcement through the use of sanctions

Regional integration is still in its formative stage in Africa. Most African states lack the capacity to implement most of the integration objectives and therefore the use of sanctions will not help to improve the status of integration. For instance, in a bid to facilitate the free movement of persons in the ECOWAS region, in 2000 member states agreed to issue common international passports to all ECOWAS citizens by the end of 2005. By May 2005 only four member states had met the deadline.⁹⁹ Most states had failed to meet this deadline due to financial and logistical challenges. Sanctioning these errant states would neither generate the required finances nor boost their technical capacity, and would therefore not be most pragmatic solution. The managerial theory does not argue that the use of sanctions or enforcement in general has no value whatsoever; rather, it suggests that the use of sanctions may not always result in states conforming to the prescribed behaviour.

2.4.3 Emphasis on process rather than the substance of the rules

This critique is based on the fact that treaty rules may sometimes be unfair or may have been generated by coercive bargains that invariably challenge the legitimacy of the rules.¹⁰⁰ This situation does not necessarily arise in the context of African integration. All the integration treaties were mutually agreed upon and were negotiated on an equal basis by Heads of States and governments. Furthermore, most African integration treaties have adopted the variable geometry principle (discussed in chapter 3) to ensure that all states do not integrate at the same pace, taking into account the different stages of development of each state. This takes care of any inequalities that may arise from the process of integration.

2.4.4 The role of international institutions

The managerial approach acknowledges that the impact of transparency, capacity building and dispute settlement will be meaningful only if an

⁹⁹ See <http://www.modernghana.com/news/89776/1/only-four-ecowas-countries-have-ecowas-passports.html> [accessed 25 November 2011].

¹⁰⁰ Harold Koh (note 97) 2641.

effective institutional setting is deployed.¹⁰¹ The interactive process between states and non-state actors occurs within the institutional framework of the treaty regime. The managerial approach goes beyond exploring the role of international institutions and includes non-state actors, such as non-governmental organisations, in the process of securing compliance. All these actors form part of a discursive process that helps to secure compliance. In the context of African integration, the African Union Commission and the Specialised Technical Committees are responsible for coordinating and harmonising various integration projects between all the actors involved in the integration process.¹⁰² At the regional level, the Secretariat or the Commission of the various RECs play the same role.¹⁰³ These institutions are important for managing the entire process of integration.

2.5 Some other theories of compliance in international law

The subject of compliance with international law has been the focus of enormous legal scholarship. An attempt to examine even a fraction on the debate would derail the focus of this thesis. However, this section gives an overview of two contemporary schools of thought: the legitimacy theory and the transnational legal process theory. The legitimacy theory supports the view that compliance with international legal obligations can be achieved without the use of enforcement mechanisms. The transnational legal process, on the other hand, contends that domestic legal institutions play a prominent role in ensuring that states comply with their international obligations by entrenching international norms in the domestic arena. Various elements of these theories validate the use of the managerial approach in securing compliance with African integration treaties.

¹⁰¹ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (note 4) 271.

¹⁰² Articles 22 and 25 Abuja Treaty.

¹⁰³ Article 20 ECCAS Treaty, article 12 IGAD Treaty, article 14 SADC Treaty, article 17 COMESA Treaty and article 71 EAC Treaty.

2.5.1 Legitimacy theory

Thomas Franck is the major proponent of the legitimacy theory.¹⁰⁴ The theory posits that states will comply with rules that they perceive to be legitimate. Legitimacy in this context means the 'quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with [the] right process'.¹⁰⁵ The legitimacy theory suggests that determinacy, symbolic validation, coherence and adherence to normative hierarchy are the elements of legitimacy which determine whether a state will comply with its obligations.¹⁰⁶ A rule that exhibits these elements will secure compliance even in the absence of coercive measures because states will regard the rule as being legitimate.

Determinate rules secure compliance because they are easily ascertainable; states understand the rule and know exactly what is expected of them.¹⁰⁷ Clarity is important because the treaty must send a clear message as to the expected normative standards. An indeterminate rule makes it difficult for states to know what level of conformity is required and thus enables non-compliance.¹⁰⁸ Determinacy therefore depends on the ability of a rule to clearly 'communicate its intent and shape that intent into a situational command'.¹⁰⁹

Symbolic validation as a determining factor for legitimacy gives rules a 'cultural and anthropological dimension'.¹¹⁰ It serves as a cue to elicit compliance by situating the rule as part of the normative structure of those states whose conduct the rule seeks to govern. In other words, the rule

¹⁰⁴ Thomas Franck 'Legitimacy in the international system' (1988) 82 *American Journal of International Law* 705–759; Thomas Franck *Fairness in International Law and Institutions* (Oxford University Press, Oxford, 1995) 25–46.

¹⁰⁵ Thomas Franck 'Legitimacy in the international system' (note 104) 706. See also Steven Bernstein and Benjamin Cashore 'Nonstate global governance: is forest certification a legitimate alternative to a global forest convention?' in JJ Kirton and MJ Treilcock (eds) *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate, Cornwall, 2004) 33–64 at 41. See MC Suchman 'Managing legitimacy: strategic and institutional approaches' (1995) 20(3) *Academy of Management Review* 571–610.

¹⁰⁶ Thomas Franck 'Legitimacy in the international system' (note 104) 712.

¹⁰⁷ *Ibid* 713.

¹⁰⁸ KW Abbott et al 'The concept of legalization' (2000) 54 (3) *International Organizations* 401–419 at 403.

¹⁰⁹ Thomas Franck 'Legitimacy in the international system' (note 104) 725.

¹¹⁰ *Ibid* 725–735.

symbolises a part of 'the overall system of social order'.¹¹¹ This makes the rule part and parcel of the system of the governed, thereby generating compliance with the rule. Symbolic validation helps to reinforce the legitimacy of a rule since it is usually viewed as an expression of a recognised and validated process.

A coherent rule helps to treat like situations in the same manner, thus establishing general principles that are applied by the rules.¹¹² Where a rule establishes general principles, it creates predictability and consistency in the system. Consistency and predictability ensure that there is uniformity in the application of a rule. An incoherent rule would fail to generate consistency and predictability, thereby generating non-compliance.

The final factor that affects the legitimacy of a rule is its adherence to a normative hierarchy, that is, the connection 'between a single primary rule of obligation and a pyramid of secondary rules governing the creation, interpretation, and application of such rules by the community.'¹¹³ A rule will be able to secure compliance if the rule is supported by a canon of rules recognised by the community, or if it operates within an institutional framework in which the community organises itself.¹¹⁴ To put it differently, for a rule to enjoy legitimacy, it must derive its source of authority from other recognised principles. In the absence of this, the ability of the rule to secure compliance may be brought into question. Franck's position on the consistency and predictability of rules reinforces the Chayes theory on the ambiguity of treaty rules as a key reason for non-compliance. Furthermore, Franck's juxtaposition of legitimacy and normative hierarchy strengthens the argument for the need for a process that constantly iterates the contents of the integration norms among states.

¹¹¹ Thomas Franck *Fairness in International Law and Institutions* (note 104) 34.

¹¹² *Ibid* 38.

¹¹³ *Ibid* 41. Thomas Franck 'Legitimacy in the international system' (note 104) 752.

¹¹⁴ Thomas Franck *Fairness in International Law and Institutions* (note 104) 41.

2.5.2 Transnational legal process theory

Harold Koh is a recent proponent of transnational legal process, and he uses it to explain how states comply with their international legal obligations.¹¹⁵

Transnational legal process is described as the ‘theory and practice of how public and private actors – nation-states, international organisations, multinational enterprises, non-governmental organisations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalise the rules of transnational law.’¹¹⁶ The theory suggests that the legal institutions of the states play a prominent role in ensuring that a state complies with its international law obligations.

The transnational legal process has four unique characteristics.¹¹⁷ The first is that it dissolves the dichotomy between national and international law, and between public and private law. Secondly, the actors in the process include state and non-state actors. Thirdly, the process is dynamic, because it oscillates between national and international law, and between public and private law. Fourthly, it is normative because the process of interactions creates new rules which are internalised and enforced by the state.

Transnational legal process posits that ‘[s]tates internalise international law by incorporating it into their domestic and political structures, through executive action, legislation and judicial decisions which take account of and incorporate international norms.’¹¹⁸ This process of internalisation of international norms by domestic institutions eventually leads to compliance in the international arena. Thus compliance occurs not as a result of the fear of sanctions but through the incorporation of the international rules into the domestic legal system of the state.¹¹⁹

¹¹⁵ Harold Koh ‘Why do nations obey international law?’ (note 88) 2599–2659; Harold Koh ‘Transnational legal process’ (1996) 75 *Nebraska Law Review* 181–207. The concept of ‘transnational law’ was coined by Phillip Jessup in 1956. See Harold Koh, ‘Transnational legal process’ 186.

¹¹⁶ Harold Koh ‘Transnational legal process’ (note 107) 183.

¹¹⁷ *Ibid* 184.

¹¹⁸ *Ibid* 204. Harold Koh ‘Bringing international law home’ (1998) 35(3) *Houston Law Review* 628

¹¹⁹ Kal Raustiala and Anne-Marie Slaughter ‘International law, international relations and compliance’ in Walter Carlsnaes, Thomas Risse, and Beth Simmons (eds) *Handbook in International Relations* (Sage Publications, London, 2002) 544.

Koh's theory has been criticised for failing to explain why and when states comply with international rules. Instead, the theory explains how states incorporate international norms into their domestic legal systems. The theory has also been criticised for not comparatively examining compliance and non-compliance so as to determine the appropriate response when non-compliance occurs.¹²⁰ However, Koh's theory is relevant to this thesis because of its emphasis on the incorporation of international norms into the domestic arena. This is particularly necessary for entrenching regional norms into the domestic legal systems of African states to secure compliance with integration treaties.

2.6 Conclusion

Anyone involved in the study of regional integration in Africa will readily admit that there are several endemic problems that need to be addressed if integration is to succeed.¹²¹ We will be oversimplifying the problem if we place the blame for the poor levels of economic integration solely on African states' wilful disregard of integration obligations. Although the problems of economic integration are well documented and evident for all to see, lawyers often find it difficult to clearly articulate solutions for resolving these problems without ignoring the practical realities. We are often quick to examine the challenges of economic integration in Africa from a purely legalistic perspective and tend to provide dry legal analyses of the problems.

It is true that 'integration is not a simple exercise in power sharing, but goes deeper and aims at a fundamental restructuring of society and of societal attitudes, and these changes are reflected in and promoted by the law'.¹²² However, the laws regulating integration have to be aligned with the

¹²⁰ Ibid.

¹²¹ Bankole Thompson 'Legal problems of economic integration in the West African sub-region' (1990) 2 *African Journal of International and Comparative Law* 85–101; UNECA *Assessing Regional Integration in African* (UNECA, Addis Ababa, 2004) 32–33; Babatunde Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012) XLV *Comparative and International Law Journal of Southern Africa* 65.

¹²² Mauro Cappelletti et al 'Integration through law: Europe and the American federal experience—a general introduction' in M Cappelletti, M Seccombe and J Weiler (eds) *Integration through Law: Europe and the American Federal Experience—A Political, Legal and Economic Overview* vol 1 book 1 (Walter de Gruyter & Co, Berlin, 1986) 42–43.

existing realities of the societies for which they were made if they are to be effective and achieve their purpose. Economic integration laws must be certain enough to clearly prescribe the behaviour that is permitted and yet dynamic enough not only to proscribe non-permissible behaviour but also to address the root causes of non-permissible behaviour. Thus, in developing strategies to secure compliance with African integration treaties, one must not only consider methods that would proscribe non-compliant behaviour; one must also explore possible mechanisms to address the root causes of non-compliance albeit within a legal regulatory environment.

To this end, this chapter has identified in broad terms the factors that affect the ability of states to comply with their treaty obligations and has also identified mechanisms that could be adopted within the treaty framework to mitigate the high levels of non-compliance. The key points that have emerged from the discussion in this chapter are the following:

- (1) Ambiguity and indeterminacy in the language of a treaty, lack of capacity, and the temporal aspects of treaties may affect a state's ability to comply with its treaty obligations.
- (2) Where a state fails to comply with its treaty obligations on the basis of these factors, the use of sanctions will not necessarily lead to the state complying with the prescribed behaviour.
- (3) In order to improve compliance or mitigate non-compliance, an iterative process which facilitates transparency, capacity building, dispute settlement and persuasion should be used.

This is not a claim that the use of the managerial approach will completely eliminate all forms of non-compliant behaviour. However, the approach could certainly mitigate the existing levels of non-compliance if used over time. In light of the above, the next chapter examines economic integration in the context of the African Union to determine how the managerial approach could be used to improve integration at the continental level.

Chapter 3: Coordinating economic integration through the African Union

3.0 Introduction

Most efforts at international cooperation take place within an institutional setting and international institutions such as the African Union (AU) play an important role in coordinating cooperation between African states.¹

International institutions help to facilitate cooperation between states by reducing uncertainty and transaction costs.² They also manage interstate relations and it has become practically 'impossible to imagine contemporary international life' without international institutions.³ The use of international institutions to manage the objectives of a treaty makes compliance possible and more likely.⁴ They make compliance possible by creating 'a stable environment for mutually beneficial decision-making as they guide and constrain behaviour'.⁵ They also facilitate iteration, reduce transaction costs, establish self-reinforcing behaviour, increase access to information, monitor behaviour, mediate disputes, and impose sanctions.⁶

In the context of economic integration in Africa, the AU is the primary international institution vested with the responsibility of managing the interstate relations of African states. This chapter examines how the AU can manage economic integration in order to mitigate the existing levels of non-compliance with African integration treaties. As stated in chapter 2, the

¹ Robert Keohane *International Institutions and State Power: Essays in International Relations Theory* (Westview Press Inc, Colorado, 1989) 159.

² Abram Chayes and Antonia Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, 1995) 229; K Abbott and D Snidal 'Why states act through formal international organizations' (1998) 42(1) *Journal of Conflict Resolution* 5.

³ Henry Schermers and Niel Blokkers *International Institutional Law: Unity within Diversity* 3 rev ed (Kluwer Law International, Cambridge, 1995) 3.

⁴ Jose Alvarez 'Why nations behave' (1997–1998) 19 *Michigan Journal of International Law* 309.

⁵ Duncan Snidal 'Political economy and international institutions' (1996) 16 *International Review of Law & Economics* 127.

⁶ William Aceves 'Institutionalist theory and international legal scholarship' (1997) 12 (2) *American University International Law Review* 248–254.

various mechanisms (transparency, dispute settlement, capacity building, and the use of persuasion) for managing non-compliance occur within an institutional setting deployed by the member states, and the success of the process is largely dependent on the efficiency of the institutional arrangement.⁷

At this juncture, it is important to clarify the approach used in examining the AU as the international institution for managing economic integration. A significant number of studies have been carried out on the composition and functions of and theoretical approaches to international institutions.⁸ This chapter does not examine these issues. Rather, the AU is examined from the perspective of its ability to elaborate upon and facilitate the implementation of integration norms at the regional and national levels. In this regard, the chapter begins with a historical analysis of the AU in order to provide background to economic integration at the regional level. The next section proceeds to examine the role and functions of the principal organs of the AU with a view to determining how they can contribute to managing economic integration on the continent. The last section examines the relationship between the AU and the Regional Economic Communities (RECs) in order to clarify the relationship between both set of institutions.

3.1 Historical analysis of the African Union and the political will to integrate

Before delving into the discussion of the AU's role in fostering economic integration on the continent, it is important to give a brief summary of the historical origins of the AU. Such a summary is necessary because it highlights the institutional and normative reforms that have occurred over the years. In addition, it helps to properly locate the discussion on African economic integration.

⁷ Abram Chayes and Antonia Handler Chayes (note 2) 271.

⁸ DW Bowett *The Law of International Institutions* 4 ed (Stevens Publishers, London, 1982); CF Amerasinghe *Principles of the Institutional Law of International Organizations* 2 ed (Cambridge University Press, New York, 2005); Rene Jean Dupuy (ed) *A Handbook on International Organizations* (Kluwer Academic, Hingham, 1988); Clive Archer *International Institutions* 3 ed (Routledge, London, 2001); Barbara Koremenos et al 'The rational design of international institutions' (2001) 55(4) *International Organization* 761–799; David Kennedy 'The move to institutions' (1987) 8 *Cardozo Law Review* 841–988; Oran Young *International Governance* (Cornell University Press, Ithaca, NY, 1994).

The AU was created in 2001 and comprises 54 member states.⁹ It succeeded the Organisation of African Unity (OAU), which was the previous organisation responsible for integrating the continent.¹⁰ The OAU was established in 1963 to promote unity and solidarity between the newly independent African states and also to achieve a better life for the people of Africa.¹¹ As part of its objectives, the OAU fought to eradicate all forms of colonialism in Africa by acting as the collective medium for defending the sovereignty, territorial integrity and independence of African states.¹² In a bid to promote unity and international cooperation within the OAU, the member states agreed to coordinate and harmonise their national policies in various areas. The areas of cooperation included politics and diplomacy, economic policies, education and culture, health and sanitation, science and technology, defence and security.¹³ In order to reinforce the commitment of member states to integrate the continent through the harmonisation of policies in the areas listed in the OAU Charter, subsequent declarations and resolutions were passed by the Assembly of Heads of State and Government of the OAU (the highest decision-making body).¹⁴

However, it was only in 1991 that member states could finally adopt a treaty to serve as the framework for continental economic integration. In this

⁹ South Sudan is the newest member of the African Union. Morocco is the only African state that is not a member of the African Union. It withdrew from the OAU (predecessor to the AU) when the OAU admitted Western Sahara as member of the OAU in 1984.

¹⁰ Charter of the Organisation of African Unity (OAU Charter) (1963) 3 *ILM* 766.

¹¹ For a history of the OAU, see Z Cervenka *The Unfinished Quest for Unity: Africa and the OAU* (Friedmann, London, 1977); AF Addona *The Organization of African Unity* (World Pub Co, Cleveland, OH, 1969); C.O.C Amate *Inside the OAU: Pan-Africanism in Practice* (St Martin's Press, New York, 1986); Colin Legum 'The Organisation of African Unity—Success or Failure?' (1975) 51 *International Affairs* 208–219.

¹² Article II (1) OAU Charter.

¹³ Article II (2) OAU Charter.

¹⁴ Some of the Declarations and Resolutions include Resolution CM/ST/12(XXI) on the African Declaration of Cooperation, Development and Economic Independence, endorsed by the Tenth Ordinary Session of the OAU held in Addis Ababa on 25 May 1973; Recommendations of the 11th Extraordinary Session of the Council of Ministers of the OAU on Economic Development and Cooperation held in Kinshasa in December 1976; Monrovia Declaration of Commitment of the Heads of State and Government of the OAU on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order AHG/ST.3 (XVI) Rev 1; Resolution on Holding an Extraordinary Session of the Assembly of the Heads of States and Government on Economic Problems of Africa AHG/ST.4 (XVI) Rev 1; Final Act of Lagos 1980; and the Lagos Plan of Action 1980. See also Jeggan Senghor 'The Treaty Establishing the African Economic Community: An introductory essay' in AA Yusuf (ed) *African Yearbook of International Law* (Martinus Nijhoff Publishers, Dordrecht, Netherlands, 1993) 183–194.

regard, the OAU adopted the Treaty Establishing the African Economic Community (Abuja Treaty) as part of its strategy for continental economic integration.¹⁵ The Abuja Treaty laid out guidelines for economically integrating Africa through the creation of an African Economic Community (AEC).¹⁶ The Abuja Treaty was also deemed an integral part of the OAU Charter and therefore its objectives were performed by the OAU.¹⁷

The adoption of the Abuja Treaty was insufficient to enable Africa to improve the living conditions of her citizens and give her prominence in the international polity. Therefore, member states decided to structurally reposition the OAU 'in order to reinvigorate the project of African integration in response to the forces of globalisation'.¹⁸ The decision to restructure the OAU was made at the Fourth Extraordinary Session of the Assembly of Heads of State and Government of the OAU, and a declaration that called for the establishment of an African Union was adopted.¹⁹

In addition to the call for the establishment of an African Union, a decision was also reached to accelerate the economic integration process laid out in the Abuja Treaty by shortening the implementation timetable. There was also a call for the rapid establishment of all key organs of the AEC that had yet to be created. On 11 July 2000 the Constitutive Act of the African Union (Constitutive Act) was adopted by the Assembly of Heads of State and Government of the OAU,²⁰ and the African Union was established

¹⁵ Treaty Establishing the African Economic Community (Abuja Treaty) (1991) 30 *ILM* 1241.

¹⁶ Article 6 Abuja Treaty.

¹⁷ Articles 96, 98 (1) and 99 Treaty Establishing the African Economic Community (1991) 30 *ILM* 1241.

¹⁸ T Maluwa 'From the Organisation of African Unity to the African Union: rethinking the framework for the inter-state cooperation in Africa in the era of globalization' (2009) 9 *University of Botswana Law Journal* 59. See also OAU Assembly of Heads of State and Government, 35th Ordinary Session/Third Ordinary Session of AEC, 12–14 July 1999, Algiers, Algeria, AHG/Dec. 140 (XXXV), available at http://www.africa-union.org/official_documents/Heads%20of%20State%20Summits/hog/9HoGAssembly1999.pdf [accessed 30 July 2010].

¹⁹ Fourth Extraordinary Session of the Assembly of Heads of State and Government, 8–9 September 1999, Sirte, Libya, EAHG/Draft/Decl (IV) Rev 1, available at http://www.africa-union.org/Docs_AUGovernment/decisions/Sirte_Declaration_1999.pdf [accessed 30 July 2010].

²⁰ Assembly of Heads of State and Government, Thirty Sixth Ordinary Session/Fourth Ordinary Session of the African Economic Community, 10–12 July 2000, Lome, Togo, AHG/Decl.1-6 (XXXVI) available at http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemndeclaration.pdf [accessed 30th July 2010].

in 2001.²¹ The Constitutive Act became operational on 26 May 2001, after it had been ratified by two-thirds of the member states, thereby replacing the OAU Charter.²²

The transformation of the OAU into the AU represented a symbolic shift in the institutional and legal architecture of integration in Africa.²³ In terms of the institutional shift, the AU created new institutions (the Pan-African Parliament, the Court of Justice, the Permanent Representatives' Committee', the Specialised Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions) to coordinate integration on the continent.²⁴ These new institutions all have specialised and technical functions necessary for giving effect to the integration agenda. Furthermore, the creation of the Court of Justice had both legal and symbolic significance. It was an indication that African states were willing to submit their disputes to a judicial organ whose decisions are binding and final. This change in attitude represents an important shift from the previous approach under the OAU, where disputes were settled by a Commission on Mediation, Conciliation and Arbitration.

In terms of the normative change in the transformation, the AU expanded its principles and objectives to include the participation of African people in the activities of the AU and the right of the AU to intervene in the internal affairs of a member state where war crimes, genocide or crimes against humanity have been committed. It also included the respect for human rights, the rule of law, democratic principles and good governance; promoting social justice to ensure balanced economic development; the rejection of unconstitutional changes in governments; and the coordination and harmonisation of policies between RECs.²⁵ These changes undoubtedly reflected a change in the attitude of African states towards creating an

²¹ Assembly of Heads of State and Government, Fifth Extraordinary Session, 1–2 March 2001, Sirte, Libya, EAHG/Dec.1 (V), available at http://www.au2002.gov.za/docs/key_oau/sirterep.htm [accessed 30 July 2010].

²² T Maluwa (note 18) 56.

²³ *Ibid* 77.

²⁴ Article 5 Constitutive Act. These institutions did not exist under the OAU. Some of them were provided for in article 7 of the Abuja Treaty but they were not operational during the lifetime of the OAU.

²⁵ Article 4 Constitutive Act.

organisation to oversee the conduct of member states in certain areas of endeavour.

While it has been commonly argued that African states are unwilling to cede sovereignty to regional institutions, some of these changes, indicate the contrary.²⁶ The debate on sovereignty always takes the centre stage in any discussion of African integration.²⁷ Undoubtedly sovereignty as a primary attribute of a state is an expression of ‘the independence and the autonomy of the state, and the possibility to exercise its powers within its borders’.²⁸ Picciotto suggests that sovereignty may be regarded ‘as a particular way of distributing political power within and between states’.²⁹ This distribution of powers involves the ability of a state to decide its internal relations within its national domain and its external relations with other members of the international community.

The default position is that every state tries to keep its sovereignty intact even in instances where it may have expressly (through treaties) or implicitly (through the acceptance of customary rules of international law) limited the exercise of its sovereign powers.³⁰ This attitude is not peculiar to African states.³¹ Article 3 (b) of the Constitutive Act, which lists the defence

²⁶ George Mukundi Wachira ‘Sovereignty and the “United States of Africa”’ *Institute for Security Studies Paper 144* (2007) 1; Percy Mistry ‘Africa’s record of regional co-operation and integration’ (2000) 99 *African Affairs* 558.

²⁷ G Naldi ‘Future trends in human rights in Africa: The increased role of the OAU’ in M Evans and R Murray (eds) *The African Charter on Human and Peoples Rights: The System in Practice, 1986-2000* (Cambridge University Press: Cambridge, 2002) 1.

²⁸ Salvatore Mancuso ‘The renunciation to state sovereignty: is it an issue for the OHADA treaty for the harmonization of business law in Africa?’ in Chima Nweze (ed) *Contemporary Issues on Public International and Comparative Law* (Vandeplas Publishing, Lake Mary, 2009) 478.

²⁹ Sol Picciotto *Regulating Global Corporate Capitalism* (Cambridge University Press, Cambridge, 2011) 30. For more definitions and discussions of sovereignty, see W Nagan and C Hammer ‘The changing character of sovereignty in international law and international relations’ (2004–2005) 43 *Columbia Journal of Transnational Law* 144–188; J Crawford, *The Creation of States in International Law* 2 ed (Clarendon Press, Oxford, 2006) 32; Ian Brownlie *Principles of Public International Law* 6 ed (Oxford University Press, Oxford, 2003) 290; S Lee ‘A puzzle of sovereignty: sovereignty either is or is not’ (1997) 27 *California Western International Law Journal* 241–263; N MacCormick ‘On sovereignty and post-sovereignty’ in N MacCormick (ed) *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999) 123–136.

³⁰ Don Greig ‘“International community”, “interdependence” and all that ... rhetorical correctness’ in Gerard Kreijen (ed) *State Sovereignty and International Governance* (Oxford University Press, New York, 2002) 524.

³¹ See generally Anne-Marie Slaughter ‘Sovereignty and power in a networked world order’ (2004) 40 *Stanford Journal of International Law* 283–327; Stephen Krasner *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersey, 1999) 3–42.

of sovereignty and territorial integrity of member states as one of the objectives of the African Union, is a clear expression of this default position.³² However, the contemporary international system has become interdependent and states cannot act independently at all times. The interdependence of states is also listed as one of the principles of the African Union.³³ Chayes and Chayes write that state 'sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life'.³⁴ In other words, while states may enter into treaties to protect their self-interest, the treaties may have provisions which curtail some aspects of that interest to protect the overall interests of all the parties to the treaty. The state will therefore be compelled to accept such curtailment in order to benefit from the treaty. This curtailment can be regarded as concessions which states are required to make in order to reach an agreement that is beneficial to all the parties to the treaty – this is the essence of regional integration.

In the context of the transition of the OAU to the AU, some key principles incorporated into the Constitutive Act, such as the right of the AU to intervene in cases of crimes against humanity, signify that states recognise interdependence and also accept the curtailment of their unilateral powers to violate the rights of their citizens. These provisions were not part of the OAU Charter and their inclusion in the Constitutive Act not only goes beyond strengthening human rights norms, but also adds a jurisprudential value to the manner in which we conceptualise the sovereign powers of African states in relation to the AU.

Another way of looking at sovereignty in relation to regional integration in Africa is to consider the compromises or concessions made by states as acts of 'sovereign bargains'.³⁵ In explaining the concept of sovereign

³² Similar expression is found in article 2(1)(4) of the United Nations Charter. See Stephen Krasner 'The hole in the whole: sovereignty, shared sovereignty, and international law' (2003–2004) 25 *Michigan Journal of International Law* 1077.

³³ Article 4(a) Constitutive Act.

³⁴ Abram Chayes and Antonia Handler Chayes (note 2) 27.

³⁵ The phrase 'sovereignty bargains' was coined by Karen Litfin. She argues that states engage in sovereignty bargains by ceding some monolithic principles of sovereignty. See

bargains, Litfin posits that the core elements of state sovereignty are 'autonomy', 'control' and 'legitimacy', and that these elements all operate within the territorial space of the state and may be varied in order to achieve the common objectives of the integrating regime.³⁶ This variation does not, however, deprive the state of its sovereign attributes. She suggests that 'states engage in sovereign bargains in which they voluntarily accept some limitations in exchange for certain benefits. The cumulative effect of these trade-offs, however, may be to alter the norms and practices of sovereignty by reconfiguring expectations regarding state autonomy, control and legitimacy'.³⁷ Mattli, in adopting the concept of sovereign bargains, argues that sovereign bargains reconfigure state sovereignty but do not diminish it, thereby keeping regional integration within the legal understanding of state sovereignty.³⁸ Therefore, expanding the objectives and principles of the AU to cover areas which were traditionally deemed to be within the exclusive domain of African states may be regarded as a trade-off that member states needed to make in order to create an organisation that would be relevant within and outside the continent. This trade-offs were voluntarily made in the creation of the AU.

Since the interdependence of states has become a fact of life, states will always have to make trade-offs. For example, a state that does not uphold the protection of human rights or the rule of law may still be compelled to join the AU because it does not want to be viewed by other African states as a gross violator of human rights and thus be deprived of the benefits that flow from being an AU member. However, joining the AU

Karen Litfin 'Sovereignty in world ecopolitics (1997) 41 *Mershon International Studies Review* 169.

³⁶ She defines 'control' as the ability to produce an effect, 'autonomy' refers to independence and 'legitimacy' refers to the recognised power to make rules. In this context, sovereignty is deemed a summative concept which differs depending on the historical and social circumstances. See Karen Litfin (note 35) 169.

³⁷ Karen Litfin (note 35) 170. In explaining sovereignty as an allocation of power and responsibility, Trachtman posits that '[t]he attractiveness of a reallocation of sovereignty should be measured by reference to whether it allows social goals to be achieved effectively. Thus the question raised regarding the allocation is whether the receipt of enhanced power and responsibility will exercise power and recognize its responsibility more effectively.' See Joel Trachtman 'Reflections on the nature of the state: sovereignty, power and responsibility' (1994) 20 *Canada.- United .States Law .Journal* 400.

³⁸ Walter Mattli 'Sovereignty bargains in regional integration' (2000) 2(2) *International Studies Review* 150.

significantly curtails the extent to which it can violate the human rights of its citizens because gross violations may trigger intervention in terms of article 4 of the Constitutive Act. So while the state has the sovereign right to conduct its internal affairs, it has voluntarily limited the manner in which it can conduct its internal affairs in exchange for membership of the AU.

Balancing the principle of sovereignty and the interdependence of states is not new in the discourse on regional integration. In addressing a similar question, the Permanent Court of International Justice in the *Customs Regime* case was of the opinion that:

[a] State would not be independent in the legal sense if it was placed in a condition of dependence on another Power, ... if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails. Restrictions on its liberty of action which a State may agree to do not affect its independence, provided that the State does not thereby deprive itself of its organic powers ... The difference between the alienation of a nation's independence and a restriction which a State may agree to on the exercise of its sovereign power ... is clear. This latter is, for instance, the position of States which become Members of the League of Nations. It is certain that membership imposes upon them important restrictions on the exercise of their independence, without it being possible to allege that it entails an alienation of that independence. Practically, every treaty entered into between independent States restricts to some extent the exercise of the power incidental to sovereignty. Complete and absolute sovereignty unrestricted by any obligations imposed by treaties is impossible and practically unknown.³⁹

In essence, since integration treaties are wilfully entered into by African states and the obligations that may curtail some of their individual actions are collectively agreed upon, one may argue that states do not necessarily lose their sovereignty by entering into integration treaties, but rather allocate some aspects of it to the regional institutions to exercise on their behalf. Just as states in exercise of their sovereignty cannot be bound by treaties they have not consented to, a state also has the capacity, in the exercise of its sovereignty, to consent to a treaty that cedes some of the state's authority to institutions vested with powers to implement the common interest of the

³⁹ *Customs Regime between Germany and Austria* Advisory Opinion [1931] PCIJ Rep, series A/B, no 41 paras 160–163, available on http://www.worldcourts.com/pcij/eng/decisions/1931.09.05_customs.htm [accessed 20 June 2011].

states.⁴⁰ To this end, the next section examines the extent of powers ceded to the principal organs of AU to implement, monitor and coordinate the objectives of economic integration in Africa.

3.2 The principal organs of the African Union

This section examines the role and functions of the principal organs of the AU. The capacity of the principal organs of the AU to coordinate and give effect to the objectives expressed in the economic integration treaties is explored. The organs which are examined are the Assembly of Heads of State and Government, the Executive Council, the African Union Commission (AUC), and the African Court of Justice and Human Rights. The AU has other institutions (namely, the Pan-African Parliament, the Permanent Representatives' Committee', Special Technical Committees, the Economic, Social and Cultural Council, and Financial Institutions) however emphasis is placed on the former four institutions because they are responsible for developing, monitoring, implementing and interpreting continental economic integration policies.⁴¹

3.2.1 The Assembly of Heads of State and Government

The Assembly of Heads of State and Government (the Assembly) is the supreme policy organ of the AU and consists of the Heads of State and Governments of member states.⁴² The Assembly is headed by a chairperson who is elected for a period of one year.⁴³ The Assembly meets at least once a year in ordinary sessions but may hold an extraordinary session at the

⁴⁰ Bruno de Witte 'Sovereignty and European integration: the weight of legal tradition' (1995) 2 *Maastricht Journal of European & Comparative Law* 146. Jose Alvarez suggests that 'sovereignty has never been an absolute but an accordion of powers subject to degrees of sovereign control' because throughout history, states have shared, pooled or delegated some of their sovereign powers depending on the interest at stake. He further suggests that in understanding the relationship between global governance and sovereignty, both concepts should not be viewed as binary opposites or products of zero sum games. See Jose Alvarez, 'State sovereignty is not withering away: a few lessons for the future' in A Cassese (ed) *Realizing Utopia: The Future of International Law* (Oxford University Press, Oxford, 2012) 31.

⁴¹ Article 5 Constitutive Act.

⁴² Article 6 Constitutive Act and article 8 Abuja Treaty.

⁴³ Article 6 (4) Constitutive Act and article 9 (2) Abuja Treaty.

request of a member state.⁴⁴ The powers and functions of the Assembly are stated in article 8 of the Abuja Treaty and article 9 of the Constitutive Act. The Assembly generally determines the common policies of the AU. Specifically, in terms of economic integration, the Assembly determines the policies for the continent and gives directives as to how these policies are to be coordinated and harmonised by member states and RECs. The Assembly also monitors the implementation of these policies and ensures compliance by all member states and RECs.

In instances of non-compliance with the economic integration policies or where an institution of the AU exceeds its limits of authority, the Assembly may refer such dispute to the Court of Justice for a decision.⁴⁵ The referral of such disputes must be confirmed by an absolute majority vote of the members of the Assembly.⁴⁶ In order to perform its functions properly, the Assembly may delegate its powers and functions to any institution of the AU.⁴⁷ The Assembly acts through decisions, and its decisions are reached through consensus, failing which, a two-thirds majority carries the vote.⁴⁸ The decisions of the Assembly are binding on all member states, institutions of the AU, and RECs.⁴⁹ They are automatically enforceable 30 days after the chairperson of the Assembly signs and publishes the decisions in the official journal of the AU.⁵⁰ The decisions of the Assembly are categorised into

⁴⁴ The request for an extraordinary session has to be supported by a majority of two-thirds of member states. Article 6 (3) Constitutive Act and article 9 (1) Abuja Treaty.

⁴⁵ Article 8 (k) Abuja Treaty.

⁴⁶ Article 8 (k) Abuja Treaty. There is, however, no indication as to what constitutes an absolute majority since the phrase 'two-thirds majority' is used in some instances.

⁴⁷ Article 9 (2) Constitutive Act and article 8(4) Abuja Treaty.

⁴⁸ Article 7 Constitutive Act.

⁴⁹ Article 10(2) Abuja Treaty; rule 34(2) Rules of Procedure of the Assembly of the African Union.

⁵⁰ Rule 34 Rules of Procedure of the Assembly of the African Union; article 10 Abuja Treaty. Ferreira-Snyman and Heyns et al erroneously argue that the African Union does not have powers to issue directives which are legally binding on member states. See Anel Ferreira-Snyman 'Regional organisations and their members: the question of authority' (2009) XLII *Comparative and International Law Journal of Southern Africa* 200; C Heyns et al 'The African Union' 2003 *German Yearbook of International Law* 263. Ferreira-Snyman and Heyns' position may have been informed by the absence of a clear position in the Constitutive Act. However, since the Constitutive Act gives the Assembly the power to make its rules and also makes it the supreme organ of the African Union, provisions of the Rules of Procedure of the Assembly are binding on member states. Furthermore, the Abuja Treaty, which is an integral part of the Constitutive Act by virtue of the OAU transformation into the AU, also makes Assembly decisions legally binding on Member States.

regulations, directives, recommendations, declarations, resolution and opinions.⁵¹

Regulations and directives are binding because non-implementation attracts a sanction from the Assembly.⁵² Resolutions, declarations, recommendations and opinions are not binding because they are intended to guide the actions of member states.⁵³ Regulations are applicable in all member states and member states are required to take the necessary measures to implement them.⁵⁴ Directives are also applicable in all member states but they bind member states only as to the objectives to be achieved.⁵⁵ They give member states the discretion to determine the means through which the objectives will be implemented.

One issue that arises in the implementation of the decisions of the Assembly is that there is no indication in the Constitutive Act, the Rules of Procedure of the Assembly, or the Abuja Treaty as to how decisions become automatically enforceable. It is not clear if this means that the decisions will automatically have the force of law within the member states and will therefore create a basis for a right of action within the national legal systems. This ambiguity or uncertainty about the nature of automatic enforcement of Assembly decisions is further compounded by article 5 (2) of the Abuja Treaty. Article 5 (2) requires a member state 'in accordance with its constitutional procedures, [to] take all necessary measures to ensure the enactment and dissemination of such legislation as may be necessary for the implementation of the provisions of this Treaty'.

This could be interpreted to mean that decisions of the Assembly made pursuant to the Abuja Treaty need to be enacted in domestic legislation in order to have the force of law in member states. This literal interpretation is in accordance with the 'ordinary meaning rule' provided for in article 31 of the Vienna Convention on the Law of Treaties.⁵⁶ The implication of this interpretation is that the obligation to enact the necessary legislation to

⁵¹ Rule 33 (1) Rules of Procedure of the Assembly of the African Union.

⁵² Rule 33 (2) Rules of Procedure of the Assembly of the African Union.

⁵³ Rule 33 (1)(c) Rules of Procedure of the Assembly of the African Union.

⁵⁴ Rule 33 (1) (a) Rules of Procedure of the Assembly of the African Union.

⁵⁵ Article 33(1) (b) Rules of Procedure of the Assembly of the African Union.

⁵⁶ Vienna Convention on the Law of Treaties, 1969. 1155 UNTS 331.

give effect to the decisions of the Assembly is subject to the constitutional procedures of member states. So, where a decision of the Assembly has not been effected through domestic legislation, such a decision would be without legal effect within the national domain.⁵⁷ This interpretation would clearly be at variance with the rule that requires the decisions of the Assembly to be automatically enforceable.

An interesting point to note is that the equivalent provision of article 5 (2) of the Abuja Treaty is omitted in the Constitutive Act and the Rules of Procedure of the Assembly. Therefore, we can question the compatibility of article 5 (2) of the Abuja Treaty with article 33 (2) of the Constitutive Act, which gives the Constitutive Act precedence over the Abuja Treaty. Does article 33 (2) of the Constitutive Act extinguish the norm created in article 5 (2) of the Abuja Treaty? Unfortunately, the Assembly has neither clarified this point nor has any member state sought an interpretation. This question needs an urgent authoritative interpretation in order to clarify how economic integration norms are to be implemented in member states.

The norms created at the continental level should have the requisite authority to influence the domestic policies of member states, thereby compelling national institutions to pursue the norms.⁵⁸ The uncertainty about how to proceed with making Assembly decisions a part of national policies requires re-examination. If member states are expected to uniformly comply with the decisions of the Assembly, then it is important to clarify how such compliance is to be obtained.

Other than the question of clarity as to how the norms are to be entrenched in the national legal systems of member states, the ability of the

⁵⁷ This interpretation of article 5 (2) is in line with the dualist approach to the application of international legal rules in the national domain. Dualist scholars contend that international legal rules and domestic law are two separate bodies of laws and that domestic law takes precedence over international law in the national domain. In order for international law to become effective in the national domain, international law has to be domesticated. Monists, on the other hand, suggest that international law and domestic law are part of the same body of law and that international law takes precedence over national law. See JG Starke 'Monism and dualism in the theory of international law' (1936) 17 *British Yearbook of International Law* 74–75.

⁵⁸ Anne-Marie Slaughter and William Burke-White 'The future of international law is domestic' in Andre Nolkaemper and Janne Nijman (eds) *New Perspectives on the Divide between International and National Law* (Oxford University Press, Oxford, 2007) 111.

Assembly to perform its functions as the supreme policy body ensuring that member states implement the integration norms is questionable. The Assembly meets twice a year and its meetings usually last for about two to three days. Since economic integration is only one of the numerous areas that fall under the jurisdiction of the Assembly, it appears that not enough time is spent on properly deliberating all the issues on the agenda.⁵⁹ A close look at the decisions of the Assembly since 2002 reveals that the Assembly has made very few decisions on core issues of economic integration. Rather, its decisions have been focused on 'recurrent issues which have no direct bearing on the integration process'.⁶⁰ Since the inauguration of the AU, the Assembly has made over 200 decisions, but only ten of these decisions relate to any of the stages of economic integration outlined in the Abuja Treaty.⁶¹

The importance of the Assembly to the process of economic integration cannot be over-stated. As the supreme political organ of the AU, it serves as the platform for exchanging commitments between states through its deliberations on issues placed on its agenda.⁶² A constant exchange of commitments between member states at the highest level would increase the credibility of commitments between states because it raises the 'cost of deception and irresponsibility'.⁶³ It would serve as a forum for promoting the iteration of regional norms. At this level, a state that constantly flouts the norms of integration stands the chance of having its reputation damaged

⁵⁹ The High Level Panel *Audit of the African Union* (2007) 25 para 67.

⁶⁰ The High Level Panel *Audit of the African Union* (2007) xxii.

⁶¹ The decisions are Decision on Economic Integration Doc. EX.CL/378 (XII) Assembly/AU/Dec. 58 (IV); Decision Granting Accreditation to the East African Community as one of the Regional Economic Communities of the African Union Assembly/AU/Dec. 58 (IV); Decision on the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament Assembly/AU/Dec. 4 (IV) Assembly/AU/Dec.17(II); Decision on the Specialised Technical Committees (STCS) Doc. EX.CL/496 (XIV); Decision on the Protocol on Relations between the African Union and the Regional Economic Communities Doc. EX.CL/348 (IX); Decision on the Specialised Technical Committees Doc. EX.CL/666/ (XIX); Decision on African Integration Doc. EX.CL/693/(XX) Assembly/AU/Dec. 392 (XVIII); Decision for Boosting Intra-African Trade and Fast-Tracking The Continental Free Trade Area Doc. EX.CL/700 (XX) Assembly/AU/Dec. 394. Decision for Boosting Intra-African Trade and Fast-Tracking The Continental Free Trade Area Assembly /AU/Dec.426.

⁶² Abram Chayes and Antonia Handler Chayes (note 2) 272.

⁶³ Robert Keohane *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, Princeton, New Jersey, 1984) 97.

among its peers.⁶⁴ Heads of states would therefore ensure that economic integration policies were implemented to avoid being regarded as the state that does not comply. Therefore, it is imperative that issues of economic integration are frequently placed on the agenda of Assembly in order to create a platform for states to exchange their commitments continually, and to restate or clarify the regional norms when necessary.

A frequent restatement or clarification of the regional norms is further necessitated by the fact that, in practice, the decisions of the Assembly are not categorised as regulations or directives. They are all regarded as decisions. Given the inherent difference between regulations and directives, it is important for Assembly decisions to be distinguished. Where a decision is intended to be a regulation, no discretion is given to the member states as to the manner in which the regulation is to be implemented. Directives do not have the same effect because they give states the freedom to adopt different approaches in implementing the decision. What is required is that the objectives of the decision should be achieved. Where this distinction is not drawn, issues of implementation of the decisions arise because states and RECs are at liberty to implement the decisions in a manner that is most convenient for them.

Furthermore, if article 3(e) of the Abuja Treaty, which requires member states to observe 'the legal system of the Community', is to be properly complied with, it is necessary for the rules created by the Assembly to be precise. A precise rule should unambiguously define the conduct that is required, authorised or proscribed.⁶⁵ The failure of the Assembly decisions to distinguish between regulations and directives creates ambiguity and lacks the element of precision that is necessary for the purposes of securing

⁶⁴ Abram Chayes and Antonia Handler Chayes (note 2) 110. Andrew Guzman suggests that states tend to comply with their international obligations so as to develop a good reputation for compliance 'because it makes promises more credible and, therefore, makes future cooperation both easier and less costly'. Therefore, even in instances where a state is better off if it violates its obligations, it tends to comply because it tries to protect its reputation to secure future commitments from other states. He further argues that the loss of reputation serves as informal sanctions because they tend to deter states from violating established rules. See Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, New York 2008) 33-38. Andrew Guzman, 'A compliance-based theory of international law (2002) 90(6) *California Law Review* 1823-1887.

⁶⁵ K Abbot et al 'The concept of legalization' (2000) 54(3) *International Organization* 401.

compliance. For example, paragraph 6 of the Decision of African Integration requires member states to internalise the relevant legal instruments and take into account regional and continental programmes.⁶⁶ If this is a regulation, it may be inferred that the obligation to internalise ‘the relevant legal instruments’ requires member states to domesticate the relevant integration instruments. On the other hand, if it is a directive, what will be required of member states is to ensure that integration objectives are achieved with or without passing the necessary legislation. While the above descriptions look similar, they generate different legal effects for private citizens who seek to enforce a right created pursuant to the decision of the Assembly. Where a member state has internalised the decision of the Assembly through domestic legislation, private citizens may seek to enforce that right through the national judicial process. In the absence of such domestic legislation, the national courts may be reluctant to grant such rights.

The Assembly as the supreme policy organ needs to be more proactive about addressing the core substantive issues on economic integration. It needs to ensure that other institutions of the AU periodically report back to it on steps that have been taken to implement its decisions. Given the busy schedule of the heads of states that constitute the membership of the Assembly, it might be prudent for the Assembly to delegate the decision-making powers on issues of economic integration to another institution of the AU. What will then be required of the Assembly is to give the necessary political support that is required to drive the process. The Assembly will still retain its powers to make the decisions on political issues and heads of state will be briefed by their representatives to the institution vested with making policy decisions for economic integration, since economic integration issues are highly technical and need detailed attention. Furthermore, the bulk of the responsibility for economic integration lies with

⁶⁶ Decision on African Integration Doc.EX.CL/693/(XX) Assembly/AU/Dec. 392 (XVIII), ASSEMBLY OF THE UNION, Eighteenth Ordinary Session 29-30 January 2012, Addis Ababa, Ethiopia, available at [http://www.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20\(XVIII\)%20_E.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20(XVIII)%20_E.pdf) [accessed 10 March 2012].

the RECs,⁶⁷ and therefore the integration process would not be adversely affected if the decision-making powers were taken away from the Assembly.

3.2.2 The Executive Council

The Executive Council (Council) is composed of Ministers of Foreign Affairs or any Minister designated by the government of a member state.⁶⁸ The Council meets twice a year in ordinary sessions but may have an extraordinary session at the request of the chairperson of Council or any member state.⁶⁹ The Council elects its chairperson after consultations between members. Decisions of the Council are reached on the basis of a consensus, failing which, a two-thirds majority is required.⁷⁰ The Council's decisions are made by means of regulations and, after approval by the Assembly, they are binding on member states, organs of the AU, and RECs.⁷¹

If a regulation is adopted in the exercise of delegated authority from the Assembly, subsequent approval from the Assembly is not required.⁷² Council decisions are also automatically enforceable 30 days after they have been signed by the chairperson of Council and published in the official journal of the African Union.⁷³ Under the Rules of Procedure of the Executive Council adopted under the Constitutive Act, the decisions of the Council are classified as regulations, directives and recommendations.⁷⁴ They have the same effect as the regulations and directives of the Assembly. As in the case of the Assembly, the decisions of the Councils are in practice not classified as either regulations or directives. The discussion about the automatic enforceability of Assembly decisions is also applicable to the decisions of the Council.

⁶⁷ See chapter 4 for a discussion of the RECs.

⁶⁸ Article 10(1) Constitutive Act. However, practice shows that states are rarely represented by ministers other than their foreign affairs ministers.

⁶⁹ Article 10 Constitutive Act and article 12 Abuja Treaty. A request for an extraordinary session has to be supported by a two-thirds majority of member states.

⁷⁰ Article 11 Constitutive Act and article 13(4) Abuja Treaty.

⁷¹ Article 13(2) Abuja Treaty.

⁷² Article 13(2) Abuja Treaty.

⁷³ Rule 35 Rules of Procedure of the Executive Council; article 10(3) Abuja Treaty.

⁷⁴ Rule 34 Rules of Procedure of the Executive Council.

The function of the Council is to coordinate and take decisions on policies in areas of common interest to member states. These areas include foreign trade; energy, industry and mineral resources; food, agricultural and animal resources; livestock production and forestry; water resources and irrigation; environmental protection, humanitarian action and disaster response; transport and communication; insurance; education, culture, health and human resources development; science and technology; nationality, residency and immigration matters; and social security.⁷⁵ The policies made in these areas are then submitted to the Assembly for deliberation and approval. Since the Council comprises the foreign affairs ministers of member states, their ability to coordinate and take decisions in these broad areas of interest is questionable.

Most of these areas are traditionally not within the sphere of influence of foreign affairs ministers. This effectively reduces the capacity of the Council to make informed decisions and properly coordinate the process of economic integration in all the sectors listed. Furthermore, the Council meets only twice a year and therefore it is difficult to see how they can effectively address core issues. This challenge is not alleviated by the fact that the Constitutive Act creates Specialised Technical Committees (STCs) and the Permanent Representatives' Committee' (PRC) to assist the Council with its functions.⁷⁶

The STC consists of national ministers or senior officials responsible for each of the sectors of integration, and its functions include the preparation and submission of programmes to the Council. These STCs have so far not been fully operational and therefore have not had any effect on the work of the Council.⁷⁷ The common practice now is for ministers in charge of the different sectors to meet to discuss issues of common concern. However, they do not meet as the STC of the AU, but as the Sectoral Conference of Ministers, reporting to the Executive Council. The challenge with this arrangement is that there have been instances where the Council

⁷⁵ Article 13 Constitutive Act.

⁷⁶ The Specialised Technical Committees are provided for in article 25 of the Abuja Treaty and article 14 of the Constitutive Act. The Permanent Representatives' Committee' did not exist under the Abuja Treaty. It was established under article 21 of the Constitutive Act.

⁷⁷ The High Level Panel *Audit of the African Union* 39 para 100.

has tried to modify the recommendations and decisions of the Sectoral Conference of Ministers without having recourse to the ministers.⁷⁸ This is rather absurd because the ministers are more informed about the problems facing their sectors. Any recommendation made by them in respect of their sectors should be given preference.

The PRC, on the other hand, comprises permanent representatives of member states of the AU.⁷⁹ Its functions include acting as a liaison between member states and the AUC, and supporting the Executive Council in executing its powers and functions.⁸⁰ The PRC has eleven sub-committees, but none of these sub-committees directly covers issues of economic integration. Instead, they focus on organisational issues.⁸¹ The PRC therefore has no technical input into the policy decisions made by the Executive Council.

The Council's lack of technical capacity to develop effective policies in all areas of economic integration is a matter of grave concern and needs to be remedied if continental economic integration is to proceed. This absence of technical capacity will impede the Council's judgement when formulating policies or programmes for the various areas of economic integration. The policies created might either be unrealistic or might fail to take into account pertinent issues. The chances of non-compliance are increased when these policies do not address the real concerns of the sectors.

3.2.3 The African Union Commission

Article 20(1) of the Constitutive Act establishes the African Union Commission (AUC). The AUC is headed by a chairperson who is assisted by

⁷⁸ The High Level Panel *Audit of the African Union* 35 para 85.

⁷⁹ Article 21 Constitutive Act.

⁸⁰ Rule 4 African Union Rules of Procedures for the Permanent Representatives' Committee'.

⁸¹ The Sub-Committees are the Sub-Committee on Administrative, Budgetary and Financial Matters; the Sub-Committee on Programmes and Conferences; the Sub-Committee on Refugees; the Sub-Committee on Contributions; the Sub-Committee on Structural Reforms and Policy; the Sub-Committee on the Special Emergency Assistance Fund for Drought and Famine in Africa; the Sub-Committee on the Review of the Scale of Assessment; the Sub-Committee on Headquarters and Host Agreements; the Sub-Committee on NEPAD; the Sub-Committee on Economic and Trade Matters; and the Sub-Committee on Multilateral Cooperation. See The High Level Panel *Audit of the African Union* 36–37 paras 92–93.

a deputy chairperson and commissioners.⁸² The AUC is the administrative hub of the process of economic integration. Unlikely the Assembly and the Executive Council, the officials of the AUC are not representatives of member states and therefore the AUC is relatively independent from the member states. The functions of the AUC include representing the AU and defending its interests under the guidance of the Assembly and Executive Council, initiating proposals for consideration by other institutions of the AU, implementing decisions of the institutions of the AU, and coordinating and monitoring the implementation of the decisions of the AU.⁸³ The AUC has eight departments which are headed by commissioners.⁸⁴ Each department is further subdivided into divisions. On paper, the AUC has been granted enough powers to coordinate economic integration but its impact has not really been felt.

The audit report of the AU suggests that the AUC lacks an adequate internal chain of command that is required for the effective coordination of the integration process.⁸⁵ There has not been adequate synchronisation of functions between the various departments. The AUC is also understaffed and therefore lacks the necessary manpower to monitor the implementation of the various integration programmes. Furthermore, the classification of divisions that fall under each AUC department also shows incoherence in its efforts to coordinate economic integration. The economic integration division falls under the Department of Economic Affairs, while issues of trade, customs, and immigration are divisions under the Department of Trade and Industry. Trade and customs are integral parts of economic integration and should fall under the department responsible for economic integration. The Department of Trade and Industry is responsible for developing a common African position in the multilateral trading system but does not oversee economic integration. Labour, employment and migration fall under the Department of Social Affairs when in fact these issues are also vital to economic integration, particularly when there is a plan to create a continental

⁸² Article 20(2) Constitutive Act.

⁸³ Article 3(2) Statute of the African Union Commission 2007, as amended.

⁸⁴ See table 1 below.

⁸⁵ The High Level Panel *Audit of the African Union* 47 para 122.

common market. These classifications clearly reflect poor coordination within the structures of the AUC and a lack of understanding of the needs of economic integration. All these areas fall under the purview of economic integration. Splitting them between three departments does not support effective coordination.

Table 1: Departments and divisions of the AUC (compiled from the AU website)

Department	Divisions
Economic Affairs	Economic Integration and Regional Cooperation; Economic Policies and Research; Private Sector Development/Investment and Resource Mobilisation; Statistics
Human Resources, Science and Technology	Education; Human Resources and Youth; Science, Technology and ICT
Infrastructure and Energy	Energy and Infrastructure
Peace and Security	Defence and Security; Conflict Management; Peace and Support Operations
Political Affairs	Democracy, Governance, Human Rights and Elections; Humanitarian Affairs, Refugees and Displaced Persons
Rural Economy and Agriculture	Agriculture and Food Security; Environment and Natural Resources; Rural Economy
Social Affairs	Health, Nutrition and Population; HIV/AIDS, Malaria and Tuberculosis; Labour, Employment and Migration; Social Welfare, Vulnerable Groups and Drug Control; Culture and Sport
Trade and Industry	Trade, Customs and Immigration; Industry

The AUC also lacks specific structures to monitor the implementation of integration objectives because it does not have a hands-on presence in the RECs or the member states. While the AUC has representational offices

in New York (the United Nations), Geneva (the World Trade Organisation), Washington (the World Bank), Brussels (the European Union) and Cairo (the Arab League), it has no representational offices in the RECs. The only representational office it has is in SADC, and the office is not in Gaborone, where the SADC headquarters are located, but in Lilongwe, Malawi. If the AUC is to coordinate the economic integration policies of the RECs and member states effectively, it must have a hands-on presence. While it might be impossible for the AUC to have offices in all the member states, it can work towards having offices situated in the headquarters of RECs. In this way it will be able to verify the implementation reports that the RECs and member states submit.

3.2.4 The Court of Justice

Articles 18 of the Constitutive Act and the Abuja Treaty provide for a Court of Justice. Pursuant to article 18 of the Constitutive Act, a Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR Protocol) was adopted by the Assembly of Heads of State and Government on 1 July 2008. Annexed to the ACJHR Protocol is the Statute of the African Court of Justice and Human Rights (Statute of the ACJHR). The ACJHR Protocol is billed to replace the earlier Protocol of the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Protocol of the Court of Justice of the African Union.⁸⁶ The ACJHR Protocol creates a single court referred to as the African Court of Justice and Human Rights (ACJHR).⁸⁷ The ACJHR has not commenced operation because ACJHR Protocol is not yet in force.

The ACJHR has 16 judges who are nationals of member states.⁸⁸ The jurisdiction of the ACJHR includes disputes arising from the interpretation of the Constitutive Act; disputes arising from decisions and regulations of the Assembly and Council; and disputes arising from the interpretation, application or validity of treaties entered into under the AU and all subsidiary

⁸⁶ Article 1 Protocol on the Statute of the African Court of Justice and Human Rights 2008.

⁸⁷ Article 2 ACJHR Protocol.

⁸⁸ Article 3 Annex to the Protocol on the Statute of the African Court of Justice and Human Rights.

instruments adopted within the framework of the AU or the OAU.⁸⁹ This broad jurisdiction can be interpreted to include disputes that arise from the Abuja Treaty.

Article 29 of the Statute of the ACJHR lists the entities that are entitled to submit cases to the court: state parties to the ACJHR Protocol; the Assembly, the Parliament and other organs of the AU as authorised by the Assembly; and staff of the AU appealing against a decision relating to staff rules and regulations. Member states that have not ratified the ACJHR Protocol are expressly prohibited from submitting cases to the court.⁹⁰ This provision creates a challenge to the efforts to achieve economic integration. The ACJHR is meant to carry out the functions of the Court of Justice created by article 18 of the Abuja Treaty. Member states that have not ratified the ACJHR Protocol cannot be sued in the ACJHR even if they have ratified the Abuja Treaty and the Constitutive Act.⁹¹ This invariably means that where a member state fails to honour its obligations under the Abuja Treaty or a protocol adopted pursuant to the Abuja Treaty, the chances of getting the ACJHR to decide on the non-compliance will be dependent on whether the member state is a signatory to the ACJHR Protocol. This places the integration process under pressure, particularly if the ACJHR is being relied upon to clarify an integration norm which a member state may have failed to honour. The provisions requiring member states to ratify the ACJHR Protocol separately is also questionable since the Protocol was made pursuant to the provisions of the Constitutive Act. Ratifying the Constitutive Act should by necessary implication grant member states access to the court.

Furthermore, the merger of the African Court of Human and Peoples' Rights (ACHPR) and the Court of Justice created under the Constitutive Act and the Abuja Treaty might also hamper the rate of ratification of the ACJHR

⁸⁹ Article 28 Statute of the ACJHR.

⁹⁰ Article 29(2) Statute of the ACJHR.

⁹¹ As at 10 February 2013, 53 member states had signed the Abuja Treaty, and 49 had ratified or acceded to it. See African Union, 'List of countries which have signed, ratified/acceded to the Treaty Establishing the African Economic Community', available at http://www.au.int/en/sites/default/files/Treaty%20Establishing%20the%20AEC_0.pdf [accessed 10 February 2013].

Protocol. The impact of the inclusion of the human rights component in the jurisdiction of the ACJHR is clear from the number of states that have ratified the ACJHR Protocol. As at January 2013, only 28 member states had signed the ACJHR Protocol and only Benin, Burkina Faso, Libya, Congo and Mali had ratified it.⁹² On the contrary, the previous Protocol on the Court of Justice of the African Union which had no express human rights jurisdiction had 43 signatories and 16 ratifications.⁹³ While the protection of human rights is essential for the development of any state, a more viable approach at this stage might have been to leave the African Court on Human and Peoples' Rights as a separate court distinct from the Court of Justice of the African Union.

3.3 The relationship between the African Union, the African Economic Communities and the Regional Economic Communities

The process of economic integration in Africa is rather complex because it is simultaneously pursued at two levels (the AU level and the REC level). On one hand, the AU aims to integrate the economies of all the African states by building on the achievements of the RECs. On the other hand, the RECs intend to integrate the economies of their member states. Since the preferences, needs and economic configuration of each REC are relatively different, the AU strives to harmonise the programmes drawn up by the RECs to integrate the economies of their member states by developing common policies for the entire continent. This is no easy task and requires proper coordination in order to exchange information between the AU and the RECs successfully, and also to ensure that the agreed policies are implemented.

⁹² See African Union, 'List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights', available at <http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf> [accessed 10 February 2013].

⁹³ See African Union, 'List of countries which have signed, ratified/acceded to the Protocol of the Court of Justice of the African Union', available at http://www.au.int/en/sites/default/files/Court%20of%20Justice_0.pdf [accessed 10 February 2013].

This section examines the relationship between the AU and the RECs in order to identify areas where clarity is needed and where better coordination can be achieved. For economic integration to succeed, the AU and the RECs must be able to reduce uncertainty in the system by collecting, verifying and exchanging data between the different actors involved in the process.⁹⁴ The process of collecting, verifying and exchanging data helps to build transparency in the system by reassuring actors that they are not the only ones complying with the rules. To facilitate the free flow of information, the functions and role of the AU and the RECs need to be clarified in order not to create confusion in the system as to the responsibilities of the AU and the RECs. In this regard, coordination between the AU and the RECs is important to ensure transparency through the exchange of information about their roles. Furthermore, clarifying the functions of the AU and the RECs will prevent the duplication of efforts in various areas of integration. First, the relationship between the AU and the AEC is discussed, followed by a discussion of the relationship between the AU and the RECs.

3.3.1 The African Union and the African Economic Community

Does the AEC have legal personality? Is there in fact an AEC? What is the relationship between the AU and the AEC? These are questions that often trouble anyone who studies economic integration in Africa. The transformation of the OAU into the AU did not help to answer these questions. Prior to the creation of the AU, the AEC was deemed an integral part of the OAU.⁹⁵ Since the AU effectively took over from the OAU, it inherited the functions of the AEC.⁹⁶ While the relationship between the AEC and the AU may look simple and straightforward, since the AEC is an integral part of the AU, the relationship is fraught with ambiguities that have raised both normative and institutional challenges.

Firstly, a cursory look at article 2 of the Abuja Treaty creates the impression that the AEC exists has legal personality. Article 2 provides that

⁹⁴ Ignaz Seidl-Hohenveldern *International Economic Organisations in the International Legal Process* (Martinus Nijhoff, Dordrecht, 1995) 76; Barbara Koremenos et al 'The rational design of international institutions' (2001) 55(4) *International Organization* 766.

⁹⁵ Article 98 Abuja Treaty.

⁹⁶ Article 33 (1) Constitutive Act.

'[t]he High Contracting Parties hereby establish among themselves an African Economic Community'. However, article 6(1) provides that '[t]he Community shall be established gradually in six (6) stages ... over a transitional period not exceeding thirty-four (34) years.' Article 6(2) then sets out the different stages for the gradual establishment of the AEC.

The first stage requires the strengthening of existing RECs and the establishing of new ones in regions where they do not exist. In the second stage, RECs are required to stabilise their tariff barriers and non-tariff barriers and strengthen sectoral integration in the fields of trade, agriculture, finance, communications, industry and energy. The third stage requires the creation of free trade areas and a customs union in each of the RECs. In the fourth stage, RECs are to coordinate and harmonise tariff and non-tariff systems with the view of establishing a continental customs union. The fifth stage requires the establishment of an African Common Market. The sixth and final stage requires the strengthening of the African Common Market to ensure the free movement of persons and factors of production, and the creation of a single domestic market, a Pan-African Economic and Monetary Union, an African Central Bank, an African currency and a Pan-African Parliament.

The stages outlined above suggest that the AEC will come into existence only at the end of the 34-year transitional period. Before the end of the transitional period, what actually occurs are efforts by the RECs to harmonise their activities with the aim of creating an AEC at the end of the process. This point is strengthened by the fact that article 6(f) (vii) of the Abuja Treaty provides that, in the final stage of the transitional period, the executive organs of the AEC will be created. This clearly suggests that at present there is no AEC.

Assuming the above analysis is wrong and that the AEC was created instantly by virtue of the Abuja Treaty, the legal personality of the AEC is also questionable. Article 98 of the Abuja Treaty makes the AEC an integral part of the AU. Scholars have suggested that the AEC was not intended to have a

legal personality distinct from that of the AU.⁹⁷ In determining when an international organisation has legal personality, the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case made its decision partly based on the functions entrusted to the organisation and the attendant duties and responsibilities placed on the organisation to effectively discharge its functions.⁹⁸ If the legal personality of the AEC is to be assessed by this standard, it definitely falls short of having a legal personality of its own, because while member states have entrusted it with the function of ensuring economic integration on the continent, the attendant duties and responsibilities are vested in the institutions of the AU. Furthermore, the capacity to enter into contracts is expressly vested in the Secretary General of the OAU (now the chairperson of the AUC).⁹⁹ The implication of this is that the AEC exists only in title and can at best be considered to be a division of the AU.¹⁰⁰

The objectives of the AU and the AEC undoubtedly share a certain level of commonality and as such a merger is justifiable. However, in some areas their objectives differ. The objectives of the AEC are geared directly towards economic integration through the promotion of economic, social and cultural development.¹⁰¹ The AU, on the other hand, has economic integration as one of its objectives, but also includes other objectives such as the defence of the sovereignty of member states, protecting human rights and democracy, promoting peace and security, promoting democracy, good governance and the rule of law, adopting a common defence policy, and eradicating preventable diseases on the continent.¹⁰² The objectives of the AU are broader in scope and more politicised, while those of the AEC are specific, highly technical and less political. Requiring one institution to

⁹⁷ Richard Oppong 'The African Union, the African Economic Community and Africa's Regional Economic Communities: untangling a complex web' (2010) 18 *African Journal of International and Comparative Law* 98.

⁹⁸ *Reparation for Injuries Suffered in the Service of the United Nations* 1949 ICJ 179.

⁹⁹ Article 98(2) Abuja Treaty.

¹⁰⁰ SKB Asante 'Towards an African Economic Community' in SKB Asante and FOC Nwonwu *Towards an African Economic Community* (Africa Institute of South Africa, Pretoria, 2001) 8–9.

¹⁰¹ Article 4 Abuja Treaty.

¹⁰² Article 3 Constitutive Act.

perform all these functions simultaneously might be asking for too much, given the poor economic and political infrastructure in most African states.¹⁰³

From an institutional perspective, scholars have queried the rationality of the merger of the OAU with the AEC. The argument was that the institutions of the OAU did not have the capacity to effectively discharge the technical responsibilities associated with economic integration.¹⁰⁴ The OAU always operated as a highly political organisation and its transformation into the AU has not changed its inherent political nature. Much to its credit, the AU has empowered the African Union Commission (AUC) and created some other institutions to handle technical and bureaucratic processes, but their capacity to perform their functions effectively in a highly politicised environment needs to be reconsidered.

Given the broader political mandate of the AU (such as its powers to intervene in the affairs of member states where there are gross human rights violations), the danger of the process of economic integration falling prey to issues of politics is increased. This fear is not unfounded, given the history of the OAU, which practically came to a halt in the mid-1980s when the OAU recognised the statehood of the Sahrawi Arab Democratic Republic (Western Sahara).¹⁰⁵ Also, the recognition of the Libyan National Transitional Council (NTC) in the recent Libyan crisis placed South Africa and Nigeria on opposing sides, which almost resulted in an impasse in the AU.¹⁰⁶ This

¹⁰³ See Clement Ng'ong'ola 'Regional integration and trade liberalization in Africa: the Treaty for the Establishment of an African Economic Community revisited in the context of the WTO system' (1999) 33(1) *Journal of World Trade* 145–171.

¹⁰⁴ Clement Ng'ong'Ola (note 103) 150; SKB Asante *Regionalism and Africa's Development: Expectations, Reality and Challenges* (Macmillan Press, London, 1997) 101–102.

¹⁰⁵ The process of drafting the Abuja Treaty was stalled for some time as a result of Morocco's withdrawal from the OAU in 1984 because the Sahrawi Arab Democratic Republic was granted membership of the OAU. The admission of the Sahrawi Arab Democratic Republic and the withdrawal of Morocco created different factions in the OAU and resulted in a stalemate. See Jeggan Senghor 'The Treaty establishing the African Economic Community: an introductory essay' in AA Yusuf (ed) *African Yearbook of International Law* 183 at 184.

¹⁰⁶ South Africa, Uganda and Zimbabwe argued that the Constitutive Act prevented the AU from recognising the NTC because it came into power through unconstitutional means. Nigeria and 34 other African states argued that the Constitutive Act was not applicable to Libya because Gaddafi's government was never constitutional. Furthermore, the Constitutive Act did not contemplate a revolt by citizens. See Yesuf Ali 'Libya: Nigeria, South Africa in cold war over Gaddafi's fate' *The Nation* 4 August 2011, available at <http://www.thenationonline.net/2011/index.php/news/18342-libya:-nigeria,-south-africa-in-cold-war-over-gaddafi%E2%80%99s-fate.html> [accessed 5 September 2011].

shows how easily friction can occur within the structures of the AU when highly political issues are involved.

Since politics cannot be divorced from economic integration, it would be naïve to assume that it is possible to create institutions that are completely non-political. However, given the convergence of the objectives of the AU and the AEC in terms of economic integration, it is suggested that there needs to be a functional delimitation of responsibilities within the structures of the AU. The implementation of the objectives of economic integration should be allocated to specific institutions under the auspices of the AU, while the overall political process necessary for integration should remain with institutions such as the Assembly of Heads of State and Government. The specific institutions in charge of economic integration should be given the responsibility of coordinating the modalities for economic integration specified in article 6 of the Abuja Treaty, and should not be involved with other issues that are not related to economic integration. The benefit of this sort of delimitation is that in the event that there is a political stalemate (as there was in the OAU) at the level of the political organs of the AU, the process of economic integration will not be adversely affected.

Presently, the merger of the AU and the AEC has successfully eroded the distinction between economic integration and political integration, and this has had a very negative effect on economic integration. This merger has effectively relegated economic integration to the backburner because the AU by default is a political organisation. To put this issue into proper perspective, the practice of the Assembly and the Council is illustrative. Since the functions of the AEC are carried out by the institutions of the AU, the practice in the OAU was that the ordinary sessions of the Assembly and the Council would reconvene as ordinary sessions of the Assembly and the Council of the AEC. However, since 1999, the Assembly and the Council have convened only twice as the Assembly and the Council of the AEC. The practice now is that matters of economic integration are discussed during the regular sessions of the Assembly and the Council. The problem here is that economic integration no longer gets that extra attention that it deserves. As noted earlier, since the inception of the AU, the Assembly has made over

200 decisions, but only nine of these decisions relate to any of the stages of economic integration outlined in the Abuja Treaty.¹⁰⁷ Given the deplorable state of African economies, issues of economic integration ought to be given more attention and deliberated upon by states.

The next sub-section discusses the relationship between the AU and the RECs. An understanding of this relationship is vital to the integration process because the whole idea of continental integration is built upon the RECs. Proper coordination is therefore necessary to adequately link the development plans of the RECs and the AU.

3.3.2 The African Union and the Regional Economic Communities

Economic integration in Africa is primarily dependent on the development of the RECs. Article 88 (1) of the Abuja Treaty expressly provides that '[t]he Community shall be established mainly through the co-ordination, harmonization and progressive integration of the activities of regional economic communities'. In other words, the RECs are required to serve as building blocks for integrating the economies of African states. Therefore, the success or failure of the RECs will invariably affect the entire integration process.

Although the RECs are a vital component of the integration process they are autonomous and may develop their own integration programmes without reference to the AU.¹⁰⁸ Presently, each of the RECs has its own objectives and programmes for integrating the economies of its member states. In order to create synergy between the RECs, the AU facilitates the

¹⁰⁷ The decisions are Decision on Economic Integration Doc. EX.CL/378 (XII) Assembly/AU/Dec. 58 (IV); Decision Granting Accreditation to the East African Community as one of the Regional Economic Communities of the African Union Assembly/AU/Dec. 58 (IV); Decision on the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament Assembly/AU/Dec. 4 (IV) Assembly/AU/Dec. 17(II); Decision on the Specialised Technical Committees (STCS) Doc. EX.CL/496 (XIV); Decision on the Protocol on Relations between the African Union and the Regional Economic Communities Doc. EX.CL/348 (IX); Decision on the Specialised Technical Committees Doc. EX.CL/666 (XIX); Decision on African Integration Doc. EX.CL/693 (XX) Assembly /AU/Dec. 392 (XVIII); Decision for Boosting Intra-African Trade and Fast-Tracking The Continental Free Trade Area Doc. EX.CL/700 (XX) Assembly/AU/Dec. 394.

¹⁰⁸ *Regional Economic Communities and the African Public Service Ministers' Programme* Paper prepared for the Conference of Ministers of Public/Civil Service (October 2008) 15.

coordination of integration programmes so as to avoid duplication of efforts by the RECs.

The role of the AU in coordinating the activities of the RECs is particularly important because the RECs were not part of the negotiation process of the Abuja Treaty. This means that African states agreed on a strategy for economic integration which was based on the activities of the RECs, but failed to give the RECs an opportunity to participate in the process. Although the RECs cannot be classified as states, their participation in the integration process is vital to African integration because the overall goal is to harmonise their activities within a specified time period to create the African Economic Community (AEC).¹⁰⁹ It was therefore only logical that the RECs should have been involved in negotiating the Abuja Treaty. The omission of the RECs from the process of negotiating the Abuja Treaty was a major flaw both on legal and technical grounds.

From a technical point of view, since each REC is created to address the specific problems of its member states, the priorities of the REC are different, and any process that requires them to harmonise policies or programmes would have benefited from their input. Furthermore, not all the RECs initially had trade liberalisation as provided for in the Abuja Treaty as their primary goal. Therefore, requiring the RECs to hurriedly develop strategies for liberalising trade within the timeframes specified in the Abuja Treaty might not have been realistic. As discussed in chapter 2, one factor that generates a propensity for compliance is the protection of the interests of the parties to the treaty. When a treaty is negotiated, each party ensures that its interest is protected in the treaty regime. However, because every party's interest cannot always be catered for without affecting the interest of another party, parties need to compromise or give concessions. The discursive process of reaching a compromise not only helps to ensure that the interests of parties are covered but it also helps parties to agree on the norms of the treaty regime. A treaty that fails to consider the interests of all the parties or totally excludes some parties from the discursive process is

¹⁰⁹ See article 6 Abuja Treaty.

less likely to be complied with.¹¹⁰ These vital points seemed either to have been overlooked or not given adequate consideration when the RECs were left out of negotiation process of the Abuja Treaty.

From a legal perspective, since the RECs, which are deemed to be the pillars of economic integration, were not signatories to the Abuja Treaty, they were not bound by the obligations created in the treaty. The RECs have separate legal identities from those of their member states and could not automatically be bound by agreements entered into by their member states.¹¹¹ Therefore, it could be argued that the obligations created for the RECs in the Abuja Treaty had no standing in law. For the RECs to be bound by the obligations created under the Abuja Treaty there had to be a legal connection between the Abuja Treaty and the RECs. Fortunately, efforts were subsequently made to draw the legal connection.

As part of its remedial strategy, in 1998 the AU adopted a Protocol on the Relations between the African Economic Community and the Regional Economic Communities.¹¹² The 1998 Protocol was signed by AMU, COMESA, ECCAS, ECOWAS, IGAD and SADC. The 1998 Protocol was subsequently replaced by a 2007 Protocol on the Relations between the African Union and the Regional Economic Communities.¹¹³ The 2007 Protocol was signed by CENSAD, COMESA, the EAC, ECCAS, ECOWAS, IGAD and SADC. These Protocols have helped to create a legal nexus between the continental economic integration strategy of the African Union and that of the RECs. For the purposes of this thesis, only the provisions of the 2007 Protocol will be examined, since it has replaced the 1998 Protocol.

The Preamble of the 2007 Protocol recites the Abuja Treaty and the Constitutive Act as the basis for defining the role of the AU and the RECs in

¹¹⁰ See chapter 2, section 2.1.2.

¹¹¹ For a discussion of the legal personality of international organisations, see *Reparations for Injuries Suffered in the Service of the United Nations* [1949] *ICJ Reports* 174.

¹¹² The EAC was not in existence when the Protocol was signed but it subsequently acceded to the Protocol.

¹¹³ Protocol on Relations between the African Economic Community and the Regional Economic Communities 1998 and Decision on the Protocol on Relations between the African Union and the Regional Economic Communities Assembly/AU/Dec.166 (IX) Doc. EX.CL/348 (IX) 2007. The 1998 Protocol is presently in force and will terminate when the 2007 Protocol comes into force.

the process of African economic integration.¹¹⁴ Article 2 stipulates that the Protocol applies 'to the mechanism established by Parties ... to fulfil the responsibilities placed on them by the Constitutive Act, [Abuja] Treaty and [2007] Protocol.' Clearly, these provisions were drafted on the assumption that the Abuja Treaty and the Constitutive Act create a binding obligation on the part of RECs to coordinate and harmonise their programmes with the view to creating an AEC in the future. While the RECs were not originally signatories to the Abuja Treaty and the Constitutive Act, the subsequent signing of the 2007 Protocol, which recites the Abuja Treaty and the Constitutive Act, can be regarded as having created the required legal connection.

Oppong has questioned the legal basis for assuming that the RECs will integrate to create the AEC as suggested in article 88 (1) of the Abuja Treaty and whether there is a basis for the RECs to be bound by the decisions of the AEC.¹¹⁵ His reasoning is based on the fact that the RECs have separate legal personalities and were not parties to the Abuja Treaty.¹¹⁶ Therefore, the RECs have no legal obligation to integrate for the purpose of creating the AEC because they are not organs, members or agents of the AEC.¹¹⁷ While this contention looks plausible at first glance, it is doubtful whether the RECs can validly question the existence of a legal obligation to integrate under the Abuja Treaty. So far, no REC has challenged the validity of the Abuja Treaty or the Constitutive Act on the basis that they were not signatories to the Abuja Treaty and were not involved in the drafting process. Rather, they have sought to act within the dictates of the Abuja Treaty. Some RECs have amended their constitutive instruments to acknowledge the adoption of the Abuja Treaty.¹¹⁸ Furthermore, article 36 (1) of the Vienna Convention on the Law of Treaties provides that '[a] right arises for a third

¹¹⁴ See the 1st, 2nd, 3rd and 10th Preambular Paragraphs of the 2007 Protocol on Relations Between the African Union and the Regional Economic Communities.

¹¹⁵ Richard Oppong 'The African Union, the African Economic Community and Africa's Regional Economic Communities: untangling a complex web' (note 97) 94; Richard Oppong *Legal Aspects of Economic Integration in Africa* (Cambridge University Press, New York, 2011) 71.

¹¹⁶ Richard Oppong 'The African Union, the African Economic Community and Africa's Regional Economic Communities: untangling a complex web' (note 97) 94.

¹¹⁷ Richard Oppong *Legal Aspects of Economic Integration in Africa* 2011 (note 115) 71.

¹¹⁸ See Preamble to the ECOWAS Treaty.

state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to *a group of states to which it belongs* [RECs] ... and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated ...¹¹⁹

Article 36 (1) of the Vienna Convention is important to this discussion because it permits states to create rights for a group of states to which they belong, provided that the group of states assent to those rights. Similarly, article 36 (2) requires the state in whose favour a right has been created to comply with the conditions for exercising the right. The implication of article 36 (1) (2) is that not only is a third party right created but also, a concomitant obligation is placed on the beneficiary of the right. In this regard, the adoption of the 2007 Protocol, which clearly recites the Abuja Treaty and the Constitutive Act, would be a basis for deeming that the RECs have assented to the rights created under the Abuja Treaty and the Constitutive Act. The argument that they are not signatories to the Abuja Treaty will thus be defeated. Therefore, the legal limbo in the relationship between the AU and the RECs has been adequately addressed by the 2007 Protocol and the failure of the RECs to merge in the future to create an AEC would give rise to a cause of action.

The 2007 Protocol creates two institutions to coordinate intra-REC policies and activities.¹²⁰ These institutions are essential for the attainment economic integration because they can facilitate the exchange information about the policies and programmes of the RECs. Since each REC acts independently of the others, the exchange of information is necessary to keep track of progress made and to ensure that the programmes do not conflict with the objectives of the Abuja Treaty and the Constitutive Act.

The institutions created by the 2007 Protocol are the Committee on Coordination and the Committee of Secretariat Officials. The Committee on Coordination consists of the chairperson of the AUC, the chief executives of the RECs, the executive secretary of UNECA, the president of the ADB, and

¹¹⁹ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. My emphasis.

¹²⁰ Article 6 Protocol on Relations between the African Union and the Regional Economic Communities 2007. See the Preambles of the Revised ECOWAS Treaty, Amended EAC Treaty and COMESA Treaty.

the chief executives of the financial institutions of the AU (which are yet to be created). The functions of the Committee on Coordination include coordinating and harmonising the policies of the RECs in all areas of integration, and monitoring and reviewing the progress made by each REC towards implementing the stages of integration listed in article 6(2)(b)–(d) of the Abuja Treaty.¹²¹

Given that the function of the Committee on Coordination is to coordinate and harmonise the policies of the RECs, it is surprising that the commissioners of the AUC who oversee the various aspects of integration are not members of the Committee. Although the chairperson of the AUC is the administrative head of the Commission, it is unlikely that he or she will have a complete knowledge of all the integration sectors. The membership of the Committee on Coordination should include the AUC commissioners so that the RECs and the AUC can synchronise their policies or programmes. The AUC commissioners would be able to provide detailed insight into the planned programmes of the AU and how the RECs could either benefit from them or adapt their policies where necessary.

The Committee of Secretariat Officials (CSO) is the administrative arm of the Committee on Coordination. The CSO consists of representatives of the AUC chairperson responsible for coordinating the activities of the RECs, the representative of chief executives of the RECs responsible for coordinating integration with the AU, the representative of the executive secretary of UNECA responsible for economic integration, the representative of the president of the ADB responsible for economic integration, and representatives of the chief executives of the AU financial institutions.¹²² The CSO prepares and submits reports to the Committee on Coordination about the implementation of policies pertaining to the Protocol, and about policies for coordination and harmonisation.¹²³ The CSO basically gives administrative support to the Committee on Coordination.

¹²¹ Article 7(2) 2007 Protocol. In article 6 (2) (b)–(d) of the Abuja Treaty, RECs are expected to go through three stages of integration: the removal of tariff and non-tariff barriers, the creation of free trade areas, and the creation of a continental customs union.

¹²² Article 9 (1) 2007 Protocol.

¹²³ Article 9 (2) 2007 Protocol.

While it is important to have a means of coordinating the activities of the RECs and the AU, the creation of these Committees seems to be a duplication of efforts because the Constitutive Act already creates institutions which should be able to manage the integration process. The entire process seems to be riddled with bureaucracy and the duplication of duties. For example, the Specialised Technical Committees (STCs) that are created under the Constitutive Act are vested with the responsibility for preparing integration programmes for the AU and ensuring that projects are harmonised and coordinated.¹²⁴ These committees are composed of ministers responsible for all the integration sectors in member states.¹²⁵ So, rather than creating new institutions with all the attendant costs of administration and bureaucracy, it would have been more prudent to enlarge the membership of the STCs to include the heads of the RECs and the other development institutions. In that way, the RECs would also have formed part of the institutional design of the AU. Presently, a direct institutional connection seems to be missing.

Another reason for suggesting that the STCs should harmonise the continental integration policies is that the 2007 Protocol presently requires the RECs to submit progress reports to the STCs about their achievements and difficulties in implementing the provisions of the Protocol.¹²⁶ Therefore, the RECs' challenges will be reported to the STC. Instead of duplicating the reporting process, the STC with an enlarged membership would be most suitable. Such an arrangement would be cost-effective and easier to manage because member states, the RECs and the AU would be jointly responsible for coordinating the entire integration process. Another advantage of such an arrangement is that it would allow for regional norms to be constantly re-stated between all the actors. This arrangement would also create an avenue for all the actors to collectively resolve the difficulties that the RECs face in implementing the objectives of the AU.

¹²⁴ Article 15 Constitutive Act.

¹²⁵ Article 14 (3) Constitutive Act.

¹²⁶ Article 17 (2) Protocol on Relations between the African Union and the Regional Economic Communities 2007.

Another challenge in the relationship between the RECs and the AU is that responsibilities have not been concretely allocated between the RECs and the AU. The objectives of the AU, as listed in article 3 of the Constitutive Act, cover areas in which the RECs also have integration programmes. To avoid the duplication of activities, the 10th Preambular paragraph of the 2007 Protocol defines the relationship between the AU and the RECs as one based on the principle of subsidiarity. However, apart from this reference, nothing in the text indicates how the principle of subsidiarity is to be applied to the relationship between the RECs and the AU. The principle of subsidiarity helps to balance power relations between various actors within an integrating unit.¹²⁷ It enables decisions to be taken on specific problems within the sphere that can best address the problem, and determines at what level the powers to make decisions on specific problems should reside.¹²⁸ In theory, the principle of subsidiarity would allow the RECs and the AU to embark on integration in specific areas to avoid overlapping responsibilities. It would also help to distribute functions between the RECs and the AU. In practice, the principle of subsidiarity has not been adequately applied to the relationship between the AU and the RECs.

Although the 2007 Protocol recognises the principle of subsidiarity, the Protocol does not indicate the areas where either the RECs or the AU have exclusive competence. Given the broad objectives of the AU in article 3 of the Constitutive Act, a clear indication as to the RECs' areas of competence is necessary. Presently, the institutions of the AU have the power to develop continental policies in almost all the areas of human endeavour. This has inevitably led to a situation where integration is pursued on all fronts, but without a structured approach. For example, the Executive Council of the AU is vested with the responsibility for taking decisions in the areas of foreign trade, transport and communications, insurance, education, culture, human resource development, nationality, residency and immigration

¹²⁷ Ademola Oyejide *Policies for Regional Integration in Africa* Economic Research Paper No 62, (ADB, Abidjan, 2000) 16; Henkel Christoph 'The allocation of powers in the European Union: A closer look at the principle of subsidiarity' (2002) 20(2) *Berkeley Journal of International Law* 359–386.

¹²⁸ Joel Trachtman 'L'Etat, c'est nous: sovereignty, economic integration and subsidiarity' (1992) 33 (2) *Harvard Journal of International Law* 469.

matters.¹²⁹ These are areas where the powers to make decisions also fall within the area competence of the RECs. Given the difference in development in each of the regions, it is practically impossible for the Executive Council of the AU to determine the proper policies in all the RECs. Furthermore, it is difficult for the Executive Council (which is made up of foreign ministers) to have a proper understanding of the challenges facing all the RECs. A call for these functions to be exclusively delimited to the RECs is not unfounded if the provisions of the Abuja Treaty are taken into consideration. Article 6(2) of the Abuja Treaty, requires the RECs to have common policies in these areas only at the fifth stage of integration. Assuming the timetable set out in article 6 (2) of the Abuja Treaty is rigorously followed, the fifth stage of integration will start only in 2019.¹³⁰ Given this timeframe, it is only logical that, at this stage, these functions should lie exclusively with the RECs. The Executive Council can use its time and resources to make policies for other areas that require urgent attention.

The scope of the functions of the AU in relation to the RECs needs to be delimited to provide adequate coordination in the integration process. This is essential to achieve compliance with the objectives of the integration treaties. Where this key element of coordination is lacking, the ability of the RECs to comply with the norms created in the process may be limited, because the norms may not address the specific concerns or challenges of a particular REC. In addition, the lack of proper coordination between the AU and the RECs may lead to the creation of imprecise norms that are difficult to implement. In calling for the delimitation of the functions of the institutions of the AU vis-a-vis the RECs, it is not being argued that the objectives of the AU should be streamlined. While the objectives of the AU can still be as broad as possible, the specific responsibility of creating policies in some areas should lie within the exclusive province of the RECs. In this regard, the function of the AU would be to assist the RECs in developing the required capacity to implement the policies that have been created.

¹²⁹ Article 13 Constitutive Act.

¹³⁰ The Abuja Treaty entered into force in 1994. The treaty required the first stage to be completed in five years (1994–1999), the second stage in eight years (1999–2007), the third stage in 10 years (2007–2017), the fourth stage in two years (2017- 2019), the fifth stage in four years (2019–2023), and the sixth stage in five years (2023–2028).

Other than defining the relationship between the AU and the RECs, the AU as the body in charge of monitoring the process of economic integration in Africa could also address the issue of overlapping memberships of RECs and the progressive realisation of the stages of integration stipulated in article 6 of the Abuja Treaty. The AU could adopt the principle of variable geometry to regulate the realisation of the provisions of article 6, thereby enabling RECs that are at a more advanced stage to progress with the goal of continental integration. Variable geometry as a principle of integration permits states within an integration regime to progress with the implementation of integration objectives at different speeds.

The use of variable geometry as a principle of regional integration was first applied in the context of European governance to enable different member states of the European Union to integrate at varied speed and extent.¹³¹ It was adopted as 'a method of differentiated integration which acknowledges that there are irreconcilable differences within the integration structure and therefore allows for a permanent separation between a group of member states and a number of less developed integration units'.¹³² Variable geometry was adopted in the European Union to enable flexibility in the process of integrating the economies of member states of the European Union.¹³³

¹³¹ Alex Mills, 'Towards a public international perspective on Private International Law: Variable Geometry and Peer Governance' *March 2012 Faculty of Law, University College London Working Paper*, 15, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025616&download=yes [accessed 4 September 2012].

¹³² See http://europa.eu/legislation_summaries/glossary/variable_geometry_europe_en.htm [accessed 4 September 2012].

¹³³ For a detailed discussion on the institutionalization, adaptation and emergence of flexible integration in the European Union, see Alexander Stubb, 'Negotiating flexible integration in the Amsterdam Treaty' in Karlheinz Neunreither and Antje Wiener (eds) *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, Oxford, 2000) 154-174. Neil Walker, 'Sovereignty and differentiated integration in the European Union' (1998) 4 (4) *European Law Journal* 355-388. Claus-Dieter Ehlermann, 'How flexible is Community Law? An unusual approach to the concept of "two speeds"' (1984) 82 (5/6) *Michigan Law Review* 1274-1293. Robert Harmsen, 'A European Union of variable geometry: problems and perspectives' (1994) 45 *Northern Ireland Legal Quarterly* 109-133. Centre for Economic Policy Research (CEPR) *Flexible Integration: Towards a More Effective and Democratic Europe* (CEPR, London, 1995) 9-14. JA Usher, 'Variable geometry or concentric circle: patterns for the European Union' (1997) 46 (2) *International and Comparative Law Quarterly* 243-273.

Variable geometry has been applied in the European Union through an 'opt-out' and 'opt-in' mechanism which enables member states, subject to certain conditions set out in the Treaty of the European Union to either opt-out or opt-in to certain aspects of the integration policy.¹³⁴ Based on the principle of variable geometry, the United Kingdom and Ireland were able to opt-out of the 1990 Schengen Convention which required members of the European Union to remove internal border controls on the movement of EU and non-EU nationals. It also enabled the United Kingdom, Ireland and Denmark to opt-out of the European Economic and Monetary Union.

In the context of African integration, variable geometry though not formally adopted as a continental principle of integration, it has been applied by some RECs. For instance, the principle has been implicitly used in SADC to grant some member states permission to proceed at a different speed in terms of SADC trade liberalisation scheme.¹³⁵ In East Africa, variable geometry is expressly adopted as a principle of integration. The EAC Treaty defines variable geometry as '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'.¹³⁶

The principle has received the support of the East African Court of Justice (EACJ). In a request for an advisory opinion brought before the EACJ by the Council of Ministers of the EAC,¹³⁷ the EACJ was called upon to determine the scope of application of the principle of

¹³⁴ Alex Mills, 'Towards a public international perspective on Private International Law: Variable Geometry and Peer Governance' (note 131)15-16.

¹³⁵ The principle has been implicitly applied within the SADC Free Trade Area to gradually phase down tariffs. See SADC FTA Brochure, 7, available on http://www.sadc.int/files/5813/3095/9803/FTA_Brochure_English.pdf [14 September 2011], See also Ashimizo Afadameh-Adeyemi, *A Survey of Trade Governance Legislations in Kenya, Lesotho, Mauritius, South Africa and Uganda*, 2011 Unpublished Report of the Labour & Enterprise Policy Research Group, Institute of Development and Labour Law, University of Cape Town, 20. SADC, *Regional Indicative Strategic Development Plan (RISDP)* (2003) 3, 84. Letlhokwa George Mpedi and Mathias Nyenti, 'Perspectives towards the development of the social protection dimension of the SADC regional integration agenda' 2012 (2) (2) *SADC Law Journal* 43.

¹³⁶ Article 1, 7 (1) (e) EAC Treaty.

¹³⁷ *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, East African Court of Justice, First Instances Division.

variable geometry and the consistency of the application of the principle in light of the requirement for consensus in decision – making.¹³⁸ The EACJ held that the variable geometry is a recognised principle of integration and its application is not in conflict with the principle of consensus in decision-making.

James Gathii defines variable geometry in the African context to mean:

Rules, principles and policies adopted in trade integration treaties that give member states, particularly the poorest members: (i) policy flexibility and autonomy to pursue at slower paces timetabled trade commitments and harmonisation objectives; (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalization commitments and policies aimed at the equitable distribution of the institutions and organizations of regional integration to avoid concentration in any one member; and (iii) preferences in industrial allocation among members in an RTA and preferences in the allocation of credit and investments from regional banks .¹³⁹

From the above definition, it is apparent that the application of variable geometry in Africa would give poorer states the flexibility to progress with economic integration at a pace which is not necessarily detrimental to their national economies. Also, taking into consideration the fact that distributional losses may be incurred in trade liberalisation schemes as a result of trade deflection, variable geometry also enables integration regimes create compensatory mechanism to account for any distributional loss that may occur.¹⁴⁰

In addition to this point, integration regimes in Africa which focus primarily on trade liberalisation often encounter the obstacle of resolving the challenge of unequal benefits that accrue to some members of the integration regime.¹⁴¹ The experience from the previously defunct East African Community shows that economic integration fails when states are of the opinion that they are unable to

¹³⁸ Supra 1.

¹³⁹ James Gathii, *African Regional Trade Agreements as Flexible Regimes* (Cambridge University Press, New York, 2011) 35.

¹⁴⁰ Ibid 41-46.

¹⁴¹ O Saasa, 'Economic cooperation and integration among developing countries', in O Saasa (ed.) *Joining the Future: Economic Integration and Co-operation in Africa 1991* (African Centre for Technology Studies Press: Nairobi) 14-15.

maximise the benefits that accrue from integration. Putting it differently, economic integration in Africa fails when a state(s) feel that other member states benefit at its own expense. While member states may agree to the broad idea of economic integration because of the inherent benefits that accrue from such arrangements, member states would often factor in the overall cost before implementing economic integration policies. Where there is no concrete arrangement for the adjustment of such costs, states may be tempted to deflect on their commitment. Finally, since the industrial base of a significant number of African states is low, variable geometry would enable the preferential allocation of credit to less industrialised countries – a mechanism which would have otherwise been deemed discriminatory.¹⁴² A significant difference between the manner in which variable geometry has been applied in Europe and Africa lies in the fact that while in Europe, it has been primarily used to give member states the flexibility to either opt-in or opt-out of certain regional policies, in Africa, variable geometry enables the minimisation of distributional losses and permits preferential allocation of credit for the purpose of industrialisation. The ‘opt-in’ or ‘opt-out’ permitted by variable geometry could also be adopted by AU so as to speed up the economic integration process.

The ‘opt-in’ or ‘opt-out’ approach could also be strategically applied to resolve the challenge of non-compliance that emanates from multiple memberships of RECs. Presently, out of the 53 African states, 26 belong to two RECs, 20 belong to three RECs, 1 belongs to four RECs and only 6 states belong to one REC.¹⁴³ Several reasons have been adduced for African states belonging to multiple RECs.¹⁴⁴ One of such reason is that multiple memberships enables states to

¹⁴² James Gathii, ‘African regional trade arrangements as flexible legal regimes’ (2009-2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 609.

¹⁴³ UNECA, *Assessing Regional Integration in Africa* (Economic Commission for Africa, Addis Ababa, 2004) 40.

¹⁴⁴ James Gathii suggests that African states belong to multiple RECs because that African states belong to several RECs because of the benefits they derive from each of the RECs. For a detailed discussion on benefits derived from multiple memberships, see James Gathii (note 139) 67-75. I Zartman, ‘Africa as a subordinate state in international relations’, (1967) 21 (3) *International Organization* 549-550.

derive different benefits specific to each REC.¹⁴⁵ Belonging to more than one REC creates challenges such as high administrative costs and conflicting obligations particularly in the area of trade liberalisation.¹⁴⁶

The main drawback with multiple memberships arises when a state belongs to different RECs with conflicting trade liberalisation policies. This is because conflict would arise in the implementation of the rules of origin of the different RECs. To resolve the problem of conflicting trade obligations, the 'opt-in' or 'opt-out' approach could be used by states. In this regard, a state may decide to opt-out of the trade liberalisation scheme of a particular REC and join that of another REC it belongs to. Although the state opts out of the trade liberalisation scheme, it would continue to be a member of the REC and as such it would derive all the other non-trade benefits that the REC has to offer. For example, Tanzania may decide to opt out of the SADC Trade Protocol and yet belong to SADC. This way, it will still enjoy the benefits SADC has to offer in other areas of economic integration (such as mining and energy).

The efficacy of variable geometry as a principle for facilitating compliance with integration norms lies in the fact that it gives states that are less enthusiastic about opting in to certain aspects of the integration regime the latitude to participate in the integration regime albeit at a slower pace compared to those states that are willing to progress at a faster pace. The intrinsic value of this flexible arrangement is found in its ability to permit states to operate within a policy framework that carefully pays attention to the interest of member states without jeopardising the overall goal of integration. States can use it as a basis to decide the areas of integration that are of specific interest to them on the basis of national policy interest. It thus serves as a basis for accommodating different interests among member states.¹⁴⁷ This is important because an integral component of the discourse on

¹⁴⁵ James Gathii (note 139) 67-68.

¹⁴⁶ UNECA, (note 143) 41.

¹⁴⁷ Peter Lloyd, 'The variable geometry approach to international economic integration' 51, available at http://journals.usb.ac.ir/Business/en-us/Articles/Article_172/ [accessed 11 June 2010].

compliance with integration treaties can be attributed to the commitment of member states to implement integration norms at the national level. Implementation at the national level is carried out by enacting appropriate national legislations or regulations to give effect to the norms created at the regional level.¹⁴⁸

Although states have an obligation to implement and give effect to these integration treaties, implementation may not always occur for various reasons. Other than ambiguity in the text of a treaty,¹⁴⁹ states may face the challenge of implementation while trying to align their national legislations with the regional norms. One factor that may warrant non-implementation of the integration norms is the inability of states to efficiently align their interest with specific aspects of the integration agenda.¹⁵⁰ While in the long-term it might be in the interest of the state to accede to the overall integration agenda, there may be certain aspects of the agenda that might not be beneficial to the state in the short-term. For instance, in the absence of avenues to create alternative means of revenue, a member state that relies heavily on customs tariffs for generating national revenue may not be able to promptly eliminate customs tariffs under a regional trade liberalisation framework. In this scenario, while it may be beneficial for a state to reciprocate the elimination of customs tariffs in order for its goods to have duty-free access in the markets of other member states, it may be practically impossible to eliminate those tariffs within the allocated timetable for the fear of governmental bankruptcy.

Given the short-term effect that the removal of customs tariffs might have on the state, it becomes imperative for the state to carry out a cost-benefit analysis on the impact of trade liberalisation on its national economy.¹⁵¹ The cost-benefit analysis of a legislation or regulation plays a

¹⁴⁸ Most of the treaties establishing the RECs and the AEC require Member States to pass national legislation to give effect to the provisions of the enabling treaties. Article 5 (1) (2) Abuja Treaty, article 5 (1)(2) COMESA Treaty, article 8 (2) EAC Treaty, article 5 (2) ECCAS Treaty, article 5 (2) ECOWAS Treaty, article 6 (5) SADC Treaty.

¹⁴⁹ Abram Chayes and Antonia Handler Chayes, (note 2)11. Thomas Franck, *The Power of Legitimacy among Nations* (Oxford University Press, New York, 1990) 54.

¹⁵⁰ Abram Chayes and Antonia Handler Chayes (note 2) 4.

¹⁵¹ Cass Sunstein defines cost-benefit analysis to mean a 'regulatory method that calls for regulators to identify, and make relevant for purposes of decision, the good effects and the

vital role in the decision to implement a legislation or regulation.¹⁵² Therefore, while the state makes the decision on whether it can afford to implement the trade liberalisation scheme in its entirety on the basis of its national interest, states that do not face the same challenge would be permitted under the variable geometry principle to proceed with all aspects of the trade liberalisation scheme. If we thus concede that a state's propensity to comply or implement its treaty obligations is increased when its interest is affected positively,¹⁵³ it becomes essential to ensure that steps are taken to progressively balance the interest of states and at the same time put in place a framework that ensures that the integration objectives are met. This is what the principle of variable geometry seeks to achieve.

Apart from the impact of national interest on propensity to comply with an integration norm(s), a state might also genuinely lack the ability to implement certain integration norms as a result of capacity constraint.¹⁵⁴ When capacity constraints arises in the implementation of regional economic policies, creating a flexible integration regime that permits member states to progressively move at different rate in the implementation of the common policies becomes necessary to prevent the entire integration process from being stalled. Examples can be drawn from the implementation of the SADC Rules of Origin which grants a special dispensation to Malawi, Mozambique, Tanzania and Zambia (MMTZ) which permits them to export into South Africa and other countries in the South African Customs Union (SACU) apparel made from fabric imported from outside the SADC region.¹⁵⁵

bad effects of regulation...' Cass Sunstein, 'Cognition and Cost-Benefit Analysis' University of Chicago, John M. Olin Law & Economics Working Paper No. 85 (2d Series) 9. Available at http://papers.ssrn.com/paper.taf?abstract_id=186669 [15 September 2012].

¹⁵² Robert Frank and Cass Sunstein, 'Cost-Benefit Analysis and Relative Position' University of Chicago, John M. Olin Law & Economics Working Paper No. 102, available at http://papers.ssrn.com/paper.taf?abstract_id=237665 [15 September 2012]. Amartya Sen, 'The discipline of cost-benefit analysis' (2000) 29 (2) *Journal of Legal Studies* 934. Richard Posner, 'Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers', (2000) 29 (2) *Journal of Legal Studies* 1153- 1177.

¹⁵³ Abram Chayes and Antonia Handler Chayes, (note 2) 4.

¹⁵⁴ See chapter 1, section 2.2.2.

¹⁵⁵ Under this dispensation, MMTZ are exempted from complying with the product specific rule of origin for textile and garment products shipped to SACU states. See SADC, Rules of Origin Exporters Guide Manual paragraph 11, Approved at the 7th Meeting of the Sub-Committee on Customs Cooperation, November 2003. Rule 2 (2) (c) Amendment to Annex I Concerning the Rules of Origin for Products to be traded between the Member States of the

Ordinarily, under the SADC Rules of Origin, apparel made from fabric imported from outside the SADC region would not qualify for SADC tariffs preferences. However, because of the lack of capacity in the textile industry in the MMTZ countries, this exemption would enable the local textile industries to recapitalize. In the absence of such an exemption, the MMTZ countries might not have been persuaded to participate in the SADC trade liberalization programme.

3.4 Conclusion

The transformation of the OAU into the AU has strengthened the institutional and normative framework for achieving continental economic integration. However, the AU has not been able to coordinate the process of economic integration properly. The shoddy manner in which economic integration issues have been handled may be attributable to the merger of the AU and the AEC. Issues of economic integration have been buried in the political structures of the AU. This needs to be addressed for regional economic integration to proceed successfully. This chapter has pointed out that there are issues of ambiguity and capacity within AU structures that reduce the AU's ability to coordinate the implementation of continental economic integration properly.

The above discussion has shown that the Assembly of Heads of State as the supreme organ of the AU is an inherently political institution which has paid insufficient attention to issues of economic integration. Clarity about the nature of the Assembly's decisions and how they are to be implemented is also required. It has been suggested that, given the busy schedule of Heads of State and the extensive deliberations needed for issues of economic integration, the powers to decide on economic integration policies should be transferred to another organ of the AU. The new organ vested with the responsibility would be more hands-on and solely responsible for issues of economic integration. The present composition of the Executive Council,

Southern African Development Community SADC FTA Brochure, 12. Available at http://www.sadc.int/files/5813/3095/9803/FTA_Brochure_English.pdf [accessed 14 September 2012].

which is meant to develop economic integration policies, does not make it the best institution to determine policies for economic integration. The structural composition of the departments of the AUC should be revised so that issues of economic integration are addressed by one department. The AU commissioner responsible for economic integration would thus be able to synchronise programmes and policies with all the RECs properly. In addition, the relationship between the AU and the RECs needs to be strengthened. In this regard, the areas where the RECs have exclusive competence should be identified while the AU assists the RECs with technical and administrative support. This would ensure that the AU does not waste resources on developing programmes in areas where the RECs might be best suited to operate. Finally, the AU could facilitate the fulfilment of the provisions of article 6 of the Abuja Treaty and the resolution of some of the challenges emanating from multiple memberships of RECs by adopting the variable geometry principle.

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Chapter 4: Securing compliance through the NEPAD and the APRM initiatives

4.0 Introduction

This chapter focuses on mechanisms that have been adopted within the framework of the African Union (AU) to ensure good governance and capacity building in African states. As was discussed in chapter 3, the AU is vested with the responsibility of coordinating and overseeing the implementation of economic integration on the continent. The AU has therefore adopted two initiatives, namely, the African Peer Review Mechanism (APRM) and the New Partnership for Africa's Development (NEPAD) to improve the governance performance of African states and to collectively attempt to build institutional, human and infrastructural capacity.¹ This chapter examines both initiatives to explore how African states have used these initiatives to create a platform for securing compliance with their obligations under the various integration treaties and other treaties, compliance with which improves the lives of African people.

Although these initiatives were not geared only towards promoting economic integration, the rationale for examining these initiatives is to emphasise the point that, even in the absence of strong supranational institutions, alternative mechanisms can be used by African states to foster compliance with their integration obligations. A close examination of NEPAD and the APRM will disclose the steps that have been taken to ensure that African states align their national policies with integration norms and, if practices are rigorously and consistently pursued, they have the capacity to change the behaviour of African states with regard to complying with their integration obligations. Consequently, the purpose of NEPAD and the APRM is not only to guarantee that regional norms affect the behaviour of states,

¹ *The New Partnership for Africa's Development* (NEPAD) October 2001, available at [http://www.nepad.org/system/files/NEPAD%20Framework%20\(English\).pdf](http://www.nepad.org/system/files/NEPAD%20Framework%20(English).pdf) [accessed 5 March 2012]; *African Peer Review Mechanism (APRM) Base Document 2003* NEPAD/HSGIC/03-2003/APRM/MOU/Annex II.

but also to determine whether the norms are effective in bringing about change on the continent. By putting these initiatives in place, African states are starting to take conscious steps to bridge the gap between the behaviour prescribed by integration treaties and their actual practices and behaviour.

4.1 African economic integration and the NEPAD agenda

Upon the independence of most African states in the 1960s, disenchantment with the post-colonial economy led third-world countries to seek to use economic integration as a means of encouraging South-South trade and economic co-operation between developing countries.² In Africa the role of economic integration was more expanded, because it was seen as a means of pooling resources to improve the living conditions of African people and to reduce the effects of Africa's balkanisation.³ Integrating African economies was based on the need to improve the overall welfare of the African people by overcoming poverty, creating self-sustenance on the continent, and giving the African people a better life. Since the creation of the Organisation of African Unity (OAU) and its subsequent transformation into the AU, African leaders have passed numerous declarations, resolutions and treaties aimed at improving the overall welfare of the African population.⁴ Therefore, in order

² Teshome Mulat 'Multilateralism and Africa's Regional Economic Communities' (1998) 32(4) *Journal of World Trade* 115-138.

³ Rene N'Guettia Kouassi 'The itinerary of the African integration process: an overview of the historical landmarks' (2007) 1(2) *African Integration Review* 1.

⁴ The resolutions and declarations include Resolution CM/ST/12(XXI) on the African Declaration of Cooperation, Development and Economic Independence, endorsed by the Tenth Ordinary Session of the OAU held in Addis Ababa on 25 May 1973; Recommendations of the 11th Extraordinary Session of the Council of Ministers of the OAU on Economic Development and Cooperation held in Kinshasa in December 1976; Monrovia Declaration of Commitment of the Heads of State and Government of the OAU on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order AHG/ST.3(XVI) Rev 1; Resolution on Holding an Extraordinary Session of the Assembly of the Heads of States and Government on Economic Problems of Africa AHG/ST.4 (XVI) Rev 1; Final Act of Lagos 1980 and the Lagos Plan of Action 1980. Of these documents, three important instruments by the OAU initially reinforced the commitment of African leaders to push for continental integration: the 1973 African Declaration on Cooperation, Development and Independence, which identified economic programmes and priority sectors for development; the 1976 Kinshasa Declaration, which defined the strategies and stages for establishing an African Economic Community; and the 1979 Monrovia Declaration of Commitment of the Heads of State and Government of the OAU on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a New International Economic Order, which called for the creation of an African Common Market as a prelude to the creation of an African Economic Community. The declarations

to properly understand economic integration in Africa, it has to be viewed as a means to an end and not as an end in itself. The end result is freeing African people from the shackles of poverty and underdevelopment, while economic integration is the means by which this goal will be achieved.

As part of the AU's goal of improving African people's quality of life, the New Partnership for African Development (NEPAD) was launched on 23 October 2001.⁵ NEPAD is the AU's economic programme of action, which promised to be a 'long term vision of an African-owned and Africa-led development programme'.⁶ The primary goal of NEPAD is to eradicate poverty, and to put Africa on the path of sustainable growth and development in order to participate actively in the world economy.⁷ To achieve this goal, the NEPAD document sets out a programme of action which identifies the conditions necessary for sustainable development in Africa. These conditions are identified as peace, security, democracy, good governance, human rights and sound economic management.⁸ Furthermore, capacity building features as a central theme in NEPAD's strategy for combating underdevelopment. The strategy highlights the fact that most African states lack the capacity to meet the conditions necessary for sustainable development. The NEPAD document emphasises capacity building in various sectors of African economies. Priority is given to bridging the existing gaps in infrastructure, education, information communications and technology, agriculture, and science and technology.⁹ NEPAD also provides strategies for facilitating capital flow initiatives and market access initiatives. As a strategy for enhancing capital flows in African economies, NEPAD advocates an increase in domestic resource mobilisation and debt relief, increased flows of

and resolutions are available at <http://www.au.int/en/decisions/assembly> [accessed 5 March 2012]. See Jeggan Senghor 'The Treaty Establishing the African Economic Community: an introductory essay' in AA Yusuf (ed) *African Yearbook of International Law* 183.

⁵ NEPAD was initially named the New African Initiative (NAI). The NAI was a merger of two previous economic strategies: the Millennium Partnership for the African Recovery Programme (MAP) and the OMEGA Plan. See African Union *Background on the New Partnership for Africa's Development (NEPAD)*, available at <http://www.au2002.gov.za/docs/background/nepad.htm>, <http://www.nepad.org/history> [accessed 5 March 2012].

⁶ The NEPAD Framework Document, October 2001, para 60.

⁷ Ibid para 1.

⁸ Ibid para 71.

⁹ Ibid part V.

Overseas Development Assistance (ODA), and private capital flows.¹⁰ In respect of market access, NEPAD advocates the removal of tariff and non-tariff barriers, diversifying production, promoting private sector participation, promoting African exports, and boosting the capacity of states in the services sector.¹¹

Given the range of policy areas that NEPAD covers, one may question how NEPAD can be used to facilitate compliance with integration objectives. As discussed in chapter 2, non-compliance with treaty obligations may sometimes arise as a result of lack of capacity to meet the required obligations under the treaty. In Africa, capacity constraints are evident in several sectors, and these inhibit the ability of African states to meet their integration obligations.¹² An essential component of the NEPAD agenda that can foster compliance with integration treaties, particularly in the area of intra-regional trade integration, is its emphasis on building capacity in regional infrastructures. The availability of sound infrastructures contributes to economic growth and poverty reduction.¹³ It is an incontrovertible fact that having adequate infrastructures, such as transnational highways, good seaports and efficient railway networks, plays an essential role in facilitating the production of goods and services, thus reducing the cost of production.¹⁴ Poor infrastructure in the areas of transport and communications has been identified as a major impediment to intra-African trade integration.¹⁵ Research indicates that although tariff levels have decreased in recent years as a result of various regional and multilateral trade agreements, transport costs still remain a restrictive trade barrier in Africa.¹⁶ Limao and Venables have shown that '[p]oor infrastructure accounts for 40 per cent of predicted transport costs for coastal countries and up to 60 per cent for landlocked

¹⁰ Ibid paras 144–152.

¹¹ Ibid paras 153–170.

¹² Soumana Sako 'Challenges facing Africa's Regional Economic Communities in capacity building' *African Capacity Building Foundation Occasional Paper No 5* (2006) 8–12.

¹³ NEPAD document (note 6) paras 96–102.

¹⁴ United Nations Economic Commission for Africa (UNECA) *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (UNECA, Addis Ababa, 2010) 295.

¹⁵ V Ancharaz, K Mbekeani and Z Brixiova 'Impediments to regional trade integration in Africa' (2011) 2(11) *Africa Economic Brief* 3.

¹⁶ Ibid.

countries'.¹⁷ This invariably increases market prices and makes intra-African trade unattractive. The correlation between transport costs and the existing restrictions on intra-African trade, despite the reduction of tariffs between African states, highlights the fact that mere compliance with trade rules such as the elimination of tariffs will not suffice to achieve trade integration on the African continent. It is this challenge that NEPAD seeks to address.

The capacity-building mechanism incorporated into the NEPAD initiative makes it an essential tool for securing compliance with integration treaties because it tries to bridge the infrastructural gap which hitherto has served as an impediment to the implementation of some of the economic integration norms. An example of NEPAD's infrastructural drive is the north-south corridor project: Durban in South Africa to Dar-es-salaam in Tanzania. So far, through this initiative, 157 infrastructural projects have been embarked upon, including 59 road projects, 38 rail projects and 6 bridge projects.¹⁸ As part of the larger Cape-to-Cairo project, a 350-kilometre road between Dar-es-salaam and Cairo is presently under construction and will be completed in 2015.¹⁹ Furthermore, preparatory work is in place for the construction of the Kazungulu Bridge linking Botswana and Zambia.²⁰ These efforts may look insignificant or minimal considering the dearth of existing infrastructure. However, they represent a starting point in the journey towards improving the overall welfare of African people. Furthermore, in order to achieve the goal of integrating all the Regional Economic Communities (RECs) into an African Economic Community (AEC), it will be

¹⁷ N Limao and AJ Venables 'Infrastructure, geographical disadvantage, transport costs, and trade' (2001) 15 (3) *The World Bank Economic Review* 452.

¹⁸ Jacob Zuma *Address delivered at the 27th Meeting of the NEPAD Heads of State and Government Orientation Committee AU Summit, Addis Ababa, Ethiopia, 14 July 2012*, available at <http://www.info.gov.za/speech/DynamicAction?id=461&sid=29019&tid=76067> [accessed 15 July 2012].

¹⁹ *Ibid.*

²⁰ Kazungulu Bridge Project: available at <http://www.trademarksa.org/news/kazungula-bridge-project> [accessed 20 July 2012]; Arthur Simuchoba 'Kazungula bridge construction to begin soon' *Mmegi online* vol 29 no 105 (19 July 2012), available at <http://www.mmegi.bw/index.php?sid=1&aid=1773&dir=2012/July/Thursday19> [accessed 20 July 2012].

necessary to create adequate transport linkages between the various RECs.²¹

4.1.1 NEPAD: A soft law approach

The NEPAD document is not a treaty between African states and as such is not binding. It could at best be described as soft law. However, its value lies in the fact that it creates a platform for strengthening the norms of integration. In chapter 1, it was pointed out that integration treaties in Africa contain both legal and non-legal norms. This is partly necessitated by the fact that integration treaties in Africa are viewed as platforms for 'integrated development and functionally specific projects'.²² Adopting a combination of legal and non-legal norms is therefore necessary for the objectives of the integration treaties to be met. Generally speaking, legal and non-legal norms are often classified as hard law and soft law respectively.²³ However, defining the boundary between hard law and soft law is often difficult.²⁴ A simple distinction would be that hard law creates legally binding obligations, while soft law does not on its own create legally binding obligations.²⁵

In broad terms, treaties such as the Constitutive Act of the African Union and the Abuja Treaty are categorised as hard law because they create legally binding obligations. However, as Baxter argues, there are instances where soft law could find its way into the text of hard law. Thus, within a hard law framework, it is not unusual to find 'norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements

²¹ James Gathii *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press, New York, 2011) 376.

²² James Gathii 'African regional trade agreements as flexible legal regimes' (2009–2010) 35 *North Carolina Journal of International and Commercial Regulation* 572–597.

²³ Dinah Shelton 'Introduction: law, non-law and the problem of "soft law"' in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000) 1–18; K Abbot and D Snidal 'Hard and soft law in international governance' (2000) 54 (3) *International Organization* 421–456; Michael Bothe 'Legal and non-legal norms—a meaningful distinction in international relations' (1980) 11 *Netherlands Yearbook of International Law* 65–95.

²⁴ S Karlsson-Vinkhuyzen 'Global regulation through a diversity of norms: comparing hard and soft law' in D Levi-Faur (ed) *Handbook on the Politics of Regulation* (Edward Elgar, Cheltenham, 2011) 605.

²⁵ *Ibid* 607.

between States but do not create enforceable rights and duties'.²⁶ This is exemplified in the embodiment of both legal and non-legal norms in the text of African integration treaties. In line with Baxter's suggestion, Boyle and Chinkin argue that there are instances where the norms created in a hard law instrument may be so 'obscurely worded' that it becomes difficult to determine if any binding obligation has been created.²⁷

The use of the term 'soft law' has been criticised because soft law cannot be classified as one of the sources of international law enumerated in article 38 of the Statute of the International Court of Justice.²⁸ Soft law falls short of the elements of hard law in that it is regarded as non-legally binding. Handl points out that soft law has been criticised by international lawyers because 'the concept has been used in reference to international prescriptions that are deemed to lack the prerequisite characteristics of international normativity, but which, notwithstanding this fact, are capable of producing certain legal effects'.²⁹ In her analysis of soft law, Dinah Shelton posits that 'non-binding norms have a complex and potentially large impact in the development of international law ... In recent years, non-binding normative instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm'.³⁰ Furthermore, when soft law is adopted in furtherance of a widely accepted hard law instrument, it yields better commitment and thus produces greater compliance.³¹

Shaffer and Pollack argue that the existing literature on hard and soft law can be viewed from the perspective of three schools of thought, namely,

²⁶ R Baxter 'International law in "her infinite variety"' (1980) 29(4) *International and Comparative Law Quarterly* 549.

²⁷ A Boyle and C Chinkin *The Making of International Law* (Oxford University Press, Oxford, 2007) 220.

²⁸ Article 38(1) list the sources of international law as: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international customs, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

²⁹ Gunther Handl 'A hard look at soft law' (1988) 82 *American Society of International Law Proceedings* 371.

³⁰ Dinah Shelton (note 23) 1.

³¹ *Ibid* 14.

legal positivist, rationalist and constructivist.³² Legal positivists regard hard law as legal obligations that are of a formally binding nature, while soft law, though not formally binding, could lead to binding hard law.³³ Rationalist consider hard and soft law as having separate attributes that states adopt for different contexts.³⁴ Constructivists view hard and soft law as facilitating the socialisation process of interstate interactions.³⁵

Some scholars are opposed to the idea of classifying some form of law as 'soft'.³⁶ Klabbers, for instance, completely rejects the notion of soft law and regards it as an attempt to create a category of law which cannot be used to compel states' behaviour.³⁷ He posits that 'if it could be claimed that soft law leads, in its application, to either hard law (hard responsibility, hard sanctions) or to non-law (no responsibility and no sanctions), soft law loses its distinctiveness, and there with its reason of existence'.³⁸ His argument is based on the fact that to refer to an instrument as soft law is to imply that it has a legal character which is however different from hard law. This in his view raises questions as to the legal consequences that may arise from the violation of the principles provided for in the soft law instrument.³⁹ In addressing the divide between hard and soft law, Schaffer and Pollack argue that hard and soft law 'serve not only as alternatives or complements, but often as antagonist'.⁴⁰ This invariably means that the desirability or appropriateness of the use of either soft or hard law will largely depend on how states choose to use these instruments in a particular situation.

³² G Shaffer and M Pollack 'Hard vs. soft law: alternatives, complements, and antagonists in international governance' (2010) 94 *Minnesota Law Review* 707.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.* 708.

³⁶ S Karlsson-Vinkhuyzen 'Global regulation through a diversity of norms: comparing hard and soft law' (note 24) 607. Thurer argues in favour of the maintenance of the distinction between law and non-law. In this regard there is no middle ground and therefore a norm can be either binding or not binding: D Thurer 'Soft law' in R Bernhardt (ed) *Encyclopaedia of Public International Law* vol 4 (Elsevier, Amsterdam, 2000) 452–60. Bilder, on the other hand, argues that the potency of the law is reduced when the term 'soft law' is used: R Bilder 'Beyond compliance: helping nations cooperate' in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* 65–73.

³⁷ Jan Klabbers 'The redundancy of soft law' (1996) 65 *Nordic Journal of International Law* 167–182.

³⁸ *Ibid.* 169.

³⁹ *Ibid.*

⁴⁰ G Schaffer and M Pollack (note 32) 708.

While it is beyond the scope of this thesis to argue either for or against the desirability of the use of soft law instruments in the international arena, soft law instruments can be used to clarify or restate obligations created through hard law.⁴¹ The NEPAD document does not create new legally binding obligations; rather, it proposes a programme of action which could be used by African states to ensure development on the continent – thereby fulfilling their obligations to improve the general well-being of African people.⁴² The NEPAD document identifies areas in which the continent is deficient and proposes methods that should be adopted by African states to remedy the deficiencies. The NEPAD document is significant because it restates the individual and collective will of African states to create a self-sustaining and globally competitive continent as mandated in the Abuja Treaty, the AU Constitutive Act and other constituent treaties establishing the RECs. It serves as a basis for boosting the capacity of member states in sectors where individual state efforts have been insufficient. The NEPAD document on its own will not bring about compliance with African integration treaties, but when applied in combination with other continental efforts, it will help to reduce some of the problems (such as poor infrastructure and lack of institutional capacity) that often impact on the ability of states to comply with their integration obligations.

4.1.2 Criticism of NEPAD

Prominent African scholars like James Gathii and Nsongurua Udombana have expressed some doubt about NEPAD's ability to extricate Africa from

⁴¹ Ulrich Fastenrath 'Relative normativity in international law' (1993) 4 *European Journal of International Law* 339. For more discussions of soft law, see Matthias Goldmann 'We need to cut off the head of the king: past, present, and future approaches to international soft law' (2012) 25 *Leiden Journal of International Law* 335–368; JJ Kirton and MJ Trebilcock 'Introduction: hard choices and soft law in sustainable global governance' in JJ Kirton and MJ Trebilcock (eds) *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate, Cornwall, 2004) 3–29; CM Chinkin 'The challenge of soft law: development and change in international law' (1989) 38(4) *The International and Comparative Law Quarterly* 850–866; J d'Aspremont 'Softness in international law: a self-serving quest for new legal materials' (2008) 19(5) *European Journal of International Law* 1075–1093; H Hillgenberg 'A fresh look at soft law' (1999) 10(3) *European Journal of International Law* 499–515.

⁴² See Preamble to the Abuja Treaty, paras 1, 2, and 3.

poverty and make her globally competitive.⁴³ For Udombana, the legitimacy of the NEPAD document can be questioned because it was unilaterally decided upon by African leaders without prior consultation with the African people.⁴⁴ He argues that, since the Constitutive Act of the AU and the NEPAD document acknowledge that for social cohesion to be created, the African people need to participate in the process of building partnerships with the government, Africans ought to have been consulted before the NEPAD document was adopted.⁴⁵ In his view, the failure to actively involve African people in the process of adopting the NEPAD document reflects the inherent autocratic nature of African leaders at the municipal level.⁴⁶ The effect of such exclusion is that the majority of African people and the private sector, which NEPAD relies heavily on, may not be aware of the benefits that the NEPAD initiative promises.

Undoubtedly the process which culminated in the creation of NEPAD was not all-inclusive.⁴⁷ While the initiative was spearheaded by a few African leaders, it was acknowledged that the participation of non-governmental organisations, socio-economic organisations, professional associations, and civil society organisations was vital in formulating the AU programme of actions.⁴⁸ Therefore, after the creation of NEPAD, efforts were made to involve African people in the various NEPAD programmes. These programmes were well received and there has been no indication that African people view NEPAD as an alien initiative. While there may have been

⁴³ N Udombana 'The unfinished business: conflicts, the African Union and the New Partnership for Africa's Development' (2003) 35 *George Washington International Law Review* 55–106; N Udombana 'A harmony or a cacophony? The music of integration in the African Union Treaty and the New Partnership for Africa's Development' (2003) 13 *Indiana International and Comparative Law Review* 185–236; J Gathii 'A critical appraisal of the NEPAD agenda in light of Africa's place in the World Trade regime in an era of market-centered development' (2003) 13 *Transnational Law and contemporary Problems* 179–210.

⁴⁴ N Udombana 'A harmony or a cacophony?' (note 43) 219. The 7th preamble of the Constitutive Act of the African Union emphasises the need to build a partnership between governments and all segments of civil society, particularly women, youth and the private sector, so as to strengthen solidarity between African people. Article 3(g) lists the promotion of democratic principles and institutions, popular participation and good governance as one of the objectives of the African Union.

⁴⁵ N Udombana 'A harmony or a cacophony?' (note 43) 219.

⁴⁶ *Ibid.*

⁴⁷ Five African presidents were primarily responsible for the conceptualisation of NEPAD.

⁴⁸ OAU *Decision of the Assembly of Heads of State and Government on the Implementation of the Sirte Summit Decision on the African Union* AHG/Dec. 160 (XXXVII) (July 2001) para 7(1).

early concerns about the manner in which the NEPAD document was adopted (if any), those concerns were not grave enough to undermine the entire initiative, since palliative measures have been taken to acquaint African people with the benefits of NEPAD. The legitimacy of a rule or a body or rules (legally binding or non-legally binding) is dependent on whether its recipients accept it as appropriate.⁴⁹ In the case of NEPAD, there has not been great resistance to the initiative. In light of the above, questioning the legitimacy of the NEPAD document on the basis of the process through which it was created may be excessive.

In his assessment of NEPAD, Gathii expresses doubt about NEPAD's ability to rescue Africa from its dependence on Western capital. He faults NEPAD's market-oriented economic approach, which is dependent on foreign aid and capital, and thus fails to challenge the existing structures that sustain 'inequality, poverty, and hierarchy, both within and without the African state'.⁵⁰ These structures, he argues, stand in the way of Africa's development and any economic strategy that fails to challenge these structures is bound to be ineffective.⁵¹ Gathii summarises his critique of NEPAD under three headings: (a) NEPAD's failure to engage with the Bretton Woods-sponsored market-centred view of development, and thereby treating it as a non-negotiable development framework; (b) using the acquisition of foreign capital and donor aid as a pre-condition for NEPAD's success; and (c) NEPAD's failure to engage with the unfairness and injustice of the international trading rules.⁵²

These criticisms of NEPAD's approach to extricating Africa from poverty and underdevelopment are robust and valid. In general, 'Africa's external economic dependence and its lop-sided participation in the international trading system are key factors accounting for the dismal

⁴⁹ Steven Bernstein and Benjamin Cashore 'Nonstate global governance: is forest certification a legitimate alternative to a global forest convention?' in JJ Kirton and MJ Treilcock (eds) *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate, Cornwall, 2004) 33–64 at 41. See MC Suchman 'Managing legitimacy: strategic and institutional approaches' (1995) 20(3) *Academy of Management Review* 571–610.

⁵⁰ J Gathii (note 43) 180–181.

⁵¹ *Ibid.*

⁵² *Ibid* 187–198.

economic performance on the continent'.⁵³ Therefore, developing an internal economic self-sustenance system will help remedy this unequal participation in the international arena and improve economic performance at the continental level. However, the NEPAD document fails to address these issues pragmatically, and rather relies on Western aid and capital.⁵⁴ If NEPAD is to rescue Africa from the shackles of poverty and underdevelopment, African leaders must, together with non-state actors on the continent, re-examine the notions of primary reliance on foreign capital, donor funding, foreign aid and the exaggerated benefits of market access liberalisation. However, while the critique of the inherent contradictions in NEPAD's market-oriented approach in resolving Africa's economic woes is important and valid, aspects of the NEPAD programme are vital to Africa's development. NEPAD's focus on developing cross-border infrastructure is essential to development in Africa. Evidence suggests that a sound infrastructure will increase intra-African trade and improve the overall welfare of African people, thereby developing internal capacity on the continent.

Furthermore, Africa's underdevelopment and exclusion from the globalised economy⁵⁵ cannot be solely ascribed to the unfair and unjust rules of the international trading system. Rather, Africa's underdevelopment traces its origins partly to the inefficient and corrupt leadership that has plagued post-colonial Africa, both at the national and continental levels.⁵⁶ As part of NEPAD's strategy to remedy the leadership deficiencies that have contributed to Africa's underdevelopment, under the NEPAD framework African leaders have adopted a self-monitoring mechanism to frequently assess their governance performance in key sectors. This self-monitoring mechanism, the African Peer Review Mechanism, could be used to remedy the governance deficiency in the continent and consequently to improve the overall performance of African states.

⁵³ J Gathii *African Trade Agreements as Legal Regimes* (Cambridge University Press, New York, 2011) 28.

⁵⁴ NEPAD document para 66.

⁵⁵ NEPAD document para 1.

⁵⁶ N Udombana 'A harmony or a cacophony?' (note 43) 215. This fact is acknowledged in the NEPAD document (note 6) para 52.

4.2 The African Peer Review Mechanism

The African Peer Review Mechanism (APRM) is a voluntary peer-review mechanism that African states accede to in order to assess their governance performance. The APRM came into existence as a result of African leaders taking cognisance of the fact that good governance is an imperative for development.⁵⁷ The APRM Base Document defines the APRM as '[a]n instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism'.⁵⁸

The function of the APRM is to foster the 'adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity building'.⁵⁹ The APRM ensures that steps have been taken by states to implement the agreed integration policies. A country that wishes to be a member of the peer-review process signs a Memorandum of Understanding (MOU) which lays out the conditions for review.⁶⁰ The benefit of the APRM is that it indicates to African people that their leaders have chosen to commit themselves to, and adhere to, agreed collective standards.⁶¹

In order to express their commitment to evaluating governance performance, the African Heads of State and Government adopted a Declaration on Democracy, Political, Economic and Corporate Governance.⁶²

⁵⁷ NEPAD *African Peer Review Mechanism: Africa's Innovative Thinking on Governance*.

⁵⁸ *The African Peer Review Base Document* AHG/235(XXXVIII) 1.

⁵⁹ Article 3 *APRM Base Document* prepared by the APRM for the Eighth Gathering of the African Partnership Forum, Berlin, Germany, 22–23 May 2007, available at <http://www.africapartnershipforum.org/dataoecd/57/8/38666393.pdf> [accessed 4 August 2012].

⁶⁰ The Sixth Summit of the Heads of State and Government Implementation Committee (HSGIC) of the New Partnership for Africa's Development (NEPAD), held in March 2003 in Abuja, Nigeria, adopted the Memorandum of Understanding (MOU) on the African Peer Review Mechanism (APRM).

⁶¹ N Udombana 'Articulating the right to democratic governance in Africa' (2002–2003) 24 *Michigan Journal of International Law* 1266.

⁶² *Declaration on Democracy, Political, Economic and Corporate Governance* AHG/235(XXXVIII) Annex 1, adopted on 8 July 2002 at the Thirty-Eighth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity [African Union].

The Declaration sets out four broad themes that are the basis upon which states are reviewed: democracy and political governance, economic governance and management, corporate governance, and socio-economic development.⁶³ These four areas broadly cover the areas in which African states have committed to integrate and foster development under the Constitutive Act of the African Union, the Treaty Establishing the African Economic Community, and the constituent treaties establishing the RECs.

The APRM is premised upon the notion that Africa does not lack ideas to propel development; rather, African states struggle to abide by and implement the principles and policies that are necessary for development.⁶⁴ The APRM process helps to ensure that states implement the regional norms at the national level. So while NEPAD helps to create an environment conducive to the implementation of regional norms, the APRM monitors the implementation. In order to monitor or assess each country's performance in these four areas, member states have also adopted standards, criteria and indicators for monitoring and assessing individual performance.⁶⁵ Through a five-stage process of review, these standards and indicators are used as the benchmark for evaluating a state's performance. Since the peer review conducted by the APRM is broad-based, it allows for the performance of member states to be assessed under the various themes covered by the African integration treaties and as specifically classified in the Declaration on Democracy.⁶⁶

By November 2011, 30 countries had acceded to the APRM by signing the MOU.⁶⁷ Angola, Cameroon, Liberia, the Republic of Congo, Egypt, Gabon, Malawi, Mauritania, Sao Tome & Principe, Senegal, Sudan

⁶³ Ross Herbert and Steven Gruzd *The African Peer Review Mechanism: Lessons from the Pioneers* (South African Institute for International Affairs, Johannesburg, 2008) 4.

⁶⁴ Steven Gruzd (ed) *Grappling with Governance: Perspectives on the African Peer Review Mechanism* (Fanele, Auckland Park, South Africa, 2010) 9.

⁶⁵ *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (The APRM)* NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI 9 March 2003.

⁶⁶ NEPAD, Declaration on Democracy, Political, Economic and Corporate Governance, AHG/235 (XXXVIII) Annex I.

⁶⁷ Available at <http://www.uneca.org/aprm/CountriesStatus.asp> [accessed 4 August 2012]. The 30 countries are Algeria, Angola, Benin, Burkina Faso, Cameroon, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Republic of Congo, Kenya, Lesotho, Liberia, Mali, Malawi, Mauritania, Mauritius, Mozambique, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Sierra Leone, South Africa, Sudan, Togo, Tanzania, Uganda, and Zambia.

and Togo acceded to the APRM, but had not commenced the review process. Tanzania and Djibouti were at the first stage of the review process, while Sierra Leone and Zambia were at the fourth stage of the review process.⁶⁸ Algeria, Benin, Burkina Faso, Ethiopia, Ghana, Kenya, Lesotho, Mali, Mauritius, Mozambique, Nigeria, Rwanda, South Africa and Uganda had completed the entire APRM process.⁶⁹

4.2.1 APRM structure

The peer review process has both continental and national structures. At the continental level, the peer review process consists of the African Peer Review Forum (APR Forum), the African Peer Review Panel (APR Panel), the African Peer Review Secretariat (APR Secretariat), the African Peer Review Teams (APR Teams) and the African Peer Review Partner Institutions (APR Partner Institutions). The APR Forum is made up of the Heads of State and Government of the participating states. The APR Forum is the apex body of the review process and has the mandate to exercise 'constructive peer dialogue and persuasion required to make the APRM effective, credible, and acceptable'.⁷⁰

The APR Panel consists of 5 to 7 eminent Africans who have distinguished themselves in careers relevant to the APRM process. They are appointed by the APR Forum and they have the mandate to oversee the APR process. They ensure that the APR process is independent, credible and carried out in a professional manner.⁷¹ The APR Secretariat provides technical, secretarial and administrative support for the APR process. The APR Secretariat carries out the analytical work for the review process and maintains a database and information about the four thematic areas that are reviewed in each country.⁷² The APR Teams are constituted only for the period a country is under review and they are approved by the APR Panel.

⁶⁸ Available at <http://www.uneca.org/aprm/CountriesStatus.asp> [accessed 5 August 2012].

⁶⁹ Ibid.

⁷⁰ *African Peer Review Mechanism Organisation and Processes* NEPAD/HSGIC/03-2003/APRM/Guideline/O&P 3.

⁷¹ Ibid 4.

⁷² Ibid 6.

The APR Teams conduct the first national self-assessment based on its terms of reference and guidelines produced by the APR Secretariat.⁷³

Finally, the APR Partner Institutions help to conduct the technical assessment of the country under review. The United Nations Economic Commission for Africa (UNECA) conducts technical assessments in the area of economic governance and the African Development Bank (ADB) provides technical assessments in the area of banking and financial standards. Organs of the AU, such as the African Commission on Human and Peoples' Rights, the African Committee of the Experts on the Rights and Welfare of the Child, the Peace and Security Council, the Pan-African Parliament, and the Conference on Security, Stability, Development and Cooperation in Africa conduct the technical assessments in the areas of human rights, democracy and political governance.⁷⁴

At the national level, the APRM structure consists of the APR National Focal Point, the APR National Commission/National Governing Council, the National APR Secretariat and the Technical Research Institutions.⁷⁵ The APR Focal Points usually comprise high level government officials or ministers and they report directly to the president.⁷⁶ They liaise with the APR Panel and the APR Secretariat to ensure that documents and logistical support are provided to the review process.⁷⁷ It also ensures that the government under review provides financial support for the institutions involved in the review. The APR Focal Point is critical to the review process because it indicates the government's intention to support the review, ensures effective interaction between the government and civil society, enables the research institutions to obtain access to government documents,

⁷³ Ibid 8.

⁷⁴ Ibid 8-9..

⁷⁵ APRM *The APRM National Structure*, available at <http://aprm-au.org/aprm-national-structure> [accessed 5 August 2012].

⁷⁶ In practice, the composition of the APR Focal Point differs from country to country. For instance, in Ghana the Focal Point was located outside a government ministry, while in Nigeria, the Secretary to the Government of Federation acted as the Focal Point. However, a common denominator is that the Focal Point always has direct access to the president. Ross Herbert and Steven Gruzd (note 64) 158; APRM *African Peer Review Mechanism Country Review Report, Federal Republic of Nigeria* June 2008, 2.

⁷⁷ Ross Herbert and Steven Gruzd (note 63) 31.

and helps to ensure that the government effectively supports any programme of action that is generated from the review process.⁷⁸

The APR National Governing Council comprises state and non-state actors who command the respect of the general public. This usually includes representatives of civil societies, the media, the private sector, academia and different sections of society. The Council's function is to ensure that the review process is credible, technically sound and devoid of political manipulation.⁷⁹ The National APR Secretariat provides technical and administrative support for the review process at the national level.⁸⁰ It helps to organise sensitisation programmes to create public awareness, thus ensuring massive citizen participation in the review process. The Technical Research Institutions are usually highly reputable research institutions that have the required competence in the four thematic areas of review. They conduct research in these areas and administer the national self-assessment questionnaires that help to evaluate how citizens rate the government in the four thematic areas under review.⁸¹

4.2.2 Stages of review

The first stage after the signing of the MOU is for the country to undergo a national self-assessment. The significance of this process is that the state, of its own accord, allows its citizens and non-governmental organisations to scrutinise its governance strategies. The essence of the assessment is to study the political, economic and corporate governance of the state under review.⁸² The assessment process usually involves consultation between state and non-state actors. At this stage, the APR Secretariat sends questionnaires to the country to be reviewed.

The questionnaires cover the four thematic areas and form the basis for the national self-assessment. Based on the data or information collected from the questionnaires, a country self-assessment report, which includes a

⁷⁸ Ross Herbert and Steven Gruzd (note 63) 31–32.

⁷⁹ Available at <http://aprm-au.org/aprm-national-structure> [accessed 5 August 2012].

⁸⁰ APRM *The APRM National Structure* (note 76).

⁸¹ *Ibid* (note 76).

⁸² *APRM Base Document* (note 59) para 18.

plan of action, is prepared and submitted to the APR Secretariat.⁸³ At this stage, the APR Secretariat also prepares a background research document on the country under review. Finally, based on the country self-assessment report and the background research document, the APR Secretariat drafts an issue paper that indicates the main issues that should guide the Country Review Mission.⁸⁴

In the second stage, the APR Secretariat and the Country Review Mission conduct a country review and consult with government officials, representatives of civil society, parliamentarians, the media, academia, trade unions, businesses and professional bodies.⁸⁵ The goal at this stage is to engage in widespread consultation in order to get the view of different stakeholders on the way in which the country is governed. The Country Review Mission also verifies the integrity of the review process in the country and discusses the issues raised in the issue paper drafted by the APR Secretariat.⁸⁶

In the third stage, the Country Review Mission prepares a draft report, based on the background research document and issue paper prepared by the APR Secretariat, the self-assessment reports and the information it received during its consultations with stakeholders.⁸⁷ The review team discusses the draft report with the government in order to ensure that the information obtained is accurate. It also gives the government the opportunity to respond to the report, and comments on the shortcomings that need to be addressed.⁸⁸

In stage four, the Country Review Mission submits its final report to the APR Panel. The APR Panel transmits the report to the APR Forum and the Head of State of the country under review is 'peer reviewed' by the APR

⁸³ The Process of Peer Review, available at http://www.aprmtanzania.org/the_process.html [accessed 6 August 2012].

⁸⁴ African Peer Review Mechanism *Country Review Report of the Republic of Ghana*, para 5, June 2005, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/00798283-EN-APRM-GHANA-REVIEW-REPORT-JUNE-2005.PDF> [accessed 7 August 2012].

⁸⁵ *APRM Base Document* (note 59) para 19.

⁸⁶ African Peer Review Mechanism *Country Review Report of the Republic of Ghana* (note 84) 3.

⁸⁷ *APRM Base Document* (note 59) para 20; Ross Herbert and Steven Gruzd (note 63) 17.

⁸⁸ *APRM Base Document* (note 59) para 21.

Forum.⁸⁹ If the government of the country under review indicates its willingness to rectify any identified shortcomings in its country report, the other participating governments pledge to provide assistance.⁹⁰ The review by the APR Forum, coupled with public pressure, helps to accelerate the process of achieving public accountability and transparency.⁹¹

In stage five, which is the final stage, the Country Review Report is presented to the public and key regional and sub-regional bodies, such as the Pan-African Parliament, the African Commission on Human and Peoples' Rights, the Peace Security Council, and the Economic, Social and Cultural Council.⁹² The entire process is repeated every two to four years in order to monitor compliance and ensure consistency. The repetitive method adopted by the APRM indicates the use of an iterative process to monitor and secure compliance with African integration objectives. This is because a constant review of national policies through the engagement of state actors, non-state actors and other Heads of State enables countries to review their national policies repeatedly, and to ensure that they comply with the agreed standards. Furthermore, countries that have been reviewed are expected to submit an annual report on the steps they have taken to implement the National Programme of Action.

4.2.3 Country Review Reports for the four thematic themes

In assessing how the APRM process has been used to monitor compliance under the four thematic areas, the APRM Country Review Reports of eight African countries are discussed. The countries examined are Algeria, Rwanda, Kenya, Uganda, South Africa, Lesotho, Nigeria and Ghana. These countries were selected from those that have completed the APRM process and represent each geographic region in the continent, namely, North Africa, Central Africa, West Africa, East Africa and Southern Africa. Two countries from West Africa, East Africa and Southern Africa are discussed. Only one

⁸⁹ *APRM Base Document* (note 59) para 23.

⁹⁰ *Ibid* para 24.

⁹¹ Adebayo Adedeji 'NEPAD's African Peer Review Mechanism: Progress and Prospects' in Akopkpari et al (eds) *The African Union and its Institutions* (Fanele, Auckland Park, Johannesburg 2008) 253.

⁹² *APRM Base Document* (note 59) para 25.

country from North Africa (Algeria) and one from Central Africa (Rwanda) are examined because, at the time of writing, these were the only countries in these regions that had completed the APRM process. Since the indicators, objectives and criteria that are used for each theme and country are uniform across the continent, a random selection of countries is unlikely to affect the integrity of the subsequent analysis.

Under each theme, a brief summary of the review of that theme is provided for two countries. These summaries are not exhaustive but indicate what factors are considered when a country is being reviewed. It is also important to mention that the indicators and criteria mentioned in the four thematic themes are not exhaustive.⁹³ In assessing these thematic areas, the first goal of the review team is to determine whether the country under review has ratified the necessary regional instruments. In instances where the regional instruments have been ratified, the team determines whether the norms created under these instruments are being implemented and also checks for the existence of domestic institutions that are vested with the responsibility of ensuring adherence to the norms.

Most importantly, the review team also evaluates the effectiveness of these norms. A peculiar feature of the review process is that it tries to monitor compliance with the norms created under the various instruments and also reviews the effectiveness of the norms created under the regional instruments. In other words, the objective of the review goes beyond determining whether the various regional instruments have been ratified, but rather examines the extent to which the norms under the various regional instruments have been able to influence a state's behaviour.

4.2.3.1 Democracy and political governance

Under the democracy and political governance theme, the objective is to assess how a country is performing in the area of democracy, the rule of law, separation of powers, and respect for human rights. The essence of the review in this area is to ensure that sustainable development is achieved on

⁹³ For a detailed list of objectives, criteria and indicators in the four thematic areas, see *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (note 65).

the continent through the maintenance of peace and stability in African countries.⁹⁴ In assessing a country in the area of democracy and political governance, its performance is benchmarked against the standards created under various international and African regional instruments.⁹⁵ Some of the regional instruments used to evaluate a country's performance in this area are the Constitutive Act, the Declaration on the Framework for an OAU [AU] Response to Unconstitutional Changes of Government (2000), the African Charter on Human and Peoples' Rights, the Conference of Security, Stability, Development and Cooperation (CSSDCA) Solemn Declaration (2000) and the NEPAD document.⁹⁶ The review process must determine whether these instruments have been implemented and if citizens benefit from the resulting norms. The assessment of the performance of African states in the area of democracy and political governance is vital in order to entrench democratic values and accountability in governance.⁹⁷

Accountability and adherence to democratic values are essential to the integration process in Africa because democratic governments tend to comply with international legal obligations.⁹⁸ This assumption is based on the

⁹⁴ Ibid 6.

⁹⁵ Since the focus of this thesis is on African integration, only African instruments will be mentioned. However, this does not mean that the APRM limits its assessment to African instruments. Since one of the goals of the African Union is to ensure that African states take centre stage in the global community, the review process also assesses compliance with international treaties and international best practices.

⁹⁶ *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (note 65) 4. In evaluating a country's performance under the democracy and political governance theme, the APRM seeks to achieve the following objectives: (a) to prevent and reduce intra- and inter-country conflicts; (b) to ensure that constitutional democracy is entrenched in the country under review; (c) to promote and protect economic, social, cultural, civil and political rights; (d) to uphold the separation of powers and independence of the judiciary; (e) to ensure accountability in the public service; (f) to fight corruption in the political sphere; (g) to protect women's rights; (h) to protect the rights of children and young persons; and (i) to protect vulnerable groups, including refugees and internally displaced persons.

⁹⁷ *Declaration on Democracy, Political, Economic and Corporate Governance* (note 62) 5.

⁹⁸ Beth Simmons 'Compliance with international agreements' (1998) 1 *Annual Review of Political Science* 83. Slaughter has examined the role the law plays in interstate relations, depending on whether the states in question are liberal or non-liberal states: Anne-Marie Slaughter 'International law in a world of liberal states' (1995) 6 *European Journal of International Law* 503–538. Dixon argues, using the democracy-war hypothesis, that in the area of managing inter-state disputes, countries that practise democracy are more likely to resolve their interstate disputes than those who adopt other forms of governance. However, Dixon accounts for extraneous effects by using a baseline model which takes into account prior management activity, the costs of conflict, and the power of the disputant: William Dixon 'Democracy and the management of international conflict' (1993) 37(1) *Journal of Conflict Resolution* 42–68.

fact that a country that adheres to the rule of law within its national domain is more likely to defer to the rule of law in its relations with other states.⁹⁹

Therefore, it is important for African states to establish a mechanism for monitoring adherence to core democratic values in order to create an enabling environment for the realisation of the integration objectives. This understanding of a direct correlation between adherence to democratic values and the development of Africa is reflected in the NEPAD document, which identifies peace, security, democracy and political governance initiatives as conditions precedent to sustainable development in Africa.¹⁰⁰

Ghana embarked on its first peer review process in 2005 and the Country Review Mission comprised experts from the APRM Secretariat, the APR Partner Institutions, and consultants.¹⁰¹ In line with the independence requirement of the self-assessment process, the Ghanaian Government appointed an independent National APRM Governing Council (NAPRM-GC), which comprised seven non-partisan professionals and public personalities.¹⁰² The NAPRM-GC also appointed four independent think-tanks and Technical Research Institutes to carry out the national self-assessment in each of the four thematic areas reviewed.¹⁰³

In reviewing Ghana's performance in the area of democracy and political governance, the Country Self-Assessment Report and Country Review Mission Report showed that, while Ghana had ratified some of the AU conventions, a significant number of conventions had not been ratified.¹⁰⁴

⁹⁹ Beth Simmons (note 98) 83.

¹⁰⁰ NEPAD Document (note 6) paras 71–85.

¹⁰¹ African Peer Review Mechanism *Country Review Report of the Republic of Ghana* (note 84) xi.

¹⁰² *African Peer Review Mechanism Country Review Report of the Republic of Ghana* (note 84)5; UNECA Economic and Social Planning Division (ESPD) 'Implementation of the African Peer Review Mechanism in Ghana' ESPD/NRP/01/05 (October 2005) 8.

¹⁰³ Democracy and political governance – the Centre for Democratic Development (CDD); economic governance and management – the Centre for Policy Analysis (CEPA); corporate governance – the Private Enterprise Foundation (PEF); socio-economic development – the Institute for Statistical, Social and Economic Research (ISSER). See Adotey Bing-Pappoe 'Ghana and the APRM: a critical assessment' (Open Society Initiative for West Africa, Senegal, 2007) 10.

¹⁰⁴ Conventions such as the African Children's Charter 1990, the Amendments to the Constitutive Act of the African Union 2003, the African Union Convention against Corruption 2003, the African Union Non-Aggression and Common Defence Pact 2005, the Protocol on the African Court of Human and Peoples' Rights 1998, and the Protocol on the African Court of Justice 2003 were among the conventions that had not been ratified by Ghana as at the

In order to strengthen its democratic process and its adherence to the rule of law, the Ghanaian Government was advised to ratify and domesticate these documents in order to make them part of its own enforceable standards.¹⁰⁵

In reviewing Nigeria's performance in the area of democracy and political governance, particularly as this performance relates to adherence to international obligations, the review team found that, although Nigeria had ratified a significant number of treaties, the complex process of domesticating these treaties within the federal and state structures reduced the efficacy of the treaties.¹⁰⁶ Another important observation that was made was that most Nigerian citizens and, in some instances, government departments, the federal legislature and the state legislature had no information as to the treaties that had been signed or negotiated by the federal government. This failure to disseminate information about the treaties made implementation of the treaties very difficult.¹⁰⁷

A recurring theme in the countries that have been reviewed is the existence of a gap between the signing or ratification of treaties at the international level and their domestication in national legal systems.¹⁰⁸ The failure of states to domesticate these treaties means that the norms created in these treaties are unenforceable in national courts. In this regard, Fisher notes that the 'one of the best ways of causing respect for international law is to make it indistinguishable from domestic law'.¹⁰⁹ Thus the domestication of AU conventions is germane to creating enforceable norms within national frameworks, particularly in light of the fact that, in practice, regional norms within the African integration framework are not directly applicable in African states.¹¹⁰ In order to strengthen implementation and compliance with the

time of the review. See APRM *African Peer Review Mechanism Country Review Report of the Republic of Ghana* (note 84) 4.

¹⁰⁵ *African Peer Review Mechanism Country Review Report of the Republic of Ghana* (note 84) 16.

¹⁰⁶ *African Peer Review Mechanism Country Review Report Federal Republic of Nigeria* June 2008, 16.

¹⁰⁷ *Ibid* 77.

¹⁰⁸ Kenya's review also indicated that the necessary steps had not been taken to entrench all the signed or ratified treaties into the national legal system through domestication. See *African Peer Review Mechanism Country Review Report of the Republic of Kenya* 15, 61.

¹⁰⁹ R Fisher *Improving Compliance with International Law* (University of Virginia Press, Charlottesville, 1981) 370.

¹¹⁰ See discussion in chapter 5, section 5.1.2.

norms entrenched in these treaties, Ghana and Nigeria, as part of their National Programmes of Action, indicated their willingness to ratify and domesticate all outstanding instruments.¹¹¹

4.2.3.2 Economic governance management

In the area of economic governance and management, the objective of the review process is to monitor a country's macroeconomic policies that are geared towards promoting sustainable development. The review process also examines the implementation of transparent government economic policies that promote sound public finance management, and guard against corruption and money laundering. Furthermore, it checks the measures a country has taken to accelerate regional integration through participation in the process of harmonising monetary, trade and investment policies. The primary documents used for this evaluation are the NEPAD document, the Treaty Establishing the African Economic Community, the Constitutive Act of the African Union and the National Accounting Standards.¹¹²

An assessment of Algeria's economic governance revealed that although Algeria showed an undeniable enthusiasm for regional integration, its vision in terms of regional integration was not well defined.¹¹³ The review also revealed that the crisis over West Sahara had also affected Algeria's relationship with Morocco and had impeded cooperation in the region. Another issue identified was that the process of integration had been affected by the low level of intra-regional trade, poor regional transport infrastructure and the persistence of tariff and non-tariff barriers. Surprisingly, although the review process highlighted the lack of clarity in Algeria's regional integration vision, nothing in the programme of action specifically indicated the steps that Algeria intended to take to ensure that its economic integration objectives are met. In this regard, the APR Panel recommended

¹¹¹ *African Peer Review Mechanism Country Review Report of the Republic of Ghana* (note 84)149; *African Peer Review Mechanism Country Review Report Federal Republic of Nigeria: National Programme of Action Annexure I*, (note 106);398.

¹¹² *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (note 65) 15–19.

¹¹³ *African Peer Review Mechanism Country Report of the People's Democratic Republic of Algeria* (September 2007) 195.

that Algeria take steps to create a transparent monitoring system to evaluate its commitments within regional institutions.¹¹⁴

The economic governance report for Rwanda in terms of its regional commitments looked promising. The review showed that Rwanda had taken the necessary steps to implement its regional trade obligations. In line with its regional obligations under COMESA, Rwanda had aligned its external tariffs in accordance with the COMESA rules. However, Rwanda faced a challenge in managing its integration commitments as a result of its multiple memberships of various regional configurations.¹¹⁵ To find a lasting solution to this problem, the National Programme of Action indicated that a cost-benefit study will be carried out to determine the economic impact of multiple memberships of regional groupings.¹¹⁶ Multiple memberships of regional groupings have advantages and disadvantages. Not only do they affect the country in question, they may also have an impact on the overall performance of the regional group. Therefore, a country has to evaluate its options properly before it participates in multiple regional groupings.

4.2.3.3 Corporate governance

In this area, the review process examines the ethical principles, values and practices adopted by a country to facilitate sound governance in the private sector. A country is assessed to determine if it has adopted an effective regulatory framework that ensures the adoption of social responsibilities, environmental sustainability and codes of good business ethics.¹¹⁷ The NEPAD document identifies investment in the private sector as vital to poverty reduction in Africa.¹¹⁸ In order to encourage investment in the private sector, the government must be able to ensure that corporate governance is taken seriously. Corporate governance facilitates the development of the

¹¹⁴ Ibid 200.

¹¹⁵ *African Peer Review Mechanism Country Report of the Republic of Rwanda* (June 2006) 159.

¹¹⁶ Ibid 186.

¹¹⁷ *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (note 65) para 4.

¹¹⁸ NEPAD Document (note 6) para 162.

private sector, thus creating economic growth that in turn helps to alleviate poverty.¹¹⁹

The review of corporate governance in Uganda¹²⁰ revealed that, while Uganda had adopted most of NEPAD's corporate governance codes and standards, 'the enactment of laws had been slow'.¹²¹ At the time of review, 64 commercial laws needed either enactment or amendment.¹²² Most regulatory bodies vested with the authority to ensure proper corporate governance in the private sector lacked proper 'institutional, financial and human capacity to effectively fulfil their mandates'.¹²³

To remedy the gaps in the corporate governance system, Uganda in its National Programme of Action agreed to take steps to fast track the enactment of laws aimed at facilitating business in Uganda. It also undertook to build institutional capacity and to take steps to ensure that corporate governance laws are enforced.¹²⁴

In Kenya, despite its generally sound legal system, it was found that government policy affecting business was unpredictable, corporate governance laws were not properly monitored and enforced, there was insufficient infrastructural development, and corporate governance was hampered by regional and ethnic politics.¹²⁵

4.2.3.4 Socio-economic governance

In this area, the overall goal of the review process is to determine what steps have been taken by the country under review to ensure the eradication of poverty through the promotion of policies that enhance social development in areas such as education, access to water, information communication

¹¹⁹ *African Peer Review Country Review Report of the Republic of Kenya* (May 2006) 156.

¹²⁰ Uganda acceded to the APRM in 2003 and the country review formally began on 4 February 2008.

¹²¹ *African Peer Review Mechanism Country Review Report No 7, Republic of Uganda* (May 2008) 206.

¹²² *Ibid* 209.

¹²³ *Ibid* 206.

¹²⁴ *African Peer Review Mechanism Country Review Report, Republic of Uganda* (note 121) 342–343.

¹²⁵ *African Peer Review Country Review Report of the Republic of Kenya* (note 119) 157. For details on the APRM process in Kenya, see Steve Ouma Akoth *The APRM Process in Kenya: A Pathway to a New State?* (AfriMAP, Johannesburg, March 2007).

technology, and gender equality.¹²⁶ The process also determines what steps have been taken by the country to facilitate the participation of stakeholders in the development of the country.

The review process in Lesotho indicated that the country had good socio-economic policies and had adopted, signed or ratified all the international instruments necessary for promoting socio-economic development.¹²⁷ However, the implementation of these policies had been a major challenge, because of nepotism, insufficient human and financial capital, a lack of proper planning, and the absence of monitoring and implementation mechanisms.¹²⁸

In South Africa, the review process found that most instruments necessary for the promotion of socio-economic development had been signed, adopted or ratified, and that the Constitution encouraged social and economic development. Various policies had also been put in place to address the socio-economic imbalances that resulted from the apartheid era. However, socio-economic development has not cut across all sections of society. Inadequate institutional and human capacity was a challenge in all the sectors of socio-economic development.¹²⁹ A shortage of human and institutional capacity often militates against proper monitoring, management and implementation of existing socio-economic policies.

4.2.4 The APRM: Africa's catalyst for securing compliance

Bad leadership, economic mismanagement and corruption partly account for Africa's poverty and underdevelopment – a fact acknowledged by the NEPAD document.¹³⁰ While external factors also influence Africa's developmental woes, the poor leadership exhibited by post-colonial African leaders must be questioned. Post-colonial African leaders failed to regard

¹²⁶ NEPAD *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (note 65)

¹²⁷ *African Peer Review Mechanism Country Review Report No 12, Kingdom of Lesotho* (June 2010) 176.

¹²⁸ *Ibid* 189.

¹²⁹ *African Peer Review Mechanism Country Review Report Republic of South Africa* 225–271.

¹³⁰ NEPAD document para 52; NEPAD *The African Peer Review Mechanism (APRM): Africa's Innovative Thinking on Governance 2*. Prepared by the APRM for the Eighth Gathering of the African Partnership Forum, Berlin, Germany, 22–23 May 2007.

development as their primary objective; rather, their efforts were concentrated on acquiring personal wealth, tightening their grip on political power and blatantly neglecting the creation of sustainable public institutions.¹³¹ Today, Africa is littered with failed or failing states.

Acknowledging the inherent deficiency in the governance methods of most African states, the APRM seeks to inculcate the habit of good governance into the national systems of African states because, no matter how grandiose regional development plans are, in the absence of good governance, implementation may be elusive. If good governance can influence the implementation of regional policies, the APRM process will place African states in a better position to comply with the norms that promote integration and sustainable development.

To entrench the good governance culture into national systems, the APRM uses frequent periodic reviews to highlight the existing gaps in a country's governance methods and proposes solutions to bridging these gaps without necessarily threatening the use of sanctions. This innovative process relies on a country's desire to meet its obligations under the various instruments to which it has acceded. The reasoning or motivation for adopting this kind of approach to securing compliance can be ascribed to the fact that non-compliance with treaty obligations in Africa often emanates from factors other than the wilful violation of agreed norms. So far, reports from the countries that have been reviewed show that one challenge common to most African states has been a lack of institutional and human capacity, which often results in the poor implementation and monitoring of compliance with the requisite norms.¹³² The APRM process facilitates the identification of the challenges that plague states in the implementation of their obligations

¹³¹ Jarle Simensen 'Africa: the causes of under-development and the challenges of globalisation', available at <http://www.regjeringen.no/nb/dep/ud/kampanjer/refleks/innsjill/afrika/simensen.html?id=533474> [accessed 18 August 2012].

¹³² Failure to comply with treaty obligations as a result of lack of capacity is not unique to African treaties or states. In international environmental law, similar problems abound. See RB Mitchell 'Compliance theory: an overview' in J Cameron et al (eds) *Improving Compliance with International Environmental Law* (Earthscan, London, 1996) 1–28; Cesare Pitea 'NGOs in non-compliance mechanisms under Multilateral Environmental Agreements: from tolerance to recognition?' in T Treves et al (eds) *Civil Society, International Courts and Compliance Bodies* (TMC Asser Press, The Hague, 2005) 205–224.

and elaborates on steps that could be taken to overcome these challenges.¹³³

The APRM also takes account of the diverse historical context and stages of development of African states, thereby enabling states to develop at their own pace albeit within a set of agreed parameters.¹³⁴ This is in line with the variable geometry principle that has been used by some RECs in the African integration process. As discussed in chapter 3, adopting variable geometry enables less developed states to partake progressively in the integration process, without slowing down the overall rate of integration of the other states.

The APRM exhibits characteristics of the managerial approach to securing compliance with treaty obligations because it uses essential elements such as information sharing, performance reporting, policy assessment, persuasion, and data collection to facilitate compliance.¹³⁵ While the APRM in itself does not create legally binding obligations, it helps states to comply with the legally binding obligations they have entered into under other instruments.¹³⁶ Compliance with African integration treaties can be achieved using the APRM because the various stages of country review bring about information sharing among states, provide a platform for reporting and data collection, evaluate the implementation and effectiveness of regional norms, involve non-governmental organisations in the assessment process, provide an opportunity for technical assistance to be given to states in areas where needed, encourage peer dialogue and persuasion from other states, and have the capacity to bring a state's

¹³³ United Nations Development Programme (UNDP) 'Implementing the African Peer Review Mechanism: Challenges and Opportunities, Report of the Sixth Africa Governance Forum (AGF-VI)' Kigali, Rwanda, 9–11 May 2006, 44.

¹³⁴ The parameters referred to here are the criteria and indicators for assessing performance within the four thematic themes. See *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism*.

¹³⁵ Abram Chayes and Antonia Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, 1995).

¹³⁶ One advantage of soft law mechanisms is that in some instances they help to set the stage for compliance with hard law obligations, facilitate cooperation and compromise, and produce innovative principles and norms. See S Karlsson-Vinkhuyzen 'Global regulation through a diversity of norms: comparing hard and soft law' (note 24) 609–610.

reputation under scrutiny. These processes serve as an effective strategy for motivating compliance with treaty obligations.¹³⁷

The process also means that citizens and other states can scrutinise a state, thereby creating transparency in governance.¹³⁸ For example, during the review process in Ghana, the APRM was regarded as a medium ‘for demonstrating greater transparency and candour in public policy to various audiences – domestic groupings, other African states, and, not least, international donors.’¹³⁹ In other words, the APRM not only helps to create transparency, it also has a reputational dimension that is important for securing compliance.

4.2.4.1 The reputational pull of the APRM process

Reputation is an essential tool in securing compliance because it increases credibility and makes future cooperation easier.¹⁴⁰ With an increase in scepticism about the efficacy of ‘formal multilateral enforcement mechanisms’ there has been a call for the state’s reputational concern to serve as part of the principal mechanism for securing compliance with treaty obligations.¹⁴¹ Emphasis is now being placed on the effect a state’s reputation has on its decision to comply with its treaty obligations. From a rationalist point of view, states comply with treaty obligations based on the calculation of long- and short-term interests. However, implicit in this calculation is the desire to make future credible commitments with other states. Therefore, reputation comes into play because states want to be seen as reliable partners who uphold their end of the bargain – an image which is vital for any African state that seeks to attract foreign investors.

In terms of the APRM, the reputational factor has both internal and external consequences. Internally, the APRM is essential because the government wants to build an internal reputation among its citizens in order

¹³⁷ Abram Chayes and Antonia Handler Chayes (note 135) 109–271. See chapter 2.

¹³⁸ NEPAD, *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (note 65) para 1.4.

¹³⁹ Ross Herbert and Steven Gruzd (note 64) 157.

¹⁴⁰ Andrew Guzman *How International Law Works: A Rational Choice Theory* (Oxford University Press, New York) 33

¹⁴¹ George Downs and Michael Jones ‘Reputation, compliance, and international law’ (2002) 31 *Journal of Legal Studies* 95.

to entrench its legitimacy.¹⁴² Thus the APRM helps the government appear transparent and committed to good governance. The review process in Ghana revealed that President John Kuffour embarked on the APRM process to portray his government as committed to accountability and transparency with the ultimate aim of attracting foreign investors.¹⁴³ Externally, the process of defending the Country Review Report at the level of the APR Forum subjects the head of state to the scrutiny of his peers. At this level, fellow heads of state will highlight the gaps in the country's governance structure, giving suggestions about the steps that could be taken to bridge those gaps. Since the country must submit yearly review reports about its implementation of the National Programme of Action, the country will strive to bridge the existing gaps to enhance its reputation. Herbert and Gruzd argue that the APRM has the potential to embarrass government leaders since it produces a report on national problems.¹⁴⁴ Although the process is not meant to be a scorecard of a government's performance, it inevitably identifies the breaching of rules, and this invariably has political and reputational consequences.¹⁴⁵

So far, from the reports that have been presented, the APR Forum has been criticised for not grilling the heads of state properly about best practices. In the case of Ghana, it was alleged that 'some Heads of State seem not have grasped the ethos of peer review, and spent time castigating Ghana for following (and the APR Panel for endorsing) allegedly Western-inspired neoliberal policies'.¹⁴⁶ It is important to note that while the peer review at the level of the APR Forum might not have taken the direction that observers expected, the fact that some members of the APR Forum could question the economic policies of Ghana is significant to the process. The overall intention of the review process is to challenge the status quo in the

¹⁴² Suchman defines legitimacy as 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions': MC Suchman 'Managing legitimacy: strategic and institutional approaches' (1995) 20(3) *The Academy of Management Review* 574.

¹⁴³ Ross Herbert and Steven Gruzd (note 63) 157.

¹⁴⁴ Ibid 102.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid 180.

governance structure in African states to develop a process that will bring about change on the continent.

4.2.4.2 Transparency, information sharing and the participation of non-state actors

The APRM is an open and participatory process that engages stakeholders in the process of information exchange and national dialogue on good governance and socio-economic development.¹⁴⁷ The process increases transparency in the manner in which governments make decisions and also builds trust in governments' commitment to national development goals.¹⁴⁸ The APRM uses transparency and information sharing as a core part of the review process.

Transparency in this context means any 'legal, political, and institutional structures that make information about the internal characteristics of a government and society available to actors both inside and outside of the domestic political system'.¹⁴⁹ Transparency in institutions of government is an integral part of good governance because it gives non-state actors or other government departments access to information about government policies. The fundamental value of transparency is that it facilitates access to information, which helps various actors to make decisions in any given situation.¹⁵⁰ Having access to information about a government's policies facilitates disclosure of that government's interpretation of norms that regulate government activities. Where these norms are created by a multilateral treaty such as African integration treaties,

¹⁴⁷ *Guidelines for countries to prepare for and to participate in the African Peer Review Mechanism (APRM)* NEPAD/APRM/Panel3/guidelines/11-2003/Doc8, 3.

¹⁴⁸ Ibid.

¹⁴⁹ Bernard Finel and Kristin Lord 'The surprising logic of transparency' (1999) 43(2) *International Studies Quarterly* 315–339 at 316; RB Mitchell 'Sources of transparency: information systems in international regimes' (1998) 42(1) *International Studies Quarterly* 110–111.

¹⁵⁰ See generally Stigler's analysis on the role of information in the advertising industry: George Stigler 'The economics of information' (1969) 69(3) *Journal of Political Economy* 213–225. Game theory also expands on the role of information particularly when one party has information that the other does not possess. It explains how this informational asymmetry affects decision-making. See Douglas Baird et al *Game Theory and the Law* (Harvard University Press, Massachusetts, 1994) 79–121. For a legal analysis of the economics of information, see James Boyle 'A theory of law and information: copyright, spleens, blackmail, and insider trading' (1992) 80(6) *California Law Review* 1443–1457.

disclosure enables third parties to evaluate a government's conformity with the norms.

The national self-assessment which is carried out through the administering of questionnaires is essential to the transparency process. The questionnaires usually contain vital questions about the four themes reviewed.¹⁵¹ Since the questionnaires are answered by a cross-section of society through a survey of public opinion, they largely reflect what the citizens think about the government. With the involvement of civil society in the APRM process, the combination of transparency and information sharing can pressure government to improve its governance and overall compliance. Given the persistent underdevelopment in most African countries, constructive engagement between civil society and governments is necessary to address existing socio-economic challenges.¹⁵² The scrutiny of a country's performance by civil society gives credibility to the review process because it prevents the government from giving a false assessment of its performance.

4.3 Conclusion

Quite often, the integrity of Africa's integration agenda comes under scrutiny because the aspirations or commitments expressed in integration treaties are often not in consonance with existing realities.¹⁵³ For example, while treaties such as the Abuja Treaty and the various founding treaties of the RECs paint a fascinating picture of a robust approach to economic integration, the latter is more or less viewed as a utopia. However, if this narrative is taken as absolute truth without further interrogation, a great disservice would be done to the African people who have earnestly toiled to make economic integration a reality.

¹⁵¹ Adotey Bing-Pappoe *Reviewing Africa's Peer Review Mechanism: A Seven Country Survey* (Partnership Africa-Canada, Ontario, 2010) 7–8.

¹⁵² George Katito and Faten Aggad *Strategies for Effective Policy Advocacy: Demanding Good Governance in Africa* Research Report (SAlIA, Johannesburg, 3 June 2009) 9–10.

¹⁵³ Greg Mills 'Africa and regional integration: what works and why' (2004) 11(2) *South African Journal of International Affairs* 21–29; Jeffrey Herbst 'Crafting regional cooperation in Africa' in Amitav Acharya and Alastair Iain Johnston (eds) *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge University Press, New York, 2007) 132.

It is true that African leaders are often guilty of poor governance, corruption and personal aggrandisement, but initiatives such as NEPAD and the APRM may change the tide of events. With good governance and sound infrastructure, regional integration can be easily achieved. In theory, some essential aspects of integration have been achieved, but have failed to materialise into tangible benefits for African people. In West Africa, for example, the ECOWAS Protocol on the Free Movement of Persons and the ECOWAS Trade Liberalisation Scheme has been adopted. However, 'random road blocks, entrenched bribery and bloated tariffs along the Ghana-Togo-Benin-Nigeria corridor' seriously impede the movement of persons and goods.¹⁵⁴ In SADC, delays in clearing goods at the ports as a result of slow customs procedures have been reported as the cause of those imported commodities having inflated prices.¹⁵⁵ These kinds of factors militate against the attainment of integration, but NEPAD and the APRM may change these areas through their approach to monitoring governance.

In the discussion about NEPAD and the APRM's capacity to influence change, it is important to bear in mind that the benefits of these initiatives may not be felt in the short term, for a couple of reasons. Firstly, bad governance and corruption is ingrained in most African states and much advocacy and constant pressure from state and non-state actors is needed to change the existing paradigm.¹⁵⁶ Secondly, building sufficient infrastructure and human capacity in areas where most African states are deficient requires consistency over a period of time. In other words, NEPAD and the APRM should not be regarded as magic wands that will bring about instant change on the continent. Conscious efforts have to be made at all levels of society to ensure that NEPAD and the APRM are kept alive, to bridge the existing gaps between the stated objectives of economic integration and the actual practices of African states. Consistent and persistent efforts have to be made over time to ensure that the policies and

¹⁵⁴ TradeMark Southern Africa *Barriers Limit Trade Aspiration of ECOWAS*, available at <http://www.trademarksa.org/news/barriers-limit-trade-aspiration-ecowas> [accessed 5 September 2012].

¹⁵⁵ TradeMark Southern Africa *SADC's Slow Customs Procedures 'Drive up Prices of Goods'*, available at <http://www.trademarksa.org/news/sadc-s-slow-customs-procedures-drive-prices-goods> [accessed 5 September 2012].

¹⁵⁶ For a discussion of the role of non-state actors in securing compliance, see chapter 5.

governance initiatives adopted at the regional level are systematically entrenched into the legal systems of member states. This issue is addressed in the next chapter.

Chapter 5: Implementing economic integration in African states

5.0 Introduction

The previous chapter dealt with initiatives that have been put in place at the continental level to enable African states improve their levels of governance and build capacity in various areas. The success or failure of initiatives such as NEPAD and APRM largely depends on how states respond to these initiatives at the national level. For instance, the APR Process will be meaningless if states fail to subject themselves to periodic reviews. In essence, one of the most crucial tasks in the quest for economic integration is to ensure that the practice of member states at the national level aligns with the behaviour that has been prescribed at the continental level. Thus, the focus of this chapter is to examine how African states can ensure that they internalise the objectives of economic integration in such a way that their practices are aligned with the behaviour prescribed at the continental level.

To achieve economic integration, member states enter into treaties that define the integration objectives. For these objectives to have a meaningful impact on the lives of African people, they must be able to 'influence the domestic policies of [s]tates and harness national institutions in pursuit of global objectives'.¹ The ability of the integration objectives to influence domestic policies will be set in motion only if the appropriate steps are taken to internalise the integration objectives at the national level.² The United Nations Economic Commission for Africa notes that 'integration objectives are not adequately internalized. Delays in ratifying regional economic community protocols hamper the timely implementation of decisions. And broad-based support for integration is lacking, with civil

¹ Anne-Marie Slaughter and William Burke-White 'The future of international law is domestic' in Andre Nolkaemper and Janne Nijman (eds) *New Perspectives on the Divide between International and National Law* (Oxford University Press, Oxford, 2007) 111.

² Harold Koh 'Bringing international law home' (1998) 35(3) *Houston Law Review* 628.

society and the private sector acting largely as spectators.³ In order to address the inadequate internalisation of integration objectives, it is necessary for member states to take steps at the national level that will enable African people to participate in the internalisation of integration objectives.

Internalising integration objectives in member states is more complex than one may assume, because the regulatory environment in the domestic arena is often highly contested by various actors who vie for the protection of their interests.⁴ Citizens acting alone or through Parliament, organised labour, civil societies and corporate entities all compete to determine the regulatory policies of the state to ensure that their interests are not overlooked. Although the state oversees the regulatory environment, it does not have a monopoly over it, and therefore it is necessary for various interest groups to be included when regulations are formulated by the state.⁵ Clifford Shearing argues that the regulatory policy of a state is likely to be ineffective if it 'fails to acknowledge that the regulatory space is a terrain in which the state must compete for control of regulation with other regulatory entities'.⁶ In applying this analysis to economic integration in Africa, it becomes evident that, while a state may intend to implement the integration objectives to which it has acceded, those objectives may conflict with the interests of some sections of society. Therefore, the state needs to carefully balance all the interests.

For example, any move by the South African government to implement any policy that might expose its textile industry to external

³ UNECA *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* (Economic Commission for Africa, Addis Ababa, 2006) 69.

⁴ See Leigh Hancher and Michael Moran 'Organising regulatory space' in Leigh Hancher and Michael Moran (eds) *Capitalism, Culture, and Economic Regulation* (Oxford University Press, New York, 1989) 271–299; Colin Scott 'Analysing regulatory space: fragmented resources and institutional design' (2001) *Public Law* 329–353; TC Daintith 'A regulatory space agency' (1989) 9 *Oxford Journal of Legal Studies* 534–546.

⁵ See generally Ian Ayres and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York, 1992).

⁶ Clifford Shearing 'A constitutive conception of regulation' in P Grabosky and J Braithwaite (eds) *Business Regulation and Australia's Future* (Australian Institute of Criminology, Canberra, 1995) 67–78 at 73. On the state not having a monopoly over regulation, also see Clifford Shearing 'Conceptions of policing: the relationship between its public and private forms' in M Tonry and N Morris (eds) *Modern Policing* (University of Chicago Press, Chicago, 1992).

competition would be severely contested by opposition parties, manufacturers and trade unions.⁷ Given the rate of unemployment,⁸ trade unions may not appreciate the reasons for opening up the national borders to textile imports from other countries at the expense of local industries. For such implementation to occur, the government would have to negotiate with all the actors involved. These actors would need to appreciate the reasons for implementing a trade liberalisation policy that may not be beneficial to citizens in the short term but will benefit them in the long term. Such contestation as to the appropriateness and benefits of the liberalisation policy may delay implementation and consequently impact on the state's ability to comply with integration objectives.

In order to contend with the various forces at play at the national level, processes that would enhance dialogue and promote a rules-based system for giving effect to the integration objectives are needed. Dialogue is required to create awareness and enlighten all actors involved about the benefits of integration and possible ways of mitigating the losses that may occur. It is also important for the integration norms to be given the force of law in the legal systems of member states to ensure that the rights flowing from the integration objectives are adequately protected at the national level.

This chapter discusses two methods of ensuring that, through dialogue and the promotion of a rules-based system, the integration practices of African states are in line with the objectives of the integration treaties. The methods are (1) the creation of national focal points to ensure adequate linkages between regional policies and national policies, and (2) the creation of systemic links between regional courts and national courts.

5.1 National focal points

The sharing of information about the treaty norms and the performance of other states involved in the treaty is an essential aspect of securing

⁷ See the Democratic Alliance criticism of the South African government's policy on the textile industry: Democratic Alliance *Textiles Sector Crisis–The DA's 8-Step Solution*, available at http://www.da.org.za/docs/591/textilesectorcrisis_document.pdf [accessed 17 January 2013].

⁸ In the third quarter of 2012, the unemployment rate was 25.5 per cent. See <http://www.statssa.gov.za/keyindicators/keyindicators.asp> [accessed 19 January 2013].

compliance with the obligations of a treaty.⁹ At the national level, information sharing between the various actors involved in giving effect to the treaty norms is also vital because the norms created by the treaty need to be implemented by the state. The process of implementation may require a collaborative effort between various government departments and/or branches of government. However, not all the departments or branches of government are involved in the treaty-making process, so it becomes essential to communicate the information about the country's commitments to the parts of government that are required to implement the treaty norms. Weiss suggests that sometimes, a government may be divided as to whether to comply with a treaty obligation.¹⁰ While the foreign ministry may intend to comply when it signs the treaty, the ministry vested with the responsibility of implementing the treaty obligation may have no intention of complying. In some instances, the ministry may intend to comply but lacks the capacity. It is partly for these reasons that national focal points are needed to coordinate and to harmonise the policies of all branches or departments of government in order to align the state's policies with its international commitments.

The World Health Organisation and the Convention on Biological Diversity are examples of treaty regimes that make use of national focal points to ensure that there is adequate interaction between parties both locally and internationally.¹¹ Adopting a similar mechanism for African integration treaties would allow for the creation of proper linkages between the integration policies and the domestic policies of member states. While some African states already have ministries of integration and cooperation that play the role of national focal points, this is not the usual trend in Africa. The last survey conducted by the Economic Commission for Africa showed that only 32 per cent of African states have national focal points or ministries

⁹ Abram Chayes and Antonia Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge University Press, Massachusetts, 1995) 135–173.

¹⁰ Edith Weiss 'Rethinking compliance with international law' in Benvenisti, E and Hirsch, M (eds.) *The Impact of International Law on International Cooperation* (Cambridge University Press, New York 2004) 144.

¹¹ World Health Organization (WHO) *International Health Regulations (2005): Toolkit for Implementation in National Legislation, The National IHR Focal Point* (WHO, Geneva, 2009); *Convention on Biological Diversity Role of the CBD National Focal Point Module A-2, Version 2 February 2009*, available on <http://www.cbd.int/doc/training/nbsap/a2-train-role-nfp-v2-2009-02-en.pdf> [accessed 25 December 2012].

to coordinate integration activities in the state.¹² This clearly needs to change. Presently, only the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) require all their member states to designate a ministry that is responsible for matters of integration.¹³ However, the ministries are required to liaise only with the Secretary-General of the Communities. The scope of the national focal points advocated for here is wider than is currently provided for under the EAC and COMESA. National focal points could enable compliance with integration norms in the following ways:

1. facilitating the harmonisation of policies between government departments;
2. liaising with the legislative arm of government to ensure that treaties and protocols are promptly ratified and domesticated;
3. serving as the interface between the executive arm of government and members of the public to create awareness about the benefits of economic integration; and
4. serving as a consultative body for receiving complaints from citizens about non-adherence to the norms of integration.

5.1.1 Facilitating the harmonisation of policies between government departments

Why is coordination between government departments and branches of government important for ensuring compliance with integration treaties? In line with the need to accelerate economic integration on the continent, the African Union adopted a Minimum Integration Programme that identifies 11 priority sectors for integration at the national level:¹⁴ free movement (persons, goods, services and capital), peace and security, infrastructure and energy, agriculture, trade, industry, investment, statistics, political affairs, science and technology, and social affairs. A cursory look at the way

¹² UNECA *Assessing Regional Integration in Africa II* (note 3) xviii; UNECA 'Mainstreaming Regional Integration at the National Level' *Sixth Session of the Committee on Trade, Regional Cooperation and Integration E/ECA/CTRCI/6/7* (13–15 October 2009) 3.

¹³ See article 8(3) EAC Treaty and article 5(3) COMESA Treaty respectively.

¹⁴ African Union *First Action Plan for the Implementation of the Minimum Integration Programme (MIP)* (Yaounde Programme) 3.

governments function reveals that these sectors are coordinated by different ministries or departments.

In order to ensure that the policies of the various departments that coordinate these sectors are in line with the overall integration goals of the state, the national focal point could play a facilitative role in ensuring that the relevant policies that affect economic integration are properly streamlined by the various departments. This will enable the free flow of information about steps that are being taken by the various departments. Such a practice would avoid a situation where the government policies conflict with each other as they relate to achieving economic integration at the national level. In the area of liberalisation of trade, for instance, the national focal point would have to work closely with the interior ministry, the finance ministry (customs authority), and the ministry of trade to ensure that their regulations are synchronised to permit the free movement of persons and goods across the nation's borders. Failure to harmonise the policies of these departments may result in a situation where the trade liberalisation policy of the state may not be in consonance with the set goal of liberalising the free movement of persons and goods across the country's borders.

5.1.2 Liaising with the legislative arm of government to incorporate integration norms into national laws

The national focal point could also liaise with the legislative arm of government. The challenge of internalising the integration norms is often complicated by the fact that most, if not all, integration treaties in Africa are concluded solely by the heads of states, with limited or no input from citizens, thus depriving citizens of the opportunity to express their views about the obligations that a state is about to undertake before such commitments are made. While the executive arm of government usually participates in the adoption of the integration norms, giving effect to these norms at the national level is not the responsibility of the executive arm alone. The ratification of protocols and treaties are often the prerogative of the legislative arm of government. Studies show that the slow ratification of protocols or treaties

contributes to the low levels of compliance with African integration treaties.¹⁵ The national focal points could therefore ensure that treaties and protocols that have been signed by the executive branch of government are promptly sent to the legislature for ratification and possible incorporation into the municipal laws of member states.

The incorporation of regional norms into the municipal legal systems of member states is essential to give effect to the norms within the territory of member states.¹⁶ Although the norms created at the regional level seemingly regulate the conduct of inter-state relations, they may also inherently confer rights on citizens of member states. To enable these citizens to enforce these rights when they are infringed by the state, other citizens or non-state actors, these rights must be enforceable at the national level. In the absence of the incorporation of regional norms into the national legal systems of member states, citizens may be unable to enforce the regional norms in national courts. The requirement to incorporate integration norms into the municipal laws of member states is in consonance with the general practice in international law of giving effect to treaty law through the domestication of treaties.¹⁷ This is because treaty law primarily does not have the force of law in the national domain until it has been incorporated into the national laws of a state.¹⁸ The process of domesticating treaties has been the subject of extensive scholarly research and would not be delved into in this thesis.¹⁹

¹⁵ UNECA *Assessing Regional Integration in Africa II* (note 3) 77.

¹⁶ Richard Oppong *Legal Aspects of Economic Integration in Africa* (Cambridge University Press, New York, 2011)188; AM Akiwumi 'Judicial aspects of economic integration treaties in Africa' in Hague Academy of International Law (ed) *Legal Aspects of Economic Integration Colloquium* (AW Sijthoff, Leiden, 1972) 79.

¹⁷ With the exception of rules of customary international law, international law usually requires the incorporation of treaty rules into municipal law. See Armand de Mestral and Evan Fox-Decent 'Rethinking the relationship between international and domestic law' (2008) 53 *McGill Law Journal* 573–648 at 577. Although Zamora has argued that some rules of international economic law should be regarded as part of customary international law, they are still largely regulated by treaties. See S Zamora 'Is there customary international economic law?' (1989) 32 *German Yearbook of International Law* 9–42.

¹⁸ This is not an absolute statement. In some countries, such as the United States of America, a distinction is drawn between self-executing treaties and non-self-executing treaties. For the former, domestication is not required for the provisions of the treaty to be enforceable in domestic courts. This is not the case for the latter. See Carlos Manuel Vázquez 'Judicial enforcement of treaties: self-execution and related doctrines' (2006) 100 *American Society of International Law Proceedings* 439–448; Stephen Vladeck 'Non-self-executing treaties and the suspension clause after St. Cyr' (2004) 113(8) *Yale Law Journal* 2007–2014; Curtis Bradley 'Intent, presumptions, and non-self-executing treaties' (2008)

Two examples are given below to clarify the importance of the domestication of treaties. To protect the human rights of African citizens, African states adopted the African Charter on Human and Peoples' Rights (Banjul Charter).²⁰ By ratifying the treaty, states are expected to domesticate the treaty and ensure that the rights that accrue to citizens under the treaty are protected at the national level.²¹ Where these rights are violated either by the state or a non-state actor, the aggrieved citizen can seek redress in the national courts based on the rights created in the Banjul Charter. Where the state fails to give effect to the rights of the aggrieved citizen, they can have their case heard at the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, or the court of the regional economic community (REC) to which the state belongs.²²

102(3) *American Journal of International Law* 540–551; Carlos Manuel Vazquez 'The four doctrines of self-executing treaties' (1995) 89(4) *American Journal of International Law* 695–723. In South Africa, self-executing provisions of a treaty become law once they are not inconsistent with the Constitution. See s 231(4) of the Constitution.

¹⁹ See Kal Raustiala 'The domestication of international commitments' (1995) *International Institute for Applied Systems Analysis Working Paper WP-95-115*; David Sloss 'The domestication of international human rights: non-self-executing and human rights treaties' (1999) 24 *Yale Journal of International Law* 129–221; John Jackson 'Status of treaties in domestic legal systems: a policy analysis' (1992) 86 *American Journal of International Law* 310–340; Anthony Aust *Modern Treaty Law and Practice* (Cambridge University Press, New York, 2000) 143–161.

²⁰ African Charter on Human and Peoples' Rights ('Banjul Charter') OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

²¹ See Solomon Ebobrah 'Application of the African Charter by African sub-regional organisations: gains, pains and the future' (2012) 16 *Law, Democracy & Development* 49–68; Solomon Ebobrah 'Human rights developments in African sub-regional economic communities during 2010' (2011) 11 *African Human Rights Law Journal* 216–250.

²² See *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996); *Constitutional Rights Project (in respect of Akamu and Others v Nigeria)* (2000) AHRLR 180 (ACHPR 1995). These cases were heard by the African Commission on Human and Peoples' Rights. The jurisdiction of the courts of the RECs to hear human rights cases is not straightforward. There is no controversy in regions like West Africa, where the court is expressly vested with human rights jurisdiction. See *Socio-Economic Rights Accountability Project v The Federal Republic of Nigeria and the Universal Basic Education Commission* ECW/CCJ/APP/0808 (ECOWAS, 27 October 2009); *Hadidjatou Mani Koraou v The Republic of Niger* ECW/CCJ/APP/08/08 (ECOWAS, 27 October 2008). In East Africa, the East African Court of Justice has heard human rights cases even though it does not have the express jurisdiction to do so. See *Ruling on Preliminary Objection in Independent Medical Legal Unit v The Attorney General of Kenya and 4 Others* (Reference No 3 of 2010, First Instance Division) 3–6; *The Honourable Attorney General of the Republic of Kenya v Independent Medical Legal Unit* Appeal No 1 of 2011 (Appellate Division) 7–13; *James Katabazi & 21 Others v EAC Secretary General & Attorney General of Uganda* Reference No 1 of 2007: Judgment of 1 November 2001. However, in Southern Africa, the SADC Tribunal was suspended after it gave its ruling in the case of *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* SADC (T) Case No 2/2007.

In respect of trade, SADC member states, as part of their obligation under the SADC Trade Protocol, have created a free trade area within the region that requires the elimination of tariff and non-tariff barriers. For importers and exporters within the SADC region to benefit from the duty-free access, the member states have to put in place regulations at the national level that will prevent their customs authority or the relevant authority from charging customs duties on goods that originate in the SADC region. The member state also has to ensure that policies are put in place to eliminate non-tariff barriers. If the customs authority still charges tariffs when there is a regulation in place that forbids such charges, the affected entity can seek redress either in the national courts or in the established regional mechanism for dispute settlement.²³

Apart from the requirement that member states give effect to integration treaties, the hierarchical nature of treaty law after it has been domesticated is significant. The relationship between international law and national law is straightforward – states are bound by their treaty obligations. This rule, known as *pacta sunt servanda*, is provided for in article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention).²⁴ Furthermore, article 27 of the Vienna Convention prevents states from escaping their international obligations by invoking the provisions of their domestic legislation. Once a state agrees to a rule or a set of rules in the international arena, it is under an obligation to give effect to those rules and cannot deviate from those rules on the basis that the rule is contrary to its domestic law. In essence, international law takes precedence over national law (at least in the international arena). In this regard, Thomas Cottier argues that, as a matter of logic, ‘international law can only assume its role of

²³ In line with the proposed Tripartite FTA in SADC, COMESA and the EAC, an online non-tariff barriers complaint mechanism has been set up for reporting, monitoring and eliminating non-tariff barriers. Exporters or importers within these RECs can lodge online complaints about non-tariff barriers that impede trade within these regions. Since the mechanism was set up, 330 complaints have been resolved, seven were deemed non-actionable and 87 are being processed. See <http://www.tradebarriers.org/> [accessed 27 December 2012].

²⁴ Vienna Convention on the Law of Treaties *International Legal Materials* 8 (1969) 679, entered into force 27 January 1980.

stabilizing a global order if it supersedes particular and local rules'.²⁵

Similarly, African integration treaties ought to take primacy over national laws to ensure that the integration treaties can regulate the conduct of African states. This is, however, not the case. Even in instances where there is an express indication as to the primacy of the rules of international law over national law, challenges may still abound in the event of a conflict between international norms and national norms.²⁶

Most African constitutions regard the constitution of the state as the supreme law of the land against which every law must be tested.²⁷ Not only is the constitution supreme, some constitutions expressly require international law in general and treaties to be consistent with the constitution.²⁸ Thus, any law that is inconsistent with the constitution is null and void.²⁹ The primacy or supremacy of the constitution over every other law in the state could affect the application of integration norms in member states, because the integration norms become subservient to the constitution and must conform to the constitution in order to have the force of law. An example of a situation where the constitution of a state was given primacy

²⁵ Thomas Cottier 'A theory of direct effect in global law' in Armin von Bogdandy (ed) *European Integration and International Co-ordination* (Kluwer Law International, Hague, 2002) 102.

²⁶ See V Vereshchetin, 'New constitutions and the old problem of the relationship between international law and national law,' (1996) 7 *European Journal of International Law* 35.

²⁷ Interestingly, some countries in Europe and the Middle East take a different view on the status of treaties or international agreements. Article 6 of the Armenian Constitution, article 5(4) of the Bulgarian Constitution, article 123 of the Estonian Constitution, article 4 of the 1995 Kazakh Constitution, article 15(4) of the Russian Constitution and article 11 of the Tadjik Constitution all provide for the supremacy of treaties over national law in the event of a conflict between the laws. See Vladlen Vereshchetin (note 26) 34.

²⁸ In this regard, some constitutions, such as the South African Constitution, also require customary international law to be consistent with the Constitution. See section 232 of the South African Constitution.

²⁹ This feature is not unique to African states alone, and forms part of the broader discussion of whether international law should have a claim to supremacy over national law. The manner in which international law is received differs from state to state, and the perceptions in terms of hierarchy also differ. See Anne Peters 'The globalization of state constitutions' in Jane Nijman and Andre Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (Oxford University Press, Oxford, 2007) 251–301; V Vereshchetin (note 26) 29–41; Anne Peters 'Supremacy lost: international law meets domestic constitutional law' (2009) 3(3) *Vienna Journal on International Constitutional Law* 170–198; Thomas Franck and Arun Thiruvengadam 'International law and constitution-making' (2003) 2 *Chinese Journal of International Law* 467–518; AO Adede 'Constitutionalism, culture and tradition: African experiences on the incorporation of treaties into domestic law' (1999) 7 *African Yearbook of International Law* 239–253.

over integration norms is the *Mike Campbell* case.³⁰ In determining the legality of the expropriation of the farms of the applicants, the SADC Tribunal was of the opinion that Zimbabwe had breached its obligations under the SADC Treaty, and therefore held in favour of the applicants.³¹ The applicants brought an application before the High Court of Zimbabwe to register the judgment of the SADC Tribunal.³² In deciding whether the judgment could be registered in Zimbabwe, the High Court of Zimbabwe held that, while Zimbabwe was bound by the SADC Treaty,³³ registering the judgment of the SADC Tribunal would be contrary to public policy because the government would be required to 'act in a manner that is manifestly incompatible with what is constitutionally ordained'.³⁴ The High Court therefore denied the application for registration.

If decisions of this nature become the usual practice, then the implementation of integration norms in member states may be constantly fraught with challenges whenever an integration norm conflicts with the constitution. The supremacy clause in the constitutions of African states could be a major impediment to the implementation of integration norms. The germane question is how integration norms can be incorporated into the laws of member states notwithstanding the supremacy clauses present in most constitutions.

In the European Union (EU) these challenges have been resolved by applying the principle of primacy or supremacy of the European Union law and the direct application of Community law in member states. Although the principle of the supremacy of EU law over national legislation was not expressly provided for in the Treaty establishing the European Community, through judicial decisions of the European Court of Justice (ECJ), EU law has been declared to be hierarchically superior to national law in the event of

³⁰ *Mike Campbell (Pvt) Ltd and 78 others v The Republic of Zimbabwe* SADC (T) Case No 2/2007.

³¹ *supra* 55–58.

³² *Gramara (Private) Limited and Colin Bailie Cloete v Government of the Republic of Zimbabwe and Attorney General of Zimbabwe and Norman Kapanga* HC 5483/09.

³³ *supra* 8–14.

³⁴ *Supra* 19.

a conflict.³⁵ Thus, even in instances where EU law is inconsistent with national law, a member state is under an obligation to bring its national laws into line with EU law.

The principle of direct application makes EU laws directly applicable in member states. Therefore, member states do not necessarily need to enact national legislation to give effect to regulations made pursuant to the EU Treaty.³⁶ The ECJ pointed out that the 'direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law.'³⁷ This decision means that the applicability of EU law is not subject to the incorporation of treaties into the legal systems of member states.³⁸ The above description of the principles of primacy of EU law and the direct application thereof is rather simplistic, but shows how the challenge of domestication of regional rules and the supremacy of national constitutions has been addressed in the European integration process.

One might argue that the EU's approach to the supremacy or primacy of EU law and the principle of direct application radically altered the traditional relational dynamics between national constitutions and international law by creating an international (regional) constitutional order where in the event of a conflict; EU laws trump the constitution of member

³⁵ *Van Gend en Loos v Nederlandse Administratie Belastingen* ECJ Case 26/62, [1963] ECR 1; *Costa v Ente Nazionale per L'Energia Elettrica (ENEL)* ECJ Case 6/64 [1964] ECR 585; *Internationale Handelsgesellschaft mbH v Einfuhr – und Vorratsstelle fur Getreide und Futtermittel* (Case 11/70) [1970] ECR 1125; Martin Stiernstrom 'The relationship between community law and national law' *Jean Monnet/Robert Schuman Paper Series* vol. 5 no 33 (October 2005); Karen Alter *Establishing the Supremacy of the European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, Oxford, 2001) 2; Joseph Weiler 'The community system: the dual character of supranationalism' (1981) 1 *Yearbook of European Law* 274; Roman Kwiecien 'The primacy of European Union law over national law under the constitutional treaty' (2005) 6(11) *German Law Journal* 1479–1495; Ines Weyland 'The application of Kelsen's theory of the legal system to European community law—the supremacy puzzle resolved' (2002) 21(1) *Law and Philosophy* 1–37.

³⁶ See generally Martin Stiernstrom (note 35).

³⁷ *Amsterdam Bulb v Produktschap voor Siergewassen* (50/76) (1976) ECR 146; *Variola SpA v Amministrazione Italiana delle Finanze* [1973] ECR 990.

³⁸ See JA Winter 'Direct applicability and direct effect: two distinct and different concepts in community law' (1972) 9 *Common Market Law Review* 425–438; PJG Kapteyn 'The application and enforcement of community law in the national legal systems' in PJG Kapteyn et al (eds) *The Law of the European Union and the European Communities* (Kluwer Law International, Netherlands, 2008) 511–574.

states.³⁹ The joint application of these principles is regarded as forming a strong basis for the effectiveness of the legal order of the EU.⁴⁰ The presence of a strong ECJ that was able to stretch the limits of EU law and the acceptance of its interpretation by member states has had an undeniable influence on the development of this kind of *sui generis* law.⁴¹ In the case of the integration process in Africa, the regional courts have not made such strong pronouncements on the status of integration norms in national legal systems. While our regional courts have, in instances like the *Campbell* case, ruled that member states have an obligation to give effect to integration norms, there has not been an express pronouncement on their supremacy over national laws.

In the absence of such express pronouncements by the courts, it is the responsibility of the legislature to ensure that integration treaties are not affected by the supremacy clause. This could be achieved by amending national constitutions to reflect the intention of the state to be bound at the national level by the integration treaties. Interaction between the national focal points and the legislature could even commence prior to the signing of the relevant treaty or protocol. At the negotiation stage of the treaty or

³⁹ This is by no means an indication that the national constitutions of member states in the EU play no role whatsoever in the integration process. It can be argued that the validity of the authority conferred on the EU by member states is derived from their constitutions. See Jan Wouters 'National constitutions and the European Union' (2000) 27 *Legal Issues of Economic Integration* 28–46. For more discussions of the constitutional legal order in Europe, see Paul Craig 'Constitutions, constitutionalism, and the European Union' (2001) 7(2) *European Law Journal* 25–150; Matej Avbelj and Jan Komarek (eds) *Four Visions of Constitutional Pluralism* EUI Working Paper Law No 2008/21 European University Institute; Neil Walker 'The idea of constitutional pluralism' (2002) 65(3) *The Modern Law Review* 317–359; Miguel Poiares Maduro 'Three claims of constitutional pluralism' in M Avbelj and J Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, Oxford, 2012) 68–84; Rene Barents 'The fallacy of European multilevel constitutionalism' in M Avbelj and J Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, Oxford, 2012) 153–183; A von Bogdandy and J Bast (eds) *Principles of European Constitutional Law* (Hart Publishing, Oxford, 2010); JHH Weiler *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999); Ingolf Pernice 'Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited' (1999) 36 *Common Market Law Review* 703–750.

⁴⁰ Roman Kwiecien (note 35) 1479.

⁴¹ The ECJ has pointed out that EU law 'constitutes a new legal order of international law' and '[b]y contrast with ordinary international treaties, the EEC has created its own legal system'. Thus the traditional approaches to the incorporation of international law into national law are not followed in the EU model. This *sui generis* law, one can argue, is an exception to the existing norm. See *Van Gend en Loos v Nederlandse Administratie Belastingen* 12; *Costa v ENEL* *Supra* (note 35) 593.

protocol, the national focal point could open lines of communication with the relevant legislative committees to brief them on the needs and implications of the treaty or protocol that the state is about to enter into. At this stage, the compatibility of the treaty with the constitution could be addressed and other possible concerns could be raised. These issues could be negotiated and clarified to avoid a situation where the legislature fails to ratify the treaty after the state has signed it.

5.1.3 The interface between the state and non-state actors

National focal points could also serve as the direct interface between the government and non-state actors. Non-state actors in this context include citizens, professionals, non-governmental organisations, corporations and any other actors that are affected by the process of integration. This interface is necessary if one considers that the social dimension⁴² of economic integration may not always resonate well with all sections of society.⁴³ Although integration is social in nature, since it brings about cohesion between the societies it integrates,⁴⁴ inadequate communication or awareness about the benefits of economic integration may result in social tension in society. These social tensions could impede the pace at which integration policies are implemented by the state. In order to diffuse these tensions there needs to be a forum for adequate discussions between the government and its citizens about the benefits of economic integration. The national focal points could be used to facilitate such discussions.

Examples from some RECs illustrate this point. ECOWAS and the EAC have protocols on the free movement of persons and the right of establishment for citizens of member states, while SADC has a Charter of

⁴² World Commission on the Social Dimension of Globalisation (WCSDG) *A Fair Globalisation: Creating Opportunities for All* (International Labour Office, Geneva, 2004) 71–74; UNU-CRIS ‘Deepening the social dimensions of regional integration’ *Discussion Paper Series No 188* (International Institute for Labour Studies, Geneva, 2008) 25–28; Rene Robert ‘The social dimension of regional integration in ECOWAS’ *Working Paper No 49* (International Labour Office, Geneva, 2005); Letlhokwa Mpedi and Mathias Nyenti ‘Perspectives towards the development of social protection dimension of the SADC regional integration agenda’ (2012) 2(2) *SADC Law Journal* 164–186.

⁴³ World Commission on the Social Dimension of Globalisation (WCSDG) (note 42); UNU-CRIS (note 42); Rene Robert (note 42); Letlhokwa Mpedi and Mathias Nyenti (note 42).

⁴⁴ Andrew Axline *European Community Law and Organizational Development* (Oceana Publications, New York 1965) 2.

Fundamental Social Rights.⁴⁵ A member state in these regions with high rates of unemployment or inadequate social security for its citizens may have to go the extra mile in convincing its citizens that implementing the provisions of these agreements will benefit the state.⁴⁶ The severe scarcity of resources in African states warrants such a dialogue between the government and its citizens to reassure them that opening up the borders of the state to other citizens from the region will not lead to a further depletion of the already scarce resources. The xenophobic attacks in South Africa on Africans who were perceived as threats to scarce employment opportunities and welfare services strengthen an argument for such a dialogue between the state and its citizens to communicate the benefits of economic integration.⁴⁷ For there to be effective economic integration the norms created at the regional level need to translate into substantive realities for the citizens of member states. One way in which this could be achieved is if citizens of member states directly benefit from and understand the reasons for participating in economic integration. Thus, it is vital that the citizens are included at every stage of the integration process.

Non-state actors, particularly non-governmental organisations are essential to secure compliance.

5.1.4 Consultative body for receiving complaints from citizens

Citizens could also use the national focal points as forums for expressing displeasure about non-adherence to the norms of integration by the state or other states within the integrating unit. Such an avenue could go a long way in mitigating some of the existing challenges faced in eliminating non-tariff barriers between African states. The imposition of non-tariff barriers is known

⁴⁵ East African Community Common Market (Right of Establishment) Regulations 2009 (EAC Secretariat: Arusha); East African Community Common Market (Free Movement of Workers) Regulations 2009 (EAC Secretariat: Arusha); Charter of Fundamental Social Rights in SADC; ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment A/P.1/5/79.

⁴⁶ For a discussion of expanding social security benefits for SADC citizens in South Africa, see Marius Olivier 'Enhancing access to South African social security benefits by SADC citizens: the need to improve bilateral arrangements within a multilateral framework (Part 1)' (2011) 1 *SADC Law Journal* 121–148; Marius Olivier 'Enhancing access to South African social security benefits by SADC citizens: the need to improve bilateral arrangements within a multilateral framework (Part 2)' (2012) 2(2) *SADC Law Journal* 129–163.

⁴⁷ Editorial Opinion 'No to xenophobia' *Daily Dispatch* (7 July 2005) 6; Glynnis Underhill 'Xenophobia? What xenophobia?' *Mail&Guardian* (28 January 2010) 6.

to be one of the greatest impediments to trade liberalisation on the continent. Sometimes, these barriers are imposed by agents of the state without the consent of the state.

In Nigeria and other West African countries, for instance, illegal road blocks mounted by security operatives along major international trade routes and bribery among customs officials are often used to extort money from traders involved in cross-border trade.⁴⁸ These road blocks mounted by corrupt government operatives impede the free movement of goods and persons across the borders. The illegal activities of these government officials could be addressed by the national focal points if citizens constantly lodge their complaints through their national focal points. Furthermore, the national focal points could address these issues internally by contacting the authorities in the relevant departments. If the complaints are about the practices in other member states, the national focal point could contact its counterparts with a view to finding lasting solutions to the imposition of illegal non-tariff barriers by unscrupulous government officials.

The national focal points could also enable its citizens or corporations to resolve the challenges of non-tariff barriers. For example, the Shoprite Group in South Africa claims that it spends a weekly average of \$20,000 to secure permits to import meat and milk for its stores in Zambia. Woolworths also claims not to export its goods under the SADC Preferential Tariffs because the cost of administering the tariffs is too high. Clearly the legality of these high costs of transactions is questionable given the existence of a SADC Trade Protocol that prohibits non-tariff barriers. Issues of this nature could be brought to the attention of the national focal points, which could then bring them before the relevant authorities or the SADC-COMESA-EAC Non-Tariffs Barriers Complaints Commission. One of the benefits of raising these issues at the governmental level is that states can continually test the content of the agreed norms, and this may lead to compliance.

⁴⁸ Mombert Hoppe and Francis Aidoo 'Removing barriers to trade between Ghana and Nigeria: strengthening regional integration by implementing ECOWAS commitments' (2012) 30 *African Trade Policy Notes* 6; Habiba Ben Barka 'Border posts, checkpoints, and intra-African trade: Challenges and solutions' 2012 *African Development Bank Chief Economist Complex* 1–19.

From the above discussion of national focal points, it is evident that not only can they be used to facilitate discussions between government departments, citizens and the legislature, but they can also be a medium for resolving instances of non-adherence to the norms of integration. It is not the contention here that the creation of national focal points will automatically eradicate all impediments to the implementation of economic integration policies at the national level. However, the impact of having such a facilitative and possibly consultative body to constantly create an enabling environment for dialogue about the norms of integration should not be overlooked. Serious consideration should be given to this mechanism, which could be adopted as part of a robust strategy for combating inherent and systemic problems associated with mainstreaming regional economic policies into national development plans.

5.2 Creating linkages between regional courts and national courts

How is creating linkages between regional courts and national courts relevant to implementing economic integration in member states, particularly as regional courts are vested with the jurisdiction to adjudicate disputes arising from the integration treaties and the decisions are binding on member states? A closer look at the treaties establishing the regional courts reveals that creating such links would strengthen the integration process and enable national courts to become actively involved in the integration process. In this section, three areas are examined to illustrate how the links could benefit the integration process and consequently improve the compliance levels of member states:⁴⁹ (1) jurisdiction and access to regional courts; (2) referrals of disputes from national courts; and (3) execution of judgments. The courts of four RECs are examined:⁵⁰ the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic

⁴⁹ For a detailed discussion of regional courts in Africa, see James Gathii 'The under-appreciated jurisprudence of Africa's regional trade judiciaries' (2010) 12 *Oregon Review of International Law* 245– 283

⁵⁰ Only four of the eight RECs are discussed because ECCAS, IGAD, AMU and CENSAD do not have functioning courts.

Community of West African States (ECOWAS), and the Southern African Development Community (SADC).

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

COMESA was created in 1994, replacing the former Preferential Trade Area for Eastern and Southern Africa. It is presently a customs union and comprises 19 states from North, East and Southern Africa.⁵¹ The objectives of the COMESA Treaty, listed in article 3, include the attainment of sustainable growth and development through the harmonious development of production and marketing structures, the promotion of peace and security to enhance economic development among member states, and contributing towards the establishment and realisation of the objectives of the African Economic Community (AEC). To achieve the above objectives, the member states give specific undertakings in the following areas: trade liberalisation and customs cooperation, transport and communications, industry and energy, monetary affairs and finance, agriculture, and economic and social affairs.⁵²

5.2.1.1 Jurisdiction and access to regional courts

Article 7(1)(c) of the Treaty Establishing the Common Market for Eastern and Southern Africa established the COMESA Court of Justice (COJ). The mandate of the COJ is to 'ensure the adherence to law in the interpretation and application of [the COMESA] Treaty'.⁵³ Article 23 gives it a general jurisdiction to adjudicate upon all matters referred to it pursuant to the COMESA Treaty. Member states may refer another member state or the COMESA Council if they fail to fulfil their obligations under the Treaty or infringe the provisions of the Treaty.⁵⁴ A member state may also challenge the legality of an act, regulation, directive or decision of Council if it is *ultra*

⁵¹ Its members are Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Seychelles, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Tanzania, Lesotho, Mozambique and Namibia were initially members of COMESA but withdrew their membership in 2000 (Tanzania), 1997 (Lesotho and Mozambique) and 2004 (Namibia).

⁵² Article 4 COMESA Treaty.

⁵³ Article 19 COMESA Treaty.

⁵⁴ Article 24(1) COMESA Treaty.

vires or infringes the Treaty or amounts to an abuse or misuse of power.⁵⁵ The Secretary-General may also refer a member state to the COJ if the member state has failed to fulfil an obligation under the Treaty or has infringed the provisions of the Treaty.⁵⁶ Finally, legal and natural persons may challenge the legality of an act, regulation, directive or decision of Council or of a member state on the grounds that the act, regulation, directive or decision in question is unlawful or has infringed the provisions of the Treaty.⁵⁷ However, legal and natural persons must first exhaust local remedies in their national courts or tribunals before they have a right of action at the COJ.⁵⁸

5.2.1.2 Referrals of disputes from national courts

Article 29(1) provides that '[e]xcept where the jurisdiction is conferred on the Court by or under [the] Treaty, disputes to which the Common Market is a party shall not, on that ground alone, be excluded from the jurisdiction of national courts.'⁵⁹ However, the COJ's interpretation of the Treaty takes precedence over the decisions of national courts.⁶⁰ In a dispute before a national court, where a question is raised as to the application or interpretation of the Treaty or the validity of an act, regulation, directive or decision, the national court may refer the matter to the COJ for a preliminary ruling if the national court is of the opinion that such a preliminary ruling is necessary to enable it to give a judgment.⁶¹ The national courts must also refer a matter to the COJ where the matter is in relation to the interpretation of the Treaty, act, regulation, directive or decision but there is no judicial remedy under the national law of the member state.⁶²

5.2.1.3 Execution of judgments

Where the COJ gives a judgment that imposes a pecuniary obligation on a person, the execution of such judgment is governed by the rules of civil

⁵⁵ Article 24(2) COMESA Treaty.

⁵⁶ Article 25 COMESA Treaty.

⁵⁷ Article 26 COMESA Treaty.

⁵⁸ Article 26 COMESA Treaty.

⁵⁹ Article 29(1) COMESA Treaty.

⁶⁰ Article 29(2) COMESA Treaty.

⁶¹ Article 30(1) COMESA Treaty.

⁶² Article 30(2) COMESA Treaty.

procedure that are in force in the member state where the judgment is to be executed.⁶³ The execution order is appended to the judgment and its authenticity is verified by the registrar.

5.2.2 The East African Community (EAC)

The EAC comprises five countries in East Africa, namely, Kenya, Uganda, Tanzania, Rwanda and Burundi.⁶⁴ It has its headquarters in Arusha, Tanzania and came into existence through the Treaty for the Establishment of the East African Community (EAC Treaty).⁶⁵ The EAC Treaty was signed on 30 November 1999, came into force on 7 July 2000,⁶⁶ and was subsequently amended on 14 December 2006 and 20 August 2007. While regional integration in East Africa is mainly justified on economic grounds, the common history, language and culture of the East African people has deepened cooperation in political, economic, social and cultural affairs.⁶⁷ The primary objective of the EAC is to develop policies and programmes aimed at strengthening cooperation between member states in the areas of politics, the economy, social and cultural affairs, research and technology, defence, security, and legal and judicial affairs.⁶⁸

⁶³ Article 40 COMESA Treaty.

⁶⁴ At www.eac.int [accessed 2 January 2013].

⁶⁵ Regional integration in East Africa dates back to the colonial era with the formation of the Kenya-Uganda Railway between 1897 and 1901, the Customs Collection Centre in 1900, the East African Currency Board in 1905, the Postal Union in 1905, the Court of Appeal for Eastern Africa in 1909, the Customs Union in 1919, the East African Governors' Conference in 1926, the East African Income Tax Board in 1940, the Joint Economic Council in 1940, the East Africa (High Commission) Orders in Council between 1947 and-1961, and the Treaty for East African Co-operation in 1967. With the dissolution of the Treaty for East African Co-operation in 1977, the East African Community officially came to an end until its resurrection in 1999. See the Preamble to the Treaty for the Establishment of the East African Community, as amended on 14 December 2006 and 20 August 2007. See also East African Community *Experts Report on The East African Political Federation: Addressing East Africans' Fears, Concerns and Challenges and Consolidating its Pillars* (EAC, Arusha, August 2010) 6; African Union *Status of Integration in Africa (SIA)* 2 ed (African Union, Addis Ababa, 2009) 96–97; Evarist Mugisa et al *An Evaluation of the Implementation and Impact of the East African Community Customs Union Final Report* (EAC, Arusha, 2009); Korwa Adar and Mutahi Ngunyi 'The politics of integration in East Africa since independence' in Walter Oyugi (ed) *Politics and Administration in East Africa* (Konrad Adenauer Foundation, Nairobi, 1992) 395–442; Ingrid Diomi Delupis *The East African Community and Common Market* (Longman, London, 1970); Joseph Nye *Pan-Africanism and East African Integration* (Harvard University Press, Massachusetts, 1965); Christian Potholm and Richard Fredland *Integration and Disintegration in East Africa* (University of America Press, Lanham, 1980).

⁶⁶ At <http://www.tralac.org/2011/03/23/eac-legal-texts/> [accessed 2 January 2013].

⁶⁷ African Union *Status of Integration in Africa (SIA)* 2 ed (African Union, Addis Ababa, 2009) 99.

⁶⁸ Article 5 EAC Treaty.

5.2.2.1 Jurisdiction and access to regional courts

Article 9(1) (e) of the Treaty Establishing the East African Community established the East African Court of Justice (EACJ). The role of the EACJ is ensure 'the adherence to law in the interpretation and application of and compliance with [the EAC] Treaty'.⁶⁹ The EACJ consists of a First Instance Division and an Appellate Division.⁷⁰ The EACJ presently has jurisdiction over the interpretation and application of the EAC Treaty.⁷¹ Member states, the Secretary-General, legal persons and natural persons all have access to the EACJ.

A member state may refer an organ or institution of the EAC to the EACJ if there has been a failure to fulfil an obligation under the Treaty or an infringement of the provisions of the Treaty.⁷² A member state may also challenge the legality of an act, regulation, directive or decision on the grounds that it is *ultra vires* or unlawful or infringes the provisions of the Treaty.⁷³ The Secretary-General may refer a member state to the EACJ if the member state has failed to fulfil an obligation under the Treaty or has infringed the provisions of the Treaty.⁷⁴ Legal or natural persons can approach the EACJ to determine the legality of an act, regulation, directive or decision of a member state or an institution of the EAC on the grounds that they have acted unlawfully or infringed the provisions of the Treaty.⁷⁵

5.2.2.2 Referrals of disputes from national courts

The national courts of member states are not precluded from hearing disputes that relate to the Treaty except where jurisdiction has been conferred on the EACJ by the Treaty.⁷⁶ However, in instances where the national courts entertain a dispute that relates to the Treaty, the interpretation given by the EACJ in similar matters takes precedence over

⁶⁹ Article 23(1) EAC Treaty.

⁷⁰ Article 23(2) EAC Treaty.

⁷¹ Article 27(1) EAC Treaty.

⁷² Article 28(1) EAC Treaty.

⁷³ Article 28(2) EAC Treaty.

⁷⁴ Article 29 EAC Treaty.

⁷⁵ Article 30(1) EAC Treaty.

⁷⁶ Article 33(1) EAC Treaty.

the decision of the national court.⁷⁷ The EAC Treaty permits national courts to request a preliminary ruling from the EACJ when there is a matter before the national courts that relates to the interpretation or application of the provisions of the Treaty or the validity of an act, regulation, directive or decision.⁷⁸

5.2.2.3 Execution of judgments

If there is a pecuniary obligation in an EACJ judgment, the rules of civil procedure in force in the member state where the judgment is to be enforced apply.⁷⁹ The order of execution is attached to the judgement and its authenticity is verified by the registrar.

5.2.3 The Economic Community of West African States (ECOWAS)

ECOWAS was created in 1975 by the Treaty Establishing the Economic Community of West African States (1975 ECOWAS Treaty).⁸⁰ The 1975 ECOWAS Treaty was terminated in 1993 when member states adopted a revised ECOWAS Treaty in 1993 (Revised ECOWAS Treaty). ECOWAS comprises 15 member states from the West African region.⁸¹ The objectives of ECOWAS are to 'promote cooperation and integration, leading to the establishment of an economic union in West Africa'.⁸² The underlying rationale for these objectives is to raise the living standards of the West African people, promote economic stability in the region, nurture relations between West African states, and enhance the overall development of the African continent.⁸³ To achieve these objectives, ECOWAS member states have progressively undertaken to harmonise their national policies and to promote economic integration in the areas of agriculture and natural resources, industry, transport, trade, money and finance, taxation, economic

⁷⁷ Article 33(2) EAC Treaty.

⁷⁸ Article 34 EAC Treaty.

⁷⁹ Article 44 EAC Treaty.

⁸⁰ The Treaty Establishing ECOWAS was adopted on 28 May 1975. For a brief history of economic cooperation in West Africa, see Adebayo Adedeji 'Prospects of regional economic co-operation in West Africa' (1970) 8(2) *Journal of Modern African Studies* 213–231.

⁸¹ The present member states are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. ECOWAS initially consisted of 16 member states, but Mauritania withdrew its membership in 2000.

⁸² Article 3(1) Revised ECOWAS Treaty 1993.

⁸³ *Ibid.*

reform policies, human resources, education, information, culture, science, technology, tourism, legal matters, and the environment.⁸⁴

5.2.3.1 Jurisdiction and access to regional courts in ECOWAS

The Revised ECOWAS Treaty established a Community Court of Justice for the region (ECCJ).⁸⁵ Article 3 of the Supplementary Protocol Amending the Protocol on ECCJ mandates the ECCJ to adjudicate disputes relating to the interpretation of the ECOWAS Treaty, Conventions and Protocols of the Community.⁸⁶ The ECCJ also has a mandate to interpret, apply and determine the legality of the regulations, directives, decision and other subsidiary legal instruments adopted by ECOWAS.⁸⁷ The ECCJ has the powers to determine non-contractual liabilities of ECOWAS and may order ECOWAS to pay damages or make reparations for acts or omissions of ECOWAS institutions or officials if performed in the course of official duty.⁸⁸ Furthermore, the ECCJ has jurisdiction over matters provided for in any agreement where the parties to the agreement confer such jurisdiction on the ECCJ.⁸⁹ In terms of access to the ECCJ, member states, the Council of Ministers, and the Executive Secretary of the ECOWAS can institute an action if another member state has failed to honour its obligations or to determine the legality of an action which is related to any ECOWAS text.⁹⁰ Individuals and corporate bodies may also institute an action to determine the legality of an action or inaction of an ECOWAS official that violates the rights of the individual or corporate body.⁹¹

5.2.3.2 Referrals of disputes from national courts

The Protocol on the ECCJ does not provide for the referral of disputes from national courts to the ECCJ.

⁸⁴ Article 3(2a) and chapters IV-XI Revised ECOWAS Treaty 1993.

⁸⁵ Article 6(1) (e) Revised ECOWAS Treaty.

⁸⁶ ECOWAS Supplementary Protocol A/SP.1/01/05/ Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice.

⁸⁷ Article 3(1) ECOWAS Supplementary Protocol on the Community Court.

⁸⁸ Article 3(2) ECOWAS Supplementary Protocol on the Community Court.

⁸⁹ Article 3(7) ECOWAS Supplementary Protocol on the Community Court.

⁹⁰ Article 4(a) (b) ECOWAS Supplementary Protocol on the Community Court.

⁹¹ Article 4(d) ECOWAS Supplementary Protocol on the Community Court.

5.2.3.3 Execution of judgments

Article 24 of the Protocol on the ECCJ requires any decision of the ECCJ to be in the form of a writ of execution which is submitted by the registrar of the ECCJ to the member state for execution in accordance with the rules of civil procedure of the member state.⁹² In order to enforce the judgments of the ECCJ, each member state is required to have a competent national authority that can receive and process the execution of the ECCJ's decisions.⁹³ Upon the receipt and verification of the writ of execution by the competent national authority, the writ is enforced.

5.2.4 The Southern African Development Community (SADC)

SADC comprises 15 member states.⁹⁴ SADC started as the Southern African Development Cooperation Conference and was later transformed into the Southern African Development Community.⁹⁵ The objectives of SADC include promoting economic and social growth, promoting common political values, promoting productive employment, achieving sustainable utilisation of resources, and ensuring the eradication of poverty.⁹⁶

5.2.4.1 Jurisdiction and access to regional courts

Article 9(1) of the Treaty Establishing the Southern African Development Community established a SADC Tribunal.⁹⁷ Article 16 of the SADC Treaty mandates the SADC Tribunal to ensure the 'adherence to and the proper interpretation of the provisions of [the SADC] Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it'.

⁹² Protocol A/P.1/7/91 Relating to the Community Court of Justice, as amended by article 6 ECOWAS Supplementary Protocol A/SP.1/01/05/ Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice.

⁹³ Article 24(4) Protocol A/P.1/7/91 Relating to the Community Court of Justice.

⁹⁴ Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁹⁵ See Ashimizo Afadameh-Adeyemi and Evance Kalula 'SADC at 30: re-examining the legal and institutional anatomy of the Southern African Development Community' in Anton Boesl et al (eds) *Monitoring Regional Integration in Southern Africa in 2010* (TRALAC, Stellenbosch, 2011) 5–22.

⁹⁶ Article 5 SADC Treaty as amended.

⁹⁷ The SADC Tribunal is presently under suspension pending a review of its role and jurisdiction. See Derek Matyszak 'The dissolution of the SADC' Tribunal Research and Advocacy Unit, available at http://www.researchandadvocacyunit.org/index.php?option=com_docman&task=doc_download&gid=108&Itemid=90 [accessed 6 June 2010].

Pursuant to article 16 of the SADC Treaty, a SADC Protocol on the Tribunal was adopted by member states. Article 14 of the Protocol on the Tribunal gives the SADC Tribunal jurisdiction over all disputes and applications which relate to the interpretation and application of the SADC Treaty, the interpretation, application or validity of the Protocols and all other instruments adopted under the auspice of SADC, and the acts of the institutions of SADC. The SADC Tribunal also has jurisdiction over any matter provided for in an agreement which specifically confers jurisdiction on the Tribunal.⁹⁸ Member states, natural persons and legal persons have access to the SADC Tribunal. However, natural and legal persons have to exhaust local remedies before they can approach the Tribunal.⁹⁹

5.2.4.1 Referrals of disputes from national courts

The Protocol on the SADC Tribunal permits the national courts of member states to approach the SADC Tribunal for a preliminary ruling on any dispute before the court.¹⁰⁰

5.2.4.3 Execution of judgments

Article 32 of the Protocol on the SADC Tribunal provides that the applicable law for the execution of a judgment is the law for the registration and enforcement of foreign judgments in force in the state where the judgment is to be enforced. Member states and institutions of SADC are mandated to take all necessary steps to ensure that the decisions of the SADC Tribunal are executed.

5.2.5 Why the link is necessary

From the brief description of the jurisdiction of the regional courts it is apparent that the mandate of the COJ and the EACJ relate only to the interpretation and application of the constituent treaty.¹⁰¹ This means that except a subsequent subsidiary instrument confers jurisdiction on the COJ

⁹⁸ Article 14(c) Protocol on the SADC Tribunal.

⁹⁹ Article 15(2) Protocol on the SADC Tribunal. It is important to note that access to the Tribunal by natural and legal persons has been the subject of controversy. It has been alleged that the right of access by legal and natural persons will be excluded from the new protocol that is being drafted.

¹⁰⁰ Article 16 Protocol on the SADC Tribunal.

¹⁰¹ See article 7(1) (e) COMESA Treaty and article 23(1) EAC Treaty.

and the EACJ, they would not have the mandate to adjudicate disputes resulting from such subsidiary instruments. On the other hand, the ECCJ and the SADC Tribunal have the mandate to interpret the constituent treaty and other subsidiary instruments.¹⁰² To illustrate the implication of this point, let us use an example from the EAC.

The EAC has adopted a Protocol establishing a Common Market.¹⁰³ Among other rights protected by this Protocol, the Protocol protects the free movement of workers and prohibits discrimination in employment and remuneration on the basis of the nationality of the worker from a member state.¹⁰⁴ This protection accorded to workers is laudable. However, the problem lays in the fact that article 54(1) of the Protocol on the Common Market, which deals with dispute settlement, gives member states access to the EACJ only to settle any dispute that may arise from the interpretation of the Protocol. The entire Protocol is silent on whether legal or natural persons can access the EACJ if a member state, legal person or natural person violates the provisions of the Protocol. Since the EAC Treaty guarantees the right of access by a legal or natural person to the EACJ only in relation to the determination of the legality of an act, regulation, directive or decision of a member state or an institution of the EAC on the grounds that they have acted unlawfully or infringed the provisions of the Treaty,¹⁰⁵ it follows that legal and natural persons cannot seek recourse at the EACJ where the provisions of the Common Market Protocol are being violated.

One may argue that an activist court like the EACJ, which has in the past exercised jurisdiction over disputes that had human rights components even though it lacked human rights jurisdiction, may extend its mandate to include the interpretation and application of subsidiary instruments of the EAC.¹⁰⁶ However, such an argument will not succeed if the approach of the

¹⁰² See Article 3 ECOWAS Supplementary Protocol on the Community Court and article 16 SADC Treaty.

¹⁰³ Protocol on the Establishment of the East African Community Common Market.

¹⁰⁴ Article 10 Protocol on the Establishment of the East African Community Common Market.

¹⁰⁵ Article 30(1) EAC Treaty.

¹⁰⁶ See *James Katabazi and 21 Others* (note 22). Other ground breaking cases from the EACJ include a decision on the procedural irregularities in the amendment of the EAC Treaty: *East African Law Society and Others v Attorney General of the Republic of Kenya and Others* East African Court of Justice Judgment Ref No 3 of 2007 (September 2008). For

President of the EACJ, Justice Harold Nsekela, is considered. Justice Harold Nsekela is of the opinion that while the Protocol on the Common Market guarantees the rights of citizens, these citizens cannot bring an action for enforcement before the EACJ.¹⁰⁷ In instances of this nature, only an amendment of either the EAC Treaty or the Protocol on the Common Market will suffice to enable legal or natural persons to enforce their rights under the Protocol on the Common Market in the EACJ.

In article 54(2) of the Protocol on the Common Market, member states guarantee, in accordance with their constitutions and national laws, the right to seek redress if the rights of any person guaranteed under the Protocol are infringed. In such a case, the competent judicial, administrative or legislative authority shall rule on the rights of the person seeking redress. The provisions of article 54(2) undoubtedly confers jurisdiction on the national courts to protect rights guaranteed by the Protocol. Conferring authority on the national courts to adjudicate disputes arising from the Protocol on the Common Market could be seen as partially bridging the gap which article 54(1) of the Protocol on the Common Market creates. For instance, if the right that was breached under the Protocol on the Common Market is the right of a worker to non-discrimination and the violator is the state, nothing precludes the national court from requesting a preliminary ruling from the EACJ on whether the violation under the Protocol on the Common Market contravenes the principle of adherence to good governance, democracy, the rule of law and social justice, which is clearly articulated in article 7(2) of the EAC Treaty.¹⁰⁸

Other than requesting a preliminary ruling from the EACJ, the national court may of its own accord determine whether the action of the member state has breached the Protocol on the Common Market. Where the national

the EACJ's decision on the irregularity in the election of members of the East African Legislative Assembly, see *Professor Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others* East African Court of Justice, Ref No 1 of 2006 (30 March 2007).

¹⁰⁷ The East African 'More teeth needed for the East African Court' at <http://www.theeastafrican.co.ke/news/More-teeth-needed-for-East-African-court/-/2558/1482514/-/view/printVersion/-/ido1lgz/-/index.html> [accessed 4 January 2013].

¹⁰⁸ See *James Katabazi and 21 Others* (note 22)¹⁸ where the EACJ held that the 'intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty'.

court decides in favour of the worker, but the member state fails to comply with the decision of the national court, the worker whose rights have been violated may approach the EACJ directly for an interpretation as to the legality of the non-compliance by the member state. In this case, the issue for determination before the EACJ would no longer be whether the worker can approach the EACJ when a right under the Protocol on the Common Market is violated. Rather, the issue before the EACJ would be the determination of the legality of the non-compliance of the member state with the decision of the national court. The decision of the EACJ in *James Katabazi and 21 others v Secretary General of the East African Community and Another* could serve as a precedent. In this case the EACJ emphasised the need for member states to abide by the rule of law and held that, when states fail to do so, it is the responsibility of the court to ensure that the rule of law is protected.¹⁰⁹ Relying on this decision, one may argue that, although citizens of member states may not have direct access to the EACJ for the purposes of enforcing their rights under the Common Market Protocol, they may still benefit from the authoritative interpretation of the EACJ through a series of direct and indirect interactions between the EACJ and the national courts.

Creating a close link between regional courts and national courts is also essential for enforcing judgments of the regional courts. In COMESA, the EAC and ECOWAS, the rules of civil procedure of the member states govern the enforcement of the decisions of the regional courts. In SADC, the judgments of the SADC Tribunal are executed as foreign judgments in the member states. Requiring the rules of civil procedure of member states to govern the enforcement of foreign judgments is fairly ambiguous because the national courts could either regard the judgments of the regional courts as foreign judgments or confer upon them the status of domestic judgments.

The approach adopted by the national courts has different implications for the enforcement of judgments of the regional courts. If the judgment of the regional court is treated as a foreign judgment, the national courts may have the jurisdiction to determine whether the judgment conforms to certain

¹⁰⁹ *Supra*.

requirements for the enforcement of foreign judgments.¹¹⁰ In Nigeria and South Africa, for instance, the national courts will not execute a foreign judgment if the court is of the opinion that enforcing the judgment is contrary to the public policy of the state.¹¹¹ Any determination of the compatibility of the decisions of the regional courts with the public policy of the state may undermine the decisions of the regional courts. The decision of the High Court of Zimbabwe in *Gramara (Private) Limited and Another v Government of the Republic of Zimbabwe*¹¹² illustrates the danger of subjecting the decisions of the regional courts to the compatibility test that judgments from foreign jurisdictions are usually required to go through.

On the other hand, if the national court treats the judgment of the regional court as a domestic judgment, then the national court does not have to subject the judgment to any form of review or to determine its compatibility with the public policy of the state. Given that the interpretation of the status of the judgments of the regional courts in COMESA, the EAC and ECOWAS seems to presently lie with the national courts (at least implicitly), it is imperative for the judiciaries of member states to have an in-depth understanding of the workings of economic integration in general and, more specifically, the role that the courts have to play in ensuring that the norms of integration are internalised by member states.

In SADC, where the Protocol on the SADC Tribunal specifically requires a judgment of the Tribunal to be treated as a foreign judgment, the national courts do not have the interpretative discretion that the courts in COMESA, the EAC and SADC have. Nevertheless, the national courts in SADC member states could determine issues of compatibility with public policy from a more holistic perspective, by taking into account the

¹¹⁰ One likely implication of this is that the decision of the court to enforce the judgment may be further appealed to the highest court that the law permits. This invariably delays the process of implementing the judgment of the regional court.

¹¹¹ See section 6(1)(v) Foreign Judgments (Reciprocal Enforcement) Act, Chapter F35, CAP 145, Laws of the Federation of Nigeria 1990; section 5(1)(e) Enforcement of Foreign Civil Judgments Act 32 of 1988, South Africa. See the decision of the South African Supreme Court of Appeal in *Jones v Krok* 1995 (1) SA 677 (AD). See generally Godwin Omoaka 'Nigeria: legal regime for the enforcement of foreign judgments in Nigeria: an overview' 2 December 2004. available at <http://www.templars-law.com/media/publications/Enforcement%20of%20Foreign%20Judg-GOO.pdf> [accessed 21 January 2013].

¹¹² *Gramara (Private) Limited and Another* (note 32) 19. See section 5.1.2.

international obligations of states. Again, for this to occur, some form of judicial activism such as the one demonstrated by the South African Supreme Court of Appeal (SCA) in *Government of the Republic of Zimbabwe v Fick & others*¹¹³ would be required from the national courts. In this case, the SCA dismissed an appeal by the government of Zimbabwe that sought to challenge an order of the Gauteng High Court authorising the Sheriff in Cape Town to attach and sell Zimbabwe's immovable properties for the purpose of paying for the costs awarded by the SADC Tribunal in the *Mike Campbell* case.¹¹⁴ Judicial activism of this nature at the national level could greatly influence the manner in which decisions of the regional courts and norms of integration in general are treated by member states.

Another aspect where a linkage between the regional courts and national courts is necessary is in the area of resolving jurisdictional uncertainties that may arise as a result of overlapping memberships of RECs. Kiplagat rightly suggests that overlapping memberships of RECs could create a problem of forum-shopping by litigants.¹¹⁵ Since different regional courts and national courts may have jurisdiction over the same dispute, litigants may decide to commence action in the court they think will be more favourable to their case. This may result to a situation where two litigants commence action on the same subject matter in different courts. To resolve issues of this nature, it will be necessary for the regional courts and courts to maintain comity in order to determine the court with exclusive jurisdiction over the dispute. If more than one court has jurisdiction over different aspects of the dispute, the courts may also decide which of the courts is best suited to effectively resolve the dispute.¹¹⁶ If this is done, the possibility of having conflicting judgements in the same dispute will be averted.

¹¹³ *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012).

¹¹⁴ *Supra* 2–3.

¹¹⁵ Kenneth Kiplagat, 'Jurisdictional uncertainties and integration processes in Africa: the need for harmony' (1995-1996) 4 *Tulane Journal of International and Comparative Law* 51.

¹¹⁶ International Tribunals have applied this principle in resolving issues of overlapping jurisdiction. In the *Mox Plant* case, the arbitral tribunal of the Permanent Court of Arbitration suspended its proceedings pending the jurisdictional findings of the European Court of Justice on the same dispute. See the *Mox Plant* case, *Ireland v United Kingdom*, Order no.3, 24 June 2003, Suspension of Proceedings on Jurisdiction and Merits, and a Request for Further Provisional Measures, para. 29.

In order to promote interaction between regional courts and national courts, the regional courts can take the lead in creating linkages with the national courts by hosting training sessions or awareness workshops for members of the national judiciaries. In this regard, a cue could be taken from the ECCJ, which has made several efforts to sensitise members of the national judiciaries and legal professions in ECOWAS about the role and functioning of the ECCJ.¹¹⁷ Furthermore, creating such linkages would enable regional and national judiciaries to create the synergy required to secure adherence to the rule of law within the territory of each member state and within the REC as a whole.

5.3 Conclusion

In order to ensure that the norms of economic integration are implemented by member states and that the implemented norms actually align the behaviour of member states with the stated goals of economic integration, a drastic and coherent approach is needed by member states to internalise the norms of integration. Just as member states at the national level cannot afford to shy away from their integration obligations by treating the rules of integration as alien to their domestic legal systems, so also can citizens not afford to resist integration on the grounds that it would make them vulnerable to competition from other states. To ensure that states and their citizens fully participate in the process of integration at the national level, it has been suggested that national focal points should be created in all states where they do not presently exist to facilitate adequate interaction at the national level between all the relevant stakeholders. These focal points will ensure that regional policies are mainstreamed into the development agendas of member states and that stakeholders are aware of their rights and obligations under the integration treaties.

¹¹⁷ 'ECOWAS Court completes training session for Bar Association of Benin Republic' available at http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=170:bar-association-benin&catid=14:pressrelease&Itemid=36 [accessed 10 January 2013]; Pasco Gerald 'West African Chief Judges assess ECOWAS Court' 7 July 2011, available at <http://www.sierraexpressmedia.com/archives/26034> [accessed 10 January 2013].

Creating links between regional courts and national courts is also vital for the implementation of economic integration on the continent. Although the regional courts have the final say on issues of integration, they do not have the means of enforcing their judgments. Enforcement of the judgments of the regional courts lies squarely within the province of the national courts. This makes the national courts an integral part of ensuring that the norms of integration are given effect to at the national level. To enable the national courts to properly perform their duties, the judges need to understand the role and functioning of the regional courts. One way of achieving this is to create a platform on which judges of the regional courts and the national courts can exchange ideas about how both sets of courts can work together to achieve the same purpose.

Given the number of states currently involved in the integration process, it would be over-ambitious to assume that the above recommendations can be implemented merely by suggesting them. Considerable public advocacy on the part of non-state actors may be needed to pressurise governments to create national focal points in states where they do not already exist. In states where they do exist, an equal amount of public advocacy will be needed to ensure that the national focal points adequately perform their role as facilitators and coordinators of the integration process. The same applies to creating links between regional courts and national courts. Experience from public advocacy in human rights indicates that consistent and concerted advocacy from non-governmental organisations can play a crucial role in ensuring that governments are held accountable. That same level of consistency can be applied to issues of economic integration to ensure that the overall behaviour of states is aligned with the objectives of the integration treaties. Obviously, there will be challenges in changing the existing paradigm. However, the challenges are not insurmountable if all stakeholders make a conscious effort. Borrowing from the words of Harold Koh, and slightly rephrasing his reasons for why nations obey international law, I suggest that African states would obey the laws of economic integration if 'lawyers and citizens who care about [the

laws of economic integration], who choose not to leave the law at the water's edge, ... do their utmost to [bring the laws of economic integration home]'.¹¹⁸

¹¹⁸ Harold Koh (note 2) 681.

Chapter 6: Conclusion

6.0 Introduction

An important aspect of the discussion about compliance with African integration treaties is how the narrative of compliance is framed. To illustrate this point, let us start by drawing examples from Africa's tale of poverty, underdevelopment and bad governance. The level of poverty and underdevelopment in most African states is relatively high and the entrenchment of 'good governance' in African states is still a fairly new development that is gradually finding its way into the normative frameworks of most African states.¹ The high level of underdevelopment has been linked by some scholars to a deliberate attempt by African leaders to keep the African populace impoverished. Greg Mills suggests in his book, *Why Africa is Poor* that 'the main reason why Africa's people are poor is because their leaders have made this choice'.² This statement, like many others, represents a one-sided view of the problems of poverty and underdevelopment in Africa.

It is true that post-colonial Africa has had its fair share of bad leadership. However, other systemic challenges inherent in the global polity have also contributed to Africa's underdevelopment.³ While it is beyond the

¹ The African Governance Report II indicates that there had been marginal progress on governance since the first baseline study was conducted in 2005. While the growth might not be astronomical, it is an indication that there has been a gradual increase in the observance of good governance principles in African states. See Economic Commission for Africa *African Governance Report II* (Oxford University Press, New York, 2009) 1.

² Greg Mills *Why Africa is Poor and What Africans Can Do About it* (Penguin Books, Johannesburg, 2010) 1.

³ See Makua Mutua 'What is TWAIL' (2000) *American Society of International Law Proceedings* 31–40. Mutua argues that current international law operates within a predatory and hegemonic construct that in its present composition prevents Third World nations from completely unshackling themselves from the grip of persistent subjugation practised by the global north. These inherent deficiencies of the international legal arena implicitly contribute to some of the systemic challenges faced by African states. See also James Gathii 'Retelling good governance narratives on Africa's economic and political predicaments: continuities and discontinuities in legal outcomes between markets and states' (2000) 45 *Villanova Law Review* 971–1035. Gathii challenges the narrative of the good governance programmes of Bretton Woods institutions and argues that, in reality, there is virtually no difference between economic regulation by the state, as practised by most post-colonial African states, and the marketplace regulation propounded by Bretton Woods institutions. It is outside the province

scope of this thesis to address the reasons for Africa's poverty, the pertinent issue is that there are different perspectives on every problem or set of problems. A one-sided perspective is dangerous because it obscures our real understanding of a people or set of events, thus creating stereotypes that are incomplete, if not untrue.⁴ Therefore, if one proceeds to resolve a problem based on an incomplete narrative, it is very likely that whatever solution is proffered will be incomplete.

If compliance is examined solely from the perspective that African leaders are unwilling to surrender sovereignty to supranational institutions and that economic integration cannot be achieved in the absence of strong supranational institutions, we are in danger of obscuring the analysis of compliance. However, we can achieve a more robust analysis if the problems around compliance are examined from a broader perspective.

It is within the above context that chapter 1 frames the central research question: 'in the absence of supranational institutions, how can compliance with African integration treaties be secured, taking into account the legal and non-legal factors that may impact on the ability of states to comply with their integration obligations?' In discussing how to secure compliance, it was argued that the absence of supranational institutions does not mean that states will not comply with their integration obligations. Furthermore, although some Regional Economic Communities have supranational courts that have actively influenced human rights norms, these courts have not been able to influence the area of economic integration.

It is also argued in chapter 1 that compliance should not be regarded as only meaning a state's 'adherence to legal rules'; rather, compliance should be equated with 'conformity of actual behaviour with the prescribed behaviour'. The justification for adopting this definition of compliance is that a

of this thesis to further discuss the arguments canvassed by Mutua, Gathii and other TWAIL (Third World Approach to International Law) scholars but it is important to note that these issues cannot be overlooked if we are to have a genuine conversation about the place of Africa in the global economy. For a bibliography on TWAIL, see James Gathii 'TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography' (2011) 3(1) *Trade and Law Development* 26–64.

⁴ Chimamanda Adichie *Dangers of a Single Story* July 2009. See transcript at <http://dotsub.com/view/63ef5d28-6607-4fec-b906-aaae6cff7dbe/viewTranscript/eng?timed=true> [accessed 25 January 2013].

state's adherence to legal rules will not always generate compliance. In addition, given the various areas that economic integration in Africa covers, taking a more holistic approach to the definition of compliance is required to foster an understanding of the real problems around non-compliance. Chapter 1 also discussed the context in which economic integration in Africa is presently taking place, to draw the distinction between the process of integration in Africa and that in the European Union (EU).

Two main differences relevant to the discussion on compliance were identified. The first was that African states place less emphasis on the creation of strong supranational institutions and therefore a direct comparison with the institutions of the EU may not enrich our discussion of how to proffer institutional solutions to the problem of non-compliance. The second difference was that, from the onset, economic integration in Africa was designed to go beyond trade liberalisation, and therefore it covers areas such as transport, infrastructure, agriculture, and the joint management of shared natural resources. The reason for identifying the differences is that a direct comparison is often made between economic integration in Africa and the EU, without necessarily taking into consideration the specific context in which integration is occurring in Africa. To resolve the challenges faced in the African integration process, the context must be properly understood so as to ensure that the solutions proffered are feasible and effective.

Taking into account the diverse nature of the problems around non-compliance, chapter 2 suggests the use of the managerial approach to secure compliance with African integration treaties. The chapter suggested that African states will tend to comply with their integration obligations to avoid the high costs of non-compliance, to protect their interests, and because of the implicit understanding that treaty norms are meant to be obeyed. The chapter also suggested that non-compliance with African integration treaties does not primarily stem from flagrant disregard for integration obligations, because there is a presumption that states generally do have the intention to comply with their treaty obligations. This presumption is manifested in the amount of effort and time that African states have put into negotiating series of integration treaties, the declarations and

resolutions that they have passed to this effect, and the constant restatement of the need to integrate the African economies in order to overcome the various socio-economic challenges that plague African states. Working from the premise that non-compliance is mostly not deliberate, the chapter suggests that non-compliance stems from deeper systemic problems that include but are not limited to ambiguities in the texts of the integration treaties, the lack of capacity of African states and the regional institutions vested with the mandate of monitoring the integration process, and the ambitious timelines imposed by African states within which they are to comply with their integration obligations. These factors manifest in different forms or influence other factors that may account for non-compliance.

It was suggested that resolving issues of non-compliance will require more than the mere use of conventional legal methods, such as having institutions that coerce compliance by imposing sanctions. A more viable option would be the use of a combination of iterative methods that promote transparency by ensuring (1) that information about compliance is shared between African states, (2) that disputes are resolved by interpretative organs that clarify the meaning of the norms and the behaviour that is accepted, (3) that institutional capacity is developed in states and regional institutions, and (4) that persuasion is employed to ensure that the actual behaviour of states conforms with the behaviour prescribed by integration treaties. The combined application of these methods will not only ensure the legitimacy of the integration process but will also help to internalise integration obligations at the national level.

Since economic integration operates within an institutional framework, chapter 3 examines the primary organs of the African Union (AU) with a view to indicating how they can facilitate the use of the iterative methods discussed in chapter 2. Before discussing the organs of the AU, the chapter gave a brief summary of the history of the AU, to show the efforts that African states have made to ensure that integration succeeds on the continent. The chapter also showed that African states have delegated certain levels of authority to the AU. Chapter 3 argues that the organs of the AU need to play a more decisive role in coordinating economic integration on the continent by

creating a platform for more interaction between all the relevant stakeholders in the integration process. In this regard, the Assembly of Heads of State and Government, as the supreme policy organ of the AU, is enjoined to be more proactive in addressing the core substantive issues of economic integration through frequent clarification and interpretation of the norms of integration. Such interpretation and clarification will enable member states to understand the specific action required to give effect to each of their obligations. However, given the busy schedule of the Assembly, it has been suggested that the Assembly could delegate these functions to another organ of the AU.

The need for such delegation of powers is particularly important because the Executive Council, which ranks next to the Assembly of Heads of State, is not properly equipped to perform its function of coordinating and taking decisions on policies in areas of common interest to member states. The suitability of the Executive Council to perform its function is questioned because it comprises Ministers of Foreign Affairs and the areas about which they must make decisions are not traditionally within the sphere of influence of the foreign ministry. This inevitably raises doubts about whether the Executive Council has the technical capacity to efficiently perform its functions. An inefficient Executive Council increases the likelihood of non-compliance because the policies it develops may not address the real concerns or pertinent issues in each sector.

The institutional incapacity of the African Union Commission was also discussed and it was pointed out that while the Commission is vested with the responsibility of monitoring the implementation of the decisions of the Assembly, it does not have a hands-on presence in either the regional economic communities (RECs) or in the member states. Finally, in terms of the organs of the AU, the decision to merge the African Court on Human and Peoples' Rights with the African Court of Justice was also questioned, as this may have affected the proper functioning of the court. The relationship between the AU, the AEC and the RECs was also discussed, and the chapter concluded with a discussion of how the AU can resolve the challenge of overlapping membership of RECs and also monitor the pace of economic integration on the continent.

Chapter 4 further examined the function of the AU as the coordinator of the integration process by discussing the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM) initiatives which ensure capacity building and entrenchment of good governance at the national level. The chapter noted that in the absence of strong supranational institutions, African states have been able to establish mechanisms that could facilitate compliance by creating transparency in governance and facilitating the participation of non-state actors in the review of the performance of member states. Furthermore, transparency enables periodic reviews and reporting measures that have a reputational effect in terms of ensuring compliance. These initiatives also create a platform for non-state actors, such as non-governmental organisations, to participate in the process of evaluating the performance of African states and actively building transnational networks to influence change not only in their countries but across the African continent. The chapter argued that if the NEPAD and APRM initiatives are continued, they will help to clarify what constitutes acceptable behaviour and will consequently instil adherence to the norms of integration.

Chapter 5 examined how the norms of economic integration agreed to by member states at the regional and sub-regional levels can be internalised at the national level. The primary argument in this chapter is that, since compliance will not occur if the norms agreed to at the regional level are not able to change the behaviour of states at the national level, then it is important to ensure that norms are implemented at the national level. However, the challenge lies in the fact that, at the national level, various interests have to be accounted for before the integration obligations can be implemented. The chapter suggested that, in order to balance all the interests at the national level and ensure that economic integration is collectively embarked upon by the state and its citizens, member states need to create national focal points that can coordinate the implementation of integration norms by various agencies of government, civil society, the private sector and other stakeholders. Since integration requires a collective effort between the state and its citizens, the national focal points can also

serve as the interface between the government and the people to ensure that citizens are actively involved in integration.

Finally, the chapter called for adequate links to be created between the regional courts and the national courts to ensure that the rights which accrue to citizens under the integration treaties are adequately protected. The creation of this link is particularly important since regional courts depend on the relevant state to enforce their judgments. The national courts can ensure that judgments of the regional courts are registered and enforced. The link is also required to create mutual respect and comity among the courts, particularly when they are faced with issues of conflicting jurisdiction. Overall, chapter 5 argues that, for economic integration to succeed, the norms of integration will have to be internalised by member states, and this can only be done with the participation of state and non-state actors.

6.1 How do we proceed?

If we work from the premise that non-compliance with integration treaties does not emanate from deliberate disobedience on the part of African states, but from ambiguity in the treaties or capacity constraints, then to achieve compliance, numerous strategies are required to address these problems at the regional and national levels. An essential aspect of the strategy will be to ensure that the integration norms are adequately clarified and internalised by member states. Clarifying the acceptable conduct of member states is relevant also because the conditions in a state may change between the time of adoption of a treaty and the implementation phase. Therefore, it is important for member states to have a forum where they can bring these changes in circumstance to the fore so that the impact of these changes on the ability of states to comply can be discussed. It is not sufficient for heads of state to meet twice a year to discuss generally the challenges faced by African states. Rather, organs such as the commissions of the AU and the RECs should constantly engage with the member states to ascertain the progress that is being made and the challenges that the member states may be encountering.

A clarification of the norms of integration is also important because it will enable legal and natural persons to identify a state's integration obligations and the action that is required by that state to give effect to its integration obligations. From the perspective of legal and natural persons, such clarification is vital to ascertain the duties of the state. As discussed in chapter 1, legal and natural persons have not been actively involved in litigation arising from a breach of the norms of economic integration. Most litigation in the regional courts has been on human rights breaches by member states. A possible explanation for this is that, while the human rights norms are clear and easily identifiable when the breach occurs, the same cannot be said of the norms of economic integration. Presently, in most RECs it is difficult to authoritatively ascertain the core norms of economic integration, and to establish whether they create enforceable rights for legal and natural persons. If the norms of economic integration are clarified and interpreted, in instances where they are breached, legal and non-legal persons may seek recourse either in the regional courts or in their national courts to enforce such rights. This will help to resolve the challenge of insufficient litigation arising from the breach of the norms of economic integration.

A framework is also needed for member states to continually report on the steps they have taken to implement their obligations. A possible way of achieving this is to require states to submit periodic reports on steps they have taken to implement their integration obligations. Since over 30 African states have signed up for the APRM,⁵ the reporting requirement could form part of the APR process. The APR process will significantly improve the availability of information about the norms of economic integration and the level of performance by each state. While the APRM is a laudable initiative, it requires consistent dedication to the process by both state and non-state actors. For the APRM to have any meaningful impact there needs to be more advocacy and scholarly discussion about it. The euphoria in academic circles that followed the launch of NEPAD and the APRM needs to be continued in order to sustain the tempo of these initiatives.

⁵ See <http://www.uneca.org/aprm/CountriesStatus.asp> [accessed 4 August 2012].

There needs to be active engagement between state and non-state actors to monitor the process of integration and to ensure that states give effect to their integration obligations. Non-governmental organisations need to be actively involved in issues of economic integration because they play a significant role in ensuring that states comply with their obligations. The participation of non-state actors in the integration process is vital and economic integration should not be regarded as solely a governmental project. In ECOWAS, for instance, the ECOWAS Commission has set up a pilot unit for monitoring the implementation of the free movement of persons. This pilot unit comprises members of civil society, the media and the judiciary. The intention is to create a sense of ownership of the integration process.⁶ Initiatives of this nature could be replicated in the various sectors in which economic integration is taking place. Furthermore, while African states might not be inclined to using formal dispute settlement mechanisms to resolve inter-state disputes, this does not preclude non-state actors from using these formal dispute settlement forums. Non-state actors need to continually test the limits of the norms of integration either in the national or regional courts to ensure that they are internalised over time. Non-governmental organisations such as the Pan-African Lawyers Union (PALU), Socio-Economic Rights and Accountability Project (SERAP) and the Southern African Litigation Centre (SALC) have been actively involved in human rights litigation in the regional courts. Such advocacy is also needed in the area of economic integration.

Conscious efforts also have to be made to address the capacity limitations of African states. Public-private sector partnerships are needed to invest in building efficient seaports, interconnected railways, transnational highways and other infrastructures necessary for the free flow of goods and services. With regard to administering the integration process, the bureaucratic capacity of the administrative bodies involved in the process of integration will need to be enhanced both at the national level and the regional level. For example, customs and other security officials at the border posts in the member states will have to be enlightened through workshops

⁶ African Union *Status of Integration in Africa* (African Union, Addis Ababa, 2009) 26.

and on-going training about the integration obligations of the state and the conduct that is required. In instances where incentives such as compensatory mechanisms to mitigate the losses that arise from trade liberalisation have been created, government officials should have the requisite capacity to manage the compensatory mechanisms.

6.2 Further research required

An essential aspect of compliance that is not discussed in this thesis is the actual measurement of the extent of compliance by African states. Empirical research would be required to measure the levels of national compliance in each area of economic integration. The benefit of carrying out this kind of study will be to ascertain the exact factors within the national framework that impact on compliance with the integration treaties. The data generated from this type of research would be beneficial for states in deciding on the practical steps that could be taken to address the specific challenges encountered by each member state. For example, it could be useful to know what impact unemployment has on compliance with the obligation to liberalise trade and free movement of persons. It will also be important to know how obligations at the multilateral level impact on national compliance with integration obligations. In order to proffer solutions to the challenge of non-compliance, it will be necessary to understand the impact, if any, that these other factors have on compliance. An understanding of the impact that these other factors have on compliance may assist us in understanding how and why African states comply with the norms of economic integration. As Benedict Kingsbury suggests, '[c]oncepts of "compliance" depend upon the understandings of the relations of law, behaviour, objectives, and justice. These relations are of central importance..., and must be theorized before there can be any true theory of "compliance".'⁷ Therefore, in order to fully understand compliance with African integration treaties, African legal scholarship must go beyond examining the text of the various integration

⁷ Benedict Kingsbury 'The conception of compliance as a function of competing conceptions of international law' (1997–1998) 19 *Michigan Journal of International Law* 346.

treaties. What is needed is an enquiry into the relationship between all the factors that contest the space wherein the integration treaties operate.

6.3 Concluding remarks

Securing compliance with African integration treaties is a broad area of study. This thesis has sought to narrow the discussion and to focus on how to secure compliance in the absence of strong supranational institutions. Given the complexity in proposing solutions to a range of problems that involve a large number of states, the suggestions made in this thesis will not secure compliance in every instance. However, a consistent and simultaneous application of these suggestions will significantly increase the levels of compliance. Below are the main suggestions made in this thesis that, if applied, could increase levels of compliance:

1. The norms of economic integration need to be constantly clarified and interpreted to enable states internalise them. Some form of persuasion is needed to convince states to adhere to their integration obligations.
2. Clarification is important also because it helps legal and natural persons to understand the rights that accrue to them.
3. The process of clarification and interpretation is not necessarily the responsibility of regional courts, but this is certainly one of the possibilities.
4. For economic integration to succeed, subsidiarity has to be applied to define the areas of competence of the AU, the RECs and the member states.
5. The NEPAD agenda cannot be ignored, particularly with regard to building infrastructural capacity on the continent.
6. The peer-review process under the APRM is an essential component in facilitating compliance because it can improve good governance member states and consequently influence the level of compliance with their integration obligations. This is because the APRM enables non-governmental organisations and other non-state actors to take part in the periodic reviews of the activities of states and allows for the

reports generated to be scrutinised by other states. The peer-review process also allows the public to have access to information about the compliance efforts of states.

7. At the national level, a collective effort is needed by states and their citizens to ensure that the benefits of integration are clearly understood by all the stakeholders involved.
8. Public awareness is needed to educate citizens about the steps that are being taken by the state to comply with the integration obligations
9. At the national level, the creation of national focal points in all the member states is essential to ensure that the norms of integration agreed to at the regional level are implemented at the national level.
10. It is important to create links between regional courts and national courts to ensure that the rights under the integration treaties are always protected.

The basic approach in the thesis has been to explore the possibility of achieving economic integration in the absence of strong supranational institutions. The underlying reason for this approach is that, while we may hope that strong supranational institutions are created by African states, the fact remains that African states are not in favour of creating strong supranational institutions. This is evidenced by their 'move away from formal institutions' and their affinity for the use of informal processes or tools to achieve their goals.⁸ Interestingly, African states are not alone in the application of informal processes to achieve specific goals. Professor Eyal Benvenisti, in his analysis of the evolution of informal international law, draws several examples – from money laundering to the fight against AIDS – to show how states engage in informal processes or formal processes of a non-legally binding character to achieve their goals in specific areas. He suggests that:

[t]his new attitude toward international obligations reflects both the availability of novel ways for governments to interact across political borders, as well as new concerns about international legal tools, especially the formal international

⁸ Tiyanjana Maluwa 'The move from institutions: examining the phenomenon in Africa (2006) 100 *American Society of International Law Proceedings* 294–298.

institutions. This preference for informal lawmaking suggests that international cooperation can be achieved without recourse to international legal tools and that the informality offers significant benefits to some governments.⁹

In order to contribute meaningfully to the discussion about how to make economic integration feasible in Africa, it is important for us to have a deeper understanding of the less formal approach that has been adopted by African states. This thesis has not argued that, to secure compliance, adherence to the rule of law and treaty obligations should be jettisoned in favour of informal processes. Instead, the argument has been that informal processes could be used *in combination with formal processes* to enhance adherence to treaty obligations.

⁹ Eyal Benvenisti “Coalitions of the willing” and the evolution of informal international law’ 2006 *Tel Aviv University Law Faculty Papers* 1, available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1031&context=taulwps> [accessed 15 January 2013].

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