



**NAVIGATING COMPLIANCE CHALLENGES IN AFRICAN
REGIONAL INTEGRATION**

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Abstract

Regional integration has been pursued on the African continent for decades, with the goal of developing and uniting the continent. The determination of African leaders to implement a system of integration is evidenced by the establishment of multiple regional economic communities across the continent. One notable issue, however, is that the results attained thus far do not correspond with the efforts made. African states have seen minimal returns in comparison to the predicted benefits regional integration promised to offer. The slow progress has been attributed to, among other reasons, a lack of compliance by member states. This thesis seeks to investigate the relationship, if any, between compliance systems of RECs and the effectiveness of the community.

It is recognised, on one hand, that member states have an obligation to comply with and implement community obligations. Conversely RECs have a role to play in developing systems that promote compliance within the community. The research consists of a desk review of the founding treaties of the African Union, the Southern African Development Community, the Common Market for Eastern and Southern Africa, and the East African Community. The study analyses the systems RECs have established to promote compliance, specifically the rules systems, compliance information systems and non-compliance response systems. The research found that rules are vague and empower executive organs with great authority; RECs do not have established monitoring mechanisms, except for the AU; and there is a gap in reporting of compliance by member states. Following the analysis of compliance reporting and monitoring, the study investigates the role of community courts in enforcing community obligations. It was found that many community courts have been limited in their powers, rendering them incapacitated in enforcing community obligations. The research concludes that there is a link between compliance systems and the effectiveness of a community. To improve effectiveness, the research recommends the development of suitable compliance systems including implementing a compliance report that can be submitted by member states both regionally and at the continental level. This research contributes to the literature on regional integration, law and development in Africa. It aims to provide insight to policy makers responsible for decisions related to the design of compliance systems within regional economic communities.

Dedication

For my parents, Gideon and Mary Nyirongo.

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I would be remiss if I did not give thanks to God first and foremost. There have been many challenges and circumstances that could have led to a different outcome, but God has been with me each day giving me strength and working in ways I could not see. I am thankful.

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ABBREVIATIONS

ACM	African Common Market
ACHPR	African Commission on Human's and People's Rights
ACJHR	African Court of Justice and Human Rights
AEC	African Economic Community
AECC	ASEAN Economic Community Council
AfCFTA	The African Continental Free Trade Area
AfCHPR	African Court on Human and People's Rights
ARII	Africa Regional Integration Index
AMRII	African Multidimensional Regional Integration Index
ARMII	African Regional Multidimensional Integration Index
APRM	African Peer Review Mechanism
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
AUCJ	African Union Court of Justice
CEN-SAD	Community of Sahel-Saharan States
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
CRT	Country Review Team
DSB	Dispute Settlement Body
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EDSM	Enhanced Dispute Settlement Mechanism
EU	European Union
FTYIP	First Ten-Year Implementation Plan
GDP	Gross Domestic Product
IGAD	Intergovernmental Authority on Development
NAFTA	North American Free Trade Agreement

NEPAD	New Partnership for Africa's Development
OAU	Organization of African Unity
PAP	Pan-African Parliament
PRC	Permanent Representative Committee
REC	Regional Economic Community
RISDP	Regional Indicative Strategic Development Plan
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SDPME	SADC Policy on Strategy Development, Planning, Monitoring and Evaluation
SPMER	SADC Policy on Strategy Development, Planning, Monitoring, Evaluation and Reporting
SEOM	Senior Economic Officials Meeting
SNC	SADC National Committees
TFEU	Treaty on the Functioning of the European Union
TFTA	Tripartite Free Trade Area
UMA	Arab Maghreb Union
UN	United Nations

1 CHAPTER ONE: INTRODUCTION

1.1 INTRODUCTION

Regional integration is a practice that has been pursued for decades by states across the globe. States have established communities such as the European Union (hereafter 'EU') and the Association of Southeast Asian Nations (hereafter 'ASEAN') in the name of regional integration. However, despite being a global phenomenon, the term regional integration is not readily defined and has both broad and narrow definitions. The broader definition of regional integration defines the integration process as acts of cooperation between states in areas including, but not limited to economic activities. For instance, Brendan Vickers and other scholars have defined regional integration as a multidimensional process by which neighbouring states within a demarcated geographical space increase their level of interaction with regard to economic, security and political issues, among others.¹ In line with Vickers' definition, John Akokpari advances that regional integration may involve economic, market, social, political and security processes.² The narrow definition of regional integration, on the other hand, restricts the affairs of states engaged in regional integration to economic activity. An example of a narrow definition is that provided by Henry Kibet Mutai, who advances that regional integration denotes a state of affairs or process involving the combination of separate economies into one large economy.³ This research adopts the broader definition of regional integration.

Regional integration may be pursued through different approaches including the linear market integration model, and the development integration model. The linear market model involves a linear progression of integration from a Free Trade Area, followed by complete economic integration which encompasses a common market with unified monetary and fiscal policies.⁴ This model focuses on promoting intra-regional trade liberalisation.⁵ Comparatively, the development

¹ Brendan Vickers *A Handbook on Regional Integration in Africa: Towards Agenda 2063* (2017) at 1; Wilfred Akhonya Mutubwa *Assessing the Feasibility of the Institutional Design of An Expanded and Developed Trade and Investment Section of the African Court of Justice and Human Rights* (unpublished PhD Thesis, University of South Africa, 2019).

² John Akokpari 'Dilemmas of Regional Integration and Development in Africa' in John Akokpari, Angela Ndinga-Muvumba and Tim Murithi (Eds) *The African Union and its Institutions* (2008) at 86-88.

³ Henry Kibet Mutai *Compliance with International Trade Obligations The Common Market for Eastern and Southern Africa* (2007) at 31.

⁴ Christian Peters-Berries 'Regional Integration in Southern Africa – A Guidebook' available at <https://www.academia.edu/32639870>, accessed on 7 September 2021; Mutai op cit note 3 at 36; Margaret Lee 'Regionalism in Africa: A Part of The Problem or A Part of The Solution' (2002) 9 *Polis: revue camerounaise de science politique* 1; Tom Ostergaard 'Classical Models of Regional Integration – What Relevance for Southern Africa' in Bertil Odén (ed) *Southern Africa After Apartheid: Regional Integration and External Resources* (1993) at 29-32.

⁵ Richard Gibb 'Regional Integration and Africa's Development Trajectory: Metatheories, Expectations and Reality' (2009) 30 *Third World Quarterly* 701 at 708; Ostergaard op cit note 4 at 29-32.

integration model focuses on economic and social development and includes policies that are intended to remedy the unequal distribution of benefits between member states.⁶

Regional integration has largely been pursued through the conclusion of Regional Trade Agreements which, despite the existence of the multilateral trading system, have increased in number.⁷ Various reasons have been advanced to account for this increase, including that through regional trade agreements states can access larger markets that may not be readily accessible through the multilateral trading system.⁸ It is also advanced that discriminatory liberalisation may be viewed as an attractive defensive measure to smaller economies that are not in a position to compete at the international level.⁹ In addition, through the conclusion of regional trade agreements member states can increase their bargaining power in the multilateral trading system.¹⁰

In pursuit of the benefits of regional integration, numerous regional integration initiatives have been established globally. Of these, the EU is arguably considered the most successful. Founded in 1993, the EU has experienced success in legal integration as well as economic integration and this has made it a community that is frequently assessed for lessons in regional integration. However, the decision of the United Kingdom to withdraw from the EU has given rise to questions of the effectiveness of the EU, and regional integration as a whole. Other initiatives across the globe include the North American Free Trade Agreement (hereafter 'NAFTA') and the Association of Southeast Asian Nations (hereafter 'ASEAN'). States on the African continent have also pursued regional integration over the years, establishing communities such as the African Union (hereafter 'AU').

1.2 REGIONAL INTEGRATION IN AFRICA

1.2.1 An Overview

African states have pursued regional integration for decades. The Southern African Customs Union (hereafter 'SACU'), for instance, was established in 1910. The initial purpose for pursuing regional integration was for protectionist purposes against colonisation as well as a way to unify

⁶ Lee op cit 4 note at 9; Ostergaard op cit 4 note at 29-32.

⁷ At the time of writing this research, the World Trade Organization has reported there are 349 Regional Trade Agreements in force. See <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>, accessed on 21 June 2021.

⁸ Jo-Ann Crawford and Roberto V. Fiorentino 'The Changing Landscape of Regional Trade Agreements' available at https://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf, accessed on 21 June 2021.

⁹ Ibid.

¹⁰ Peters-Berries op cit note 4 at 16; Manone Regina Madyo *The Importance of Regional Economic Integration in Africa* (unpublished MCom thesis, University of South Africa, 2008) at 49.

African states.¹¹ The Organisation of African Unity (hereafter the 'OAU') which was a continental integration initiative at the time, was established with the overall purpose of resolving the consequences of colonialism and fulfilling the aspirations of African success.¹² This is evident in the OAU Charter, which includes specific objectives such as promoting unity and solidarity; defending the sovereignty of African states; and eradicating colonialism.¹³

However, in the years post-independence, and as the prevailing circumstance on the continent changed, the purpose of regional integration shifted to meet new needs. One of the areas that was viewed as important in the development and progression of the continent was Africa's economic development, which was, and continues to be faced with many challenges. To name a few: numerous African states are landlocked states without seafaring port access; many African states have low population densities which means they have small domestic markets or purchasing power; and the markets of most African states are geographically far from major markets such as Asia and Europe.¹⁴

In recognition of this, the focus of regional integration shifted to the economic development of African states and the continent. The reason regional integration has been used as a tool for economic development is because of the benefits it is said to offer. It is advanced that regional integration of states with small domestic markets can lead to benefits of economies of scale, stronger competition and increased investment.¹⁵ Furthermore, it is advanced that cooperation between small African states would increase the bargaining power of those states internationally.¹⁶ Taking these benefits into consideration, regional integration appears to be a reasonable approach where the aim is to improve economic development on the continent.

In line with a focus on economic development, various regional integration initiatives were established. The African Economic Community (hereafter 'AEC'), for instance, was established in 1991 to create a continent-wide economic community, built through the already existing regional

¹¹ J.M Biswaro *The Quest for Regional Integration in the Twenty First Century: Rhetoric Versus Reality – A comparative study* (2012) at 316.

¹² Elizabeth Justice 'The African Union: Building a Dream to Facilitate Trade, Development and Debt Relief' (2003) 12 *Currents: International Trade Law Journal* 127 at 130.

¹³ Article II(1) of the Organisation of African Unity Charter.

¹⁴ Kennedy K Mbekeani, 'Understanding the Barriers to Regional Trade Integration in Africa' available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/September_2013_-_Understanding_the_Barriers_to_Regional_Trade_Integration_in_Africa.pdf accessed on 31 July 2018; Trudi Hartzenberg 'Regional Integration in Africa' available at <https://www.econstor.eu/bitstream/10419/57595/1/669412368.pdf>, accessed on 21 June 2021.

¹⁵ Peters-Berries op cit note 4 at 16; Madyo op cit note 10.

¹⁶ Peters-Berries op cit note 4 at 16; Madyo op cit note 10 at 49.

economic communities.¹⁷ One of the objectives of the AEC is the promotion of economic, social and cultural development, and integration of African economies to increase economic self-reliance and promote self-sustained development.¹⁸

Regionally, communities such as the Common Market for Eastern and Southern Africa (hereafter 'COMESA') and the Southern African Development Community (hereafter 'SADC') were formed. COMESA was specifically formed with economic integration at its crux and envisaged the consolidation of economic cooperation in the region through the implementation of common policies and programmes.¹⁹ Through the establishment of a common market, the region seeks to achieve full market integration.²⁰ The SADC, however, has a broader cooperation agenda that not only focuses on cooperation in economic activities but in other policy areas as well such as combatting communicable diseases in the region. When the SADC was established to replace the Southern African Development Coordination Conference (hereafter 'SADCC'), the part to be played by the market in the development process became more significant.²¹

When one looks at regional economic communities established by African states, the most commonly adopted approach is that of linear market integration. As highlighted earlier, the linear market integration approach entails regional economic communities progressing in five stages successively to achieve economic integration. The first stage is the formation of a Free Trade Area and at this stage members states remove tariffs between them.²² This is followed by the establishment of a Customs Union whereby a common external tariff is imposed against states that are not members of the community.²³ Thereafter, a Common Market is created which entails the introduction of the free flow of factors of production.²⁴ This is followed by the creation of an Economic Union and entails the harmonisation of monetary and fiscal policies.²⁵ The final stage of the linear market integration approach is complete economic integration of the fiscal and monetary policies of the states.²⁶ We see the linear market integration approach clearly stipulated

¹⁷ Richard Frimpong Oppong 'The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a complex web' (2010) 1 *African Journal of International and Comparative Law* at 92.

¹⁸ Article 4(1)(a) of the Treaty Establishing the African Economic Community, 1991.

¹⁹ Preamble of the Treaty Establishing the Common Market for Eastern and Southern Africa.

²⁰ Ibid.

²¹ Arigo Pallotti 'SADC: A development community without a development policy?' (2004) *Review of African Political Economy* at 516.

²² Peters-Berries op cit note 4 at 30-31.

²³ Peters-Berries op cit note 4 at 29-31; Lee op cit note 4 at 3.

²⁴ Peters-Berries op cit note 4 at 31-33; Lee op cit note 4 at 3.

²⁵ Ibid.

²⁶ Ibid.

in the founding treaties of the AEC,²⁷ COMESA,²⁸ and the East African Community (hereafter 'EAC').²⁹

In more recent years, the drive towards regional integration on the continent has accelerated. The year 2015 is worth noting as the AU launched Agenda 2063. Agenda 2063 is the strategic framework for the socio-economic transformation of the continent which aims to accelerate the implementation of past and existing continental initiatives for the purpose of growth and sustainable development.³⁰ In addition in the same year, the Tripartite Free Trade Area between SADC, COMESA and the EAC was established. The Tripartite Free Trade Area was established to assist in the process of harmonising programmes and policies between and within the three regional economic communities and to advance the establishment of the AEC.³¹

Furthermore, 2015 saw the start of negotiations on the African Continental Free Trade Area (hereafter 'the AfCFTA'). The AfCFTA was finally launched in March 2018 at the Extraordinary Summit of the AU held in Kigali Rwanda where forty-four member states signed the founding instruments. These instruments included the Kigali Declaration for the Launch of the African Continental Free Trade Area and the Agreement Establishing the African Continental Free Trade Area. The main objective of the AfCFTA is to create a single continental market for goods and services, with free movement of businesspersons and investments.³² In turn, this will create a foundation for the establishment of a continent-wide customs union.³³ The AfCFTA began trading on 1 January 2021.

1.2.2 Challenges of Regional Integration in Africa

Although the efforts towards regional integration have yielded some results, the progress has been slower than hoped. Progress has been hindered by various challenges that have arisen. Such challenges include but are not limited to the lack of coordination and harmonisation of economic policies; inadequate resources such as funding and human capacity; and political instability.³⁴

²⁷ Article 6 of the Treaty Establishing the African Economic Community, 1991.

²⁸ Article 45 of the Treaty Establishing the Common Market for Eastern and Southern Africa.

²⁹ Articles 74 – 76 of the Treaty for the Establishment of the East African Community

³⁰ African Union Commission 'Agenda 2063: The Africa We Want' available at <https://au.int/en/agenda2063>, accessed on 19 September 2018.

³¹ Mark Pearson, Trade Facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area available at <file:///C:/Users/Youth/Downloads/S11WP112011%20Pearson%20Trade%20Facilitation%20in%20TFTA%2020110921%20fin.pdf> accessed on 31 July 2018.

³² Article 3(a) of the Agreement Establishing the African Continental Free Trade Area.

³³ Ibid Article 3(d).

³⁴ Soumana Sako 'Challenges Facing Africa's Regional Economic Communities in Capacity Building' available at <https://opendocs.ids.ac.uk/opendocs/handle/123456789/2966>, accessed on 16 March 2016.

One of the prominent challenges faced in African regional integration is what is termed the “spaghetti bowl”. The spaghetti bowl refers to the occurrence of multiple, overlapping state memberships in more than one regional economic community.³⁵ Research has shown that on average 95% of African states that belong to regional economic communities belong to more than one.³⁶ States may belong to more than one regional economic community for reasons such as to acquire the benefits that each community offers, to access funding opportunities through the different communities, and for political reasons, among others. However, the existence of multiple memberships is undesirable as it causes additional challenges, such as conflicting programs and duplicated efforts by the member states. This, in turn, impacts the effectiveness of the communities to which they belong.³⁷ Considering the constraints that African states face with resources, both financial and human, belonging to more than one regional economic community puts a further strain on those resources.

Another challenge affecting the progress of regional integration on the African continent is the general lack of political will and commitment of the leaders of African states, which is compounded by the unwillingness of leaders to surrender sovereignty. This challenge is reflected through the failure of member states to take measures to meet the targets set in the attainment of the community objectives. As each community has set objectives, it is necessary for member states to such agreements to implement plans and policies to meet set objectives. Instead, it appears as though the leaders of African states conclude agreements without the intention of taking the steps necessary to make the agreements effective.

This is evident by the inability of member states to give effect to provisions relating to a crucial aspect of integration, namely the free movement of persons. Free movement of persons is an integral part of regional integration and for achieving the vision of a united Africa. There are various benefits that free movement of persons can offer both host states and states of origin. Enabling freer movement by eliminating or lessening the visa requirements between states would ease travel of persons involved in informal cross-border trading, enabling them to travel between states for short periods of time.³⁸ Free movement would also allow for skills to be transferred between states, growth of labour pools in host states, lead to job creation in host states and boost

³⁵ United Nations Economic Commission for Africa and the African Union *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* (2006) at 50.

³⁶ Ibid at 51.

³⁷ United Nations Economic Commission for Africa, the African Union and the African Development Bank *Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area* (2012) at 21; United Nations Economic Commission for Africa and the African Union (2006) at 51.

³⁸ African Union ‘Africa Integration Report: Putting Free Movement of Persons at the Centre of Continental Integration’ available at https://au.int/sites/default/files/documents/41587-doc-African_Integration_Report_2021_-_Final_Design.pdf, accessed on 8 October 2022.

tourism.³⁹ Furthermore, free movement can enable states to focus investment in sectors where they have comparative advantage.⁴⁰ For states of origin, remittances become a source of income as migrants send money home to their families.⁴¹ A downside for states of origin may be brain drain, as citizens choose to migrate to more developed states. However, this can lead to lower levels of unemployment in states of origin. An important benefit of free movement is the deepening of social integration across the continent, strengthening the pan-African identity.⁴²

Although provision has been made for the freer movement of persons in the AU, SADC, COMESA and EAC, the progress in some instances has been hindered due to non-implementation. For instance, in SADC, the movement of persons is regulated by the Protocol on the Facilitation of Movement of Persons (hereafter the ‘SADC FMP’), which was signed in 2005. The overarching purpose of the SADC FMP is to develop policies aimed at the progressive elimination of obstacles to movement of persons in the region and within the territories of member states.⁴³ More specifically, the SADC FMP seeks to enable citizens of member states entry into the territory of another state for 90 days without a visa; permanent or temporary residence in the territory of another state; and the establishment of oneself and working in the territory of another state.⁴⁴

In order for the SADC FMP objectives to be implemented, it is stipulated that the timeframe for implementation will be determined by an Implementation Framework agreed upon by member states six months from the date the protocol has been signed by at least nine member states.⁴⁵ At the time of writing, the SADC FMP had not yet taken effect as only six member states had ratified it after seventeen years.⁴⁶ The fact that member states have not ratified the protocol after so long indicates that member states in the community are not held accountable for not implementing community agreements.

³⁹ Victor Amadi and Patricia Lenaghan ‘Advancing Regional Integration through the Free Movement of Persons in the Southern African Development Community (SADC)’ (2020) 34 *Speculum Juris* 51 at 61; African Union op cit note 38.

⁴⁰ Ibid.

⁴¹ Ibid; Ottilia Anna Maunganidze and Julian Formica ‘Freedom of movement in Southern Africa – A SADC (pipe)dream’ available at <https://issafrica.s3.amazonaws.com/site/uploads/sar-17.pdf>, accessed on 8 October 2022.

⁴² African Union op cit note 38.

⁴³ Article 2 of the SADC FMP.

⁴⁴ Article 3 of the SADC FMP.

⁴⁵ Article 4 of the SADC FMP.

⁴⁶ Christopher C. Nshimbi, Innocent Moyo and Trynos Gumbo ‘Between Neoliberal Orthodoxy and Securitisation: Prospects and Challenges for a Borderless Southern African Community’ in Hangwelani Hope Magidimisha, Nene Ernest Khamela, Lovemore Chipungu, Tamuka C. Chirimambowa and Tinashe Lukas Chimedza (eds) *Crisis, Identity and Migration in Post-Colonial Southern Africa* (2018) 169.

In COMESA, the movement of persons is regulated by two protocols. The first protocol is the Protocol relating to the Gradual Relaxation and Eventual Elimination of Visa Requirements of 1984 (hereafter the ‘Visa Protocol’), which was adopted under the Preferential Trade Area. In 2001, the Protocol on the Free Movement of Persons, Labour, Services, the Right of Establishment and Residence (hereafter the ‘COMESA FMP’) was adopted. The intention is for the COMESA FMP to replace the Visa Protocol, once it comes into effect.⁴⁷

The COMESA Protocol makes provision for the gradual removal of restrictions to the free movement of persons, labour, and services.⁴⁸ This is to be achieved by following a sequence of steps. As a first step, member states agree for citizens of member states to be granted visas upon arrival at entry points of fellow member states, on the condition they provide a valid travel document.⁴⁹ Following this, and within two years of the COMESA Protocol entering into force, member states agree for citizens of member states holding valid travel documents to enter the territory of other member states without a visa for up to 90 days at a time.⁵⁰ Furthermore, member states agree that within six years of the COMESA Protocol entering into force, all restrictions to movement of persons and in particular the requirement for a visa, will be removed.⁵¹

A unique provision is that the COMESA FMP forms an integral part of the COMESA Treaty and enters into force once it is adopted.⁵² This means that the next step would be for member states to implement the protocols provisions. At the time of writing only four states had implemented the protocol’s provisions.⁵³ The lack of implementation can be partly attributed to the lack of provision for a timeframe within which implementation of the first phase should take place.

For states that are yet to implement the COMESA FMP, one can assess the movement of persons based on the Visa Protocol. The Visa Protocol makes provision for ninety-day visa free travel between member states and access upon arrival.⁵⁴ The implementation and compliance with this Visa Protocol remains incomplete and varies per member state, despite it being four decades old. Some states have complied to a larger extent in comparison to others. For instance, Mauritius,

⁴⁷ Article 164(3) of the COMESA Treaty.

⁴⁸ Article 2(2) of the COMESA Treaty.

⁴⁹ Article 3 of the COMESA FMP.

⁵⁰ Article 4 of the COMESA FMP.

⁵¹ Article 5 of the COMESA FMP.

⁵² Article 14 of the COMESA FMP.

⁵³ See ‘Fresh Impetus to Implement COMESA Protocols on Free Movement’, available at <https://www.comesa.int/fresh-impetus-to-implement-comesa-protocols-on-free-movement/>, accessed on 19 September 2022; Azwimpheleli Langalanga and Mgcini Charisma Ncube ‘Do the COMESA, EAC and SADC Migration Regimes Fall Within the Framework of the Tripartite Free Trade Area?’ available at <https://saiia.org.za/research/do-the-comesa-eac-and-sadc-migration-regimes-fall-within-the-framework-of-the-tripartite-free-trade-area/>, accessed on 21 September 2022.

⁵⁴ Langalanga & Mgcini Charisma Ncube op cit note 53.

Seychelles and Rwanda have waived visas for nationals from COMESA member states. Whereas other states such as Malawi, Kenya and Zimbabwe have partially complied by making provision for ninety-day visa access for citizens of other member states. Zambia has waived visa requirements and visa fees for all COMESA nationals on official business.⁵⁵ When considering whether the Visa Protocol has been effective from a legal oriented approach, the Visa Protocol hasn't been effective. However, if one considers the problem-solving approach to analyse effectiveness, the challenge of movement of persons has been improved although not to the extent that it could be if the protocol had been fully complied with.

The EAC does not have a standalone protocol for the free movement of persons. Instead, the movement of persons in the EAC is regulated by the Protocol on the Establishment of the East African Community Common Market (hereafter the 'ECM Protocol'). In comparison to the legal instruments regulating free movement of persons in the SADC and COMESA, all states that were members of the EAC at the time the ECM Protocol was adopted ratified it, thus giving it effect.⁵⁶ This signifies the commitment of member states to achieving the goals of the community and establishing a common market. Among its objectives, the EAC Common Market seeks to accelerate economic growth and development of member states through the attainment of free movement of goods, persons and labour.

In the AU, the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (hereafter the 'AU FMP') was adopted in 2018. The AU FMP provides for the progressive realization of its objectives through three phases. The first phase is implementing the right of entry and abolition of visa requirements.⁵⁷ This would enable citizens of AU states to enter the borders of member states and move freely for a period of 90 days.⁵⁸ The second phase is to implement the right of residence which enables AU citizens to take up residence in member states.⁵⁹ The third phase is to implement the right of establishment, which would permit a citizen of a member state to participate in economic activity as a self-employed person or a business or trade.⁶⁰ To give effect to the AU FMP, member states have the responsibility of implementing the protocol through adopting

⁵⁵ See 'Zambia drops visa requirements for all COMESA citizens' <https://www.lusakatimes.com/2015/03/05/zambia-drops-visa-requirement-comesa-citizens/>, accessed on 21 September 2022.

⁵⁶ See 'EAC Protocols and Other Annexes to the Treaty for the Establishment of the East African Community As of March 2013', available at <https://www.tralac.org/documents/resources/eac/1401-eac-protocols-update-march-2013/file.html>, accessed on 22 September 2022.

⁵⁷ Article 5(1) of the AU FMP.

⁵⁸ Article 6 of the AU FMP.

⁵⁹ Article 5(1) and 16 of the AU FMP.

⁶⁰ Article 5(1) and 17 of the AU FMP.

measures to implement and give it effect.⁶¹ The AU Commission has the role of monitoring the implementation of the AU FMP.⁶²

In order for the AU FMP to enter into force, 15 member states must ratify it.⁶³ At the time of writing, 32 states had signed the AU FMP, and only four had ratified it.⁶⁴ This means the AU FMP has not yet taken effect. However, member states of the AU are permitted to provisionally apply the provisions of the protocol until it enters into force.⁶⁵ The AU FMP does not stipulate a time frame within which it is to be ratified or implemented.

The aforementioned clearly shows the lack of implementation of and compliance with community commitments. This challenge is made worse by the weak design of the legal and institutional frameworks of Africa's regional integration initiatives. Most regional integration initiatives have stipulated areas of cooperation including trade liberalization and market integration but have neglected the legal and institutional frameworks required to achieve this. This can partly be attributed to the unwillingness of African state leaders to surrender sovereignty. However, holding on to sovereignty means regional authorities lack the ability to enforce community obligations in instances of non-implementation.

An example of this was seen in the *Mike Campbell (Pvt) Ltd And Others vs Republic of Zimbabwe* case,⁶⁶ in which the state of Zimbabwe refused to comply with the ruling of the SADC Tribunal, and sanctions could not be enforced against it. Furthermore, regional integration is not viewed as a fundamental part of the national development strategy of most African states.⁶⁷ As such member states place greater importance on national interests than on regional interests. This indicates that leaders of African states do not recognise the long-term benefits that regional integration can provide to the state.

Legal and institutional frameworks impact the effectiveness of regional economic communities because they guide the conduct of the community, member states and citizens of member states. This framework includes the institutions and the instruments that can be used to achieve

⁶¹ Article 27 of the AU FMP.

⁶² Article 29 of the AU FMP.

⁶³ Article 33(1) of the AU FMP.

⁶⁴ African Union op cit note 38.

⁶⁵ Article 33(2) of the AU FMP.

⁶⁶ *Mike Campbell (Pvt) Ltd. And Others v Republic of Zimbabwe* SADC (T) Case No. 2/2007.

⁶⁷ University of Cape Town Graduate School of Development Policy and Practice 'Research Roundtable: Governance, Society and Development in Africa' available at http://www.mandelaschool.uct.ac.za/sites/default/files/image_tool/images/78/Files/BB/Research_Roundtable_Report.pdf, accessed on 7 September 2021.

community objectives. Having a suitable framework in place can promote implementation of and compliance with community objectives.

1.3 COMPLIANCE, IMPLEMENTATION AND EFFECTIVENESS IN REGIONAL INTEGRATION

Regional integration has been largely pursued through the conclusion of agreements that establish regional economic communities. As such, an analysis of regional integration entails examining the effectiveness of underlying agreements that form the foundation of regional integration efforts. Due to the underlying agreements being analysed to determine effectiveness, the question of the effectiveness of regional integration falls within the broader research area of the effectiveness of international agreements. The effectiveness of international agreements is a broad research area that can be assessed through sub-questions such as: what amounts to an effective treaty; what makes a treaty effective; what the relationship between effectiveness, implementation and compliance is; and what mechanisms can be used to measure effectiveness.

The question of what amounts to an effective rule, or in this case an effective agreement, has not been clearly determined. Kal Raustiala stipulates that an effective agreement is one that leads to observable and desired behavioural change and that effectiveness is the measure of that change.⁶⁸ However, the standard of effectiveness has not been readily agreed upon. It is advanced that two standards can be used to determine effectiveness. One standard entails assessing whether the issue the agreement was established to resolve was successfully resolved.⁶⁹ The other less stringent standard entails assessing whether the agreement has caused improvements in resolving the issue for which it was established.⁷⁰

The effectiveness of regional integration is affected by how it is received and implemented within member states.⁷¹ Through the conclusion of regional integration agreements, states create a community that has its own legal and institutional framework. Regional economic communities also have what is termed 'community law'. Community law has been defined as the binding legal instruments of a regional economic community and it is binding on the member states of that

⁶⁸ Kal Raustiala 'Compliance and Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Review Journal of International Law* 387 at 394.

⁶⁹ Ronald B. Mitchell 'Institutional Aspects of Implementation, Compliance, and Effectiveness' in Urs Luterbacher and Detlef Sprinz (ed) *International Relations and Global Climate Change* (2001) 222.

⁷⁰ Ibid.

⁷¹ Richard Frimpong Oppong *Relational Issues of Law and Economic Integration in Africa* (unpublished PhD Thesis, The University of British Colombia, 2009) 191.

community.⁷² Community law may take the form of treaties, protocols, regulations, decisions, principles, objectives, and general undertakings.⁷³

The existence of community law does not mean the rules established will automatically affect member states. However, in order to achieve the objectives for which the communities were established, these rules must have an impact on the actions of member states and their citizens. Thus, to some extent, community law needs to be complied with.

Various definitions of the term “compliance” have been advanced, and this has made it challenging to determine what action by member states amounts to compliance. Kal Raustiala and Anne-Marie Slaughter state that compliance amounts to any conformity with a specified rule.⁷⁴ This definition limits compliance to conformity with legal rules and does not take into consideration conformity with non-legal rules.⁷⁵ Oran Young, however, presents a more holistic definition through his acknowledgement that the prescribed behaviour may not always take the form of compliance with legal rules.⁷⁶ Young argues that compliance occurs when the actual behaviour of a given subject conforms with the prescribed behaviour and non-compliance occurs when actual behaviour departs significantly from prescribed behaviour.⁷⁷ Similar to Young’s definition, Harold Jacobson and Edith Weiss advance that compliance takes the form of adherence to specific obligations, both procedural and substantive, and adherence to the spirit of the treaty as well.⁷⁸

The test of compliance is two-fold in nature as it entails analysing both formal and actual compliance. The test of formal compliance involves examining the regulatory framework a member state has put in place per the agreement it is a party to.⁷⁹ Actual compliance, on the other hand, examines whether the private actors of the member states are complying with the regulations and as such fulfilling these laws.⁸⁰ Furthermore, for agreements concluded to address collective challenges, it is imperative for the rules created to be conformed with collectively for there to be

⁷² Gerhard Erasmus ‘The domestic status of international agreements: has the South African Constitutional Court chartered a new approach and could regional integration benefit?’ (2012) 12 *Monitoring Regional Integration in Southern Africa*.

⁷³ Ibid.

⁷⁴ Kal Raustiala & Anne-Marie Slaughter ‘International Law, International Relations and Compliance’ in Walter Carlsnaes, Thomas Risse and Beth Simmons (Eds) *The Handbook of International Relations* (2002) at 539.

⁷⁵ Ibid.

⁷⁶ Ashimizo Afadameh-Adeyemi *Securing Compliance with African Economic Integration Treaties* (Unpublished PhD Thesis, University of Cape Town, 2013) at 10.

⁷⁷ Ibid.

⁷⁸ Harold Jacobson and Edith Weiss ‘Strengthening compliance with international environmental accords: preliminary observations from a collaborative project’ (1995) 1 *Global Governance* 119 at 123.

⁷⁹ Shima Baradaran, Michael Findley, Daniel Nelson and J.C Sharman, ‘Does International Law Matter?’ (2013) 97 *Minnesota Law Review* at 25.

⁸⁰ Ibid.

progress in resolving the collective challenges.⁸¹ Compliance should therefore not only be considered for one state but must rather be looked at with consideration for all member states party to a regional agreement.

Beyond the consideration of compliance, the implementation of regional obligations is another factor that affects the effectiveness of regional integration. The process of implementation goes beyond translating regional commitments to national laws as it also refers to the process of putting regional commitments into practice.⁸² In other words, implementation refers to the process of turning policy, in this instance regional integration agreements, into action.⁸³ Implementation takes place both at the regional and national levels. Regionally, implementation entails actions such as the establishment of a secretariat and other institutions created by the community agreements, and the launching of projects to give effect to community decisions. At the national level, implementation entails actions such as reducing tariff barriers as stipulated in the community agreement, enacting national laws to give effect to community directions, and developing infrastructure in line with community projects. Low levels of implementation at the national level affect progress at the regional level.⁸⁴ Thus implementation plays a key role in the effectiveness of regional integration. However, implementation at the national level has proven to be a challenge due to factors such as inadequate infrastructure and resources.

1.4 MONITORING AND EVALUATION

Compliance and implementation by member states are key aspects in promoting effective regional integration efforts and as such, it is important to keep track of the progress of member states in these aspects. This is the role of monitoring and evaluation. Through the use of monitoring and evaluation mechanisms, member states and other stakeholders can more accurately assess the current state of regional integration and identify the areas that need to be improved upon. Monitoring can be used either to assess the progress that has been made in achieving the objectives of the integration, which is referred to as “reflexive” monitoring; or to compare regional integration initiatives with one another, which is referred to as “comparative” monitoring.⁸⁵

⁸¹ Afadameh-Adeyemi op cit 76 at 8.

⁸² Raustiala op cit 68 at 392.

⁸³ Susan M. Barrett ‘Implementation Studies: Time for a Revival? Personal Reflections on 20 Years of Implementation Studies’ (2004) 82 *Public Administration* at 251.

⁸⁴ United Nations Economic Commission for Africa *Mainstreaming Regional Integration into National Development Strategies and Plans* (2012) 1.

⁸⁵ Philippe De Lombaerde, ‘Indicators of Regional Integration: Methodological Issues’ available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=739711, accessed on 10 December 2018.

The drivers of regional integration on the continent have increased efforts towards developing monitoring and evaluation mechanisms. When Agenda 2063 was launched, the AU Summit directed the AU Commission to prepare the First Ten Year Implementation Plan of Agenda 2063 (hereafter ‘FTYIP’).⁸⁶ The FTYIP sets out the three levels of implementing and monitoring the implementation of Agenda 2063, namely national, regional and continental. At the national level, the key role of states is to integrate Agenda 2063 into their national visions and plans.⁸⁷ At the regional level, regional economic communities have the responsibility of adopting Agenda 2063 as the basis for developing their regional visions and plans, as well as monitoring and evaluating the implementation of Agenda 2063 and reporting annually to the AU Assembly.⁸⁸ At the continental level, the AU Organs have been assigned different tasks concerning the implementation agenda.⁸⁹ The role of the AU Commission is of note as it is responsible for adopting decisions on Agenda 2063, including guidelines on implementation, monitoring and evaluation.

The role assigned to the AU Commission can be compared to that of the EU Commission in monitoring and implementing EU law. The EU Commission is regarded as the guardian of the treaties of the EU and has the responsibility of overseeing the application of EU law.⁹⁰ The EU Commission has the responsibility of securing compliance with EU law and to fulfil this role, the EU Commission uses pre-litigation and post-litigation compliance proceedings. In terms of pre-litigation compliance, if the EU Commission is of the view that a state has not fulfilled its obligations, the EU Commission must deliver an opinion and offer the state an opportunity to comply with the opinion. Failing this, the matter may be referred to the Court of Justice of the European Union.⁹¹ Post-litigation compliance occurs after a matter has been decided upon by the Court of Justice of the European Union, but due to non-compliance by the state, the EU Commission may refer the matter back to the Court.⁹²

Further efforts to develop monitoring and evaluation of regional integration can be seen through the development of the APRM by NEPAD. This voluntary self-monitoring mechanism is open to all member states of the AU provided the states sign up to the NEPAD Declaration on

⁸⁶ African Union Commission, ‘First Ten-Year Implementation Plan 2014-2023’, available at https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf accessed on 15 August 2018.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ European Parliament, ‘Monitoring the implementation of EU law: tools and challenges’ available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596799/IPOL_STU\(2017\)596799_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596799/IPOL_STU(2017)596799_EN.pdf) accessed on 15 August 2018.

⁹¹ Ibid.

⁹² Ibid.

Democracy, Political, Economic and Corporate Governance.⁹³ Member states that sign up are required to submit to periodic reviews by the Independent Panel of Eminent Persons of the APRM. Upon the conclusion of the review, a report is drafted with findings and recommendations which are not binding on the reviewed state.⁹⁴

In addition, the ARII was developed with the aim of establishing a standardised and internationally recognised tool to track the progress of states and regions in pursuit of regional integration.⁹⁵ The ARII provides reliable and independent information to stakeholders which enables them to identify the strengths and weaknesses of the integration process and track trends.⁹⁶ The ARII focuses on five main dimensions of regional integration namely trade integration, regional infrastructure, productive integration, free movement of people, financial and economic convergence.⁹⁷ The ARII carries out this monitoring through the comparison of the progress made but does not evaluate the progress. To fill the gap that remained after the ARII was developed, the ARMII was established to comprehensively assess regional integration on the continent.⁹⁸

1.5 PROBLEM STATEMENT

Regional integration has been pursued on the African continent for decades, and in that time some progress has been made toward achieving the objectives laid out as part of this integration. For instance, one of the objectives of regional integration is the free movement of persons to promote the use of resources and regarding this, some regional economic communities have introduced policies that enable citizens of member states to travel between states without the requirement of a visa for a certain period.⁹⁹ In some regional economic communities, progress has been made in the development of the infrastructure necessary for the promotion of growth in the areas of energy and transport.¹⁰⁰ However, given the period of time over which regional integration has been pursued and the multiple initiatives that have been established during this time, it would be

⁹³ Article 5 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism available at <https://www.aprm-au.org/publications/partnership-for-africa-nepad-and-aprm/> accessed on 14 January 2020.

⁹⁴ Articles 20-22 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93.

⁹⁵ Africa Regional Integration Index 'Methodology for calculating the Africa Regional Integration Index (ARII)' available at https://www.integrate-africa.org/fileadmin/uploads/afdb/Documents/ARII2016-methodology_29mar16.pdf, 7 September 2021.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ African Union 'Africa Regional Multidimensional Integration Index (ARMII)' available at https://au.int/sites/default/files/newsevents/workingdocuments/35691-wd-african_regional_multidimensional_index_report_eng.pdf, accessed on 14 January 2020.

⁹⁹ United Nations Economic Commission for Africa and the African Union supra note 35 at 8.

¹⁰⁰ For instance, SADC has established the SADC Power Pool.

expected that greater progress would have been made than what is currently experienced. Greater benefits of regional integration should be evident in Africa by now. One of which is that Africa should have gained strength as a competitor in the global market, instead it has remained marginalised.¹⁰¹

This lack of progress can be attributed to the various challenges that are faced in the pursuit of regional integration. Such challenges include a lack of financial and human resources, insufficient infrastructure and a lack of political will. These challenges have affected the degree of compliance with, and the implementation of, regional obligations by member states. This has impacted the effectiveness of regional integration.

Regional economic communities are established through the conclusion of agreements between states. These agreements put forward the objectives of the respective regional economic community. One method of determining the effectiveness of such a community entails assessing whether the norms of the underlying agreement achieve their objectives.¹⁰² Considering that states are party to these agreements, the role of member states in the implementation of, and compliance with, agreements is one of the measures of the effectiveness of the agreements. Implementation is a two-fold process. First, member states must translate the rules of the agreement into their national legal systems. Second, member states must take practical steps towards implementing the objectives of the community.

Member states in African integration face challenges in implementing and complying with community obligations. The implication of this is multidimensional. Member states that are fulfilling their community obligations, will be negatively impacted by member states that are not meeting their end of the deal. For example, if member states of a community are to eliminate barriers to free movement of persons, the citizens of Country A which has complied with the community decision will not have access to Country B, which has not complied. Whereas citizens of Country B will have access to Country A. At the national level, persons that should receive certain benefits as a result of community decisions may not have such benefits if the member states to which they belong have not implemented or complied with decisions. For example, if member states are required to eliminate tariffs as part of a community, businesses of a state that has not eliminated tariffs will face difficulty in importing products from other member states.

¹⁰¹ Tony Binns, Etienne Nel and Kenneth Lynch 'Introduction' in Tony Binns, Kenneth Lynch and Etienne Nel *The Routledge Handbook of African Development* (2018) at 3.

¹⁰² Afadameh-Adeyemi op cit 76 at 12.

Considering the important role of member states in complying with and implementing regional obligations to meet regional community objectives, having frameworks that enable such compliance and implementation in place is important. Such frameworks need to exist not only within member states but at the regional community level as well. If the goal is to achieve the objectives of regional economic communities, then regional economic communities should create an environment that enables this. What such an environment looks like may vary from community to community although some general features can be adopted. For instance, the framework could provide monitoring and evaluation mechanisms.

Monitoring and evaluation mechanisms have the benefit of identifying the progress that has been made in implementing objectives, highlighting the existing challenges and providing the information necessary to take corrective measures.¹⁰³ Additionally, information attained through monitoring establishes a transparent and broader knowledge base for the management of the community.¹⁰⁴ Thus, through monitoring, a feedback mechanism is created that can assist in efforts to improve effectiveness.

In recognition of the importance of monitoring and evaluation, certain mechanisms have been developed and implemented in the area of regional integration on the continent. At the continental level, the Africa Regional Integration Index (hereafter 'ARII') was developed to establish a standardised, internationally recognised tool to track the progress of states and regions towards regional integration.¹⁰⁵ This was followed by the formation of the African Multidimensional Regional Integration Index (hereafter 'AMRII') which was developed to fill the gaps of the ARII.

In addition, the New Partnership for Africa's Development (hereafter 'NEPAD') established the African Peer Review Mechanism (hereafter the 'APRM') as a voluntary self-monitoring mechanism.¹⁰⁶ The APRM is a commendable initiative as it has been designed to meet the needs of African development. The APRM goes beyond simply conducting studies and identifying challenges. It also provides a platform to find solutions and the resources necessary to address the

¹⁰³ Peter Walkenhorst 'Indicators to Monitor Regional Trade Integration in Africa' 2013 at 5 available at <https://www.tralac.org/images/docs/63/indicators-to-monitor-regional-trade-integration-in-africa-world-bank-sep-2013.pdf>, accessed on 19 August 2021.

¹⁰⁴ German Society for International Cooperation 'Monitoring regional economic integration in practice: Monitoring approaches applied in Regional Economic Communities (RECs)' available at <http://star-www.giz.de/cgi-bin/getfile/53616c7465645f5f0ed45559fad365c28fb6e5dc0582f9c1ee8bda77291568dbf15e7e9f9ee2d5ca67b904f5b2e46daf9ed104438fb3be94694bc128e89369a3b0f512770548d1b2/giz2015-0738en-monitoring-regional-economic-integration.pdf>, accessed on 7 September 2021.

¹⁰⁵ Op cit note 95.

¹⁰⁶ Funmilola T. Abioye 'Africa's drive towards self-monitoring: NEPAD's peer review mechanism' (2005) 30 *South African Yearbook of International Law* 193 at 196.

problems identified.¹⁰⁷ The non-binding nature of the conclusion of the review process, however, can lessen the effectiveness of the mechanism.

The introduction and use of monitoring mechanisms in regional integration is a positive step towards improving the effectiveness of regional integration. The role of member states in the success of regional integration cannot be overemphasized. Member states have the obligation of putting created community rules into practice and the extent to which member states fulfil these obligations should be continually monitored and evaluated. Through monitoring, the challenges affecting implementation can be identified and measures to promote implementation or compliance can be introduced. Where necessary, enforcement measures may be used against member states that are not complying with obligations. However, the monitoring and evaluation mechanisms and compliance measures currently in place fall short of addressing the challenges of implementation and compliance.

Similarly, the legal and institutional of Africa's RECs do not adequately create an environment that promotes compliance and implementation. This research undertakes to study the existing frameworks and their impact on community's effectiveness. This is done to highlight the existing gaps.

As regional integration is pursued, it is important to develop and adopt frameworks that suit the needs of regional integration in Africa. Furthermore, once the progress of member states has been determined, a framework must be established in regional economic communities to promote compliance and implementation.

1.6 RESEARCH QUESTIONS

The central question this research analyses is whether the compliance systems of regional economic communities, which includes their legal and institutional frameworks, have an impact on their effectiveness. This question is approached by analysing whether, and to what extent: regional obligations are being implemented and complied with by member states; the monitoring and evaluation mechanisms that have been adopted to track progress; and the framework in place to manage instances of non-compliance. The questions this research seeks to address will be as follows:

¹⁰⁷ Article 3 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93; see also African Peer Review Mechanism (APRM) available at <https://au.int/en/organs/aprm>, accessed on 5 December 2019.

- 1) What factors, legal and non-legal, affect implementation and compliance within the African context?
- 2) What monitoring and evaluation mechanisms have been adopted to monitor implementation and compliance with regional obligations in Africa?
- 3) What legal and institutional frameworks have been established to induce compliance and implementation?
- 4) What steps can be taken to improve the levels of implementation and compliance with regional commitments, considering the challenges of regional integration in Africa?

1.7 JUSTIFICATION OF THE STUDY

Although regional integration is a global practice, the conditions under which it is pursued and the purposes for which it is pursued vary depending on the needs of the member states of each regional integration initiative. At the continental level, regional integration has been pursued with the overall objective of attaining African unity and economic development. At the regional level, the aims vary depending on the interests or needs of the specific region. In any case, regardless of the objectives of each initiative, efforts must meet their objectives to some degree for regional integration to be effective.

Considering that the prevailing circumstances vary from region to region, the frameworks of regional integration initiatives should be designed adapted to meet each region's needs. As such, the framework that is adopted for regional integration in Africa, both continentally and regionally, must meet the needs of the continent. Despite the research being conducted in the area of compliance with regional integration obligations, there appears to be a gap in research from an African regional integration perspective. More specifically, there is a gap in research relating to compliance and implementation of regional obligations on the African continent and the use of frameworks to address any challenges of ineffectiveness.

This research, therefore, assesses the effectiveness of regional integration frameworks in Africa in attaining regional integration objectives. Through understanding the current frameworks, this research aims to identify deficiencies in the framework that can be addressed. Research in this area will enable a greater understanding of the challenges that have affected the progress of regional integration and the ways in which regional communities have attempted to address these challenges. Upon drawing conclusions on the effectiveness of regional integration frameworks in

Africa, this research provides recommendations on the possible steps that can be adopted and modified to suit regional integration in the African context.

This research is conducted with the intention of contributing to the knowledge and resources channelled towards improving the effectiveness of regional integration on the African continent. Furthermore, the research is conducted with the objective of providing practical solutions that can be implemented to ensure regional integration is an effective developmental tool that can be used to assist in the realisation of Africa's full potential.

1.8 RESEARCH METHODOLOGY

This study was conducted using a combination of doctrinal and comparative approaches. The first stages of this research involved the doctrinal approach. Doctrinal legal research is a method of research that provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules and explains areas of difficulty.¹⁰⁸ Doctrinal legal research primarily focuses on primary and secondary materials for literature review, but it may also use other sources for support including resources from other fields.¹⁰⁹ The doctrinal method is suitable for this research because one of the aims of the research is to analyse the existing frameworks of regional integration in Africa. This is achieved by considering the primary resources such as treaties, protocols and declarations of regional economic communities. In addition, secondary resources such as books, journal articles, and publications by international and non-governmental organisations are utilised.

Doctrinal legal research has an interdisciplinary aspect that enables the consideration of resources from other fields.¹¹⁰ The study of state behaviour in relation to international agreements has required an exposition into other fields such as international relations, to gain a better understanding of state behaviour in regional economic communities. This further motivated the choice of doctrinal legal research.

To supplement the existing literature, visits were planned to the offices of the African Institute of South Africa in Pretoria, South Africa; the COMESA Secretariat in Lusaka, Zambia; and the SADC Secretariat in Gaborone, Botswana. Such visits would have allowed for the gathering of additional

¹⁰⁸ Terry Hutchinson and Nigel Duncan 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 101.

¹⁰⁹ P. Ishwara Bhat *Idea and Methods of Legal Research* (2019) 151.

¹¹⁰ *Ibid* at 151.

information and opinions on the existing frameworks. However, due to the COVID19 pandemic such visits could not be undertaken.

This research also aimed to identify mechanisms that can be implemented to improve the effectiveness of regional integration in Africa. To achieve this, a comparative study of regional integration frameworks in other jurisdictions was conducted. Comparative legal research entails a systematic analysis of rules, institutions and procedures in one or more legal systems.¹¹¹ The use of comparative legal research provides for a wider range of model solutions, which in turn places a researcher in a better position to find a suitable solution for the research problem.¹¹²

The comparative study analysed other jurisdictions such as the EU and ASEAN. The EU was selected for comparative study because it is considered one of the most successful regional integration initiatives. The success of the EU has resulted in other regional economic communities across the world adopting the same approach as that used in European integration. A comparative study enabled an analysis of whether the EU approach is suitable for African integration and whether there are lessons that can be adapted.

A comparative study of the approach adopted in the ASEAN was also conducted. The approach to regional integration that has been followed in ASEAN focuses on consultation and consensus between member states rather than using enforceable obligations. This approach is different to that followed in Europe and Africa and as such, this research assessed how this approach works, whether it is effective and whether Africa can gain any lessons from it.

1.9 SCOPE OF THE STUDY

This research was conducted with the aim of improving the effectiveness of regional integration on the continent by making recommendations relating to established frameworks. The research will involve an analysis of frameworks both at the continental level and the regional level. At the continental level, the framework of the AU was analysed and at the regional level focus was given to SADC, COMESA and EAC. The research only focused on three RECs because an analysis of all fourteen RECs was beyond the scope of this research. Additionally, the three selected RECs are progressive in their approach to regional integration. Furthermore, many of the other RECs focus on addressing challenges that are peculiar to the community.

¹¹¹ Ibid at 270.

¹¹² Ibid at 271.

The role of states in integration cannot be overstated as it is through the actions undertaken by states that treaties can be implemented, and their objectives achieved. This research considered theories on state behaviours in relation to international agreements. These theories were considered to provide insight into the approach that states have towards regional integration. Frameworks that are established by member states within their territory to give effect to regional integration objectives are an important part of the effectiveness of regional integration. Conducting an in-depth analysis into these frameworks was beyond the scope of this research, though the research briefly highlighted some characteristics of member states' frameworks that have been established to implement regional integration.

The research sought to understand factors that challenge the implementation of and compliance with regional integration obligations. In order to make recommendations, the research analysed methods of compliance that have been developed over the years as a foundation for the recommendations.

1.10 CHAPTER OUTLINE

This research paper consists of seven chapters. A brief outline of each is provided below.

Chapter One: Introduction

Chapter One introduces the research. This chapter provides an overview of the regional integration efforts in Africa. Additionally, the chapter provides a review of the literature on compliance, implementation and effectiveness. As well as a background to the study, laying out the objectives of the research, the need for this research, and the methodology used within it.

Chapter Two: Conceptual Framework

Chapter Two analyses the concepts that have been used in this research. The chapter looks at the concept of treaty effectiveness with specific reference to implementation and compliance. Specifically, this chapter examines the links between implementation and compliance on one hand and effectiveness on the other. It also considers the factors that hinder or promote implementation and compliance and the theories that have been developed to understand state behaviour towards international agreements.

Chapter Three: Understanding Regional Integration in Africa

Chapter Three provides a background into regional integration initiatives in Africa. This chapter analyses the history of African integration, how regional integration has progressed on the

continent, and the approach that has been followed. This chapter includes an overview of initiatives such as the AU, SADC and the EAC.

Chapter Four: Framework for Effective Integration in the African Union

Chapter Four analyses the framework of the AU and the extent to which it enables implementation and compliance by member states. As the continental integration community, and one that recognises the regional economic communities of the continent as building blocs, the AU has the potential to positively influence the progress of integration. The AU has developed mechanisms that are intended to improve the monitoring and evaluation of integration on the continent which are analysed in the chapter. Furthermore, the chapter considers the role of the Pan-African Parliament and the African Court of Human and People's Rights in promoting an effective community.

Chapter Five: Framework for Effective Integration in African Regional Economic Communities

Chapter Five focuses on the existing legal and institutional framework of regional agreements within the African continent. This was done with the aim of assessing whether they promote the effectiveness of concluded agreements. This chapter analyses the provisions of agreements relating to implementation and compliance and the measures put in place to evaluate the progress made towards compliance, if any. This chapter also analyses the varying roles of judicial organs in the regional economic communities.

Chapter Six: Lessons from Other Regional Integration Initiatives

Chapter Six draws on the experiences of other regional economic communities to make recommendations as to how the current situation in Africa can be improved. This chapter is the comparative chapter that focuses largely on the experience of the EU because it has a long-standing history as an effective legal system. The chapter considers regional economic communities in Asia such as ASEAN.

Chapter Seven: Thesis Conclusion and Recommendations

Chapter Seven presents the observations, conclusions, and recommendations from the research. The last chapter highlights the challenges that have been identified and makes recommendations to address these challenges. Included in the recommendations is a compliance report template that is recommended to be submitted by member states as a way of checking compliance.

2 CHAPTER TWO: CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

This research analyses the impact that existing regional integration frameworks, both legal and institutional, have on the effectiveness of regional integration initiatives. Considering that regional integration initiatives are established through the conclusion of agreements, usually regional trade agreements, it becomes necessary to understand how such agreements impact the community's effectiveness. Greater understanding of this is necessary as African states continue to attempt to deepen integration through the conclusion of agreements. The conclusion of the agreement which established the African Continental Free Trade Area (hereafter 'AfCFTA') serves as the most recent example thereof. Thus, as African states continue to utilise resources to integrate the continent and respective regions, an understanding of how established frameworks impact the achievement of goals is important.

This research is informed by two concepts namely Law and Development, and Integration through Law. Each of these concepts provides a foundation for understanding the relationship between law and regional integration efforts. Chapter Two will therefore provide background to these concepts and how they have been adopted in the African context. The chapter will then analyse the concepts of treaty effectiveness, implementation, and compliance. Attention will also be given to the links between implementation and compliance, as well as effectiveness. For the purposes of creating a framework for further analysis of the state of implementation and compliance with regional commitments on the continent, the chapter will also consider the factors that hinder or promote the implementation of and compliance with regional integration obligations.

2.2 LAW, INTEGRATION AND DEVELOPMENT

The theory of Law and Development looks to analyse the relationship that exists between law and development. This theory brings together two concepts and as such, primary consideration needs to be given to understanding the meaning of each concept in relation to the theory. The law component encompasses both formal legislation that is prescribed by a controlling authority and informal rules such as customary law.¹¹³ The development component refers to both economic development as well as non-economic development such as social development.¹¹⁴ When it comes

¹¹³ Yong-Shik Lee 'General Theory of Law and Development' (2017) 50 *Cornell International Law Journal* 415 at 423; Mashood A. Baderin 'Law and Development in Africa: Towards a New Approach' (2010) *NIALS Journal of Law and Development* 19.

¹¹⁴ Baderin op cit note 113 at 22.

to determining what amounts to development in Law and Development theory, states must determine how best to prioritise and balance economic and non-economic development.¹¹⁵ In cases of developing states economic development may need to be the priority to improve the state's economic condition. This can, in turn, also improve the non-economic condition of the state.¹¹⁶ As such, development may have varying interpretations in different states.

Three 'moments' have been identified throughout the evolution of the doctrine of Law and Development as key to the wide acceptance and understanding of the relationship that exists between law and development. The first 'moment' was in the 1950s and 1960s and during this period the law was viewed as a tool that could be used to promote and strengthen the role of the state.¹¹⁷ The law was understood as a tool to create a framework that would enable efficient governance of the public sector and direct economic behaviour in accordance with national plans.¹¹⁸ This period focused on bringing modern law from developed states and implementing it in developing states.¹¹⁹ Thus this period saw the adoption of laws in African states that may not have been appropriately adapted to meet the needs of those states.

The second 'moment' occurred during the 1980s and 90s. In contrast to the first moment, this moment viewed the law as a foundation for market relations and as a tool to promote deregulation of the economy by the state.¹²⁰ Some areas of focus during this moment included the role of the judiciary in protecting businesses from state intervention and the establishment of core institutions of private law.¹²¹

In the first and second moments, the law was used as an instrument to achieve a particular end goal. These goals were state intervention in one moment and privatisation in the other. By contrast, in the third moment, the law was not only viewed as an instrument to bring about development but also as an aspect of development itself.¹²² In the third moment, the law is understood to regulate and complement the market.¹²³

¹¹⁵ Lee op cit note 113 at 428.

¹¹⁶ Lee op cit note 113 at 428.

¹¹⁷ David M. Trubek and Alvaro Santos *The New Law and Economic Development: A Critical Appraisal* (2006) 5; Lee op cit note 113 at 421; Mashood A. Baderin 'Law and Development in Africa: Towards a New Approach' (2010) *NLALS Journal of Law and Development* 11.

¹¹⁸ Trubek & Santos op cit note 117 at 5.

¹¹⁹ Lee op cit note 113 at 421.

¹²⁰ Trubek & Santos op cit note 117 at 5; Lee op cit note 113 at 421.

¹²¹ Ibid.

¹²² Trubek & Santos op cit note 117 at 5.

¹²³ Wouter Vandenhoele 'Towards a Fourth Moment in Law and Development?' (2019) 12 *Law and Development Review* 265 at 267.

Considering that regional integration has been pursued as a means to promote development, both economic and non-economic, in regions and on the continent, and that the foundation of regional economic communities is agreements, one can conclude that law is being used to further development. This also brings us to the concept of Integration through Law. The theory of Integration through Law focuses on the ways in which the law can be used to support economic integration by providing the regulatory and institutional framework necessary to coordinate the collective actions of member states.¹²⁴ The institutional framework refers to the organisations, norms, and practices related to the adoption, implementation, and enforcement of the law.¹²⁵ The institutional framework of a Regional Economic Community (hereafter 'REC') would include institutions that enforce and monitor compliance with community law, among other institutions. Closely linked to the institutional framework is the legal framework which is the framework within which the law is recognised.¹²⁶

2.3 THE CONCEPT OF EFFECTIVENESS

The question of whether regional integration efforts are effective is a central aspect of this research. Regional integration initiatives on the African continent are largely established through the conclusion of agreements between states. As such, the assessment of the effectiveness of regional integration in this research entails analysing the effectiveness of the underlying agreements. The question of the effectiveness of regional integration agreements falls within the broader question of the effectiveness of international agreements and international regimes which has been an area of interest in International Law.

Whether an agreement is effective is a rather broad research area that will be considered through sub-questions. These are namely: what amounts to an effective treaty; what makes a treaty effective; and what mechanisms can be used to measure effectiveness.

Various approaches have been developed in the quest to understand what amounts to an effective treaty. The first approach is the problem-solving approach. In terms of this approach, an agreement or regime is viewed as being established to address a problem. The effectiveness of such an agreement is then determined by considering whether the agreement improves the

¹²⁴ Jonathan Bashi Rudahindwa *Regional Developmentalism Through International Law: Establishing an African Economic Community* (2018) 10.

¹²⁵ Lee op cit note 113.

¹²⁶ Ibid.

problem it was created to address.¹²⁷ If we consider that regional integration regimes are created to coordinate behaviour between states in situations where the absence of such coordination will lead to substandard outcomes two factors can impact on effectiveness when using the problem-solving approach. These two factors are the nature of the problem and the capacity to solve the problem.¹²⁸

The second approach that has been used determines effectiveness by considering the policy impact of a regime and whether the regime achieves its policy objectives.¹²⁹

The third approach analyses effectiveness by focusing on the actors that are involved in addressing a problem and the interrelationship between these actors.¹³⁰ This approach considers the policy changes that would need to be made to address the challenge and analyses the changes in behaviour caused by the regime to achieve its policy objectives.¹³¹

The fourth approach is a legal oriented approach which analyses effectiveness by considering whether a rule has been complied with or whether a contractual obligation has been met.¹³² In summation, to determine whether a treaty is effective consideration is given either to: the degree to which a treaty induces changes in behaviour that further the goals of the treaty or regime; the degree to which a treaty improves the state of the underlying problem; or the degree to which a treaty achieves its policy objectives.¹³³

In the study of the effectiveness of a regime or treaty, consideration must be given to the fact that a regime can have different consequences. First, a regime may have direct or indirect effects.¹³⁴ The shorter the causal chain between the regime and the result, the more direct the effect.¹³⁵ However, determining causality may prove difficult as there may be other factors that impact the result. Second, a regime may have internal or external effects. External effects mean that the regime has an impact on areas that are outside of the primary concern for which it was established.¹³⁶ Third, regimes can have positive and negative effects.¹³⁷ These are important to note as they

¹²⁷ Marc Levy, Oran Young and Michael Zurn 'The Study of International Regimes' (1995) *European Journal of International Relations* 267 at 291; Arild Underdal 'One Question, Two Answers' in Edward L. Miles, Arild Underdal, Steinar Andresen et al *Environmental Regime Effectiveness: Confronting Theory with Evidence* (2002) 3 – 46.

¹²⁸ Underdal op cit note 127.

¹²⁹ Levy, Young & Zurn op cit note 127 at 291; Raustiala op cit note 68 at 391.

¹³⁰ Levy, Young & Zurn op cit note 127 at 291.

¹³¹ Ibid; Raustiala op cit note 68 at 391.

¹³² Levy, Young & Zurn op cit note 127 at 291.

¹³³ Raustiala op cit note 68 at 394.

¹³⁴ Levy, Young & Zurn op cit note 127 at 293.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

determine which effects will be analysed for purposes of determining the effectiveness of the subject matter. It must thus be decided if a regime would be considered as effective only if it has made a measurable impact on the problem it was created to address or would indirect effects also contribute to effectiveness.¹³⁸

Furthermore, every agreement, and the issue it was established to address, is different. As such, effectiveness would need to be measured in the context of both the breadth and depth of the problem at hand.¹³⁹ Since some problems are more difficult to address than others, an agreement that has had a small impact on a difficult problem may nonetheless be considered effective in comparison to an agreement that has had a significant impact on an easier problem.¹⁴⁰

Some factors have been identified as having an impact on the effectiveness of regimes. These factors have been categorised as exogenous, endogenous, and behavioural mechanisms. Exogenous factors include distribution of interests, distribution of influence among member states, and the nature of the issue area. Endogenous factors are factors within the regime that have an impact on its effectiveness, for example, the design of the agreement.¹⁴¹

At this point, it is important to distinguish between two concepts: effectiveness and compliance. Effectiveness considers whether a law changes the behaviour of states and examines its impact.¹⁴² It involves comparing two situations, namely what would have happened in the absence of the law and what happened in the presence of the law.¹⁴³ Compliance, on the other hand, looks at whether a state meets the set standards of the relevant law or regime.¹⁴⁴ The way the relationship between the two concepts is viewed varies. For instance, some view effectiveness as compliance. This view links effectiveness to compliance in the sense that if international law is not complied with then it has no effect.¹⁴⁵ Viewing effectiveness in this way essentially equates effectiveness to compliance and does not consider the reason why states are complying. As such this view may not analyse whether compliance is a result of the relevant regime or whether states are doing what they would

¹³⁸ Emily O'Brien and Richard Gowan 'What Makes International Agreements Work: Defining Factors of Success' available <https://cdn.odi.org/media/documents/7839.pdf>, accessed on 7 September 2021.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ The design of the agreement includes aspects such as the scope the agreement covers and the depth of the agreement in terms of the change that is required to implement the agreement. See also Levy, Young & Zurn op cit note 127 at 299; O'Brien & Gowan op cit note 138.

¹⁴² Timothy Meyer 'How Compliance Understates Effectiveness' (2014) 108 *American Journal of International Law Unbound* 168 at 169; Jean d' Aspremont "Effectivity" in International Law: Self-Empowerment Against Epistemological Claustrophobia' (2014) 108 *American Journal of International Law Unbound* 165.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Liam Murphy 'Varieties of Effectiveness: What Matters?' (2014) 108 *American Journal of International Law Unbound* 99.

have done regardless.¹⁴⁶ Another view is that effectiveness induces compliance. This view looks at whether the regime affects the behaviour of states.¹⁴⁷ In addition, effectiveness can also be viewed as enforcement. This view looks at whether the regime in and of itself can provide norms and institutional structures that cause states to comply.¹⁴⁸

A legal regime may be analysed with respect to both concepts, and various findings are possible.¹⁴⁹ For instance, compliance may be high, but effectiveness may be found to be low. This can happen if the regime prescribes behaviour or actions that do not greatly differ from what member states are already doing, or if the rules created by regional agreements simply mirror the already existing rules in member states, which means a state can comply with community rules without making any changes.¹⁵⁰ In other cases, compliance may be low, and effectiveness may be high.¹⁵¹ It is important to note that high levels of compliance do not automatically mean the rules are effective. In the same way, rules can be effective even if compliance with them is low.¹⁵²

Having looked at effectiveness and its relationship with compliance, there are multiple ways these theories can be conceptualised. The approaches adopted to determine effectiveness will be the problem-solving approach and the legal oriented approach. A regime is established for various reasons and has objectives to achieve. As this research focuses on legal and institutional frameworks of regional economic communities, what will be considered is whether these frameworks are designed in a way that either induces compliance or enforcing it. If a framework induces or enforces compliance by member states, this may result in the attainment of community objectives to some extent, thus making a community more effective.

2.4 IMPLEMENTATION OF REGIONAL OBLIGATIONS

Having discussed the concept of treaty effectiveness, focus will now be given to the steps that must take place before the analysis of effectiveness can be considered. The effect of a treaty can be deemed to be the result of the actions the member states take after signing the founding treaty of the community. First, the concept of implementation of community agreements by member

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Mitchell op cit note 69.

¹⁵¹ Meyer op cit note 151; Joan E. Donoghue, Benedict Kingsbury, Oran Young, Abram Chayes, Edith Brown Weiss and George Davis 'Theme Plenary Session: Implementation, Compliance and Effectiveness' (1997) 91 *Proceedings of the Annual Meeting (American Society of International Law)* 50; Jacobson & Weiss op cit note 78 at 123.

¹⁵² Mitchell op cit note 69.

states will be assessed and thereafter the concept of compliance by member states is looked at in the following section.

The concept of implementation refers to putting international commitments, or in the case of regional integration, regional commitments into practice.¹⁵³ When it comes to regional agreements, implementation takes place at both the regional and national levels. At the regional level, implementation includes acts such as establishing community institutions, for example a secretariat or court of justice. At the national level, the process of implementation entails member states putting regional commitments into practice for example by enacting domestic legislation.¹⁵⁴ However, national level implementation goes beyond member states enacting national legislation in accordance with community law as it also includes any measures taken by such states to make community law effective nationally.¹⁵⁵ The measures states can take include promulgating regulations, creating institutions, and other actions to implement regional obligations.¹⁵⁶

The implementation process of directives in European Union (hereafter 'EU') Law involves two stages: transposition and application. Transposition is the process of translating EU Law into national law, and the amount of time each member state takes to do this within the limit stipulated may vary.¹⁵⁷ Transposition in the EU relates to directives as these legal acts are not directly applicable. Once the directives have been translated into national laws, member states must apply the new national law through actions such as drafting policy, information dissemination, and enforcement.¹⁵⁸ These aspects of EU law implementation will be examined in depth in a later chapter.

In order to gain a better understanding of the implementation of regional integration commitments, implementation at the national level will briefly be discussed. Nationally, implementation is viewed as an interactive process among actors which leads to certain behaviours. These actors can be grouped within three categories: law-making organisations, regulating organisations, and regulated organisations.¹⁵⁹ Each actor plays a specific role in the implementation

¹⁵³ Raustiala op cit note 68 at 392.

¹⁵⁴ Ibid; Jacobson & Weiss op cit note 78 at 123.

¹⁵⁵ Barrett op cit note 83 at 251; Jacobson & Weiss op cit note 78 at 123.

¹⁵⁶ Ibid.

¹⁵⁷ Francesco Duina 'Explaining Legal Implementation in the European Union' (1997) 25 *International Journal of the Sociology of Law* 155 at 156.

¹⁵⁸ Ibid.

¹⁵⁹ William H. Clune 'A Political Model of Implementation and Implications of the Model of Public Policy, Research, and the Changing Roles of Law and Lawyers' (1983) 69 *Iowa Law Review* 47 - 126.

process. Law making organisations make legal commands, regulating organisations make legal incentives,¹⁶⁰ and regulated organisations comply or do not comply with the legal commands.¹⁶¹

The process of implementation can be viewed as either a top-down approach or a bottom-up approach. The role that each actor plays and the nature of the interaction between actors depend on the approach. In the top-down approach, the first step in implementation at the national level is the existence or creation of a legal mandate.¹⁶² Once a legal mandate exists, legal incentives are applied to make it effective. Legal incentives refer to the actual or probable imposition of any positive or negative action, such as sanctions.¹⁶³ The final step is the response of the regulated organisation to the legal mandate and incentives. Through legal mandates and legal incentives, regulated organisations are required to change their behaviour to some degree in order, hence to comply or not comply.¹⁶⁴ The degree to which regulated organisations comply is impacted by the interaction between the legal mandate and the already existing organisational goals.¹⁶⁵ In the top-down approach, the policy is made by central policymakers and focus is given to compliance with policy decisions by the actors that need to implement the policy.¹⁶⁶

The bottom-up approach focuses on the efforts of regulated organisations to find compromises with law-making or regulating organisations.¹⁶⁷ Actions such as lobbying to weaken an underlying legal mandate fall within the realm of the bottom-up approach.¹⁶⁸ The top-down approach has been the predominant approach in regional economic communities for some time. This means decisions were largely taken at the regional level by policy makers, mostly the executive organs, and the expectation was for there to be implementation and compliance by national actors. This approach is gradually changing as there is greater involvement of the people in decision making processes.

Recognising that member states of regional economic communities are sovereign, an understanding of how policy decisions made at the regional level can be implemented at the national level needs to be attained. One question is whether policy decisions become the law of the community and if so, does community law apply automatically at the national level or are there

¹⁶⁰ Legal incentives refer to the actual or probable imposition of any positive or negative action. Clune op cit note 159 at 51.

¹⁶¹ Clune op cit note 159.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Helga Pölzl and Oliver Treib 'Implementing Public Policy' in Frank Fischer, Gerald J. Miller and Mara S. Sidney (eds) *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (2007) 90; Clune op cit note 168.

¹⁶⁷ Ibid.

¹⁶⁸ Clune op cit note 159.

requirements that must be met and procedures that must be followed. To gain a better understanding of the relational issues between regional economic communities and member states a brief explanation will be given on the meaning of community law and some of the doctrines and principles that have an impact on the relationship between community law and national law.

2.4.1 Community Law

The reception of community law into national law is an aspect of the implementation of community obligations and can be considered the first step of implementation. It is therefore important to first provide a brief explanation of the meaning of community law.

Through the conclusion of regional economic agreements between states community law is created. Community law is considered to encompass the binding legal instruments of specific regional economic communities, including the founding treaties of regional economic communities, provisions of instruments enacted by community institutions, general principles of law, case law, and any law contained in conventions and agreements between member states enacted to give effect to treaty provisions.¹⁶⁹

Community law is considered to be a form of international law, however since it provides rights for both member states and individuals within those states, it is considered a *sui generis* legal regime.¹⁷⁰ The Vienna Convention creates an obligation for all states party to a treaty to perform treaties in good faith.¹⁷¹ A treaty is defined as an international agreement concluded between states in written form that is governed by international law.¹⁷² A treaty may be embodied in a single instrument or more than one instrument.¹⁷³

Erasmus advances that community law has two features: direct effect and primacy. The implication of community law having direct effect means that persons and entities within the member states can rely on community law and make use of it before courts that have jurisdiction to hear matters on the interpretation or application of community law, including national courts.¹⁷⁴ The concept of direct effect is discussed in greater detail below. With regards to community law having primacy,

¹⁶⁹ Oppong op cit note 71 at 191; Gerhard Erasmus 'The Development of REC Community Law: The EAC Court of Justice makes an important Contribution' available at <https://www.tralac.org/publications/article/14159-the-development-of-rec-community-law-the-eac-court-of-justice-makes-an-important-contribution.html>, accessed on 4 June 2020.

¹⁷⁰ Gerhard Erasmus 'The COMESA Court of Justice: Regional agreements do protect private parties' available at <http://www.tralac.org/files/2013/10/S13TB092013-Erasmus-COMESA-Court-of-Justice-Legal-agreements-protect-private-parties-20131015-fin.pdf>, accessed on 29 June 2016.

¹⁷¹ Article 26 of the Vienna Convention.

¹⁷² Article 2(1)(a) of the Vienna Convention.

¹⁷³ Ibid.

¹⁷⁴ Erasmus op cit note 170.

in order for community law to have the intended effect, it is reasonable to expect that a national law should not be able to overrule a community rule.¹⁷⁵ As such, primacy of community law means that in instances of conflict, community law takes precedence over national law.¹⁷⁶ However, one must note the fact that these two features are dependent on the national law of member states.

The founding agreements of regional economic communities in some instances make provision for the relationship between community law and national law. However, regardless of whether or not the founding treaty makes such a provision, one must refer to the constitution of a member state to determine whether community law will have effect in that state.

2.4.2 Monism and Dualism

Attention must now be given to understanding how community law relates to the national law of member states. Within regional economic communities, two legal systems operate concurrently, namely law of the community and the national law of each member state. In order for the objectives of the community to be realised, the member states have the responsibility of implementing the community law. As such, there will be some interaction between community law and national law. The mere conclusion of an agreement between states which stipulates rules for member states to abide by does not mean community law can be directly applied within member states. Whether international law, or in this case community law, becomes directly applicable within member states once an agreement is concluded is affected by the nature of the legal system of the member states, and more specifically whether a state has a monist or dualist legal system.

In the theory of monism, international law and national law are viewed as interrelated parts of one legal system.¹⁷⁷ As such, in monist states, if international law is enacted in line with the constitution of the state, it automatically becomes a part of the law of the state without the need to enact national law to give it effect.¹⁷⁸ This process is also referred to as the doctrine of automatic incorporation and may be provided for either in a state's constitution, statutory law, or it may be

¹⁷⁵ Cornelia Koch 'The Doctrine of Supremacy of European Community Law As A Condition Precedent For The Doctrine of Direct Effect' (2005) 9 *International Trade & Business Law Review* 201 at 209.

¹⁷⁶ Erasmus op cit note 170; Koch op cit note 175 at 209.

¹⁷⁷ Itumeleng Shale 'Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy' (2019) 19 *African Human Rights Law Journal* 193 at 196; Michelle Barnard 'Legal Reception in the AU against the Backdrop of the Monist/Dualist Dichotomy' (2015) 48 *Comparative and International Law Journal of Southern Africa* 144 at 155.

¹⁷⁸ G Ferreira and A Ferreira-Snyman 'The Incorporation of Public International Law Into Municipal Law and Regional Law Against The Background of the Dichotomy Between Monism and Dualism' (2014) 17 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1471; Barnard op cit note 177 at 155; Anthony Aust *Modern Treaty Law and Practice* (2000) at 183.

an unwritten principle of law.¹⁷⁹ The way in which international law is to be incorporated may vary from state to state.¹⁸⁰ Although international law is incorporated into national law, international law retains its nature as international law and in instances of conflict between international law and national law, international law prevails.¹⁸¹ What this means for community law is that once a regional agreement has been concluded according to a member state's constitution, community law has effect in that state and in instances of conflict, community law will prevail over national law.

In comparison, the theory of dualism views international law and national law as two separate and distinct legal systems.¹⁸² Dualist states require the enactment of national legislation which transform international law to give effect to any rights and obligations created in international law.¹⁸³ As a result, international law is integrated into national law, and it does not retain its international law status.

It is important to note that the categorisation of states as monist or dualist does not conclusively determine the link between international law and national law in those states.¹⁸⁴ Hence reference to national constitutions is necessary.

2.4.3 The Principles of Direct Applicability and Direct Effect

Although there are some states where community law does become automatically enforceable, this is not commonly the case. As a way of dealing with this challenge, some regional economic communities have developed and adopted principles that enable the enforceability of community law. Two of these principles will now be considered as a way of understanding how community law can be given effect in member states of African regional economic communities.

¹⁷⁹ David Thor Bjorgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (2015) 56.

¹⁸⁰ Aust op cit note 178 at 183.

¹⁸¹ Bjorgvinsson op cit note 179; Shale op cit note 177 at 196; Ferreira & Ferreira-Snyman op cit note 178.

¹⁸² Shale op cit note 177 at 196; James Crawford *Brownlie's Principles of Public International Law* 8 ed (2012) 280.

¹⁸³ Aust op cit note 178 at 187; Bjorgvinsson op cit note 179 at 56; Barnard op cit note 177 at 155.

¹⁸⁴ Onkemetse Tshosa 'The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy' available at http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/2010_1/NIJ_section_1.pdf, accessed on 11 January 2017. In *Glenister v President of the Republic of South Africa* 2011] ZACC 6 the Constitutional Court of South Africa had to determine whether an obligation created by a treaty that had not been incorporated into domestic law, through resolution of the National Assembly and National Council of Assemblies as stipulated in section 231(2) of the Constitution, could be enforced domestically. The majority judgement held that in this instance the obligation had to be given effect because the state has the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. This case serves as an example that states may not strictly follow either dualist or monist legal systems.

The principle of direct applicability enables international law to be incorporated automatically into the national legal system of member states upon the treaty taking effect.¹⁸⁵ This means international law becomes applicable within member states without the necessity of intervening national implementation measures such as the enactment of legislation.¹⁸⁶ Direct applicability has the advantage of the international law, or community law in this instance, retaining its original nature instead of being translated into a national law.¹⁸⁷ Furthermore, as regional economic communities may be composed of both monist and dualist states, direct applicability allows for uniform reception of community law regardless of the nature of the legal systems in member states.¹⁸⁸ Provision can be made for direct applicability through the founding treaties of communities which means dualist states can make provision for community law to be directly applicable.

In addition to international law being directly applicable within member states, such law needs to be enforced at the national level in order for it to be effective. International law can only have effect in member states if it has been adopted in monist states or transformed in dualist states. In order to bypass this, the principle of direct effect was developed to deal with the legal enforcement of rights created by community laws.¹⁸⁹ As mentioned above, community law creates rights for both member states and individuals within member states. Through direct effect individuals in member states can enforce community rights in national courts, and national courts are able to rely on community law as a direct basis for judicial decisions.¹⁹⁰ It is important to note that a directly applicable law is not automatically directly effective and this is possible due to issues of vagueness, ambiguity, and other factors.¹⁹¹

2.5 COMPLIANCE IN REGIONAL INTEGRATION

Consideration in the previous section was given to how community law can have an effect within the territory of member states. Once community law has been given effect at the national level,

¹⁸⁵ Richard Frimpong Oppong *Legal Aspects of Economic Integration in Africa* (2011) 42 – 44; Narine Glazaryn ‘Who Are the Gatekeepers of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements’ (2018) 37 *Yearbook of European Law* 27 at 32.

¹⁸⁶ Oppong op cit note 185 at 42–44.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid; The principle of direct effect was developed by the Court of Justice of the European Union in the *Van Gend en Loos v Nederlandse Administratie der Belastingen* Case 26/26.

¹⁹⁰ Oppong op cit note 185 at 44–46; Armin Cuyvers ‘The Scope, Nature and Effect of EU Law’ in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) 165; Koch op cit note 175 at 202; Tiyanjana Maluwa ‘The Development and Enforcement of Community Law in the African Regional Economic Communities: Conceptual Issues, Architecture and Institutions’ in Charles Chernor Jalloh and Olufemi Elias (ed) *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* (2015) 536–564.

¹⁹¹ Oppong op cit note 185 at 44–46.

the next step would be for member states to act in accordance with what community law requires. This is the compliance stage. At this point consideration will be given to the concept of compliance, factors that may have an effect on compliance and approaches that have been adopted to induce compliance.

2.5.1 The Concept of Compliance

The concept of compliance is not readily defined, which has made it challenging to determine what actions by states amount to compliance. Kal Raustiala and Anne-Marie Slaughter, for instance, state that compliance amounts to any conformity with a specified rule.¹⁹² The authors do acknowledge that although their focus is compliance with legal rules, compliance is not limited to legal rules.¹⁹³ Alternatively, the definition advanced by Oran Young can be considered a more holistic definition as it acknowledges that the prescribed behaviour may not always take the form of compliance with legal rules.¹⁹⁴ Young stipulates that compliance occurs when the actual behaviour of a given subject conforms with the prescribed behaviour and non-compliance occurs when actual behaviour departs significantly from prescribed behaviour.¹⁹⁵ Similar to Young's definition, Harold Jacobson and Edith Weiss advance that compliance refers to procedural and substantive adherence by member states to the provisions of an agreement and adherence to the spirit of the treaty as well.¹⁹⁶ Jacobson and Weiss conclude that compliance entails assessing the extent to which states have followed through on the steps undertaken to implement the agreement.¹⁹⁷

A distinction can also be made between first- and second-order compliance. First-order compliance relates to compliance with substantive rules embodied in treaty agreements.¹⁹⁸ Second-order compliance refers to compliance with authoritative decisions of a third party such as the Court of Justice of the European Union.¹⁹⁹ This research relies on the holistic definition of compliance and considers both first- and second-order compliance in African RECs.

¹⁹² Raustiala & Slaughter op cit note 74 at 539; Afadameh-Adeyemi op cit note 76 at 12.

¹⁹³ Raustiala & Slaughter op cit note 74 at 539.

¹⁹⁴ Oran R. Young *Compliance and Public Authority: A Theory of International Relations* (1979) 172.

¹⁹⁵ Ibid.

¹⁹⁶ Jacobson & Weiss op cit note 78 at 123. See also Ronald B. Mitchell 'Compliance Theory: An Overview' in James Cameron, Jacob Werksman and Peter Roderick (eds) *Improving Compliance with International Environmental Law* (1996) 3 – 28 in which compliance is defined as a state's behaviour that conforms with the explicit rules of a treaty.

¹⁹⁷ Jacobson & Weiss op cit note 78 at 123.

¹⁹⁸ Beth A. Simmons 'Compliance with International Agreements' (1998) 1 *Annual Review of Political Science* 75 at 79.

¹⁹⁹ Ibid.

2.5.2 Theories of State Behaviour in Relation to International Agreements

Benedict Kingsbury argues that the concept of compliance depends on understanding the relationship between law, behaviour, objectives, and justice.²⁰⁰ Although member states make commitments at the regional level, whether these commitments will be honoured is affected by the approach that states have towards non-national commitments. Over the years International Relations theories have been adopted to explain the way states behave in relation to international law. A brief overview of these theories will now be given to gain perspective on the way African states may behave in a regional setting.

2.5.2.1 Realist Theories

The standard realist theory views states as unitary actors that are pursuing their own interests.²⁰¹ Realists advance that states use the law as a means of maintaining stability and to solve coordination problems.²⁰² Additionally, the theory postulates that states are more likely to follow international law if it is within their interest.²⁰³ Furthermore, realists advance that states may behave habitually without recalculating interest and transaction costs, which results in compliance.²⁰⁴ However, if the legal commitment is inconsistent with the interest of a state, and as the interests of states outweigh the established law, the state is likely to act in a way that better serves its own interest resulting in non-compliance.²⁰⁵

Structural realists hold the view that states are the primary actors in the international system and that the international system does not have a centralised system of governance.²⁰⁶ Due to the inability of a decentralised international system to ensure enforcement and the focus of states on their own interests, states are less inclined to adhere to international legal regimes and will only cooperate when it is in their own interest.²⁰⁷ Furthermore, a dominant state can use its power to

²⁰⁰ Benedict Kingsbury 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 *Michigan Journal of International Law* 345.

²⁰¹ Ibid at 350.

²⁰² Coordination problems are discussed in more detail below.

²⁰³ Markus Burgstaller *Theories of Compliance with International Law* (2005) 96; Stacy-Ann Elvy 'Theories of State Compliance with International Law: Assessing the African Union's Ability to Ensure State Compliance with the African Charter and Constitutive Act' (2012) 41 *Georgia Journal of International and Comparative Law* 75 at 80.

²⁰⁴ Kingsbury op cit note 200 at 350.

²⁰⁵ Ibid.

²⁰⁶ Sarah Elizabeth Kreps and Anthony Clark Arend 'Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes' (2006) 16 *Duke Journal of Comparative & International Law* at 331.

²⁰⁷ Ibid; Simmons op cit note 198 at 79; Andrew T. Guzman 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823 at 1837.

establish and enforce norms on weaker states that further its interests, thus compliance with such norms is more likely.²⁰⁸

2.5.2.2 Rationalist Theories

Rationalist theories explain compliance by states by linking the behaviour of states to the nature of the problem (problem structure), the structure of the chosen solution (solution structure), and the costs and benefits associated with different behaviours.²⁰⁹ When analysing compliance, rationalists focus on the consistency of the behaviour of a state with respect to a developed rule.²¹⁰

With respect to problem structure, a central aspect that is considered for purposes of analysing compliance is based on what is referred to as non-cooperative game theory.²¹¹ Non-cooperative game theory looks at the incentives that exist for states to comply with collective obligations relating to problems characterised by either coordination games or collaboration games.²¹² Compliance levels will vary depending on whether the problems are characterised by coordination or collaboration games. Coordination games refer to situations in which member states all benefit from the existence of a common rule, and due to the mutual benefit, the incentive to deviate is weak.²¹³ Compliance levels will likely be higher. For instance, agreements relating to the use of nuclear weapons can be characterized as coordination games.

Alternatively in collaboration games, while member states jointly benefit from the existence of the common rule, individual member states may stand to benefit from non-compliance.²¹⁴ In collaboration games, non-compliance may occur if the incentives to not comply are strong.²¹⁵ An example of collaboration games can be international trade issues where states may enter into an agreement that will jointly benefit each party but individual states might stand to benefit from not complying.

Furthermore, the breadth of the underlying regulatory problem may also affect compliance.²¹⁶ For instance, some behaviours are more capable of being monitored due to their transparency, thus creating an opportunity to improve compliance.²¹⁷ Similarly, the scope and complexity of the

²⁰⁸ Kreps & Arend op cit note 206 at 331; Elvy op cit note 203 at 81.

²⁰⁹ Raustiala op cit note 68 at 400.

²¹⁰ Kingsbury op cit note 200 at 350.

²¹¹ Raustiala op cit note 68 at 400.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

underlying problem impacts compliance.²¹⁸ An agreement that requires little to no action by member states will have a higher compliance rate compared to an agreement that requires more action by member states.²¹⁹

When analysing state behaviour based on solution structure, rationalists look at the rules, standards, and institutions created by an agreement to analyse compliance.²²⁰ For instance, compliance will be impacted by whether the rules of an agreement are more challenging to comply with or whether the regulated activity is easily monitored.²²¹

2.5.2.3 Norm Driven Theories

The focus of norm driven theories is on the power of norms and ideas to influence state behaviour. One norm driven theory referred to as Legitimacy Theory developed by Thomas Franck focuses on the role of legitimacy in influencing compliance.²²² As Franck sought to understand what causes states to comply with rules that do not have a strong system of enforcement, he advanced that states comply with rules that are perceived as coming into being in accordance with the right process.²²³ According to Franck, there are four factors, namely determinacy, symbolic validation, coherence, and adherence, that determine whether a state complies with obligations or not.²²⁴

Another norm driven approach is that developed by Harold Koh, who advances that internalisation of international norms within a state is a way to promote compliance by states.²²⁵ Koh advances that through internalisation international legal norms become embedded in the domestic legal and political processes which creates compliance.²²⁶ Internalisation may take place in three forms in no particular order, namely social, political, and legal internalisation. Social internalisation occurs when a norm acquires legitimacy in the public to the extent that there is general adherence to it.²²⁷ Political internalisation occurs when a norm is accepted within the political sphere and politicians then advocate for the norm to be adopted as a matter of

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid.

²²² Thomas M. Franck 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705 at 751; Raustiala op cit note 68 at 406.

²²³ Raustiala op cit note 68 at 405.

²²⁴ Franck op cit note 222; Raustiala op cit note 68 at 405.

²²⁵ Harold Koh 'Why Do Nations Obey International Law' (1997) 106 *The Yale Law Journal* 2599 at 2655; Harold Koh 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181; Raustiala op cit note 68 at 405; Raustiala & Slaughter op cit note 74 at 544.

²²⁶ Harold Koh 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 623; Raustiala op cit note 68 at 405.

²²⁷ Koh op cit note 225 at 642; Koh op cit note 225 at 2655.

government policy.²²⁸ Legal internalisation occurs when an international norm is incorporated into the domestic legal system and becomes a domestic law.²²⁹

The Managerialist Theory developed by Chayes and Chayes is also largely norm driven. This theory argues that non-compliance is non-volitional and occurs as a result of a lack of capacity, ambiguity in treaty terms, or unforeseen changes in conditions.²³⁰ To promote compliance, this theory advances that non-compliant states should receive the assistance needed.²³¹ This theory will be considered in more detail in a section to follow.

2.5.2.4 Liberal Theories

Liberalist theories focus on actors and structures at the domestic level to explain the behaviour of states in the international sphere.²³² Proponents of liberalism advance that the domestic structure of liberal states, including the constitutional design, may have a direct influence on the compliance of such states with international laws.²³³ It is argued that liberalist states are more likely to comply with international rules because of national reverence for the rule of law.²³⁴ However, as states are viewed as being composed of various actors, assessing compliance involves evaluating compliance by the different actors with rules that are created specifically for those actors.²³⁵ Thus, compliance is not measured by analysing an action by the state as a whole but by the actions of the actors.²³⁶

2.5.3 Factors that Influence Compliance

In analysing compliance in regional economic communities, an attempt is made to understand why states do or do not comply. The previous section considered theories that have been developed to understand the behaviour of states towards international obligations. Compliance or non-compliance may be as a result of factors that are not based on what is stipulated in the founding agreements.²³⁷ These various factors will now be considered.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Abram Chayes and Antonia Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) at 9; Raustiala op cit note 68 at 405.

²³¹ Raustiala op cit note 68 at 405.

²³² Raustiala op cit note 68 at 409; Guzman op cit note 207 at 1838; Anne-Marie Slaughter 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503 at 507.

²³³ Raustiala op cit note 68 at 409.

²³⁴ Ibid.

²³⁵ Kingsbury op cit note 200 at 357.

²³⁶ Guzman op cit note 207 at 1838.

²³⁷ Ronald B. Mitchell has termed these 'first order' sources of compliance. See Mitchell op cit note 196.

One such factor is the self-interest of member states. It is advanced that since states are likely to conclude agreements that embody the interests of each state to some degree, states are more inclined to comply with an agreement to further their own interests.²³⁸ In coordination games, there will also be compliance on the basis of interdependent self-interest. This means that since each member state benefits from compliance, each state will likely comply.²³⁹ The aforementioned factors can also be linked to the consideration of reputation by member states. Reputation can be defined as the judgement of a state's past behaviour and predictions made about future compliance based on that behaviour.²⁴⁰

Andrew Guzman has advanced that the decision of a member state to comply or not will affect the way the non-compliant state is viewed by other states, in other words it will impact the reputation of the state.²⁴¹ The view other states have of a non-compliant state could influence how the other states interact with the non-compliant state.²⁴² When it comes to international agreements, a state that complies with its international commitments will develop a good reputation and will be viewed as a good partner, whereas a state that does not comply with obligations will be viewed as an unreliable partner.²⁴³ It is therefore advanced that reputation is an important factor of consideration, as a state with a good reputation will be able to find state partners more easily and extract better concessions from such partners.²⁴⁴ Thus a state may opt to comply for the purpose of the long-term gains that result from having a good reputation.²⁴⁵

In addition to the above, the intent and capacity of member states have an impact on compliance. A state may or may not have the intent to comply with obligations created by agreements with other states, but determining such intent can prove challenging.²⁴⁶ There are instances when states become parties to treaties as a result of social and political pressures but lack the intent of following through with their obligations. States need to have the capacity required to fulfil their obligations as well.²⁴⁷ Capacity can include finances, infrastructure, expertise, and other necessary resources. A state may have the intent to comply but lack the necessary capacity which may result in lower levels of compliance.

²³⁸ Chayes & Handler Chayes op cit note 230 at 4; Mitchell op cit note 196 at 7.

²³⁹ Mitchell op cit note 196 at 7.

²⁴⁰ Andrew T. Guzman *How International Law Works: A Rational Choice Theory* (2008) at 33; Jack L. Goldsmith and Eric A. Posner *The Limits of International Law* (2005) at 101.

²⁴¹ Ibid at 33.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Donoghue, Kingsbury, Young, et al. op cit 151 at 56.

²⁴⁷ Ibid.

Another factor relates to the efficiency of compliance. It is argued that compliance is promoted by the fact that it is more cost-effective for states to comply with treaty established rules rather than recalculate costs and benefits.²⁴⁸

Factors that can positively influence, and thus promote, compliance have been discussed. However, it is also important to be aware of the factors that may negatively influence compliance and lead to member states not fulfilling their obligations. Three factors can be mentioned here. First, is non-compliance as a choice or preference.²⁴⁹ As mentioned above, some states may sign an agreement without the intent of complying. However, there may be instances where a state signed an agreement with the intent of complying, but circumstances may have changed and the state may benefit more from non-compliance or not see the value in complying.²⁵⁰ A situation such as this may arise in collaboration games. The second is non-compliance due to capacity as discussed above.²⁵¹ The third is the issue of inadvertence. In this case, a member state takes the necessary actions to comply but their actions fall short of the required treaty standards.²⁵²

2.5.4 Methods to Induce Compliance

Having considered the first order sources of compliance, consideration will now be given to methods that have been suggested to induce compliance. These largely relate to the design of the framework within which the community will operate.

2.5.4.1 Compliance System

First, how a treaty may be designed to bring about compliance will be addressed. Ronald Mitchell advances that a treaty can have a built-in compliance system which is aimed at influencing compliance and this can take the form of a subset of rules and procedures.²⁵³ The compliance system has three elements namely the primary rule system, the compliance information system, and the non-compliance response system. The primary rules system deals with the actors, rules, and processes relating to the substantive target of the community, as well as the community's overarching goals.²⁵⁴ It involves decisions such as who will be regulated and how and this then allows a system to be designed with suitable direction and incentives.²⁵⁵ Other features, such as the

²⁴⁸ Chayes & Handler Chayes op cit note 230.

²⁴⁹ Mitchell op cit note 196 at 9.

²⁵⁰ Ibid.

²⁵¹ Ibid; Chayes & Handler Chayes op cit note 230 at 13.

²⁵² Mitchell op cit note 196 at 9.

²⁵³ Ibid at 14; Ronald B. Mitchell and Abram Chayes 'Improving Compliance with the Climate Change Treaty' in Henry Lee (ed) *Shaping National Responses to Climate Change: A Post- Rio Policy Guide* (1995) at 120.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

transparency and specificity of the rules or regime, can also promote compliance.²⁵⁶ This is because these features enable member states to detect violations sooner and also decrease the chances of inadvertence.²⁵⁷

Compliance could also be induced through the clear stipulation of the action required by the member state, as the state may find it easier to comply when there is an understanding of what is specifically required of them.²⁵⁸ The clear stipulation also reduces the room that non-compliant states have to argue their position of non-compliance due to misinterpretation or inadvertence.²⁵⁹ In consideration of sovereignty issues that may be faced when attempting to enforce treaty provisions, treaties may also redefine what constitutes an infringement of sovereignty by authorising certain actions in instances of non-compliance.²⁶⁰

George Downs' argument that the depth of cooperation of agreements affects the degree of compliance by states is also in support of the importance of primary rules.²⁶¹ Downs argues that the ambitiousness of agreements influences the rate of compliance, as well as the connection between compliance and enforcement.²⁶² If an agreement requires a modest or minor departure from the existing practice of a member state and has few enforcement provisions, the level of compliance is likely to be higher.²⁶³ Whereas an agreement that demands more from member states and requires a greater shift in the existing practice of that state will tend to have lower levels of compliance, especially when enforcement mechanisms are absent.²⁶⁴

The compliance information system component is involved with the collection and dissemination of information.²⁶⁵ This aspect involves determining what the rules and processes for reporting will be and how collected data will be analysed to determine sources of non-compliance.²⁶⁶ It is within this component that the monitoring system will be determined. Establishing a monitoring system involves determining matters such as who will monitor, how and when will information be collected. With respect to who will monitor, Simon Chesterman advances various actors that can fulfil this role. These actors include the community secretariat, an independent regional

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Mitchell op cit note 196 at 18.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ See Donoghue, Kingsbury, Young et al. op cit note 151 at 59.

²⁶² Ibid.

²⁶³ Ibid; Mitchell op cit note 69 at 222.

²⁶⁴ Ibid.

²⁶⁵ Mitchell op cit note 196 at 14; Mitchell & Chayes op cit 253 at 120.

²⁶⁶ Ibid.

mechanism, a regional political mechanism, self-monitoring, peer monitoring, civil society, private enterprises and individuals.²⁶⁷

The third element, the non-compliance response system, then deals with what happens in instances of non-compliance.²⁶⁸ The built-in responses to non-compliance could range from measures to assist non-compliant states, such as burden sharing, to sanctions.²⁶⁹ Financial burden-sharing as a built-in response would enable states that have the will to comply, but not the capacity, to receive financial assistance from other states and thus enable compliance.²⁷⁰ This would, however, be dependent on the willingness and ability of states to provide such assistance and would also be impacted by possible problems of free-riding.²⁷¹

2.5.4.2 Coercive Enforcement Model

Various models have been developed over the years to promote compliance with international agreements, and the coercive enforcement model is one of them. The coercive model of enforcement advances that compliance can be induced through monitoring and sanctions.²⁷² This argument is based on the premise that, at least in collaboration games, states are likely not to comply with their obligations if their interests will be better met by non-compliance and so enforcement is needed as a deterrent.²⁷³ It is advanced that monitoring increases transparency and exposes possible defectors whilst sanctions make non-compliance less attractive.²⁷⁴ Sanctions can be categorised into three groups: treaty-based sanctions, membership sanctions, and unilateral sanctions. Treaty-based sanctions are military or economic sanctions that are authorised by the treaty instrument to punish violations of the norms established by the treaty.²⁷⁵ This includes dispute settlement mechanisms. Membership sanctions entail the expulsion or suspension of rights and privileges of a member state of the treaty.²⁷⁶ Membership sanctions can include the violating member state not being able to vote or participate in the governance of the community, as well as

²⁶⁷ Simon Chesterman *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN* (2015) at 81.

²⁶⁸ Mitchell op cit note 196 at 14; Mitchell & Chayes op cit 253 at 120.

²⁶⁹ Ibid.

²⁷⁰ Mitchell op cit note 69 at 18.

²⁷¹ Ibid.

²⁷² Jonas Tallberg 'Paths to Compliance: Enforcement, Management and the European Union' (2002) 56 *International Organization* 609 at 611.

²⁷³ Ibid.

²⁷⁴ Ibid; Mitchell op cit note 69 at 19.

²⁷⁵ Chayes & Handler Chayes op cit note 230 at 1137.

²⁷⁶ Ibid; Tseming Yang 'International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements' (2006) 27 *Michigan Journal of International Law* 1131 at 1136.

expulsion from the community.²⁷⁷ However, these measures may prove ineffective if the benefits of the community are not valuable to the member state.²⁷⁸

Unilateral sanctions entail coercive action that is not expressly authorised by the treaty but applied unilaterally or by several member states in concert to bring a member state into compliance.²⁷⁹

Unilateral sanctions may include actions such as reciprocal non-compliance. Guzman argues that one member state complying with obligations created by an agreement will induce other member states to comply with obligations of the agreement.²⁸⁰ In the instance of non-compliance, if the long-term gains of compliance are greater than the short-term gains of non-compliance, the other states can threaten to terminate their own compliance should a member state fail to comply.²⁸¹ However, reciprocity is not guaranteed to ensure compliance. For instance, if a state threatening non-compliance lacks credibility or if the gains from non-compliance are greater than those from compliance, a state may not be deterred from non-compliance.²⁸²

Unilateral sanctions can also take the form of retaliation, which refers to the decision of a state to impose sanctions in the instance of non-compliance by another state.²⁸³ Retaliation can serve two functions. Retaliation can be used to create the reputation of the retaliating state as one that will react when its legal rights are compromised.²⁸⁴ Through a reputation of retaliation, a retaliating state may be able to induce its other member states to be more compliant to obligations with that state.²⁸⁵ In addition, retaliation may serve as a tool in response to ongoing violations to persuade the violating state into compliance.²⁸⁶ However, retaliation is only effective if the non-compliant state is convinced that further sanctions will be imposed should the non-compliance continue.²⁸⁷ Retaliation is costly for the retaliating state.²⁸⁸ The use of sanctions bears costs not only for the non-compliant state being sanctioned, but for the sanctioning state as well which may cause sanctions to be ineffective.²⁸⁹

²⁷⁷ Yang op cit note 276 at 1136.

²⁷⁸ Ibid.

²⁷⁹ Chayes & Handler Chayes op cit note 230; Yang op cit note 276 at 1135.

²⁸⁰ Guzman op cit note 240 at 44.

²⁸¹ Ibid.

²⁸² Ibid at 42.

²⁸³ Ibid at 46.

²⁸⁴ Ibid at 46 – 48.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Mitchell op cit note 69.

2.5.4.3 Managerial Model

The managerial model was designed by Abram Chayes and Antonia Chayes. This model follows a cooperative problem-solving approach, rather than the use of coercive mechanisms to ensure compliance.²⁹⁰ Chayes and Chayes have identified factors that result in non-compliance by member states. They advance that the broad and general language in which agreements are drafted may result in non-compliance.²⁹¹ Ambiguous wording of agreements may cause member states to adopt different positions as to the meaning of created rules which may result in states using the broad language to justify conduct that does not comply with the agreement.²⁹² The capacity of member states is another factor, as discussed above.

The managerial model is based on the premise that states tend to comply with international law obligations for three reasons namely efficiency, interests, and norms.²⁹³ In terms of efficiency, Chayes and Chayes argue that once states realise that a treaty establishing authoritative rule has been established they will recognise that compliance with such a rule will save transaction costs.²⁹⁴ With respect to interest, this model advances that due to the consensual nature of the agreements, problems of compliance and enforcement are likely to be easier to manage, even if the result of the treaty is not the ideal of the particular state.²⁹⁵ With respect to norms, the model advances that the existence of a legal obligation means states will comply unless there are strong countervailing circumstances.²⁹⁶ This is similar to Thomas Franck's legitimacy theory considered below.

The managerial model of compliance is criticised as being an incomplete model of compliance because it makes provision for instances where the agreements between states are based on coordination, but it does not make provision for instances when states have to act against their own interests.²⁹⁷

²⁹⁰ Guzman op cit note 207 at 1830; Chayes & Handler Chayes op cit note 230.

²⁹¹ Chayes & Handler Chayes op cit note 230 at 10.

²⁹² Ibid.

²⁹³ Guzman op cit note 207 at 1830; Chayes & Handler Chayes op cit note 230.

²⁹⁴ Mutai op cit note 3 at 3.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Guzman op cit note 207 at 1833.

2.5.4.4 Legitimacy Model

Thomas Franck introduced the hypothesis that states obey rules because they perceive the rule and its institutional background to have a high degree of legitimacy.²⁹⁸ Legitimacy refers to the properties of a rule that exert a pull towards compliance with the rule.²⁹⁹

Franck argues that four factors, namely determinacy, symbolic validation, coherence, and adherence, affect the degree of legitimacy of a rule.³⁰⁰ Determinacy refers to the ability of a rule to convey a clear message and appear transparent in such a way that those to whom the rule is addressed will know exactly what is expected of them.³⁰¹ Furthermore, the rule must clearly communicate what conduct is permitted and what conduct is not permitted.³⁰² Through this transparency, states would know exactly what is required of them which can aid compliance and also reduce the chances of states arguing non-compliance on the basis of a lack of certainty.³⁰³ The failure of a rule to be textually determinate can be overcome if the rule can be clarified through legitimate procedures, for example clarification through a legitimately recognised authority such as a court.³⁰⁴

Whilst determinacy deals with the linguistic component of legitimacy, symbolic validation is considered to be the cultural and anthropological component of legitimacy.³⁰⁵ Symbolic validation considers the extent to which a state can communicate a signal that serves as a cue to elicit compliance.³⁰⁶ In addition to determinacy and symbolic validation, Franck advances that coherence is a factor that can impact legitimacy. Legitimacy is impacted by coherence in the sense that a rule will be considered more legitimate if the applicable principles and procedures are followed in like cases.³⁰⁷ Finally, Franck advances that a primary rule that adheres to the procedural and institutional framework of an organised community is more likely to obligate states to comply.³⁰⁸

This theory is criticised for failing to provide why legitimacy leads to compliance.³⁰⁹ Furthermore, it is argued that the existence of a legal obligation in and of itself translates to a presumption of

²⁹⁸ Ibid at 1834.

²⁹⁹ Thomas M. Franck *The Power of Legitimacy Among Nations* (1990) 25; Thomas M. Franck 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *The American Journal of International Law* 88 at 93.

³⁰⁰ Guzman op cit note 207 1826 at 1834.

³⁰¹ Franck op cit 299 at 713.

³⁰² Ibid.

³⁰³ Franck op cit note 299 at 50.

³⁰⁴ Ibid.

³⁰⁵ Franck op cit note 299 at 716.

³⁰⁶ Franck op cit note 299 at 92.

³⁰⁷ Franck op cit note 299 at 741.

³⁰⁸ Franck op cit note 299; Franck op cite note 299 at 751.

³⁰⁹ Guzman op cit note 207 at 1834.

compliance.³¹⁰ This is linked to the principle in international law of *pacta sunt servanda* which means treaties are to be obeyed.³¹¹ Therefore states may comply with obligations if it is efficient to do so.

2.5.4.5 Consent Model

The consent model is based on the notion that states are not bound by any obligation to which they did not consent.³¹² This approach advances that once states enter into agreements, states should obey the rules of the agreements because they consented. However, this approach does not go beyond this and does not make provisions for how states should obey these agreements.³¹³ Furthermore, mere consent may not be sufficient reason for states to comply. Similarly, to issues of will and capacity, a state may give consent to an agreement but may find itself in a position where it is not able to comply or will be better served by not complying.³¹⁴

2.5.5 Test of Compliance

Having considered the various aspects relating to compliance, this section now turns to the question of how to test or determine compliance. As with all other aspects relating to compliance, there are various facets to consider with respect to the test of compliance. The test of compliance can be deemed two-fold in nature as it entails analysing both formal and actual compliance.

Formal compliance involves examining the regulatory framework a member state has put in place in accordance with the agreement it is party to.³¹⁵ Thus, formal compliance focuses on analysing compliance by member states. Actual (informal) compliance examines whether the private actors in the member states are complying with the regulations and as such fulfilling the laws.³¹⁶ Through testing actual compliance one recognises that whilst states are actors in implementing international law, there are other actors within member states that must put the rules created by international law into practice. Member states may enact laws and create the required regulatory framework, but these laws will only make a difference if they are followed by the relevant actors within the states.

For there to be progress in resolving collective challenges the rules created need to be conformed with collectively by all member states, such that agreements concluded may address these collective

³¹⁰ Chayes & Handler Chayes op cit note 230 at 8.

³¹¹ Ibid.

³¹² Guzman op cit note 207 at 1833.

³¹³ Ibid at 1834.

³¹⁴ Andrew Guzman 'The Consent Problem in International Law' available at https://escholarship.org/content/qt04x8x174/qt04x8x174_noSplash_5221402d70d7d0b5afbb467a7a464009.pdf, accessed on 18 March 2021.

³¹⁵ Baradaran et al. op cit note 79 at 25.

³¹⁶ Ibid.

challenges.³¹⁷ Compliance should therefore not only be considered with respect to one state but rather the compliance of all member states to a regional agreement must be considered. It is also important to recognise the existence of extenuating circumstances that may justify deviation from compliance. Situations in which extenuating circumstances limit the ability of a state to comply give rise to the question of what amounts to an acceptable level of compliance.

In addition to the above mentioned, a distinction has been made between first- and second-order compliance. First-order compliance refers to compliance with standing substantive rules embodied in agreements.³¹⁸ Whilst second-order compliance is compliance with the authoritative decision of a third party such as a court of justice of a community.³¹⁹

In analysing compliance, this research will look at formal compliance and also cover first- and second-order compliance. Such an approach will compliment the chosen approach of analysing effectiveness based on the legal oriented approach and the problem-solving approach.

2.6 CONCLUSION

Regional integration efforts can be viewed as an attempt to use law to further development. This is because the foundation of regional integration is legal agreements between states. However, the conclusion of such agreements is simply the beginning of the process of regional integration or cooperation. Once these agreements have been concluded, member states must take measures to give effect to regional policy at the national level.

The concepts of effectiveness, compliance and implementation are closely connected. Effectiveness is a multifaceted concept that is not easily determined. Although these concepts can be used independently to analyse regional economic communities, compliance and implementation can also be viewed as components in the analysis of the effectiveness of RECs. For instance, even though implementing measures does not equate to an effective community, having measures in place does create an environment for regional policies to have national impact. Beyond the implementation of measures is the need to comply with regional policies. For example, if a regional policy requires member states to reduce tariffs on certain products, a member state would need to enact legislation to such an effect and also ensure that in practice, the legislation is complied with. Therefore, member states need not only carry out implementation but must comply as well.

³¹⁷ Afadameh-Adeyemi op cit note 76 at 8.

³¹⁸ Simmons op cit note 198 at 78.

³¹⁹ Ibid.

Implementation and compliance cannot be viewed only from a theoretical perspective as there are practical steps that need to be taken as well. For one thing, states have varying approaches towards international and regional agreements. As was highlighted in the chapter, states may adopt realist, rationalist, liberalist and norm-drive approaches towards international commitments. These approaches play a role in implementation and compliance. For instance, if a state only acts in its best interests and the regional policies do not meet those interests or are outweighed by national interests, a state is not compelled to comply which is why compliance systems are necessary. Thus, the behaviour of states should inform the design of community frameworks. Other practical considerations include interest, capacity and intent of member states.

As mentioned earlier, effectiveness for the purpose of this research will adopt a hybrid approach combining the legal oriented approach, looking at whether a rule has been complied with, and the problem-solving approach, looking at whether the problem is being addressed. The definition of compliance adopted in this research focuses on whether rules of an agreement have been complied with (first-order compliance) and whether authoritative decisions have been complied with (second-order compliance). Understanding compliance levels and the factors that affect compliance will enable decision makers to determine measures needed to induce or enforce compliance, thus improving effectiveness.

In an attempt to address the challenges faced in implementation, compliance and ultimately effectiveness, various approaches have been advanced as methods of inducing compliance. The compliance systems approach advanced by Ronald B. Mitchell is a broader concept that encompasses both the managerial and enforcement models of inducing compliance. The compliance systems approach will be used to analyse the legal and institutional frameworks of the selected RECs.

3 CHAPTER THREE: UNDERSTANDING REGIONAL INTEGRATION IN AFRICA

3.1 INTRODUCTION

States in Africa have cooperated extensively in one way or another to achieve certain goals. For example, during the period of colonialism African states were grouped to increase the profits of colonial powers.³²⁰ Upon gaining independence, leaders of African states continued to work together with the aim of uniting the continent and collectively addressing the needs of the continent through regional integration. These continued efforts to work together are in recognition of the challenges many African states face that place an additional strain on their already limited resources. Some common challenges include small populations, low incomes, small domestic markets, inadequate production structures, and low productivity. As a result of this, regional integration has been viewed as a way of addressing these challenges due to the benefits that can be gained from it. Within the African context, regional integration would, amongst other benefits enable states to benefit from economies of scale and increased competition; strengthen the bargaining power of African states on the international market; and enable states to pool and share resources to aid development.

This chapter will provide a background into regional integration initiatives in Africa. It will look at the history of regional integration on the continent, the approach that has been followed, and the different steps that have been taken towards African unity. This chapter will include an overview of continental initiatives such as the African Union (hereafter ‘AU’) and the African Continental Free Trade Area (hereafter ‘AfCFTA’), and regional initiatives such as the Southern African Development Community (hereafter ‘SADC’) and the Tripartite Free Trade Area (TFTA). The objective of this chapter is to provide an understanding of some of the efforts that have been made to integrate the continent to provide a deeper understanding of the state of regional integration on the continent today.

3.2 PAN-AFRICANISM AND REGIONAL INTEGRATION

The process of integrating and unifying Africa is marked by the ideology of Pan-Africanism. Pan-Africanism has been defined as a cultural, political, and economic movement designed to regroup

³²⁰ Rudahindwa op cit note 124 at 12.

and mobilise Africans in Africa and the diaspora.³²¹ Pan-Africanism promotes the values that are a product of African civilisation and the struggles faced by the African people, including slavery, racism, and colonialism.³²² Although the ideology of Pan-Africanism originated outside of Africa,³²³ Pan-Africanism gained momentum in Africa as a political movement involved in the struggle against colonialism and the socio-economic development of Africa.³²⁴ The shared suffering between African states provided a basis for the growth of Pan-Africanism and motivation for states to stay together for a shared common cause.³²⁵

As states on the African continent pursued independence, the shared view held by leaders was that of the formation of a united Africa. However, there were opposing views on which course should be followed to create a united Africa and what form such a union should take. States were divided into two groupings, namely the Casablanca Bloc³²⁶ and the Monrovia Bloc³²⁷. The states that constituted the Casablanca Bloc sought to advance the ideology of Pan-Africanism by advocating for the immediate political and economic integration of the African continent with the view of the formation of a United States of Africa.³²⁸ Kwame Nkrumah, who was one of the leading Pan-Africanists on the continent, advocated for the immediate and total integration of Africa politically and economically, putting forward that political unity was a prerequisite for economic unity to be effective.³²⁹

³²¹ Reiland Rabaka 'Introduction: On the Intellectual elasticity and political plurality of Pan-Africanism' in Reiland Rabaka (ed) *Routledge Handbook of Pan-Africanism* (2020) 8; Guy Martin 'Dream of Unity: From the United States of Africa to the Federation of African States' (2013) 12 *African and Asian Studies* 169 at 171; E.O. Ijeoma 'Re-Thinking Pan-Africanism: Dilemmas and Efforts Towards African Integration' (2007) 42 *Journal of Public Administration* 179 at 180.

³²² Martin op cit note 321 at 171.

³²³ The ideology of Pan-Africanism originated outside of Africa. The first Pan-African gatherings were held outside of Africa in locations such as London and New York. It was only at the sixth Pan-African congress held in New York, that Africans from Africa took part in the in the meetings. Eventually, Pan-African congresses were held in Africa.

³²⁴ Mohammed Bedjaoui 'Brief Historical Overview of Steps to African Unity' in Abdulqawi A. Yusuf and Fatsah Ouguergouz *The African Union: Legal and Institutional Framework – A manual on the Pan-African Organization* (2012) 9-23.

³²⁵ Mari Langerud *From the Organisation of African Unity to the African Union: From a policy of non-interference to a policy of non-indifference?* (unpublished Masters thesis, University of Oslo, 2016) at 24; Kay Mathews 'Renaissance of Pan-Africanism: The AU and the New Pan-Africanists' in John Akokpari, Angela Ndinga-Muvumba and Tim Murithi (Eds) *The African Union and its Institutions* (2008) at 32.

³²⁶ The Casablanca bloc comprised of seven states namely Algeria, Egypt, Ghana, Guinea, Libya, Mali and Morocco. Guinea and Mali, however, left the Casablanca Bloc and became part of the Monrovia Bloc.

³²⁷ The Monrovia Bloc was the result of two blocs joining forces, namely the Monrovia bloc and the Brazzaville Bloc. The Brazzaville bloc consisted mostly of Francophone states. The Monrovia bloc consisted of the following states after the merger; Cameroon, Central African Republic, Chad, Congo-Brazzaville, Cote d'Ivoire, Dahomey (Benin), Gabon, Upper Volta (Burkina Faso), Madagascar, Mauritania, Niger, Senegal, Congo, Ethiopia, Liberia, Nigeria, Sierra Leone, Somalia, Togo and Tunisia.

³²⁸ Martin op cit note 321 at 175.

³²⁹ Adeniyi S. Basiru, Mashud L.A. Salawu and Adewale Adepoju 'Radical Pan-Africanism and Africa's Integration: A Retrospective Exploration and Prospective Prognosis' (2018) 41 *Ufahamu: A Journal of African Studies* 103 at 110; Martin op cit 321 at 175.

The states that constituted the Monrovia Bloc represented the gradualists. The leaders of these states advocated for integration to take place gradually by first cooperating in areas such as transport, communications, and trade, with political integration being envisaged as the final stage of the process.³³⁰ It is clear to see that these two groupings held opposing views on the approach to be adopted in uniting Africa and as a result states could not agree on the nature of the organisation that was to be established pursuant to African unity.

In the years to follow, as a way of promoting cooperation between states, conferences were held for the leaders of all the independent African states. At the time of the first conference, held in 1961 in Liberia, twenty-seven African states had gained independence and had been expected to attend the conference.³³¹ However, the states that constituted the Casablanca bloc at the time did not attend the conference.³³² In the absence of the Casablanca Bloc states, the states in attendance held the unanimous view that a loose form of association of independent African states should be created rather than a political union.³³³ Great importance was placed on the principle of respect for territorial integrity, the political independence of each African state, and the principle of non-interference.³³⁴ The preference of states towards principles that prioritised national sovereignty is not surprising as states had recently gained independence and sought to limit any further interference. These views formed the basis of the subsequent meetings of the independent African states which sought to create a charter to reflect their shared objectives. In 1962, the Charter of the Organisation of African and Malagasy States (also known as the Lagos Charter) was signed by seventeen of the twenty-two states that attended the conference.³³⁵

Although the Casablanca Bloc did not attend the conferences held in 1961 and 1962, the states of the Casablanca Bloc attended the conference held in February 1963 in Addis Ababa. At this conference, the states in attendance adopted what is known as the Charter of the Organisation of African Unity.³³⁶ The Charter of the Organisation of African Unity largely reflected the views of the gradualists and created an organisation that was based on cooperation, the respect of sovereignty, and territorial integrity and the principle of non-interference in the affairs of states.³³⁷

³³⁰ Martin op cit note 301 at 175.

³³¹ T. O. Elias 'The Charter of the Organization of African Unity' (1965) 59 *The American Journal of International Law* 243 at 243-246.

³³² Basiru et al. op cit note 329 at 111; Elias op cit note 331 at 243-246.

³³³ Elias op cit note 331 at 243-246.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Basiru et al. op cit note 329 at 109; Elias op cit note 331 at 243-246.

³³⁷ Kelechi Johnmary Ani and Victor Ojaborotu 'Pan-Africanism, African Union and the Challenge of Transformative Development in Africa' (2017) 6 *Journal of African Union Studies* 5 at 17; Martin op cit note at 321.

The organisation established through the charter was called the Organisation of African Unity (hereafter 'OAU').

Through the above, we see that although there were differing views on what integration of the continent should look like, it was generally agreed upon that integration was necessary. The agreement to establish the OAU was a positive step because the states were able to agree on a starting point. Although the OAU reflected a more gradual approach to integration, it is important to realise that under the circumstances at the time, moving from newly independent states to complete political and economic continental unity would have come with challenges and been a lengthy process. Although the borders that created these independent states were the result of colonialism, the changes that occurred during that period and existing differences would have made immediate unity challenging. As integration is a process rather than a fixed state, it was important to start somewhere and build on that.

3.3 EFFORTS TOWARDS AN INTEGRATED CONTINENT

The need and desire to unite the continent has manifested in the formation of various initiatives, both at the continental and regional levels. The initial integration led by African leaders was through a gradual intergovernmental approach. This was done to protect national interests and sovereignty. However, these efforts have progressively deepened and the areas of cooperation have increased.

As will be evident, integration on the African continent has followed a fragmented approach. There are multiple integration initiatives, each with their own goals, objectives and structures. The history of integration at the continental and regional levels will now be considered. We will start by looking at continental initiatives, followed by some of the regional initiatives that are intended to be building blocks.

3.3.1 The Organisation of African Unity and the African Union

The OAU was established in 1963 in an effort to create unity, solidarity, and cooperation among African states.³³⁸ The OAU was established at a time when colonised African territories sought independence from colonial powers and independent states sought to strengthen sovereignty, thus

³³⁸ Biswaro op cit note 11 at 316.

the principles enshrined in the OAU Charter included promoting continental unity,³³⁹ defending African sovereignty³⁴⁰ and eradicating colonialism.³⁴¹

Membership to the OAU was restricted to independent sovereign African states.³⁴² This meant that territories that were under colonial rule or liberation movements could not become members.³⁴³ One example is the Republic of South Africa which was under the Apartheid regime at the time and was only able to become a member of the OAU in 1994 after Apartheid came to an end. The inclusion of this provision was in clear support of the OAU's objective to eradicate colonialism.³⁴⁴

In line with the commitment to eradicate colonialism, the OAU sought to support territories that had not yet gained independence and acted as a platform through which states could coordinate efforts to assist one another in gaining independence.³⁴⁵ Through the OAU, states that were independent committed to providing monetary support to nationalist and liberation movements to enable them to carry out independence struggles.³⁴⁶ Furthermore, on an international level, independent African states were to undertake concerted efforts to put pressure on the international community to bring an end to the rule of colonising powers.³⁴⁷ In the decades to follow, the OAU engaged in a quest for independence for all African countries.

The principles of national sovereignty and territorial integrity were further core principles of the OAU. Despite being independent states when the OAU Charter was enacted, the signatory states were politically weak and underdeveloped.³⁴⁸ As a result, leaders of the states that signed the OAU Charter were greatly concerned about protecting state sovereignty, not only from powers from outside Africa but from other African states as well.³⁴⁹ These concerns were reflected in the OAU Charter, which required member states to respect the sovereign equality of all member states³⁵⁰

³³⁹ Article II(1)(a) of the OAU Charter stipulates that to promote the unity and solidarity of the African states is one of the purposes of the organisation.

³⁴⁰ Article II(1)(c) of the OAU Charter stipulates that defending the sovereignty, territorial integrity and independence of African states is one of the purposes of the organization. This principle is also echoed in the preamble of the OAU Charter.

³⁴¹ Article II(1)(d) of the OAU Charter stipulates that eradication of all forms of colonialism from Africa is one of the purposes of the organisation.

³⁴² Article IV of the OAU Charter.

³⁴³ Zdenek Cervenka *The Unfinished Quest for Unity: Africa and the OAU* (1977) at 16.

³⁴⁴ Article III(6) of the OAU Charter stipulates that absolute the dedication to the total emancipation of African territories that were still dependent is one of the principles of the organization.

³⁴⁵ Biswaro op cit note 11 at 318.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Langerud op cit note 325.

³⁴⁹ Biswaro op cit note 11 at 316; Langerud op cit note 325.

³⁵⁰ Article III(3) of the OAU Charter.

and to not interfere in the internal affairs of other states.³⁵¹ Furthermore, member states of the OAU had the goal of defending their sovereignty, territorial integrity, and independence as stipulated in Article II of the Charter.³⁵²

The importance the OAU placed on these principles impacted conflict resolution efforts by the organisation. When the OAU was in operation, conflicts arose not only between states but within states as well.³⁵³ However, amidst this unrest, the role of the OAU or independent African states was restricted in the interest of upholding the principles of sovereignty and non-interference.³⁵⁴ In instances when the OAU did get involved, actions taken were limited to mediation due to the principle of non-interference.³⁵⁵ The lack of action by the OAU led to states seeking assistance from powers outside the continent such as from organisations like the United Nations (hereafter 'UN'). Considering the objective of the OAU to create unity and solidarity among African states, it is difficult to see how this could have been achieved if the community could not aid when conflict arose.

The OAU Charter made provision for four principal institutions. First, the Assembly of Heads of State and Government was the supreme organ composed of heads of state and government.³⁵⁶ The Assembly had the role of discussing matters of common interest to Africa and coordinating and harmonising the policy of the organisation.³⁵⁷ Second, the Council of Ministers was composed of foreign ministers and had the responsibility of preparing conferences of the Assembly.³⁵⁸ The Council also had the responsibility of implementing decisions of the Assembly.³⁵⁹ Third, the General Secretariat, headed up by a Secretary General.³⁶⁰ Lastly, the Commission of Mediation, Conciliation and Arbitration was the institution responsible for settling disputes between the member states.³⁶¹ Such an approach to dispute meant that only alternative dispute resolution was available and only accessible by member states.

³⁵¹ Article III(2) of the OAU Charter.

³⁵² Article II(1)(c) of the OAU Charter.

³⁵³ Langerud op cit note 325.

³⁵⁴ Georges Nzongola-Ntalaja 'Pan-Africanism since decolonization: from the Organisation of African Unity (OAU) to the African Union (AU)' (2014) 1 *African Journal of Democracy and Governance* 31 at 33; Corinne A. Packer & Donald Rukare 'The New African Union and its Constitutive Act' (2002) 96 *The American Journal of International Law* 365 at 367.

³⁵⁵ Langerud op cit note 325.

³⁵⁶ Article IX of the OAU Charter.

³⁵⁷ Article VIII of the OAU Charter.

³⁵⁸ Article XII of the OAU Charter.

³⁵⁹ Article XIII of the OAU Charter.

³⁶⁰ Article XVI of the OAU Charter.

³⁶¹ Article XIX of the OAU Charter.

The establishment of the OAU was an important step in the pursuit of African unity, as it served as a platform for states with opposing views to work together in addressing the challenges the continent faced at the time. Looking at the history of the continent and the circumstances at the time the OAU was established, having a decentralised structure that did not bind member states was necessary to start the process of integration driven by African leaders. The priority of African leaders at that time was gaining independence and working together to achieve that. Being bound by a community at that point, may not have appealed to leaders. The OAU, with its principles and organization, managed to unite member states to work towards a goal and formed the foundation for further cooperation and integration.

In the years that the OAU was operational, colonialism on the continent was eradicated. However, the ability of the OAU to address the changes in prevailing conditions and to promote the economic development of the continent was questioned. The OAU was viewed as a voluntary organisation for cooperation between states that did not have supranational authority.³⁶² Considering that the purposes for which the organisation had been established became obsolete, the leaders of African states sought to establish a continental organisation that would focus more on the economic development of the continent. As such the Organisation of African Unity was replaced by the African Union (hereafter the 'AU').

The transition from the OAU to the AU was a gradual process the heads of African states undertook in recognition of the need to revise the political, legal, and institutional aspects of the existing continental organisation. The purpose of transforming the continental organisation was to establish an organisation that would be more effective in addressing the changing conditions within and outside of Africa.³⁶³

In 1999, the Heads of State and Government of the OAU held the Fourth Extraordinary Session of their Assembly in Sirte, Libya, and concluded the Sirte Declaration. The Sirte Declaration echoed the commitment of leaders of African states to strengthen unity and solidarity amongst the African people.³⁶⁴ At the extraordinary session, states decided to establish an African union that

³⁶² Tiyanjana Maluwa 'The Transition from the Organization of African Unity to the African Union' in Abdulqawi A. Yusuf and Fatsah Ouguergouz, *The African Union: Legal and Institutional Framework – A manual on the Pan-African Organization* (2012) 25-52; Martin op cit note 321; Edward Marinov The History of African Integration: A Gradual Shift from Political to Economic Goals available at https://www.researchgate.net/publication/303548370_The_History_of_African_Integration_-_A_Gradual_Shift_from_Political_To_Economic_Goals, accessed on 8 April 2019.

³⁶³ Cervenka op cit note 343; Justice op cit note 12.

³⁶⁴ Article 5 of the Sirte Declaration.

would be in line with the objectives of the Charter of the OAU and the provisions of the Treaty Establishing the African Economic Community.³⁶⁵

The Constitutive Act of the AU (hereafter ‘Constitutive Act’) was adopted in the year 2000, at the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU.³⁶⁶ In 2001, the Constitutive Act entered into force and the establishment of the AU was declared.³⁶⁷ However, the AU did not immediately replace the OAU. The Constitutive Act made provision for a transitional period of one year.³⁶⁸ Article 33 of the Constitutive Act stipulates that the Charter of the OAU was to remain operative for a transitional period of one year for the purpose of enabling the OAU/African Economic Community to undertake the necessary measures regarding the devolution of its assets and liabilities. The AU, therefore, became operational in 2002.

Although the OAU was replaced by an entirely new organisation, some of the principles and objectives embodied in the OAU Charter were carried to the Constitutive Act. For instance, Article 4 of the Constitutive Act incorporates the principles of the OAU, including principles of sovereign equality,³⁶⁹ non-interference,³⁷⁰ and peaceful resolution of settlements.³⁷¹ The incorporation of these principles highlights aspects of the African integration process that were not only relevant at the time the OAU was operational but that continue to be principles in the African integration process. Whilst the establishment of the AU marked a new phase of integration of the continent, the retention of some of the principles raises questions of the extent to which member states were prepared to achieve the levels of integration envisioned by the AU.

The aforementioned reveals that regional integration is underpinned by two contradicting ideologies. On the one hand is the idea of a united Africa and on the other is a strong emphasis on protection of national sovereignty. As a result, the community’s effectiveness has been impacted. The AU will be discussed in detail in a chapter to follow.

³⁶⁵ Article 8(i) of the Sirte Declaration.

³⁶⁶ Maluwa op cit note 362.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Article 4(a) of the Constitutive Act provides one of the principles of the AU as follows “sovereign equality and interdependence among member states of the Union”.

³⁷⁰ Article 4(g) of the Constitutive Act provides one of the principles of the AU as follows “non-interference by any member state in the internal affairs of another”.

³⁷¹ Article 4(e) of the Constitutive Act provides one of the principles of the AU as follows “peaceful resolution of conflicts among member states of the Union through such appropriate means as may be decided upon by the Assembly”.

3.3.2 Economic Integration on the Continent

As African states pursued unity and cooperation on the continent, there was a growing interest in the economic development of the continent. The African continent had been divided into numerous states which were considered not large enough to construct a modern economy independently.³⁷² The leaders of African states recognised that although the continent was rich in resources, these resources were divided between states which did not have the capacity independently to achieve economic development.³⁷³ This not only strengthened the argument for continental integration but created a strong argument for emphasis on the economic integration of the continent.

Multiple meetings were held that focused specifically on strategising towards improving the economic development of the continent. One such meeting resulted in the adoption of the Addis Ababa Declaration of 1973, which reflected the recognition by Heads of State of the ineffectiveness of the measures adopted in the past decade to combat under development and the inability of the international community to create favourable conditions for the development of Africa.

Over time, the meetings resulted in the decision to establish a continent-wide economic community, namely the African Economic Community (hereafter 'AEC'). The Treaty Establishing the African Economic Community (hereafter the 'Abuja Treaty') was signed in 1991, by forty-one of the fifty-one member states of the OAU. The Abuja Treaty came into force in 1994. Peculiarly, the decision to establish a continent-wide economic community came before the decision to transform the OAU to the AU. This indicates a strong desire by member states to cooperate in economic matters first and foremost.

The overall aim of the Abuja Treaty is the establishment of an African Common Market (hereafter 'ACM').³⁷⁴ In order to achieve this, some of the objectives of the AEC include the promotion of the economic, social, and cultural development and integration of the continent;³⁷⁵ and the

³⁷² Mathews op cit note 325 at 31; Kwaku Danso 'The African Economic Community: Problems and Prospects' (1995) 42 *Africa Today* 31 at 35.

³⁷³ Ibid.

³⁷⁴ Preamble of the Abuja Treaty reads as follows:

'Considering the "Monrovia Declaration of Commitment on the Guidelines and Measures for National and Collective Self-reliance in Economic and Social Development for the Establishment of a New International Order" and which, inter-alia, calls for the Creation of an African Common Market as a prelude to an African Economic Community'.

³⁷⁵ Article 4(1)(a) of the Abuja Treaty.

establishment of a framework for the development, mobilisation, and utilisation of the human and material resources of the continent in order to achieve self-reliant development.³⁷⁶

Article 6 of the Abuja Treaty makes provision for a linear process to be followed in establishing the community within a period of 34 years.³⁷⁷ The first stage entails the strengthening of existing regional economic communities and the establishment of new economic communities in regions where such communities do not exist.³⁷⁸ The second stage involves reducing barriers between the regional economic communities by stabilising tariff and non-tariff barriers, customs duties, and internal taxes between states.³⁷⁹ The third stage entails the establishment of Free Trade Areas within each of the regional economic communities.³⁸⁰ The fourth stage envisages the establishment of a continental customs union through the adoption of a common external tariff.³⁸¹ The fifth stage entails the establishment of an ACM through the adoption of common policy in areas such as agriculture and energy; the harmonisation of monetary, financial and fiscal policies; and the application of the principle of free movements of persons.³⁸² The sixth and final stage involves the complete economic integration of Africa through the creation of an African Monetary Union, a single African Central Bank, and a single African Currency.³⁸³

The progress made towards establishing the AEC can serve as an example of non-compliance and lack of implementation. The Abuja Treaty envisages the AEC to be established within 34 years, that is by 2028. This was to be achieved through achieving the set milestones. However, the milestones have not been achieved within the set targets. For instance, not all recognized RECs have established free trade areas as envisaged in the third stage and the stipulated period of ten years has been exceeded. The fact that the Abuja Treaty sets a timeframe within which milestones are to be achieved is commendable and important as it can enable monitoring. However, the Abuja Treaty simply states that the community will be responsible for evaluating activities of RECs and that the Secretary General has the responsibility of ensuring community decisions are implemented.³⁸⁴ It fails to provide how the achievement of milestones will be monitored which is a major oversight if the goals are to be achieved within set timeframes.

³⁷⁶ Article 4(1)(b) of the Abuja Treaty.

³⁷⁷ Article 6(1) of the Abuja Treaty.

³⁷⁸ Article 6(2)(a) of the Abuja Treaty.

³⁷⁹ Article 6(2)(b) of the Abuja Treaty.

³⁸⁰ Article 6(2)(c) of the Abuja Treaty.

³⁸¹ Article 6(2)(d) of the Abuja Treaty.

³⁸² Article 6(2)(e) of the Abuja Treaty.

³⁸³ Article 6(2)(f) of the Abuja Treaty.

³⁸⁴ Articles 22(2)(a) and 88(3) of the Abuja Treaty.

In line with the goal of continental economic integration, the AfCFTA was established.³⁸⁵ The AU Assembly envisioned the establishment of AfCFTA by the year 2017 through a sequence of steps. The first step was to be the finalisation of the Tripartite Free Trade Area (hereafter ‘TFTA’) between the East African Community, the Common Market for Eastern and Southern Africa and the Southern African Development Community by 2014.³⁸⁶ The second step was to be the completion of Free Trade Areas by regional economic communities that were not part of the TFTA by 2014.³⁸⁷ The third step would be the consolidation of the TFTA and the free trade areas into a Continental Free Trade Area between the years 2015 and 2016, a step not envisaged by the Abuja Treaty.³⁸⁸ The final step, to be completed by 2017, was to be the establishment of the Continental Free Trade Area.³⁸⁹

The negotiations to establish the AfCFTA were launched in 2015 and were divided into two phases. The AfCFTA was finally launched at the 10th Extraordinary Session of the AU Assembly held in March 2018, through the adoption and signing of the founding agreements.³⁹⁰

Ordinarily, the establishment of a Free Trade Area entails the removal of tariffs among member states and has a limited scope of trade in goods. However, once in force, the AfCFTA will have a wider scope as it will not only cover trade in goods but will also regulate trade in services, investment, intellectual property rights, and competition policy.³⁹¹ Another feature of the AfCFTA worth noting is that the Agreement Establishing the AfCFTA (hereafter the ‘AfCFTA Agreement’) places the responsibility of establishing and maintaining the institutional framework for the implementation and administration of the AfCFTA on the member states.³⁹² Erasmus advances that the AfCFTA Agreement will not be self-executing but will rather be a member-driven framework arrangement, whose implementation will require collective and individual follow-up action by the member states.³⁹³

³⁸⁵ African Union Declaration on Boosting Intra-African Trade and the Establishment of a Continental Free Trade Area (CFTA) Assembly/AU/Decl.1(XVIII) available at https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf, accessed on 24 May 2019.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Ibid.

³⁹⁰ The Agreements that were adopted at the time were the Agreement Establishing the African Continental Free Trade Area, the Protocol on Trade in Goods, the Protocol on Trade in Services and the Protocol on Rules and Procedures on the Settlement of Disputes. Although the principal document of the AfCFTA is the Agreement Establishing the AfCFTA, the Protocols form an integral part of the Agreement, once adopted.³⁹⁰

³⁹¹ Article 6 of the AfCFTA Agreement.

³⁹² Article 4(g) of the AfCFTA Agreement.

³⁹³ Gerhard Erasmus ‘Ratification of the AfCFTA Agreement: What happens next?’ available at <https://www.tralac.org/documents/publications/working-papers/wp2019/2821-s19wp022019-erasmus-ratification-of-the-afcfta-agreement-what-happens-next-30042019-fin.html>, accessed on 24 May 2019.

To date, fifty-four of the fifty-five African states that are members of the AU, have signed the consolidated text of the AfCFTA Agreement.³⁹⁴ However, signing the AfCFTA Agreement does not mean that states are bound by it. In order for the agreement to be binding, the signatory states are required to ratify it and the agreement must enter into force.³⁹⁵ Article 23(1) of the AfCFTA Agreement stipulates that the AfCFTA will enter into force thirty days after the twenty-second instrument of ratification is deposited to the Chairperson of the AU Commission. The implication is that for the agreement to take effect, of the fifty-four states that have signed the agreement, twenty-two must deposit ratifications. The twenty-second ratification was deposited by the Saharawi Republic on 29th April 2019, as such the date for the AfCFTA Agreement to enter into force was set to be 30th May 2019.³⁹⁶

It is worth noting that the establishment of the AfCFTA has not followed the stages envisioned by the AU Assembly. For one thing, the TFTA is yet to be finalized and become operational. Furthermore, as aforementioned, not all RECs have established Free Trade Areas. The formation of a continental Free Trade Area is a further attempt by African leaders to strengthen the efforts of economic integration. The AfCFTA seeks to create a single market for goods and services; to create a liberalised market for goods and services; to contribute to the movement of capital and natural persons; to promote the development of member states; and to lay the foundation for the establishment of a Continental Customs Union, among others.³⁹⁷

The AfCFTA has also made provision for a dispute settlement mechanism that will be used to resolve disputes arising between the member states under the AfCFTA Agreement. The dispute settlement mechanism provides for the establishment of a Dispute Settlement Body (hereafter the 'DSB') that has the authority to make recommendations and rulings.³⁹⁸ Furthermore, the DSB may authorise the suspension of concessions and other obligations in instances where there is a dispute.³⁹⁹ It is noteworthy that only member states can institute proceedings in the DSB. This means that although natural and legal persons may be the most impacted by free trade, they do not have access to the DSB.

³⁹⁴ African Union 'List of Countries which have signed, ratified/acceded to the Agreement Establishing the African Continental Free Trade Area' available at <https://afcfta.au.int/en/documents/2020-12-28/state-parties-ratification-status-list>, accessed on 11 August 2021.

³⁹⁵ Erasmus op cit note 393.

³⁹⁶ AfCFTA Agreement Secures Minimum Threshold of 22 Ratifications as Sierra Leone and the Saharawi Republic deposit instruments available at <https://au.int/en/pressreleases/20190429/afcfta-agreement-secures-minimum-threshold-22-ratification-sierra-leone-and>, accessed on 23 May 2019.

³⁹⁷ Article 3 of the AfCFTA Agreement.

³⁹⁸ Article 4(2) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

³⁹⁹ Article 5(3) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

It is recognized that the approach to Africa's integration has been fragmented. In addition to this, the aforementioned shows that the approach is disorderly to some extent. This is because, first, the AEC is intended to be built through the RECs but provision hasn't been made to keep track of progress or to provide assistance and direction to the RECs. Second, before the achievement of establishing FTAs in each REC, a continental FTA has been established which was not according to the plan laid out. Whilst the establishment of a continental FTA is progress and commendable, had appropriate frameworks been put in place to support the goals of the Abuja Treaty, the continental FTA could have been built on the RECs as planned which could have eliminated some of the processes needed to establish the continental FTA.

3.4 REGIONAL ECONOMIC COMMUNITIES – THE BUILDING BLOCS OF AFRICAN INTEGRATION

In addition to integration at the continental level, states on the continent have pursued integration in smaller groups, usually based on proximity. Regional economic communities have been recognised as the key components of both the AU and the AEC. The Abuja Treaty specifically emphasises the importance of strengthening existing regional economic communities and establishing new communities in regions where they do not exist, to gradually establish the AEC.⁴⁰⁰ As it stands, Africa has fourteen Regional Economic Communities (hereafter 'REC'), but only eight are recognised as building blocs of the AEC.⁴⁰¹ The recognised eight are the Arab Maghreb Union (hereafter 'UMA'), the COMESA, the Community of Sahel-Saharan States (hereafter 'CEN-SAD'), the EAC, the Economic Community of Central African States (hereafter 'ECCAS'), the Economic Community of West African States (hereafter 'ECOWAS'), the Intergovernmental Authority on Development (hereafter 'IGAD'), and SADC.⁴⁰²

The existence of many RECs and a lack of rules to regulate membership in RECs has resulted in many African states holding membership in more than one REC. This leads to complications such as states having multiple and often contradictory obligations, states being liable for multiple membership fees, and uncertainty about which trade rules to apply when trading with other states. Such a set up undoubtedly has a negative impact on compliance and implementation.

In recognition of the role that has been assigned to RECs as building blocs, this research seeks to analyse whether RECs have frameworks that make them effective. This research will not

⁴⁰⁰ Article 6 and 28 of the Abuja Treaty both contain provisions regarding this.

⁴⁰¹ African Union 'Regional Economic Communities (RECs)' available at <https://au.int/en/organs/recs>, accessed on 10 February 2022.

⁴⁰² Ibid.

endeavour to assess all recognised eight RECs. Rather, this research will focus on three communities, namely SADC, COMESA and the EAC, each of which have adopted frameworks to meet their specific needs. A brief overview of each of these RECs and how they have developed over the years follows and the frameworks of each will be analysed in Chapter 5.

3.4.1 The Southern African Development Community

The Southern African Development Community was established as the successor of the Southern African Development Coordination Conference (hereafter the 'SADCC'). The SADCC was an initiative established in 1980 by Southern African states⁴⁰³ to reduce the economic dependence of those states on the South African government at the time. The member states of the SADCC sought to attain economic independence by pursuing regional cooperation and adopting an approach that focused on project coordination.⁴⁰⁴ This was done by specifying the economic activities and development projects that were to be pursued by the community and then allocating a specific sector to each member state for coordination.⁴⁰⁵

The replacement of the SADCC by SADC in 1992 indicated a shift in the principles that guided the integration of the Southern African region. Instead of focusing on a goal of self-reliance, the community emphasized the role the market could play in the development process.⁴⁰⁶ Furthermore, the leaders recognised the importance of trade liberalisation, and this influenced the decision to move from the regional economic cooperation approach to an integration model that was trade-based.⁴⁰⁷

The adoption of the Treaty of the Southern African Development Community (hereafter the 'SADC Treaty') had the implication of creating a legally binding instrument between the member states of the community and establishing a centralised structure for the community. This was in contrast to the framework of the SADCC which adopted a decentralised approach to integration and did not have an instrument to bind its member states. Member states were therefore bound to observe the objectives and principles of SADC and in principle could not place national interests

⁴⁰³ The member states of the SADCC were Botswana, Tanzania, Mozambique, Zambia, Zimbabwe, Angola, Lesotho, Malawi and Swaziland.

⁴⁰⁴ Kyu Deug Hwang 'The Historical Evolution of SADC(C) and Regionalism in Southern Africa' (2007) 10 *International Area Review* 55 at 64.

⁴⁰⁵ Ibid.

⁴⁰⁶ Arigo Pallotti 'SADC: A development community without a development policy?' (2004) *Review of African Political Economy* at 516.

⁴⁰⁷ Peters-Berries op cit note 4.

above the interests of the community. Furthermore, SADC was established as an international organisation with legal personality.⁴⁰⁸

The SADC seeks to promote sustainable economic growth and socio-economic development to ensure poverty alleviation and enhance the standard and quality of life of the people of Southern Africa; promote self-sustaining development on the basis of self-reliance and interdependence of member states; and promote the utilisation of resources of the region.⁴⁰⁹ The principles that guide the activities of SADC include sovereign equality of member states; solidarity, peace and security; human rights, democracy and the rule of law; equity, balance and mutual benefit; and peaceful settlement of disputes.⁴¹⁰ In pursuit of economic integration, SADC has sought to eliminate barriers between states. To this end, the SADC Free Trade Area was launched in 2008 and a customs union is yet to be established.

SADC has established an institutional framework that is intended to aid in the community's operations. To some extent, SADC established three branches of government, namely the executive, legislative and judicial organs. The Summit of Heads of State or Government is the supreme policymaking organ of the community and determines the overall policy direction of SADC.⁴¹¹ The Summit further adopts legal instruments for the implementation of SADC Treaty provisions.⁴¹² The Summit is, however, permitted to delegate the authority to adopt legal instruments to other institutions of the community that it may deem fit.⁴¹³ Decisions of the Summit are taken by consensus and have a binding effect.⁴¹⁴

The SADC Parliamentary Forum is the organ that represents the people through elected representatives. Although the word 'parliamentary' could imply that this organ fulfils the role of a community parliament, reading the relevant legal instruments reveals that the SADC PF is more of a platform for parliamentarians to cooperate and engage with the community. The SADC PF does not have legislative functions, which as seen above, lie with the Summit.

The SADC Tribunal is the intended judicial organ. It is responsible for ensuring that the provisions of the SADC Treaty are adhered to and properly interpreted.⁴¹⁵ The Tribunal has jurisdiction over the implementation of the SADC Treaty and Protocols relating to disputes between the member

⁴⁰⁸ Article 13(1) of the SADC Treaty.

⁴⁰⁹ Article 5 of the SADC Treaty sets out the objectives of the community.

⁴¹⁰ Article 4 of the SADC Treaty provides the principles of the community.

⁴¹¹ Article 10(2) of the SADC Treaty.

⁴¹² Article 10(3) of the SADC Treaty.

⁴¹³ Ibid.

⁴¹⁴ Article 10(9) of the SADC Treaty.

⁴¹⁵ Article 16(1) of the SADC Treaty.

states.⁴¹⁶ The decisions of the Tribunal are final and binding,⁴¹⁷ and member states and SADC institutions have an obligation to take all measures necessary to ensure the execution of the decisions of the Tribunal.⁴¹⁸ However, the Tribunal does not have any powers to enforce its decisions. The Tribunal was suspended in 2010 following a decision of the Summit subsequent to the Tribunal's decision in the case of *Mike Campbell (Pvt) Ltd. And Others v Republic of Zimbabwe*.⁴¹⁹ The details of this case will be discussed at a later stage in this research.

Other institutions include the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Sectoral and Cluster Ministerial Committees; the Standing Committee of Officials; the Secretariat; and the SADC National Committees.⁴²⁰ The Secretariat is the principal executive institution of SADC.⁴²¹ The Secretariat is led by the Executive Secretary⁴²² and is the community institution that plans and manages SADC programmes;⁴²³ monitors and evaluates the implementation of such programmes;⁴²⁴ harmonises the policies of member states;⁴²⁵ and performs general administration;⁴²⁶ among other functions.

The Council of Ministers consists of one minister from each member state.⁴²⁷ The Council has diverse functions which include to oversee the functioning and development of SADC;⁴²⁸ to oversee the implementation of SADC policies;⁴²⁹ and to direct, coordinate, and supervise the operations of the institutions of SADC that are subordinate to it.⁴³⁰ In light of its role in developing and implementing the common agenda of the community, the Council is regarded as the engine room of SADC.⁴³¹

3.4.2 The Common Market for Eastern and Southern Africa

Established in 1994, the leaders of the member states of the Common Market for Eastern and Southern Africa (hereafter the 'COMESA') envisaged the consolidation of economic cooperation

⁴¹⁶ Article 33 of the Protocol on the Tribunal in SADC.

⁴¹⁷ Article 38(3) of the Protocol on the Tribunal in SADC.

⁴¹⁸ Article 44(1) of the Protocol on the Tribunal in SADC.

⁴¹⁹ *Campbell* Supra note 66.

⁴²⁰ Article 9 of the SADC Treaty.

⁴²¹ Article 14(1) of the SADC Treaty.

⁴²² Article 14(2) of the SADC Treaty.

⁴²³ Article 14(1)(a) of the SADC Treaty.

⁴²⁴ Article 14(1)(i) of the SADC Treaty.

⁴²⁵ Article 14(1)(f) of the SADC Treaty.

⁴²⁶ Article 14(1)(d) of the SADC Treaty.

⁴²⁷ Article 11(1) of the SADC Treaty.

⁴²⁸ Article 11(2)(a) of the SADC Treaty.

⁴²⁹ Article 11(2)(b) of the SADC Treaty.

⁴³⁰ Article 11(2)(e) of the SADC Treaty.

⁴³¹ Ashimizo Afadameh-Adeyemi & Evance Kalula 'SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community' (2010) 10 *Monitoring Regional Integration in Southern Africa Yearbook* at 13.

in the region through the implementation of common policies and programmes.⁴³² Through creating a common market, the region seeks to achieve full market integration.⁴³³ Although one would expect, as its name suggests, that COMESA member states would be states from Eastern and Southern Africa, COMESA has members from other regions of the continent. Such as Tunisia, which is a state of the Northern Region and the Democratic Republic of Congo, which is a Central African state.

With a current membership of twenty-one states across the continent,⁴³⁴ COMESA has followed a trade development approach to integration. This approach entails the community progressing in three stages until a Monetary Union is created. Article 1(a) of the COMESA Treaty creates an obligation for member states to establish a customs union, abolish all non-tariff barriers between themselves, and establish a common external tariff. In line with this, COMESA has adopted a programme for the financial and monetary integration of the community, which will lead to a Monetary Union. The first phase towards the financial and monetary integration was the creation of a Free Trade Area to remove all the tariff and non-tariff barriers between member states.⁴³⁵ The COMESA Free Trade Area was launched in 2000, and sixteen of the twenty-one COMESA member states participate in it.

The second phase was the establishment of a customs union which would entail the imposition of a Common External Tariff on goods imported into member states from third countries. The COMESA Customs Union was launched in 2009 but it is yet to be operational. The fact the customs union is not yet operation is an example of lack of implementation as member states are yet to address various issues required for the customs union to operate. The problem is exacerbated by the existence of member states who are members of other customs unions such as the EAC Customs Union or the Southern African Customs Union (SACU). The final phase is the creation of a Monetary Union. Article 4(4)(a) of the COMESA Treaty provides that member states shall cooperate in monetary and financial matters and gradually establish convertibility of their currencies and a payments union as a basis for the eventual establishment of a monetary union. In order to achieve this, the community has adopted a phased monetary co-operation programme

⁴³² Preamble of the COMESA Treaty.

⁴³³ Preamble of the COMESA Treaty.

⁴³⁴ Member states of COMESA are as follows: Burundi, Comoros, Djibouti, Ethiopia, Eritrea, Egypt, Kenya, Libya, Zimbabwe, Zambia, Swaziland, Sudan, Uganda, Rwanda, Democratic Republic of Congo, Malawi, Madagascar, Mauritius, Seychelles, Somalia and Tunisia.

⁴³⁵ Article 1(a) of the COMESA Treaty.

aimed at establishing a common monetary area.⁴³⁶ As a founding step, the community has developed the Monetary Harmonization Programme to enable states to undergo monetary harmonization first.⁴³⁷ The long-term goal is to attain a monetary union with a single currency.⁴³⁸

The COMESA Treaty makes provision for organs of the community. The organs are the Authority; the Council; the Court of Justice; the Committee of Governors of Central Banks; the Intergovernmental Committee; the Technical Committees; the Secretariat; and the Consultative Committee.⁴³⁹ The Authority is the principal organ of COMESA and comprises the Heads of State or Governments of the member states.⁴⁴⁰ The Authority fulfils the executive functions of COMESA,⁴⁴¹ and has the power to give directions and make decisions that are binding on member states and other organs of the Common Market except for the COMESA Court of Justice.⁴⁴²

The Council of Ministers is responsible for monitoring the functioning and development of the Common Market.⁴⁴³ The Council of Ministers also makes regulations, issues directives, and takes decisions that are binding on member states.⁴⁴⁴ The Secretariat is the administrative organ of COMESA. The role of the Secretary General is to assist the other organs in the performance of their functions; and as well as to be responsible for the finances and administration of the Common Market.⁴⁴⁵ The Secretariat must further ensure that the objectives set out in the COMESA Treaty are attained and investigate any presumed breach of the Treaty.⁴⁴⁶

As a community focused on economic integration, there have been institutions established that focus on market related matters. For instance, the COMESA Business Council was established to represent the interests of the business sector in the community.⁴⁴⁷ COMESA has also established a Competition Commission that monitors anti-competitive behaviour.⁴⁴⁸ This is a way to protect small, local businesses and to enable them to contribute to community decision making. Such a

⁴³⁶ COMESA 'Monetary Harmonization Programme' available at <https://www.comesa.int/programme-activities-financial-and-monetary-systems/#:~:text=COMESA%20has%20adopted%20a%20phased,establishing%20a%20common%20monetary%20area.&text=The%20ultimate%20objective%20of%20the,status%20of%20an%20Economic%20Community,> accessed on 10 February 2022.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Article 7 of the COMESA Treaty.

⁴⁴⁰ Article 8(1) of the COMESA Treaty.

⁴⁴¹ Article 8(2) of the COMESA Treaty.

⁴⁴² Article 8(3) of the COMESA Treaty.

⁴⁴³ Article 9(2)(a) of the COMESA Treaty.

⁴⁴⁴ Article 9(2)(d) and 9(3) of the COMESA Treaty.

⁴⁴⁵ Article 17(8) of the COMESA Treaty.

⁴⁴⁶ Article 17(8) of the COMESA Treaty.

⁴⁴⁷ See COMESA Business Council available at <https://comesabusinesscouncil.org/about/>, accessed on 11 November 2022.

⁴⁴⁸ Article 6 of the COMESA Competition Regulations.

focus does not mean the community overlooks the interests and rights of natural and legal persons, as their rights are protected by the COMESA Court of Justice.

The COMESA Court of Justice is the judicial organ of the community. The court has jurisdiction over all matters referred to it pursuant to the COMESA Treaty.⁴⁴⁹ The COMESA Treaty makes provision for member states, the Secretary General and legal and natural persons to refer matters to the court.⁴⁵⁰ The role of the court in improving the community's effectiveness will be considered in a later chapter.

3.4.3 The East African Community

The EAC was established through the Treaty for the Establishment of the East African Community (hereafter the 'EAC Treaty'), which entered into force in 2000. The EAC Treaty was concluded between three states, namely the Republic of Uganda, the Republic of Kenya, and the United Republic of Tanzania.⁴⁵¹ However, Article 3 of the EAC Treaty does make provision for states other than the signatory states to become members of the community and as such, the community has a current membership of seven states.⁴⁵²

The member states of the EAC seek to widen and deepen cooperation among themselves politically, economically, socially, and culturally.⁴⁵³ Similarly to the AEC COMESA, the community aims to achieve this by following a series of steps. The first step was the creation of a Customs Union. In 2004, member states signed the Protocol for the Establishment of the East African Community Customs Union, and the Customs Union was launched in 2005. The EAC Customs Union was established to further liberalise intra-regional trade, promote efficiency in production in the community, and enhance investment in the community.⁴⁵⁴ The second step was the creation of a Common Market, which became operational in 2010. The EAC Common Market aims to accelerate the economic growth and development of member states through attaining the free movement of goods, persons and labour.⁴⁵⁵ The third step is the creation of a Monetary Union. The Protocol for the Establishment of the East African Community Monetary Union came into force in 2014 and the community is seen to be making progress towards attaining a Monetary

⁴⁴⁹ Article 23 of the COMESA Treaty.

⁴⁵⁰ Articles 24, 25 and 26 of the COMESA Treaty.

⁴⁵¹ Article 3(1) of the EAC Treaty.

⁴⁵² Rwanda, Burundi, South Sudan and the Democratic Republic of Congo are the three additional members of the EAC.

⁴⁵³ Article 5(1) of the EAC Treaty.

⁴⁵⁴ Article 3 of the Protocol on the Establishment of the East African Community Customs Union.

⁴⁵⁵ Article 4 of the Protocol for the Establishment on the East African Community Common Market.

Union. The final step is the establishment of a Political Federation, the process of which was still underway, at the time of writing.

The EAC has various organs that have been established for the effective operation of the community. These include the Summit, the Council, the East African Court of Justice (hereafter 'EACJ'), the East African Legislative Assembly (hereafter 'EALA') and the Secretariat, among others. Each of these organs has a role in enabling an effective community. Of note for purposes of this research are the Council, the EALA and the EACJ. The Council serves as the policy organ of the community and has the responsibility to promote, monitor and review the implementation of programs of the EAC.⁴⁵⁶ In addition, the Council has the authority to make regulations, directives and decisions, which have a binding effect on the member states and the organs of the community except for the Summit, the EACJ, and the EALA.⁴⁵⁷ The EALA serves as the legislative organ of the community, participating in the legislative process of community law and representing the people of member states.⁴⁵⁸ The EACJ is the judicial organ of the community and hears matters relating to non-compliance or infringements by member states.⁴⁵⁹ The role that each of these organs has in improving the EAC's effectiveness will be analysed in more detail in a chapter to follow.

In comparison to SADC and COMESA, the EAC has made noticeably greater progress. Not only does the community have an operational customs union, but it is also actively working towards the establishment of the common market. The success of the EAC is attributable to the framework in place, which will be discussed in greater detail in Chapter 5.

3.4.4 The Tripartite Free Trade Area

The regional economic communities of the EAC, COMESA and SADC have for some years now sought to enhance integration among one another. These three communities, noting the interlinked nature of their constituent members, decided to cooperate for their mutual benefit and enhance integration.⁴⁶⁰ Areas of cooperation include trade liberalization, customs cooperation and the establishment of a Free Trade Area; the development of programmes to enhance the movement of businesspersons, labour and services across the region; and development of joint

⁴⁵⁶ Article 14 of the EAC Treaty.

⁴⁵⁷ Article 16 of the EAC Treaty.

⁴⁵⁸ Article 49 of the EAC Treaty.

⁴⁵⁹ Article 23 of the EAC Treaty.

⁴⁶⁰ Article 1 of Memorandum of Understanding on Inter Regional Cooperation and Integration Amongst Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC), available at <file:///C:/Users/user/Downloads/Tripartite%20MoU.pdf>, accessed on 23 January 2023.

infrastructure programme.⁴⁶¹ The approach adopted to integration is the development integration approach with three pillars as the focus, namely industrial development, infrastructure development and market integration.⁴⁶²

The Tripartite Free Trade Area (hereafter 'TFTA') is the result of cooperation between these three communities and it was established with the ultimate goal of forming a customs union.⁴⁶³ Negotiations began in 2011 and the Tripartite Free Trade Area was launched in 2015.⁴⁶⁴ The TFTA seeks to promote the economic and social development of the region; create a large single market with free movement of goods and services to promote intra-regional trade; and enhance regional and continental integration processes; among others.⁴⁶⁵ The member states of the TFTA, among other obligations, undertake to eliminate tariffs and non-tariff barriers to trade in goods; and liberalize trade in services.⁴⁶⁶ Upon taking effect, the TFTA would bring together 28 member states, making it the second largest Free Trade Area on the African continent, after the African Continental Free Trade Area (hereafter the 'AfCFTA').⁴⁶⁷

At the time of writing, the TFTA Agreement had been ratified by 10 member states which is four short of the required number for it to enter into force.⁴⁶⁸ The progress that has been made towards implementing the TFTA can be compared to that of the AfCFTA. The AfCFTA negotiations were launched five days after the TFTA was launched in 2015.⁴⁶⁹ However, in comparison, at the time of writing the AfCFTA had been sufficiently ratified and entered into force despite being initiated later, while the TFTA still needs sufficient ratifications.

⁴⁶¹ Article 2 of Memorandum of Understanding on Inter Regional Cooperation and Integration Amongst Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC), available at <file:///C:/Users/user/Downloads/Tripartite%20MoU.pdf>, accessed on 23 January 2023.

⁴⁶² Declaration Launching the Negotiations for the Establishment of the Tripartite Free Trade Area.

⁴⁶³ Ibid.

⁴⁶⁴ Communiqué of the Third COMESA-EAC-SADC Tripartite Summit 10 June 2015, available at <https://www.tralac.org/documents/resources/tfta/1079-communiqué-third-tripartite-summit-june-2015-english/file.html>, accessed on 30 September 2022.

⁴⁶⁵ Article 4 of the Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa, The Eastern African Community and the Southern African Development Community.

⁴⁶⁶ Article 5 of the Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa, The Eastern African Community and the Southern African Development Community.

⁴⁶⁷ COMESA 'Implementation of the Tripartite FTA Agreement Now in Sight' available at <https://www.comesa.int/implementation-of-the-tripartite-free-trade-area-now-in-sight/>, accessed on 5 November 2022.

⁴⁶⁸ COMESA 'New Deadline set for Ratification of Tripartite Free Trade Area' available at <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/>, accessed on 30 September 2022; Article 39(3) of the TFTA Agreement.

⁴⁶⁹ David Luke and Zodwa Mabuza 'The Tripartite Free Trade Area and the African Continental Free Trade Area: The Case for Consolidation' in in Said Adejumo and Cyril Obi (Eds) *Developmental Regionalism and Economic Transformation in Southern Africa* (2020) 42.

As with many other agreements, at the time of concluding the TFTA Agreement, a time frame within which to ratify the agreement was not stipulated. Noticing the delay in implementation, a deadline was later set by the Tripartite Council of Ministers. At the 2nd Extra-Ordinary Meeting of the Tripartite Council of Ministers, the deadline to achieve the threshold of ratifications was set to June 2021.⁴⁷⁰ However, provision was not made for any mechanism to monitor compliance or implementation.

The TFTA is not one of the recognized regional economic communities of the AU or AEC. However, it was recognized as a step in the establishment of the AfCFTA. Had it become operational before the AfCFTA it could have positively impact the formation of continental free trade area and the lessons learned through the TFTA could be applied to the AfCFTA. However, this has not been possible and the status of the TFTA serves as an example of non-implementation by member states. It further shows the lack of a sufficient framework being established to enable the formation of the TFTA, including monitoring and reporting mechanisms.

3.5 CONCLUSION

This chapter sought to lay out the background of regional integration on the African continent. The unity of African states is something that has been envisioned for decades. However, the nature of such cooperation and unity has been a point of contention as some states sought immediate integration whereas others preferred a gradual approach. The gradual approach was chosen and has been followed since the time of the Organization of African Unity. This approach has served the interests of most African states that seek to protect national sovereignty and further national interests.

The existence of multiple regional economic communities, in addition to a continental organization, is indicative of the continent's fragmented approach. The continental organization, the African Union, comprises of all African states which in turn are also members of at least one of the regional economic communities. Each REC has its own set objectives, principles, priorities and projects. This means that the work of the RECs, including those recognized by the AU as building blocs, does not necessarily compliment the continental organization's objectives. This can lead to a less effective approach to integration as objectives and efforts are not aligned.

⁴⁷⁰ COMESA 'New Deadline set for ratification of Tripartite Free Trade Area', available at <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/>, accessed on 30 September.

The manner in which integration has progressed through various pre-defined stages is as a result of the chosen gradual approach. States do not agree to immediately integrate upon the conclusion of such agreements but rather agree to gradually take steps leading up to the desired level of integration. Efforts to gradually integrate have manifested in integration developing through various stages. For instance, prior to the establishment of a continental free trade area, the intention was to establish the Tripartite Free Trade Area, followed by the completion of Free Trade Areas between other RECs. The intention was not to immediately establish the African Continental Free Trade Area, although that is what has occurred. Similarly, RECs such as SADC and the EAC agree to take gradual steps such as becoming a Free Trade Area before integrating further.

The approach towards integration has informed the frameworks of the various RECs and as such has had an impact on how effective integration efforts have been. A fragmented approach means that each REC is focused on achieving its own objectives and meeting its own needs, not necessarily on building continental integration. A gradualist approach means that states are enabled to hold on to their sovereignty and promote national interests over community interests. This has, for instance, resulted in a strong intergovernmental approach in RECs.

4 CHAPTER FOUR: FRAMEWORK FOR EFFECTIVE INTEGRATION IN THE AFRICAN UNION

4.1 INTRODUCTION

The African Union (hereafter ‘AU’) is the product of efforts of African leaders to unite the continent over many years. Although the AU itself can be considered just under two decades old, its predecessor, the Organization of African Unity (hereafter ‘OAU’), was established in the 1960s. Thus, efforts to unite and integrate the continent are not new.

It is recognized that the progress made towards attaining continental integration has been slower than anticipated. In the years it has been operational, the AU has undertaken various studies with the objective of identifying reforms that need to be implemented for a more effective community. A report prepared following a recent review of the AU has highlighted four major challenges that the organisation continues to face. These include that the AU is highly fragmented with too many focus areas; it has a complicated structure and limited managerial capacity that leads to inefficient working methods, poor decision-making, and a lack of accountability; it is not financially independent nor self-sustaining and relies on partner funding; and the coordination between the AU and the Regional Economic Communities (hereafter ‘RECs’) is limited.⁴⁷¹ Current efforts of reform have identified areas to focus on. Some of these areas include focusing on the key priority areas of the AU with a clear division between the AU and RECs; re-aligning AU institutions; connecting the AU to its citizens; and sustainably financing the AU.⁴⁷²

It is commendable that these challenges have been identified, however, beyond identifying these challenges the question is whether the AU can make changes and implement the recommendations. Whilst recognition of these challenges is a good step, it is simply the first step. Studies indicate that although many recommendations have been put forward to improve the effectiveness of the AU, these recommendations have not been implemented due to poor stakeholder buy-in at all levels; insufficient monitoring and evaluation; and the lack of a structured implementation process.⁴⁷³

Chapter Four analyses the framework of the AU and the extent to which it facilitates implementation and compliance by member states through the overall creation of a more effective

⁴⁷¹ African Union ‘Building A More Relevant African Union’ January 2017 at 26, available at https://au.int/sites/default/files/documents/35998-doc-20170117_draft_technical_au_reform_report_v23.pdf, accessed on 15 June 2021 at 5.

⁴⁷² Ibid.

⁴⁷³ Ibid.

community. As the continental integration organisation, and one that views regional economic communities as building blocs, the AU has the potential to positively influence the progress of integration at the regional level. Frameworks established at the AU level can serve as models for African RECs to adopt.

As seen in Chapter Two, one way to induce compliance is through the compliance system design of a regime. Chapter Four looks to analyse the framework of the AU with the view of understanding whether the AU is designed in a way that promotes compliance and effectiveness. The chapter will analyse various features of the AU framework such as its principles and objectives; some of its organs such as the Pan-African Parliament and the African Court of Human's and People's Rights and their role in promoting effectiveness. Furthermore, the AU has developed some mechanisms intended to improve the monitoring and evaluation of integration on the continent and these are analysed in the chapter. The chapter concludes by considering the AU's non-compliance response system by looking at sanctions in the AU.

4.2 OVERVIEW OF THE AFRICAN UNION'S RULES SYSTEM

The AU was established through the adoption of the Constitutive Act, which sets out the primary rules governing the AU. The establishment of an organisation that would further the political, social, and economic development of the continent was a long-awaited step. In recognition of the changing social, political, and economic conditions within and outside Africa, the leaders of African states expressed the need to revitalise the continental organisation in order to be able to meet the needs of the African people and to respond to the prevailing circumstances.⁴⁷⁴ With the objective of strengthening the unity of the continent, the leaders of African states committed to establishing the AU and accelerating the process of implementing the Treaty Establishing the African Economic Community (hereafter the 'AEC Treaty').⁴⁷⁵

The establishment of the AU marked a new dawn in the pursuit of unity on the Continent. Without discrediting the work done by the OAU, the climate of the continent required an organisation that would foster social and economic development and strengthen unity.⁴⁷⁶

The establishment of the AU saw the introduction of new objectives and principles that reflected the prevailing circumstances at the time. However, some of the principles of the OAU were

⁴⁷⁴ Article 6 of the Sirte Declaration.

⁴⁷⁵ Article 8 of the Sirte Declaration.

⁴⁷⁶ The Assembly of the Heads of State and Government of the African Union adopted the Durban Declaration in Tribute to the Organization of African Unity on the Occasion of the Launching of the African Union, in which the Assembly recognizes the successes of the OAU.

retained. At the core of the AU are the objectives of African unity,⁴⁷⁷ state sovereignty⁴⁷⁸ and international cooperation⁴⁷⁹. Whilst these objectives were also found in the OAU Charter, it is important to note that the meanings attached to some of these objectives were adapted to meet the needs of the continent at the time of the adoption of the Constitutive Act.

Although the Constitutive Act respects the sovereignty and independence of member states and provides for non-interference in the internal affairs of member states⁴⁸⁰, it also recognises that instances may arise that require the AU to intervene. Thus, the Constitutive Act makes provision for instances where the AU may intervene in the internal affairs of member states.⁴⁸¹ Furthermore, according to Article 4(j) of the Constitutive Act, a member state is entitled to request the AU to intervene in order to restore peace and security. The Constitutive Act, therefore, gives the AU more authority in internal matters of member states in comparison to the OAU Charter. However, the principles of sovereignty and independence have an impact on how effectively the community can operate to achieve its goals. This will be discussed in more detail below.

Some of the new principles reflect the commitment of leaders of African states to protect the human rights of the African people. In addition to enabling the AU to intervene in member states in certain instances of war crimes, genocide, and crimes against humanity, clear provision is made for the respect of human rights. Article 4(m) of the Constitutive Act provides that respect for democratic principles, human rights, the rule of law, and good governance, is one of the principles that will guide the functions of the AU. Furthermore, the promotion of gender equality has been included as a principle of the AU.⁴⁸² This differs from the approach of the OAU, which was criticised for a lack of involvement in the protection of the human rights of citizens of member states.

Additionally, in recognition of the objective to improve the lives of the African people by uniting Africa, the Constitutive Act has made provision for the participation of the people in the activities of the African Union.⁴⁸³ The inclusion of such a principle in the founding agreement of the

⁴⁷⁷ Article 3(a) of the Constitutive Act of the African Union reads as follows “The objectives of the Union shall be to achieve greater unity and solidarity between the African countries and the peoples of Africa.”

⁴⁷⁸ Article 3(b) of the Constitutive Act of the African Union reads as follows “The objectives of the Union shall be to defend the sovereignty, territorial integrity and independence of its member states.”

⁴⁷⁹ Article 3(e) of the Constitutive Act of the African Union reads as follows “The objectives of the Union shall be to encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights.”

⁴⁸⁰ Article 4(g) of the Constitutive Act.

⁴⁸¹ Article 4(h) of the Constitutive Act gives the AU the authority to intervene in the internal affairs of a member state in the instance of grave circumstances such as war crimes, genocide and crimes against humanity.

⁴⁸² Article 4(l) of the Constitutive Act.

⁴⁸³ Article 4(c) of the Constitutive Act.

continental organisation creates a legal foundation for the people to play a role in the decisions that impact them. However, such a legal foundation must be met by the establishment of an institutional framework that enables such participation.

At this point it is also important to mention Agenda2063. 50 years after its establishment, heads of state of the AU decided to adopt Agenda2063. This was done, once again, as a way of reprioritizing and refocusing efforts on the continent to better fit the prevailing circumstances. Thus, Agenda2063 was adopted to serve as the community's blueprint to achieve inclusive and sustainable socio-economic growth and development.⁴⁸⁴ Agenda2063 has seven development aspirations, each with a set of goals to be achieved. The seven aspirations are a prosperous Africa based on inclusive growth and sustainable development; an integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance; an Africa of good governance, democracy, respect for human rights, justice and the rule of law; peaceful and secure Africa; an Africa with a strong cultural identity, common heritage, shared values and ethics; an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children; Africa as a strong, united and influential global player and partner.

4.3 ORGANS OF THE AFRICAN UNION

The AU has established various organs, each of which has specific responsibilities. These include the Assembly; the Executive Council; the Pan-African Parliament; the Court of Justice; the Permanent Representatives Committee; and the Economic, Social and Cultural Council. Looking at each AU organ is beyond the scope of this research. Rather focus will be given to select organs with the objective of exploring their role in promoting an effective community.

Similarly to the OAU, the AU is led by the Assembly of the Heads of States and Governments of member states which is the supreme organ of the AU.⁴⁸⁵ Under the Constitutive Act, the Assembly has a more defined role and it is responsible for determining the policies of the AU and monitoring the implementation and compliance of these policies by member states.⁴⁸⁶ The Assembly has the authority to make decisions on any reports and recommendations from other organs.⁴⁸⁷ The Assembly is empowered to make decisions that will have varying effects on member states.

⁴⁸⁴ AUDA-NEPAD 'Second Continental Report on the Implementation of Agenda2063', available at <https://au.int/sites/default/files/documents/41480-doc-2nd-Continental-Progress-Report-on-Agenda-2063-English.pdf>, accessed on 12 October 2022.

⁴⁸⁵ Article 6 of the Constitutive Act.

⁴⁸⁶ Article 9(1)(a) and (e) of the Constitutive Act.

⁴⁸⁷ Article 9(1)(b) of the Constitutive Act.

Regulations issued by the Assembly are applicable in all member states, and member states are required to take all necessary measures to implement them.⁴⁸⁸ Directives issued by the Assembly can be addressed to any or all member states, to undertakings, or to individuals.⁴⁸⁹ Directives are only binding with respect to their objectives however, the form and means of implementation is at the discretion of national authorities.⁴⁹⁰ The Assembly can also issue non-binding decisions such as recommendations, declarations, resolutions, and opinions.⁴⁹¹

The Constitutive Act replaced the Council of Ministers with the Executive Council, which is composed of the Ministers of Foreign Affairs of the member states.⁴⁹² The functions of the Executive Council include coordinating and making decisions in areas of common interest between member states and monitoring the implementation of policies formulated by the Assembly.⁴⁹³

The Constitutive Act established the AU Commission which is the secretariat of the AU.⁴⁹⁴ The AU Commission has a large number of functions which include organising and managing meetings of the AU; implementing decisions taken by organs of the AU; coordinating and monitoring the implementation of decisions and reporting to the Executive Council; assisting members in the implementation of Union programmes and policies; managing the budget and financial resources of the Union; and strengthening cooperation and coordination of activities between member states in fields of common interest.⁴⁹⁵ Considering the multiple functions entrusted to it, the AU Commission would need to have suitable resources to fulfil its mandate. However, the AU Commission faces many challenges that hinder the fulfilment of its mandate including inadequate supervision and coordination, and weak staff management systems.⁴⁹⁶

In addition to the organs stipulated in the Constitutive Act, the Assembly has the authority to establish other organs.⁴⁹⁷ In line with this, the New Partnership for Africa's Development (hereafter 'NEPAD') was established. NEPAD was officially adopted by the AU in the year 2002

⁴⁸⁸ African Union Rules of Procedure of the Assembly and the Executive Council, Statutes of the Commission and Rules of Procedure of the Permanent Representatives' Committee page 11 available at https://archives.au.int/bitstream/handle/123456789/6448/Rules%20of%20Procedure%20of%20the%20Assembly%20c%20Executive%20Council%20PRC%20%26%20Statutes%20of%20the%20Commission%20_E.Pdf?sequence=1&isAllowed=y, accessed on 11 August 2021.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Article 10(1) of the Constitutive Act.

⁴⁹³ Article 13(2) of the Constitutive Act.

⁴⁹⁴ Article 20 of the Constitutive Act.

⁴⁹⁵ African Union Op cit note 488 at 37.

⁴⁹⁶ African Union op cit note 471.

⁴⁹⁷ Article 5(2) of the Constitutive Act of the African Union.

as the primary mechanism to coordinate the pace and impact of Africa's development.⁴⁹⁸ In 2018, the decision was taken to transform NEPAD into the African Union Development Agency-NEPAD (hereafter 'AUDA-NEPAD').⁴⁹⁹ AUDA-NEPAD is governed by the NEPAD Heads of State and Government Orientation Committee.⁵⁰⁰ However, the AU Commission Chairperson exercises supervisory authority over the institution.⁵⁰¹ AUDA-NEPAD mandate includes to coordinate and execute priority regional and continental projects with the goal of promoting regional integration towards the accelerated realization of Agenda2063; provide knowledge-based advisory services and technical assistance to AU member states and RECs.⁵⁰²

4.3.1 The Pan-African Parliament – A voice for the People?

The PAP was established to ensure the participation of the people in the economic development and integration of the continent.⁵⁰³ The PAP is composed of nominated representatives from each member state who are members of their respective national parliaments and the representation must reflect the diversity of political opinions in each National Parliament.⁵⁰⁴ Before looking into the functioning of the PAP, it is beneficial to understand the role that parliaments play at the national level.

In a national context, there are three branches of government, namely the executive branch, the legislative branch, and the judicial branch. Each branch has a specific function. Parliament is the legislative branch of government and has three key responsibilities which are legislation, oversight, and representation. In terms of representation, parliaments are constituted by representatives that are elected by citizens.⁵⁰⁵ Parliament is comprised of representatives whose role it is to act in the interest of their constituents and ensure that their views are considered in policymaking.⁵⁰⁶ Having

⁴⁹⁸ African Union 'New Partnership for Africa's Development (NEPAD)' available at <https://au.int/en/organs/nepad>, accessed on 21 May 2019.

⁴⁹⁹ Assembly of the Union 31st Ordinary Session 'Decision on the Transformation of the NEPAD Planning and Coordination Agency (NPCA) into the African Union Development Agency (AUDA)' Assembly/AU/Dec.691(XXXI) available at https://au.int/sites/default/files/decsions/36130-assembly_au_dec_690_-_712_xxxi_e.pdf, accessed on 12 October 2022.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² Assembly of the Union 11th Extraordinary Session 'Decision on the Institutional Reform' Ext/Assembly/AU/Dec.1(XI) available at https://au.int/sites/default/files/decsions/36425-ext_assembly_dec_1-4xi_e.pdf, accessed on 13 October 2022.

⁵⁰³ Article 17(1) of the Constitutive Act; Article 2(2) of the Protocol To The Treaty Establishing The African Economic Community Relating To The Pan-African Parliament.

⁵⁰⁴ Article 5 of the Protocol to The Treaty Establishing The African Economic Community Relating To The Pan-African Parliament.

⁵⁰⁵ Takawira Musavengana *The proposed SADC Parliament: Old wine in new bottles or an ideal whose time has come?* (2011) at 25; Barney Karuombe 'The role of Parliament in Regional Integration – The Missing Link' in Anton Bösl, Willie Breytenbach, Trudi Hartzenberg, Collin McCarthy and Klaus Schade (eds) *Monitoring Regional Integration in Southern African Yearbook Volume 8* (2008) at 225.

⁵⁰⁶ Ibid.

a regional parliament that plays a similar role and represents the interest of citizens of member states would create a pathway for views of the people to be considered in policymaking.

In terms of the legislative function, parliament makes or changes national laws.⁵⁰⁷ This ensures, to some extent, that laws passed consider the positions of the citizens parliamentarians represent. Akin to this, is the role that parliament plays in the domestication of international law into national law. Some constitutions, including those of some AU member states, stipulate that international law does not have the force of law unless it has been ratified and domesticated.⁵⁰⁸ This legislative role of national parliaments could be mirrored at the regional level. Through the involvement of parliamentarians in the passing of community laws, the ownership that parliamentarians have at the national level could increase to promote domestication or incorporation and implementation.⁵⁰⁹

The PAP has a consultative and advisory role and as such, some of its functions include making recommendations on the Community's budget to the Assembly; working towards the harmonisation or coordination of the laws of member states; and making recommendations aimed at contributing to the realization of the Community's objectives.⁵¹⁰

Of note regarding the role of the PAP, is that it does not currently have a legislative function.⁵¹¹ This is particularly pertinent when consideration is given to the fact that at the time of the PAP's establishment it was envisioned that the PAP would be transformed into an organ with full legislative functions.⁵¹² It is also worth noting that a protocol to transform the PAP into a legislative organ, the Protocol To The Constitutive Act of the African Union Relating to The Pan-African Parliament (hereafter 'the 2014 PAP Protocol'), was adopted in 2014.⁵¹³ The 2014 PAP Protocol confers limited legislative powers on the PAP. Under the 2014 PAP Protocol, the PAP would be able to propose draft model laws only within areas determined by the Assembly.⁵¹⁴ However, the

⁵⁰⁷ Musavengana op cit note 505 at 26; United Nations Economic Commission for Africa Governance and Public Administration Division 'The Role of Parliament in Promoting Good Governance' available at <https://repository.uneca.org/handle/10855/22131>, accessed on 21 May 2021.

⁵⁰⁸ Musavengana op cit note 505 at 26; Marilyn Aniwa 'Rationalising regional economic communities and implementing the treaty establishing the African Economic Community: The role of parliaments' in Timothy Murithi (ed) *Towards A Union Government For Africa: Challenges and Opportunities* (2008) 69 – 78; Karuuombe op cit note 505 at 225.

⁵⁰⁹ Karuuombe op cit note 505 at 225.

⁵¹⁰ Article 11 of the Protocol to The Treaty Establishing The African Economic Community Relating To The Pan-African Parliament.

⁵¹¹ Ibid.

⁵¹² Article 2(3) of the Protocol of The Treaty Establishing the African Economic Community Relating to The Pan-African Parliament.

⁵¹³ The Protocol To The Constitutive Act of the African Union Relating to The Pan-African Parliament.

⁵¹⁴ Article 8(1) of the 2014 PAP Protocol.

Assembly would have the final say on whether the model laws would be approved.⁵¹⁵ The 2014 PAP Protocol has not yet been sufficiently ratified by member states to take effect.⁵¹⁶ The delay to confer legislative powers on the PAP can partly be attributed to the fact that it is at the discretion of member states to change the PAP's role.⁵¹⁷ This means if member states are not willing to confer these powers, the PAP will continue to have an advisory role as is the current case. This highlights one of the prominent issues in integration efforts in Africa, namely that member states have great authority. Member states having such authority is a manifestation of protecting sovereignty because through this authority, member states remain in control. This can also be seen by the Assembly having the final say on approved model laws, which means in the instance that the PAP does have some legislative power, the Assembly members (Heads of States) can prevent enactment should they disagree.

This limitation in the powers of the PAP means there is a disconnect between the regional legislative process and the national legislative processes. If the Assembly is the final authority on community legislation, there is an increased chance that legislation enacted will focus on the interests of the elite and will have little consideration for the interests and needs of the people that are to implement such legislation.

4.3.2 The African Union's Judicial System's Role in Effectiveness

The framework of the AU is such that it is comprised of multiple judicial organs such as the African Commission on Human and People's Rights (hereafter 'ACHPR'), the African Court on Human and People's Rights (hereafter 'AfCHPR'), the African Court of Justice (AUCJ) and the AU Commission on International Law, among others. Each judicial organ has a role however, it is beyond the scope of this research to analyse each organ. This research will focus on the AfCHPR and the AUCJ, and the role these could play in promoting a more effective community.

4.3.2.1 Jurisdiction of the African Court on Human and People's Rights

The AfCHPR is one of the judicial organs of the AU. The AfCHPR was established through the Protocol to the African Charter on Human and Peoples' Rights in the Establishment of an African Court on Human and People's Rights (hereafter the 'AfCHPR Protocol'). In line with this, the

⁵¹⁵ Article 8(1) of the 2014 PAP Protocol.

⁵¹⁶ The 2014 PAP Protocol will come into effect 30 days after instruments of ratification have been deposited by a simple majority of the AU member states. At the time of writing, 21 member states had signed the protocol and 12 had ratified it.

⁵¹⁷ Article 2(3)(i) of The Protocol To The Treaty Establishing The African Economic Community Relating To The Pan-African Parliament provides that the Pan-African Parliament will continue to have only consultative and advisory powers until the Member states decide otherwise by amending the protocol.

AfCHPR's role is to complement the ACHPR's mandate to protect human and people's rights. The AfCHPR has limited jurisdiction in terms of the cases it may hear. The AfCHPR has jurisdiction to hear cases and disputes relating to the interpretation and application of the African Charter on Human and Peoples' Rights, the AfCHPR Protocol, and any other human rights instrument ratified by the States concerned.⁵¹⁸ With respect to these cases the decisions of the court are final and binding.⁵¹⁹ As one can imagine, such jurisdiction is limiting for a judicial organ intended to serve a community that is impacted by decisions that affect more than only human rights. For instance, socio-economic rights are also impacted by decisions of the AU.

In addition to the jurisdiction limitation, access to the AfCHPR is also limited. Such cases could only be brought before the AfCHPR by the ACHPR, a state party that has lodged a complaint to the ACHPR, a state party against which a complaint has been lodged at the ACHPR, a state party whose citizen is a victim of a human rights violation, and African Intergovernmental Organisations.⁵²⁰ This meant that private individuals, who have rights based on community agreements, could not directly bring matters for adjudication before the AfCHPR. In an attempt to lessen the impact of this limitation, an important decision was taken by the AU Assembly in 2016 when the Assembly decided to empower individuals to directly petition the AfCHPR on the implementation of decisions taken by policy organs.⁵²¹ However, this is subject to the individual being a citizen of a member state that made a declaration under Article 34(6) of the AfCHPR Protocol accepting the court's competence to receive such cases.⁵²² This means that if a state has not made such a declaration, individuals of that state cannot access the AfCHPR. At the time of writing, 11 states had deposited declarations, of which four states have since withdrawn their declarations.⁵²³

The AU seeks to respect human rights, justice and the rule of law. Based on the limitations the AfCHPR is subjected to, such principles cannot be said to be protected. This is because people cannot directly seek recourse if their human rights have been violated, unless their respective states

⁵¹⁸ Article 3 of the AfCHPR Protocol.

⁵¹⁹ Article 28 (2) of the AfCHPR Protocol and Rule 72 of the AfCHPR Rules of Court.

⁵²⁰ Article 5 of the AfCHPR Protocol.

⁵²¹ Assembly of the Union 26th Ordinary Session 'Decision on Streamlining of the African Union Summits and The Working Methods of the African Union' Assembly/AU/Dec.597(XXVI) available at https://au.int/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf, accessed on 23 June 2021.

⁵²² Article 34(6) of the AfCHPR Protocol reads as follows:

'At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.'

⁵²³ See Declarations available at <https://www.african-court.org/wpafc/declarations/>, accessed on 8 November 2022.

grant the court jurisdiction or member states agree to institute proceedings on their behalf. In many instances, human rights violations are perpetrated by member states, and such states do not want to be held accountable or challenged. Thus, such states are unlikely to agree to the AfCHPR having jurisdiction. This is further evidenced by the withdrawals that have taken place because the AfCHPR has made decisions against member states.⁵²⁴

4.3.2.2 The African Union Court of Justice

The AfCHPR was established under the OAU regime. When the AU was established, the Court of Justice (hereafter the ‘AUCJ’) was envisioned as the judicial organ, and it is to be composed of judges who are nationals of member states⁵²⁵. The AUCJ is to have jurisdiction over all disputes that are referred to it including disputes relating to the interpretation or application of the Constitutive Act and any legal instruments adopted within the framework of the AU.⁵²⁶ Thus, the AUCJ is intended to replace the Commission of Mediation, Conciliation and Arbitration of the OAU. Article 18 of the Protocol of the Court of Justice stipulates that cases may be submitted to the AUCJ by member states and organs of the AU. Following the submission and hearing of a case by the AUCJ, it has the authority to make a judgment that is final and binding on the parties.⁵²⁷ The implication of this is that the member states are obliged to comply with the judgement, and failure to do so may result in action against the state parties by the Assembly.⁵²⁸

Similarly, to the AfCHPR, we see that natural and legal persons would not have access to the AUCJ. This once again is in contradiction of AU principles and objectives such as having a people driven approach and promoting economic development. This is because it is not only member states that would be affected by AU laws but private individuals and businesses as well. Thus, it is important that such persons are also granted access to the court.

It must be pointed out that although the AUCJ was established on paper, at the time of writing, it was not operational. The current judicial system of the AU will be considered in greater detail below.

⁵²⁴ Rwanda withdrew due to the case of *Ingabire Victoire Umubozza v Republic of Rwanda* AfCHPR Application No. 003/2014; Tanzania withdrew due to the case of *Ally Rajabu and Others v United Republic of Tanzania* AfCHPR Application No. 007/2015; Benin withdrew due to cases such as *Sébastien Germain Ajanon v République de Bénin* AfCHPR Application No. 013/2017; Côte d’Ivoire withdrew following judgment in the case of *Guillaume Kigbafori Soro and Others v Republic of Côte d’Ivoire* AfCHPR Application No. 012/2020.

⁵²⁵ Article 18 of the Constitutive Act of the African Union; Articles 2(1) and 3(1) of the Protocol of the Court of Justice of the African Union.

⁵²⁶ Article 19(1) of the Protocol of the Court of Justice of the African Union.

⁵²⁷ Articles 35 and 37 of the Protocol of the Court of Justice of the African Union.

⁵²⁸ Articles 51 and 52 of the Protocol of the Court of Justice of the African Union.

4.3.2.3 Merging courts to establish the African Court of Justice and Human Rights

In 2008, the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter '2008 Protocol'), was adopted. The 2008 Protocol aims to merge the AfCHPR and the AUCJ to become the African Court of Justice and Human Rights (hereafter 'ACJHR'). The 2008 Protocol gives the ACJHR jurisdiction over cases relating to the interpretation and application of the Constitutive Act; the interpretation, application or validity of other AU Treaties and subsidiary legislation; all acts, decisions, regulations, and directives of organs of the AU; among others.⁵²⁹ The 2008 Protocol enables the ACJHR to hear a wide range of cases and decisions of AU organs can be questioned. It also does not exclude human rights matters.

A limitation to this jurisdiction, however, is that only certain entities may submit cases to the court. These entities include member states to the Protocol; the Assembly, the Parliament and other authorised organs of the AU; and a staff member on appeal in a dispute acting under terms and conditions laid out in Rules and Regulations.⁵³⁰ Individuals may only bring cases to the court if the dispute relates to a human rights issue, which once again is a limitation on citizens' rights to access the courts.⁵³¹ The 2008 Protocol will enter into force 30 days after 15 states have deposited instruments of ratification.⁵³² At the time of writing, which is 12 years since the 2008 Protocol was adopted, only eight states had deposited instruments of ratification.⁵³³

Once again, the importance that has been given to sovereignty of states is evident. The highlighted limitations reflect, to some extent, the guarded approach to the sovereignty of member states. However, such limited jurisdiction restricts the ability of the people to dispute the decisions of the AU that have an impact on them which is thus a hindrance to the effectiveness of the community. Similarly, within the AU framework, individuals or private entities are not able to dispute the acts of member states that have a detrimental effect on said individuals. Furthermore, the authority member states have to ratify protocols and give them effect has proven to be a hindrance, as many of the judicial organs have been inoperative for this reason. This leaves a current gap in the protection of the rights of the African people, who are the citizens under the AU regime.

⁵²⁹ Article 28 of the 2008 Protocol.

⁵³⁰ Articles 29 of the 2008 Protocol.

⁵³¹ Articles 30 of the 2008 Protocol.

⁵³² Article 9 of the 2008 Protocol.

⁵³³ African Union 'List of countries which have signed, ratified/accepted to the Protocol on the Statute of the African Court of Justice and Human Rights', available at <https://au.int/sites/default/files/treaties/36396-sl-PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf>, accessed on 1 September 2021.

4.3.2.4 Compliance with decisions of the AfCHPR

As the AfCHPR is the only AU judicial organ that is operational, attention will be given to compliance with its decisions. Member states have an obligation to comply with the decisions of the AfCHPR.⁵³⁴ To keep track of such compliance, member states must submit reports on compliance with decisions.⁵³⁵ If a member fails to comply with a decision of the court, the AfCHPR reports such non-compliance in its annual report to the Assembly.⁵³⁶ Even though compliance is an obligation, the AfCHPR reports a high rate of non-compliance. For the year 2020, the AfCHPR had reported twenty-three cases of non-compliance with judgements and three cases of partial compliance.⁵³⁷ The powers of the AfCHPR in instances of non-compliance are limited in that the Court only has the power to report findings of non-compliance to the Assembly.⁵³⁸

In recognition of a need to induce compliance and the lack of an established compliance reporting system, the Executive Council requested that the AfCHPR draft a monitoring and evaluation mechanism that would alert AU policy organs of instances of non-compliance. The proposed framework for reporting and monitoring the execution of judgements of the AfCHPR provides for the establishment of a formal Implementation Monitoring and Reporting Unit (hereafter ‘MRU’) within the court’s Registry.⁵³⁹ The MRU would have the specific task of monitoring and reporting on the implementation of court decisions.⁵⁴⁰ The MRU would have an active role in following up with parties on the implementation of decisions, assessing the adequacy of measures that have been adopted, as well as organising compliance hearings.⁵⁴¹

The proposed framework also lays out the procedure for the delivery of the decision to the involved parties, the Executive Council, and other relevant institutions of the AU.⁵⁴² Informing institutions of the AU is important because such institutions can play a role in promoting compliance. For instance, one of the functions of the Executive Council is to monitor implementation of Assembly decisions. One way of fulfilling this responsibility is through ensuring

⁵³⁴ Article 30 of the AfCHPR Protocol.

⁵³⁵ Article 30 of the AfCHPR Protocol and Rules 80 and 81 of the AfCHPR Rules of Court.

⁵³⁶ Article 30 of the AfCHPR Protocol and Rules 81(5) of the AfCHPR Rules of Court.

⁵³⁷ African Court on Human and People’s Rights Activity Report of the African Court on Human and People’s Rights 1 January – 31 December 2020, available at <https://www.african-court.org/wpafc/wp-content/uploads/2021/03/Activity-report-of-the-Court-January-to-December-2020.pdf>, accessed on 14 July 2021 Annex II.

⁵³⁸ Article 31 of the AfCHPR Protocol.

⁵³⁹ African Union Executive Council 34th Ordinary Session EX.CL/1126(XXXIV) Annex 1 page 2, available at <https://www.african-court.org/wpafc/wp-content/uploads/2020/05/Activity-report-January-December-2018.pdf>, accessed on 29 June 2021.

⁵⁴⁰ Ibid at 12.

⁵⁴¹ Ibid at 13.

⁵⁴² Ibid at 12.

actions that the AfCHPR has determined to be contrary to or conflict with community law are complied with. Furthermore, the AfCHPR would also inform the respondent state of the relevant institutions and resources that it may rely on for support in implementing the decision.⁵⁴³ This is a relevant provision because, although it is presumed that member states are aware of the facilities available to them from the community, it is not necessarily the case even more so considering the complicated structure of the AU. Thus, informing member states will make member states aware and can reduce instances of states using lack of knowledge of resources available as a reason for non-compliance. The respondent state would need to submit reports to the MRU on the progress that has been made within the stipulated timeframe.⁵⁴⁴ The proposed framework does make allowance for states to request an extension if necessary and for the Monitoring Unit to send reminders if the state has not submitted its report in time.⁵⁴⁵

The proposed Monitoring and Reporting framework provides for a detailed process that gives member states several opportunities to comply and offers assistance towards compliance. If a state has failed to implement the court's decision, the court may convene a compliance hearing of its own accord or at the request of any party, or conduct an on-site visit to directly understand the implementation progress.⁵⁴⁶ Conducting an on-site visit would place give the court an opportunity to understand the reality on the ground and the reasons for non-compliance. If a compliance hearing is held, the court may then issue a compliance judgement in terms of which it indicates whether the state has complied fully, partially, or not at all.⁵⁴⁷ Such judgment will be included in the court's report to the AU policy organs. The provision of a judgment indicating the level of compliance with a decision would help in readily identifying compliance. One challenge faced in this research was identifying whether a decision of a community court has been complied with. In many instances, one would need to conduct research at a national level to attain this information.

If a compliance hearing is not held, the Registry of the court notifies the parties on the status of compliance. If there has been a finding of non-compliance, the status of the implementation will be recorded as 'non-compliant' until the court receives an implementation report.⁵⁴⁸ The court then submits the compliance report to the Executive Council through the Permanent Representatives Committee (hereafter 'PRC').⁵⁴⁹ The PRC examines the report on behalf of the Executive Council and submits a report to the Executive Council which recommends the adoption

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid at 5.

⁵⁴⁷ Ibid at 6.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid at 7.

of a decision that the non-complying state should execute the decisions of the court.⁵⁵⁰ The PRC also assesses the support the state received from all the relevant AU organs.⁵⁵¹ This process allows the respondent state further opportunity to comply.

In the instance that the respondent state fails to comply with the decision by the Executive Council, the PRC may recommend various courses of action. First, the PRC may make a recommendation to the Executive Council that it request that AU organs, and other institutions which perform functions that are relevant to the issues, support the respondent state in implementing the court decision.⁵⁵² The respondent state will be given three months to engage with such organs, following which the state must report to the PRC on the measures discussed.⁵⁵³ These measures, once endorsed by the PRC, must be implemented within a period not exceeding six months.⁵⁵⁴ This approach may prove challenging in the instance the respondent needs financial assistance, as the AU does not have unlimited resources.

The PRC may also recommend that a fund be established for the implementation of decisions so as to provide the respondent state with necessary assistance.⁵⁵⁵ This approach may be more suitable in instances where the cause for non-compliance is a lack of financial resources. However, the question of source of funds and the practicality of establishing such a fund for all such cases would need to be considered. After the six-month period, the respondent state must submit a report on the progress of implementation to the PRC.⁵⁵⁶ The PRC will consider the implementation report and submit recommendations to the Executive Council.⁵⁵⁷ The Executive Council may determine that the matter be referred back to the PRC for an additional follow-up over a period not exceeding 6 months.⁵⁵⁸

The Executive Council considers the report of the PRC on behalf of the Assembly and makes decisions or recommendations to the Assembly.⁵⁵⁹ If the respondent state has not implemented the judgment, even after interventions by the PRC and the Executive Council, the Assembly may adopt the recommendations and draft decisions of the Executive Council.⁵⁶⁰ The Assembly may

⁵⁵⁰ Ibid at 8.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

⁵⁵³ Ibid.

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid at 9.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid at 10.

offer to engage with the parties to implement the judgement or reach a settlement.⁵⁶¹ Additionally, the Assembly may invoke sanctions based on Article 23 of the Constitutive Act in deserving cases.⁵⁶²

This is a draft framework that, at the time of writing, was yet to be considered by the Specialised Technical Committee on Justice and Legal Affairs. However, the fact that the Executive Council is aware of the need for such a monitoring mechanism and the Court is drafting the proposed framework is a welcome move. Furthermore, the suggested measures to be adopted in cases of non-compliance have taken into account the challenges that states face that result in non-compliance, such as insufficient resources and support. However, this framework would simply strengthen monitoring of court decisions but it would not provide enforcement powers to the court.

Overall, the judicial organ of a community should enforce the laws of that community. Furthermore, the judicial organs should be accessible to all stakeholders of the community, which includes the people. The judicial organs of the AU, as can be seen from the above, are largely restricted. Of the court that is operational, only human rights matters can be heard and it can only hear such cases from NGOs or individuals if their respective member states have authorised this. This has been the situation for decades and attempts to change it have not yielded any results because member states have control. In light of this, the design of the community's judicial system cannot be considered to promote effectiveness. There isn't a direct avenue to hold member states accountable for their actions which means actions of member states that infringe community law can continue. In turn this could mean the objectives of the community are not being achieved and community law isn't being complied with.

4.4 MONITORING AND EVALUATION BY THE AFRICAN UNION

As highlighted above, the AU Assembly has the authority to make decisions of a binding nature. It goes without saying that keeping track of implementation of and compliance with such decisions is important for the attainment of objectives. In recent years, there has been a growing interest in the development of tools that can be used to track the progress of integration on the continent and within regional economic communities. This has resulted in the development of some monitoring and evaluation mechanisms, each with a unique approach. The use of such mechanisms makes it possible to analyse the current state of integration and identify areas that can

⁵⁶¹ Ibid at 11.

⁵⁶² Ibid.

be improved upon to achieve the goals set. Some of the mechanisms that are being utilized to monitor African integration will now be considered.

4.4.1 The African Peer Review Mechanism

4.4.1.1 Introduction

One approach to monitoring is through peer review. Peer review involves assessing the performance of states by other states with the goal of helping the reviewed state to improve and comply with established standards and principles.⁵⁶³ In the context of African integration, the African Peer Review Mechanism (hereafter the ‘APRM’) fulfils the function of a peer review mechanism at the continental level. The APRM was established by the African Union in 2003 as an agency of the AU. The APRM is a self-monitoring mechanism with the mandate to ensure that the policies and practices of member states conform to the political, economic, and corporate governance standards stipulated in the Declaration on Democracy, Political, Economic and Corporate Governance^{564, 565} The Declaration provides the objectives that the Heads of State and Government of AU member states have committed to work towards. Amongst the set objectives, is the pursuit of socio-economic development in terms of which member states are to develop policies that, among others, strengthen RECs and promote international trade and investment.

Although the APRM is an AU initiative, and participation in the review process is open to all AU member states, AU member states are not obliged to participate in the review process. In order for an AU member State to participate in the process, the state must notify the Chairman of the NEPAD Heads of State and Government Implementation Committee.⁵⁶⁶ By submitting such a notification, a member State undertakes to submit to periodic peer reviews, to facilitate such reviews and be guided by the agreed upon parameters of the Declaration.⁵⁶⁷ Furthermore, states

⁵⁶³ OECD ‘Peer Review: An OECD Tool for Co-operation and Change’ available at https://read.oecd-ilibrary.org/economics/peer-review_9789264099210-en-fr#page3, accessed on 26 December 2021.

⁵⁶⁴ The Declaration on Democracy, Political, Economic and Corporate Governance provides the objectives that the Heads of State and Government of AU member states have committed to work towards. See The New Partnership for Africa’s Development (NEPAD): Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) available at <https://www.aprm-au.org/publications/declaration-on-democracy-political-economic-and-corporate-governance/>, accessed on 5 December 2019.

⁵⁶⁵ Article 2 of The New Partnership for Africa’s Development (NEPAD): The African Peer Review Mechanism op cit note 93.

⁵⁶⁶ Article 5 of The New Partnership for Africa’s Development (NEPAD): The African Peer Review Mechanism op cit note 93.

⁵⁶⁷ Article 5 of The New Partnership for Africa’s Development (NEPAD): The African Peer Review Mechanism op cit note 93.

are required to set a time-bound Plan of Action for implementing the Declaration.⁵⁶⁸ At the time of writing, the APRM has a membership of thirty-eight AU member states.⁵⁶⁹

The APRM serves as a platform for states to share experiences, identify deficiencies, and assess capacity-building needs to promote the adoption of practices and standards that lead to political stability, economic growth, sustainable development, and accelerated growth.⁵⁷⁰ Through the APRM, the policies and practices of participating states will be reviewed to determine the progress that has been made towards achieving the goals and complying with the values and standards in the Declaration.⁵⁷¹ The mandate of the APRM was widened by a decision adopted during the 28th Ordinary Session of the Assembly of the Union in 2017. In addition to monitoring the thirty-eight states that participate in the peer review process, the APRM is also responsible for monitoring and evaluating the implementation of Agenda 2063 and the 2030 Agenda by all African Union member states.⁵⁷² Such an expansion of mandate is welcome as it broadens the areas participating states can be reviewed on.

The APRM has four organizational components, each responsible for different aspects of the work of the APRM. The first organ is the Committee of Participating Heads of State and Government, also referred to as the APR Heads of State Forum, which is the highest decision-making authority of the APRM.⁵⁷³ The APR Heads of State Forum has the overall responsibility for the APRM organization and processes, including appointing the APR Panel of Eminent Persons, adopting country review reports, and communicating recommendations to a country after the country report is reviewed.⁵⁷⁴ The second organ is the Panel of Eminent Persons which is responsible for ensuring the peer review process is independent and credible.⁵⁷⁵ In addition, the Panel of Eminent Persons reviews country reports and makes recommendations to the APR Forum.⁵⁷⁶ The third

⁵⁶⁸ Article 13 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93.

⁵⁶⁹ See African Peer Review Mechanism (APRM) op cit note 107.

⁵⁷⁰ Article 3 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93; see also African Peer Review Mechanism (APRM) op cit note 107.

⁵⁷¹ Article 15 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93.

⁵⁷² Assembly of the Union 28th Ordinary Session Assembly/AU/Dec.631(XXVIII) available at https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf, accessed on 6 April 2021; The African Union 'Agenda 2063 and SDGs Implementation in Africa: Assessing Governance Mechanisms for Implementation of the African Union Agenda 2063 and the 2030 Agenda for Sustainable Development In Africa' (2020), available at <https://www.aprm-au.org/publications/agenda-2063-and-sdgs-implementation-in-africa/>, accessed on 7 April 2021.

⁵⁷³ African Peer Review Mechanism Organisation and Processes NEPAD/HGSIC-3-2005/APRM/Guideline/O&P available at <https://www.aprm-au.org/publications/aprm-organisation-and-processes/>, accessed on 9 December 2019.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid.

⁵⁷⁶ Article 3 of African Peer Review Mechanism Organisation and Processes op cit note 573.

organ is the APRM Secretariat which provides the secretarial, technical, coordinating, and administrative support required for the APRM process to be effective.⁵⁷⁷ Activities of the secretariat include maintaining a database and information on the four areas of focus of the APRM, preparing background documents for Country Review Teams, and organising country review visits.⁵⁷⁸ The fourth organ is Country Review Teams (hereafter ‘CRT’), which are constituted only for the period of a country review visit.⁵⁷⁹ The CRTs visit participating member states to conduct reviews and the composition of each team is designed to enable an effective assessment.⁵⁸⁰

Four types of review can take place within the APRM. The first is the base review which is carried out within eighteen months of a state becoming a member of the APRM process.⁵⁸¹ The second type of review is the periodic review that takes place every two to four years.⁵⁸² The third type of review is a review that a member state may request for its own reasons.⁵⁸³ The fourth type of review is a review that may be requested by the Heads of State and Governments of participating states in the instance of a political or economic crisis in another participating state.⁵⁸⁴

4.4.1.2 Stages of the Peer Review Process

The review process of the APRM has five stages. The first stage involves a study by the APR Secretariat of the political, economic, and corporate governance and development environment of the member state to be reviewed.⁵⁸⁵ In addition, the state under review completes the self-assessment questionnaire and drafts a paper indicating the issues of the state and the National Programme of Action (hereafter ‘NPOA’) which includes the state’s plan to conform with its obligations under the APRM and as a member of the AU.⁵⁸⁶ The preparation of a report creates an responsibility on states to analyse their circumstances and prepare an action plan for the achievement of community goals, which may not be a priority otherwise. The APR Secretariat develops the plan for the country review.⁵⁸⁷ The state provides the APR Secretariat with documentation such as relevant laws, treaty ratifications, budgets, and development plans, which

⁵⁷⁷ Article 4 of African Peer Review Mechanism Organisation and Processes op cit note 573.

⁵⁷⁸ Ibid.

⁵⁷⁹ Article 5 of African Peer Review Mechanism Organisation and Processes op cit note 573.

⁵⁸⁰ Ibid.

⁵⁸¹ Article 14 of The New Partnership for Africa’s Development (NEPAD): The African Peer Review Mechanism op cit note 93.

⁵⁸² Ibid.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ Article 15 of The New Partnership for Africa’s Development (NEPAD): The African Peer Review Mechanism op cit note 93.

⁵⁸⁶ Article 18 of The New Partnership for Africa’s Development (NEPAD): The African Peer Review Mechanism op cit note 93; see African Peer Review Mechanism (APRM) op cit note 107.

⁵⁸⁷ African Peer Review Mechanism Organisation and Processes op cit note 573.

is then used to prepare a background assessment document on the state.⁵⁸⁸ The background assessment document and the Programme of Action submitted by the state form the basis for the development of an issues paper which stipulates the main challenges in the APRM focus area of review.⁵⁸⁹

The APRM review process adopts a participatory approach, with the second stage being the review mission stage, in which a CRT visits the state to conduct consultations with various stakeholders, including government officials, civil society organisations, and the private sector.⁵⁹⁰ This enables the review process to access information from other stakeholders and not be restricted by the information provided by the state. The third stage involves the preparation of a draft report based on the information gathered in the previous two stages by the review team.⁵⁹¹ The draft report is discussed with the state under review providing the state with the opportunity to respond to the report and provide ways in which any identified shortcomings may be addressed.⁵⁹²

The fourth stage is the peer review stage, in which the report is submitted to the participating Heads of State and Government through the APRM Secretariat for consideration and adoption.⁵⁹³ During this stage, participating states engage with the state under review and will assist the reviewed state to address the identified shortcomings.⁵⁹⁴ However, in the instance the reviewed state is not willing to address the shortcomings, as a last resort, the participating states have the option to notify the reviewed state of their collective intention to proceed with appropriate measures.⁵⁹⁵ Such a provision is contradictory to the principle of non-interference and sovereignty and gives rise to the question of under what circumstances such action could be resorted to. Furthermore, the question of how states would proceed to implement such measures which remains unclear.

The final stage is for the report to be formally tabled which occurs six months after consideration by the participating states.⁵⁹⁶ The report is tabled in the key regional and sub-regional structures

⁵⁸⁸ Article 18 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93; see also African Peer Review Mechanism (APRM) op cit note 586.

⁵⁸⁹ African Peer Review Mechanism Organisation and Processes supra note 573.

⁵⁹⁰ Article 19 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93; see African Peer Review Mechanism (APRM) op cit note 570.

⁵⁹¹ Articles 20-22 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93; see African Peer Review Mechanism (APRM) op cit note 570.

⁵⁹² Ibid.

⁵⁹³ Article 23 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93; see African Peer Review Mechanism (APRM) op cit note 570.

⁵⁹⁴ Article 24 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93.

⁵⁹⁵ Ibid.

⁵⁹⁶ Article 25 of The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism op cit note 93; see African Peer Review Mechanism (APRM) op cit note 570.

such as the Pan-African parliament.⁵⁹⁷ Upon the completion of the country review, the National Programme of Action is divided into short-term, medium-term, and long-term goals.⁵⁹⁸ The achievement of these goals is monitored by the National Governance Commission/National Governing Council. Progress reports are submitted annually to the APR Forum.⁵⁹⁹

In addition to the above five stages of the review process, a further process exists which is referred to as the second-generation review.⁶⁰⁰ The second-generation review takes place after the state's progress following the country review has been reviewed. Through this second-stage review, the extent to which the National Programme of Action has been implemented is assessed, and a second National Programme of Action is developed if the need for one has been identified within the second-stage review process.⁶⁰¹ Thus, there is a follow up system and a way to adapt the NPOA if necessary.

The APRM process creates a system that enables participating states to proactively assess their capacity and abilities and identify challenges. It also requires participating states to develop plans for implementation. Through this process states are able to analyse strengths and weaknesses, creating, at the very least, a more effective approach to fulfilling obligations. Considering socio-economic development is one of the objectives of the Declaration and member states are to create an international economic environment on the continent with greater market access and the removal of barriers, the policies adopted by member states in this regard also fall under the purview of the APRM process. The exposure of these policies to peer review could positively impact economic integration as member states would be in a position to receive input into areas of weakness that could be strengthened or improved.

Furthermore, the consultation of stakeholders in the process indicates a recognition of the role other actors have in the implementation of community objectives. The APRM also creates a platform for states to learn from one another and assist where possible. A downside to peer review, however, is the non-binding nature of findings, as a state does not have an obligation to implement recommendations. Additionally, the voluntary nature to partake in the peer review is also a limitation, as not all states are participating which limits the impact peer review can have on the community as a whole.

⁵⁹⁷ Ibid.

⁵⁹⁸ See African Peer Review Mechanism (APRM) op cit note 570.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid.

4.4.2 The African Regional Integration Index

The African Regional Integration Index (hereafter ‘ARII’) was developed in recognition of the need for a minimized and internationally recognized tool to track the progress made by member states and the eight AU recognized RECs in integration on the African continent.⁶⁰² The ARII analyses the state of regional integration at the national and regional levels and provides information to stakeholders that enables them to act or react in a way that promotes regional integration.⁶⁰³ Through the ARII, stakeholders can to assess the degree of regional integration in each state and REC; identify strengths and weaknesses of the integration process; and track trends over time.⁶⁰⁴

At the time of writing, two editions of the ARII had been published. The first was published in 2016 and the second in 2019. The ARII is based on five dimensions which are considered the key socio-economic categories that are fundamental to integration in Africa. The five dimensions are trade integration; regional infrastructure; productive integration; free movement of people; and macroeconomic integration.⁶⁰⁵ The ARII makes use of 16 indicators with each of the dimensions having specific indicators to monitor the progress in that area.⁶⁰⁶ It is important to note that although the total number of indicators remains 16, the ARII 2019 changed some of the indicators.⁶⁰⁷ For example, the 2019 ARII includes whether states have signed or ratified the African Continental Free Trade Area agreement as an indicator.⁶⁰⁸ This demonstrates the ability of the ARII to be adapted depending on the prevailing circumstances. At the time of the ARII 2016, the AfCFTA negotiations were underway and at the time the ARII 2019 the AfCFTA agreement was open for signature and ratification.

States or regional economic communities receive scores depending on their performance under each indicator. The 2016 ARII used various methods to classify states. One method was to classify states or RECs according to rank based on the overall scores.⁶⁰⁹ Another method used was that of classifying states according to class in each regional economic community.⁶¹⁰ Under this method,

⁶⁰² Africa Regional Integration Index op cit note 95.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

⁶⁰⁵ Ibid at 10; AU, AFDB and UNECA ‘Africa Regional Integration Index Report 2019’, available at <https://www.integrate-africa.org/fileadmin/uploads/afdb/Documents/ARII-Report2019-FIN-R40-11jun20.pdf>, accessed on 6 July 2021.

⁶⁰⁶ AU, AFDB and UNECA op cit note 605.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid at 21.

⁶⁰⁹ Ibid at 6.

⁶¹⁰ Ibid.

a state could either be a high performer,⁶¹¹ low performer⁶¹² or average performer⁶¹³. The 2016 ARII also provided for the classification of states based on the depth and breadth of economic integration in the REC. A state's economic integration is considered "deep" if the state's overall score within the REC is higher than the average and is considered "broad" if the state is high performing in at least three dimensions.⁶¹⁴ If a state meets both conditions, such a state is considered "deep and integrated".⁶¹⁵

The 2019 ARII scored performance under each indicator and dimension on a scale from 0 to 1. A score that is closer to 0 reflects lower levels of integration and such a state or REC would be considered low performing.⁶¹⁶ A state closer to 1 reflects higher levels of integration and such a state or REC would be considered high performing.⁶¹⁷ Scores around 0.5 are considered average.⁶¹⁸

The ARII was the first of its kind mechanism in the area of monitoring regional integration in Africa. Its development was much needed and overdue. As with any other mechanism, the ARII has its shortcomings. While it gives a good overview of the state of integration in certain areas, it does not enable one to understand the reason for the level of integration as presented. This was a limitation the AU Commission identified which contributed to the establishment of a supplementary mechanism, namely the African Multidimensional Regional Integration Index.

4.4.3 The African Multidimensional Regional Integration Index

The African Multidimensional Regional Integration Index (hereafter the 'AMRII') was developed by the AU Commission with the objective of developing an index that will sufficiently meet the monitoring and evaluation needs of integration in Africa. The ARII was designed to assess the level of integration of RECs and states, whilst the AMRII was designed to assess RECs through implementation of key integration programmes.⁶¹⁹ Whilst the ARII is recognised as a commendable tool for comparison between states and regional economic communities, the fact that the ARII focuses on comparison rather than on the evaluation of integration in accordance

⁶¹¹ A state that scores higher than the average and has a confidence interval of 95%.

⁶¹² A state that scores below average.

⁶¹³ A state that scores within the average and performs moderately.

⁶¹⁴ AU, AFDB and UNECA op cit note 605.

⁶¹⁵ Africa Regional Integration Index op cit note 95.

⁶¹⁶ AU, AFDB and UNECA op cit note 605 at 22.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid.

⁶¹⁹ African Union 'African Multidimensional Regional Integration Index' available at https://au.int/sites/default/files/documents/40069-doc-amrii_feb1.pdf, accessed on 16 October 2022.

with integration initiatives has been a point of criticism.⁶²⁰ This is because results based on the approach adopted by the ARII could reflect that a state is highly integrated in an area but does not follow the stages set out in the Abuja Treaty or Agenda 2063.⁶²¹ Such information would serve a limited purpose in enabling stakeholders to make decisions. Furthermore, the ARII is criticised for making use of a small number of dimensions which do not fully cover the areas that have an influence on integration.⁶²²

The AMRII was therefore developed to fill the gap that continued to exist after the development of the ARII. The AMRII specifically seeks to evaluate the progress of states and regional economic communities in the implementation of integration projects in line with the Abuja Treaty and Agenda 2063.⁶²³ The AMRII also highlights the efforts that have been made towards implementing the integration agenda.⁶²⁴ Such a study is undertaken to gain insight into the reasons for the delays in implementing the integration agenda.⁶²⁵ The AMRII has also broadened the dimensions of integration to include emerging issues that have an impact on integration.⁶²⁶ Thus, the AMRII is better placed to provide a comprehensive viewpoint on the state of integration efforts in Africa.

4.4.3.1 AMRII Dimensions and Indicators

The AMRII makes use of eight dimensions to assess the progress that has been made in achieving the four main objectives of the Abuja Treaty.⁶²⁷ The first dimension is the free movement of persons, which refers to the right of a citizen of a member state of an REC to move freely from one member state to another without hindrance.⁶²⁸ The second dimension is trade integration, which refers to the abolition of tariff and non-tariff barriers to economic transactions so as to enable factors of production to circulate unhindered within the zone.⁶²⁹ Trade integration also entails the harmonisation of rules of origin.⁶³⁰ The third dimension is infrastructure integration, which refers to the process of the establishment of common infrastructure to facilitate the

⁶²⁰ African Union op cit note 98; African Union The 3rd Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration Eco/STC/MAEP(III)/EXP/2.1 available at https://au.int/sites/default/files/newsevents/workingdocuments/35691-wd-african_regional_multidimensional_index_report_eng.pdf, accessed on 14 January 2020.

⁶²¹ African Union op cit note 98 at 13.

⁶²² Ibid at 14.

⁶²³ Ibid at 15.

⁶²⁴ Ibid

⁶²⁵ African Union op cit note 620 at 8.

⁶²⁶ African Union op cit note 98 at 14.

⁶²⁷ Ibid at 25. The four main objectives have been identified as the Preferential Trade Area, the Free Trade Area, the Customs Union and the Common Market.

⁶²⁸ Ibid at 26; African Union op cit note 620 at 17.

⁶²⁹ African Union op cit note 98 at 26; African Union op cit note 620 at 18.

⁶³⁰ African Union op cit note 98 at 26.

realisation of activities of a group of states.⁶³¹ The fourth dimension is social integration, which considers the structural, cultural, and identity aspects of integration.⁶³² The fifth dimension is financial integration and the free movement of capital, which refers to the process by which the financial markets of states are integrated and restrictions on the free movement of capital are either removed or minimised.⁶³³ The sixth dimension is monetary integration, which is a deeper form of integration than financial integration. Monetary integration refers to the establishment of a common currency and a central bank by member states which give up sovereignty over monetary and exchange rate policies to the central bank.⁶³⁴ The seventh dimension is institutional integration, which considers the establishment of community institutions relating to legislation, justice, defence, and currency.⁶³⁵ This dimension includes actions such as promulgating uniform laws, ensuring the REC treaty is interpreted in compliance with the law, and resolving conflicts, among others.⁶³⁶ The eighth dimension is environmental integration, which aims to consider the progress made in addressing the environmental challenges of Africa's development, such as climate change.⁶³⁷

Each of the abovementioned dimensions has a set of indicators that have been selected to assess the progress made by each REC in implementing the goals and aspirations set out in the Abuja Treaty and Agenda 2063. The selected indicators may either be quantitative or qualitative.⁶³⁸ For example, one of the trade integration indicators, such as the Common External Tariff, is qualitative whilst intra-community imports and exports are quantitative indicators.⁶³⁹ The AMRII seeks to present results in a way that shows the efforts that have been made towards attainment of objectives. As such, a 5-step in depth analysis is adopted to analyse the implementation of a tool. The steps include inter-country discussions and drafting of agreements; adoption of agreements between countries; ratification of agreements; ratification and domestication of ratified agreements.⁶⁴⁰ The adoption of such an analysis allows for intermediate values that can show the efforts in implementation of tools, rather than simply reflecting 0 (for non-implementation) and 1 (for implementation).⁶⁴¹

⁶³¹ Ibid at 27; African Union op cit note 620 at 18.

⁶³² Ibid.

⁶³³ African Union op cit note 620 at 19.

⁶³⁴ African Union op cit note 98 at 29; African Union op cit note 620 at 19.

⁶³⁵ African Union op cit note 98 at 29; African Union op cit note 620 at 20.

⁶³⁶ African Union op cit note 98 at 29.

⁶³⁷ African Union op cit note 98 at 30; African Union op cit note 620 at 20.

⁶³⁸ African Union op cit note 98 at 17.

⁶³⁹ Ibid at 26.

⁶⁴⁰ African Union 'African Multidimensional Regional Integration Index' available at https://au.int/sites/default/files/documents/40069-doc-amrii_feb1.pdf, accessed on 16 October 2022.

⁶⁴¹ Ibid.

Indicators for infrastructure integration have been selected to identify the manner in which RECs establish common and regional infrastructure to facilitate trade and the free movement of persons.⁶⁴² Social integration is reflected in the manner in which individuals who move from one state to another are integrated into a community. As such, the indicators that are selected enable an assessment of the rights that are granted to members of the community in states other than their state of origin.⁶⁴³

The dimension of financial integration is based on the provision in the Abuja Treaty for the creation of a regional common market that is supposed to facilitate financial integration.⁶⁴⁴ With respect to monetary integration, the AMRII selected indicators will evaluate the policies and instruments of RECs towards the Continent's Economic and Monetary Union as envisaged in the Abuja Treaty.⁶⁴⁵

With respect to institutional and political integration, the indicators are a regional parliament, a regional court of justice, a regional armed force, a regional central bank, and a regional university.⁶⁴⁶ In terms of indicators for environmental integration, the AMRII acknowledges that this dimension is an emerging one in Africa and as such the indicators selected focus on the establishment of a community system that acts in favour of the environment.⁶⁴⁷

The AMRII makes use of indicator thresholds to compare the level of integration of RECs. The use of thresholds is intended to provide decision-makers and stakeholders with direction on the appropriate policy that will enable the achievement of set integration objectives.⁶⁴⁸ To determine thresholds, the AMRII makes use of two methods namely the averages method and the objectives method. Understanding the average level of development will enable stakeholders to see which RECs are below average and provide evidence in support of arguments in favour of implementing certain policies to raise the REC to the average level.⁶⁴⁹ The objectives method looks to analyse RECs based on the integration agenda and the goals to be achieved.⁶⁵⁰

The AMRII is evidently broader than the ARII, and it aims to consider the efforts that have been made towards implementation. Such an approach is important to encourage states as their progress is acknowledged. It also shows stakeholders that efforts are being made and enables them to

⁶⁴² Ibid at 34; African Union op cit note 620 at 23.

⁶⁴³ Ibid at 36; Ibid at 25.

⁶⁴⁴ Ibid at 37; Ibid at 26.

⁶⁴⁵ Ibid at 38; Ibid at 27.

⁶⁴⁶ Ibid at 39; Ibid at 27.

⁶⁴⁷ Ibid at 41; Ibid at 28.

⁶⁴⁸ African Union op cit note 620 at 30.

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid.

recognize where progress has stalled, identify the challenges that have led to the stalled progress and think of solutions.

4.5 THE AU NON-COMPLIANCE RESPONSE SYSTEM

Having looked at the monitoring and evaluation framework the AU has established, this research now turns to the non-compliance response system that the AU has in place for instances where measures are needed. This entails considering the role of the judicial system in non-compliance response as well as the sanctions system that the AU has established.

4.5.1 The role of judicial organs in non-compliance response

As discussed earlier, the only operational court of the AU is the AfCHPR. The decisions of the AfCHPR are intended to be final and binding, and parties to the dispute have an obligation to comply with the decisions. To keep track of compliance, member states are required to submit compliance reports to the court.⁶⁵¹ Notably, the applicant or party in whose favour judgment was made cannot institute proceedings or report non-compliance. Rather, the parties that need to comply must submit a report on their progress. This means the applicant does not have recourse in instances of non-compliance.

Additionally, the AfCHPR does not have any enforcement powers. Where there has been non-compliance with a decision, the AfCHPR reports to the AU Assembly.⁶⁵² Provision has not been made as to the action the Assembly can take in instances of non-compliance. The AfCHPR reports a majority of its decisions as not being complied with. Thus, the lack of enforcement powers means the court is unable to fulfil its mandate even further, that is protecting human and people's rights. This without a doubt impacts the effective operations of the community, as member states know there will not be consequences for their actions.

4.5.2 AU Sanctions System

The AU has established a sanctions system to deal with various situations that may arise within the community that require an enforcement response. The Constitutive Act stipulates that the Assembly may impose sanctions on a member state that fails to make payment of its contributions to the budget of the Union; a state that fails to comply with the decisions and policies of the AU;

⁶⁵¹ Rule 81 of the AfCHPR Rules.

⁶⁵² Article 31 of the AfCHPR Protocol.

and on governments that come into power through unconstitutional means.⁶⁵³ Each of these categories of sanctions will be briefly discussed.

4.5.2.1 Sanctions for Non-Payment

Member states have an obligation to contribute annually to the budget of the AU.⁶⁵⁴ Failure to make these payments can give rise to sanctions being imposed against defaulting member states. Considering the need to strengthen the AU's financial position and ability to fund its projects and programmes, the AU has made decisions aimed at promoting the payment of contributions. One such decision was for the sanctions mechanism for non-payment to be strengthened and enforced.⁶⁵⁵ The Rules of Procedure of the Assembly were, as a result, amended to make provision for the new sanctions regime to be implemented.⁶⁵⁶

The sanctions imposed for failure to make payments towards the budget vary depending on the extent of the arrears. A member state will be in arrears if it has failed to settle at least 50% of its current assessed contributions after the second quarter of each financial year in which the contribution is due.⁶⁵⁷ Once a state is in arrears, the sanctions imposed will depend on how long the state has been in arrears. A member state that is in arrears for a period of six months is in short-term arrears.⁶⁵⁸ Short-term arrears give rise to cautionary sanctions which deprive the defaulting member state of the right to speak at meetings.⁶⁵⁹

A member state that is in arrears for a period of one year is in intermediate arrears.⁶⁶⁰ Intermediate sanctions apply in this case, which include deprivation of rights to speak, vote, and receive documentation at meetings of the AU; to offer to host sessions or meetings of the AU; to be a member of a Bureau of any organ of the AU; host any organ, institution or office of the AU; have

⁶⁵³ Article 23 and 30 of the Constitutive Act of the African Union.

⁶⁵⁴ Article 30(a) of the Financial Rules and Regulations of the African Union.

⁶⁵⁵ Assembly of the Union 28th Ordinary Session Assembly/AU/Dec.635(XXVIII) 'Decision on the Outcome of the Retreat of the Assembly of the African Union on the Institutional Reform of the African Union' at 3, available at https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf, accessed on 16 June 2021.

⁶⁵⁶ Assembly of the Union 11th Extraordinary Session Ext/Assembly/AU/Dec.3(XI) 'Decision on the New African Union Sanctions Regime for the Non-Payment of Contributions', available at https://au.int/sites/default/files/decisions/36425-ext_assembly_dec.1-4xi_e.pdf, accessed on 16 June 2021; Assembly of the Union 34th Ordinary Assembly/AU/Dec.806(XXXIV) available at https://au.int/sites/default/files/decisions/40231-assembly_au_dec_796_-_812_xxxiv_e.pdf, accessed on 16 June 2021.

⁶⁵⁷ Rule 36(2)(a) of Rules of Procedure of the Assembly of the Union 2020.

⁶⁵⁸ Rule 36(2)(b)(i) of Rules of Procedure of the Assembly of the Union 2020.

⁶⁵⁹ Rule 36(2)(c)(i) of the Rules of Procedure of the Assembly of the Union 2020.

⁶⁶⁰ Rule 36(2)(b)(ii) of Rules of Procedure of the Assembly of the Union 2020.

its nationals participate in missions and any meetings organised by the AU; and have its nationals appointed as elected or non-elected staff of the AU.⁶⁶¹

A member state that is in arrears for at least two years is in long-term arrears and will be subject to comprehensive sanctions.⁶⁶² Comprehensive sanctions include all the cautionary and intermediate sanctions, as well as the member state being deprived of the rights to participate in AU meetings; have contracts of employment of its nationals renewed; and the provision of funds by the AU for new projects.⁶⁶³

The AU has imposed sanctions on member states for being in arrears in some cases. For instance, in 2018 the Executive Council imposed sanctions for non-payment on the Central African Republic, Guinea Bissau, and South Sudan.⁶⁶⁴ The sanctions against the Central African Republic were lifted in 2019 after the state made payments to clear its arrears.⁶⁶⁵ It is worth noting that sanctions for non-payment may temporarily be lifted if the member state pays at least 50% of its arrears at least thirty days before the commencement of the session of the Executive Council preceding that of the Assembly.⁶⁶⁶ Whether the imposition of sanctions in instances of non-compliance is the most effective way to deal with defaulting states is debatable. African states face many limitations, including financial limitations. A challenge that is made worse by the existence of multiple memberships in RECs. As such, states are in a difficult position to meet financial obligations to their respective RECs.

4.5.2.2 Sanctions for Non-Compliance

The Assembly makes decisions in the form of regulations and directives and member states have an obligation to comply with these decisions.⁶⁶⁷ Provision is made for sanctions to be imposed against member states that fail, without good and reasonable cause, to comply with decisions and policies of the Union.⁶⁶⁸ Sanctions that can be imposed include the denial of transport and communication links with other member states; and other economic and political measures

⁶⁶¹ Rule 36(2)(c)(ii) of the Rules of Procedure of the Assembly of the Union 2020.

⁶⁶² Rule 36(2)(b)(iii) of the Rules of Procedure of the Assembly of the Union 2020.

⁶⁶³ Rule 36(2)(c)(iii) of the Rules of Procedure of the Assembly of the Union 2020.

⁶⁶⁴ African Union Executive Council 32nd Ordinary Session EX.CL/Dec.100(XXXII)Rev.1 'Decision on the Scale of Assessment and Contributions' available at https://au.int/sites/default/files/decisions/33909-ex_cl_decisions_986-1007_e.pdf, accessed on 18 June 2021.

⁶⁶⁵ African Union Executive Council 35th Ordinary Session EX.CL/DEC.1071(XXXV) 'Decision on the Report of Ministerial Committee on Scale of Assessment and Contributions' available at https://au.int/sites/default/files/decisions/37554-ex_cl_dec_1057-1072_xxxv_e.pdf, accessed on 18 June 2021.

⁶⁶⁶ Rule 37(3) of the Rules of Procedure of the Assembly of the Union.

⁶⁶⁷ Article 9(1)(b) of the Constitutive Act of the African Union; Rule 34(1) and 35 of the Rules of Procedure of the Assembly of the Union 2020.

⁶⁶⁸ Rule 37(1) of the Rules of Procedure of the Assembly of the Union.

determined by the Assembly.⁶⁶⁹ There is, however, a requirement for the Assembly to stipulate the time frame within which a decision should be complied with and indicate when failure to comply will trigger sanctions.⁶⁷⁰ The inclusion of such a timeframe would clearly inform member states of what they are required to do and by when, which leaves little to no room for member states to argue ambiguity as a reason for non-compliance. With such a provision, the question arises as to how the Assembly becomes aware in instances of non-compliance with decisions. This research has not been able to identify a mechanism that has been established for purposes of states reporting decisions have been complied with. Furthermore, a majority of decisions are adopted without a timeframe being stipulated. The result of this being that the Assembly is not readily aware when states fail to comply, meaning action cannot be taken promptly. This in turn impacts the effective operations of the community.

4.5.2.3 Sanctions for Unconstitutional Changes in Government

The sanctions that have been imposed most commonly by the Assembly are sanctions for unconstitutional changes in governments of member states.⁶⁷¹ If a government comes into power unconstitutionally, that government will be suspended and will not be permitted to participate in the activities of the Union.⁶⁷² Further sanctions against such a government include visa denials for the perpetrators of the unconstitutional change; restriction of government to government contracts; trade restrictions; other sanctions provided for in the Constitutive Act and Assembly Rules of Procedure; and any additional sanctions recommended by the Peace and Security Council of the AU.⁶⁷³

The AU has not shied away from using sanctions against states for unconstitutional changes in government. Most recently, the AU has suspended Mali's membership due to a coup d'état in the state and has urged the military actors to refrain from interference in the states' political processes.⁶⁷⁴ The AU has similarly suspended other member states such as the Central African

⁶⁶⁹ Rule 37(1) and (2) of the Rules of Procedure of the Assembly of the Union.

⁶⁷⁰ Rule 37(3) of the Rules of Procedure of the Assembly of the Union.

⁶⁷¹ Regarding what is considered 'unconstitutional', Rule 38(2) reads as follows:

'2. In conformity with the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the African Charter on Democracy, Elections and Governance, Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, the situations considered as unconstitutional change are:

- a) Military and other coup d'état against a democratically elected Government;
- b) Intervention by mercenaries to replace a democratically elected government;
- c) Replacement of democratically elected governments by armed dissident groups and rebel movements; and
- d) Refusal by an incumbent government to relinquish power to the winning party after a free and fair election.'

⁶⁷² Article 30 of the Constitutive Act of the African Union; Rule 38(1) of Rules of Procedure of the Assembly of the Union.

⁶⁷³ Rule 38(5) of Rules of Procedure of the Assembly of the Union.

⁶⁷⁴ African Union Peace and Security Council PSC/PR/COMM.(1001(2021)) available at <https://www.peaceau.org/uploads/psx.1001.comm.mali.1.06.2021.pdf>, accessed on 18 June 2021.

Republic,⁶⁷⁵ Sudan⁶⁷⁶ and Burkina Faso.⁶⁷⁷ Sudan's suspension was lifted in September of the same year after the country formed a Transitional Government.⁶⁷⁸

4.6 CONCLUSION

The African Union is the continental body that brings together all African states and serves a very important part in the integration process. A well-functioning continental body could improve conditions on the continent and aid in enabling African states to play a bigger role at the global level. Within the continent, a continental body that has an effective legal and institutional framework could strengthen efforts towards continental unity.

This chapter focused on aspects of the AU's compliance system. This included the AU's rules system, the organs it has established and the mechanisms in place to monitor and evaluate progress. The decision-making approach in the AU appears to focus on a downward approach of implementation, whereby decisions and policies are made by the Heads of State and expected to be implemented by the relevant actors at the regional and national levels. This has an impact on compliance as there is a lower likelihood of actors complying with decisions they had no part in making. Although a regional parliament has been established it plays a restricted role. Another challenge identified in the rules system is the lack of provision for timeframes within which decisions are to be complied with and implemented.

The AU has made some progress in developing a compliance information system, that is, a system to gather information on the status of compliance and implementation. The review process used by the African Peer Review Mechanism enables the collection of information that can be used by participating member states to analyse their strengths and weaknesses and determine any policy changes that need to be implemented at the national level. The use of the African Regional Integration Index and the African Multidimensional Regional Integration Index also enables the collection of information for analysis. However, provision has not been made to monitor the implementation and compliance of AU decisions by member states. Furthermore, the ability of individuals to enforce the rights granted to them through community law is hindered by the limited

⁶⁷⁵ African Union Peace and Security Council PSC/PR/COMM.(CCCLXIII) available at <https://www.peaceau.org/uploads/psc-com-363.car.pdf>, accessed on 18 June 2021.

⁶⁷⁶ African Union Peace and Security Council PSC/PR/COMM.(DCCCXLIV) available at <https://www.peaceau.org/uploads/psc.854.comm.sudan.6.6.19.pdf>, accessed on 18 June 2021.

⁶⁷⁷ African Union Peace and Security Council PSC/PR/COMM./3.DXLIV) available at <https://www.peaceau.org/uploads/psc-544-comm-burkina-faso-18-9-2015.pdf>, accessed on 18 June 2021.

⁶⁷⁸ African Union Peace and Security Council PSC/PR/COMM.(DCCCXXV) available at <https://www.peaceau.org/uploads/eng.875.psc.communique.sudan.6.9.2019.pdf>, accessed on 18 June 2021.

access they have to the community court. The implication of this is that should rights be violated an individual would not readily be able to seek redress from the community court nor report such violation.

When it comes to dealing with non-compliance, the Constitutive Act makes provision for sanctions to be imposed. Whilst the nature and extent of sanctions may vary depending on the violation, the focus on using sanctions to induce compliance rather than including positive measures is a limitation. This is because non-compliance by member states is in many cases due to insufficient resources and member states could benefit from receiving some form of assistance to address these insufficiencies.

Sanctions for failure to pay and unconstitutional changes in government are easier to impose because of the nature of infringement. This is because it is easier for the relevant authority to become aware when an infringement of such nature has taken place. For instance, in the case of non-payment of membership contributions, the AU keeps a report on the status of contributions by member states which then informs the AU of which states have not completely met their obligations. When it comes to unconstitutional changes of government, such events are reported through media in many instances, thus bringing them to the attention of the AU. Comparatively, there does not appear to be a system in place to inform the AU of non-compliance with decisions which makes the imposition of sanctions challenging.

5 CHAPTER FIVE: FRAMEWORK FOR EFFECTIVE INTEGRATION IN SELECT AFRICAN REGIONAL ECONOMIC COMMUNITIES

5.1 INTRODUCTION

The approach that has been adopted in Africa's regional integration has resulted in the formation of multiple Regional Economic Communities (hereafter 'RECs'). The previous chapter focused on the African Union as the continental organization. This chapter turns to focus on the frameworks of select RECs and consider whether a framework for effective regional integration is created. Of the fourteen RECs that are operational on the continent, attention will be given to the Southern African Development Community (hereafter 'SADC'), the Common Market for Eastern and Southern Africa (hereafter 'COMESA') and the East African Community (hereafter 'EAC').

Tiyanjana Maluwa defines the institutional framework of RECs as the legal framework that guides the pursuit of the organisation's objectives.⁶⁷⁹ This includes, but is not limited to, the formal laws, regulations and procedures, customs and norms that shape socio-economic activity and behaviour.⁶⁸⁰ As such frameworks are integral to the effective functioning of RECs. This chapter will analyse the existing legal and institutional frameworks of regional agreements of select RECs. This will be done with the aim of assessing whether established frameworks promote the effectiveness of concluded agreements. Thus, consideration is given to the nature of community organs and their impact on the operations of the community.

The chapter will consider the primary rules of each REC, including the principles that guide their activities. This is followed by an analysis of community organs, their roles, and powers, and how their operations impact the effectiveness of the community. After this, consideration will be given to the monitoring and reporting mechanisms that are used to track implementation and compliance. To end off, the non-compliance response system of each REC will be analysed.

5.2 SADC'S FRAMEWORK FOR EFFECTIVE INTEGRATION

5.2.1 Overview of SADC's Rules System

The first REC that will be analysed is the South African Development Community (hereafter 'SADC'). The Treaty of the Southern African Development Community (hereafter the 'SADC Treaty') is the founding instrument of the community and as such provides the primary rules of the community. The SADC Treaty makes provision for principles that guide the community such as sovereign equality of member states, democracy and the rule of law.⁶⁸¹ To achieve its objectives, the community commits to harmonize political and socio-economic policies and plans of member states; and create appropriate institutions and mechanisms for mobilization of required resources for implementation of programs.⁶⁸² Furthermore, the SADC Common Agenda stipulates additional principles that underpin its activities, such as the principles of development orientation; subsidiarity; market integration; development, facilitation and promotion of trade and investment; dynamic and economy of scale gains; additionality; and variable geometry.⁶⁸³

⁶⁷⁹ Maluwa op cit note 190.

⁶⁸⁰ Ibid.

⁶⁸¹ Article 4 of the SADC Treaty.

⁶⁸² Article 5(2) of the SADC Treaty.

⁶⁸³ Report on the Review of the Operations of SADC Institutions 2001 available at https://www.sadc.int/files/6113/5281/6304/REPORT_ON_THE_REVIEW_OF_OPERATIONS.pdf, accessed on 29 March, 2020.

In addition to the above, the SADC Treaty makes provision for general undertakings of member states. Among these, member states undertake to adopt adequate measures to promote the achievement of SADC objectives and will refrain from taking measures that will jeopardize the achievement of such objectives.⁶⁸⁴ Furthermore, member states undertake to take all necessary measures for the uniform application of the SADC Treaty and accord it the force of national law.⁶⁸⁵

Although SADC member states have undertaken to cooperate in all areas where cooperation is necessary, there are specific areas which have been stipulated and these include food and security; infrastructure and services; trade, industry, finance, investment and mining; politics, diplomacy, international relations, peace and security; among others.⁶⁸⁶ These areas therefore guide the activities of the community and the conduct of member states.

It is interesting to note that although the SADC Summit can adopt legal instruments, the SADC Treaty is silent on the legal force of such instruments. This creates the impression that such instruments are not legally binding. The only instruments that the SADC Treaty expressly stipulates are binding are protocols. However, protocols are only adopted where necessary and must be signed and ratified to be binding on states that are party to the protocol.⁶⁸⁷ Such a situation makes it difficult to hold member states accountable for not implementing or complying with a legal instrument, since they are not bound unless they have ratified a protocol.

Since the time of the Southern African Development Coordination Conference (hereafter ‘SADCC’), member states have taken various measures to create a more effective community. After the replacement of the SADCC with the SADC, the Council of Ministers (hereafter ‘CoM’) conducted a review of SADC institutions and undertook an exercise to restructure the community institutions. At the time of the review, the organisational structure of SADC was decentralised in nature and member states could coordinate in at least one sector.⁶⁸⁸ The reason for this decentralised structure was to encourage a sense of ownership amongst member states and to directly involve member states in the initiation and implementation of programmes of the community.⁶⁸⁹ The review of the structure identified various shortcomings of the decentralised structure that impacted on the effective operation of the community. Some of the shortcomings included poor communication, coordination, and performance due to the lack of authority and

⁶⁸⁴ Article 6(1) of the SADC Treaty.

⁶⁸⁵ Articles 6(1) and (2) of the SADC Treaty.

⁶⁸⁶ Article 21(1) and (3) of the SADC Treaty.

⁶⁸⁷ Article 22 of the SADC Treaty.

⁶⁸⁸ Report on the Review of the Operations of SADC Institutions 2001 available at https://www.sadc.int/files/6113/5281/6304/REPORT_ON_THE_REVIEW_OF_OPERATIONS.pdf, accessed on 29 March, 2020.

⁶⁸⁹ Ibid.

accountability; duplication of efforts and resources among actors in the decentralised structure; and differences in procedures and rules, standards, and qualifications; among others.⁶⁹⁰ The review of the SADC structure indicated that a large proportion of SADC projects had more of a national character and should have been implemented at the national level rather than at the regional level.⁶⁹¹ Furthermore, the projects and activities being undertaken at the time were not based on a developmental strategy and as such were not in line with the strategic goals of the community.⁶⁹² The review resulted in a restructure of SADC institutions which will be discussed below.

In addition to the restructure, the SADC Summit approved the development of the Regional Indicative Strategic Development Plan (hereafter 'RISDP') to provide clear direction for SADC policies and programmes. The RISDP is a comprehensive development and implementation framework developed to guide the regional integration agenda of SADC for a period of fifteen years (2005-2020) initially.⁶⁹³ The RISDP provides strategic direction to SADC programmes and activities, and aligns the strategic objectives and priorities of SADC with the community's policies and strategies for achieving its long-term goals.⁶⁹⁴ The RISDP sets out the conditions that need to be met in order to achieve the community goals and provides targets and timeframes for goals to be achieved.⁶⁹⁵ Furthermore, it sets out priority areas in which action must be taken for the community's overarching goals to be achieved. Each priority area has strategies and set targets. Thus, the RISDP forms part of the community's rules system.

Although the RISDP was intended to guide activities for the period of 2005-2020, it has since been revised and is currently to be used until 2030. The revisions have been conducted as a way of taking stock and amending the plan where necessary. As such, the priority areas have also been revised. In 2020, the RISDP 2020-2030 was formulated and outlines how SADC can work towards SADC Vision 2050.⁶⁹⁶ The RISDP 2020-2030 has six priority areas as the Foundation: Peace, Security and Good Governance; Industrial Development and Market Integration; Infrastructure Development in Support of Regional Integration; Social and Human Capital Development; Cross-cutting issues including Gender, Youth, Environment and Climate Change; and Strategic Management of RISDP 2020-2030. RISDP 2020-2030 recognises the importance of the legal, institutional, and policy frameworks of SADC in ensuring an efficient community. As such it includes strategic objectives that are aimed towards capacitating SADC institutions at national and

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid.

⁶⁹² Report on the Review of the Operations of SADC op cit note 661.

⁶⁹³ SADC, Regional Indicative Strategic Development Plan, Gaborone, Botswana, 2003.

⁶⁹⁴ Ibid; SADC, Annual Report 2002-2003.

⁶⁹⁵ Ibid.

⁶⁹⁶ SADC *Southern African Development Community Regional Indicative Strategic Development Plan 2020-2030* (2020).

regional levels, establishing a dispute settlement mechanism, and establishing a mechanism to ensure compliance.⁶⁹⁷ The determination to establish a dispute settlement mechanism while seemingly commendable, gives rise to the question of why the suspended SADC Tribunal is not permitted to operate.

Furthermore, the RISDP makes provision for the monitoring and evaluation of the RISDP. Monitoring is to be done at two levels, namely the political and policy level; and the operational and technical level.⁶⁹⁸ Monitoring at the political and policy level includes institutions such as the Summit, CoM, and Sectoral and Cluster Ministerial Committees which will exercise oversight of the implementation of the RISDP.⁶⁹⁹ Monitoring at the operational and technical level involves the regular monitoring of the progress of the RISDP by the Secretariat and the SADC National Committees.⁷⁰⁰ The SADC National Committees will monitor implementation plans at the national level and provide status reports to the Secretariat.⁷⁰¹ This reflects a realization of the importance of monitoring progress and the inclusion of different organs and institutions of the community at various levels may promote transparency and accountability. However, such monitoring is only applicable to the RISDP and it does not stipulate the way such monitoring should take place. Such a lack in clarity can delay the process if each institution is to determine how to monitor and may lead to incompatible methods being adopted and duplicated efforts.

5.2.2 SADC's Organs and their Role in Effectiveness

Following the review of the structure, the SADC Heads of State and Government made the decision to restructure SADC institutions. The restructuring was viewed as a way of improving the efficiency and effectiveness of SADC policies and programmes by creating a more coordinated strategy.⁷⁰² The restructure saw the community adopt a clustering approach in which coordinating units would be grouped into four clusters that would operate as directorates. The four directorates would be Trade, Industry, Finance and Investment; Infrastructure and Services; Food, Agriculture, and Natural Resources; and Social and Human Development and Special Programmes.⁷⁰³

⁶⁹⁷ Ibid.

⁶⁹⁸ SADC op cit note 693.

⁶⁹⁹ Ibid.

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid.

⁷⁰² Ibid.

⁷⁰³ SADC Extraordinary Summit Communiqué Namibia – Windhoek 2001 available at https://www.sadc.int/files/3913/5292/8384/SADC_SUMMIT_COMMUNIQUES_1980-2006.pdf, accessed on 1 April, 2020; SADC Annual Report 2000 – 2001 available at https://www.sadc.int/files/2713/5333/8067/SADC_Annual_Report_2000-2001.pdf.pdf, accessed on 1 April, 2020.

Furthermore, the restructure formalised the Troika system for specific SADC institutions, namely the Summit; the Organ on Politics, Defence, and Security Co-operation; the CoM; the Integrated Committee of Ministers; and the Standing Committee of officials.⁷⁰⁴ According to Article 9A(6) of the SADC Treaty, the Troika of each institution will function as a steering committee of the institution and be responsible for decision making, facilitating the implementation of decisions, and providing policy directions in between the meetings of the institution. The Troika system enables tasks to be executed and decisions to be implemented expeditiously.

The restructure also focused on strengthening the capacity of the SADC Secretariat to enable the organ to effectively perform its functions as stipulated in the SADC Treaty. The restructure of the SADC secretariat has been an ongoing process over the years. The Secretariat has established the position of Deputy Executive Secretary of Regional Integration and the holder of this position is responsible for five directorates⁷⁰⁵ that manage the community's regional integration themes. The function of the directorates includes the promotion of regional integration and addressing key issues within the community.⁷⁰⁶

Whilst SADC has various institutions that have differing roles in the community's operations and promoting effectiveness, there are specific organs that can be positioned to have greater impact. These include the SADC Parliamentary Forum, the SADC National Committees and the SADC Tribunal. Each of these will now be considered in more detail.

5.2.2.1 The SADC Parliamentary Forum

Regional integration is a process can be considered to have at least two levels, namely the community level and the national level. Regional policies, programmes, and projects are made at the community level and are implemented at the national level. This means that the citizens of member states have a role to play in the implementation of regional policies and ultimately in the achievement of regional objectives. Therefore, the degree of ownership that governments and various stakeholders at the national level have has an impact on implementation and effectiveness of regional decisions. If governments and national stakeholders have a stronger sense of ownership towards regional policies, because of the benefits such policies and programmes have to offer, implementation efforts could be strengthened.

⁷⁰⁴ Report on the Review of the Operations of SADC Institutions op cit note 656; Article 9A(1) of the SADC Treaty.

⁷⁰⁵ The directorates are Industry Development and Trade; Infrastructure and Services; Food, Agriculture and Natural Resources; Social and Human Development and Special Programmes; and Policy, Planning and Resource Mobilization.

⁷⁰⁶ Report on the Review of the Operations of SADC op cit note 661.

The SADC RISDP 2020-2030 SWOT Analysis identified the limited visibility of SADC as a challenge in achieving ownership of regional programmes and projects by citizens of member states.⁷⁰⁷ This is because, other than officials directly involved in implementation, citizens are largely unaware of the community or the benefits that can be gained from the community.⁷⁰⁸ Thus there exists a gap between the community and the people of the community. One way to address this gap is through the use of regional parliaments.

The SADC Parliamentary Forum (hereafter ‘SADC PF’) was established in 1997 to constitute a Parliamentary Consultative Assembly.⁷⁰⁹ Although the SADC Treaty does not make express provision for a parliamentary institution, the SADC Parliamentary Forum was established pursuant to Article 9(2) of the SADC Treaty which enables the establishment of other institutions as necessary. The objective of the forum was to constitute a Parliamentary Consultative Assembly, with the ultimate goal of establishing a regional Parliamentary Structure.⁷¹⁰ The purpose of this ultimate goal was to strengthen the capacity of SADC by involving parliamentarians of SADC member states.⁷¹¹ The membership comprises national parliamentarians of member states.⁷¹²

The SADC PF is guided by a constitution, namely the Constitution of the SADC Parliamentary Forum. The Constitution provides the objectives of the Forum which include strengthening the implementation capacity of SADC by involving Parliamentarians in SADC affairs; advocating for the harmonisation, ratification, domestication and implementation of SADC protocols; and providing a parliamentary perspective on issues affecting SADC states.⁷¹³ The ratification, domestication and implementation of SADC legal instruments is important because it is through that process that community law can have effect within member states. If this does not take place, policies will remain unimplemented, and objectives will not be achieved.

However, the SADC Parliamentary Forum does not have a legislative function, the power to adopt laws or to participate in policymaking. Rather the power to adopt legal instruments and make policies is vested in the SADC Summit which can be considered the executive branch of SADC.⁷¹⁴ This means that the voices of the people, who are represented by parliamentarians, are not taken into consideration when making decisions. This has an overall effect on the ownership.

⁷⁰⁷ SADC RISDP 2020-2030 at 61.

⁷⁰⁸ Ibid.

⁷⁰⁹ SADC Record of Council of Ministers Held in Blantyre Republic of Malawi 4-5 September, 1997 available at <https://www.sadc.int/documents-publications/show/7813>, accessed on 22 December 2021.

⁷¹⁰ Ibid.

⁷¹¹ Ibid.

⁷¹² Article 7 of the Constitution of the SADC Parliamentary Forum.

⁷¹³ Article 6 of the Constitution of the SADC Parliamentary Forum.

⁷¹⁴ Article 10(2) of the SADC Treaty.

Furthermore, if the idea is to increase ownership at the national level, citizens need to be involved at the regional level.

The powers entrusted to the SADC PF reflect the intergovernmental approach that is preferred in Africa's RECs. The issue of sovereignty is not new to African regional integration, and it is no surprise that supranationalism has not been the go-to approach. That some recommendations suggest using a bottom-up approach so as to enable greater involvement of national governments and other national stakeholders is thus expected.⁷¹⁵ One way of enabling such involvement is through the SADC PF. The SADC PF could contribute to the bottom-up approach in two ways. First, through representation and giving a voice to the people so that SADC policies developed take the view of the people into account. Second, through increasing the sense of ownership when such legislation needs to be domesticated at the national level by granting more legislative authority to the SADC PF.

As the end goal was for the establishment of a SADC Parliament, in 2020 a proposed Draft Protocol Establishing the SADC Parliament was submitted to the Heads of State and Government. The objectives in the draft Protocol mirror those of the Parliamentary Forum, however, provision is specifically made for the proposed Parliament to develop Model Laws.⁷¹⁶ This would give the proposed SADC Parliament legislative powers to an extent which could further the domestication or reception of community law in member states. In addition, the proposed Protocol makes provision for the SADC Parliament to make recommendations to the SADC Summit through Resolutions of the Plenary.⁷¹⁷ This would allow for the voices of the people to be considered in policymaking by the Summit.⁷¹⁸ The draft Protocol had not yet been approved at the time of writing, a possible consequence of the unwillingness of Heads of State to surrender sovereignty.

5.2.2.2 SADC National Committees

The restructure also introduced SADC National Committees that were to be established in each member state.⁷¹⁹ Through these committees, SADC incorporated a bottom-up approach to

⁷¹⁵ ECDPM 'SADC Institutional Capacity to Deliver on its Mandate' paper prepared for the SADC Ministerial Retreat – "The SADC We Want", 12-14 March 2017, Kingdom of Swaziland.

⁷¹⁶ SADC Parliamentary Forum 'Strategic Lobby for the Transformation of the SADC PF into A SADC Regional Parliament' available at <https://www.sadcpf.org/index.php/en/documents/statutory-documents/sadc-pf-transformation-to-a-sadc-parliament/en-speaker-sadc-lobby-document/viewdocument/386>, accessed on 7 September 2021.

⁷¹⁷ Ibid at 12.

⁷¹⁸ Ibid.

⁷¹⁹ Article 16A of the SADC Treaty.

regional integration enabling stakeholders to contribute towards the decisions that are adopted regionally.⁷²⁰

The SADC Treaty makes provision for the establishment of SADC National Committees (hereafter ‘SNCs’) by member states.⁷²¹ SNCs are meant to consist of key stakeholders within member states which include the government, private sector, civil society, non-governmental organisations, and workers’ and employers’ organisations.⁷²² The SNCs have various roles. However, for purposes of this analysis only two will be considered.

The first role of consideration is the task that SNCs have of providing national level input in the formulation of SADC policies, strategies, and programmes of action.⁷²³ This role means that SNCs would serve as a link between national needs and regional decisions. SNCs would create a platform for various stakeholders to have a say in the policies that are made at the regional level thus enabling a bottom-up approach to regional policymaking.⁷²⁴ This would have the benefit of regional policies being made to meet the needs of those they are intended to assist.

The second role of SNCs is the coordination and oversight of the implementation of SADC programmes of action at the national level.⁷²⁵ Furthermore, provision is made for SNCs to create national steering committees which will be responsible for ensuring the rapid implementation of programmes without having to wait for a formal SNC meeting.⁷²⁶ Provision is also made to enable each member state to create a national secretariat that would facilitate the operation of SNCs.⁷²⁷ These national secretariats would report directly to the SADC Secretariat.⁷²⁸ SNCs were recognised as the entry point to SADC for member states.⁷²⁹ The implementation of regional policies not only involve various member states, but various actors within member states. SNCs have the potential to strengthen efforts by coordinating the implementation activities of the various actors, thus promoting effectiveness.

It is clear from the above that the SADC Treaty envisions that national institutions and national stakeholders would play an important role in implementation. Furthermore, SNCs are recognised as one of the principal organs driving regional integration and have a role in monitoring

⁷²⁰ Afadameh-Adeyemi & Kalula op cit note 431 at 17.

⁷²¹ Article 16A of the SADC Treaty.

⁷²² Article 16A(2) and 13 of the SADC Treaty.

⁷²³ Article 16A(4)(a) of the SADC Treaty.

⁷²⁴ Afadameh-Adeyemi & Kalula op cit note 431 at 17.

⁷²⁵ Article 16A(4)(b) of the SADC Treaty.

⁷²⁶ Article 16A(4)(d) and (7) of the SADC Treaty.

⁷²⁷ Article 16A(9) of the SADC Treaty.

⁷²⁸ Article 16A(10) of the SADC Treaty.

⁷²⁹ SADC op cit note 693 at p87.

implementation of the RISDP at the national level.⁷³⁰ However, member states have not effectively made use of SNCs despite the important potential SNCs have for improving regional integration. Studies show that not all member states have established SNCs, and of those that have established SNCs, the SNCs are not adequately equipped to fulfil the role assigned to them.⁷³¹ A review of the Windhoek Declaration on a New Partnership Between SADC and the International Cooperating Partners reflects the need to develop the capacity of SNCs to strengthen the link between national and regional programming.⁷³² Being organs that have a key role to play, it would be prudent to establish a timeline for member states to establish operational SNCs.

5.2.2.3 The SADC Tribunal

An important aspect of an effective community is the enforcement of community obligations. As such, a discussion of the SADC Tribunal is necessary for assessing the effectiveness of the SADC Community. The Tribunal also forms part of the community's non-compliance response system and that component of it will be discussed in the next section.

The SADC Tribunal was established in 2005 pursuant to Article 9 of the SADC Treaty. The Tribunal only began its work over a decade after SADC became operational however, its establishment was a positive step in further integrating the community. The operations of the Tribunal were governed by the Protocol on the Tribunal in SADC (hereafter the '2000 Protocol') and the Rules of Procedure of the SADC Tribunal.

The SADC Treaty stipulates the role of the Tribunal as that of ensuring adherence to and the proper interpretation of the provisions of the SADC Treaty and other subsidiary instruments.⁷³³ The Tribunal was established to have jurisdiction over all disputes and applications that were referred to it in relation to the interpretation and application of the SADC Treaty; the interpretation, application or validity of all subsidiary instruments adopted within the framework of the community, as well as acts of the community institutions; and all matters that are provided for in other agreements concluded between member states that confer jurisdiction on the

⁷³⁰ Ibid; ECDPM op cit note 715.

⁷³¹ Ogochukwu Nzewi and Lungu Zakwe 'Democratising Regional Integration in Southern Africa: SADC national committees as platforms for participatory policy-making' <https://media.africaportal.org/documents/RR122.pdf>, accessed on 16 August 2021; Dirk Hansohm and Rehabeam Shilimela 'Progress in economic integration with SADC' in Anton Bösl, Willie Breytenbach, Trudi Hartzenberg, Collin McCarthy and Klaus Schade (eds) *Monitoring Regional Integration in Southern African Yearbook Volume 6* (2006) at 31.

⁷³² A Review of The Windhoek Declaration on a New Partnership Between the Southern African Development Community and The International Cooperating Partners available at https://www.sadc.int/files/4413/7630/2472/Windhoek_Decl_Review_Final_Report_20th_June_2012.pdf, accessed on 13 May 2021.

⁷³³ Article 16 of the SADC Treaty.

Tribunal.⁷³⁴ Under the 2000 Protocol, the Tribunal could hear disputes between member states;⁷³⁵ natural or legal persons and member states;⁷³⁶ the community and member states;⁷³⁷ natural or legal persons and the community;⁷³⁸ and the community and staff members of the community.⁷³⁹ Such access by natural and legal persons, however, was not without limit as all local remedies had to be exhausted first.⁷⁴⁰

The extensive provision for matters that could be heard by the Tribunal reflected an understanding of the reach of community decisions, namely that they affect natural and legal persons of member states. It furthermore reflects a determination to protect their rights. Such access can promote effectiveness in various ways. For instances, if a state behaves in a way that contradicts the SADC Treaty, such conduct can be challenged in the Tribunal. This could prevent or stop contradictory conduct by member states or the community. This also promotes accountability in the community as action can be taken against the community.

The relevant instruments made extensive provisions regarding the nature of the decisions of the Tribunal. According to the SADC Treaty, the decisions of the Tribunal were to be final and binding.⁷⁴¹ The 2000 Protocol provided that the decisions of the Tribunal were to be binding on the parties to the dispute in respect of that particular case and enforceable within the territories of the member states concerned.⁷⁴² Furthermore, the 2000 Protocol determined that the member states and institutions of the community had an obligation to carry out all measures necessary to ensure the execution of Tribunal decisions.⁷⁴³ These provisions, therefore, placed an obligation on the parties relevant to a dispute to abide by the ruling of the Tribunal.

The SADC Tribunal was suspended 2010 following a dispute involving a member state's non-compliance. With respect to natural or legal persons, the suspension of the Tribunal created the absence of an organ that allows persons to seek protection of the rights conferred on them by regional communities. This creates a situation in which governments may violate rights without consequence. With respect to member states, the non-existence of a functional judicial organ in

⁷³⁴ Article 14 of the 2000 Protocol.

⁷³⁵ Article 15 of the 2000 Protocol.

⁷³⁶ Article 15 of the 2000 Protocol.

⁷³⁷ Article 17 of the 2000 Protocol.

⁷³⁸ Article 18 of the 2000 Protocol.

⁷³⁹ Article 19 of the 2000 Protocol.

⁷⁴⁰ Article 15 of the 2000 Protocol.

⁷⁴¹ Article 16(5) of the SADC Treaty and Article 24 of the 2000 Protocol.

⁷⁴² Article 24 of the 2000 Protocol.

⁷⁴³ Article 32(3) and (2) of the 2000.

the community creates a gap in the enforcement of community obligations in situations of non-compliance.

In an attempt to have a functional Tribunal, the Summit adopted and signed the new SADC Protocol in 2014 (hereafter '2014 Protocol'). The 2014 Protocol made amendments to the jurisdiction of the Tribunal. The 2014 Protocol provides that the Tribunal will have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between member states.⁷⁴⁴ Thus, only member states would be able to bring matters before the Tribunal whilst natural and legal persons would not. Furthermore, the Tribunal would not have the authority to hear disputes regarding the application or interpretation of any other legal instruments, nor application of the Treaty.⁷⁴⁵

Another distinct feature of the 2014 Protocol is that it provides an option for member states to opt-out of the jurisdiction of the Tribunal.⁷⁴⁶ In effect member states may choose not to be accountable to the judicial organ of the community and effectively not to be held accountable in the instance of non-compliance. This being a provision similar to that relating to the African Court of Human and People's Rights.

In addition to the abovementioned changes, the 2014 Protocol retained the authority of the Summit as the organ to take appropriate action in instances of non-compliance with decisions of the Tribunal.⁷⁴⁷ Once again what amounts to 'appropriate action' is not defined which means the Heads of State and Government have the discretion to decide what action is appropriate.

Although the 2014 Protocol has been signed, it has not yet entered into force. For the 2014 Protocol to enter into force, two-thirds of the SADC member states must deposit instruments of ratification. As it stands, the revival of the SADC Tribunal, whether under the 2014 Protocol or the 2000 Protocol, remains unclear. In 2019, South Africa withdrew its support of the 2011 decision to abolish the Tribunal.⁷⁴⁸ Whether other states will follow suit remains to be seen. However, the RISDP 2020-2030 reflects the need for a dispute settlement mechanism to be established.⁷⁴⁹

⁷⁴⁴ Article 33 of the 2014 Protocol.

⁷⁴⁵ Gerhard Erasmus 'The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law', available at <https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html>, accessed on 16 June 2020.

⁷⁴⁶ Article 50 of the 2014 Protocol.

⁷⁴⁷ Article 44(4) of the 2014 Protocol.

⁷⁴⁸ Tralac 'South Africa withdraws its Signature from the Decision to abolish the SADC Tribunal' available at <https://www.tralac.org/blog/article/14240-south-africa-withdraws-its-signature-from-the-decision-to-abolish-the-sadc-tribunal.html>, accessed on 16 June 2020.

⁷⁴⁹ SADC RISDP 2020-2030 at 58.

5.2.3 Monitoring Compliance in SADC

Research reveals that SADC does not have a mechanism used to monitor compliance with and implementation of SADC legal instruments. Instead, SADC has in some instances developed mechanisms to monitor specific projects. For instance, SADC has implemented the SADC Finance and Investment Protocol Macroeconomic Surveillance Mechanism and the Tripartite Free Trade Area Non-Tariff Barriers Monitoring Mechanism.⁷⁵⁰

The SADC Policy on Strategy Development, Planning, Monitoring and Evaluation (hereafter the ‘SDPME’) was adopted in 2012. Its purpose was to strengthen SADC’s decision-making processes to improve performance towards the community objectives and it provides an overarching framework for monitoring.⁷⁵¹ Specifically, among other objectives, the policy seeks to consolidate the institutional mechanisms for strategy development, monitoring, and reporting among others.⁷⁵² The SDPME was revised and upgraded to the SADC Policy on Strategy Development, Planning, Monitoring, Evaluation and Reporting (hereafter ‘SPMER’), adopted in 2020.

Under the SPMER, the SADC Secretariat has a responsibility to monitor the implementation of protocols and other core policies of the community. To achieve this, the secretariat is expected to prepare technical guidelines and procedures for the collection of information on the domestication and implementation of protocols and core policies; prepare annual reports on policy implementation in member states, in collaboration with said member states; and support the preparation of implementation plans for protocols and other core policies to enable member states to domesticate.⁷⁵³

The lack of a mechanism to keep track of compliance and implementation causes challenges in monitoring progress as well as identifying challenges. Since the SADC Treaty is silent on whether legal instruments are binding on member states, with the exception of the Treaty itself and protocols, states will not have an obligation to implement such instruments. Through tracking progress, the community would be in a position to devise strategies to promote compliance, such as providing inducements to states.

⁷⁵⁰ SADC ‘Developing an Effective Mechanism to Monitor and Ensure Compliance to SADC Protocols and other Legal Instruments and Commitments’ available at <https://imanidevelopment.com/wp-content/uploads/2020/01/SADC-Summary-Report.pdf>, accessed on 25 October 2022.

⁷⁵¹ SDPME at 12; SPMER at 6.

⁷⁵² SDPME at 6; SADC ‘Developing an Effective Mechanism to Monitor and Ensure Compliance to SADC Protocols and other Legal Instruments and Commitments’ available at <https://imanidevelopment.com/wp-content/uploads/2020/01/SADC-Summary-Report.pdf>, accessed on 25 October 2022.

⁷⁵³ SDPME at 12; SPMER at 17.

5.2.4 SADC's Non-Compliance Response System

Having looked at the rules system that underpins the community and the role of some organs in the effectiveness of the community, this section will consider the measures SADC has in place in instances of non-compliance. SADC's non-compliance response system can be divided into two, that is, the role of the Tribunal in instances of non-compliance and the sanctions regime that has been provided for in the SADC instruments.

5.2.4.1 The Role of the Tribunal

As aforementioned, decisions of the Tribunal were intended to be binding on the parties of a dispute. In the instance of the failure of a party to a dispute to comply with the decision of the Tribunal, the failure could be referred to the Tribunal for consideration. Provision for referral to the Tribunal in the instance of non-compliance is important as it allows affected parties a form of recourse. If the Tribunal established that such a failure did exist, the finding would be reported to the Summit for appropriate action to be taken.⁷⁵⁴ However, an issue arises in the fact that authority is given to the Summit to take appropriate action in instances of non-compliance. First, this indicates that there is no clear separation of powers between the executive organ of the community, which is also subject to the Tribunal, and the judicial organ of the community. Second, the term 'appropriate action' is not defined and could be interpreted in various ways and be subject to political influence.

The authority of the Tribunal was put to the test in one of the cases brought before it, namely the case of *Mike Campbell (Pvt) Ltd. And Others v Republic of Zimbabwe*⁷⁵⁵. This case was a dispute between Mike Campbell (Pvt) Limited and William Michael Campbell (the Applicants) and the Republic of Zimbabwe (the Respondent). At the time of the application to the Tribunal, land acquisitions were underway in Zimbabwe under Section 16B of the Constitution of Zimbabwe.⁷⁵⁶ Section 16B made provision for the acquisition of land by the government for purposes such as settlement for agricultural use, land reorganisation, or the relocation of persons that were dispossessed of land.⁷⁵⁷ Section 16B further stipulated that compensation would not be paid in the instance of acquisition except for any improvements that had been effected on the land prior to the acquisition.⁷⁵⁸ In addition, Section 16B expressly prohibited any person who has any rights or interest in the land

⁷⁵⁴ Article 32(4) and (5) of the 2000 Protocol.

⁷⁵⁵ *Campbell* supra note 66.

⁷⁵⁶ Section 16B had been added to the Constitution of Zimbabwe through Amendment 17.

⁷⁵⁷ Section 16B(2)(a) of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

⁷⁵⁸ Section 16B(2)(b) of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

from challenging the acquisition in court and for any court to hear such a challenge.⁷⁵⁹ Access to the courts was only permitted to challenge the compensation payable for improvements effected on the land before it was acquired.⁷⁶⁰

The Applicants sought relief from the SADC Tribunal arguing that the Respondent had breached its obligations under the SADC Treaty. First, the Applicants argued that Zimbabwe had breached Article 4(c) of the SADC Treaty which required states to act in accordance with human rights, democracy, and the rule of law.⁷⁶¹ The rule of law embodies two rights which are the right to access the courts and the right to a fair trial.⁷⁶² Second, the Applicants argued that the expropriation of land was primarily based on consideration of the race and ethnic origin of the farmers, regardless of whether the land had been acquired during the colonial period or after independence.⁷⁶³ This, they argued, was in breach of Article 6(2) of the SADC Treaty which prohibits discrimination against persons by member states.⁷⁶⁴

The court decided in favour of the Applicants and found, amongst other findings, that the Applicants had been denied access to courts in Zimbabwe, that the Applicants had been discriminated against on the grounds of race, and that the Respondent was in breach of its obligations under the SADC Treaty.⁷⁶⁵ The Tribunal directed the Respondents to take the necessary measures to protect the possession, occupation, and ownership of the lands of the Applicants.⁷⁶⁶ As provided for by the SADC Treaty the decisions of the Tribunal are final and binding which means the parties could not appeal. Furthermore, the party against whom the decision is given, in this instance the Government of Zimbabwe, had an obligation to comply with the decision.

With regards to the enforcement and execution of decisions of the Tribunal, Article 32(1) of the 2000 Protocol stipulated that the enforcement of decisions is to be governed by the law and rules of civil procedure of the relevant state. One problem with such a provision is that the laws of states make provisions for the enforcement of judgments of foreign national courts, but not for

⁷⁵⁹ Section 16B(3)(a) of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

⁷⁶⁰ Section 16B(3)(b) of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

⁷⁶¹ *Campbell* supra note 66 at 26.

⁷⁶² *Ibid* at 26.

⁷⁶³ *Ibid* at 41.

⁷⁶⁴ *Ibid*.

⁷⁶⁵ *Ibid* at 57.

⁷⁶⁶ *Ibid*.

judgments of international courts.⁷⁶⁷ Additionally, this provision leaves the manner of enforcement to be determined at the discretion of member states.

In the case of *Mike Campbell (Pvt) Ltd. And Others v Republic of Zimbabwe*, the Tribunal had made a decision and thus the Government of Zimbabwe had to comply. The respondent, however, did not comply with the decision. This led the Applicants filing an application with the Tribunal seeking a declaration that the respondent was in breach and contempt of the Tribunal's decision. The Tribunal found for the Applicants, and according to the Tribunal's Protocols, reported the finding to the Summit for appropriate action to be taken.

As the term 'appropriate action' is not defined in the 2000 Protocol nor the SADC Treaty, the action to be taken is at the discretion of the Summit. It is worth mentioning that Summit decisions are taken by consensus, meaning all members must agree with the decision.⁷⁶⁸ Considering that Zimbabwe's head of state is a member of the Summit, it is difficult to see how it would agree to a decision against it. In this instance, the Summit decided that the appropriate action was to not take any measures to ensure Zimbabwe's compliance. Instead, in 2010, the Summit made a decision to review the role, functions, and terms of reference of the Tribunal to be concluded within a six-month period.⁷⁶⁹ At the Extraordinary Summit held in 2011, the Summit considered the report received on the review of the Tribunal. Upon considering this report, the SADC Tribunal decided to initiate the process aimed at amending the relevant SADC instruments so as not to reappoint members whose terms of office had expired and to not replace members of the Tribunal whose terms were due to expire.⁷⁷⁰ Furthermore, the Summit prohibited the Tribunal from receiving any new cases or hearing any cases until the SADC Protocol had been reviewed and approved.⁷⁷¹ In effect, the operations of the SADC Tribunal were suspended. This approach was in contradiction of the SADC Treaty which requires a three-quarter majority decision to dissolve a SADC institution.⁷⁷²

⁷⁶⁷ Richard Frimpong Oppong 'Enforcing Judgments of the SADC Tribunal in the domestic courts of member states' (2010) 10 *Monitoring Regional Integration in Southern Africa* 116.

⁷⁶⁸ Article 10(9) of the SADC Treaty.

⁷⁶⁹ SADC Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government, available at https://www.sadc.int/files/3613/5341/5517/SADC_Jubilee_Summit_Communique.pdf.pdf, accessed on 7 February 2022.

⁷⁷⁰ SADC Communiqué, Extraordinary Summit Heads of State and Government of the Southern Africa Development Community Windhoek, Republic of Namibia 20 May 2011, available at http://archive.kubatana.net/docs/demgg/sadc_summit_communique%E9_110520.pdf, accessed on 23 December 2021.

⁷⁷¹ Ibid.

⁷⁷² Article 35(1) of the SADC Treaty.

Such a position is a concern when one considers the effective operation of the community. The history of African states and the socio-economic challenges faced contribute to the approach member states have towards regional or international agreements. The approach focuses on protecting national interests over regional or community interests. Thus, the preference for an intergovernmental approach. The emphasis on non-interference is also reflected in the choice of member states to refrain from getting involved in national affairs of other member states, and from holding member states accountable. This becomes problematic when community law is infringed. Furthermore, by acting in contradiction of the treaty, the Summit appears to be above the community law and with an inoperative Tribunal, this conduct cannot be challenged.

Overall, the Tribunal, whether operational or not, under the 2000 Protocol had restricted powers to address non-compliance. At most, the Tribunal could make a judgement against a non-compliant state which would need to be enforced by the member state or the Summit.

5.2.4.2 Sanctions In SADC

Similarly, to the African Union, the SADC Treaty has made provision for sanctions in certain instances. According to the SADC Treaty, sanctions may be imposed in three cases; namely if a member state persistently fails, without good reason, to fulfil obligations assumed under the Treaty; implements policies which undermine the principles and objectives of SADC; and if a state is in arrears in payment of contributions to SADC and has not secured dispensation of the Summit.⁷⁷³ The imposition of sanctions is at the discretion of the Summit on a case by case basis, except in the case of contribution arrears.⁷⁷⁴ Furthermore, the nature of sanctions that may be imposed is not provided for in the SADC Treaty, except in the case of arrears, which means the Summit has the authority to decide what sanctions to impose, if any.

Sanctions if a state in arrears are at the discretion of the Secretariat and do not need to be referred to the Summit or Council.⁷⁷⁵ The sanctions that may be imposed vary depending on the period for which a state has been in arrears. If a state is in arrears for one year, the state's rights to speak and receive documentation at SADC meetings are suspended.⁷⁷⁶ If a state is in arrears for two years, in addition to the arrears above, the state's personnel are suspended from recruitment or renewal of contracts of employment.⁷⁷⁷ If a state is in arrears for three years, the suspension also includes

⁷⁷³ Article 33(1) of the SADC Treaty.

⁷⁷⁴ Article 33(2) of the SADC Treaty.

⁷⁷⁵ Article 33(4) of the SADC Treaty.

⁷⁷⁶ Article 33(3)(a) of the SADC Treaty.

⁷⁷⁷ Article 33(3)(b) of the SADC Treaty.

being suspended from provision by SADC of funds for new projects in the member state.⁷⁷⁸ Arrears for four or more years attract all the above-mentioned sanctions and in addition, a member state is suspended from cooperation between SADC and the member state from cooperation in the areas provided for in Article 21 of the SADC Treaty.⁷⁷⁹

5.3 COMESA'S FRAMEWORK FOR EFFECTIVE INTEGRATION

5.3.1 Overview of COMESA's Rules System

The Common Market for Eastern and Southern Africa (hereafter 'COMESA') was established in pursuit of economic integration between member states. The member states have undertaken to cooperate in areas such as trade liberalization and customs cooperation; transport and communications; industry and energy; monetary affairs and finance; and economic and social development.⁷⁸⁰ To achieve this, member states are to create favourable conditions for the achievement of Common Market aims and the implementation of COMESA Treaty provisions.⁷⁸¹ Furthermore, members are to abstain from any measures likely to jeopardize achievement of community goals.⁷⁸² The principles that guide the activities of the community include equality and interdependence of member states; solidarity and collective self-reliance among member states; accountability and economic justice; and non-aggression between member states.⁷⁸³ In comparison to SADC, the COMESA Treaty does not make provision for non-interference.

The COMESA Treaty makes specific provision for implementation and monitoring in the community. In terms of Article 173, member states agree to prioritize the implementation of treaty provisions through comprehensive and measurable programmes with clear implementation targets and effective evaluation mechanisms.

COMESA has adopted strategic plans for five-year periods, namely the Medium-Term Strategic Plans (hereafter 'MTSP'). The first MTSP was for the period of 2016-2020 and the current MTSP is for the period 2021-2025. The MTSP sets out activities that guide integration efforts of the community in line with the objectives of the community. The 2021-2025 puts forward four

⁷⁷⁸ Article 33(3)(c) of the SADC Treaty.

⁷⁷⁹ Article 33(3)(d) of the SADC Treaty.

⁷⁸⁰ Article 4 of the COMESA Treaty.

⁷⁸¹ Article 5(1) of the COMESA Treaty.

⁷⁸² Article 5(1) of the COMESA Treaty.

⁷⁸³ Article 6 of the COMESA Treaty.

strategic pillars namely market integration; physical integration/connectivity; productive integration; and good and social integration.⁷⁸⁴

In developing the 2021-2025 MTSP, challenges faced in implementing the 2016-2020 MTSP were considered. Challenges highlighted included slow rate in signature, ratification and domestication of legal instruments; delayed implementation of Authority and Council decisions and a lack of results-oriented action plans; lack of implementation of regional programmes into national development plans; inadequate domestic resources; and low levels of awareness on COMESA regional integration programmes.⁷⁸⁵ Similar challenges can be seen in SADC. Furthermore, difficulties in evaluation performance based on results attained in programmes impacted the implementation of a results-based management approach in the implementation of the 2016-2020 MTSP.⁷⁸⁶

The 2021-2025 MTSP seeks to improve implementation through improving the monitoring and evaluation framework of the community. Emphasis will be passed on improving reporting of implementation by adopting a Results-Based Management (hereafter 'RBM') approach. The RBM approach has various aspects to it including identifying objectives and indicators; setting targets; establishing a monitoring system for regular data collection and comparing results with targets; and using collected information to inform decisions.⁷⁸⁷ The MTSP indicates monitoring will be done through institutional arrangements at member state and Secretariat levels.⁷⁸⁸ However, the MTSP also identifies the need to assist member states in implementing mechanisms for reporting the domestication of regional policies.⁷⁸⁹

5.3.2 COMESA's Organs and their Role in Effectiveness

The Authority of COMESA as well as the Council of Ministers have power to make decisions that have a binding nature. Decisions and directions of the Authority are binding on member states, organs of the community except the COMESA COJ and those to whom they may be addressed.⁷⁹⁰ Such decisions and directions are to be notified to those they are addressed and will take effect either upon such notification or on the specified date.⁷⁹¹

⁷⁸⁴ COMESA 2021-2025 MTSP at 44.

⁷⁸⁵ COMESA 2021-2025 MTSP at 28.

⁷⁸⁶ COMESA 2021-2025 MTSP at 28.

⁷⁸⁷ COMESA 2021-2025 MTSP at 102.

⁷⁸⁸ COMESA 2021-2025 MTSP at 107.

⁷⁸⁹ COMESA 2021-2025 MTSP at 103.

⁷⁹⁰ Article 8(3) of the COMESA Treaty.

⁷⁹¹ Article 8(4) of the COMESA Treaty.

The Council of Ministers has power to make regulations, issue directives, take decisions, make recommendations and deliver opinions.⁷⁹² The effect of each of these varies. A regulation in its entirety is binding on Member States.⁷⁹³ Regulations take effect on the date they are published in the COMESA Gazette or a later specified date.⁷⁹⁴ A directive is only binding on the member states it is addressed to and only with respect to the result to be achieved, leaving the means of achieving the result at the discretion of member states.⁷⁹⁵ A decision is binding only upon those to whom it is addressed.⁷⁹⁶ Both directives and decisions take effect upon notification or at a later date specified.⁷⁹⁷ Recommendations and opinions do not have binding force.⁷⁹⁸

The COMESA Secretariat is also a key organ when it comes to establishing a more effective community. Although the nature of COMESA is different to SADC, it is possible to compare the nature of their respective regional judicial organs. One point of comparison is that under the COMESA Treaty, the Secretary General may refer instances of non-compliance to the Court of Justice. One of the responsibilities of the Secretary General is to ensure that the objectives in the Treaty are met and to investigate any presumed breach of the Treaty.⁷⁹⁹ According to Article 25 of the COMESA Treaty, if the Secretary General considers that a member state has failed to fulfil an obligation under the Treaty or has infringed a provision of the Treaty, the Secretary General is to submit these findings to the member state. The member state then has the opportunity to submit its observations on the findings of the Secretary General within two months.⁸⁰⁰ If the member state fails to submit observations in time or if the submitted observations are unsatisfactory, the Bureau of the Council⁸⁰¹, upon referral by the Secretary General, will decide whether the matter should be referred to the Court of Justice or the Council.⁸⁰² If the matter is referred to the Council, and the Council fails to resolve it, the matter is to be referred to the Court.⁸⁰³ The result of this process is that the Court of Justice has the power to impose sanctions if a member state has not complied with its obligations or has infringed on provisions of the Treaty. This creates a system of accountability and enforcement that is less likely to be influenced by political interests.

⁷⁹² Article 10 of the COMESA Treaty.

⁷⁹³ Article 10 of the COMESA Treaty.

⁷⁹⁴ Article 12(1) of the COMESA Treaty.

⁷⁹⁵ Article 10 of the COMESA Treaty.

⁷⁹⁶ Article 10 of the COMESA Treaty.

⁷⁹⁷ Article 12(2) of the COMESA Treaty.

⁷⁹⁸ Article 10 of the COMESA Treaty.

⁷⁹⁹ Article 17(8)(f) of the COMESA Treaty.

⁸⁰⁰ Article 25(2) of the COMESA Treaty.

⁸⁰¹ Article 2 of the COMESA Treaty provides that the “Bureau of the Council” means the Chairman, Vice-Chairman and Rapporteur elected in accordance with the Rules of Procedure of the meetings of the Council.

⁸⁰² Article 25(2) of the COMESA Treaty.

⁸⁰³ Article 17(8)(h) and 25(3) of the COMESA Treaty.

The Secretariat is, however, constrained by various factors that have affected its effectiveness and efficiency. Such challenges include a misaligned organizational structure and restricted resources. Having such an organ unable to perform its function will impact the effective operations of the community.

5.3.2.1 COMESA Court of Justice

The COMESA Court of Justice (hereafter ‘COMESA COJ’) was established as the community’s judicial organ. The COMESA COJ is responsible for ensuring the law is adhered to with respect to the interpretation and application of the COMESA Treaty.⁸⁰⁴ The COMESA COJ has jurisdiction over all matters referred to it pursuant to the COMESA Treaty.⁸⁰⁵ Matters may be referred to the COMESA COJ by member states, the Secretary General of COMESA, and legal and natural persons that are resident in member states.⁸⁰⁶ Under the COMESA Treaty, the judgment of the court is final, conclusive, and binding from the date of delivery.⁸⁰⁷ Member states thus have an obligation to take the measures required to implement a judgment of the court.

The COMESA COJ has made critical judgements that have strengthened the position of community law in the community. In the case of *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius*,⁸⁰⁸ one of the issues before the court was whether individuals who reside in member states of COMESA can have an enforceable right under the COMESA Treaty. The Court referred to Article 26 of the COMESA Treaty which stipulates that any person who is resident in a member state may refer for determination by the Court the legality of any act, regulation, directive, or decision of the COMESA Council or of a member state on the grounds that such act, directive, decision, or regulation is unlawful or an infringement of the provisions of the COMESA Treaty. The position of the Court was that community law not only creates obligations applicable to residents of member states but also creates rights that can be enforced by the residents.⁸⁰⁹ The Court held that residents have a right before it provided that they can establish that they have been prejudiced by an act of a member state that contravenes the COMESA Treaty.⁸¹⁰

⁸⁰⁴ Article 19(1) of the COMESA Treaty.

⁸⁰⁵ Article 23(1) of the COMESA Treaty.

⁸⁰⁶ Articles 24, 25 and 26 of the COMESA Treaty.

⁸⁰⁷ Article 31 of the COMESA Treaty and Rule 69(1) of the Rules of the COMESA Court of Justice.

⁸⁰⁸ *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius* Reference No. 1 of 2012.

⁸⁰⁹ *Ibid* at 17.

⁸¹⁰ *Ibid* at 19.

The First Instance Division (hereafter the 'FID') of the COMESA COJ also made an impactful ruling in the *Malawi Mobile Ltd v Government of Malawi and MACRA*⁸¹¹ case. In this case the COMESA COJ had to decide whether it had jurisdiction over matters relating to the national law of member states. The FID interpreted that the acts, regulations, directives, and decisions referred to in Article 26 of the COMESA Treaty relate to acts, regulations, directives, and decisions not only of organs of the community but of the COMESA Council and member states that are amenable to be examined by the Court.⁸¹² Furthermore, the court held that in order to determine whether fundamental principles of the COMESA Treaty have been breached, the municipal laws of member states need to be examined.⁸¹³ However, upon appeal, the Appellate Division took a more restrictive approach and held that the COMESA COJ does not have jurisdiction where the cause of action is based solely on an infringement of a national law.⁸¹⁴ Furthermore, an 'unlawful act' does not include any breach of domestic law, but there should be a relationship between the act and unlawfulness under the COMESA Treaty.⁸¹⁵ Such a restrictive approach will have the implication of leaving natural or legal persons with restricted recourse in instances that domestic law infringes their rights.

5.3.3 Monitoring Compliance in COMESA

COMESA, similar to the situation in SADC, does not have a community monitoring mechanism to keep track of compliance and implementation. In 2011, a transposition survey was conducted by the COMESA Secretariat to ascertain the extent to which member states had transposed Council Decisions, Regulations and Directives.⁸¹⁶

Transposition, for purposes of this survey, was defined as policy and administrative measures that have been put into place to implement regional agreements, decisions, Protocols at the national level.⁸¹⁷ The survey sought to determine the level of transposition of member states by using four levels as benchmarks. The legal and regulatory framework level referred to the degree actual transposition of commitments into national legal and regulatory frameworks required for their implementation.⁸¹⁸ The strategic policy level referred to the degree commitments had been integrated into national policy frameworks.⁸¹⁹ The planning level considered the degree of concrete

⁸¹¹ *Malawi Mobile Ltd v Government of Malawi and MACRA* Reference No. 1 of 2015.

⁸¹² Ibid at 12.

⁸¹³ Ibid at 15.

⁸¹⁴ *Government of the Republic of Malawi v Malawi Mobile Limited* Appeal No. 1 of 2016 at 20.

⁸¹⁵ Ibid at 22.

⁸¹⁶ SADC Key Issues in Regional Integration Volume 2 at 146.

⁸¹⁷ Ibid at 144.

⁸¹⁸ Ibid at 145.

⁸¹⁹ Ibid at 145.

transposition into national planning tools.⁸²⁰ Finally, the operational implementation level analysed the existence of a monitoring mechanism and the degree of actual implementation of commitments against the set roadmap and monitoring benchmarks.⁸²¹

One of the findings of the transposition survey was that the monitoring and evaluation capacity of both the COMESA Secretariat and member states is low which creates a challenge in keeping track of implementation. As such, one of the recommendations was to enhance the monitoring, evaluation and reporting system by establishing regional Monitoring and Evaluation Frameworks.⁸²²

Research has shown that such a framework has not been established as yet. This is to the detriment of the community because, although decisions continue to be made, their transposition is not monitored regularly. However, there have been monitoring mechanisms set up for specific programmes or projects of the community. For instance, COMESA is participating in the Non-Tariff Barriers to Trade Online Reporting, Monitoring and Eliminating Mechanism for the Tripartite Free Trade Area.⁸²³ COMESA has also introduced SMS Monitoring and Reporting Tools to further keep track of elimination of non-tariff barriers to trade in the region.⁸²⁴

5.3.4 COMESA's Non-Compliance Response System

5.3.4.1 Court of Justice's Role

As mentioned above, member states have an obligation to implement the decisions of the COMESA COJ. In the instance that a party fails to implement a decision of the court, the court is authorised to impose a sanction on that party in the form of a fine to be paid to the Court.⁸²⁵ This is clearly different to the authority afforded to the SADC Tribunal, as well as the African Court on Human and People's Rights, which can only refer non-compliance to the Summit and Assembly respectively for appropriate action to be taken. This puts the COMESA COJ in a stronger position with some authority to enforce community law.

⁸²⁰ Ibid at 145.

⁸²¹ Ibid at 145.

⁸²² Ibid at 149 and 150.

⁸²³ COMESA 2021 Annual Report at 34.

⁸²⁴ Ibid at 34.

⁸²⁵ Article 34(3) of the COMESA Treaty and Rule 69(3) of the Rules of the COMESA Court of Justice.

5.3.4.2 Sanctions in COMESA

The COMESA Treaty makes provision for the imposition of sanctions. Sanctions may be imposed by the Authority to secure fulfilment by member states of their obligations under the COMESA Treaty.⁸²⁶ Sanctions may be imposed against a member state in two circumstances, namely if a member state defaults in performing an obligation under the COMESA Treaty or if a member state's conduct is prejudicial to the existence or the attainment of the objectives of the Common Market.⁸²⁷

Such sanctions include suspension from exercising rights and privileges of membership; imposition of a financial penalty; suspension from the community for a period deemed appropriate by the authority; or expulsion from the community.⁸²⁸ Suspension may also occur if a member state is in arrears for two or more years towards the payment of its contributions.⁸²⁹ Suspended member states are still expected to continue performing their outstanding obligations during the period of suspension.⁸³⁰

Expulsion, however, is not available as a first resort. A member state may be expelled if such state's rights and privileges were suspended and it has failed to remedy the default within the specified time; or if a member has failed to pay a financial penalty that was imposed as a sanction. In the case where a member state is suspended from the community, such a state's membership will automatically end if the state fails to meet the imposed conditions within the stipulated time.

The provision for the nature of sanctions is important because it clearly informs member states of the consequences they will face should they fail to meet their obligations. Additionally, this eliminates the problems faced when sanctions are left to the discretion of the executive organs. This also limits the possibility of sanctions being influenced by political interests.

5.4 EAC'S FRAMEWORK FOR EFFECTIVE INTEGRATION

5.4.1 Overview of EAC's Rules System

The East African Community (hereafter 'the EAC') in operation today is not the first attempt at regional integration in the region. The first EAC that was established in 1967 collapsed in 1977 due to various reasons, including a lack of adherence to the intention of having a people-centered

⁸²⁶ Article 171(1) of the COMESA Treaty.

⁸²⁷ Article 171(2) of the COMESA Treaty.

⁸²⁸ Article 171(3) of the COMESA Treaty.

⁸²⁹ Article 171(6) of the COMESA Treaty.

⁸³⁰ Article 172(1) of the COMESA Treaty.

community. Upon establishing the current EAC, the leaders of the member states undertook to address the challenges that caused the demise of the first EAC and made provisions to this effect in the Treaty for the Establishment of the East African Community (hereafter ‘EAC Treaty’).

As the founding document of the EAC, the EAC Treaty is the first point of reference when analysing the community’s rules system. The EAC seeks to deepen cooperation between member states in political, economic, social and cultural fields, among others.⁸³¹ To achieve this, the community undertakes various activities such as strengthening and consolidating political, social, economic and cultural ties between peoples of member states; promoting the harmonious development of member states; cooperating in fields that would lead to equitable economic development within member states; and promoting peace, security and stability within and among member states.⁸³²

The activities of the community are guided by a set of fundamental principles. These include mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; good governance; equitable distribution of benefits; and cooperation for mutual benefit.⁸³³ Furthermore, the EAC Treaty provides for operational principles of the community. These include people-centered and market driven co-operation; provision by member states of an adequate and appropriate environment; the principle of subsidiarity with an emphasis on multi-level participation; the principle of variable geometry; the principle of complementarity and the principle of asymmetry.⁸³⁴

The terms that the EAC Treaty stipulates for implementation can serve as an example of the role that treaties can play in assisting member states to take measures towards implementation. Article 8 of the EAC Treaty makes provision for the general undertaking of member states in relation to implementation. Although the EAC Treaty does not provide for direct applicability, it does require that each state ensures the enactment and effective implementation of legislation that is necessary to give effect to the EAC Treaty within a period of 12 months of signing.⁸³⁵ The member states of the EAC are considered dualist and as such, in order for community law to have effect at a national level, community law has to be domesticated or incorporated into national law.⁸³⁶ Therefore, such a provision, that clearly states what is required of the member states, is essential in ensuring

⁸³¹ Article 5(1) of the EAC Treaty.

⁸³² Article 5(3) of the EAC Treaty.

⁸³³ Article 6 of the EAC Treaty.

⁸³⁴ Article 7 of the EAC Treaty.

⁸³⁵ Article 8(2) of the EAC Treaty.

⁸³⁶ John Eudes Ruhangisa ‘The Scope, Nature and Effect of EAC Law’ in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, and Armin Cuyvers (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) 139 – 160.

community law is given effect at the national level. Furthermore, the stipulation of a timeframe within which to enact national legislation strengthens this provision and prevents delays in the enactment of such legislation.

One of the challenges faced in giving effect to community law is the issue of hierarchy, specifically which law between community law and national law should apply in instances of conflict. To circumvent this issue, the EAC Treaty stipulates that community organs, institutions, and laws are given precedence over national ones in matters relating to the implementation of the EAC Treaty.⁸³⁷ This provision makes it clear that the community legal order is afforded supremacy over the national legal order. The shortfall, however, is that member states have the discretion of enacting legal instruments to confer such precedence. This dependence on national legislation could act as a hindrance towards achieving supremacy.

However, the EAC member states have displayed their commitment to integration in the EAC by enacting national legislation to this effect. For example, Kenya enacted the Treaty for the Establishment of the East African Community Act, 2000; Tanzania enacted the Treaty for the Establishment of the East African Community Act No. 4 of 2001; and Uganda enacted the East African Community Act, 2002. It is worth mentioning that although other regional economic communities, such as SADC,⁸³⁸ COMESA,⁸³⁹ and Economic Community of West African States (hereafter 'ECOWAS'),⁸⁴⁰ contain similar provisions, they do not specify a time frame for implementation as the EAC Treaty does. Thus, such provisions lack persuasive force.

To further strengthen implementation efforts, the EAC Treaty requires each state to designate a ministry that will be responsible for communicating with the Secretary General on any matters relating to implementing the EAC Treaty.⁸⁴¹ The government of Kenya has designated the Ministry of East African Community and Regional Development, whilst Uganda has the Regional Economic Cooperation Department within the Ministry of Foreign Affairs. These ministries consistently interact with the EAC Secretariat and are considered to play an important role in the successful implementation of EAC trade rules.⁸⁴²

In addition to the above, member states have an obligation to plan and direct national policies with a view of creating conditions favourable for the development and achievement of the

⁸³⁷ Article 8(4) of the EAC Treaty.

⁸³⁸ See Article 6(5) of the SADC Treaty.

⁸³⁹ See Article 5(2) of the COMESA Treaty.

⁸⁴⁰ Article 5(2) of the ECOWAS Treaty.

⁸⁴¹ Article 8(3) of the Treaty for the Establishment of the East African Community.

⁸⁴² United Nations Economic Commission for Africa, African Union and African Development Bank *Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About* (2017) 122.

community's objectives and implementation of the EAC Treaty.⁸⁴³ Member states are also under an obligation to abstain from any measures that are likely to jeopardise the achievement of community objectives or treaty implementation.⁸⁴⁴ The use of such clear language to describe what is required of member states could reduce the likelihood of states not complying on the basis of ambiguity.

5.4.2 EAC's Organs and their Role in Effectiveness

As with other communities, the EAC has established organs to perform functions for the operation of the community. The following section will consider select organs, specifically the East African Legislative Assembly and the EAC Court of Justice.

5.4.2.1 The East African Legislative Assembly

The East African Legislative Assembly (hereafter 'EALA') is the legislative organ of the EAC and it carries out legislative, representation, and oversight functions including approving the community budget.⁸⁴⁵

The EALA is comprised of members that are elected by the National Assembly of each member state.⁸⁴⁶ Each National Assembly elects nine members who will represent, at the community level, the various political parties within each National Assembly.⁸⁴⁷ The elected members may not be members of the National Assemblies, nor may they be a Minister of a member state.⁸⁴⁸ The exclusion of existing national assembly members creates an opportunity for others to represent the people, rather than the same people who serve as representatives at the national level.

a greater opportunity for representation of the people, however there is criticism of the election process as the members of the EALA are not directly elected by the people but rather indirectly by members of national assemblies. Representatives in regional parliaments, in this instance members in the EALA, are meant to represent all people of a nation as far as possible. However, the use of indirect elections creates a window for national assemblies to elect people within their respective political parties who represent their political interests.⁸⁴⁹

⁸⁴³ Article 8(1)(a) of the EAC Treaty.

⁸⁴⁴ Article 8(1)(b) of the EAC Treaty.

⁸⁴⁵ Article 49(1) of the EAC Treaty.

⁸⁴⁶ Article 50 of the EAC Treaty.

⁸⁴⁷ Ibid.

⁸⁴⁸ Ibid.

⁸⁴⁹ Wilbert T.K. Kaahwa 'The Institutional Framework of the EAC' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, and Armin Cuyvers (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) at 52; Petro Protas and Theophil Romward 'Reflections on 'People Centered Principle' in the East African Community: The Current Legal Controversy' (2015) 42 *Eastern Africa Law Review*.

Furthermore, since the EAC Treaty only provides that National Assemblies should elect their representatives and the criteria such representatives should meet, the procedure to be followed in electing members of the EALA is at the discretion of the member states' National Assemblies. This discretion has proven problematic in some instances and the East African Court of Justice (hereafter 'EACJ') has heard matters relating thereto. In the case of *Prof. Peter Anyang' Nyong'o & Others v Attorney General of Kenya & Others*,⁸⁵⁰ the EACJ had to determine whether the election by Kenya's National Assembly of representatives of the EALA was done within the meaning of Article 50 of the EAC Treaty. The court found that the National Assembly of each member state has been given the function of electing members of the EALA and determining the procedure to follow.⁸⁵¹ Furthermore, the court held that elections should take place through voting, even though the voting procedures may vary.⁸⁵²

Another issue that has arisen is that of equal representation in the members of the EALA. The EAC Treaty stipulates that the nine elected members shall, insofar as it is feasible, represent the various political parties in the National Assembly, shades of opinion, gender, and other special interest groups.⁸⁵³ The EAC Treaty does not make further provision with respect to representation and it is at the discretion of the National Assemblies. One of the cases that dealt with the issue of representation is the case of *Among A. Anita v Attorney General of Uganda & The Secretary General of the East African Community*.⁸⁵⁴ The Parliament of Uganda enacted the Rules of Procedure for the Election of Members of the East African Legislative Assembly, 2012. The applicants argued that in making the rules, the Parliament of Uganda was bound to guarantee the effective representation of the interests of each of the intended beneficiaries of Article 50(1) of the EAC Treaty.⁸⁵⁵ Furthermore, the applicant argued that the rules should have provided for the specific slots for the interest groups set out in Article 50(1) of the Treaty.⁸⁵⁶ The court held that there is no such guarantee and that it cannot be deduced from the Treaty that specific slots should be assigned for the interest groups.⁸⁵⁷ Furthermore, representation is qualified by the word 'feasible', but each National Assembly has the discretion of determining what is feasible.⁸⁵⁸

⁸⁵⁰ *Prof. Peter Anyang' Nyong'o & Others v Attorney General of Kenya & Others* EACJ Reference No.1 of 2006.

⁸⁵¹ *Ibid* at 29.

⁸⁵² *Ibid* at 34.

⁸⁵³ Article 50 of the EAC Treaty.

⁸⁵⁴ *Among A. Anita v Attorney General of Uganda & The Secretary General of the East African Community* EACJ Reference No.6 of 2012

⁸⁵⁵ *Ibid* at 20.

⁸⁵⁶ *Ibid*.

⁸⁵⁷ *Ibid* at 26.

⁸⁵⁸ *Ibid* at 28. See also *Anyang' Nyong'o & Others* *supra* 850.

It is apparent from the above cases, the rules stipulated in the EAC Treaty relating to the election of EALA members is ambiguous. This has resulted in each member state following its own approach for the elections.

Regardless of the election issues, the EALA, as the legislative organ of the EAC, considers Bills before they are enacted into legislation. There are two ways that Bills may be initiated. The EAC Council has the authority to initiate and submit Bills to the EALA;⁸⁵⁹ and members of the EALA may also introduce Bills for consideration.⁸⁶⁰ Members of the EALA, however, may only introduce Bills that relate to functions of the Community and to a matter with respect to which Acts of the Community may be enacted.⁸⁶¹ Once a Bill has been introduced in the Assembly, it must be read three times before it can be passed.⁸⁶² The Rules of the EALA provide for thorough consideration of a Bill involving examination of the details of the Bill and debates on the merits and principles of the Bill, before being passed.⁸⁶³ Once passed by the EALA, a Bill is submitted to the Summit for assent by all Heads of State.⁸⁶⁴ The Heads of State have the authority to assent to a Bill or withhold assent.⁸⁶⁵ In the instance, that assent has been withheld, or assent has not been given within three months, the Bill is referred back to the Assembly to be reconsidered.⁸⁶⁶ The EALA may then reconsider the Bill and once approved, it is resubmitted to the Heads of State for assent.⁸⁶⁷ If, after resubmission, the Heads of State do not assent, the Bill will lapse.⁸⁶⁸

Enabling the EALA to participate in the legislative process, the voices of the people, through their representatives, can be taken into consideration. This, to an extent, curbs the possibility of laws being enacted that do not consider the people. Although the EALA is involved in the legislative process and plays an important role in enacting community law, it does not have the final say on whether a Bill is enacted. This authority is given to the Heads of State of the community, which is essentially the executive organ of the community.⁸⁶⁹ This is a notable constraint on the powers of the Assembly and makes the legislative process susceptible to political interference.

⁸⁵⁹ Article 14(3) of the EAC Treaty.

⁸⁶⁰ Article 59(1) of the EAC Treaty.

⁸⁶¹ Article 59(1) of the EAC Treaty.

⁸⁶² Rule 65 of the Rules of Procedure of the EALA.

⁸⁶³ Rules 66 to 73 of the Rules of Procedure of the EALA the procedure to be followed during readings of Bills.

⁸⁶⁴ Article 62(2) of the EAC Treaty.

⁸⁶⁵ Article 63(1) of the EAC Treaty.

⁸⁶⁶ Article 63(2) of the EAC Treaty and Rule 73 of the Rules of Procedure of the EALA.

⁸⁶⁷ Article 63(3) of the EAC Treaty and Rule 73 of the Rules of Procedure of the EALA.

⁸⁶⁸ Article 63(4) of the EAC Treaty.

⁸⁶⁹ Davor Jancic 'Regional Parliaments and African Economic Integration' (2019) 30 *European Journal of International Law* 199 at 209; Ulf Terlinden 'African Regional Parliaments – Engines of Integration and Democratisation?' available at <http://library.fes.de/pdf-files/iez/02581.pdf>, accessed on 4 June 2021.

The EAC budget is prepared by the Secretary General and it covers all the organs and institutions of the community that are not self-accounting.⁸⁷⁰ The budget is then considered by the Council which must approve all expenditures of the community.⁸⁷¹ Following this, the EALA is then responsible for the approval of the budget as well as monitoring its implementation.⁸⁷² The EALA has exercised this function over the years, annually debating and approving the budget of the community. The provision for the EALA to have a central role in the budgetary process has a positive impact as it creates a degree of accountability and transparency for community expenditure.

One of the operational principles of the EAC is to have a people-centered community.⁸⁷³ One of the ways in which the EAC promotes public participation is through the EALA. The EAC Treaty makes provision for the relationship between the EALA and the National Assemblies of member states. In essence, the clerk of the EALA has to provide copies of records of relevant EALA debates, copies of Bills introduced, and Acts of the Community.⁸⁷⁴ In the same way, the clerks of National Assemblies must provide copies of all relevant debates of the National Assemblies to the clerk of the EALA.⁸⁷⁵ The clerk of the EALA also provides the Council with copies of records of debate in the Assembly.⁸⁷⁶ Such a system creates a channel for information sharing between the two levels of parliament. Through this, national parliamentarians are informed of regional parliament discussions and can use this to discuss topics of interest from a national perspective. Such records would then be shared to the regional parliament, thus creating a way in which the opinions of the people are available to policymakers and considered in the legislative process.

The EALA should be commended for being operational and looked to as an example for the role regional parliaments can have in other RECs. However, the issues relating to representation could limit the impact the EALA has on the operation of an effective community and more specifically, the people-centred approach the community seeks to achieve. This is because some member states may adopt election processes that do not promote equal representation of all intended beneficiaries.

⁸⁷⁰ Articles 132(1) and (2) of the EAC Treaty and Section 3(1) of the East African Community Budget Act, 2008.

⁸⁷¹ Articles 132(2) and (3) of the EAC Treaty and Section 3(4) of the East African Community Budget Act, 2008.

⁸⁷² Article 132(2) of the EAC Treaty and Rule 74 of the Rules of Procedure of the Assembly.

⁸⁷³ Article 7(1)(a) of the EAC Treaty.

⁸⁷⁴ Article 65 of the EAC Treaty.

⁸⁷⁵ Ibid.

⁸⁷⁶ Ibid.

5.4.2.2 The East African Court of Justice

The EAC Treaty established the East African Court of Justice (hereafter ‘EACJ’) as the judicial organ of the community.⁸⁷⁷ The role of the EACJ is to ensure adherence to law in the interpretation and application of and compliance with the EAC Treaty.⁸⁷⁸ From a general reading of the role envisioned for the EACJ, it can be concluded that an effectively functioning court would improve the effectiveness of the community. It is therefore important for this research to analyse, to some extent, how the EACJ is fulfilling its role.

The EAC Treaty makes provision for various ways in which a matter may be brought before the EACJ. First, member states may refer a matter to the EACJ if that state considers that another state has failed to fulfil an obligation under the EAC Treaty or has infringed a provision of the EAC Treaty.⁸⁷⁹ Providing member states with this option of recourse could positively impact on compliance because it creates a way in which member states can be held accountable to fulfil their treaty obligations. Member states may also refer to the court for determination the legality of any Act, regulation, directive, decision, or action on the grounds that it is *ultra vires*, unlawful, or an infringement of the EAC Treaty, or amounts to an abuse of power.⁸⁸⁰ This is an important measure of recourse considering that regulations, directives and decisions have a binding effect. This means member states and community organs would be bound by what the Council decides even in instances such decisions were contradictory to community law. Thus, organs of the community can also be held accountable for decisions adopted.

Second, a matter may be referred to the EACJ by the Secretary General of the EAC. If the Secretary General considers that a member state has failed to fulfil an obligation or has infringed upon the Treaty, the Secretary General will submit its findings to the member state.⁸⁸¹ The member state has an opportunity to submit its observations on the findings of the Secretary General within four months.⁸⁸² If the member state fails to do so or submits unsatisfactory observations, the Secretary General will refer the matter to the EAC Council which then decides if it will resolve the matter or if the matter should be referred to the EACJ.⁸⁸³ If the Council undertakes to resolve the matter but fails to do so, the EAC Council will direct the Secretary General to refer the matter to the EACJ.⁸⁸⁴ Although this process does not enable the Secretary General to immediately refer a

⁸⁷⁷ Article 23(1) of the EAC Treaty.

⁸⁷⁸ Ibid.

⁸⁷⁹ Article 28(1) of the EAC Treaty.

⁸⁸⁰ Article 28(2) of the EAC Treaty.

⁸⁸¹ Article 29(1) of the EAC Treaty.

⁸⁸² Article 29(2) of the EAC Treaty.

⁸⁸³ Ibid.

⁸⁸⁴ Article 29(3) of the EAC Treaty.

matter of non-compliance to the EACJ, the authority to refer matters does exist. This approach also allows defaulting member states an opportunity to address the issue before legal action is taken.

Third, the EAC Treaty makes provision for legal and natural persons to refer matters to the EACJ. A person that is resident in any of the member states may refer to the EACJ for determination on the legality of any Act, regulation, directive, decision, or action of a member state or a community institution.⁸⁸⁵ Such proceedings must be initiated within two months of the enactment, publication, directive, decision, or action brought before the EACJ or on the day when the complainant became aware of it.⁸⁸⁶ Such a provision strengthens the ability of the people to hold states or the community accountable. However, the time limit imposed has been critiqued and it is suggested that it limits the powers of the court.⁸⁸⁷ There have been multiple cases that the EACJ has dismissed on the basis of the time limit, despite the merits of the case. This has had the impact of limiting remedies available to applicants or those whose community rights have been infringed, which can be said to have been the intention behind the introduction of the time limit in the first place.⁸⁸⁸ The two month time limit, paired with factors such as the availability of resources for persons to approach the court hosted in another country, the need to find appropriate representation, makes it quite challenging for persons to meet the time limit.

The EACJ has heard many cases in the time it has been operational, and in some instances has faced political backlash as a result of its decisions. In the application of *Calist Andrew Mwatela & Others v East African Community*,⁸⁸⁹ the applicants challenged the authority of the EAC Council to withdraw Private Member Bills from the Assembly. The EACJ stated that the EAC Treaty does not give the Council power to take over Bills without observing the EALA rules and that the only lawful way of withdrawing Bills that have become the property of the EALA is through the introduction of a motion under Rule 34 of the EALA Rules.⁸⁹⁰ Furthermore, the court had to

⁸⁸⁵ Article 30(1) of the EAC Treaty.

⁸⁸⁶ Article 30(2) of the EAC Treaty.

⁸⁸⁷ *The East African Law Society & Others v The Attorney General of The Republic of Kenya & Others* EACJ Reference No. 3 of 2007; Karen J. Alter, James T. Gathii and Laurence R. Helfer 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *The European Journal of International Law* 293 at 300; Ally Possi 'An Appraisal of the Functioning and Effectiveness of the East African Court of Justice' (2018) 21 *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* at 8.

⁸⁸⁸ See Karen J. Alter, James T. Gathii and Laurence R. Helfer 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *The European Journal of International Law* 293 at 300. The time limit was introduced through an amendment to the EAC Treaty in 2007. The events leading to this amendment flow from the EACJ's decision against the government of Kenya in the *Prof. Peter Anyang' Nyong'o & Others v Attorney General of Kenya & Others* case. The intention was to limit the jurisdiction of the court.

⁸⁸⁹ Application No. 1 of 2005.

⁸⁹⁰ *Calist Andrew Mwatela & Others v East African Community* Application No. 1 of 2005 at 18. Rule 34(1) of the EALA Rules of Procedure at the time of this case provided that a motion or an amendment to the motion may be withdrawn at the request of the mover by leave of the House of Committee before a question is put.

determine whether decisions of the EAC Council could be binding on the EALA. Article 16 of the EAC Treaty provides that regulations, directives, and decisions of the Council are binding on the member states and all organs of the community except the Summit, the EACJ, and the EALA within their jurisdictions. The respondents contended that a decision of the EAC Council given pursuant to Article 14 overrides the bar in Article 16.⁸⁹¹ In making a decision, the EACJ agreed with the Assembly's submission that the EALA is a representative organ established to enhance a people-centred approach and thus its independence should be preserved.⁸⁹² The EACJ held that decisions of the EAC Council do not have a place in areas that are in the jurisdiction of the EALA.⁸⁹³ Through the case, the Court strengthened the separation of powers between the executive and legislative organs of the community. However, the court has clearly held that the doctrine of separation of powers does not mean that organs of the community that act outside of the law cannot be brought before the court on the basis of separation of powers.⁸⁹⁴ If there has been a breach of community law by any community organ or institution, such organ or institution can be brought before the EACJ.⁸⁹⁵ This creates accountability.

The EACJ has also heard matters relating to the sovereignty of member states and the supremacy of community law. In the case of *Samuel Mukira Mobochi v The Attorney General of the Republic of Uganda*⁸⁹⁶ the court had to decide whether the decision of Uganda to deny a citizen of an EAC member state entry into Uganda was consistent with the obligations created by EAC law. The EAC law in question here was the EAC Treaty and the East African Common Market Protocol. First, the court affirmed that member states are sovereign, and that their sovereignty is defined by law.⁸⁹⁷ Prior to the enactment of the EAC Treaty, the sovereignty of Uganda was determined by Uganda's national law, in this case, The Citizenship and Immigration Control Act, Chapter 66, Laws of Uganda. However, upon Uganda giving the EAC Treaty the force of law, EAC law became applicable within the territory of Uganda and takes precedence if there is a conflict between EAC law and national law.⁸⁹⁸ This meant that the law of Uganda relating to the movement of people was governed by the EAC Treaty, the Protocol, and Uganda's Citizenship and Immigration Act, with provisions of the Treaty taking precedence in instances of conflict.⁸⁹⁹ The court also held that sovereignty cannot take precedence over community law and member states

⁸⁹¹ *Mvatela & Others* supra note 889 at 18.

⁸⁹² Ibid.

⁸⁹³ Ibid at 20.

⁸⁹⁴ *Hon. Dr. Margaret Zziwa v The Secretary General of the East African Community* EACJ Appeal No. 2 of 2017 at 23 - 24.

⁸⁹⁵ Ibid at 23 - 24.

⁸⁹⁶ EACJ Reference No. 5 of 2011.

⁸⁹⁷ *Samuel Mukira Mobochi v The Attorney General of the Republic of Uganda* at 26.

⁸⁹⁸ Ibid at 27.

⁸⁹⁹ Ibid.

cannot use it as a defence or justification for non-compliance with Treaty obligations.⁹⁰⁰ In this matter, the court held that Uganda's sovereignty to deny citizens of member states entry was not taken away by the Treaty and Protocol, but that Uganda had to exercise this sovereignty in compliance with the treaty provisions.⁹⁰¹

When considering how the EACJ has contributed to the effectiveness of the community, the court's approach to cases involving human rights issues should be highlighted. The EACJ does not have express jurisdiction over human rights issues. However, the court has heard cases and adopted an interpretation that has enable it to make decisions on such matters. In the case of *James Katabazi v The Secretary General of the East African Community*⁹⁰² the court had to determine whether it had jurisdiction to deal with human rights issues. The court found that, based on the provisions stipulating the jurisdiction of the court, it does not have jurisdiction to adjudicate matters of human rights *per se*.⁹⁰³ However, the court considered the objectives and the principles of the community, and held that the court could consider human rights violations if it falls within its authority to interpret as stipulated under Article 27(1) of the EAC Treaty.⁹⁰⁴ Similar decisions were made in the cases of *Attorney General of Rwanda v Plaxeda Rugumba*⁹⁰⁵ and *Samuel Mukira Mobochi v Attorney General of Uganda*.⁹⁰⁶ The court adopting a purposive approach has created a pathway for human rights violations to be heard before the court. This also creates a platform for matters to become public which can create accountability.

The EACJ has played an active role in promoting community objectives and protecting community law. It has, through its judgments, shown that it can operate independently and make judgments against member states and community organs. This builds a reputation for the court as a protector of community law and community rights. A weakness, however, is the court's strict adherence to the time limit.

5.4.3 Monitoring Compliance in EAC

The EAC's monitoring framework is provided for in the Development Strategies the community adopts. With each adopted development strategy, the monitoring and evaluation framework is reviewed and improved. The monitoring and evaluation of the EAC takes a results-based approach. To achieve this, provision is made for various reports to be submitted. There are four

⁹⁰⁰ Ibid at 29.

⁹⁰¹ Ibid at 30.

⁹⁰² EACJ Reference No.1 of 2007.

⁹⁰³ *James Katabazi v The Secretary General of the East African Community* EACJ Reference No.1 of 2007 at 15.

⁹⁰⁴ Ibid at 15-17.

⁹⁰⁵ EACJ Appeal No.1 of 2012.

⁹⁰⁶ EACJ Reference No. 5 of 2011.

reports that are specified. The first is a monthly activity report to be prepared by sector heads or project managers and submitted to heads of directorates.⁹⁰⁷ This report covers the status of implementation of key activities.⁹⁰⁸ The second report is a quarterly performance report prepared by the directorates to provide the status of achievement of targeted outputs and assessment of progress made.⁹⁰⁹ The third report is a bi-annual progress report prepared by the EAC Secretariat in collaboration with member states, to provide the progress made towards implementing the development strategy.⁹¹⁰ The fourth report is an annual report which provides information on the progress made in implement the development strategy.⁹¹¹

In addition, the EAC Common Market Scorecard (hereafter ‘EAC CMS’) was developed to monitor measures that EAC member states have taken in order to comply with commitments made in the Common Market Protocol and other related commitments.⁹¹² The purpose of the EAC CMS was to develop a tool that would provide stakeholders with the relevant information in an impartial and transparent manner, enabling them to further interpret and analyse said information.⁹¹³

The EAC CMS measures *de jure* compliance, that is, whether the laws and regulations of member states comply with their commitments under the Common Market Protocol.⁹¹⁴ It does not measure *de facto* compliance, that is, how commitments are implemented in practice.⁹¹⁵ This is a limitation as the scorecard measures domestication but does not look at the practical implementation. This can create a gap in the monitoring and evaluation process because in some instances a state could adopted laws and regulations in compliance, but it is not practically implementing it.

The EAC CMS focused on measuring compliance in the areas of freedom of movement of capital, freedom of movement of services, and freedom of movement of goods. For each of these areas, there were areas focused on to measure compliance. In the area of movement of goods, the focus areas were elimination of tariffs and equivalent measures on intraregional trade; elimination of

⁹⁰⁷ See ‘EAC Development Strategy (2011/12 – 2015/16)’ available at <https://www.preventionweb.net/files/EAC%20development%20strategy.pdf>, accessed on 26 October 2022.

⁹⁰⁸ Ibid.

⁹⁰⁹ Ibid.

⁹¹⁰ Ibid.

⁹¹¹ Ibid.

⁹¹² Alfred Ombudo K’Ombudo, Philippe De Lombaerde and Maria Borda ‘The East African Community Common Market Scorecard’ in Philippe De Lombaerde and Edgar J. Saucedo Acosta (eds) *Indicator-Based Monitoring of Regional Economic Integration: Fourth World Report on Regional Integration* (2017) at 241.

⁹¹³ Ibid at 245.

⁹¹⁴ East African Common Market Scorecard 2014, available at <https://documents1.worldbank.org/curated/en/799871468194049251/pdf/938430WP0v20Bo0arket0Scorecard02014.pdf>, accessed on 24 October 2022.

⁹¹⁵ Ibid.

non-tariff barriers; implementation of common external tariff; and harmonization and mutual recognition of sanitary and phytosanitary standards and technical standards.⁹¹⁶ In the area of services, focus was given to the obligations of member states towards liberalization of services, as provided in the Common Market Protocol. The members had undertaken to work towards liberalizations in areas including business services, communication services, distribution, education and transport.⁹¹⁷ In the area of capital, the analysis was based on measuring member states' compliance with commitments made towards the EAC Common Market Protocol Schedule on the Removal of Restrictions on the Free Movement of Capital.⁹¹⁸ This covered 20 market operations in the schedule.⁹¹⁹ The EAC CMS was published twice, in 2014 and 2016.

5.4.4 The EAC's Non-Compliance Response System

5.4.4.1 The East African Court of Justice

The wide array of cases that the EACJ has heard and the use that has been made of it by legal and natural persons are a positive sign. The EACJ can be commended for the contributions it has made to the development of community law through its judgments. However, beyond making decisions, another important role of the court is enforcement. When the EACJ makes a judgement, such a decision will not carry much weight unless the member states comply with and execute the judgements.⁹²⁰ The Treaty does not specifically stipulate the measures the EACJ may impose to ensure adherence with the law. However, the Appellate division of the EACJ in the case of *Hon. Dr. Margaret Z̄ĩĩva v The Secretary General of the East African Community*⁹²¹ made clear the role of the court as the guardian of the EAC Treaty. The Court stated that it is the EACJ's duty to ensure that those who have duties under the EAC Treaty act in accordance with the EAC Treaty and any breaches are remedied as may be appropriate in the circumstances.⁹²² The Court further stated that for community laws of the EAC to be fully effective, the Court must be able to grant effective relief by appropriate remedies in the event of a breach of laws.⁹²³ Thus, it is within the jurisdiction of the EACJ to grant remedies.⁹²⁴

⁹¹⁶ Ibid.

⁹¹⁷ Ibid

⁹¹⁸ Ibid.

⁹¹⁹ Ibid.

⁹²⁰ Possi op cit note 887.

⁹²¹ EACJ Appeal No. 2 of 2017.

⁹²² *Z̄ĩĩva* supra note 894 at 18.

⁹²³ Ibid at 19.

⁹²⁴ See also *Martha Wangari Karua v The Attorney General of The Republic of Kenya* EACJ Reference No. 20 of 2019; *Grands Lacs Supplier S.A.R.L. & Others v The Attorney General of Burundi* EACJ Reference No. 6 of 2016.

The above notwithstanding, one of the challenges facing the EACJ is the lack of enforcement mechanisms. Once the Court has made a decision, the enforcement of the decision is the responsibility of the member states.⁹²⁵ Where a judgment imposes a pecuniary obligation on a person, the execution of that judgment is governed by the rules of civil procedure of the member state in which the execution is to take place.⁹²⁶ No provision is made for the process to be followed if a decision of the court is not complied with.

In *Hon. Sitenda Sebalu v The Secretary General of the East African Community*⁹²⁷ the Court had to decide whether failure by the respondent to implement the judgment of the Court amounted to an act of contempt of Court. The judgement the respondent had to comply with had been given in an earlier case between the Applicant and Respondent where the Court had ruled in the Applicant's favour.⁹²⁸ In making its decision, the EACJ stated that court decisions remain valid unless they are discharged, and a valid court order must be obeyed.⁹²⁹ To prove contempt, the Court provided four elements that a complainant must prove, namely the existence of a lawful order; the potential contemnor's knowledge of the order; the potential contemnor's ability to comply; and the potential contemnor's failure to comply.⁹³⁰ The Court found the respondent in contempt of Court for failing to implement the judgement against it.

The EACJ can be seen to be bridging the gap created by the failure to make specific provisions for enforcement. However, this gap still affects how effectively treaty obligations can be met. If a judgment does not carry much weight and non-compliance is not likely to give rise to consequences, those against whom judgments are made may choose to not comply.

5.4.4.2 Sanctions in the EAC

The EAC Treaty has made provision for measures that can be taken against member states that fail to meet their obligations under the Treaty. A member state that defaults on its obligations will be subject to sanctions that the Summit may deem fit upon recommendation by the EAC Council.⁹³¹ If a member state fails to observe and fulfil fundamental principles and objectives of the EAC Treaty, the Summit may suspend the member.⁹³² Suspension may also be imposed against

⁹²⁵ Article 38(3) of the EAC Treaty provides that a Member State or the Council shall take, without delay, the measures required to implement a judgment of the Court.

⁹²⁶ Article 44 of the EAC Treaty.

⁹²⁷ EACJ Reference No. 8 of 2012.

⁹²⁸ *Hon. Sitenda Sebalu v The Secretary General of the East African Community and Others* EACJ Reference No.1 of 2010.

⁹²⁹ *Hon. Sitenda Sebalu v The Secretary General of the East African Community* EACJ Reference No.8 of 2012 at 20.

⁹³⁰ *Ibid* at 21.

⁹³¹ Article 143 of the EAC Treaty.

⁹³² *Ibid*.

a member that fails to meet its financial commitments within a period of eighteen months.⁹³³ The effect of the suspension is that the member cannot enjoy the benefits of the EAC Treaty, but is still bound by its obligations until the suspension is lifted.⁹³⁴ Although the EAC faces challenges of member states being unable to meet their financial obligations, this form of sanction is yet to be imposed.

The Summit has also been given the authority to expel a member state for gross and persistent violation of the principles and objectives of the EAC Treaty.⁹³⁵ Expulsion can only be affected after giving the member twelve months written notice.⁹³⁶ To date, this form of sanction has not been used.

Notably, as is the case with SADC, the EAC Treaty does not expressly stipulate the types of sanctions other than suspension or expulsion, the Summit can determine what sanctions to impose. Recommendations by the Council or imposition of sanctions and suspension of a member must be decided by consensus.⁹³⁷

5.5 CONCLUSION

Regional Economic Communities are recognised as the building blocs of Africa's integration. At the time the African Union was established, some of the recognised RECs already existed whilst others were established at later stages. Each REC has adopted an approach to integration that is unique to it and the depth of integration varies from community to community. Furthermore, each REC has also established its own compliance system to an extent. This chapter analysed the legal and institutional frameworks of three RECs, namely the Southern African Development Community, the Common Market for Eastern and Southern Africa, and the East African Community. Specifically, attention was given to the rules system, the organs, the monitoring and evaluation, and the compliance response system of each REC.

SADC has made a continued effort to improve the effective operation of the community. The review and restructure of SADC institutions attempted to actively bridge the gap between national and regional decision-making and implementation through the creation of organs such as the SADC Parliamentary forum and SADC National Committees. The formation of the SADC PF stood to have a positive impact by involving national representatives to play a role in community

⁹³³ Article 146(1) of the EAC Treaty.

⁹³⁴ Article 146(2) of the EAC Treaty.

⁹³⁵ Article 147(1) of the EAC Treaty.

⁹³⁶ Article 147(1) and (2) of the EAC Treaty.

⁹³⁷ Article 2(1)(h) of the Protocol on Decision Making by the Council of the EAC.

level decisions. However, since it merely has an advisory role, the degree of ownership by national stakeholders is impacted negatively. Similarly, the creation of SNCs could promote national involvement and ownership but because most SNCs appear to not be operational their impact is hampered. The implementation of SADC policies is further obstructed by the currently inoperative SADC Tribunal which is meant to be the judicial organ of the community. The fact that Heads of State have the authority to determine the fate of such an important community organ indicates that political interests have preference.

The Regional Indicative Strategic Development Plan adopted by SADC gives a detailed framework for implementation of SADC programmes and makes provision for monitoring and evaluation. However, the RISDP does not provide much detail on how reporting will take place beyond the use of the SADC Online Monitoring and Evaluation System, which does not appear to be operational or accessible.

The EAC has made great progress in the establishment of a functioning compliance system. The EAC Treaty, which is the foundational document of the community, makes clear provisions for the obligations of member states and the precedence of community law and institutions over national counterparts. This is strengthened by the provision for the separation of powers in community organs, which has enabled such community organs to enforce community law and carry out oversight functions. The East African Court of Justice has made great progress in being accessible and making judgments even against community organs. This is, however, hampered by the time limit imposed on natural or legal persons to bring cases before the court. The EAC has also attempted to establish monitoring framework through annual Development Strategies. The EAC's non-compliance response system, however, could be further strengthened by addressing the EACJ's limited enforcement powers once a judgment has been made.

COMESA, in comparison to the other two RECs, was established to focus specifically on economic integration between member states. The COMESA Court of Justice has played an important role in reinforcing community law through decisions it has made. Its role in enforcement is further strengthened by the authority the court has to impose sanctions for non-compliance with court judgments. This is not a competence that the judicial organs in SADC or EAC have. Although the COMESA Treaty makes provision for the imposition of sanctions if member states fail to fulfil obligations, the community does not have a monitoring and evaluation framework in place to inform the authority of such non-compliance. This creates a gap in the compliance system of the community.

6 CHAPTER SIX: LESSONS FROM OTHER REGIONAL INTEGRATION INITIATIVES

6.1 INTRODUCTION

The practice of states working together is not unique to Africa and it is one of a global nature. This chapter focuses on assessing the frameworks of other Regional Economic Communities (hereafter 'RECs') that have been established across the world. Having looked at the framework that has been put in place in African regional integration initiatives in the previous chapters, this analysis is undertaken with the objective of drawing lessons from such initiatives that can be adapted to improve the effectiveness of regional integration efforts in Africa.

One of the RECs that this chapter will analyse is the European Union (hereafter 'EU') as a community that has achieved a much deeper level of integration than other communities. The EU is chosen on the basis of its experience and the depth of integration it has achieved over the years. This chapter will also analyse the Association of Southeast Asian Nations (hereafter 'ASEAN') which has taken an approach to integration that is focused on consensus and accommodating all member states. The ASEAN is chosen because of the similarities ASEAN states have with African states, with respect to the unwillingness to surrender sovereignty coexisting with the need to cooperate with neighbouring states.

6.2 THE EUROPEAN UNION – A COMMUNITY FOUNDED ON LAW

The EU, as it is known today, is the result of a long-standing and gradual process of integration between European states. Following the events of World War II, one of the driving forces behind cooperation between European states was the promotion of peace. In 1952 the European Coal and Steel Community was established, followed by the establishment of the European Economic Community and the European Atomic Energy Community a few years later. Further cooperation between European states led to the signing of the Treaty of Maastricht in 1992, which established the EU.

The EU has, to a large extent, served as a model of integration for other communities due to its perceived success. The EU has gone through a lengthy process, adapting to the needs of the community at various times. Some features of the European integration process that can provide lessons for Africa's integration will be considered.

6.2.1 The European Union's Rules System

6.2.1.1 Principles and Objectives

The EU is founded on two treaties, namely the Treaty on European Union (hereafter the "TEU") and the Treaty on the Functioning of European Union (hereafter the "TFEU"), which have the same legal value. These treaties make provision for various aspects of integration in the EU such as the principles and objectives of the community, the division of competencies between the Union and member states, rights and obligations of citizens of member states, decision-making procedures, union institutions, and many more.

The EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.⁹³⁸ The objectives of the community include establishing an internal market; an economic and monetary union; and providing citizens with an area of freedom, security and justice.⁹³⁹

One of the core principles of the EU is that of representative democracy. To this end, provision is made for the participation of EU citizens in the processes of the community. EU citizens are directly represented through the European Parliament and have the right to participate in the decision-making process.⁹⁴⁰ As will be seen below, the European Parliament plays a key role in the adoption of legislative acts. EU institutions are also required to provide citizens with an opportunity to publicly make their views known.⁹⁴¹ The Treaty on European Union goes as far as enabling citizens of member states to invite the European Commission to submit proposals for the adoption of legal acts for the purpose of implementing community law.⁹⁴² As will be seen through this analysis, the principles of the EU have strongly influenced the legal and institutional frameworks of the community.

6.2.1.2 Legal acts of the Community

In addition to the two treaties, EU institutions have the authority to adopt legal acts. Legal acts can take the form of regulations, directives, decisions, recommendations, and opinions, each of which has different implications for member states.⁹⁴³ First, regulations are legal acts that are binding and are directly applicable to all member states.⁹⁴⁴ This means that regulations do not need

⁹³⁸ Article 2 of the TEU.

⁹³⁹ Article 3 of the TEU.

⁹⁴⁰ Article 10 of the TEU.

⁹⁴¹ Article 11(1) of the TEU.

⁹⁴² Article 11(4) of the TEU.

⁹⁴³ Article 288 of the TFEU.

⁹⁴⁴ Ibid.

to be transposed into national law to confer rights and obligations within the member states and that they are applicable in their entirety.⁹⁴⁵

Second, directives are legal acts that are binding but only on the member states to which they are addressed.⁹⁴⁶ Directives set out objectives that must be achieved by the respective member states within a specified timeframe and are not directly applicable.⁹⁴⁷ The implication of this is that the particular member states have an obligation of incorporating the directive objectives into their national law and have the discretion to decide how to achieve this.⁹⁴⁸ Due to directives not being directly applicable, rights and obligations do not result from the directive itself but rather from the measures adopted by member states to implement the directive.⁹⁴⁹ However, to ensure that member states have fulfilled this obligation, member states are required to submit reports to the Commission within the given timeframe, failing which infringement proceedings are initiated.⁹⁵⁰

As a way of ensuring member states comply with EU Law and that EU Law is beneficial to individuals in member states, the Court of Justice of the European Union has held that directives may have vertical direct effect in certain instances.⁹⁵¹ Directives having only vertical direct effect means that individuals can only rely on directives against member states but not against other individuals.⁹⁵² Directives can have vertical direct effect if the directive hasn't been transposed into national law within the specified time frame; if the directive has been incorrectly implemented by a member state; and if a directive has been correctly implemented but incorrectly applied by national authorities.⁹⁵³ Such an allowance is important because it ensures that individual's rights as conferred by the community are not infringed upon because of a failure by a member state.

Third, EU institutions can make decisions to order a measure to be taken.⁹⁵⁴ Decisions can be addressed to member states, groups of people, or even individuals and are only binding on those to whom they are directed.⁹⁵⁵ Decisions are binding in their entirety upon those to whom they are

⁹⁴⁵ Klaus-Dieter Borchardt *The ABC of European Union Law* (2016) 100; European Commission *The European Union Explained – How the European Union Works* (2013) 5.

⁹⁴⁶ Article 288 of the TFEU.

⁹⁴⁷ Borchardt op cit note 945.

⁹⁴⁸ Ibid at 101; European Commission *The European Union Explained – How the European Union Works* (2013) 5; Alina Kaczorowska-Ireland *European Union Law* 4ed (2016) at 131.

⁹⁴⁹ Borchardt op cit note 948; European Commission op cit note 948.

⁹⁵⁰ Ibid.

⁹⁵¹ Kaczorowska-Ireland op cit note 948 at 328.

⁹⁵² Case 152/84 *M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] E.C.R. 1986-00723 para 48; Cuyvers op cit note 190 at 171; Kaczorowska-Ireland op cit note 948 at 327.

⁹⁵³ Case C-62/00 *Marks & Spencer plc v Commissioners of Customs and Excise* [2002] E.C.R. I-06325 para 38; Kaczorowska-Ireland op cit note 948 at 325.

⁹⁵⁴ Article 288 of the TFEU.

⁹⁵⁵ Ibid; Borchardt op cit note 945 at 5.

addressed and may not only stipulate the result to be achieved but can go so far as to stipulate the methods to be adopted to achieve the result.⁹⁵⁶

Fourth, EU institutions may make recommendations that are used to request the addressee to behave in a particular way but do not place any legal obligation on the addressee.⁹⁵⁷ Fifthly, opinions are used to provide an assessment of a situation or development in the EU or individual member states.⁹⁵⁸ Both recommendations and opinions do not have binding force.⁹⁵⁹

The clear provision for different legal acts and their effect is important as it leaves little room for uncertainty. The varying nature and effect of legal acts enables the EU to create uniformity in certain areas whilst maintaining a certain degree of the sovereignty of member states. This can be considered a hybrid approach to integration as it is a system that requires states to forgo sovereignty in some, but not all, areas. This brings us to the division of competences in the EU.

6.2.1.3 Division of Competences

The EU was founded with the understanding that member states would confer certain competences on the Union with the goal of attaining common objectives.⁹⁶⁰ As such, the founding treaties make provision for the division of competences between the EU and member states. Some areas fall within the exclusive competence of the EU, whilst others remain fully within the competence of member states, and some areas are of shared competence. In exercising its competences, the EU has an obligation to respect the equality of member states as well as their national identities and essential state functions.⁹⁶¹

In areas of exclusive competence, the EU alone has the authority to legislate and adopt legally binding acts.⁹⁶² Member states may only legislate in these areas if empowered by the EU or for purposes of implementing EU acts.⁹⁶³ Areas of exclusive competence include the customs union, establishing competition rules for the functioning of the internal market, and the common commercial policy.⁹⁶⁴

⁹⁵⁶ Kaczorowska-Ireland op cit note 948 at 134.

⁹⁵⁷ Borchardt op cit note 945; European Commission op cit note 948 at 5.

⁹⁵⁸ Ibid.

⁹⁵⁹ Article 288 of the TFEU.

⁹⁶⁰ Article 1 of the TEU.

⁹⁶¹ Article 4(2) of the TEU.

⁹⁶² Article 2(1) of the TFEU.

⁹⁶³ Ibid.

⁹⁶⁴ Article 3(1) of the TFEU.

Areas of shared competence are areas in which both the EU and member states may legislate and adopt legally binding acts.⁹⁶⁵ However, member states can only exercise their competence to the extent that the EU has not.⁹⁶⁶ Meaning, if the EU has passed legislation on a specific area of shared competence, member states cannot adopt measures that are contrary to the EU principles and values.⁹⁶⁷ Areas of shared competence include the internal market and consumer protection.⁹⁶⁸

In addition to areas of exclusive and shared competence, the EU is empowered to provide support, to coordinate, or supplement the actions of member states without superseding the competence of member states in these areas.⁹⁶⁹ Such areas include tourism, culture, education, and the protection and improvement of human health.⁹⁷⁰

The exercise of competences in the EU is governed by three principles. First, the principle of conferral, which requires the EU to only act within the limits of the competences conferred upon it by member states in the EU Treaties.⁹⁷¹ Second, the principle of subsidiarity, which governs areas that do not fall within the EU's exclusive competence. In terms of the subsidiarity principle, the EU can only act with respect to areas of shared competence in so far as the objectives of the proposed actions cannot sufficiently be achieved by member states but can be better achieved at the Union level.⁹⁷² The principle of subsidiarity, therefore, ensures that, where appropriate, decisions are made at the local or national level, and the Union must show that a decision would be better decided at the union level.⁹⁷³

Third, the EU is obliged to exercise its competences in line with the principle of proportionality, in terms of which the Union's actions should not exceed what is necessary to achieve the objectives of the Treaties.⁹⁷⁴ Unlike the principle of subsidiarity, the principle of proportionality applies to all measures adopted by the EU not only those adopted within shared competences.⁹⁷⁵ Furthermore, this principle of proportionality is used to check whether the measures that have been adopted are appropriate and do not go beyond what is necessary to achieve their objectives.⁹⁷⁶ It is evident that

⁹⁶⁵ Article 2(2) of the TFEU.

⁹⁶⁶ Ibid.

⁹⁶⁷ Kaczorowska-Ireland op cit note 948 at 183.

⁹⁶⁸ Article 4 of the TFEU.

⁹⁶⁹ Article 2(5) of the TFEU.

⁹⁷⁰ Article 6 of the TFEU.

⁹⁷¹ Article 5(2) of the TEU.

⁹⁷² Article 5(3) of the TFEU.

⁹⁷³ Kaczorowska-Ireland op cit note 948 at 191; Andreas von Staden 'Subsidiarity in Regional Integration Regimes in Latin America and Africa' (2016) 79 *Law and Contemporary Problems* 27 at 29.

⁹⁷⁴ Article 5(4) of the TEU.

⁹⁷⁵ Kaczorowska-Ireland op cit note 948 at 199.

⁹⁷⁶ Ibid.

these principles are focused more on ensuring the Union does not encroach on member state sovereignty more than necessary.

The clear division of competences should have the advantage of each party, in this case, the EU and member states, knowing which areas to act in and which to not. However, in some instances, the Union has been seen to act beyond the competences conferred on it. This has been termed the ‘competence creep’.⁹⁷⁷ Actions of the Union that have been considered to exceed exclusive competences include instances where the EU has adopted legislation in areas where such competence has not been conferred on it; where decisions of the CJEU constrain the actions of member states; and through the conclusion of international agreements by the EU.⁹⁷⁸

6.2.1.4 The Ordinary Legislative Procedure

The EU Treaties have made provision for detailed procedures to be followed in the adoption of legal acts. Attention will be given to the Ordinary Legislative Procedure. The Ordinary Legislative Procedure is the standard procedure followed for the adoption of legal acts in the EU. Three EU institutions in particular work together in this process. The European Commission has the right of initiative, which means it has the authority to prepare a proposal for a measure to be adopted.⁹⁷⁹ Once the Commission has drafted a proposal, the proposal is submitted to the European Parliament and the Council, which have the joint authority to adopt regulations, directives, or decisions.⁹⁸⁰

The proposal is first read in the European Parliament, and after deliberations, its position is communicated with the Council.⁹⁸¹ The Council may either approve the Parliament’s position and the act may be adopted⁹⁸² or in the instance that the Council does not approve, the Council adopts its position and communicates this with the Parliament for a second reading.⁹⁸³ Following the second reading by the Parliament, it may approve the Council’s position within three months and the act is deemed to be approved.⁹⁸⁴ The Parliament can also reject the Council’s position and the proposed act is deemed not to have been adopted.⁹⁸⁵ A third option is for the Parliament to amend

⁹⁷⁷ Sacha Garben ‘Competence Creep Revisited’ (2019) 57 *Journal of Common Market Studies* at 205; Sacha Prechal ‘Competence Creep and General Principles of Law’ (2010) 3 *Review of European Administrative Law* at 5.

⁹⁷⁸ Garben op cit note 977 at 206.

⁹⁷⁹ Article 17(2) of the Treaty on European Union provides that Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.

⁹⁸⁰ Article 14(1) and Article 16(1) of the TEU; Article 289(1) of the TFEU.

⁹⁸¹ Article 294(3) of the TFEU.

⁹⁸² Article 294(4) of the TFEU.

⁹⁸³ Article 294(5) of the TFEU.

⁹⁸⁴ Article 294(7)(a) of the TFEU.

⁹⁸⁵ Article 294(7)(b) of the TFEU.

the Council's position and communicate the amended text to the Council and the Commission to deliver an opinion on the position.⁹⁸⁶

If the Parliament adopts an amended position, the Council can either approve the Parliament's amendments and the act is adopted or if the Council does not approve the amendments conciliation proceedings then take place.⁹⁸⁷ The conciliation procedure is followed in instances where the Parliament and the Council cannot reach an agreement on a proposed act. The Conciliation Committee⁹⁸⁸ is tasked with reaching an agreement on a joint text on the basis of the positions of both the European Parliament and the Council.⁹⁸⁹ An agreement must be reached within six weeks, failing which the proposed act is deemed not to have been adopted.⁹⁹⁰ If an agreement is reached within the allocated six weeks, the European Parliament and the Council each have a period of six weeks to adopt the act in question in accordance with the joint text adopted by the Conciliation Committee.⁹⁹¹ If at this point the Parliament and the Council do not agree, the act is deemed not to have been adopted and the legislative process comes to an end.⁹⁹²

This aspect of EU law is of interest to the analysis of effectiveness because of the roles played by the European Parliament and the Council. The European Parliament, which represents the Union's citizens, plays a key role in ensuring that the interests of citizens are considered in the adoption of legal acts whilst the Council, which represents member state governments, acts in the interest of member states. The involvement of the European Parliament may therefore ensure that legal acts adopted at the EU level are in the interest of citizens, which may then lead to improved ownership, understanding, and implementation in member states. Furthermore, provision is made for a role to be played by national parliaments which enhances the principle of representative democracy in the EU.⁹⁹³ Legislative acts are to be sent to national parliaments and national parliaments may give opinions as to whether the proposed legislative act complies with the principle of subsidiarity.⁹⁹⁴

⁹⁸⁶ Article 294(7)(c) of the TFEU.

⁹⁸⁷ Article 294(8) of the TFEU.

⁹⁸⁸ The Conciliation Committee is composed of an equal number of members or representatives from the European Parliament and the Council.

⁹⁸⁹ Article 294(10) of the TFEU.

⁹⁹⁰ Article 294(10) & (12) of the TFEU.

⁹⁹¹ Article 294(13) of the TFEU.

⁹⁹² Article 294(10) of the TFEU.

⁹⁹³ Kaczorowska-Ireland *op cit* note 948 at 162.

⁹⁹⁴ Article 12 of the TEU; Articles 2 and 3 of the Protocol (No 1) on the Role of National Parliaments in the European Union.

6.2.2 The EU's Organs and their Role in an Effective Community

The institutional framework of the EU was designed to ensure the consistency, effectiveness, and continuity of EU policies and actions.⁹⁹⁵ The EU's institutional framework has evolved over time in attempt to create an institutional balance of power. There are a number of EU institutions that have been established but for purposes of this research, a select few and their role in promoting an effective community will be considered. These are the European Council, the European Parliament, the Council of the European Union, the European Commission and the Court of Justice of the European Union.

First, the European Council (hereafter the 'EC') consists of Heads of State or Government of member states, its President, and the President of the Commission.⁹⁹⁶ It is one of the institutions that represents member states at the community level. The European Council defines the general political directions and priorities of the Union and provides guidelines to the Council and the European Commission.⁹⁹⁷ It is clearly stipulated that the EC does not exercise legislative functions.⁹⁹⁸ This is unlike what we see in Africa's RECs, where the organs of similar composition have the authority to perform legislative functions, in many instances being the only organs in RECs to have such authority. Functions of the EC include examining matters within the exclusive competence of the EU, deciding whether a revision of the Treaties is necessary, and providing political impetus for development of the EU.⁹⁹⁹

Second, the European Parliament (hereafter the 'EP') is composed of representatives of the EU's citizens who are elected by direct elections.¹⁰⁰⁰ Members of the EP are citizens of EU and they serve for a term of five years.¹⁰⁰¹ The EP's powers have gradually been increased from having a consultative role to now sharing legislative and budgetary powers with the Council.¹⁰⁰² Additionally, the EP has to give consent with respect to certain decisions such as the conclusion of international agreements between the EU and third countries¹⁰⁰³; application for admission of a state to the EU,¹⁰⁰⁴ and determination that a member state is at risk of a serious breach of the EU values.¹⁰⁰⁵ The involvement of the EP in union level decisions ensures that such decisions are taken as closely

⁹⁹⁵ Article 13(1) of the TEU.

⁹⁹⁶ Article 15(2) of the TEU.

⁹⁹⁷ Article 15(1) of the TEU.

⁹⁹⁸ Article 15(1) of the TEU.

⁹⁹⁹ Kaczorowska-Ireland *op cit* note 948 at 87.

¹⁰⁰⁰ Article 14(2) and (3) of the TEU.

¹⁰⁰¹ Article 14(2) and (3) of the TEU.

¹⁰⁰² Article 14(1) of the TEU.

¹⁰⁰³ Article 218 (6) of the TFEU.

¹⁰⁰⁴ Article 49 of the TEU.

¹⁰⁰⁵ Article 7(1) of the TEU.

as possible to the citizens of the EU and enables citizens to participate. Once again, this is contrary to the position of regional parliaments in Africa's RECs. For one thing, in instances that an REC has a regional parliament, such parliaments have limited legislative authority if any. Further, the election process of representatives in some instances is not through direct elections.

Third, the Council of the European Union (hereafter the 'Council'), which jointly performs legislative and budgetary functions with the EP, is composed of representatives at the ministerial level from each member state.¹⁰⁰⁶ This is the other organ that represents member state interests at the community level and Council members can take decisions that bind member states. In addition to its legislative and budgetary functions, the Council carries out policymaking and coordinating functions, coordinating the economic policies of member states.¹⁰⁰⁷

Fourth, the European Commission (hereafter the 'Commission') promotes the general interest of the EU and ensures the application of the Treaties and measures adopted by EU institutions pursuant to the Treaties.¹⁰⁰⁸ The Commission also oversees the application of EU law under the control of the Court of Justice of the European Union.¹⁰⁰⁹ It is a completely independent institution and its members are chosen on the grounds of general competence, European commitment, and independence beyond doubt.¹⁰¹⁰ The Commission plays a key role in the monitoring and evaluation process of the EU and in the enforcement of EU law. This will be considered below.

Fifth, the Court of Justice of the European Union (hereafter the 'CJEU') ensures that the law is observed in the interpretation and application of the Treaties.¹⁰¹¹ The CJEU includes the Court of Justice, the General Court, and specialised courts.¹⁰¹² The Court of Justice consists of one judge from each member state whereas the General Court consists of at least one judge per member state.¹⁰¹³ The responsibilities of the CJEU include ruling on actions brought by a member state, an EU institution or a natural or legal person; giving preliminary rulings on the interpretation of EU law or the validity of acts adopted by the institutions; and rule on other matters provided for in the Treaties.¹⁰¹⁴ Actions that can be brought to the court include actions against a member state

¹⁰⁰⁶ Article 16(2) of the TEU.

¹⁰⁰⁷ Article 16(1) of the TEU.

¹⁰⁰⁸ Article 17(1) of the TEU.

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ Article 17(3) of the TEU.

¹⁰¹¹ Article 19(1) of the TEU.

¹⁰¹² Ibid.

¹⁰¹³ Article 19(2) of the TEU.

¹⁰¹⁴ Article 19(3) of the TEU.

for failing to fulfil its obligations;¹⁰¹⁵ against a member state for failing to comply with an earlier judgment;¹⁰¹⁶ and actions for annulment of legislative acts.¹⁰¹⁷

The CJEU has played an integrationist role through its judgments. For instance, the CJEU has, through decisions, clarified the relationship between the community legal system and national legal systems. The principle of direct effect was developed in the *Van Gend*¹⁰¹⁸ case where the court held that EU law not only imposes obligations on individuals but it also confers rights which must be protected by national courts.¹⁰¹⁹ A few years later, the court went on to establish the doctrine of supremacy in the *Costa v ENEL* case. The court held that due to the special and original nature of community law, it cannot be overridden by domestic legal provisions without being deprived of its character as community law and without the legal basis of the community being called into question.¹⁰²⁰ These principles have not only informed EU integration, but have shaped integration in other initiatives as well.

The institutional set-up of the EU has features of both supranationalism and intergovernmentalism, depending on the institution. The Commission, for instance, is considered supranational due to its independence. Article 17(3) of the Treaty on EU explicitly stipulates that the Commission is to be independent and that the commissioners are not to take instructions from any government or take any action that is incompatible with the performance of their tasks. As such, the Commission is considered as an institution that furthers the interest of the community as a whole rather than the interests of specific states.¹⁰²¹ The Commission's power to initiate draft legislation is complemented by its independence because this ensures that legislative drafts do not reflect any specific national interests.¹⁰²² The Council is also considered to be intergovernmental while the EP is supranational.

Overall, the institutional framework of the EU has been crafted in a way to promote its principles and objectives. The activities of the institutions with the most power are interlinked in a way that promotes the interest of all parties namely the community, member states and EU citizens. This framework promotes transparency and accountability. The involvement of the people promotes

¹⁰¹⁵ Article 258 and 259 of the TFEU.

¹⁰¹⁶ Article 260 of the TFEU

¹⁰¹⁷ Article 263 of the TFEU.

¹⁰¹⁸ *NV Algemene Transport – en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration Case 26/62*.

¹⁰¹⁹ *Ibid* at 11.

¹⁰²⁰ *Flaminio Costa v E.N.E.L. Case 6/64* at 594.

¹⁰²¹ Roger J. Goebel 'Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon' (2013) 20 *Columbia Journal of European Law* 77 at 87.

¹⁰²² *Ibid* at 91.

awareness and ownership. Additionally, having a court that can enforce community law promotes compliance and implementation.

6.2.3 Monitoring Compliance in the EU

6.2.3.1 Transposition Monitoring by the European Commission

The Commission monitors the transposition of directives through a two-stage process. The first stage is the transposition check which begins when the transposition deadline has expired.¹⁰²³ During the transposition check, the Commission ensures that the national measures notified by member states completely cover each obligation contained in the directive.¹⁰²⁴ If a directive has not been completely transposed, the Commission launches infringement proceedings.¹⁰²⁵

The second stage is the conformity check, which begins when the transposition check has been completed.¹⁰²⁶ During the conformity check, the Commission assesses the compatibility of the national implementing measures with the directive's provisions and obligations.¹⁰²⁷ In other words, this stage checks whether the national measures have accurately reflected all the provisions of the directive.¹⁰²⁸ This is an important aspect considering that it is through the national implementing measures that rights and obligations are conferred. Simply enacting national measures does not mean that the measures comply. Failure to conform with the directive will lead to the Commission launching infringement proceedings.¹⁰²⁹

6.2.3.2 The EU Single Market Scoreboard

One of the cornerstones of the EU is the establishment of a Single Market that enables free movement of goods, services, capital, and persons. Although the Single Market is operational, achieving the full potential of the Single Market is a continual process that requires monitoring. The Single Market Scoreboard was established to keep track of the transposition of Internal Market

¹⁰²³ European Commission 'Better regulation Toolbox' at 283, available at https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox_2.pdf, accessed on 21 September 2020; European Commission 'Commission Staff Working Document: Better Regulation Guidelines' at 42, available at <https://ec.europa.eu/info/sites/default/files/better-regulation-guidelines.pdf>, accessed on 16 August 2021.

¹⁰²⁴ Ibid.

¹⁰²⁵ Ibid.

¹⁰²⁶ Ibid.

¹⁰²⁷ Ibid.

¹⁰²⁸ Ibid; European Court of Auditors 'Putting EU law into practice: The European Commission's oversight responsibilities under Article 17(1) of the Treaty on European Union' at 8, available at https://www.eca.europa.eu/Lists/ECADocuments/LR_EU_LAW/LR_EU_LAW_EN.pdf, accessed on 16 August 2021.

¹⁰²⁹ Ibid.

law by EU member states.¹⁰³⁰ The Scoreboard organises information in five ways, namely by stage in the governance cycle, by member state performance, by governance tool, by policy area, and by the state of trade integration and market openness. Each of which will be briefly discussed.

The Single Market Governance Cycle refers to the mechanisms, rules, and practices that have been put in place to design, implement, apply, and enforce the Single Market Regulatory Framework.¹⁰³¹

There are seven stages in the cycle, namely adopt, transpose, inform, enable, connect, solve, evaluate. Each stage of the governance cycle will be briefly highlighted. The adopt category provides information on the Commission's activities with respect to the adoption of new rules or the adaptation, simplification, or deletion of existing rules.¹⁰³²

Transposition of Single Market laws into national laws is a key step in creating an effective single market and the transposition stage provides information on the performance of member states in transposing the relevant laws and the number of infringement proceedings.¹⁰³³ Five indicators are used to monitor transposition, and these are transposition deficit, progress over the last 12 months, long-overdue directives, total transposition delays, and conformity deficit. Transposition deficit refers to the gap between the number of Single Market directives that the EU has adopted and the directive that member states have transposed.¹⁰³⁴ As member states have an obligation to notify the Commission of transposition by the stipulated deadline, the transposition deficit indicator shows the percentage of Single Market directives not yet completely notified in relation to the total number of directives that should have been notified by the deadline.¹⁰³⁵ The 'change over the last 12 months' indicator monitors whether there has been a reduction in accumulated uncompleted transpositions and notifications over the last 12 months, and shows whether member states are making efforts towards reducing their transposition deficit.¹⁰³⁶ This approach not only shows the status of member states but the progress made as well.

¹⁰³⁰ Vanessa Fernández Moriana, Alexandra Melissa Vida and Philippe De Lombaerde 'The European Commission Single Market Scoreboard' in Philippe De Lombaerde and Edgar J. Saucedo Acosta (eds) *Indicator-Based Monitoring of Regional Economic Integration: Fourth World Report on Regional Integration* (2017) at 3; Ana-Cristina Coseta, Philippe De Lombaerde, Wouter De Vriendt and Birger Fühne 'Monitoring and (Good) Governance of the Integration Process in the European Union' in Philippe De Lombaerde, Antoni Estevadeordal and Kati Suominen (eds) *Governing Regional Integration for Development: Monitoring Experiences, Methods and Prospects* (2008) at 229.

¹⁰³¹ See https://ec.europa.eu/internal_market/scoreboard/governance_cycle/index_en.htm, accessed on 27 July 2021.

¹⁰³² Ibid; Moriana et al. op cit note 1030 at 8.

¹⁰³³ Ibid, Moriana et al. op cit note 1030 at 9.

¹⁰³⁴ Ibid.

¹⁰³⁵ Op cit note 1031.

¹⁰³⁶ Ibid; Moriana et al. op cit note 1030 at 9.

The ‘long-overdue directives’ indicator monitors directives that are two or more years overdue.¹⁰³⁷ The ‘total transposition delays’ indicator monitors the percentage of outstanding directives by calculating the average of delays in months.¹⁰³⁸ The ‘conformity deficit’ indicator is used to monitor the level of compliance of transposed directives.¹⁰³⁹ Beyond transposition, the national law must conform with the directive. The conformity deficit, therefore, measures the number of directives transposed for which infringement proceedings for incorrect transposition have been launched, as a percentage of the number of directives notified to the Commission as transposed.¹⁰⁴⁰

The transpose stage of the governance cycle also monitors infringements using four indicators namely: number of pending infringement proceedings; duration of infringement proceedings; change over the last 12 months; and time taken to comply with the CJEU’s ruling.¹⁰⁴¹ The number of pending infringements shows the number of open infringements per member state, whilst the change over the last 12 months indicator measures any increases or decreases in the number of pending proceedings compared to the last reporting period.¹⁰⁴² The duration of infringement proceedings indicator calculates the number of months that have passed from the time a formal notice letter of infringement was dispatched but before cases are sent to the CJEU.¹⁰⁴³ Thus, this indicator only takes into account the pre-litigation stage of infringement proceedings. The final indicator focuses on infringement cases that are brought before the court and monitors the time taken between the delivery of the court’s judgment and the closure of the case confirming that the member state has complied with the judgment.¹⁰⁴⁴ This implies that a case is only closed when the decision has been complied with.

An important part of the process is the awareness of citizens of the Union’s activities. As such, the ‘inform’ stage of the governance cycle is used to inform citizens and businesses about their rights under EU law and provide advice.¹⁰⁴⁵ The enable stage aims to simplify administrative procedures with the aim of helping citizens and businesses to make use of their rights.¹⁰⁴⁶ The Scoreboard measures this stage through four indicators, namely: quality and availability of

¹⁰³⁷ Moriana op cit note 1030 at 9.

¹⁰³⁸ Ibid at 11.

¹⁰³⁹ Op cit note 1031.

¹⁰⁴⁰ Ibid.

¹⁰⁴¹ Moriana et al. op cit note 1030, See also op cit note 1031.

¹⁰⁴² Op cit note 1031.

¹⁰⁴³ Moriana et al. op cit note 1030 at 12.

¹⁰⁴⁴ Ibid; op cit note 131.

¹⁰⁴⁵ European Commission ‘Single Market Scoreboard’ available at https://ec.europa.eu/internal_market/scoreboard/governance_cycle/index_en.htm, accessed on 28 July 2021.

¹⁰⁴⁶ Ibid.

information; online application procedures; accessibility for users from other countries; and usability.¹⁰⁴⁷

In the ‘connect’ stage, the performance of states is measured using indicators that monitor the speed of communication between different administrations and efforts made to improve the systems in place.¹⁰⁴⁸ Since there are systems that have been put in place to improve cooperation between national authorities, these systems are monitored. These systems include the Internal Market Information system, the Consumer Protection Cooperation Network, and the Technical Regulations Information System.

There are formal and informal procedures in place aimed at addressing the breaches of EU rights and the Scoreboard monitors the performance of these procedures in the ‘solve’ stage of the governance cycle.¹⁰⁴⁹ The procedures include SOLVIT, which is used to assist in instances of breaches between citizens or businesses of one member state and another;¹⁰⁵⁰ the Consumer Protection Cooperation Network which consists of authorities responsible for enforcing EU consumer protection laws;¹⁰⁵¹ and EU Pilot which is a tool used for informal dialogue between the Commission and member states in instances of potential non-compliance with EU law.¹⁰⁵²

The ‘evaluate’ stage involves using the information from the preceding stages to evaluate the Single Market as a whole.¹⁰⁵³ This stage also feeds into the decision-making process.

The Scorecard provides for very detailed monitoring of the progress being made in the Common Market. It provides stakeholders with clear and simple information. One downside is that it focuses only on the Common Market, whilst there are other areas of European Integration that could benefit from such monitoring.

6.2.3.3 The EU Integration Index

The EU Integration Index is a tool developed by individuals to serve as a mechanism that looks at the overall level of integration of member states.¹⁰⁵⁴ The index takes into account the unique

¹⁰⁴⁷ Op cit 1031.

¹⁰⁴⁸ Op cit 1045.

¹⁰⁴⁹ Ibid.

¹⁰⁵⁰ Ibid.

¹⁰⁵¹ Ibid.

¹⁰⁵² Ibid.

¹⁰⁵³ Moriana et al op cit note 1030 at 15.

¹⁰⁵⁴ Jörg König and Renate Ohr ‘Different Efforts in European Economic Integration: Implications of the EU Index’ (2013) at 51 *Journal of Common Market Studies* 1074 at 1075.

dimensions of EU integration, such as positive and negative integration, as well as the varying degrees of effort and capability of member states when it comes to deepening EU integration.¹⁰⁵⁵

The EU Integration Index makes use of four dimensions which consist of a total of 25 indicators. The first is the Single Market dimension, which analyses the extent of integration in the Single Market in two ways. One way, called ‘EU openness’, measures the sum of a member state’s intra-European imports and exports as a percentage of its gross domestic product.¹⁰⁵⁶ The other way, called ‘EU importance’, measures the sum of a member state’s intra-European imports and exports as a percentage of its total world trade.¹⁰⁵⁷ The indicators used are trade in goods, trade in services, capital movement, and labour migration, which encompass the four freedoms underlying the Single Market.¹⁰⁵⁸

The second dimension is EU homogeneity which measures the extent of economic convergence between member states.¹⁰⁵⁹ This dimension has seven indicators which are per capita income, purchasing power standards, labour costs, long-term interest rate, public debt ratio, consumer tax rate, and capital tax rate.¹⁰⁶⁰

The third dimension is EU symmetry which analyses the degree of synchronisation of business cycles of member states.¹⁰⁶¹ The indicators used to analyse this are gross domestic product growth rate, inflation rate, change in unemployment, and government net borrowing.¹⁰⁶²

The fourth dimension is EU conformity which looks at the participation of member states in important steps in European institutional integration and through compliance with EU law.¹⁰⁶³ The EU conformity dimension uses six indicators which are EMU membership, Schengen participation, infringement proceedings, CJEU verdicts in cases relating to the single market, CJEU verdicts in consumer protection and environment, and CJEU verdicts in other sectors.¹⁰⁶⁴

Although this is not an official monitoring tool, the EU Integration Index has the potential to be a valuable tool as it covers EU integration in general, without being limited to a specific area.

¹⁰⁵⁵ Ibid at 1077; Jörg König ‘The EU Index of Integration Effort’ in Philippe De Lombaerde and Edgar J. Saucedo Acosta (eds) *Indicator-Based Monitoring of Regional Economic Integration: Fourth World Report on Regional Integration* (2017) at 74.

¹⁰⁵⁶ König & Ohr op cit note 1054 at 1077; König op cit note 1055 at 79.

¹⁰⁵⁷ Ibid.

¹⁰⁵⁸ Ibid.

¹⁰⁵⁹ König & Ohr op cit note 1054 at 1078; König op cit note 1055 at 80.

¹⁰⁶⁰ Ibid.

¹⁰⁶¹ König & Ohr op cit note 1054 at 1078.

¹⁰⁶² König & Ohr op cit note 1054 at 1078; König op cit note 1055 at 79.

¹⁰⁶³ König & Ohr op cit note 1055 at 1079.

¹⁰⁶⁴ König & Ohr op cit note 1054 at 1078 ; König op cit note 1055 at 82.

However, research shows that the tool has not been in use for some years. This may be due to the challenges faced in maintaining such a monitor by individuals.

6.2.4 The EU's Non-Compliance Response System

The EU has made provision for various methods that can be used in situations where EU Law has not been complied with or implemented. This section will consider how the Commission enforces EU Law through infringement proceedings and the role that the Court of Justice of the European Union plays in enforcement. Additionally, the concept of member state liability will be considered.

6.2.4.1 Infringement Proceedings by the Commission

The Treaty on the Functioning of the European Union (hereafter 'TFEU') makes provision for proceedings to be followed by the Commission in instances of infringement by member states. Article 258 of the TFEU stipulates that if the Commission considers that a member state has failed to fulfil an obligation under the Treaties, the Commission may bring the matter before the CJEU.¹⁰⁶⁵ The Commission may become aware of such infringement in various ways, including complaints made by individuals.¹⁰⁶⁶ Before taking the matter to the CJEU, the Commission must communicate with the member state to provide an opportunity to fulfil its obligations.¹⁰⁶⁷

In order to initiate such proceedings, there must be a failure by the member state to fulfil an obligation under the Treaties. Such failure may take the form of breach of a pre-existing, specific, and precise obligation, or general and persistent infringements of EU Law.¹⁰⁶⁸ An obligation is broadly interpreted to include obligations imposed by the treaties, protocols, regulations, decisions, directives, and binding acts adopted by EU institutions.¹⁰⁶⁹

If the member state does not reply satisfactorily to the Commission's communication, the Commission has the discretion to bring the matter before the CJEU.¹⁰⁷⁰ If the infringement proceedings are based on a member state's failure to notify, the Commission may specify the amount of lump sum or penalty it deems appropriate for the member state to pay.¹⁰⁷¹

¹⁰⁶⁵ Article 258 of the TFEU; European Commission 'Infringement Procedure' available at https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en, accessed on 22 September 2020.

¹⁰⁶⁶ Kaczorowska-Ireland op cit note 948 at 439.

¹⁰⁶⁷ Article 258 of the TFEU.

¹⁰⁶⁸ Kaczorowska-Ireland op cit note 948 at 431.

¹⁰⁶⁹ Ibid.

¹⁰⁷⁰ Article 258 of the TFEU; European Commission 'Infringement Procedure' op cit note 1065.

¹⁰⁷¹ Article 260(3) of the TFEU.

A gap that is created through Article 258 of the TFEU, however, is that it is at the discretion of the Commission to initiate proceedings. For example, this means that if an individual makes a complaint about a member state's failure to meet an obligation, the Commission may decide not to pursue the complaint and initiate infringement proceedings. This would mean that the individual's complaint would be left unaddressed.

6.2.4.2 Enforcement by the CJEU

The CJEU has jurisdiction over actions brought by member states, the European Parliament, the Council, or the Commission on grounds of infringement.¹⁰⁷² If a member state considers that another member state has not fulfilled an obligation under the Treaties, the member state can bring the matter before the CJEU.¹⁰⁷³ However, prior to bringing an action before the CJEU, the member state must bring the matter before the Commission.¹⁰⁷⁴ The Commission acts as an intermediary and gives each member state an opportunity to submit an observation before it delivers a reasoned opinion within three months.¹⁰⁷⁵ Requiring a member state to approach the Commission before the CJEU is an attempt to conclude a settlement between the states concerned.¹⁰⁷⁶

If the CJEU finds that a member state has failed to fulfil an obligation, the CJEU will pass a judgement requiring the member state to take the necessary steps to comply with its judgement.¹⁰⁷⁷ The Commission then checks whether the member state has complied with the ruling of the CJEU.¹⁰⁷⁸ If the Commission finds that the member state has not complied, the Commission may refer the matter back to the CJEU after providing the member state with a notification letter and an opportunity to submit their observations.¹⁰⁷⁹ At this stage, the Commission also specifies the amount to be paid by the member state for non-compliance.¹⁰⁸⁰ If the CJEU finds that the state has failed to comply with the court's judgment, the court is empowered to impose a penalty or lump sum on the non-compliant member state.¹⁰⁸¹

¹⁰⁷² Article 263 of the TFEU.

¹⁰⁷³ Article 259 of the TFEU.

¹⁰⁷⁴ Ibid.

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ Kaczorowska-Ireland op cit note 948 at 453.

¹⁰⁷⁷ Article 260(1) of the TFEU.

¹⁰⁷⁸ Article 260(2) of the TFEU; European Commission 'Infringement Procedure' op cit note 1065.

¹⁰⁷⁹ Ibid.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Article 260(2) of the TFEU.

6.2.4.3 Member State Liability

The CJEU has developed the principle of state liability as a further measure to protect the rights of individuals. State liability enables private individuals to seek compensation from member states in instances in which they have suffered damages or loss due to a member state's failure to meet its obligations.¹⁰⁸² This principle derives from the fact that member states have an obligation to take the appropriate measures to ensure the fulfilment of obligations arising out of EU law.¹⁰⁸³

The provision for state liability recognises that the effectiveness of the community would be impaired if individuals are not able to obtain redress when their rights have been infringed upon by a member state's breach of community law.¹⁰⁸⁴ Member states can be held liable regardless of which organ of the state is responsible for the act or omission that caused the breach.¹⁰⁸⁵

In order for a member state to be held liable, three conditions need to be met. First, the rule of law infringed must be intended to confer rights on individuals.¹⁰⁸⁶ Second, the breach must be sufficiently serious.¹⁰⁸⁷ Third, there must be a direct causal link between the state's breach and the injured party's loss and the existence of a causal link is to be determined by the national courts.¹⁰⁸⁸ Once the conditions of liability have been satisfied, the member state must make reparations based on its national rules of liability.¹⁰⁸⁹

6.3 THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

The Association of Southeast Asian Nations (hereafter 'ASEAN') was established in 1967 through the signing of a declaration by five states. ASEAN was established by states that had experienced some form of foreign intervention and these states had the common goal of protecting themselves from such foreign intervention.¹⁰⁹⁰ At the time of its establishment, ASEAN had a loose organisational structure aimed at achieving the community's objectives of promoting cooperation

¹⁰⁸² Joined cases C-6/90 and 9/90 *Andrea Francovich and Danila Bonifazi and others v Italian Republic* [1991] E.C.R I-05357 para 35.

¹⁰⁸³ Article 4(3) of the TEU.

¹⁰⁸⁴ *Franovich* supra note 1082 para. 32 - 33.

¹⁰⁸⁵ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and R v Secretary of State for Transport ex parte Factortame Ltd and Others* [1996] E.C.R I-01029 para 32.

¹⁰⁸⁶ *Franovich* supra note 1082 para 40; *Brasserie du Pêcheur* supra note 1085 para 51; Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] E.C.R I-02553.

¹⁰⁸⁷ *Ibid.*

¹⁰⁸⁸ *Ibid.*

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ Atena S. Feraru 'ASEAN Decision-Making Process: Before and After the ASEAN Charter' (2015) 4 *Asian Development Policy Review* 26 at 28; Laurence Henry 'The ASEAN Way and Community Integration: Two Different Models of Regionalism' (2007) 13 *European Law Journal* 857 at 859.

amongst member states whilst protecting national sovereignty from internal and external interference.¹⁰⁹¹

Over the years, ASEAN has grown in membership and efforts have been made to create a more structured and concrete community, including the signing of the ASEAN Charter. ASEAN is comprised of states that have varying histories and prevailing domestic circumstances. Differences can be seen in the political composition of member states, as some are new democracies, guided or directed democracies and authoritarian regimes.¹⁰⁹² There are also differences in the socio-economic circumstances of member states, with some rich states and some relatively poor states.¹⁰⁹³ Integration in Africa has faces similar challenges due to the continent's history and circumstances on the continent.

This section will analyse the approach that has been adopted by ASEAN in pursuing integration. This will include looking at the rules system that ASEAN has in place, the roles the organs of the community play in promoting a more effective community, and the community's non-compliance response system including the dispute settlement mechanisms adopted. The purpose of this is to consider a regional economic community that faces socio-economic challenges similar to those faced in Africa.

6.3.1 Overview of ASEAN's Legal Framework

The ASEAN Charter serves as the primary agreement of the community and it was adopted in 2007, 40 years after ASEAN was established. The ASEAN Charter stipulates the purposes of the community which include maintaining and enhancing peace, security and stability in the region; promoting greater political, security, economic and socio-cultural cooperation; strengthening democracy, enhancing good governance and the rule of law, and protecting and promoting human rights and fundamental freedoms; and promoting a people-oriented ASEAN.¹⁰⁹⁴ The activities of ASEAN and its member states are guided by principles such as respect for independence, sovereignty, equality, territorial integrity and national identity of all member states; non-interference in internal affairs of member states; enhanced consultations on matters seriously affecting the common interest of ASEAN; and peaceful settlement of disputes.¹⁰⁹⁵

¹⁰⁹¹ Joshua Kurlantzick 'ASEAN's Future and Asian Integration' available at <https://www.jstor.org/stable/pdf/resrep05639.pdf?refreqid=excelsior%3Ab504a3cf943fb3bd4f51925ec67eb6e1>, accessed on 3 August 2021.

¹⁰⁹² Gino J. Naldi 'The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal' (2014) 5 *Journal of International Dispute Settlement* 105 at 109.

¹⁰⁹³ Ibid.

¹⁰⁹⁴ Article 1 of the ASEAN Charter.

¹⁰⁹⁵ Article 2 of the ASEAN Charter.

The ASEAN Charter creates rights and obligations for member states of the community. Member states are required to take the measures necessary to implement provisions of the Charter and comply with membership obligations.¹⁰⁹⁶

6.3.1.1 Decisions Making in ASEAN

These principles have been influenced by the history of the region, including internal conflicts and the desire to maintain a peaceful region. These factors have resulted in a unique approach to integration including the way decisions in the community are made. Decisions are made through consensus and consultation.¹⁰⁹⁷ The unique approach, paired with the guiding principles of independence, equality, sovereignty, and non-interference, has been termed the 'ASEAN Way'.¹⁰⁹⁸ In terms of this approach, as a starting point, informal intensive and discreet discussions take place behind the scenes to arrive at a general consensus.¹⁰⁹⁹ The consensus reached through the informal discussions forms the foundation for decisions to be reached in formal meetings.¹¹⁰⁰ The approach, therefore, starts with informal and non-binding agreements, which are later on accepted at formal meetings.¹¹⁰¹

Decision making through these informal discussions means that the process to reach a decision on issues is lengthy.¹¹⁰² The consensus approach also results in decisions being based on the lowest common denominator.¹¹⁰³ This means that the position of the state that stands to benefit the least from a decision will take preference in the group's decision making.¹¹⁰⁴ When it comes time to adopt a formal decision, member states are not required to explicitly agree or vote, but a member state can vote against a decision being adopted.¹¹⁰⁵

Although ASEAN has undergone changes to establish more formality in the organisation, the consensus approach to decision making has been retained. The approach has been a source of criticism from some whilst it has been viewed by others as the reason behind ASEAN's continued

¹⁰⁹⁶ Article 5 of the ASEAN Charter.

¹⁰⁹⁷ Article 20 of the ASEAN Charter.

¹⁰⁹⁸ Cheong Kee Cheok and Yong Chen Chen 'Assessing ASEAN's Relevance: Have the Right Questions Been Asked?' (2019) 36 *Journal of Southeast Asian Economies* 11 at 14.

¹⁰⁹⁹ Paul J. Davidson 'The ASEAN Way and the Role of Law in ASEAN Economic Cooperation' (2004) 8 *Singapore Yearbook of International Law* 165 at 167; Henry op cit note 1090.

¹¹⁰⁰ Davidson op cit note 1099 at 167.

¹¹⁰¹ Ibid.

¹¹⁰² Bilson Kurus 'The ASEAN Triad: National Interest, Consensus-Seeking, And Economic Co-operation' (1995) 16 *Contemporary Southeast Asia* 404 at 406.

¹¹⁰³ Ibid.

¹¹⁰⁴ Ibid.

¹¹⁰⁵ Feraru op cit note 1090 at 27; Vinod K. Aggarwal and Jonathan T. Chow 'The perils of consensus: How ASEAN's meta-regime undermines economic and environmental cooperation' (2010) 17 *Review of International Political Economy* 262 at 269.

survival. On the one hand, it is argued that the approach has helped to manage the intra-mural conflicts and facilitated cooperation.¹¹⁰⁶ On the other hand, it is criticised for delaying regional action and for resulting in an organisation that makes minimal progress.¹¹⁰⁷

As a way of enabling the integration agenda beyond the shortfalls of consensus, ASEAN minus X and 2 plus X formulas have been introduced. The adoption of these formulas reflects flexibility in ASEAN's approach to integration. In terms of the ASEAN minus X formula, all ASEAN member states are required to consent and participate in intra-ASEAN economic arrangements but when it comes to implementation, only two or more member states are required to participate first if other member states are not ready.¹¹⁰⁸ The 2 plus X formula allows for two or more ASEAN member states to reach agreements to liberalise trade in services for specific sectors.¹¹⁰⁹ Under this principle, other Member states may become party to such agreements at later stages should they wish to do so.¹¹¹⁰ The inclusion of these two formulas reflects recognition of the delay caused by consensus decision making to progress the community's projects.

AEAN has made a conscious decision to maintain decision making through consensus. This is because the view is that such a style of decision-making has contributed to member states being comfortable with decisions and sovereignty not being threatened.¹¹¹¹ Whether this approach is contributing to a more effective community is debatable. However, it was noted that consensus should not impede effectiveness of the community.¹¹¹²

6.3.2 Institutional Framework For An Effective Community

Prior to 2007, ASEAN did not have a legal and institutional framework beyond what was stipulated in the ASEAN Declaration. The ASEAN Declaration made provision for the machinery that would be used to carry out the aims and purposes of the association. This included an Annual Meeting of Foreign Ministers which was to be convened as required; a Standing Committee under the chairmanship of the host country and consisted of the membership of Ambassadors of member states; Ad-Hoc Committees and Permanent Committees of officials and specialists on

¹¹⁰⁶ Feraru op cit note 1090 at 27; Kurus op cit note 1102 at 406.

¹¹⁰⁷ Feraru op cit note 1090 at 27; John Ravenhill 'Fighting Irrelevance: an economic community 'with ASEAN characteristics' (2008) 21 *The Pacific Review* 469 at 480.

¹¹⁰⁸ Article 21(2) of the ASEAN Charter; ASEAN Framework Agreements on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992 available at https://asean.org/wp-content/uploads/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff/Framework%20Agreements%20on%20Enhancing%20ASEAN%20Economic%20Cooperation%20.pdf, accessed on 7 September 2021.

¹¹⁰⁹ Article 1 of the Protocol to Amend the ASEAN Framework Agreement on Services.

¹¹¹⁰ Ibid.

¹¹¹¹ ASEAN 'Report of the Eminent Persons Group on the ASEAN Charter' available at <https://www.asean.org/wp-content/uploads/images/archive/19247.pdf>, accessed on 1 November 2022.

¹¹¹² Ibid.

specific subject matters; and a National Secretariat in each member state.¹¹¹³ The role of the Standing Committee was to carry out the work of the Association in between Meetings of the Foreign Ministers, and the National Secretariats had the role of carrying out the work of the Association on behalf of each country and servicing meetings of Foreign Ministers and committees.¹¹¹⁴ It is clear that the community had a very minimal institutional framework and notably, the community did not have an administrative body.

As the needs of the community evolved, the member states signed the Charter of the Association of Southeast Asian Nations (hereafter ‘ASEAN Charter’) which makes provision for the community’s legal and institutional framework. The ASEAN Charter established various organs that have a role in the community’s operations, some of which will now be considered. First, the ASEAN Summit consists of the Heads of State or Government of the member states and is the supreme policymaking body of the community.¹¹¹⁵ The ASEAN Summit provides policy guidance and takes decisions on key issues relating to the attainment of community objectives.¹¹¹⁶ The ASEAN Summit is also responsible to make decisions if the Charter has been breached; in the instance of non-compliance by a member state; if a dispute remains unresolved after following stipulated dispute settlement mechanisms; and if a decision resulting from an ASEAN dispute settlement mechanism has not been complied with.¹¹¹⁷ The nature of decisions that the ASEAN Summit may make in such instances is not stipulated in the Charter. The authority the ASEAN Summit has is comparable to the authority of executive organ of SADC.

Second, the ASEAN Coordinating Council is made up of the ASEAN Foreign Ministers.¹¹¹⁸ Thus, under the ASEAN Charter, the Foreign Ministers constitute an organ rather than an annual meeting. The ASEAN Coordinating Council is responsible for preparing meetings of the ASEAN Summit and coordinating implementation activities.¹¹¹⁹ The Coordinating Council is also entrusted with responsibilities in some of the dispute settlement mechanisms of the community.

Third, the Charter makes provision for councils of the community, namely the ASEAN Political-Security Community Council, the ASEAN Economic Community Council, and the ASEAN Socio-Cultural Community Council.¹¹²⁰ Each of these councils is responsible for ensuring the implementation of decisions of the ASEAN Summit that are relevant to it, coordinating the work

¹¹¹³ See The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967.

¹¹¹⁴ Ibid.

¹¹¹⁵ Article 7(1) and 7(2)(a) of the ASEAN Charter.

¹¹¹⁶ Article 7(2)(b) of the ASEAN Charter.

¹¹¹⁷ Articles 20, 26 and 27 of the ASEAN Charter.

¹¹¹⁸ Article 8(1) of the ASEAN Charter.

¹¹¹⁹ Article 8(2) of the ASEAN Charter.

¹¹²⁰ Article 9(1) of the ASEAN Charter.

of the sectors under its purview, and submitting reports and recommendations to the ASEAN Summit.¹¹²¹

Fourth, the ASEAN Charter establishes a Secretary General and the ASEAN Secretariat. The Secretary General is a national of the member states appointed by the ASEAN Summit on an alphabetical rotational basis of the member states.¹¹²² The Secretary General facilitates and monitors progress in the implementation of ASEAN agreements and decisions and serves as ASEAN's Chief Administrative Officer.¹¹²³ The Secretariat is also entrusted with monitoring compliance with decisions of some of the dispute settlement mechanisms.¹¹²⁴

Fifthly, the ASEAN Charter retains the ASEAN National Secretariats, which serve as national focal points and coordinate implementation of ASEAN decisions at the national level.¹¹²⁵ These have been retained from the time of the ASEAN Declaration and play a key role in coordinating national activities with those of the community.

In addition to the above, the ASEAN Charter has made provision for a rotational chairmanship. The ASEAN Charter stipulates that the chairmanship shall rotate annually based on the alphabetical order of the English names of member states.¹¹²⁶ Each year there will be a single chairmanship that will chair the ASEAN Summit, the ASEAN Coordinating Council, the three ASEAN Community Councils, among others.¹¹²⁷ The role of the member state holding the Chairmanship will be to actively promote and enhance ASEAN interests; ensure the centrality of ASEAN; and ensure an effective and timely response to urgent issues affecting ASEAN.¹¹²⁸

It is without question that ASEAN has made progress in creating an increasingly rules-based community and establishing organs that will help toward the community's goals. However, the current institutional framework can be improved to promote effectiveness. The community does not have a judicial organ, although there are dispute settlement mechanisms, nor a legislative organ. The Summit is the only organ that can make decisions and these form part of the community's legal system. These decisions are mainly made through consensus, which is time consuming and may not meet the immediate needs of the people. Furthermore, since there isn't an organ that represents the people, decisions made are more like to prioritize political and national interests.

¹¹²¹ Article 9(4) of the ASEAN Charter.

¹¹²² Article 11(1) of the ASEAN Charter.

¹¹²³ Article 11(2) and 11(3) of the ASEAN Charter.

¹¹²⁴ Article 27(1) of the ASEAN Charter.

¹¹²⁵ Article 13 of the ASEAN Charter.

¹¹²⁶ Article 31(1) of the ASEAN Charter.

¹¹²⁷ Article 31(2) of the ASEAN Charter.

¹¹²⁸ Article 32 of the ASEAN Charter.

6.3.3 Monitoring and Evaluation in ASEAN

The member states of ASEAN have an obligation to take all the necessary measures to effectively implement the provisions of the ASEAN Charter and comply with obligations of membership.¹¹²⁹

In the instance of a serious breach or non-compliance with a decision of the Association, the matter is to be referred to the ASEAN Summit to make a decision.¹¹³⁰ ASEAN's framework, however, includes minimal provision for monitoring and evaluation of compliance by member states. The ASEAN Charter only provides that the Secretary General will facilitate and monitor progress in the implementation of ASEAN agreements and decisions and submit an annual report to the ASEAN Summit.¹¹³¹ Beyond that, provision has been made for monitoring and evaluation mechanisms to be used in some pillars of the ASEAN community.

One of the pillars, The ASEAN Economic Community, was established to achieve the community's objective of economic integration amongst its members. The ASEAN Economic Community Blueprint lays out the foundation of the economic community and stipulates its four key characteristics namely a single market and production base; a highly competitive economic region, a region of equitable economic development; and a region fully integrated into the global economy.¹¹³²

Under the ASEAN Economic Community Blueprint 2008, the ASEAN Secretariat had the responsibility of reviewing and monitoring compliance.¹¹³³ To this end, the ASEAN Economic Community Scorecard (hereafter 'AEC Scorecard') was developed. The AEC Scorecard monitored and reported the progress of each member state in implementing the AEC measures, identified implementation gaps and challenges, and tracked the realisation of the AEC by 2015.¹¹³⁴ The implementation rate was calculated through a simple method with "yes" indicating full implementation and "no" indicating otherwise.¹¹³⁵ A Scorecard measure would be considered fully

¹¹²⁹ Article 5(2) of the ASEAN Charter.

¹¹³⁰ Article 5(3) and 20(4) of the ASEAN Charter.

¹¹³¹ Article 11(2)(a) of the ASEAN Charter.

¹¹³² ASEAN Economic Community Blueprint 2008 at 6.

¹¹³³ Ibid at 27.

¹¹³⁴ ASEAN Economic Community Scorecard *Charting Progress Toward Regional Economic Integration Phase I (2008-2009) and Phase II (2010-2011)* 2012. Building the ASEAN Community *Monitoring the ASEAN Economic Community – Supporting integration through effective monitoring* available at https://www.asean.org/storage/images/2015/August/outreach_document/batch-1/Edited%20Monitoring%20AEC.pdf, accessed on 19 October 2020.

¹¹³⁵ Ibid.

implemented only when all the relevant ASEAN member states have implemented the measure or all the activities under the measure had been fully implemented.¹¹³⁶

Once the ASEAN Economic Community was established in 2015 a new blueprint was developed. The ASEAN Economic Community Blueprint 2025 focuses on five elements of the economic community namely a highly integrated and cohesive economy; a competitive, innovative and dynamic ASEAN; enhanced connectivity and sectoral cooperation; a resilient, inclusive, people-oriented, people-centred ASEAN; and a global ASEAN.¹¹³⁷ Blueprint 2025 identifies the ASEAN Economic Community Council (hereafter ‘AECC’) as the main organ that is responsible for the implementation of the strategic measures.¹¹³⁸ The AECC has the responsibility of monitoring and enforcing compliance with all measures in the 2025 Blueprint.¹¹³⁹ The AECC is empowered to establish special task forces that can assist in the resolution of non-compliance.¹¹⁴⁰

The ASEAN Economic Community 2025 Monitoring and Evaluation Framework comprises of compliance monitoring, outcomes monitoring, and impact evaluation. Compliance monitoring measures the progress that has been made towards achieving key outputs.¹¹⁴¹ Outcomes monitoring assesses the changes in key performance indicators as benefits that have resulted from the implementation of the AEC Blueprint 2025.¹¹⁴² Impact evaluation involves assessing the impact that regional economic integration goals have on the socio-economic environment of ASEAN member states.¹¹⁴³ Essentially, impact evaluation assesses the effectiveness of regional economic integration efforts. This approach to monitoring the next phase of establishing the ASEAN Economic Community is more extensive in comparison to the scorecard approach that was previously adopted. The provision for a monitoring and evaluation framework within the ASEAN Economic Community may indicate that the achievement of economic integration is a higher priority than other areas.

¹¹³⁶ Building the ASEAN Community Monitoring the ASEAN Economic Community – Supporting integration through effective monitoring available at https://www.asean.org/storage/images/2015/August/outreach_document/batch-1/Edited%20Monitoring%20AEC.pdf, accessed on 19 October 2020.

¹¹³⁷ ASEAN Secretariat *ASEAN Economic Community Blueprint 2025* (2015) 1.

¹¹³⁸ Ibid; ASEAN Secretariat *Towards ASEAN Economic Community 2025: Monitoring ASEAN Economic Integration* (2017) 7.

¹¹³⁹ ASEAN op cit note 138 at 36.

¹¹⁴⁰ Ibid.

¹¹⁴¹ ASEAN op cit note 1138 at 9.

¹¹⁴² Ibid at 10.

¹¹⁴³ Ibid at 12.

6.3.4 ASEAN's Non-Compliance Response System

Thus far we have looked at the rules system that guides ASEAN's activities. One challenge that has been identified is the lack of implementation and compliance.¹¹⁴⁴ This, without doubt, impacts the extent to which the community is able to achieve its objectives. As such, it was recommended that dispute settlement mechanisms be established in all of ASEAN's areas of cooperation. This section will look at the dispute settlement mechanisms (hereafter 'DSM') that have been put in place in ASEAN to facilitate compliance, as well as the consequences for non-compliance.

6.3.4.1 Dispute Settlement as an Enforcement Measure

As ASEAN has sought to develop into a more structured international institution, the community has also sought, at least theoretically, to develop its dispute settlement mechanisms. ASEAN's approach to dispute settlement has been fragmented, with different mechanisms being established for different areas of cooperation. The first point of referral in understanding the dispute settlement mechanisms in ASEAN is the ASEAN Charter.

In terms of the ASEAN Charter, member states are to resolve disputes peacefully through dialogue, consultation and negotiation.¹¹⁴⁵ ASEAN makes provision for dispute settlement in relation to specific instruments as well as in relation to other disputes. For disputes relating to specific ASEAN instruments are to be settled through the mechanisms provided for in those instruments.¹¹⁴⁶ In instances of disputes that do not relate to the interpretation or application of any ASEAN instrument, they are to be resolved through the Treaty of Amity and Cooperation in Southeast Asia.¹¹⁴⁷ For disputes relating to the interpretation or application of ASEAN economic agreements, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism is applicable.¹¹⁴⁸

If a dispute relates to the interpretation or application of ASEAN economic agreements, such dispute is to be settled through the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (hereafter the 'ASEAN EDSM').¹¹⁴⁹ This Protocol was adopted in 2004 and was amended in 2019. If a member state considers benefits accruing to them are being nullified or impaired or that the attainment of objectives of covered agreements are being impeded because of the failure of another member state to carry out its obligations, said state can seek redress through the ASEAN

¹¹⁴⁴ ASEAN op cit note 1111.

¹¹⁴⁵ Article 22(1) of the ASEAN Charter.

¹¹⁴⁶ Article 24(1) of the ASEAN Charter.

¹¹⁴⁷ Article 24(2) of the ASEAN Charter.

¹¹⁴⁸ Article 24(3) of the ASEAN Charter.

¹¹⁴⁹ Article 24(3) of the ASEAN Charter.

EDSM.¹¹⁵⁰ Under the EDSM member states are to explore consultation as a first measure should any dispute arise relating to the implementation, interpretation or application of the agreements the EDSM applies to.¹¹⁵¹

Where consultations are not successful, the next stage is the establishment of a panel which will examine the matter and make a finding and recommendation to assist in the adoption of a panel report by the Senior Economic Officials Meeting (hereafter the ‘SEOM’).¹¹⁵² The panels are composed of governmental and/or non-governmental individuals who have some relevant experience.¹¹⁵³ A panel report must recommend that a member state brings its conduct in conformity with the relevant agreement, if the panel concludes that a measure is inconsistent with the agreement.¹¹⁵⁴ The panel report is shared with the SEOM, which then decides to either adopt or not adopt the report.¹¹⁵⁵ If the report is adopted, parties to the dispute that need to comply with the decision have an obligation to comply within 60 days, unless the party requests an extension of the period for compliance.¹¹⁵⁶ A party required to comply must submit a status report to the SEOM on the progress made towards implementing the findings and recommendations.¹¹⁵⁷

Should the party required to comply fail to do so within the stipulated time, the parties to the dispute may enter into negotiations to determine compensation and if this fails, the aggrieved party may request the SEOM to suspend the non-compliant party’s concessions or other obligations under the relevant agreement.¹¹⁵⁸ The Protocol has gone so far as to provide stages to be followed when applying concessions. The first option should be to apply concessions in the sectors of the agreement that are under dispute.¹¹⁵⁹ The second option, should the first be insufficient, is to apply concessions in other sectors of the same covered agreement.¹¹⁶⁰ If this is not practical, the third option is to apply concessions under other covered agreements.¹¹⁶¹

The ASEAN EDSM makes further provision for a matter to be referred for arbitration if a responding party objects to the level of concessions.¹¹⁶² The decision from arbitration is the final

¹¹⁵⁰ Article 3(2) of the ASEAN EDSM.

¹¹⁵¹ Article 3(1) of the ASEAN EDSM.

¹¹⁵² Article 9 of the ASEAN EDSM.

¹¹⁵³ Article 8(1) of the ASEAN EDSM.

¹¹⁵⁴ Article 16(1) of the ASEAN EDSM.

¹¹⁵⁵ Article 11 of the ASEAN EDSM.

¹¹⁵⁶ Article 17(1) and (2) of the ASEAN EDSM.

¹¹⁵⁷ Article 17(4) of the ASEAN EDSM.

¹¹⁵⁸ Article 18(2) of the ASEAN EDSM.

¹¹⁵⁹ Article 18(3) of the ASEAN EDSM.

¹¹⁶⁰ Article 18(3) of the ASEAN EDSM.

¹¹⁶¹ Article 18(3) of the ASEAN EDSM.

¹¹⁶² Article 18(7) of the ASEAN EDSM.

decision and concessions must be applied accordingly.¹¹⁶³ Arbitration is also an avenue available to member states if parties agree to it.¹¹⁶⁴

6.3.4.2 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms

Under the ASEAN Charter, dispute settlement mechanisms will be established for disputes that concern the interpretation or application of the Treaty.¹¹⁶⁵ In line with this, the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (hereafter the ‘DSM Protocol’) was adopted in 2010. The DSM Protocol provides an avenue for dispute resolution limited to member states only.¹¹⁶⁶ The first step to address a dispute is through consultation requested by the complaining party.¹¹⁶⁷ If consultation fails, the complaining party may request for the matter to be addressed through arbitration.¹¹⁶⁸ If a matter is referred to arbitration, an arbitral tribunal is established to examine the facts of the case and make a decision.¹¹⁶⁹ Such an award is final and binding to the parties of the dispute, who have an obligation to comply.¹¹⁷⁰ Parties that are required to comply must provide the ASEAN Secretary-General with a status report on the extent of its compliance.¹¹⁷¹

If arbitration is not successful, the dispute can be referred to the ASEAN Coordinating Council which may then direct the parties to resolve the dispute through good offices, mediation, conciliation or arbitration.¹¹⁷² The ASEAN Coordinating Council will have forty-five days to make a decision, unless extended, failing which any party to the dispute may refer the dispute to the ASEAN Summit as an unresolved dispute.¹¹⁷³ Article 26 of the ASEAN Charter merely provides that an unresolved dispute is to be referred to the Summit for decision but does not provide the nature of decision the Summit can make. Furthermore, although member states affected by non-compliance with a DSM decision may refer the matter to the Summit, there is no indication as to what decision the Summit can take.¹¹⁷⁴

¹¹⁶³ Article 18(8) of the ASEAN EDSM.

¹¹⁶⁴ Article 19 of the ASEAN EDSM.

¹¹⁶⁵ Article 25 of the ASEAN Charter.

¹¹⁶⁶ Article 1 of the DSM Protocol defines parties to the dispute as member states that are either a complaining party or a responding party to the dispute.

¹¹⁶⁷ Article 5 of the DSM Protocol.

¹¹⁶⁸ Article 8 of the DSM Protocol.

¹¹⁶⁹ Article 12 of the ASEAN Charter.

¹¹⁷⁰ Article 15 of the ASEAN Charter.

¹¹⁷¹ Article 16 of the ASEAN Charter.

¹¹⁷² Article 8(4) and 9 of the DSM Protocol.

¹¹⁷³ Article 9(3) of the ASEAN Charter.

¹¹⁷⁴ Article 27(2) of the ASEAN Charter.

Among other features of the DSMs adopted by ASEAN, one thing that is peculiar is the issue of access to the dispute settlement mechanisms. The above mechanisms discussed make provision for only member states to address disputes through the DSMs. However, decisions made at the community level by the Summit have implications not only on member states, but on the natural and legal persons of those member states. Thus, for natural or legal persons to have matters addressed such persons would need to be represented by the government.

6.3.4.3 Consequences for Non-Compliance

The ASEAN Charter makes very minimal provision for actions to be taken when there is a problem of non-compliance. Under Article 20(4) of the ASEAN Charter, if a member state breaches the ASEAN Charter or does not comply, the matter is referred to the Summit for decision. The Charter is silent on the actions the Summit can take. Additionally, and notably, the Charter is also silent on sanctions that can be taken in cases of serious breach. For instance, the Charter does not stipulate whether suspension or expulsion are available where a member has committed a serious breach.¹¹⁷⁵ The lack of such provisions can be considered as fitting ASEAN's approach to integration, which is to foster close relationships between member states. However, considering that lack of compliance and implementation are challenges that the community faces, the exclusion of sanctions may hinder progress. This is because if there aren't any consequences for non-compliance, member states may not be deterred from not complying.

6.4 CONCLUSION

The European Union has long served as an example for regional integration across the globe due to the success it has had. It has developed key principles that have shaped how community law is understood today, including the principles of direct applicability and direct effect. Through the practice of EU Law, the EU has established a hierarchy which shows the relationship between community law and national law. This is an aspect that many Regional Economic Communities find challenging.

The EU compliance system is very detailed. The EU has made a clear division between the areas that are going to be managed at the community level and those that will remain within the control of member states. Even though there have been issues of 'competence creep' whereby the community has acted beyond its competence, a clear provision for division of competences has

¹¹⁷⁵ Eugene K.B. Tan 'The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia' (2008) 12 *Singapore Yearbook of International Law* 171-198.

been beneficial. One of the challenges faced in African regional integration is that communities seek to cooperate various aspects and do not clarify which issues will be dealt with by member states. This creates a challenge because many states hold on to national sovereignty.

The EU has also established a comprehensive compliance information system. Reporting on the implementation of directives not only requires members to report that they have transposed the directive within the specified time but also if the enacted national legislation complies with the directive. This system promotes community policies being translated nationally. The EU has also created systems that monitor state compliance with decisions of the Court of Justice of the European Union, which can be used to take further action against member states that do not comply.

The non-compliance system adopted in the EU involves various avenues that can be explored in cases where states fail to comply. For instance, the EU Commission has the authority to initiate infringement proceedings for delayed, incorrect, or failed transposition. Furthermore, the CJEU has the jurisdiction to hear cases relating to member states' failure to fulfil obligations and such cases include those in which private individuals may seek compensation for damages suffered due to member state actions.

This is not to say that compliance by member states in the EU is perfect. The EU also faces challenges where states fail to comply with community obligations. However, the existence of a strong compliance system that assists in determining what the reality of compliance is and in analysing what challenges are faced has been beneficial.

This chapter also analysed the compliance system in the Association of Southeast Asian Nations. ASEAN was chosen because of its similarity to Africa's RECs with respect to prioritizing member state interests above community interests. ASEAN has followed an intergovernmental approach to integration and focused more on maintaining stable relations between member states. This is reflected in the community's principles which include independence, sovereignty, and non-interference among others. Furthermore, the community's approach to making decisions through consensus and consultation is indicative of the community's preference to maintain peace among member states and to not enforce decisions on other member states. Although ASEAN has introduced two alternative methods to make decisions, this only applies to economic decisions. In instances of non-compliance, the matter is referred to the Summit and a decision on what steps should be taken is made by consensus.

Whilst ASEAN has attempted to have a formal monitoring tool through the ASEAN Economic Community Scorecard and the monitoring provided for in the ASEAN Economic Community Blueprint, this does not sufficiently keep track of progress in implementation and compliance of community decisions as a whole. However, such a fragmented approach does fit the community's desired informal integration approach. This is also reflected in the community's approach to dispute settlement. There are various dispute settlement avenues available depending on the nature of the dispute, which can be less inefficient in comparison to adopting an all-encompassing dispute settlement mechanism.

7 CHAPTER SEVEN: THESIS CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

The development of the African continent and the improvement of the quality of life of the African people is one of the top priorities of leaders on the continent. Regional integration, for its potential benefits, has been one approach that has been used in an attempt to achieve development goals. What regional integration looks like may vary from region to region, but the foundation of it is that states come together, agree on goals, and agree on the steps to be taken to achieve those goals. It goes without saying that to achieve the goals, member states need to take the agreed-upon steps. The conclusion of an agreement in and of itself is not the end of the regional integration process. The steps that need to be taken by member states include enacting suitable legislation, ensuring the enacted legislation is applied, establishing national mechanisms that can strengthen implementation, and informing the citizens of their rights and obligations under the community, among others.

Despite the continued efforts towards regional integration, the continent has reaped minimal rewards from it. Many challenges have been attributed to the slow progress. Such challenges include the unwillingness of African leaders to surrender sovereignty and submit to supranational institutions, financial constraints, and limitations in resources such as expertise. These challenges are indicative of the prevailing circumstances on the continent, which are unique to Africa and require solutions fitting for Africa. This is where the question of compliance system design comes in.

A compliance system refers to the systems that have been put in place in RECs to promote compliance. Such a system encompasses both legal and institutional frameworks, including aspects such as treaty provisions dealing with obligations of member states, monitoring and evaluation mechanisms that have been established, and measures adopted in instances of non-compliance. The importance of an effective compliance system within a community cannot be overstated. Through a compliance system, member states can, from the time they conclude an agreement, be informed of their obligations with respect to implementation and compliance, be aware of the methods to report progress, and the consequences of non-compliance. Such a system can positively impact compliance. A well-designed compliance system that meets the demands of the REC can positively impact the effectiveness of the community.

With this background, this research sought to understand the compliance systems that have been established, if any, in African RECs and their impact on effectiveness. The questions the research sought to address as laid out in Chapter One were as follows:

- 1) What factors, legal and non-legal, affect implementation and compliance within the African context?
- 2) What monitoring and evaluation mechanisms have been adopted to monitor implementation and compliance with regional obligations in Africa?
- 3) What legal and institutional frameworks have been established to induce compliance and implementation?
- 4) What steps can be taken to improve the levels of implementation and compliance with regional commitments, considering the challenges of regional integration in Africa?

This chapter seeks to discuss the conclusions and insights gained from the research. The chapter will also include recommendations for academic scholars and policymakers.

7.2 THESIS FINDINGS

7.2.1 Challenges to Africa's Integration

The research identified factors that impact implementation and compliance in regional integration on the African continent. The existence of regional economic communities and continued effort to conclude agreements that further integration is a clear indication of the desire to integrate. However, multiple factors have hindered progress in integration. First, the fragmented approach to integration efforts on the continent has impacted progress in many ways. The existence of a continental integration community and multiple regional integration communities may be attributed to the diverging views on what Africa's integration should look like, between immediate complete integration and gradual integration. The approach of creating smaller groupings of states with common interests has enabled integration to progress within those groupings. However, each REC has its own objectives and policies that do not necessarily align with those of the continental community. This means there is division and a lack of uniformity. This mix of communities paired with the issue of multiple and overlapping memberships results in states working towards multiple, sometimes conflicting, objectives and having to stretch already thin resources. Being in such a position, states may need to choose which policies and objectives to prioritise, and this, in turn, may mean that some policies will not be complied with.

Second, at the member level, states have limited resources to meet national needs and community objectives. States often have to decide how to best utilize already limited resources for the benefit of the state. Thus, in some instances states will allocate finances to other purposes. The lack of human resources also hinders progress as states are not able to dedicate human resources towards integration efforts. It cannot be ignored that the limited resources of member states, including infrastructure, have an impact on the progress of integration. A member state that is not able to implement and comply will not do so, even if there is willingness.

Third, another notable challenge is the design of the legal and institutional frameworks of Africa's regional economic communities. The founding treaties of RECs provide great detail but have many shortcomings with respect to the compliance systems of the communities. This will be discussed in greater detail below.

7.2.2 Rules Systems of Africa's RECs

Each regional economic community has objectives and principles that are stipulated in the founding agreements. However, the objectives are quite broad and involve various areas of cooperation. Whilst the intention behind the objectives is to improve the overall condition of life of the people of the community, having broad objectives means there are more areas in which member states are required to cooperate and surrender sovereignty. Requiring already reluctant member states to cede sovereignty in too many areas at one time increases the likelihood of such states choosing not to comply with obligations as a way of retaining control. Additionally, broad objectives mean that the focus of integration efforts is divided across these various objectives rather than focused on a specific, attainable few. The impact of this, once again, is that member states are likely to prioritize which objectives to focus on complying with, most probably based on national interests which will vary from state to state.

The research also found that there is a lack of provision in community agreements for the relationship between the community legal system and national legal systems, and this has created ambiguity in RECs. This is problematic because if member states have the option of choosing between community interests and national interests, they are more likely to choose national interests which may mean not complying with community policies. The East African Community is the exception with provision made in the EAC Treaty for the community legal order to have supremacy over national legal orders. Although some court decisions have sought to strengthen the position of community law, having this enshrined in the founding treaties would solidify the rule.

Furthermore, the way in which decisions, including community laws, are made has an impact on how these laws are received and implemented. The making of community law in the analysed RECs, with the exception of the EAC, is largely centralised as the executive organs, rather than legislative organs, have the legislative power. The parliament is the organ that represents the interests of the people, and traditionally has legislative powers. This would mean legislative decisions would be made having taken the needs of the people into consideration. Regional parliaments not having legislative authority impacts on the reception of community law into national law, because at the national level national parliaments carry out the legislative function. To implement community law would mean national parliaments must approve a decision that may not align with interests of the people or national legislation. Thus, there is a disconnection between regional and national parliaments. Ultimately, national parliaments have less ownership which in turn affects transposition and compliance.

7.2.3 Compliance Information Systems of Africa's RECs

This research further sought to identify the systems that have been put in place in Africa's RECs to provide information on the progress of integration. This included analysing monitoring and evaluation mechanisms that were in place, if any. The research revealed that in recent years there has been an increase in interest in tracking the progress of integration in recognition of the lack of progress that has been made thus far. At the continental level, various mechanisms have been established which include the African Peer Review Mechanism (hereafter 'APRM'), the African Regional Integration Index (hereafter 'ARII'), and the African Multidimensional Regional Integration Index (hereafter 'AMRII'). The approach of each of these methods varies, each with a different focus and way of presenting the information. The APRM has adopted the peer review approach to monitor the progress of participating states and creates a platform for member states to assist one another. The extension of the APRM's mandate to include progress made in implementing Agenda 2063 and the Agenda 2030 was a welcome step as this created an avenue to monitor the progress of member states in these areas. The voluntary nature of the peer review process is, however, a shortfall.

The ARII and AMRII, on the other hand, are indexes used to present information that has been collected. The focus of the ARII is the comparison of the level of integration between RECs and member states, and as such it gives an appreciable overview of the status of integration in selected areas. This, however, is also a limitation as stakeholders require more information to make decisions that will promote effectiveness. It is worth mentioning that the ARII is presented in a manner that is readily accessible. The AMRII is more comprehensive, in comparison to the ARII,

and stands to provide stakeholders in depth information on the reasons for the current status of implementation and compliance.

Although the continental integration organization has developed some monitoring and evaluation mechanisms to monitor overall integration progress, the same cannot be said about the regional economic communities. The research revealed that in most instances, the approach in the RECs has been to develop monitoring mechanisms for specific projects. The RECs have each attempted to establish an overarching monitoring and evaluation framework but have not provided in great detail the manner in which monitoring and evaluation activities are to take place.

With respect to second-order compliance, both the continental and regional communities do not have a comprehensive monitoring mechanism. The African Union does not currently have a monitoring mechanism in place with respect to compliance with decisions of the African Court on Human and People's Rights (hereafter 'AfCHPR'). The Implementation Monitoring and Reporting Unit proposed by the AfCHPR is yet to be adopted. At the regional level, regional courts do not appear to have systems in place to actively monitor whether decisions are being complied with. In most instances, the courts will become aware if proceedings are instituted because of a state's failure to comply with a court decision.

7.2.4 Non-Compliance Response System of Africa's RECs

This research sought to analyse the legal and institutional frameworks that have been put in place to address non-compliance. This entailed an analysis of the role of regional courts and sanctions regimes that are in place. It is important to highlight the progress that has been made with respect to judicial organs at the community level. All the analysed RECs have established a judicial organ through their founding treaties. These judicial organs have served as a platform to seek redress and have played a role in maintaining peace. Whilst the authority entrusted to the judicial organs varies between communities, the fact that matters can be brought to challenge decisions or actions at a regional level is no small feat, even more so considering the fight for national sovereignty. Some community courts have made judgements against governments, which can be said to increase accountability on the part of governments.

Regional courts have been established to ensure the law is adhered to in the interpretation and application of the relevant treaty. Thus, regional courts, theoretically, should be able to hear cases of non-compliance and enforce the law. At the continental level, AfCHPR was analysed. The AfCHPR serves as an example of a court that has been limited by the founding treaty and consequently the executive organ of the community. The AfCHPR is currently restricted to

hearing cases relating to human rights violations. This is a limitation because the AU does not only seek to integrate the continent on human rights issues, but it also seeks to regulate other aspects of life. It is possible that the actions of AU institutions or member states in pursuance of integration may result in damages that do not relate to human rights issues. In such cases, natural and legal persons should be able to access regional courts to seek redress. Thus, the provision that the AfCHPR can hear only human rights-related issues, coupled with the fact that natural and legal persons do not readily have *locus standi*, hinders the ability of the community to protect the rights of all affected parties. Thus, states cannot be held accountable for any such infringements.

The effort that was made to extend the jurisdiction of the AfCHPR through the 2008 Protocol that would transform it into the African Court of Justice and Human Rights was the right step. However, the 2008 Protocol has not been ratified for years which reflects the power that heads of state hold over judicial organs and the integration process. It is also an example of the challenges RECs face in implementing decisions for the benefit of the community. The reluctance to ratify could be as a result of the broader jurisdiction the court would have over cases. Comparatively, the judicial organs of the SADC, COMESA and EAC have broader jurisdictions and can hear cases beyond those relating to human rights violations. However, there are limitations to access such as the time limit imposed to bring cases before the EACJ.

Furthermore, the judicial organ in regional economic communities should be independent and free from interference from other institutions of the community. The courts should be able to protect the rights of those affected and heads of state should not have the power to stop judicial organs from performing their functions if decisions are made against them. However, this is not the case with regional courts on the continent. The suspension of the SADC Tribunal reflects the lack of separation of powers as well as the power held by the executive organ. The inability of some regional courts to impose sanctions in instances of non-compliance with court decisions is also a reflection of restricted authority.

The other aspect of non-compliance responses found in the RECs researched is the use of sanctions. Sanctions have been provided for in the founding instruments of the communities studied. However, the nature of sanctions, as well as the organ that has the authority to impose sanctions, varies per community. In the AU, SADC, and EAC, the imposition of sanctions is the decision of the executive organ alone including in instances of non-compliance with regional court decisions. Alternatively in COMESA, the imposition of sanctions for non-compliance with community obligations is the decision of the COMESA Authority, whilst the COMESA Court of Justice has the authority to impose sanctions for non-compliance with court decisions. The non-

compliance response system in most regional economic communities, therefore, seems to be largely in the hands of executive organs, which means the enforcement of non-compliance is subject to political interests. In some instances, such as in the AU and COMESA, the sanctions to be imposed are stipulated whilst in other RECs they are not stipulated.

7.3 THESIS RECOMMENDATIONS

This research was conducted with the objective of providing practical recommendations aimed at improving the effective operation of Africa's integration initiatives. The research has revealed that the compliance systems, encompassing both legal and institutional frameworks, have shortcomings that need to be addressed. The thesis recommendations will be made based on the three aspects of the compliance system, namely the rules system, the compliance information system and the non-compliance response system.

7.3.1 Improving the Rules Systems of Africa's RECs

There are various aspects of the rules systems of Africa's RECs that can be improved upon to promote compliance and implementation. First, is the issue of division of competences. The problem of national sovereignty and the unwillingness of member states to surrender authority to regional institutions is one of the challenges that has plagued integration on the continent. The reluctance to surrender sovereignty is understandable considering the continent's history with colonisation and external interference. However, the reality is that due to the developing state of African states, most African states are not in a position to independently develop their economies. As such, states seek to use regional integration to achieve common goals whilst working together. In order for regional communities to function and to achieve their objectives, regional institutions are needed. These regional institutions require authority to perform community level functions and, to some extent, member states need to confer authority on these institutions. Recognising the desire of member states to retain control over national matters and the coexisting need for regional institutions that can govern regional interests, it is recommended that a clear division of areas of competence is made between member states and RECs.

A clear division of areas of competence, which has been agreed upon by member states, will be a starting point in strengthening the compliance system. This is because member states will have chosen areas and agreed upon them, giving legitimacy to decisions made by regional institutions in their areas of competence. In determining areas of competence, member states should conduct national consultations with various stakeholders. This would create more ownership at the national

level and spread awareness. The EU experience serves as an example of this and whilst the management of areas under the different areas of competence has not been perfect, it has created more transparency and strengthened EU decisions.

Second, there is a need to make provision for the relationship between the community and national legal systems. The lack of such provisions has resulted in ambiguity and member states have in some instances attempted to act in a way that contravenes community interests, in the name of national interests. Whilst there have been cases that have been brought before judicial organs that have challenged such actions, it is possible that some actions are unchallenged and unknown beyond national borders. Such actions ultimately impact the operations of the community and the achievement of goals, not to mention the infringement of rights granted by the community.

Third, there is a need for a clear division of powers and to strengthen the powers of certain key organs. This recommendation builds on the recommendation to divide competences between RECs and member states. Regional institutions are necessary to act in community interests and to coordinate the activities of member states to enable the achievement of community goals. Even though different communities may have various types of institutions, the core institutions that function as the executive, legislative, and judicial branches must exist in RECs. The communities analysed in this research have all established institutions that fulfil these roles, but not all communities have provided for the separation of powers. In some instances, the executive institution exercises all the functions, which means accountability is limited. It is therefore recommended that separation of powers should be provided for, and the current powers of some institutions should be strengthened, as will be explained below.

With respect to separation of powers, community treaties should establish and clearly stipulate which community institution will fulfil the roles of the executive, legislature and judiciary respectively. These functions should be exercised by different institutions to limit conflicting interests and enable accountability. All the analysed RECs have an executive organ that is comprised of heads of state or government. However, not all RECs have separate organs that fulfil the role of the legislature, such as a regional parliament. In such instances, the legislative authority is exercised by the executive organ. It is recommended that regional parliaments be established in all the RECs that do not have such an institution. However, the existence of such an organ does not automatically mean legislative is vested in that organ. The treaties must clearly stipulate that legislative authority is vested in the regional parliament.

One of the traditional functions of parliament at the national level is that of law-making and regional parliaments should have the same function. The reluctance to entrust such powers to

regional parliaments appears to stem from issues of sovereignty, as leaders of states wish to retain legislative authority. It is therefore recommended that, once areas of competence have been determined according to the previous recommendation, the regional parliament's legislative authority be restricted to areas of competence that are entrusted to the community.

In addition, regional parliaments should be comprised of representatives that are elected directly by their constituents and rules should be stipulated regarding this. The benefit of this would be to increase awareness of regional matters and increase the involvement of citizens in the regional integration process. Direct elections of representatives in regional parliaments may prove challenging and strain resources, but this can be curtailed if such elections are held at the same time as national elections.

The situation is slightly different with respect to regional courts since most RECs have one established. However, the jurisdiction and enforcement powers of the courts are restricted. It is recommended that the jurisdiction of courts should not be limited to human rights issues and should be accessible to citizens of member states. This would enable those affected by regional decisions to have recourse in cases in which local remedies have been exhausted.

7.3.2 Establishing Compliance Information Systems

There is a gap that exists in the reporting and monitoring of compliance with and implementation of binding decisions. Although most communities have organs that make decisions that bind member states, there is a lack of mechanisms to report whether such decisions are being implemented and complied with. It is therefore recommended to establish a reporting system and a monitoring mechanism that enables tracking the implementation of decisions by member states in the AU and each REC. Regarding the reporting system, it is recommended that member states should be required to submit a 'Compliance Report' (shown as Table 1 below) to the secretariat of the regional community. The use of a Compliance Report will be a form of self-monitoring and reporting.

For a Compliance Report to be submitted, decisions that have binding effect on member states should have a time frame within which member states need to implement them nationally. Member states must be required to submit compliance reports by the time the stipulated time frame lapses. The Compliance Report should include the measures that member states have adopted to implement the decision, if legislation was enacted such legislation should be included. Additionally, if a member state has not complied with the decision to any extent, the Compliance Report should include the challenges that hindered compliance.

If a member state has not submitted a Compliance Report on time, or the measures adopted by a member state do not comply, compliance proceedings must be initiated. Compliance proceedings would entail communication being made to the member state to notify of a finding of non-compliance. For a member state that has not submitted a Compliance Report, the notification would request the submission of a Compliance Report within a specified time frame or a report that details the hindrances that the state has faced in attempting to comply. For a member state that has submitted a Compliance Report that reflects partial or non-compliance including the challenges faced, the compliance proceedings would entail communication being made to arrange for the provision of assistance from the community institutions and other member states to enable compliance.

This recommendation is made with the awareness of the challenge that such a method of monitoring may bring, namely that member states need to be motivated to submit such a report. Member states would need to be incentivised in some way. In recognition of this, the purpose of the Compliance Report would be twofold. First, to enable checking of progress that is being made in implementing community decisions and making them applicable in member states. Second, to enable the provision of assistance to promote compliance from the community to member states that are facing difficulties in complying.

COMPLIANCE REPORT TEMPLATE 1. Introduction Provide a background of the state and its history with the regional economic community. Provide a background on the issue the decision addresses. 2. Constitutional and Legislative Framework Provide an explanation of the state’s existing constitutional and legislative framework at the time of the decision. Provide an explanation of the legislative measures which have been introduced to give effect to the decision. A copy of the relevant legislation should be attached. 3. Institutional Framework Provide an explanation of the institutions or institutional changes that have been introduced to implement the decision at the national level. 4. Budgetary Allocation Include a report on the budgetary allocation towards the implementation of the decision, in cases where a budget was required. 5. Special Measures Indicate any additional measures that have been introduced to give effect to the decision. Include a brief comment on the consultations that were conducted with stakeholders. 6. Challenges Highlight the challenges faced in complying with the decision, if any. Additionally, indicate measures that were adopted to overcome those challenges. Any challenges that have hindered compliance and that could not be resolved should be included. 7. Required Assistance If non-compliance is due to challenges faced, indicate the assistance that would be required to facilitate compliance. Required assistance can include financial assistance, trainings, human resources, equipment, among others. 8. Other Any additional matters.

Table 1: Compliance Report Template

With regards to a monitoring mechanism, the purpose would be to collect and collate information on transposition and compliance in a manner that is accessible to all relevant actors. Considering the existence of the African Multidimensional Regional Integration Index it is recommended that a ‘Transposition’ dimension be added as a dimension of the AMRII with the following indicator:

Transposition deficit – this indicator would track the number of decisions that member states have transposed, of the total number of binding decisions that have been adopted annually.

Additionally, it is recommended that participation in the peer review process of the APRM should be required of all member states rather than voluntary. Peer review is a valuable method of monitoring. It enables member states to actively analyse the progress made towards meeting their commitments, and to identify the existing strengths and weaknesses. Furthermore, it prompts member states to engage other actors that are involved in the integration process, such as civil society organizations and the private sector. With this information, member states are placed in a better position to make policy decisions that will have a positive impact.

7.3.3 Strengthening Non-Compliance Response Systems

It is recommended that enforcement measures used for compliance should not be limited to sanctions but should include positive incentives as well. This recommendation is based on the recognition that compliance by member states is affected by various factors which include lack of financial and human resources. It is therefore recommended that measures such as the provision of financial assistance, provision of human resources, training for skills development, among others, be adopted as measures to enforce decisions. Additionally, recognizing that a failure to comply is not an indication that a member state did not make an effort to comply, it is recommended that member states receive recognition for efforts that have led to substantial progress towards compliance. Such recognition could take the form of a formal commendation issued by the supreme authority of a community. The use of such non-coercive measures can be the first course of action, failing which sanctions may be imposed.

With respect to sanctions, the nature of sanctions and the community institution that has the authority to impose them should be clearly stipulated in the founding treaty of the community. It is recommended that regional courts should have the authority to impose sanctions for non-compliance with court decisions, as is the case in COMESA. This will limit such decisions being influenced by political interests. With respect to sanctions for non-compliance with community obligations, it is recommended that the executive institution have the authority to impose

sanctions. The nature of sanctions for the different violations should be expressly provided for in the community treaties rather than being at the discretion of the relevant authority.

7.4 THESIS CONCLUSION

The quest for compliance with regional commitments is long-standing. There are many ideas that have been put forth on how compliance could be secured on the African continent. This research sought to focus on one aspect of the compliance discussion, namely the systems regional economic communities have established to promote compliance. This research was undertaken with the understanding that the challenges that hinder compliance are complex and wide ranging. Additionally, regional integration is a process that brings together a large number of states, each with its own interests and circumstances. The recommendations put forward, therefore, do not purport to ensure compliance in all instances. Instead, it is advanced that the application of the recommendations consistently across the AU and its building blocs will increase compliance.

If we consider that the practice of regional integration creates a new level of governance, namely regional governance, this means systems have to be established for the purpose of regional governance. The conclusion of agreements to establish RECs creates a relationship of principal and agent between member states and regional institutions respectively. For regional commitments to be achieved, regional institutions require a degree of autonomy to act in the interest of the community. Chapter Two highlighted various theories developed to explain the way states behave in international agreements. Whilst these theories largely explain the behaviour of states from global north, one can identify similarities in the behaviour of global south states such as African states. The compliance problem in African integration, however, cannot be solely explained by the approach states have adopted towards international agreements. Chapter Three analysed the history of regional integration in Africa and highlighted its unique features. The capacity challenges states face as well as the history of interference play a big role in non-compliance. The chapter therefore highlighted different methods that have been adopted to induce compliance.

It is recognised that member states are reluctant to surrender sovereignty, and this has impacted the effectiveness of regional economic communities. However, member states simultaneously have a lot to gain from participating in regional integration and relinquishing some authority. To circumvent the impact of such resistance, the establishment of systems to promote compliance can go a long way. Chapter Four investigated the frameworks that have been set up by the African Union to promote an effective community, and Chapter Five focused on the frameworks of specific regional economic communities. Having an effective compliance system starts from the

time of drafting the founding treaty of the community and continues by ensuring frameworks are set up and operational. Considering that the founding treaties of all regional economic communities have long entered into force, remedying the defects in compliance systems will entail, among others, amending community treaties. Amending a treaty can be a challenging process, even more so because member states need to be encouraged to agree to changes. The role of civil society organisations will therefore be key, to engage leaders within national borders, coordinate efforts with civil society organisations in other states and apply pressure for change.

Chapter Six considered the compliance systems in place in other regional economic communities outside Africa. Through this chapter it is noticeable that RECs adopt frameworks that are better suited for their respective needs. Conducting a comparative analysis enables an enriched understanding of compliance systems and broadens perspectives when making recommendations.

The discussion on how to make regional integration more effective is ongoing, not only with respect to integration in Africa, but integration as a whole. This research recommends measures that can be introduced to strengthen the compliance systems of Africa's RECs. The research recommends, first, that the rules of the RECs should be revised with the objective of clarifying the division of competences, the separation of powers and the relationship between community and national legal systems. Second, it is recommended that the mechanisms in place to keep track of compliance and implementation be improved. Third, it is recommended that the non-compliance response system in Africa's RECs be expanded to not only provide for the imposition of sanctions but to also make provision for positive incentives. Furthermore, it is recommended that the nature of sanctions that can be imposed should be clearly stipulated.

In conclusion, this research has looked at the frameworks of Africa's RECs from the perspective of compliance systems. The objective of this research is to provide policy makers with the requisite information to identify the gaps and adopt decisions that will positively impact the effectiveness Africa's efforts to integrate. There are many aspects of compliance debate that research did not address and there is a need for further research in this area.

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