

UNIVERSITY OF KWAZULU-NATAL
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LEGAL HARMONISATION OF NON-TARIFF BARRIERS OF REGIONAL ECONOMIC
COMMUNITIES AS A CATALYST TO THE REALISATION OF THE AFRICAN
CONTINENTAL FREE TRADE AREA

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This thesis is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

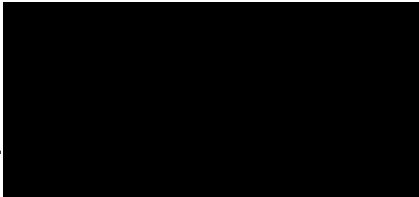
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DEDICATION

This thesis is dedicated to my precious darling daughter, Abia Achancho Elise Brielle. Your coming into this world gave me the required momentum to complete this challenging but ultimately fulfilling journey.

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ABSTRACT

Legal harmonisation is an integral aspect of regional integration and the desire to promote regional and sub-regional economic integration in Africa is exemplified by the establishment of the African Continental Free Trade Area (AfCFTA) in 2018. The 2012 decision of the AU to create the CFTA by 2017 was reiterated in Aspiration two of Agenda 2063. The legal harmonisation of non-tariff barriers has been a vital instrument in the achievement of EU economic integration and the Organisation for the Harmonisation of Business Laws in Africa (OHADA).

The study seeks to critically examine the theoretical and conceptual underpinnings of regional integration and legal harmonisation of non-tariff barriers by the AU and RECs. It also analyses the current political, economic, and legal reinforcements to regionalism in Africa and practices needed to advance intra-regional trade within the framework of Agenda 2063. This was done by evaluating the key legal frameworks of the AU (the Abuja Treaty, the Constitutive Act of AU, 2007 Protocol on relations between AU and RECs and Agenda 2063) with the aim of identifying best practices, gaps and impediments pertinent to strengthening Agenda 2063 CFTA. At the end of the study, the abilities of three selected RECs (SADC, COMESA and EAC) were assessed to drive home the AfCFTA. This was done by identifying flaws in existing treaties of RECs, while advancing a model of legal harmonisation of NTBs between them.

It was found out that the AU and RECs have not vigorously considered the significance of legal harmonisation in their integration agendas. This resulted in the lack of unambiguous and concrete provisions for the legal harmonisation of NTBs in their guiding policies. Where some attempts are evident, such as in the EAC, they have been implemented unsatisfactorily with lack of a compliance mechanism. This study contended that if legal barriers to free trade are not eliminated, even if all other barriers were to be removed, the effective realisation of the AfCFTA would still be hindered. Hence, this study recommends the principles of direct applicability and direct effects of regional laws to addressing the legal harmonisation challenge underscored.

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GLOSSARY OF ACRONYMS

AEC	African Economic Community
AEC	ASEAN Economic Community
AfCFTA	African Continental Free Trade Area
AFGTI	Facilitated and Guided Trade Initiative
AFTA	ASEAN Free Trade Area
AGOA	African Growth and Opportunity Act
APRM	African Peer Review Mechanism
ASEAN	Association of South East Asian Nations
AU	African Union
AUC	African Union Commission
AUDA	African Union Development Agency
BIAT	Boosting Intra-Africa Trade
BRIC	Brazil, Russia, India and China
BRICS	Brazil, Russia, India, China and South Africa
CBI	Cross-Border Initiative
CCJA	Common Court of Justice and Arbitration
CDC	Defence and Security Commission
CEFTA	Central European Free Trade Area
CEMAC	Economic and Monetary Community of Central Africa
CEN–SAD	Community of Sahel–Saharan States
CEPGL	Economic Community of the Great Lakes Countries

CEPT	Common Effective Preferential Tariff
CET	Common External Tariff
CEWARN	Conflict Early Warning and Response Mechanism
CEWS	Continental Early Warning System
CFTA	Continental Free Trade Area
CMR	Customs Management Regulations
COMESA	Common Market for Eastern and Southern Africa
COPAX	Council for Peace and Security in Central Africa
COVID-19	Coronavirus disease 2019
CRIS UNU	Comparative Regional Integration Studies of the United Nations University
CTN	Common Tariff Nomenclature
DA	Direct Applicability
DE	Direct Effect
EAC	East African Community
EACJ	East African Court of Justice
EBA	Everything But Arms
EBID	ECOWAS Bank for Investment and Development
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECCAS	Economic Community of Central African States
ECE	Economic Commission for Europe
ECJ	European Court of Justice

ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EEA	European Economic Area
EFTA	European Free Trade Area
EPAs	Economic Partnership Agreements
EU	European Union
FIDIC	Fédération Internationale des Ingénieurs Conseils
FOMAC	Multinational Force of Central Africa
FTA	Free Trade Area
FTYIP	First Ten Year Implementation Plan
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
IBSA	India, Brazil and South Africa
ICC	International Chamber of Commerce
ICPAC	IGAD Climate Predication and Application Centre
IGAD	Intergovernmental Authority on Development
IGADD	Intergovernmental Authority on Drought and Development
IOC	Indian Ocean Commission
LAFTA	Latin American Free Trade Association
LAIA	Latin American Integration Association
LPA	Lagos Plan of Action
MARAC	Early Warning Mechanism of Central Africa

MDGs	Millennium Development Goals
MERCOSUR	Southern Common Market
MFN	Most-Favoured Nation
MRU	Mano River Union
NAFTA	North American Free Trade Agreement
NEPAD	New Partnership for African Development
NTBs	Non-Tariff Barriers
OAU	Organisation of African Unity
OHADA	Organisation for the Harmonisation of Business Laws in Africa
PAP	Pan-African Parliament
PAPSS	Pan-African Payment and Settlement System
PIL	Private International Law
PRC	Permanent Representative Council
PSC	Peace and Security Council
RECs	Regional Economic Communities
REPAC	Network of Parliamentarians of Central Africa
RIFF	Regional Integration Facilitation Forum
RISDP	Regional Indicative Strategic Development Plan
RTAs	Regional Trade Arrangements
SAATM	Single African Air-Transport Market
SACU	Southern African Customs Union
SADC	Southern African Development Community

SADCC	Southern African Development Coordination Conference
SDGs	Sustainable Development Goals
SMS	Short Messaging System
SSA	Sub Saharan Africa
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFTA	Tripartite Free Trade Area
UA	Uniform Acts
UEMOA/WAEMU	West African Economic and Monetary Union
UMA/AMU	Arab Magreb Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNECA	United Nations Economic Commission for Africa
UNIDROIT	International Institute for the Unification of Private Law
USMCA	United States–Mexico–Canada Agreement
WTO	World Trade Organization

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1. CHAPTER ONE: INTRODUCTION

1.1 Background and outline of the research problem

From the time African countries started achieving their independence, they had welcomed the idea of regionalism. This quest for regional integration led to establishing the Organisation of African Unity (OAU) in 1963. For Africa to assume its economic space in the international arena, she had to change from the OAU to the African Union (AU). The OAU Assembly adopted the Constitutive Act in July 2000, and it finally came into effect on the 26 of May 2001, making the AU a political and legal personality.

It is assumed that Africa's economic and social advancement will be quickened if there is closer cooperation between Africa's Regional Economic Communities (RECs) and the AU. RECs have been considered pillars of the AU since the 1991 Abuja Treaty; thus coordinating and harmonising their rules and regulations, which are of great importance. Article 28 made the idea of strengthening the RECs vital.¹ The AU has so far recognised eight RECs, three of which have been analysed in this research.²

The AU has promulgated several legal instruments intended to enhance the harmonisation and coordination of rules, principles, and practices within the RECs. The normative frameworks regulating this relationship are: the Abuja Treaty of 1991, the AU Constitutive Act of 2000, the 2007 Draft Protocol on Relations between the AU and RECs, and AU's Agenda 2063 of 2015. The AU's principal approach to the legal harmonisation of policies, principles, and practices within the RECs is articulated in these four policy documents.

¹ On strengthening Regional Economic Communities, Article 28 of the 1991 Abuja Treaty requires: '1. Member states to strengthen the existing RECs and create new ones where necessary to ensure a progressive institution of the community; and 2. The member states to take all steps required to foster closer cooperation between the communities, principally through coordination and harmonisation of their activities in all fields or sectors to ensure the realisation of the objectives of the community'.

² Arab Magreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).

The Abuja Treaty of 1991, ratified in 1994, established the African Economic Community (AEC).³ Following article 88(1) of the Abuja Treaty, the AEC was to be progressively realised by harmonising, coordinating, and integrating Africa's RECs activities. Out of the fourteen RECs existing in Africa, eight have been selected as AEC building blocks. The Treaty envisioned the creation of a Continental Free Trade Area (CFTA) in 2017 and the RECs amalgamation into one customs union with a single currency, parliament, and central bank by 2028.⁴

Harmonisation of the guiding principles of the present and prospective RECs is one of the AU's goals to ensure the ongoing achievement of its aims.⁵ The AU adopted the 2007 Protocol on Relations between itself and RECs to define its relationship with RECs and their activities towards the AEC's achievement. Like the 1998 Protocol,⁶ it has, among others, the goal of formalising, consolidating and advancing close cooperation between the RECs and the AU. This has to be achieved by harmonising and coordinating their programmes, policies, standards, activities, and practices in all arenas. A harmonised framework was developed for the AEC and the RECs. The Arab Maghreb Union (UMA) did not, however, sign the Protocol. This could be as a result of the political crisis between Member States that paralysed UMA, for example, there is the dispute between Algeria and Morocco over Western Sahara (the Sahrawi Arab Democratic Republic). According to article 7 of the Protocol, the Coordination Committee, among others, has undertaken the duty of harmonising and observing how the RECs evolved in attaining the regionalism objective elaborated as a priority in the Abuja Treaty (article 6).

The objectives laid down in the above legal frameworks are yet to be achieved. There are no established concrete and clear-cut measures/procedures for achieving these goals, nor has any of them clearly defined the legal relationship between the RECs and how they will eventually lead to a supranational continental union of African States. One of the significant problems that the AU is still facing is the rationalisation of multiple memberships of regional organisations among the Member States.

³ M Rettig, A W Kamau & A S Muluvi 'The African Union can do more to support Regional Integration' 2013 available at <http://www.brookings.edu/blogs/up-front/posts/2013/05/17-african-union-support-regional-integration-kamau>, accessed on 21 May 2020.

⁴ Ibid.

⁵ Article 3(1) of the Constitutive Act of AU 2000.

⁶ 1998 Protocol on Relations between the AEC and the RECs.

In May 2013, during the semi-centennial anniversary celebrating the OAU/AU's golden jubilee,⁷ the AU Member States and leaders recognised their previous accomplishments and flaws, thus re-consecrating themselves to the Pan-African dream of

‘An integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena.’⁸

In doing this, they promised to commit themselves to Africa's progress in eight strategic areas,⁹ and this culminated in the development of Agenda 2063. Agenda 2063 is, therefore, a renewed commitment by African leaders to correct past mistakes and follow a reviewed trajectory of African economic integration.

A decision to establish a CFTA by an indicative date of 2017 was taken at the eighteenth Ordinary Session of the AU's Assembly of Heads of State and Government in Ethiopia in January 2012.¹⁰ Furthermore, the Summit authorised the Action Plan on Boosting Intra Africa Trade (BIAT), pinpointing seven clusters.¹¹ The CFTA will comprise 54 African nations, with a total populace exceeding one billion and a joint gross national product beyond US\$3.4 trillion.¹²

The creation of a CFTA by 2017 was reiterated in Aspiration 2 of AU Agenda 2063. The core aims of the CFTA are to build a distinct African marketplace for services and goods, with investments and liberal movement of commercial individuals, and hence accelerate the formation of the customs union. This will augment intra-regional commerce via the coordination and harmonisation of trade practices within the RECs and AU. Predictably, the CFTA will augment competitiveness at the commercial businesses and industry level by utilising continental market access opportunities, large-scale production, and improved resource rationalisation. However,

⁷ The African Union ‘21st Ordinary session of the Assembly of Heads of State and Government at Addis Ababa’ on 26 May 2013.

⁸ Final Draft Agenda 2063 Framework Document Sept. 2015.

⁹ These 8 areas are: ‘African Identity and Renaissance, The struggle against colonialism and the right to self-determination of people still under colonial rule, Integration Agenda, Agenda for Social and Economic Development, Agenda for Peace and Security, Democratic Governance, Determining Africa's Destiny, and Africa's place in the world,’ in the Final Draft Agenda 2063 Framework Document.

¹⁰ Decision of Assembly/AU/Dec.394 (XVIII).

¹¹ Trade information, trade finance, trade policy, productive capacity, trade-related infrastructure, trade facilitation and factor market integration.

¹² AUC ‘Update on the Report on the Continental Free Trade Area (CFTA)’ 2015 available at https://au.int/sites/default/files/newsevents/workingdocuments/12582-wd-update_on_the_report_on_the_continental_free_trade_en.pdf, accessed on 20 October 2022.

these aspirations cannot be achieved without the harmonisation of non-tariff barriers at the core of the legislation governing the CFTA.

Non-Tariff Barriers (NTBs) are measures that restrict international trade. Countries use NTBs devices such as quotas, embargoes, sanctions, and licenses as part of their political and economic strategy to curtail the amount of trade they conduct with other nations. In a World Trade Organisation (WTO) working paper series, Staiger classified NTBs into three categories.¹³ The first category includes NTBs such as import licensing, import quotas, customs procedures, administration fees and import prohibitions which are imposed on imports. Those imposed on exports fall in the second category which includes export quotas, export taxes, voluntary export restraints, export embargoes and export subsidies. The third category is those applied internally in the country. These internal measures or behind the border barriers are national legislation, subsidies and internal charges that prohibit trade. The first two categories are enforced at the border during imports or exports. For WTO to guard against undesirable NTBs, provisions were made against quantitative restrictions (the General Agreement on Tariffs and Trade (GATT) article XI (1)) and discrimination between Member States (GATT articles I (1) and III (1-5)).¹⁴

¹³ R W Staiger, 'Non-tariff measures and the WTO' (2012) WTO Staff Working Paper, No. ERSD-2012-01, World Trade Organization (WTO), Geneva, <https://doi.org/10.30875/5703a171-en>

¹⁴ GATT article XI (1) states: No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article I (1) states: With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article III (1) states: The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of

It is absolutely necessary for AU to harmonise NTBs used by Member States to prohibit trade with other members.

The concept of harmonisation is an integral aspect of regional integration. This study argues that for integration to be achieved, there needs to be legal harmonisation of rules, trade practices, and legal systems regarding NTBs. The term harmonisation involves the coming together of different legal systems, laws or rules, principles, policies, standard practices, or regulations, which institutions, governments, or states freely agree to make identical. For instance, within the EU, harmonisation of law relates to the creation of common standards across the internal market to achieve uniformity of laws in Member States.¹⁵ In the AU, the harmonisation of law, as elaborated in the Abuja Treaty, means creating common rules, principles and policies in all sectors of community activity.¹⁶ Specifically, article 6(2)(b)(i) of the Abuja Treaty aims at harmonising the NTBs of RECs and gradually eliminating the same for regional and intra-community trade.

1.2 Research problem

Agenda 2063 represents an important, ground-breaking, and innovative vision that could shape the future of Africa if developed to its full potential.¹⁷ It is Africa's leading framework for

the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

¹⁵ J Turnbull 'Harmonisation of the Law and Legal Cultures in the EU: A Linguistic Approach' in D S Giannoni & C Frade (eds) *Researching Language and the Law, Textual Features and Translation Issues*, (2010) 135—54.

¹⁶ Article 28(2) of the Abuja Treaty.

¹⁷ The African Capacity Building Foundation (ACBF) and 3rd Pan-African Capacity Development Forum (CDF) 'Regional Integration: key to achieving Agenda 2063' Harare, Zimbabwe 28 February 2015 available at <http://www.acbf-pact.org/media/news/regional-integration-key-achieving-agenda-2063> accessed on 04 February 2020.

advancement within the next 50 years. It will be implemented via a series of medium-term programmes with the long-term development policies of RECs and Member States increasingly aligning with the continental framework.¹⁸ Regionalism, it is argued, is central to achieving Agenda 2063, and should be a priority for continental advancement. Being central components of the Union, the RECs are vital for executing, financing, observing, and appraising Agenda 2063 and its priority programmes (one of which is the CFTA). In other words, since regionalism is the basis for the RECs, Agenda 2063 appeals for an extra vigorous commitment of RECs while applying joint community agendas, together with the harmonisation of trade practices. The need for robust engagement of RECs, including synchronising the RECs' primacies with those of the Union, cannot be overstressed.¹⁹ The AU (central level) and RECs (regional level) need to make substantial advancements in the integration project, their legal relations and the harmonisation of NTB practices for the achievement of the CFTA.

The harmonisation objectives of the AU's legal frameworks have not been effective because the RECs have progressed unequally in meeting their own treaty goals and essential programs, such as establishing free trade areas.²⁰ As a result, their integration agendas have advanced disproportionately. Presently, Member States of RECs trade and collaborate more with partners outside the AU than with fellow African states; for instance, Morocco and the USA signed a free trade arrangement in 2004,²¹ besides some other agreements with the EU on economic cooperation and one establishing a free trade zone for industrial goods.²² The intra-

¹⁸ M Nyaggah 'Challenges to Agenda 2063 – Financing Africa's Priorities' 2015 Meeting of the Committee of Experts at the Conference of Ministers Addis Ababa, Ethiopia, available at http://www.developlocal.org/africas-development-goals/#.VrM_Uk8X5Qf, accessed on 04 February 2020.

¹⁹ Office of the Special Adviser on Africa, Nations Development Programme Regional Bureau for Africa and Office of the Permanent Observer of the African Union to the United Nations, Concept Note for the Briefing by African Regional Economic Communities to the member states of the United Nations On 'The Role of Africa's Regional Economic Communities in Consolidating Peace, Security, Governance and Development in the Context of Agenda 2063.' 2014.

²⁰ EAC is considered the most successful REC in Africa with a functional custom union and a common market. Some other RECs that have made significant progress in their integration agenda are ECOWAS, SADC and COMESA.

²¹ Y Nezerwe & A Karangwa 'Did the Morocco stock market benefit from the free trade agreement with the US?' (2018) 10(2) *Transnational Corporations Review* 161-169.]. Indeed, in 2004 Morocco and the United States signed a bilateral Free Trade Agreement [Morocco-United States Free Trade Agreement (FTA)] aimed to liberalise trade in goods and services between the two countries, eliminate tariffs, and reduce non-tariff barriers.

²² EFTA Global Trade Relations, Free Trade Agreement with Morocco – European Free Trade <https://www.efta.int/free-trade/free-trade-agreements/morocco>, accessed on 31 May 2020.]. Morocco has engaged in economic cooperation agreements with the EU, including the Euro-Mediterranean Association Agreement entered

Africa trade level, presently at about 12 per cent, is the lowest compared to the world's leading regional groupings. Intra-regional trade between these regions (Latin America, ASEAN, EU, and North America) is above 40 per cent.²³ This and the poor integration of regional markets explain why African trade is dominated by the exportation of indispensable products. Practically, this is not in line with the ambitions of Agenda 2063, which calls for Africa's development by Africans themselves.²⁴ However, this can be accounted for by the influence of historical trade relationships and patterns established during the colonial era that continue to influence trade flows. These historical ties undeniably often shape trade preferences and relationships, leading to a preference for trading with non-African partners; the established specific economic specialisations that align with the demands and markets of non-African partners. African country XB which is rich in natural resources, for example, may have established strong trade relationships with resource-importing countries outside Africa; and the fact that non-African markets may often offer larger consumer bases and more significant economic opportunities compared to individual African markets thus enticing member States of RECs in Africa to prioritise accessing these larger markets to expand their trade and economic activities.

Also, the RECs priority sectors are nonaligned with those of the Union, as set out in its relevant legislation, leading to conflicting priorities.²⁵ This status quo requires greater rationality and harmonisation between RECs and the AU to achieve the CFTA. Knowing that the Agenda 2063 target is to provide answers to various current developmental challenges irritating the continent,²⁶ together with the harmonisation of NTBs, it is crucial to address these legal challenges to facilitate the attainment of Agenda 2063.

to promote trade, investment, and economic integration between Morocco and the EU member states. Also, Morocco and the EU have signed various agreements in specific sectors, such as agriculture, fisheries, and textiles, to foster cooperation and enhance market access. Notable further is the Free Trade Zone for Industrial Goods between Morocco and the EU (known as the Euro-Mediterranean Free Trade Area), which is aiming to create a framework for the liberalization of trade in industrial products between Morocco and the EU member states. In particular, the Euro-Mediterranean Free Trade Area involves the gradual elimination of tariffs and NTBs.

²³ UNECA 'Colloquium on the Continental Free Trade Area: Internal Challenges and External Threats and Civil Society Strategy Meeting on Advocacy Around Africa's Trade and Development Challenges' Accra, Ghana 2015.

²⁴ Chapter 2 Aspiration 6 of the Final Draft Agenda 2063 Framework Document Sept. 2015.

²⁵ Ibid.

²⁶ UNECA 'Africa Sustainable Development Report: Tracking Progress on Agenda 2063 and the Sustainable Development Goals' 2017 available at <https://www.uneca.org/publications/2017-africa-sustainable-development-report>, accessed on 02 June 2020.

Paradoxically, African countries' supposed commitment to integration has created overlapping membership, a key barrier to implementing the integration programmes. Despite the numerous rationalisation programmes instituted by the AU, REC Member States are still struggling with multiple and confusing memberships, creating duplication of efforts and competing activities. This overlap is even more pronounced among the eight selected RECs envisaged as the Union's backbone and which are presumably going to merge to form the AEC. However, there is not enough evidence of all the RECs having the ultimate objective of African regionalism on their agenda or a radical zeal to succumb to the AU's community goals. They either belong to two or more of the selected RECs, those not officially recognised by the AU as RECs,²⁷ or other trade arrangements. For example, Kenya belongs to four different selected RECs.²⁸ Among the three RECs that have launched a Tripartite Free Trade Area,²⁹ all EAC Member States belong to either COMESA or SADC, some of COMESA belong to SADC and vice versa. This is a key problem because strategic considerations weigh heavily in a decision to join an REC. Different RECs have conflicting goals and incompatible timetables,³⁰ which impede their efforts to achieve the AU's overall objectives, such as implementing trade agreements or regional protocols. Others like CEN-SAD and AMU have not met their FTA objectives despite more than twenty years of existence and have serious policy lapses, indicating they were unprepared for such engagements.

Another major problem affecting the harmonisation of NTBs between the RECs is that RECs are not members of the AU following the Treaty. RECs stand on their own as legal entities. Although the 2007 Protocol has attempted to legalise this relationship, it does not create

²⁷ The following are the RECs which are not recognised by the AU but are still operating: Economic and Monetary Community of Central Africa (CEMAC), West African Economic and Monetary Union (UEMOA/WAEMU), Economic Community of the Great Lakes Countries (CEPGL), Indian Ocean Commission (IOC), Mano River Union (MRU), Southern African Customs Union (SACU).

²⁸ Kenya is a member of; the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC) and the Intergovernmental Authority on Development (IGAD).

²⁹ COMESA-EAC-SADC Tripartite Free Trade Area launched in June 2015. They are: the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Southern African Development Community (SADC).

³⁰ T Corrigan 'Regional Integration in Africa: Can Agenda 2063 be different?' 2015 South African Institute of International Affairs (SAIIA) available at <http://www.saiia.org.za/opinion-analysis/regional-integration-in-africa-can-agenda-2063-be-different>, retrieved on 04 February 2020.

any legally binding obligations.³¹ The momentum attached to Agenda 2063 by the African heads of state indicates that more needs to be done in this respect,³² even though this vision has nothing to do with legal relations between the stakeholders and key actors who are supposed to realise it.

Following the Commission's background note,³³ Agenda 2063 will be executed in stages,³⁴ beginning with the First Ten-Year Implementation Plan.³⁵ This plan, part of the fifty-year programme, acquired its legality from the Agenda 2063 Technical Document. The document covers the eight Priority Sectors of the Solemn Declaration, all the seven Ambitions for 2063, Continental Agendas, and National Strategies.³⁶ Some areas of focus that fell within the first ten years are: creating the CFTA by 2017,³⁷ instituting the African passport, eliminating visa requirements for African citizens by 2018,³⁸ and silence all guns by 2020,³⁹ among others. There were, however, no succinct provisions on how to achieve these aspirations within the limited timelines set. More so, none of these aspirations were achieved by the due dates set.

In summary, the key challenges addressed in this research are the failure to meet the AU and RECs legal harmonisation objectives, which have hindered and continue to impede the achievement of priority programmes, including the CFTA. The failure of the AU to meet the CFTA stated establishment date of 2017, like many other priority programmes, indicates that it is practically impossible to efficiently implement the CFTA given the present status quo. Across many countries in Africa, there are no technological and regional infrastructures like roads and rail transport networks, no free movement, and insecurity challenges. Another major problem is the overlapping and confusing membership of RECs, which creates a duplication of efforts, conflicting goals, and heavy financial burdens suppressing the achievement of the AU's overall objectives.

³¹ 2007 Protocol on Relations between AU and RECs

³² H Viswanathan 'Africa's 'Agenda 2063': A Document of Hope' 2018 available at http://www.orfonline.org/wp-content/uploads/2018/04/ORF_IssueBrief_237_AfricaAgenda.pdf, accessed on 03 June 2020.

³³ AUC 'Background Note on Agenda 2063: A Shared Strategic Framework for Inclusive Growth and Sustainable Development' 2013 available at http://www.au.int/en/sites/default/files/newsevents/working_documents/12984-wd-27_08_agenda_2063_background_note_en_0.pdf, accessed on 05 February 2020.

³⁴ Phase 1 is the first 10 years, phase 2 is the next 25 years and phase 3 is the next 50 years.

³⁵ Assembly of the Union Twenty-Fourth Ordinary Session 30 - 31 January 2015. Report of the Commission on the African Union Agenda 2063; Addis Ababa, Ethiopia.

³⁶ Ibid.

³⁷ Chapter 2 Aspiration 2 of the Final Draft Agenda 2063 Framework Document Sept. 2015.

³⁸ Agenda 2063, Popular Version, Final Edition April 2015.

³⁹ Chapter 2 Aspiration 4 of the Final Draft Agenda 2063 Framework Document Sept. 2015.

This research builds on the premise that the CFTA is achievable through the legal harmonisation of NTBs between the African RECs. Until a model of legal harmonisation of NTBs is adopted and consolidated, it would be extremely challenging, if not impracticable, for the AU to follow through with the CFTA within the perspective of Agenda 2063 proficiently.

It is, therefore, imperative to: first examine the theoretical and conceptual underpinnings of regional integration and legal harmonisation, and attempts at harmonisation by the AU and RECs; secondly, analyse the current political, economic, and legal reinforcements to regionalism in Africa and practices needed to advance intra-regional trade within the framework of Agenda 2063; and thirdly, ascertain the abilities of three selected RECs to drive home the CFTA while advancing a model of legal harmonisation of NTBs between them.

1.3 Key questions to be asked

This research work focuses on the following research questions:

- What are the conceptual and theoretical underpinnings of regional integration and legal harmonisation?
- Have there been attempts at legal harmonisation by the AU and RECs?
- What lessons can be learned from the current political, economic, and legal keystones to regionalism in Africa and the advancement of intra-regional trade within the framework of Agenda 2063?
- To what extent are the three selected RECs (COMESA-EAC-SADC), in their current form, the best vehicles to deliver the CFTA?
- Can the legal harmonisation of NTBs assist in the achievement of Agenda 2063 CFTA?

1.4 Literature review

As the continent takes the trajectory of advancement and relentlessly forges ahead, scholars will continue to appeal for rigorous joint efforts to rethink and redesign Africa's future.⁴⁰ There is a need to do the following: first, examine the theoretical foundations of regionalism and legal harmonisation. Secondly, interrogate the political, economic, and legal reinforcements for

⁴⁰ K DeGhetto, Jacob R Gray & Moses N Kiggundu 'The African Union's Agenda 2063: Aspirations, Challenges, and Opportunities for Management Research' (2016) 2(1) *Africa Journal of Management* 93-116.

regionalism in Africa and practices needed to advance intra-regional trade within the framework of Agenda 2063. Finally, ascertain the abilities of the three selected RECs to drive home the CFTA and advance the harmonisation model proposed by this thesis. It is on this basis that this thesis reviews related writings on the subject.

Salami looked at the level of legal stumbling blocks in Africa's regional integration laws, which include: the ambiguous nature of some RECs' treaty requirements and the weak regional enforcement mechanisms.⁴¹ Salami therefore called for an improvement in the regulations for both community and domestic spheres. Among the reforms proposed is clarification of the position of community laws in the REC treaty proviso to the Member States. More so, Member States should recognise the higher position of RECs legislation in their administration and introduce African integration law at the national legal and institutional framework. This thesis identifies disruptions and lapses in the law and clarifies them by including other legal aspects of integration, like the harmonisation of NTBs measures and restrictive legal relations for achieving the CFTA within the context of Agenda 2063. Member states have to surrender economic sovereignty to build a free trade regime.

Fagbayibo posits that there has been a poor record of commitment to realising African integration goals and objectives by Member States.⁴² The author suggested a way forward through a commitment to constitutionalism in the Member States, a framework for ensuring observance of universal directives, improved cooperation between national and regional institutions, and strengthened collaboration among legal stakeholders throughout the continent. This thesis has done a trade-related legal study to identify other legal hurdles to enhance the CFTA for Africa's Vision 2063. Cooperation and collaboration can only be improved when there is physical integration. There is free movement of goods and persons in the European Union (EU) because of regional infrastructure and an extraordinary transfer of sovereignty.⁴³

⁴¹ I Salami 'African Economic Integration and Legal Challenges' (2012) 1(1) *Great Insights*, available at <https://ecdpm.org/great-insights/boosting-intra-african-trade/african-economic-integration-legal-challenges/>, accessed on 08 November 2020.

⁴² B O Fagbayibo 'Exploring legal imperatives of regional integration in Africa' (2012) *Comparative and International Law Journal of Southern Africa* XLV(1).

⁴³ K Archick & D Mix 'The European Union: questions and answers' Congressional Research Service, the Library of Congress, 2005, updated in September 2019 available at <https://fas.org/sgp/crs/row/RS21372.pdf>, accessed on 04 June 2020.

According to Oppong,⁴⁴ the main challenge in regional economic integration is enforcing regional regulations and making them applicable in domestic legal systems. The author suggests, among others, that community laws should be translated into national legal systems of Member States. This thesis argues that regional community regulations can only be legally binding and applicable within national legal systems when there is harmonisation and proposes a new legal, economic harmonisation model between African regional integration players, especially concerning the CFTA, to enhance Agenda 2063.

According to the AU Constitutive Act adopted in 2000 at Lome, Togo,⁴⁵ the AU's main objective is to attain more unity and harmony among Member States and African people.⁴⁶ Also, it has to fast-track the continent's economic, social, and political integration.⁴⁷ Furthermore, it aims to enhance security, peace, and stability on the continent,⁴⁸ and promote sustainable development.⁴⁹ Synchronising and coordinating guidelines among the current and upcoming RECs to achieve the AU's ambitions is another goal.⁵⁰ It is evident that these goals have not been met. Economic, political and legal reasons have often slowed down the realisation of these goals.

Based on the AU's Issue Paper on Governance,⁵¹ these legal challenges to regional economic integration are because most key protocols, instructions, guidelines, undertakings, and decisions of the AU Assembly are not endorsed, ratified sluggishly, or not executed. One of the reasons for the poor execution of these protocols is that the main structures of the AU, for instance, the Parliament, Commission, and Court of Justice, are not empowered enough to move economic integration forward.⁵² African countries are still tied to state sovereignty at the expense of achieving community goals and objectives. This thesis purports that the arrival of the AU Vision 2063, with vast ambitions, should be interrogated because the long-standing legal

⁴⁴ R F Oppong *Legal Aspects of Economic Integration in Africa* (2011) 5.

⁴⁵ Article 3 of the AU Constitutive Act, 2000.

⁴⁶ *Ibid* art 3 (a).

⁴⁷ *Ibid* art 3 (c).

⁴⁸ *Ibid* art 3 (f).

⁴⁹ *Ibid* art 3 (j).

⁵⁰ *Ibid* art 3(l).

⁵¹ AU 'Issue paper on Governance of Integration in Africa: Challenges and Way Forward' available at <http://www.au.int/ar/sites/default/files/Issue%20paper%20on%20Governance%20of%20Integration%20%20en.pdf>, p.1 accessed on 18 January 2020.

⁵² *Ibid*.

challenges are yet to be resolved. The AU needs to be more practical now than ever. This can be done by synchronising the priority programs of the RECs.

Fagbayibo argues that establishing the AU in 2001 was viewed to be a momentous epitomic move towards Africa's integration.⁵³ The different facets of the AU structures, like some of its bodies, and the goal of harmonising the plan of action of RECs beneath the Union's authority, could be referred to as supranationalism. The author sees normative supranationalism as one of the AU's goals because the designers of the AU intended to form a system whereby AU regulations and guidelines supersede domestic and sub-regional laws. To realise that after two decades of the AU's existence, there has been an insignificant or no advancement necessitates solemn reflection. Consequently, the author explored some of the reasons that challenged the actual process of AU supranationalism while advancing suggestions to handle the limitations. This thesis adds that the trade sector is another sector where no progress has been made. Harmonisation of NTBs has been proposed as a means to enhance the CFTA within the sphere of Africa Union Vision 2063.

Further, Fagbayibo postulated that the remarkable exploits of the EU have not only influenced Africa's integration agenda but also implanted in them unchanged traditional methods of evaluating regional integration.⁵⁴ Because the traditional assessment methods are based primarily on the objectives, goals, and time frames that have been agreed upon by the Member States, there is an inclination to misjudge or disregard other measures proficient enough to accelerate the integration process. This thesis complements the views of Fagbayibo regarding the trade sector, particularly on NTBs. Presently, the EU is facing capital and labour movement, and its economy is becoming less competitive. It would be erroneous for Africa to implant EU methods without considering Africa's trade realities. Therefore, there is a need for a significant continental shift from imported paradigms.

Rettig et al. 2013 have argued that in contrast to the ambitious strategies to create a CFTA, RECs struggle with profuse legal impediments.⁵⁵ Although RECs and the Member States are responsible for implementing Resolutions and Treaties, the duty of tracking Africa's

⁵³ B O Fagbayibo 'Looking back, thinking forward: Understanding the feasibility of normative supranationalism in the African Union' (2013) 20 (3) *South African Journal of International Affairs* 411–426.

⁵⁴ B O Fagbayibo 'In search of nuanced methods of assessing African integration' (2013) 32(1) *Politeia* 59–73.

⁵⁵ M Rettig, A W Kamau & A S Muluvi 2013 op cit note 3.

economic integration process rests with the Union's Commission. The economic integration process has not moved forward, although the AU's working committees have made tremendous efforts to organise the RECs, signifying that a lot still needs to be done.⁵⁶ Many RECs have failed to meet individual timelines to achieve customs unions and common market objectives.⁵⁷ For economic integration objectives to be met, especially achieving the CFTA, after missing its target date of 2017, the RECs and AU may have to do some more work. This thesis reveals that even if other challenges to the effective achievement of the CFTA disappear, the state of existing laws and their implementation will hinder its proper implementation within the context of Agenda 2063. It is also practically impossible for the CFTA to commence effectively because the AU has not laid the groundwork for it.

This thesis suggests the reinforcement of the CFTA Secretariat to ensure the implementation of NTB principles. It should be empowered to enforce and interpret all CFTA principles and practices to the RECs to avoid different practices across the AU. With some degree of shared sovereignty with the AU, the CFTA Secretariat will safeguard consistent penalties for infringement of NTB principles and ensure no discretion among Member States to avoid different enforcement cultures.

Following UNECA,⁵⁸ as one of the leading initiatives of Agenda 2063, the African CFTA is vital to enhance African trade. It will bring together regional markets and strengthen economic integration. It is argued that if this is done, then the CFTA would have the potential to contribute immensely to sustainable economic growth, poverty reduction, infrastructural development, and job creation. So far, heading toward the ambitions of Agenda 2063 in the direction of 'the Africa we want' will depend on a paradigm shift from the present manner in which African Member States trade among themselves. This can be changed by harmonising the RECs NTB principles and practices. The CFTA Secretariat should also monitor Africa's trade itself.

⁵⁶ Ibid.

⁵⁷ UMA, CEN-SAD and IGAD have not achieved the FTA and customs union. All the others have not achieved customs union apart from EAC.

⁵⁸ UNECA 'Colloquium on the Continental Free Trade Area: Internal Challenges and External Threats and Civil Society Strategy Meeting on Advocacy Around Africa's Trade and Development Challenges' 2015 Accra, Ghana.

According to Kolbeck,⁵⁹ the presentation of the current legal framework for Africa's integration process shows that it does not allow for effective and coherent governance of the relationships between the different institutions entrusted with the continent's integration. Kolbeck posits that the lack of well-defined relations between Africa's integration actors slows down the whole Pan-African integration project. However, adopting the different legal documents that are supposed to clarify, strengthen, and speed up the continent's integration process demonstrates that Africa is never short of new ideas. The ambitious objectives clash with reality when it comes to the realisation and application of new agreements, protocols, and declarations. Kolbeck suggests that reforms are certainly recommendable; however, true political will from the African leaders to internalise reforms into national laws is also critical. This thesis adds that if African countries could relinquish some degree of sovereignty to the AU as a supranational entity, ensuring the harmonisation of NTB practices between RECs, the achievement of the CFTA will be an accomplished project.

In the view of Oppong,⁶⁰ RECs are not members of the AEC although they are chosen to be the AEC's backbone. However, the different African countries are members of the AEC, and these countries are also members of the treaties establishing the RECs. The author then questions the extent to which the RECs are tied to the decisions of the AEC. He goes on to ask: what makes it legally binding for RECs to join and form the African Economic Community, now that the RECs are legal persons and not members of the AEC Agreement? The author concludes that the Protocol on Relations does not adequately address these questions. Even the treaties creating the RECs do not throw any light on these concerns. Although the REC treaties were drawn after those of the AEC, it may be assumed at the onset that they would address the concerns raised regarding the relations of these RECs with the AEC and what became of them after the establishment of the AEC, but RECs have not done so. However, this is a moot argument because the AEC has been subsumed into the AU legal framework, and all structures under the AU are bound by it. This thesis proposes a protocol for harmonising NTB principles and

⁵⁹ B Kolbeck Legal Analysis on the Relationship between the AU / AEC and RECs: Africa Lost in a “Spaghetti Bowl” of Legal Relations? (LLM dissertation, University of Cape Town, 2014).

⁶⁰ R F Oppong ‘The African Union, African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web’ (2010) 18(1) *African Journal of International and Comparative Law* 92–103.

practices whereby the newly established CFTA Secretariat will ensure that what is practised by one REC is unanimously adopted to achieve the CFTA.

Maluwa points out that the AU strives to attain its objectives by approving and implementing the agreements signed by the Member States.⁶¹ Still, it is deficient in obliging member countries to ratify them and act per the treaty's requirements. The author looked at the constitutional and legislative processes through which the AU Member States ratify these treaties, factors that hinder swift ratification, and identified the types of treaty policy areas and the level at which the AU members commit themselves. He recommends, among others, that the legal and all vital data accessed during the debate of these treaties may offer insight into future treaty success within the AU. It will also help them to forecast policy sectors with the kinds of accord that would be completely or partially agreed upon by the member countries. He concludes that where regulations do not generate friction with prevailing domestic legislation, but only require slight modification, there is a bigger opportunity for endorsement. This thesis posits that the above problem is caused by the liberal model of agreement practice by many regional groupings. It is suggested that if a free trade regime is built, the successes will have a spillover effect on political sovereignty.

Tanyi studied the gains of inter and intra-regional trade in Africa.⁶² He looked at trade liberalisation, the progressive stripping off of tariff obstacles throughout Africa and its effects on state sovereignty, including the multiple trade agreements. This was done to address the current challenges impeding effective African regional integration, including sustainable growth. To ease trading activities for youths and businesswomen in Africa, there is a need to harmonise trade rules between RECs to access Africa's prospective market, anticipated at 2.8 billion people by 2063.⁶³ He concludes by indicating that Africa will reap the enormous benefits of regional markets if the different stakeholders are involved in mobilising efforts towards an all-inclusive approach for Africa's emergence by 2063. This thesis further theorises that there is a need for harmonisation of NTBs measures, principles and practices between the AU and RECs and among RECs themselves. Given that there are eight selected RECs, the AU must set up a

⁶¹ T Maluwa 'Ratification of African Union treaties by member states: law, policy and practice' (2012) 13(2) *Melbourne Journal of International Law* 636-684.

⁶² K T Tanyi 'Assessing Africa's Two Billion Populated Market by 2063: The Facts and Fallacies of a Continental Free Trade Area (CFTA)' (2015) 6 *Bus Eco J* 154.

⁶³ *Ibid* at 8.

permanent structure to ensure the actual application of uniform NTBs-related legal practices in each of them and their Member States.

UNECA estimated the economic impacts of the waves of trading rules for the envisioned Pan-African CFTA.⁶⁴ It found out that abolishing tariff obstacles predominant within African borders and creating African free trade could increase regional trade exports by US\$25.3 billion (a 4 per cent upswing) by 2022. There will be an eventual rise in the overall continental exports amounting to US\$17.6 billion (a 2.8 per cent upswing) from nothing during the period of an absence of free trade.⁶⁵ Exports outside Africa will plunge in amount of about US\$9.4 billion. This means that there will be a boost of US\$ 34.6 billion (52.3 per cent) by 2022 for regional trade.⁶⁶ The assumptions of the CFTA showed that there would be a net trade creation outcome. It also revealed that there would be a significant increase in trade and industry benefits with the establishment of the CFTA. UNECA did not look at the practical legal trade hurdles of NTBs that would hinder the achievement of the benefits outlined above, and this is the subject of this thesis.

Sara asserts that eliminating extreme poverty in Africa is crucial to the AU's Agenda 2063.⁶⁷ However, the International Futures forecasts posit that several Member States will not achieve the MDGs mark by 2030, even if they display a collection of fast-growing poverty alleviation performances. This thesis seeks to establish that one of the targets that have not been met is the establishment of CFTA by 2017.⁶⁸ Although it was established in 2018 and launched in 2019, it is yet to go operational. In addition, the advent of COVID-19 has also affected the operational phase of this project. Therefore, it is not only necessary for complex objectives to be set, but the feasibility of their implementation is of paramount importance. This thesis proposes a new model of harmonising NTB principles and practices between RECs, which will go a long way to contribute to poverty alleviation in Africa, and thereby enhance Agenda 2063.

⁶⁴ UNECA 'Assessing Regional Integration in Africa (ARIA)V: Towards an African Continental Free Trade Area' 2012 ECA publication; Addis Ababa Ethiopia.

⁶⁵ Ibid at 40.

⁶⁶ Ibid at 42 see also UNECA 'Assessing Regional Integration in Africa (ARIA) VIII: Bringing the Continental Free Trade Area About' 2017 ECA publication; Addis Ababa Ethiopia at 65.

⁶⁷ S Turner, J Cilliers & B Hughes 'Reasonable goals for reducing poverty in Africa: Targets for the post-2015 MDGs and Agenda 2063' (2015) Institute for Security Studies (ISS); *African Futures Paper* 13.

⁶⁸ To be discussed in chapter three

For the AUC 2015, looking at the vital aims of the AU's Agenda 2063, the CFTA proffers a device necessary to help Africa access the abundant business opportunities available to transform African economies.⁶⁹ Following this transformation, the CFTA should contribute to providing African citizens with rewarding employment opportunities, thereby contributing to poverty eradication. However, this cannot be achieved without the legal harmonisation of trade principles and practices (trade in goods and services, rules of origin, rules on competition policy, investment, intellectual property rights and disclosure of information, among others) between RECs.

DeGhetto et al. examined some critical issues related to Agenda 2063, such as institutional arrangements challenges, the diverse nature of African States, comparative cost advantage, regional identity, and ownership of Agenda 2063.⁷⁰ They see these as issues that need to be addressed if Agenda 2063 is to succeed. In addition to the above issues, NTB practices and their enforcement are further obstacles to achieving the CFTA. The above issues will be tackled with the adoption of a legal harmonisation model of NTB practices between RECs and ensuring that the CFTA Secretariat monitors its implementation.

Sahra and Faten, in a briefing note, looked at the challenges of financing Agenda 2063, its priorities and action plans.⁷¹ They presented the different financing sources that Africa could tap into to finance its initiatives and underlined the need to go beyond a 'demand-side' to a 'supply-side' narrative.⁷² The briefing note also identified the need to move from merely identifying and developing trustworthy mechanisms to looking into their relevance and investment returns. Further, the note highlighted the need to build a process that provides space to look back and reflect on the opportunities through which the major challenges to internal financing could be addressed concretely. Harmonising NTB principles and practices within AU and empowering the Secretariat could go a long way to augment continental financing, thereby enhancing Agenda 2063.

Abdoulahi presented an overview of the numerous exploits made at stimulating intra-regional trade envisioned in several accords, regulations, or laws enacted at different regional

⁶⁹ AUC 'Update on the Report on the Continental Free Trade Area (CFTA)' 2015.

⁷⁰ K DeGhetto, Jacob R Gray & Moses N Kiggundu 2016 op cit note 40.

⁷¹ El F Sahra & A Faten 'Implementing African Development Initiatives: Opportunities and challenges to securing alternative financing for the Agenda 2063' 2014 ECDPM, Briefing Note No. 65.

⁷² Ibid.

phases.⁷³ He also examined the institutional framework for liberalising intra-community trade. The author further analysed the progress made so far for trade liberalisation in the different RECs. Also, he considered the effect of business liberalisation rules on trade, the impediments to intra-continental commerce, and proposed actions and instruments that can encourage business expansion. This forms the backdrop of this thesis, although it envisions protocols and new structures within Agenda 2063.

For the 18th AU General Assembly 2012, Africa must vigorously pursue comprehensive and harmonised regional trade policies as part of their collective transformative approach to development.⁷⁴ African leaders' commitments to boosting intra-African trade can be seen through the momentous pronouncement by COMESA, EAC, and SADC establishing a common FTA. The Tripartite Free Trade Area (TFTA) is a key stepping stone towards the CFTA and, thus, the AEC, as further elaborated by UNECA, 2013.⁷⁵ The launching of this TFTA project involving 26 African states, which constitute almost half of the Union members with about 530 million inhabitants (57 per cent of the African population) and a total GDP of \$630 billion (53 per cent of the total GDP in Africa) has stimulated concerns about a bigger African FTA.⁷⁶ According to the Assembly, the CFTA has immense benefits. This includes more comprehensive marketplaces for products and services, eliminating the intersecting memberships in RECs. In addition, it will promote harmonisation, coordination of trade mechanisms and vocabulary, fast-tracking the realisation of the African common market and, eventually, the AEC. This thesis work is therefore positioned in this sphere although adopting a legal perspective.

Closely related to the above, Albagoury and Anber investigated the possible gains and obstacles to the COMESA-EAC-SADC tripartite FTA.⁷⁷ They found out that although the Tripartite FTA will significantly increase intra-trade within the region, trade barriers, inadequate infrastructure, administrative procedures, high costs from domestic policies, and regulatory

⁷³ M Abdoulaoui 'Progress report on regional integration efforts in Africa towards the promotion of intra-African trade' 2005 UNECA.

⁷⁴ ASSEMBLY/AU/DECL.1 (XVIII) 'AU General Assembly Declaration on boosting intra-African trade and the Establishment of a Continental Free Trade Area (CFTA)' 2012.

⁷⁵ UNECA 'Assessing Regional Integration in Africa (ARIA)VI: Harmonising Policies to Transform the Trading Environment' 2013 ECA publication; Addis Ababa Ethiopia.

⁷⁶ Ibid foreword at V.

⁷⁷ S Albagoury & M Anber 'COMESA-EAC-SADC tripartite free trade area: challenges and prospects' 2018 MPRA Paper No. 92621.

environment while crossing the border will impede intra-regional trade. This thesis investigates the effective realisation of the TFTA as a stepping stone to achieving the CFTA. The TFTA agreement is yet to meet its 14 Member States' ratification threshold, while the CFTA Agreement entered into force on the 30th of May 2019. As it stands now, eleven countries have ratified the TFTA,⁷⁸ with three outstanding to reach the required threshold of 14 for the Agreement to go operational.⁷⁹ This is not surprising because the three RECs are in different stages of integration. COMESA, for example, launched an FTA in 2000 and a common market in 2009, parallel to negotiations of TFTA.⁸⁰ Trade negotiations within COMESA are still to be completed, as Uganda and Ethiopia joined the FTA in 2014. The TFTA region has multiple RECs with different rules of origin and trade agreements, and Member States belong to more than one of them, making it challenging to facilitate trade. Therefore, there is greater urgency to harmonise the trade regimes of Member States.

Sodipo and Luke explored the ambit of the CFTA and the standards guiding the negotiations, which are the principle of 'variable geometry', 'RECs Free Trade Agreements as building blocks for the CFTA', 'flexibility', 'special and differential treatment', 'reservation of acquis', and 'transparency and disclosure of information'.⁸¹ They analysed the complexity of the exercise and the challenge of distributing the gains from the CFTA among the participating countries. This thesis complements the above issues with the legal harmonisation of NTB practices to ensure effective implementation of the envisaged CFTA across Africa.

AUC's first-ever report on African regional integration within the context of Agenda 2063 shows that RECs need to do more to push the continental free trade agenda forward.⁸² REC programmes and action plans differ from the Abuja Treaty and Agenda 2063. In their current

⁷⁸ Burundi, Egypt, South Africa, Kenya, Rwanda, Uganda, Botswana, Namibia, Eswatini, Zambia and Zimbabwe.

⁷⁹ COMESA 'Tripartite framework win accolades at the AU Mid-Year Summit' 2022 available at <https://www.comesa.int/tripartite-framework-win-accolades-at-the-au-summit/#:~:text=To%20date%2C%2022%20of%20the,Namibia%2C%20Zambia%20and%20Zimbabwe>, accessed on 25 October 2022. See also Busiweek 'EAC-COMESA-SADC tripartite not ratified 7 years on' 2022 available at <https://www.bilaterals.org/?eac-comesa-sadc-tripartite-not>, accessed on 25 October 2022.

⁸⁰ Tralac News 'Implementation of the Tripartite FTA Agreement now in sight' 2020 available at <https://www.tralac.org/news/article/14415-implementation-of-the-tripartite-fta-agreement-now-in-sight.html>, accessed on 10 March 2020.

⁸¹ B Sodipo & D Luke 'Launch of the Continental Free Trade Area: New prospects for African trade?' 2015 *BRIDGES AFRICA* 4(6)

⁸² AUC (2019) 'African Regional Integration Report: Towards an integrated and prosperous and peaceful Africa' 2019 Addis Ababa (Ethiopia).

format, it is argued that RECs serve the various interests of the regions and not continental concerns. There are no coordination, monitoring, and evaluation mechanisms, including robust institutions and regulations. The report recommends statutory and institutional structures to safeguard projects, harmonise, and implement resolutions. This thesis examines the African Continental Free Trade Area (AfCFTA) agreement, which finally came to light on 21 March 2018 in Kigali, Rwanda and went into force on 30 May 2019. The operative stage of the AfCFTA⁸³ was launched on 7 July 2019,⁸⁴ and trade was scheduled to begin on 1 July 2020,⁸⁵ but it only started on 1 January 2021 as a result of the COVID-19 delay.⁸⁶ Although trading began on 1 January 2021, no trade has occurred under the AfCFTA system.⁸⁷ The AfCFTA will be governed by five functioning mechanisms,⁸⁸ and Mr Wamkele Mene was appointed as the first secretary-general to head the AfCFTA Secretariat.⁸⁹ One of the AfCFTA Secretariat's major objectives is to supervise and appraise the level of execution of the AfCFTA.⁹⁰ The RECs are the execution and enforcement arm of the AfCFTA, while the AfCFTA Secretariat oversees, monitors and ensures the evaluation of the provisions of the CFTA.⁹¹ Undoubtedly, this will not be effective without the legal harmonisation of NTB practices. The fact that the Secretariat lacks autonomy like other AU institutions shows that Africa is not yet ready for the strong institutions and laws needed to enhance economic integration.

⁸³ The acronyms CFTA and AfCFTA will be used interchangeably in this research work. The CFTA was used during the period of conception from the 1991 Abuja Treaty to the 2015 Agenda 2063 while the AfCFTA came to the limelight in its final agreement established in 2018.

⁸⁴ Launched during the 12th Extraordinary Session of the Assembly of the AU in Niamey, Niger, on July 7, 2019.

⁸⁵ Tralac Trade Law Centre 'African Continental Free Trade Area (AfCFTA) legal texts and policy documents' 2020 available at <https://www.tralac.org/resources/by-region/cfta.html>, accessed on 09 November 2020.

⁸⁶ Tralac 'Status of AfCFTA ratification' <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html#:~:text=The%20operational%20phase%20of%20the,place%20under%20the%20AfCFTA%20regime>, accessed on 24 July 2022.

⁸⁷ Ibid.

⁸⁸ They are; the monitoring, reporting and elimination of non-tariff barriers; Rules of Origin; the AfCFTA trade in goods protected system; the Dashboard African Trade Observatory and a digital payment and settlements system.

⁸⁹ One of the outcomes of the 12th Extraordinary Session of the Assembly of the AU held in Niamey, Niger, on July 7, 2019 was the hosting of the AfCFTA secretariat by Ghana. The 33rd Ordinary Session of the Assembly of the Union held on the 9-10 February 2020 at Addis Ababa, Ethiopia appointed H.E. Mr. Wamkele Mene as its first Secretary General.

⁹⁰ Tralac op cit note 86.

⁹¹ UNECA 'Assessing Regional Integration in Africa (ARIA)VIII: Bringing the Continental Free Trade Area About' 2017 ECA publication; Addis Ababa Ethiopia at 121.

1.5 Objectives of the study

Cognisant of the challenges highlighted above, it is imperative to examine the theoretical and conceptual underpinnings of regional integration and legal harmonisation. Similarly, the thesis explores the current political, economic, and legal reinforcements to regionalism in Africa. It considers the practices needed to advance intra-regional trade within the framework of Agenda 2063 and attempts to harmonisation by AU and RECs. It further evaluates the abilities of the selected RECs to drive home the CFTA and proposes a model of legal harmonisation of NTBs between them.

A proposed model of legal harmonisation of NTBs among RECs could explore ways and means of trade consolidation.

1.6 Methodology

This thesis is a qualitative review of literature already in the public domain. The review rely mainly on the archival search of documents, content analysis of data accessed from political, economic, legal and international instruments and a detailed study of AU's governing laws and the selected RECs in Africa. The thesis context was accessed through the internet, official gazettes of the AU, and selected RECs. COMESA, EAC and SADC are used as case studies as their establishment of a Tripartite Free Trade Area (TFTA) is considered a key stepping stone towards the AfCFTA. Academic commentaries and lessons are drawn from the experiences of other RECs and FTAs outside Africa (MERCOSUR, NAFTA, ASEAN-FTA and EU).

The theory is that an effective legal harmonisation of NTBs practices in Africa significantly impacts the achievement of the CFTA. This research argues that it is practically impossible to achieve Agenda 2063 CFTA given the status quo.

This thesis maintains that without effective harmonisation of NTBs rules, it will be impossible to achieve a functioning CFTA. It concludes that with an effective CFTA, the vision of a complete African economic integration will be clear and facilitate the realisation of Agenda 2063.

1.7 Limitation of the thesis

This thesis has some limitations. Although there are numerous scholarly writings on legal harmonisation, intra-regional trade and regional integration, literature on the legal harmonisation

of NTBs measures for the AfCFTA is scarce. Existing literature dwells on the benefits of intra-African trade without necessarily connecting the legal harmonisation of NTBs to the achievement of AfCFTA. Scholarly work on legal harmonisation and regional integration is far-reaching and covers diverse areas of regionalism. Even within the legal harmonisation of NTBs adopted for this thesis, there are various subjects that shape the philosophies and realities of the integration process. This thesis is confined to the legal harmonisation of NTBs to achieve the AfCFTA. The motivation behind this is that developing a legal harmonisation model of NTBs will provide the required momentum to address the complex hurdles of Africa's economic integration barriers.

The scope of this thesis is time-based, with a cut-off period of 31 December 2022. African economic integration and the operationalisation of the AfCFTA are at a thought-provoking stage, with alterations taking place continuously. Consequently, important events and documents circulated post-cut-off time, specifically impacting the subject matter, may cause the recommendations to become obsolete or immaterial.

1.8 Structure of the thesis

Chapter one provides an introduction to the thesis, including the background, research problem, objectives, methodology, limitations and structure of the thesis.

Chapter two provides the conceptual and theoretical framework of regional integration and legal harmonisation. The chapter outlines the political, economic, and legal theories underlining this thesis and then proceeds to define the principle of legal harmonisation, stating its features, and importance in this context, and presents a case for and against (with advantages and disadvantages of) legal harmonisation

Chapter three presents an overview of regionalism in Africa. The chapter examines current political, economic, and legal keystones to regionalism in Africa. In addition, there will be an appraisal of the Abuja Treaty, the Constitutive Act of AU, the 2007 Protocol on Relations between AU and RECs, and the AU Agenda 2063, which are defined legal frameworks for the advancement of African regional trade within the framework of Agenda 2063.

Chapter four examines the abilities of COMESA, EAC and SADC among the selected RECs to drive home the CFTA. It analyses the unaddressed issues of legal harmonisation among RECs in Africa, emphasising on the three selected RECs. These issues are: the rationalisation of

overlapping membership, aligning RECs priorities to that of the AU, the non-implementation of community regulations and surrounding part of states sovereignty. It argues that, to a large extent, there has been no legal harmonisation of NTB practices within Africa's RECs for achieving the CFTA. It draws lessons from other RECs outside Africa (Asia, Europe, Latin and North America).

Chapter five suggests a model of legal harmonisation of NTBs and assesses the feasibility of implementing this model within the AfCFTA Member States.

Chapter six provides the conclusion and recommendations for further research.

1.9 Conclusion

This chapter underscores the introduction and background of the study, research problem, objectives, methodology, limitations and structure of the thesis. It examines existing literature on African regional integration, legal harmonisation, RECs FTAs and AfCFTA.

The next chapter will examine the concepts and theories that highlight legal harmonisation and regional integration.

2. CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK OF REGIONAL INTEGRATION AND LEGAL HARMONISATION

2.1 Introduction

The desire to reap the benefits of global trade through forming regional trading communities and efforts to harmonise supranational and domestic legislations are among the major developments in contemporary global endeavours.⁹² Several industrialised and emerging economies worldwide belong to regional groupings, and several are affiliated to more than one.⁹³ A considerable amount of international trade occurs within these regional arrangements. This is the prevailing norm, as the world becomes increasingly interconnected, motivated by the need for countries to collaborate in a macro-regional context. With this world phenomenon of a global village, the harmonisation of NTBs is gradually becoming customary practice and will eventually form a source of international uniform legislation. A foreword to an economic policy report on regionalism in Africa by the AU former chairperson, Alpha Oumar Konare, noted that:

It is reasonable to assume that the most significant trend in this new millennium is global competitiveness. In the face of opportunities and challenges posed by the new paradigm of the ‘global economy’, nations are moving towards integrating their economies with those of their neighbours, to create larger and more competitive regional economic blocs, and to engage in international trade; not just as individual states but as regional powers.⁹⁴

The past years have experienced a notable advancement among emerging nations to attain regional integration. This effort coincides with new and deepened regional integration among industrialised nations, exemplified and evidenced by the success of the European Union (EU). As a result, the EU continued to be the world's most prominent outward investor in 2017,

⁹² Some of these regional trading communities include: ASEAN Free Trade Area (AFTA), Central European Free Trade Area (CEFTA), North American Free Trade Agreement (NAFTA), Southern Common Market (MERCUSOR), European Economic Area (EEA), Latin American Integration Association (LAIA) and European Free Trade Area (EFTA).

⁹³ H Trudi ‘Regional Integration in Africa’ 2011 available at https://www.wto.org/english/res_e/reser_e/ersd201114_e.pdf, accessed on 09 March 2022.

⁹⁴ UNECA ‘Assessing Regional Integration in Africa I: ECA Policy Research Report’ 2004 Addis Ababa Ethiopia, Alpha Oumar Konare, a foreword, p. ix.

accounting for more than two-fifths (41 per cent) of the world's outward investment positions.⁹⁵ The argument is that when emerging countries compete in regional markets, they will be equipped to participate fully in the global economy. This has been exemplified by the EU legal harmonisation processes of creating common standards across the internal market.

The shift in regional integration is even more relevant in Africa due to the low levels of intra-continental trade, comparatively small economies, and the impact of imperialism, poor governance and conflicts that have ensured Africa's peripheral status in the global political economy.⁹⁶ Africa has, therefore, incorporated regionalism as an imperative constituent of its development approach and established multiple regional integration groupings,⁹⁷ with some countries belonging to as many as four different organisations.⁹⁸

To stimulate development and reap regional trade gains, there has been a gradual movement toward economic integration through the legal harmonisation of trading principles, standards and practices. Also, Africa's colonial legacy of foreign legal traditions and the random balkanisation of its frontiers make it the most fragmented region in the world.⁹⁹ This unique phenomenon makes the issue of legal harmonisation even more crucial. Chapter one reviewed related writings on Africa's economic integration, legal harmonisation, and efforts to advance intra-regional trade to realise the CFTA. Therefore, this chapter analyses the different conceptual and theoretical perspectives of regional integration and how legal harmonisation enhances regionalism.

2.2 Conceptual framework

A general and segmented definition of regional integration and supranationalism would be included in this conceptual framework, as both have benefited from multidisciplinary research and inputs from international organisations. However, it is adequate to define the concept of

⁹⁵ Eurostat, 'World direct investment patterns' 2019 available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=World_direct_investment_patterns accessed on 01 May 2022.

⁹⁶ UNECA 2004, op. cit, note 94 at ix.

⁹⁷ H Trudi (2011) op cit note 93. Also article 28 of the 1991 Abuja Treaty supported this move of belonging to and creating many regional groupings as possible.

⁹⁸ For example, Kenya belongs to the following four regional groupings: the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC) and the Intergovernmental Authority on Development (IGAD). In the same vein, the Democratic Republic of Congo belongs to four recognised RECs (SADC, ECCAS, COMESA and EAC).

⁹⁹ B O Fagbayibo 'Towards the harmonisation of laws in Africa: is OHADA the way to go?' (2009) 42(3) *Comparative and International Law Journal of Southern Africa* 309—322.

national sovereignty at the outset as it greatly impacts the success or failure of any integration agenda. The rationale is that if states intend to practice total sovereignty, they need not engage in economic integration, which requires opening to other economies and mutual liberalisation of trade.

2.2.1 National sovereignty, regional integration and supranationalism

a) National sovereignty

The principle of sovereignty of States is as old as the Peace Treaty of Westphalia of 1648 for the reciprocal recognition of sovereign nations.¹⁰⁰ The Peace Treaty of Westphalia marked a significant turning point in international relations by establishing the concept of state sovereignty and the principle of non-interference in the internal affairs of other states. This has been established as an international law principle recognized by the UN Charter 1945¹⁰¹ and the AU Constitutive Act 2000 in Article 3(b). The legal dictionary defines sovereignty as the uncontrollable absolute and supreme power where an independent nation is governed and from which all specific political powers are derived, the deliberate independence of a nation with the right and power to regulate its internal affairs without external interference.¹⁰² It is also the power of the nation to govern itself by making, executing and applying laws, declaring war and peace, imposing and collecting taxes, signing treaties and engaging in trade with other nations. For any regional economic arrangement to succeed, it will require its affiliates to partially transfer national sovereignty to the regional entity. One of the most significant impediments to economic integration has been the issue of sovereignty. As Keller puts it, for nations to integrate, some of their authority, especially control over external affairs and trade, must leave national rulers to regional powers.¹⁰³

¹⁰⁰P R Almeida 'Sovereignty and regional integration in Latin America: a political conundrum?' (2013) 35(2) *Contexto Internacional* 471-495.

¹⁰¹Chapter 1, articles 1 and 2.

¹⁰²Definition of national sovereignty available at, <https://legal-dictionary.thefreedictionary.com/National+sovereignty> accessed on 16 March 2022.

¹⁰³R Keller 'Building Nuestra América: national sovereignty and regional integration in the americas' (2013) 35(2) *Contexto Internacional* 537—564.

b) Regional integration

Regional integration, on the other hand, can be legal, political, economic, social or cultural.¹⁰⁴ Haas posits that regional integration is a process of combining different economies into larger political communities.¹⁰⁵ This refers to the level where political and economic strengths are integrated into any debate on the economic and political components. As Deutsch and other early theorists have expounded, genuine regional integration enjoins the whole “system”.¹⁰⁶

Politically, regional integration has witnessed peaceful establishment in a more extensive logical political structure from formerly distinct entities (independent states). Each of them will willingly relinquish a fraction of its sovereignty to a supranational power and forsake the use of force and violence in resolving disputes among stakeholders.¹⁰⁷

Economically, it is a process whereby the Member States unavoidably seek, amongst others, economies of scale, improved business undertakings, and free movement through institutional integration and policy integration, all of which add to the evolution of shared decision-making and the allocation of responsibility for policies.¹⁰⁸ It is the formation of closer ties among countries geographically close to each other, especially by forming preferential trade areas and economic blocs to enhance competition and diversification of commodities.¹⁰⁹ It can equally mean a practice whereby a group of States freely accesses each other's markets following different stages of integration¹¹⁰, and creating instruments and methods that reduce conflicts and make the best use of internal and external benefits of their interaction.¹¹¹

According to the Department of Comparative Regional Integration Studies of the United Nations University (CRIS UNU), regions are territorially based subsystems of the international

¹⁰⁴L Olu-Adeyemi & B Ayodele ‘The challenges of regional integration for development in Africa: Problems and prospects’ (2007) 15(3) *Journal of Social Sciences* 213—218.

¹⁰⁵E Haas *Beyond the Nation- States: Functionalism and International Organization* (2008) ECPR Press, P. 13.

¹⁰⁶K Deutsch *The Analysis of International Relations* (1971) Englewood Cliffs, NJ: Prentice-Hall, P. 158.

¹⁰⁷J Lodge ‘Transparency and Democratic Legitimacy’ (1994) 32 *Journal of Common Market Studies* 45—69.

¹⁰⁸O A Babarinde ‘Analysing the Proposed African Economic Community: Lessons from the Experience of the European Union’ (1996) in paper for the Third ECSA-World Conference on The European Union in a Changing World (Brussels: European Commission, DG X).

¹⁰⁹I E Chirisa, A Mumba and S O Dirwai ‘A review of the evolution and trajectory of the African Union as an instrument of regional integration’ (2014) 3(1) *SpringerPlus* 101.

¹¹⁰V O Nmehielle ‘The African Union and Africa Renaissance: A New Era for Human Rights Protection in Africa’ (2003) 7 *Sing. J. Int'l & Comp. L.* 412.

¹¹¹K Govender & Y Ngandu ‘Towards enhancing the capacity of the African Union in mediation’ (2010) *ACCORD* at 52.

system, which may give rise to micro-regions, cross-border regions, macro-regions and sub-regions.¹¹²

The term 'regional integration', is a modern process of amalgamation or fusion, or bringing together two or more sovereign entities, within a given geopolitical zone, into one unit, for the greater or enhanced protection and promotion of their political, economic and legal priorities or interests. Hence, regional integration may be political, economic, legal, or a combination of the above interests or priorities.¹¹³

It is possible to define regional integration in terms of the depth of integration.¹¹⁴ The depth of cooperation is demonstrated by the range of activities performed by Member States. Therefore, joint projects and programmes are conducted to formulate policies and form institutions. The Member States will facilitate it all by ceding some degree of their sovereignty to a supranational body.

One of the simplest and most relaxed forms of integration is cooperation. Here, countries may cooperate on a joint development project. They may also do so to facilitate the exchange of information and best practices while retaining complete control of such arrangements. If needed, they may leave the arrangement at any time. It effectively addresses common issues like joint developmental projects that entail regular exchanges, conferences and sessions. However, this does not require a supranational entity to make a decision. "Sub-regional common goods" would typically be the subject of joint development and management schemes. An example is the River Nile Basin Initiative, where the main objective was to ensure cooperation and joint action between riparian countries to eradicate poverty and promote economic integration.¹¹⁵ It could also be for specific sub-regional initiatives like combating epidemic diseases,¹¹⁶ conflicts,¹¹⁷ and sharing technical expertise and best practices like technology from Europe to Africa.

¹¹² Centre for Regional Integration Studies of the United Nations University (CRIS UNU), 2001. Regional Integration, publication, p. 2.

¹¹³ T Ladan *Harmonisation of Trade and Investment Laws in Africa* (2004) Yaounde, Cameroon 1.

¹¹⁴ L Kritzinger-van Niekerk 'Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience' (2005) *World Bank Country Office: South Africa* 6—10.

¹¹⁵ F Batisha Ayman 'Cooperative shared water resources management in the Nile River Basin: The Engine for Growth' (2011) IWTC – 15.

¹¹⁶ The WHO Regional Research Framework to Strengthen Communicable Disease Control and Elimination in the Western Pacific (2013 – 2017).

¹¹⁷ P Henrike 'The Nile basin initiative: a catalyst for cooperation' *In Security and Environment in the Mediterranean* (2003) Springer Berlin, Heidelberg 761—774.

Harmonisation and coordination constitute the other form of integration.¹¹⁸ The two imply a higher and more formalised degree of cooperation and commitment,¹¹⁹ hence a more effective lock-in arrangement than mere cooperation.¹²⁰ Typically, harmonisation is intended to address the inconsistencies in policy content, whereas coordination seeks to solve time-consistency issues. Harmonisation can best be applied to economic and trade regulations, such as taxation¹²¹ and tariff policies, as well as rules and procedures for quality control in the business law discipline. Although this means a higher degree of joint commitment, harmonisation does not necessarily need joint administration or a supra-national entity. For instance, countries may opt to harmonise tariffs like in the case of customs unions, and consent to use a common legal framework like the OHADA Member States¹²² but continue to retain their custom and traditional legal system.

The last form is integration, which can be considered a higher degree of cooperation resulting in the loss of part of state sovereignty. It applies to a wider scope of cooperation (political and economic), such as that which is intended for the AU and more united markets but could also be limited to a particular market.¹²³ Notably, the steps necessary to achieve the higher degree of cooperation intended for the AU as outlined in Aspiration 2, goal 1 of Agenda 2063, are deliberated in this thesis.¹²⁴

Regional integration in the context of this thesis may be defined as a ‘process of social transformation, characterised by the intensification of relations between independent sovereign states,’¹²⁵ illustrated by different types of regional cooperation, which are meant to improve the political, socio-economic and cultural status of stakeholders. The experience of most regional institutions has shown that the integration agenda can only be achieved if Member States

¹¹⁸ A Mouloul Understanding the Organisation for the Harmonisation of Business Laws in Africa (OHADA) 2 ed (2009) OHADA 24—25.

¹¹⁹ No 169 January – February 2003 the Courier ACP-EU. Towards a more effective development cooperation: the EU’s coordination and harmonisation initiative at 18—20.

¹²⁰ L Kritzinger-van Niekerk 2005 op cit note 114 at 6—7.

¹²¹ L Kouba, M Mádr, D Nerudová et al ‘Policy Autonomy, Coordination or Harmonisation in the Persistently Heterogeneous European Union?’ (2015) P.4WWforEurope Working Paper No. 95. WIFO Studies.

¹²² A Mouloul 2009 op cit note 118 at 8—25.

¹²³ This form of integration is discussed in detail in the subsequent sections of this chapter.

¹²⁴ Agenda 2063 Framework document, 2015 at 95.

¹²⁵ P De Lombaerde (ed) Assessment and measurement of regional integration (2006) 9 Routledge.

relinquish an aspect of their national sovereignty. Hence, it is argued that they cede it to empower regional organisations to make binding decisions and execute them.¹²⁶

Some of the characteristics of regional integration are: supranationalism, unity and partnership. Unity among Member States plays a significant role in the integration process. It indicates the extent to which the system forms an integrated part through its relation to the environment and management of its internal affairs. Externally, a system demonstrates unity if it can act like one vis-à-vis its physical and social environment. It concerns the actual capacity of the group to effectively mobilise, use and coordinate the efforts and resources of its members. Unity also consists of the system's ability to steer its members' behaviour to resolve their differences. This is particularly important for the African continent, which has historically been fragmented.

Regional integration is also about partnership. Ruben Balock supports the concept that the promotion of partnership stems from the idea that, faced with a persistent crisis, the notion of 'everyone for himself' gives way to 'everyone for all', and the victory of one member in the partnership means the victory of the others.¹²⁷ In other words, a partnership is a moral obligation that touches the mind of each member to feel for the other, share in each other's failures, and join in its benefits equitably. Thus, states may decide to overlook the confines set by territorial barriers and work together to enhance the region's agenda. This has not been the case with the African continent. The RECs in Africa are still struggling with territorial barriers.

c) Supranationalism

At this point, it is necessary to discuss supranationalism as a concept. It is a multinational political union where some power is delegated to a higher authority by the governments of Member States. The concept of supranational union is sometimes used to describe the EU as a new political entity.¹²⁸ Practically, supranationalism is a legal term that originated in Europe after the horrors of World War II. As a legal concept, it appeared in an international treaty (the Treaty of Paris,¹²⁹ signed 18 April 1951) for the first time and created the first supranational

¹²⁶ T Ladan 2004 op cit note 113 at 2.

¹²⁷ B Ruben 'La notion de partenariat en Droit Communautaire' (2001) 2(2) *Revue Africaine des Sciences Juridiques* 164.

¹²⁸ K Kiljunen *The European Constitution in the making* (2004) CEPS 21—26.

¹²⁹ Robert Schuman's speeches and texts on the origin, purpose and future of Europe (2004) Bron 129.

institution – European Coal and Steel Community (ECSC), presently the EU. The legal meaning of the concept laid down a model for the European Coal and Steel Community.

Weiler stated that, there are two main constituents to European supranationalism.¹³⁰ The two are not unique to European supranationalism, as they are also present in other supranational systems.¹³¹ The first one is normative supranationalism which is the hierarchical relationship between community policies and legal measures on the one hand and the competing policies and legal measures of the Member States on the other (the executive dimension). The second one is decisional supranationalism which has to do with the institutional framework and decision-making, by which such measures are initiated, debated, formulated, promulgated and, finally, executed (the legislative-judicial dimension). It can be deduced from the partition above that the separation of powers has been condensed into just two branches. This is because the decisional arm of supranationalism performs the functions of the legislature and the judiciary.

It suffices to say that supranationalism and legal harmonisation are intertwined. Again, reference to the EU process is relevant. The EU, the most successful supranational entity globally, has, as one of its overarching goals, the harmonisation of private law as part of the development of the internal market.¹³² Thus, upon joining the EU, each member state must adopt the *Acquis Communautaire*.¹³³ The conditions for joining the EU are: a steady democracy, a free market economy, the rule of law, human rights and adherence to EU law and its currency (euro). These are commonly called the ‘Copenhagen criteria’.¹³⁴ Unlike the AU, the conditions of membership have nothing to do with its legislation, legal harmonisation or supranationalism. For a state to become a member of the AU, it must be an African state,¹³⁵ a simple majority of

¹³⁰ J Weiler ‘The Community system: the dual character of supranationalism’ (1981) 1(1) *Yearbook of European law* 267-306.

¹³¹ Such as North American Free Trade Area (NAFTA) and Asean Free Trade Area (AFTA)

¹³² L Turner ‘Update: Researching the Harmonisation of International Commercial Law’ (2022) https://www.nyulawglobal.org/globalex/Unification_Harmonization1.html, accessed on 14 September 2022.

¹³³ *Acquis Communautaire* is a body of the EU law that must be adopted by each Member State upon joining the EU. It contains 35 chapters of major harmonisation areas, such as: free movement of goods, services, capital employees etc. the greater section of the *Acquis* uniform commercial law is a tool used for developing the internal market. Harmonisation of contract law has succeeded because of the passage of directives and regulations.

¹³⁴ These membership criteria were laid down at the June 1993 European Council in Copenhagen, Denmark, from which they take their name.

¹³⁵ See Article 29(1) of the AU Constitutive Act. Haiti application to become an associate member was denied on 17 May 2016 on grounds of it not being an African country. It should be noted that Haiti has had Observer Status since 2 February 2012.

Member States shall decide its admission,¹³⁶ and the applicant shall sign and ratify the Constitutive Act.¹³⁷

2.3 Theoretical framework

This section will examine legal, political science and economic theories of regional integration using a legal harmonisation perspective.

2.3.1 Legal harmonisation theories of integration

Legal integration seeks to harmonise the legal systems of different Member States through substantive rules and procedures. As articulated by Weiler, any regional integration practice is a creation of the law because once Member States have concluded the political negotiations, the process of integration then begins with an agreement on legal instruments.¹³⁸ The rights and responsibilities of Member States, including action plans, are clearly outlined in these instruments in the form of treaties or conventions.

Weiler distinguishes legal from political theories of integration by asserting that:

Political theories of ... integration [are] largely wedded to a certain notion about the outcome of the process and embodied a certain predictive element about continued progress. In addition, political theory laid great emphasis on the social, political and economic substantive achievements and less emphasis on the ways and means.¹³⁹

The above extract explains that political theories focus on the hypothesis and conclusion of the cooperation agenda. On the other hand, the legal analysis explores the *modus operandi*, course of action, progression and the outcome of the integration agenda for the Member States.

Looking at the EU, legal harmonisation is an essential model for establishing common standards across the Member States. For example, there must be unanimity in the harmonisation of national laws following the 1957 Treaty of Rome.¹⁴⁰ The EU has stated principles regarding

¹³⁶Ibid, art 29(2).

¹³⁷Ibid, art 27(1).

¹³⁸ B O Fagbayibo *A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union* (Unpublished PhD thesis, University of Pretoria, 2010) 21-25.

¹³⁹ Weiler 1981 op cit. note 130.

¹⁴⁰ W Palk 'Harmonization of the Laws of the European Common Market Countries' (1967) 2(2) *Manitoba Law Journal* 173-189.

legal harmonisation in most of its treaties,¹⁴¹ which is generally what occurs in the present-day EU.

The situation in the AU is different. Despite the clear-cut indication in its legal instruments that harmonising principles and practices is a *sine qua non* process to supranationalism,¹⁴² its effective implementation is far from reality. Articulating on this, Pougoue notes that legal integration, as portrayed by OHADA, constitutes a real epistemological break in Africa, which had primarily known economic integration following independence.¹⁴³ To Pougoue, economic integration merely mitigates investment, as it induces the harmonisation of some common legal principles and commercial agreements.¹⁴⁴ Legal integration results from a great sacrifice of legislative and judicial sovereignty to facilitate exchange, investment, and security in business and overcome the hurdles of conflicts of laws.

Contemporary African jurists, as Ladan notes, argue that it is impossible to sustainably achieve any meaningful economic integration agenda without legal integration.¹⁴⁵ Legal integration is realised through the harmonisation of trading rules in the area. Ladan points out that legal integration is an indispensable foundation of economic integration, while Pougoue argues that it is a 'technical tool' and an impulse for economic integration.¹⁴⁶ Mouloul affirms this and further enumerates the advantages of this 'technical tool'.¹⁴⁷ Legal integration (harmonisation) will provide a comprehensive and efficient legal text to each state that will ease intra-regional trade and formulate guidelines for competitiveness, eliminate conflicts of laws in the legally harmonised area and strengthen African unity, among others. It can therefore be said that legal harmonisation is the substratum of supranationalism.

¹⁴¹ Qualified majority voting was introduced by the Single European Act in 1987 for harmonisation in the internal market. The Maastricht, Amsterdam and Nice treaties have given the EU more authority and extended areas for majority decisions at the supranational level. The Lisbon Treaty (2009) also harmonised complex political areas of the EU law through a qualified majority voting. Essential harmonisation from the EU court has also been carried out via ground-breaking verdicts. A radical verdict was passed in the case of Cassis de Dijon in 1979. The Court applied higher standards of Member States and obliged other members to do same. This was to ensure harmonisation of standards and practices while avoiding lower models of standards from being accepted as law.

¹⁴² Article 28(2) and 88(1) of Abuja Treaty and article 3(1) of the Constitutive Act of AU.

¹⁴³ P G Pougoue 'OHADA, Instrument d'Intégration Juridique' (2001) 2(2) *Revue Africaine des Sciences Juridiques* 11.

¹⁴⁴ Ibid.

¹⁴⁵ T Ladan 2004 op cit note 113 at 13.

¹⁴⁶ Ibid at 13, 29, 30, 31 and 32. See also P G Pougoue 2001 op cit note 143 at 12.

¹⁴⁷ A Mouloul, 2009 op cit note 118.

Constitutionalisation or international constitutionalism is another aspect of the legal harmonisation theory of integration. These two legal concepts aim at the same outcome in regional integration. Constitutionalism outlines standardised or harmonised actions, allocation of powers and execution of shared values.¹⁴⁸ The impact of inter-state pacts or agreements is the drawing-up of international legislation that act as national constitutional instruments.¹⁴⁹

Constitutionalisation, as defined by Aoife, is a process where a legal system goes from an *ad hoc*, decentralised and consent-based order to a system where the law controls the use of power and governance.¹⁵⁰ Constitutionalisation requires that legal order moves from an arrangement where national actors are not accountable to the people to a structure that gives room for checks and balances. This means that supranational legislation will be transposed to domestic legislation giving the supranational entity a greater influence over domestic constitutions. Here, constituents of constitutionalism will become part and parcel of supranational legislation relieving the state from its tasks while recognising actors within the supranational system. In this process, states are seen as dynamic actors during constitutionalisation since their role will and is potentially already becoming less significant within a constitutionalised universal order, however below total dissipation.¹⁵¹

Another significant component of the legal theory of integration is the concept of ‘conservatory principles’ rooted in constitutionalism.¹⁵² This denotes that states are the original custodians of power from which some power is relinquished to supranational authorities. Thus, the conservatory principles aim at maintaining the equilibrium of power between states and supranational bodies. Since these international organisations derive their authority from Member States, there must be regulatory instruments aimed at preserving national interests. In the EU, the legal bases of conservatory principles have been established in the treaties governing the EU¹⁵³ and are enshrined in article 5 of the Treaty on the Functioning of the European Union (TFEU).

¹⁴⁸ Fagbayibo 2010 op cit note 138 at 22.

¹⁴⁹ Ibid.

¹⁵⁰ A O’Donoghue ‘International constitutionalism and the state’ (2013) 11(4) *International Journal of Constitutional Law* 1021—1045.

¹⁵¹ D Haskell John ‘The Strategies of Rupture in International Law: The Retrenchment of Conservative Politics and the Emancipatory Potential of the Impossible’ (2012) 13(5) *German Law Journal* 468-82.

¹⁵² Fagbayibo 2010 op cit note 138 at 22.

¹⁵³ Subsidiarity principle was initiated by the Maastricht Treaty, which included a reference to it in the TEC. The Single European Act (1987) previously put a subsidiarity criterion into environmental policy. While maintaining the reference to the principle of subsidiarity in the renumbered Article 5(2) of the EC Treaty, the Treaty of Amsterdam

There are four models of conservatory principles: subsidiarity, proportionality, attributing powers and flexibility.¹⁵⁴ The subsidiarity component prescribes that unique issues that do not fall under the exclusive competence of the supranational entity and cannot be effectively and efficiently handled at the national level, but can be handled by the supranational authority. Following article 5(3) of the TFEU, the subsidiarity principle allows the EU to exercise a non-exclusive competence only if the required goal cannot be realised appropriately by the Member State's action alone but can aptly be achieved at the level of the Union owing to the outcome of the suggested action.¹⁵⁵ Thus the EU may only intervene if its actions are more effective than those of the member state. The demand for subsidiarity would mainly arise where there are overlapping competencies and in cases of delegation and pooled sovereignty.¹⁵⁶

Proportionality is fact-finding on whether the activities carried out by international organisations are relevant for achieving stated objectives. For instance, it ensures that any action taken by the EU should not exceed what is required to achieve the goals of the applicable treaties. Elaborating on the EU as our model for specimen, the principles of subsidiarity and proportionality govern the exercise of Member State competencies where the EU does not have such exclusive authority.¹⁵⁷ In the AU, the AfCFTA Committee on NTBs is expected to intervene only on NTBs inter RECs complaints and when the NTB measure is beyond RECs national monitoring committees and national focal points.¹⁵⁸

Concerning the attribution of powers, supranational bodies can only exercise power surrendered to them by the Member States. This means the EU can exercise only those powers given to it by the treaties. This can also be referred to as the principle of conferral as enshrined in Article 5 of TFEU. Therefore, the EU cannot exercise competence where the legal basis of the

annexed to the EC Treaty a 'Protocol on the application of the principles of subsidiarity and proportionality'. The Lisbon Treaty incorporated the principle of subsidiarity into Article 5(3) TEU and repealed the corresponding provision of the TEC while retaining its wording. The Lisbon Treaty later replaced the 1997 protocol on the application of the principles of subsidiarity and proportionality with a new protocol of the same name (Protocol No 2).

¹⁵⁴ Fagbayibo 2010 op cit note 138 at 23.

¹⁵⁵ A Von Staden, 'Subsidiarity in Regional Integration Regimes in Latin America and Africa' (2016) 79(2) *Law and Contemporary Problems* 27-52.

¹⁵⁶ Ibid at 31.

¹⁵⁷ See Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

¹⁵⁸ Article 12(4) of Annex 5 of the compiled annexes of the ACFTA signed 16 May 2018.

treaty is not found.¹⁵⁹ However, it is argued that this principle is not straightforward, and actors must apply it on a case-by-case basis.

Finally, the principle of flexibility represents a legal understanding under which some Member States may decide to pursue a shared interest outside the institutional framework.¹⁶⁰ When an action is not provided for in a treaty, article 352 of TFEU provides that the EU may act if the desired goal of the action is necessary to achieve the treaty's objectives. Nevertheless, this clause is surrounded by strict processes and restrictions as far as its application is concerned.¹⁶¹ There is no clear policy on the principle of flexibility in the AU. This explains why some Member States have resorted to coup d'états even when the AU frowns at such an unconstitutional change of government.¹⁶²

2.3.2 Political science theories of integration

a) The federal theory

According to Babarinde,¹⁶³ there are three widely acclaimed alleyways to regional integration. The first school of thought maintains that the best approach to regional integration is establishing a superior supranational body, whereby Member States will 'surrender' part of their sovereignty to the higher entity. In these circumstances, there must be legal harmonisation of major NTBs for the supranational organisation to be successful. This path, known as the Federalist Strategy advocates for a federal configuration whereby political power is officially allocated between the state and the supranational levels of government. One of the deepest forms of integration is a federated union, such as the United States, involving political and economic integration, including infrastructure-related services such as telecom and air transport. Secondly, a higher degree of economic interaction, such as trade, and investment, among others, could make integration more cost-effective than simple harmonisation and coordination because it is easier for a State to quit the arrangement. Following the federalist approach, the main source of supranational regionalism, the state will have to cede a fraction of its sovereignty to the novel

¹⁵⁹ E Fierro *The EU's Approach to Human Rights Conditionality in Practice* (2003) 31.

¹⁶⁰ Fagbayibo 2010 op cit note 138 at 23.

¹⁶¹ E Ciongaru 'Principles of the exercise of the European Union competences' (2014) 55(2) *ACTA JURIDICA HUNGARICA* 127–134.

¹⁶² Central African Republic, Egypt, Madagascar, Guinea Bissau and Guinea. The most recent is Mali where there were two coup d'états in two successive years, namely, 2020 and 2021.

¹⁶³ Babarinde, 1996 op cit, note 108.

established supranational authority.¹⁶⁴ Thirdly, harmonisation will handle the problem of diverse legal cultures in federal systems.

Federalism theory seeks to explain the evolution, organisation and management of federations without a normative bend.¹⁶⁵ Two leading schools of thought of the federalist theory have been identified: the liberal and the realist schools.

i. The liberal school

It is linked with 20th-century authors like Spinelli,¹⁶⁶ Burgess,¹⁶⁷ Elazar,¹⁶⁸ and Wheare.¹⁶⁹ Elazar sees federalism as a structure and a process where structures and processes create federal systems. The process of federation centres on the legal harmonisation of Member States' principles, standards and trading practices, especially on NTBs measures. Wheare's classical liberal approach also centres on harmonisation aspects of federalism. Wheare handles the question of how federations are created, saying that there has to be a desire to be under a single independent government for some purposes and, at the same time, a wish to have regional governments responsible for some matters.¹⁷⁰ For states to be under a single independent government for any purpose, legal harmonisation must occur. In other words, they must desire to be united, semi-united but not unitary. This argument distinguishes between harmonisation and unification. Harmonisation strives to coordinate diverse legal systems by removing the main inconsistencies and establishing minimum principles and practices, making the states united or semi-united. At the same time, unification aims to replace different legal systems with one main, unitary legal system. Any process of unification begins with harmonisation.

There must also be a capacity to operate a general government and independent and regional governments that are not submitted to the general or federal government. According to Wheare,

¹⁶⁴ L Olu-Adeyemi & B Ayodele 'The challenges of regional integration for development in Africa: Problems and prospects' (2007) 15(3) *Journal of Social Sciences* 213-218.

¹⁶⁵ S Dosenrode 'Federalism Theory and Neo-Functionalism: Elements for an analytical framework'(2010) 2(3) *Perspectives on Federalism* 1-28.

¹⁶⁶ A Spinelli 'The growth of the European movement since the Second World War' In M Hodges (Ed.) *European Integration*. (1972) Harmondsworth: Penguin 43-68.

¹⁶⁷ M Burgess *Federalism and European Union – Political ideas, influences and strategies in the European Community, 1972-1986* (2006) Routledge, London.

¹⁶⁸ J D Elazar *Exploring federalism* (1987) University of Alabama Press 64-68.

¹⁶⁹ C K Wheare *Federal Government* 4th ed (1963) Oxford University press, London 247.

¹⁷⁰ Ibid.

people wish to unite federally because communities desire security.¹⁷¹ The issue of military insecurity and the consequent need for a common defence, a willingness to be independent of foreign powers, and the understanding that independence can only be secured through a group or union of a political nature and the economic advantage of cooperation. Politically, the community will associate with the federal union as part of the same empire or as a loose confederation. Though operating at varying degrees, all these factors were present in the United States, Switzerland, Canada and Australia, and these produced a desire for a union in these communities.¹⁷²

The above-mentioned factors leading to federation point to the fact that integration will be successful where there is legal harmonisation of NTBs to build a robust supranational union. This is undoubtedly similar to neo-functional theory, but Wheare's federalism does not contain the 'spill-over' concept, making natural development less 'automatic'. Wheare continues to write about the significance of producing comparable social and political institutions.¹⁷³ He concludes his discussion by arguing that states that produce similar social and especially political institutions are the ones that can best build a union. It should be noted that according to Wheare, the need for a union among those who are looking for it has never been present in reality or anticipation unless they have similar political institutions (political harmonisation). This represents one of the most substantial aspects of integration that make states want to work together as one formidable force. If states want to work together towards integration, according to Wheare,¹⁷⁴ they must share some fundamental values, such as having the same economic form and must be organised in the same way considering the goals of their integration arrangement. These are the significant objectives of harmonisation.

However, the liberal school of thought has not expressly indicated that federalism theory equally refers to the regional integration theory or legal harmonisation. No allusion has been made to that, but their agendas have prompted reference to it in this thesis. For example, federalism theory focuses on the creation of new states and new international players as a result of a voluntary resolution to merge more formerly 'sovereign' states into a new one under a

¹⁷¹ Ibid.

¹⁷² Dosenrode 2010 op cit note 165 at 12.

¹⁷³ Wheare 1963 op cit note 169.

¹⁷⁴ Ibid.

higher body; a supranational authority makes it logical to treat it as a regional integration theory. Furthermore, the aspect of states wishing to be united, having the same economic form and been organised in the same way means harmonisation of NTBs principles, standards and practices.

ii. The realist school

Among the proponents of the realist school of federalism are Riker and McKay.¹⁷⁵ Following Riker's rational choice approach, federalism is one means of resolving the challenges of growing and expanding governments. This can only be realised with the legal harmonisation of NTBs. With the increasing advancement in technology, it is possible to administer a bigger geographic area, accumulate more finances, maintain a larger system of government, and ensure security to protect the citizens and an army to guard against aggression. The result is that neighbouring communities will feel insecure or threatened once one community enlarges itself and is forced to expand too. Riker then discusses the successful creation of empires in the ancient period. Empire as a form of state was utterly outdated in the 20th century. So what do newly independent sub-units of former empires do when liberated? Standing alone renders them vulnerable, but some federal agreements allow these states to keep some sort of political self-control and use the larger unit's resources to compete with neighbours.¹⁷⁶ Even though Riker's point refers to former colonies, he does not rule out federal solutions for other groups of countries.

The main component of integration that deals with the topic of theories of regional integration is what Riker describes as 'the federal bargain'.¹⁷⁷ There are two essential elements that Riker identifies as the reasons why political leaders would want to embrace federal bargaining.¹⁷⁸ First, the desire of some political leaders to expand their territories through peaceful means will make them offer the bargain. They will do this because they want to combat an outside diplomatic or military threat or to equip themselves for diplomatic or military aggression of others to enlarge the territory. For those who offer the bargain, their inclination for

¹⁷⁵ H McKay David *Federalism and European Union: a political economy perspective* (1999) Oxford University Press, USA 15-36.

¹⁷⁶ H Riker William *Federalism: Origin, operation, significance*. Boston: Little, Brown, 1964. See also, F Greenstein, I Fred, W Nelson & W Riker 'Federalism' (1975) 5 *Handbook of Political Science* 93-172.

¹⁷⁷ The notion of a bargain here means an aspect of voluntary action, as stated above.

¹⁷⁸ V Craig 'Origin, operation, and significance: The federalism of William H. Riker' (2004) 34(4) *Publius: The Journal of Federalism* 89—108 . See also; McKay David 'William Riker on federalism: sometimes wrong but more right than anyone else?' (2004) 14(2) *Regional & Federal Studies* 167-186.

this is that federalism is the only peaceful means available to achieve the goal of expansion. In all these, the bargain must integrate the legal harmonisation of NTBs to succeed. Secondly, other political leaders will accept the bargain and give up some independence for the sake of the union, which requires harmonisation to concretely establish a supranational union. In this way, they will voluntarily do so because of certain exterior military-diplomatic menaces or prospects. Aspirations for either security or participation that states may have prevail over any desire for self-governance.

According to Riker, federations will fail at the beginning when the two provisions are not met.¹⁷⁹ Still, he outlined that the need for security and participation overshadow the advantages of independence. Riker's theory lays down clear and practical ways to achieve integration realistically and not just on liberal premises. Riker explains why states think in a particular way at a given time, but his examination does not include the inability of states to predict the effects of actions they take.¹⁸⁰ This thesis considers that leaders in decision-making positions would not be fair with others if legal harmonisation is ruled out.

McKay rejects the initial elements for integration as identified by Wheare above. It is, however, important to recognise the basic elements necessary for a successful integration project and for the project to continue to exist without interruption.¹⁸¹ If Riker had used a particular case of a failed federation to make his point, his analysis would have made more sense. A glaring case in point is India's separation from Pakistan. It should be understood that it is practically difficult for states who do not share the same basic culture to form a supranational organisation and stay together. This basic culture is the basis on which future rules and laws would be made and accepted by those directly affected by the laws. A common culture will facilitate understanding fundamental notions such as human rights, the rule of law and democracy. As already mentioned by Wheare, this will help cement the federation and smoothen it.¹⁸²

¹⁷⁹ He did not find out what keeps federations alive and active which is harmonisation of NTBs principles and practices, but he outlined the fact that the need for security and participation overshadows the advantages of independence.

¹⁸⁰ D McKay 'William Riker on federalism: sometimes wrong but more right than anyone else?' (2004) 14(2) *Regional & Federal Studies* 167—186.

¹⁸¹ Unlike Wheare, Riker and McKay are more explicit in their approach of leaving out the cultural element considerations, thus making the analysis deficient.

¹⁸² Deutsch 1971 op cit note 106 at 191.

Riker, in his theory, does not account for the role of institutions of the federation in the integration project. For example, in the case of the EU, institutions like the Court of Justice are understood to mean specialised organs. The Court of Justice's main task is to ensure the uniform application of EU law, thereby preventing the federation from dissolving. There are two or more levels of government in a federation, and it is important to highlight the strength between the levels of government in the federation. The federal institutions need to be sufficiently empowered to prevent the federation from dissolving, but they are not robust enough to compete with the strength of the Member States. A further task of the Court is to be a guardian of the federal initiative. In the United States of America, the US-Federal Court of Justice assumes this role with the federal government and administration, and logically to the president.¹⁸³ In this model, everyday activities strengthen the integration process and facilitate new decisions. The federal institutions try to further the integration project but on their own cannot direct the federation's development. There are no routine and quick steps to the integration process; it all depends on the states promoting it. However, one can not underestimate the role of the federal institutions as the guardians of the integration agenda.

Further, Riker and McKay have not been able to explain the step-by-step integration process by States, which has nothing to do with an all-out decision to integrate or federate on this or that date. The theory does not explain the move from a free trade area to a customs union, which is a progressive process, a point considered in this thesis.

As is always the case, federations depend on the voluntary choice of states to integrate and form a new state or a new international body like in the USA and Australia or the federations of Switzerland, Germany and Austria in Europe. Since federations, in some cases, are the end product of regional integration processes, it would be a significant oversight not to consider the theory of federalism as a regional integration theory. It is acceptable that McKay's evaluation of Riker's theory of federal bargaining in the revised version was a positive examination. It extended the identified menace from that on the exterior and interior diplomatic or military coercion to add economic and social perils also. But as already highlighted above, Riker's theory is short of reasons why factors such as a common culture and institutions promoting the federal

¹⁸³ L Koen 'Interpretation and the Court of Justice: A Basis for Comparative Reflection' (2007) 41(4) *Int'l Law* 1011-1032.

initiative to enhance the integration process and maintain the federation together are not present. The position adopted by this thesis is that it is important to consider culture as a necessary variable when establishing a new federation. This is so because integration is easier within states having the same or a similar culture.

Overall, federal theories present an ‘all out’ situation, where all sovereign states at a particular time accept a federal bargain and form or adhere to a federation. It is difficult for Riker and Wheare to discuss a natural or step-by-step establishment of a federation. That notwithstanding, it can be concluded that the federal theory disregards and pays no attention to the step-by-step creation of a federation, where there is a sluggish or gradual shift of autonomy from the Member States to a higher body. This implies that the federal theories can adequately explain only one kind of regional integration process and not the other, which has significantly informed African regional integration. This was the integration approach adopted by Nkrumah of Ghana, who is considered the founding father of the idea of ‘a united Africa’, which he presented in a Pan-African Assembly held in Cairo in 1960.¹⁸⁴ He took a ‘radical’ (federal) stance on how Africa should unite. In his opinion, African integration could only be achieved through political means, and economic growth would follow. Nkrumah believed the federal bargain was imperative for Africa because Africa had to first equip itself in defence, international affairs, diplomacy, and the economic sphere.¹⁸⁵ Here, two processes possibly lead to the same goal: a new state or international body. He was not in favour of Nyerere’s gradual approach to unity which, according to him, had colonial affinities.¹⁸⁶ However, Nkrumah’s model was later opposed by ‘gradualists’ or ‘confederals’ such as Thabo Mbeki of South Africa and Umaru Musa Yar’Adua of Nigeria,¹⁸⁷ who aligned with Nyerere. They believed that the ‘United States of Africa’ should be built gradually through RECs. However, this gradual approach has not yielded the desired results as Africa is yet to integrate economically. This thesis posits that the federal model is best suited for Africa.

¹⁸⁴ S Okhonmina ‘The African Union: Pan-Africanist aspirations and the challenge of African unity’ (2009) 13(4) *Journal of Pan African Studies* 85-100.

¹⁸⁵ Ibid.

¹⁸⁶ Julius Nyerere of Tanzania is one of the founding fathers of African integration, an advocate of Pan-Africanism and African unity. As mentioned/alluded to earlier, Nyerere is the father of the “gradual” and intergovernmental approach to African integration.

¹⁸⁷ Okhonmina 2009 op cit note 184 at 86.

Further, in the African regional integration project and Nkrumah's view, the political leaders of African governments are not willing to surrender a fraction of their state sovereignty to a supranational authority like the AU. From its creation, the OAU has guarded the sovereignty of African States, and the AU followed on a similar trajectory, although the Constitutive Act moves power from States to a supranational organisation.¹⁸⁸ This apparently nullifies the theory of federalism since the political leaders of African States do not intend to form a federation type of supranationalism to which they will relinquish their sovereignty.

b) The functionalist theory

The functionalist theory posits that Member States are involved in a functional collaboration. The path to regional integration does not require Member States to give away their autonomy. It simply entails and encourages inter-governmental cooperation.¹⁸⁹

The main objective of functionalist authors is to develop an interdisciplinary theory of development based on a different international economic order, different from federalism.¹⁹⁰ The main characteristics of the functional approach are: awareness of the complex reasons behind the disappointing results of the integration processes (not only the economic processes), more realistic definitions of the benefits that developing countries could obtain when integrating each other, and meticulous development of alternative strategies and instruments for integration.¹⁹¹

Mitrany, the principal author of functionalism, postulates that any community's primary purpose is to provide basic welfare and security to its people.¹⁹² Therefore, if the citizens have a good share of what they need and are supposed to have, there will be no protest. He further argues that integration should start with socioeconomic concerns such as sanitation, communication, health, trade and technology.¹⁹³ By this proposition, the functionalists argue that a peaceful international community can only occur if countries collaborate through seminars, practicum, and trade instead of signing treaties and conventions, which are more political. This also requires that power be given to the new international body, which performs the functional

¹⁸⁸ Article 4 (h) of the Constitutive Act 2000.

¹⁸⁹ J Lodge 1994 op cit note 107.

¹⁹⁰ B Andrea 'A step further in the theory of regional integration: A look at the Unasur's integration strategy' (2016) Working paper GATE 2016-17.

¹⁹¹ Ibid.

¹⁹² D Dinan (ed.) 'Encyclopedia of the European Union' (2000) Boulder/London: Lynne Rienner 245.

¹⁹³ D Mitrany 'The Prospects of Integration: Federal or Functional' in Groom, A.J.R and P Taylor (eds.) *Functionalism: Theory and Practice in International Relations* (1975) London: University of London Press 13.

duties that will benefit all stakeholders of the integration project, and they are encouraged to display commitment.¹⁹⁴ Thus, cooperating is more beneficial than being alone. As Rosamond has pointed out, the functionalists see states as an impediment to the functional organisation that serves humanity.¹⁹⁵ Therefore, states cannot completely satisfy humankind, but some of these needs can best be met by disregarding national treaties and conventions. Undoubtedly, functionalists reject the idea of states being the centre of the most functional form of an organisation to fulfil human needs. Thus, state-like entities, such as supranational bodies, should not drive the integration process.

Consequently, classical functionalism believes that regional integration should progress slowly but surely from the socioeconomic aspects rather than political because “form” follows “function”.¹⁹⁶ Functionalists believe that creating a supranational institution should happen accidentally and not be a conscious action.¹⁹⁷

They also posit that international organisations focused on their functional tasks would increase the people’s well-being, interest, safety and happiness more than the state would.¹⁹⁸ They equally assume that the benefits will be far more if the organisation works from small beginnings. The functional approach could eventually entangle national governments in a dense network of interlocking cooperative ventures.¹⁹⁹ The significant outcome of functional integration is that the good results of international cooperation in functional spheres will take away the people's confidence in the state.²⁰⁰

Some scholars have attributed the issue of weak integration in Africa to stakeholders’ poor socio-economic situations and the multiple numbers of regional bodies which are dysfunctional.²⁰¹ This particular school of thought posits that functional regional bodies are the backbone of economic integration in Africa. Mitrany argues that power should be attached to a

¹⁹⁴ D Aworawo ‘Integration, Economic Globalization and Africa’s Development: the Experiences of Nigeria and Botswana’ (2006) 5 *Nigerian Journal of Policy and Development* 23-52.

¹⁹⁵ B Rosamond *Theories of European Integration* (2000) London: Macmillan Press Ltd. 33-51.

¹⁹⁶ Aworawo 2006 op cit note 194.

¹⁹⁷ S Ibrahim, D Ogbeidi and J Adams ‘An intergovernmentalist approach to regional integration in Africa: The efficacy of the African Union (AU)’ (2015) 1(1) *International Journal of Multidisciplinary Research and Modern Education (IJMRME)* 461—476.

¹⁹⁸ Ibid at 472.

¹⁹⁹ Aworawo 2006 op cit note 194 at 26.

²⁰⁰ Ibrahim et al 2015 op cit note 197 at 472.

²⁰¹ A Gabriel *The African Union and the Challenges of Regional Integration in Africa* (2011) 2.

particular task so that the intrinsic connection between authority and a specific territory should be cut off.²⁰² However, Member States are the major players in international relations in Africa – they are unwilling to relinquish their sovereignty to functional units of the AU, especially when they do not directly benefit from doing so.

Dissenting from the arguments of neo-functionalists like Haas, Schmitter and Leon Lindberg, AU, a more neo-liberal supranational body, was intended to integrate the African continent. The functionalist assumption that socio-economic cooperation is required to stop political conflicts and wars ravaging the African continent is a sharp contrast to the existence of eight approved ‘functional’ regional economic communities in Africa. In the West African subregion, for instance, which began a process of economic integration in 1975, warfare and all sorts of bloody conflicts have emerged within and often between states.²⁰³

The SADC, built on the functionalist approach to regional integration, has dysfunctional units of its regional economies. Systems theory assumes that units within a system will perform specific ‘functions’ for the system to function properly. The problem with SADC is that, as evidenced by the sectoral division of functions for each country, the units are dysfunctional. Hence, the organisation itself is also struggling to function properly. However, SADC needs reforms such as eliminating the repetitive and circular use of “function”.

c) Neo-functionalism

The third regional integration approach synthesises the two theories analysed above. This approach asserts that while the federalist theory may be demanding far too much too fast,²⁰⁴ the functionalist theory is too weak and half-hearted.²⁰⁵ Hence, a common ground is proposed, a hybrid of the theories above.

Haas, the father of neo-functionalism, has been critical of Mitrany’s functionalism theory since the 1940s.²⁰⁶ He disagrees with Mitrany that the regional integration process should not be political. Haas understood that the integration process is political and not just a simple,

²⁰² Mitrany 1975 op cit note 193.

²⁰³ For instance there have been civil wars in; Liberia 1989 – 2003, Sierra Leone 1991 – 2002 and Mali 2012.

²⁰⁴ Dosenrode 2010 op cit note 165 at 21.

²⁰⁵ A Hayrapetyan ‘Federalism, Functionalism and the EU: The Visions of Mitrany, Monnet and Spinelli’ (2020) *E-International relations* available at <https://www.e-ir.info/2020/09/21/federalism-functionalism-and-the-eu-the-visions-of-mitrany-monnet-and-spinelli/>, accessed on 08 September 2021.

²⁰⁶ Dosenrode 2010 op cit note 165 at 21-22.

functional or technocratic process. Haas combined functionalism with inspiration from Jean Monnet's pragmatic approach to European integration. Following neo-functionalism, the society comprises diverse people with diverse interests, and only integration will provide a meeting point. The major assumption of neo-functionalism is the issue of spillover, which is an integration process that moves in stages. The process will move from economic to political integration, and states will end up uniting in one international body and, as a result, automatically acquire the status of national political systems.²⁰⁷ The main focus of Haas' neo-functionalism theory is the concept of 'spill-over', which stipulates that integration in one economic or social sphere will, after some time, cause the other economic or social areas to be integrated so that the overall benefit of integration can be guaranteed in the first policy area. As time goes on, the political aspect of integration will be achieved.

Another key element is the existence of a high authority (above the nation states), which would point the integration process the right direction. The integration project would be headed by professional leaders who would mean that the union's administration stands on a practical foundation and not in theory to satisfy the interests of the people. Haas based his initial thesis on the idea of loyalty. To this extent, political spillover would be accomplished through loyalty transference from the nation-state to the high authority.²⁰⁸ The neo-functionalist strategy posits that regional integration can best be achieved by creating specialised organs of the supranational body, and these organs have the task of promoting integration in the member countries. If they perform their duties well, the spillover effect will occur because the stakeholders will see their effectiveness and accord them more authority.

Haas' initial stipulations for regional integration were that the organs should be economic, have pluralistic social systems and be industrialised.²⁰⁹ There should be a common pattern of ideology within the organisation's units. This approach explains integration in an all-inclusive social organisation. However, the neo-functionalist theory was closely tied to the case of EU integration. Haas revised it to make it applicable to all other integration projects.²¹⁰ As seen in

²⁰⁷ Rosamond 2000 op cit note 195 at 51-52.

²⁰⁸ B Rosamond 'The uniting of Europe and the foundation of EU studies: revisiting the neo-functionalism of Ernst B. Haas' (2005) 12(2) *Journal of European Public Policy* 237-254.

²⁰⁹ E B Haas and P C Schmitter 'Economics and differential patterns of political integration: Projections about unity in Latin America' (1964) 18(4) *International Organization* 705-737.

²¹⁰ Ibid.

the concept of pluralism, culture was considered in Haas' theory, and it has an impact in their examination of the probable unity of Latin America, though not as a focal point.²¹¹

This shows that Haas also agreed with the step-by-step integration process, unlike his federalist counterparts. Again, based on the views of Tranholm-Mikkelsen,²¹² Haas understood that it is necessary to put more political effort into achieving integration. It was also important to create a higher body to pilot the affairs of the integration project to meet common integration interests. The motives and driving forces of integration would be the pursuit of politics. The transfer of loyalty towards the new 'unit' was another key issue for Haas. Thus prompting him to note that:

'Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities to a new centre, whose institutions possess or demand jurisdiction over pre-existing national states. The result is a new political community, superimposed over the pre-existing ones.'²¹³

According to this approach, integration is an intrinsically sporadic and conflicting project. With the democratic and pluralistic principles, states will see that they can no longer withstand the regional pressure and demands of integration and will relinquish more of their authority to the supranational body they established.²¹⁴ Over time, the nationals will also start looking at regional organs for satisfaction. If this is done, there is a likelihood that economic and social integration will 'spill over' into political integration. According to Schmitter,²¹⁵ the spillover could happen if certain changes occurred. There should be increased interdependence between Member States, the development of a robust regional bureaucracy and the development of independent, regional interest organisations capable of acting in the region.

Haas and Schmitter did their primary studies on European integration and the Economic Community/EU. Schmitter's interpretation of neo-functionalism's distinctive maxims is

²¹¹ Ibid.

²¹² J Tranholm-Mikkelsen Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC. (1991) 20(1) *Millennium: Journal of International Studies* 1-22.

²¹³ E B Haas *The Uniting for Europe, Social and Economic Forces 1950-1957* (1958) 16.

²¹⁴ Frank Schimmelfennig 'Regional integration theory' (2018) *Oxford Research Encyclopedia of Politics* 1-45.

²¹⁵ P Schmitter 'Ernst B. Haas and the legacy of neo-functionalism' (2005) *Journal of European Public Policy* 258-260.

exemplary, and it is a central contribution to the ‘new generation’ of neo-functionalists.²¹⁶ The maxims state that:

- States are not exclusive and may no longer be the predominant actors in the regional/international system.²¹⁷
- Rather than common ideals or identity, interests are the driving force behind the integration process.²¹⁸
- Decisions next to integration are normally taken with an imperfect knowledge of their consequences and frequently under the pressure of deadlines or impending crises.²¹⁹
- Functions or issue areas provide the usual foci for the integration process (at least in Western Europe), beginning with those initially considered the least controversial and, hence, easiest to deal with.²²⁰
- Since actors in the integration process cannot be confined to existing national states or their interest groups and social movements [...], a theory of it should explicitly include a role for supranational persons, secretariats, and associations whose careers, resources and expectations become increasingly dependent upon the further expansion of integrative tasks.²²¹
- [Actors] Strategies about integration are convergent, not identical.
- Outcomes of international integration are neither fixed in advance by the founding treaty nor are they likely to be expressed exclusively through subsequent formal agreements.²²²
- This shows that Schmitter is aware of the need for national leaders who are politicians acting in the supranational setting to advance the process of integration. This goes a long way to buttress the fact that Schmitter is more pragmatic in his analysis of the concept of regional integration.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

The main theoretical underpinning of neo-functionalism is that the integration process involves all the different aspects of integration, such as those of the functionalist ideology and political areas.²²³ Therefore, countries should follow all these areas of integration, beginning with “low politics”, which are also “strategic economic sectors.”²²⁴ States are therefore advised to create a supranational entity that will serve the common interest and not the interest of selected individual countries who are stakeholders in the integration project.²²⁵

States are not the only participants in the integration agenda and may, in future, not be the leading participants because of the spill-over notion.²²⁶ This notion, primary in the neo-functionalist theory states that, integrating one aspect in the integration process will pressure other similar sectors to integrate. As a result, Member States would slowly begin to get entangled and gradually become interdependent from one sector to the other. In the end, their citizens will rely on the supranational authority to satisfy them. If this is done, it will increase the possibility of economic and social integration to ‘spill over’ into political integration.²²⁷

The fact remains that neo-functionalist theories do not empirically explain the growing role of the states in Africa and the over-protection of their sovereignty and territories despite the need to build a continental union. Also, the market integration model (the African common market), which the AU relies heavily upon, expects the African integration process to follow the economic integration stages from a free trade area to a political union. However, this belief is not working because the continent’s share of intra-regional trade has traditionally been low.²²⁸

Neo-functionalism has received varied criticisms. One of the most criticised ideas is the decreased role and authority of the Member State. The concept of spillover was criticised by scholars like Hoffmann,²²⁹ and this brought about the theory of intergovernmentalism. This was mostly based on the argument that economic integration would eventually lead to political integration.

²²³ Dosenrode 2010 op cit note 165 at 22.

²²⁴ Rosamond 2000 op cit note 195 at 51-52.

²²⁵ Ibid.

²²⁶ Dosenrode 2010 op cit, note 165 at 24.

²²⁷ Ibid at 23.

²²⁸ See chapter one at 6.

²²⁹ S Hoffmann ‘Obstinate or obsolete? The fate of the nation-state and the case of Western Europe’ (1966) 95(3) *Daedalus* 862-915.

d) The theory of intergovernmentalism

The theory of intergovernmentalism was first proposed by Stanley Hoffmann.²³⁰ According to this theory, Member States have authority and control over the extent to which European integration can go. Also, the degree to which the spillover concept restricts the liberty of government actions was limited by the logic of diversity conceived by the theory. The logic of diversity means that on essential matters, the loss of one state cannot be compensated by the gains of other areas.²³¹ Hoffmann considers that any progress in the integration agenda, especially at the supranational level, is driven by Member States and governments. Intergovernmentalism rejects the notion of spillover upheld by neo-functionalist theorists and the thought that supranational entities have the same influence and authority (political authority) as Member States governments.²³²

Intergovernmentalism drew inspiration from neo-realism, a classical international relations theory. Neo-realism shares the realist belief that acting on the international political stage is a decision that the Member States willingly take in an environment where there is anarchy without any superior influence. Based on Kenneth Waltz,²³³ the theory of intergovernmentalism comes from an international system where anarchy is the order of the day. The system is also made up of officially and practically identical components. Thus, international bodies are forums for the continuation of power politics.

The most widely referred to version of intergovernmentalism, is Moravcsik's liberal intergovernmentalism view.²³⁴ It is influenced by the works of Keohane on neoliberal institutionalism.²³⁵ Moravcsik posits that the integration project can only progress as far as the national governments want it to go. He based his assumptions on the rational behaviour of states

²³⁰ Ibid. The key proponents of neorealism/intergovernmentalism are Stanley Hoffmann, Andrew Moravcsik, Kenneth Waltz, John Mearsheimer, just to name a few. See also Ibrahim et al op cit at 474.

²³¹ S Hoffmann (1966) op cit note 227. See also S Hoffmann 'Reflections on the nation-state in Western Europe today' (1982) 21 (1) *J. Common Mkt. Stud.* 21-38.

²³² I Heiko 'The Common Foreign and Security Policy of the European Union: A Stress Ratio between Intergovernmentalism and Supranationalism' (2010) 20(3) *earicle* 301-324.

²³³ Rosamond 2000 op cit note 195 at 132.

²³⁴ A Moravcsik 'Preferences and power in the European Community: a liberal intergovernmentalist approach' (1993) 31(4) *JCMS Journal of Common Market Studies* 473-524.

²³⁵ Rosamond 2000 op cit note 195.

that the states' actions are based on the achievement of their goals.²³⁶ His approach emphasises the preferences and power of the states. The politicians present their states' preferences in policy development, meaning that all decisions made by the EU result from bargaining among states. Moravcsik regards the EU integration as a pattern of commercial advantage, the relative bargaining power of governments and the incentives that take care of the credibility of inter-state commitment.²³⁷

There are two dimensions to liberal intergovernmentalism, namely: supply and demand. There is a demand for cooperation from the national government and a supply of integration from inter-state negotiations. This has been exemplified by the EU integration. The relationship between demand and supply dimensions of liberal intergovernmentalism is explained by economic interest, relative power and credible commitments.²³⁸ He argues that European institutions exist because it is the will of European member countries to use these mechanisms to achieve their objectives, thereby satisfying their interests. The EU is a forum where the Member States strategically bargain their interests, defined by domestic-level negotiations.

Following Rosamond,²³⁹ intergovernmentalism proceeds with the basic assumption that the power exerted by international organisations comes from the national governments and rules are made by their unanimous decisions. Therefore, the international body is unquestionably empowered by the Member States. It is the integration of unequal partners, and its benefits are polarised. Thus, integration, driven by states, is based on their interests, and the domestic political and economic issues of the day. It also dismisses the thought that supranational organisations are on an equal level or higher (in terms of political influence) than states.

The theory of intergovernmentalism, especially Moravcsik's view, was seen to strengthen neofunctionalist beliefs somehow. Lindberg, for example, states that the actions of member countries during negotiations at the European stage are based on their national interests as seen

²³⁶ A Moravcsik 'The Choice for Europe: Social Power and State Purpose from Messina to Maastricht' (1998) *Ithaca, NY*.3-9.

²³⁷ Ibid.

²³⁸ Ibid at 4.

²³⁹ Ibrahim et al 2015 op cit note 197 at 474-475.

in the European Commission,²⁴⁰ where Member States are key actors. The commission attends to policy items selected by Member States as issues to be considered for integration.²⁴¹

Liberal intergovernmentalism has been criticised by many scholars as being an idea and not a theory,²⁴² based on the fact that Moravcsik falls short of identifying the conditions under which his ‘theory’ could be experimentally contested. This is a similar argument that was advanced in the case of neo-functionalist theory. The liberal intergovernmentalist approach did not account for what goes on in the day-to-day policy-making at the organisation where there is no bargaining. He did not consider the fact that institutions interact among themselves, which has an impact on membership.²⁴³

In line with African integration, the intergovernmentalism approach to integration was buttressed by Julius Nyerere.²⁴⁴ He promoted a step-by-step and intergovernmental confederal methodology to unity which permits Member States to retain their sovereignty.²⁴⁵ Intergovernmentalism theory adequately elucidates why Morocco initially withdrew from being a member of the AU. This is because the supranational body took decisions that did not serve the national interest of Morocco by accepting the disputed Sahrawi Arab Democratic as an independent state.²⁴⁶

e) Interdependency theory

The interdependency theory of Nye and Keohane accepts Haas’ contributions related to institutions but simultaneously seeks to defy the realist leading theory of the 70s. In its earliest formulation in 1977, the “complex interdependence theory” aspired to contest realism with the

²⁴⁰ R McGeehan ‘Europe's Would-Be Polity: Patterns of Change in the European Community’ (1972) 66(2) *American Political Science Review* 681-2.

²⁴¹ D Corbey ‘Dialectical functionalism: stagnation as a booster of European integration’ (1995) 49(2) *International organization*, 253-84.

²⁴² D Wincott, ‘Institutional Interaction and European Integration: Towards an Everyday Critique of Liberal Intergovernmentalism’ (1995) 33 (4) *J Common Mkt Stud* 597-610.

²⁴¹ M A Pollack ‘International Relations Theory and European Integration’ (2001) 39 (2) *Journal of Common Market Studies*, 221-44.

²⁴² Luwam G Dirar ‘and Rethinking Theorizing Regional Integration in Southern Africa’ (2014) 28 *Emory International Law Review* 123 -166.

²⁴⁵ Ibid at 129.

²⁴⁶ Ibrahim et al 2015 op cit note 197 at 475.

presentation of two ideas: realism and complex interdependence which can be regarded as a range where realism can be placed.²⁴⁷

Keohane and Nye noted that international relations in the 1970s were characterised by an increasing interconnection between domestic and international affairs, termed “intermestic”. From this perspective, the realist definition of states as billiard balls motivated by rational choice and national interest is not useful anymore.²⁴⁸ Following this idea, they advocated for trans-governmental networking and interstate relations outside formal channels. Notably, this theory was influenced by the implications of the 1973 economic crisis, which showed the interconnection between national economies and the interdependence of all states on resources, notably oil.

Remarkably, a decade later, Keohane and Nye, in *Power and Interdependence Revisited*, reduced their level of criticism against realism and assumed some realists' claims and tried to collaborate with realism to create a broader realism or at least, complement it.²⁴⁹ Also, the increase in international relations and the second phase of the Cold War seemed to give force to realist interpretation despite complex interdependence theory formulations.

In the end, Keohane and Nye are repositioned between realism and liberalism and in their own words:

Our analysis linked realist and neorealist analysis to concerns of liberals with interdependence. Rather than viewing realist theory as an alternative to liberal interdependence theory, we regarded the two as necessary complements to one another.²⁵⁰

Knowing the argumentative stronghold of neo-realism but conscious of its lack of explanation, they reformulated a modified form of neo-realism that emphasised exchanges. According to Keohane, they viewed their structural models as efforts to advance the realist analytical ability to explain the international system change. They saw themselves adapting realism and attempting to go beyond it rather than rejecting it.²⁵¹ These exchanges would

²⁴⁷ R Keohane & J Nye *Power and Interdependence* (1977) 40.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ R O Keohane and S J Nye ‘Power and Interdependence revisited’ (1987) 41(4) *International Organization* 725-753.

²⁵¹ R O Keohane ‘Theory of World Politics: Structural realism and beyond’ (1986) 158 *Neorealism and its Critics* 190-197.

generate a mutual dependency until weaving an interdependent network in which national and regional aspects were blurred. In any case, the thin line between national and regional integration kept getting thinner because of the growing international institutions and their importance as they began talking in an “intermestic” way.²⁵²

Besides the limitations of Nye and Keohane’s formulations, announced ten years after their *magnum opus*, there have also been concerns about the complex interdependence consequences. The optimism showed in 1977 about unleashing cooperation processes among states has been constrained. This is because cooperation is no longer understood as a fundamental consequence of interdependence. Realising their shortcomings, Keohane and Nye went on to write:

In analysing the politics of interdependence, we emphasised that interdependence would not necessarily lead to cooperation, nor did we assume that its consequences would automatically be benign in other respects. The key point was not that interdependence made power obsolete far from it, but that patterns of interdependence and patterns of potential power resources in a given issue-area are closely related.²⁵³

From a neoliberal institutionalist point of view, the regional/inter-regional mechanisms are seen as channels for the collective solution to common problems – for example, obstacles to investor socialising frames within which errant members can be brought into line with the dominant rules. This approximation emphasises the role of state agency and understands regionalisation as a means to negotiate intrastate demands in the context of external forces in transformation.

It can be concluded that African regional integration cannot be explained with the interdependence theory because most African states are presently cooperating more with foreign countries than their peers, especially regarding trade. For example, African states that were former colonies of France trade and cooperate more with France than other African states.²⁵⁴ The same applies to former British colonies such as Nigeria and Ghana.

However, to some extent, COMESA members depend on one another for trade, although the existence of barriers to this interdependence under the guise of regulatory frameworks imposed

²⁵² Ibid.

²⁵³ R O Keohane & J S Nye 1987 op cit note 250 at 730.

²⁵⁴ For example Cameroon, Gabon, Chad, Senegal, Mali and Central African Republic trade more with France, their colonial master.

by member countries makes the issue of interdependence complex.²⁵⁵ In the event of an effective operationalisation of the AfCFTA, trade between African States can be said to be interdependent.

f) Structuralism theory

Structuralism explains regional integration from a sociological and economic perspective, in line with Marx's materialism theory.²⁵⁶ The Cold War realist justification was criticised and replaced by the political theories of the global economy, which became dominant with writers such as 'Wallerstein of the core-periphery theory' and 'Raul Prebisch, president of the Economic Commission for Latin America and the Caribbean (ECLAC) of the dependency theory.'²⁵⁷

According to neorealism, disputes are part and parcel of the structure of a system or an organisation. In contrast, Marx's materialism theory sees it as what causes the system's structure to change.²⁵⁸ Both theories agree on organisational conflicts but differ on how they arise. Neorealism holds that dispute is a natural inborn attribute of a human being. It shows up because of their power-seeking nature with other system players in the political structure. On the other hand, Marx theorises that dispute is a way through which constant change arises in human personality and the need to change laws and policies in the system for growth, progress and better social relations. With this philosophy, new kinds of conflict are bound to arise. Therefore, neorealism views disputes as a result of an existing system, while materialism views them as a cause for structural change. Consequently, structuralism contradicts multilateralism and neoliberal institutions because it promotes disparities and partial structures; nonetheless, they recognise that it is only in a multilateral world that this unfair system set-up can be fought. Still, multilateralism is seen globally as a ground for the battle between the centre and the periphery. On this avenue, the complaints of the periphery may be united as common requests to the centre for structural change in the global economy.

South American academics have used structuralism to describe the course of the South American regional integration scenario. In this line of thought, the writings of Helio Jaguaribe

²⁵⁵ S Mukwena & J Kurebwa 'The Implications of Nontariff Barriers to Trade on COMESA Free Trade Area: The Case of Zimbabwe and Zambia' (2019) 15(2) *Canadian Social Science* 34—43.

²⁵⁶ S C Santos 'Regional Integration Theories: The Suitability of a Constructivist Approach (at least, in the case of South America)' In XXI IPSA World Congress of Political Science-Globalisation and Governance. Paper 2009 383, 1-28.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

and Aldo Ferrer justified regional integration as a protective response to global side-lining spawned by the international economy.²⁵⁹ Concurrently, their socio-cultural inter-regional uniqueness was given great significance above economic preferences. Jaguaribe opined that ‘Mercosur is the main tool for its members to protect their international interests and, in the long term, to preserve their identity and national autonomy.’²⁶⁰

Although Ferrer shares related views with Jaguaribe, his claims are redirected to the differences concerning the ‘ideal Mercosur and the possible Mercosur’.²⁶¹ The ‘ideal Mercosur’ has been distinguished by the EU to buttress its frustration with its inability to form a supranational entity. On the other hand, the ‘possible Mercosur’ is an assessment of how South America was, in the 80s alongside the state of affairs twenty years on, confirming acceptable results and encouraging outlooks after earlier mutual agreements with ‘Sarney and Alfonsín.’²⁶² Needless to say that Ferrer’s designation for ‘the possible Mercosur’ denotes recommended standards for the future and concurrently points toward criticisms of several previous occurrences. However, South American structuralism has been criticised for its neoliberal trade and industry policies of the 90s, illustrated by the Washington Consensus.²⁶³

To an extent, the structuralism theory can be relied upon to explain integration in Africa. However, factors impeding African integration are both political and economic. These range from political will to low levels of inter-regional trade²⁶⁴ and inequalities.

g) Organisational theory

All of the above theories can be incorporated into the organisational theory, which encompasses a vast field of research. The richness of the organisational theory concepts allows for a better

²⁵⁹ Ibid.

²⁶⁰ Ibid at 16.

²⁶¹ Ibid at 17.

²⁶² Ibid. Alfonsín and Sarney, signed 11 protocols that would increase trade between their two countries (Argentina and Brazil). This was a program of economic integration that was geared towards the long-awaited Latin American common market. The agreements grant mutual preferences in purchases of industrial and agricultural goods over goods from third countries and stress greater integration of energy, communications and transport.

²⁶³ John Williamson ‘The strange history of the Washington consensus’ (2004) 27(2) *Journal of Post Keynesian Economics* 195-206.

²⁶⁴ In July 2020, 26 of the 55 African States updated their trade figures. Intra-Africa trade for 2019 was estimated at US\$69 billion; 5 per cent less than in 2018. Intra-Africa trade accounted for 15 per cent of Africa’s total trade in 2019; the same as for 2018. Over the last ten years intra-Africa trade has remained low; the highest was recorded in 2015 and 2016 with 19 per cent and 20 per cent of total trade. See Tralac Summary of intra-Africa trade 2019, See also UNCTAD, Economic Development in Africa Report 2019.

understanding of the AU integration processes and functioning using the EU model. Organisations exist because they can assist members in achieving their development and other goals – which they would not be able to achieve individually. The stakeholders have an interest and a share in the organisation, in everything the organisation does and how well it executes its tasks.²⁶⁵ As such, the members are inspired to get involved and play an active role in the organisation if the benefit they receive is more than the contribution they make to the organisation.

Different groups of stakeholders use different organisations, and their reasons and individual objectives differ.²⁶⁶ An organisation's effectiveness varies for each group, as each group evaluates the organisation by looking at how it best accomplishes its aspirations. Stakeholders' aspirations are sometimes conflicting, and as such, they debate over their benefits.

Stakeholder groups engage in continuous and simultaneous competition and collaboration, which is the essence of the organisation.²⁶⁷ This is a characteristic of the AU. All members want the organisation to continue to exist as a basic requirement for pursuing their ambitions, and because of this, they work together. They bargain over the allocation of benefits to safeguard their interests. As Bacharach and Lawler have argued, stakeholders operate in two dimensions in an organisation.²⁶⁸ Stakeholders are either in cooperation or in competition. They compete when they feel the need and cooperate when they see the importance. No stakeholder works against another but, at the same time, none of them will give up their interests to work together on every matter for the sole purpose of an organisational agreement or for the benefit of the entire organisation.²⁶⁹

h) Relating global regional integration theories to AU integration

Attributing the theory of intergovernmentalism to the African regional integration case demonstrates that the heads of states and governments pursued the integration project. The roles played by former presidents Thabo Mbeki of South Africa and Olusegun Obasanjo of Nigeria

²⁶⁵ G Jones *Organizational Theory, Design, and Change* 4th ed (2004) New Jersey: Prentice Hall 253.

²⁶⁶ A Ujupan 'Reconciling theories of regional integration: a third way approach' 2009 University of Ulster Available at: www.jhubc.it/ecpr-instabul/virtualpaperroom, accessed on 28 January 2021.

²⁶⁷ G Morgan *Images of organizations* (2006) Thousand Oaks: Sage Publications 54.

²⁶⁸ S Bacharach & E Lawler 'Political Alignments in Organizations: Contextualization, Mobilization and Coordination' in Kramer, R. M. & Neale, M. A. (eds.) *Power and Influence in Organizations* (1998) Thousand Oaks 14.

²⁶⁹ Ibid.

illustrates this point.²⁷⁰ Therefore, the AU, like the OAU, remained the captive of competition for national interests with rulers focusing on national benefits through integration or even unification under the canopy of Pan-Africanism.²⁷¹ Therefore the assumption was that the formation of the AU was originally the desire of some national leaders and many other African states who were unwilling to abandon their leadership positions.²⁷² These relate to the realist view that in an international system of anarchy, there is room for order since states will want to cooperate to survive, which makes it possible for the AU to lessen anarchy.²⁷³ This means that as much as a supranational body has been created to strengthen integration, African countries will continue to direct the process to meet their national interests. Some of these significant interests are national survival and preservation of sovereignty.

It can be said that the major reason for the failure of the OAU was its attachment to the policy of non-interference in Member States' internal affairs. This implies that the OAU Member States cling to their national sovereignty to the detriment of the organisation. As already stated, the Member States of the integration project must be willing to relinquish some part of their sovereignty for effective integration. The OAU could not manage disagreements and civil wars, which were prevalent at the time. Following the views of Abdalla Bujra,²⁷⁴ the OAU attempted to restore peace among African countries, but since it did not have an army, it could not successfully manage the civil wars. This does not accurately capture the situation, because even if the OAU had an army, the policy of non-interference in the internal affairs of Member States would have prevented them from doing so. That notwithstanding, there remains hope as this policy of non-interference in the affairs of the member states, which limited the powers of the OAU from realising its objectives, has been addressed by the Constitutive Act of the AU.²⁷⁵ The reaction of ECOWAS and the AU to suspend the Republic of Guinea from AU activities due to

²⁷⁰ A Biney 'The Legacy of Kwame Nkrumah in Retrospect' (2008) 2(3) *Journal of Pan African Studies* 129-159.

²⁷¹ Nsongurua J Udombana 'Can the Leopard Change Its Spots--The African Union Treaty and Human Rights' (2002) 17 (6) " American University International Law Review, 1177-1262.

²⁷² Ibrahim et al 2015 op cit note 197at 475.

²⁷³ Ibid.

²⁷⁴ A Bujra Transition from the OAU to the AU. Being Lecture delivered at ACARTSOD Tripoli, Libya on 23 September 2002 P.1.

²⁷⁵ Specifically, Article 4(h) of the Constitutive Act provides for 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.'

the military coup that overthrew a sitting president, President Alpha Conde, is an indication of hope.²⁷⁶

Following the lessons learnt from third-world integration processes, especially in Africa, the structuralist approach deals with regional integration from a social perspective.²⁷⁷ Accordingly, the factors that determine the successes and/or failures of regional integration processes among developing countries are both economic and political.²⁷⁸ Economically, the region's global development level notes the developmental inequalities between states and the existing level of economic interdependence account for some of the failures of the AU. For example, since some states rank their development better than others, opening their borders to other African states will hamper their economy. On the other hand, the complementarity of resources, production factors, the chosen integration model and the applicability of integrating policies will facilitate the AU's success if reinforced. Politically, if the level of political willingness and institutional stability is strengthened, free trade in Africa will be a reality. The level of political equality within African states, notably the socio-political systems in force and the efficacy of national and common institutions and their capacity to adapt to ongoing changes, will contribute to the success or failure of the AU project.

Exploring why organisations are created provides a logical response to how such a space is best able to satisfy collective interests instead of individual needs. Individual interests are not necessarily pragmatic; they could also be ideological.²⁷⁹ In reflecting on the creation of the OAU, the interests that the founding fathers and the African states portrayed were: to liberate Africa from the yoke of colonialism, co-ordinate and intensify the cooperation of African countries to attain living conditions for Africans, defend the territorial integrity, maintain sovereignty and independence of African countries and ultimately form a united state of Africa.²⁸⁰ Individual actions become challenging if the focus is not on being highly interdependent. From the

²⁷⁶ President Alpha Conde was ousted on the 5th of September 2021 by a military coup.

²⁷⁷ B Andrea 'A step further in the theory of regional integration: A look at the Unasur's integration strategy' 2016 Working paper GATE, 17.

²⁷⁸ Ibid.

²⁷⁹ A Ujupan 2009 op cit note 266.

²⁸⁰ Kwame Nkrumah *Africa must unite* (1963) London: Heinemann at 142. The Ghana-Guinea-Mali Union formed in January 1960 known as the Union of African States (U.A.S.) was to form the nucleus of the United States of Africa. It had a Charter which was declared open to every state or federation of African States which accepted its aims and objectives. Articles 3 and 4 of the Charter contained the aims and activities of the Union. See also the objectives of the OAU Charter 1963 article 2.

organisational point of view, this explains the emergence of the African integration project whereby national leaders convened and ‘seemingly’²⁸¹ placed their political will and resources under the jurisdiction of a higher authority (AU). These synergises with all theoretical perspectives for the emergence of the African Integration project.

Every member country, by joining the organisation, is intentional in their engagement. From its inception in 1963, the name itself (OAU) reflected the relevance of the word ‘organisation’, which organisational theory itself depicts. In time, Member States joined the AU for the same reasons as the founding fathers – they knew their aspirations could only be attained considerably within the organisation. Member states are organisations since they comprise different groups who negotiate their interests until common ground is reached. It is accepted that Member States, as shareholders, have different shares. This distinction is confirmed by Bacharach and Lawler (1980) who maintain that Member States are categorised according to their strength and authority.²⁸² Therefore it can be inferred that the most powerful will follow their priority goals.

Like any organisation, membership of the AU is governed by norms and procedures, and in this instance they are embedded in the Constitutive Act and the African Charter.²⁸³ One of the significant areas of divergence between theories of regional integration is the status, importance and power of supranational institutions.²⁸⁴ Here the situation is similar to that in an organisation. In any organisation, stakeholders transfer power and control to a system of management which decides and implements policies for the organisation. The management system of every organisation influences its choices and priorities but still considers the aspirations of stakeholders to guard against loss of position by the affected member. The AU Summits, on the other hand,

²⁸¹ The word ‘seemingly’ is used here to denote that African leaders disguised their individual interest to make the citizens believe that they were working for the advancement of their common good. See also Udombana 2002 op cit note 271 at 1257.

²⁸² Bacharach & Lawler 1998 op cit note 268.

²⁸³ The African Commission on Human and Peoples’ Rights existed since 1986 and is established under the African Charter on Human and peoples’ Rights (The African Charter) rather than the Constitutive Act. It is the supreme African Human Rights body with the responsibility of monitoring and promoting compliance with the African Charter. A Protocol to the African Charter also provided for the creation of the African Court of Human and Peoples’ Rights which was established in 2006 to supplement the work of the Commission.

²⁸⁴ A Ujupan 2009 op cit note 266.

are similar to stakeholder meetings in the organisation, which have decision-making and delegation powers where necessary.²⁸⁵

The integration process is another contentious aspect among integration theorists, mainly neo-functionalism and intergovernmentalism. Neo-functionalists promote gradual integration and spill-over. This concept could not explain stagnation in the AU, especially in most of its RECs.²⁸⁶ Intergovernmentalists contend that Member States control the extent to which integration can go and delegate power where necessary for the supranational institutions to accomplish their goals. The organisational theory has implications here, as it is within an environment and continuously adapts both externally and internally. Causes of changes can also vary, such as economic factors at an intra-African trade level or social or technological ones. The AU has to boost trade between states within RECs and adopt the harmonisation of NTBs for Africa to start experiencing negative integration. This will ultimately strengthen the role of the AU.

The need for political change is vital. For the AU to effectively achieve its integration goals, there is a need for leadership change in Africa at the national and continental levels. Integration stagnation is a phenomenon of resistance to change. There is an assertion that the main vital element of change is people, and they react to it in three different ways. First, some resist it; secondly, some follow it; and thirdly, some play a leadership role and orchestrate it.²⁸⁷ The

²⁸⁵ For example, the Assembly of the AU decides on the AU's guidelines, determines its priorities, approves its annual programme and oversees the execution of its policies and resolutions. The Assembly is supposed to speed up the integration process of the African region both political and socio-economic. It has the prerogative to give directives to the AU Executive Council, Peace and Security Council to manage war and conflicts, terrorism, emergencies and to restore peace. The Constitutive Act of AU gives the Assembly the right to sanction defaulting Member States in particular situations. The Assembly has delegated this duty to the Peace and Security Council. More so, the Assembly of the AU appoints the following category of persons, the Chairperson and Deputy of the AU Commission and the Commissioners. It is responsible for requests for AU membership, approves AU budget, and considers reports and recommendations from the other AU organs, establishes new committees, specialised agencies, commissions and working groups as it deems necessary. Under the Rules of Procedure, it may also: Amend the Constitutive Act in conformity with the laid down procedures, Interpret the Constitutive Act (pending the establishment of the Court of Justice), Approve the structure, functions and regulations of the Commission, Determine the structure, functions, powers, composition and organisation of the Executive Council. The Assembly may delegate its powers and functions to other African Union organs as appropriate.

²⁸⁶ Stagnation in RECs and AU especially in meeting their treaties objectives, The EAC for example that was originally founded in 1967, collapsed in 1977 and was only re-established in 2000. ECCAS that was formed in 1983, ceased being in operation from 1992 to 1998 and was only revived in 1999. The time frame for the achievement of the harmonisation agenda under article 6 of the Abuja Treaty has not been met. These points are elaborated in chapter four.

²⁸⁷ Jones 2004 op cit note 265.

failure of the AU to denounce dictatorial regimes and arbitrate in the numerous civil wars is an act of resistance to change. It includes, among other issues, the initial withdrawal of Morocco from the AU and the states' refusal to release their sovereignty. It further involves the failure of many RECs to meet their target dates for implementing customs unions and common market objectives and the inability to effectively resolve the problem of overlapping membership within the RECs.²⁸⁸

Jones posits that organisations strive to be independent and not rely on others to provide scarce resources and explore necessary avenues to influence them to make resources available.²⁸⁹ This is another justification for the expansion of the AU. The question that would arise when the AU fully integrates is how, when and where it will comprehensively expand. Relationally, organisational theory responds to the ultimate goal of the AU. Organisations are built up by various stakeholders and numerous interest groups that bargain and struggle for power or influence, and change goals. Stakeholders in organisations bargain with each other for the distribution of organisational benefits. Every stakeholder cannot be satisfied in the same way, and the most influential members usually define how benefits are to be distributed.²⁹⁰ Members do not possess the same strength, and their interactions are characterised by power-dependency variables.²⁹¹ Within the AU, the one aspect that needs attention is the tendency of some states to dominate in leadership and authority, such as Libya, Nigeria, South Africa, other and states that follow their actions.

Goals change as the balance of power changes inside an organisation, which is also evident in the AU. There are old members and new members and states gaining influence, such as South Africa and Nigeria, and those losing influence, like Libya. Even inside Member States, governments change, hence changes of priority. Since the definition of the AU trajectory strongly depends on these internal shifts, the future of the AU cannot be anticipated to be similar to any other organisation. It is assumed that AU configurations will constantly adjust to the

²⁸⁸ The above-mentioned points will be elaborate in chapter four.

²⁸⁹ G Jones *Organizational theory, design, and change* 7th ed (2013) Upper Saddle River NJ: Pearson at 172 –180.

²⁹⁰ Ibid.

²⁹¹ S Bacharach and E Lawler *Power and politics in organisations* (1980) San Francisco: Jossey-Bass Publishers. See also S Bacharach 'Organizational theories: Some criteria for evaluation' (1989) 14(4) *Academy of management review* 496-515.

aspirations and desires of Member States and those of its external environment. Therefore, the process of integration does not need to be conclusive, but continuous.²⁹²

Lastly, the issue of identity, culture and preference change is worth noting. There is a large body of organisational theory that addresses the development of organisational culture.²⁹³ Large organisations usually develop an organisational culture where they cultivate the feeling of belonging to that organisation. Its informal internal environment forms organisational patterns, values, uniqueness and choices. Hence, the organisational theory can also account for the ‘sociological’ dimension of the AU.

In conclusion, the AU regional integration agenda can be viewed at a more concrete economic level, especially regarding trade which is the basis for this thesis. Does African integration involve the elimination of trade barriers or policy harmonisation? According to Laffan,²⁹⁴ the most-favoured nations (MFN), free trade areas, and customs unions, which entail the removal of trade barriers, are demonstrations of “negative integration.” Conversely, common markets and economic unions symbolise “positive integration,” a reason which more often does not require international organisational illumination and policy synchronisation. It can be established that organisations would experience a greater incidence of positive integration as they advance to a more comprehensive integration phase.

2.3.3 Economic theory of integration

Economic integration²⁹⁵ is the most common regional integration form in the world today.²⁹⁶ In the most general sense, economic integration (sometimes referred to as trade or market integration) denotes the process in which the economic barriers between two or more economies are eliminated or reduced. To some, it involves specific government policy decisions, designed to reduce or remove the obstacles that may impede the mutual exchange of goods, services,

²⁹² A Ujupan 2009 op cit, note 266.

²⁹³ Ibid at 8.

²⁹⁴ B Laffan *Integration and Co-operation in Europe* (1992) Psychology Press 4-5.

²⁹⁵ Economic theory of integration is a theory that explains how communities can integrate their economies while economic theories of integration deals with a number of theories under the same banner these theories are the theory of the free trade area, custom union theory, optimum currency area theory and common market theory. See Jacques Pelkmans, 'Economic Theories of Integration Revisited' (1980) 18(4) *Journal of Common Market Studies* 333—354.

²⁹⁶ L Zeng ‘Conceptual analysis of China’s belt and road initiative: A road towards a regional community of common destiny’ in *Contemporary International Law and China’s Peaceful Development* Springer, Singapore (2021) 305—331. See also Eduard Marinov ‘Economic determinants of regional integration in developing counties’ (2014) MPRA Paper No. 60321, 363-383.

capital and people. In comparison, other scholars see it as emanating from the natural forces of proximity, income and policy convergence, and more significant intra-firm trade.²⁹⁷

Economic integration is about the Member States of a regional grouping adopting and implementing measures that would lower the cost of doing business within the group by removing all impediments and taking steps conducive to intra-regional trade and investment.

The economic integration course is usually classified into stages. It begins with a preferential trade area and ends with complete economic integration. The process starts at one point and then creates a spill-over effect to the next level, making its implementation a *sine qua non*. Balassa's theory distinguishes five stages of integration that demand the removal of discriminatory measures:²⁹⁸ Economic integration evolves from preferential tariff reductions through a Free Trade Area (FTA), customs union, a common market to an economic union where member countries integrate all economic policies and full integration or complete economic integration.

The first stage is the Free Trade Agreements, where tariffs and quotas are abolished against member countries, but individual tariffs and quotas are retained against third countries. Article (XXIV) paragraph 8 of the General Agreement on Trade and Tariffs (GATT) defines an FTA as a group of two or more states where duties and other restraining regulations of commerce are removed on basically all trade between member countries in products originating from those countries. The main agenda for an FTA is to reduce to the barest minimum, if not abolish, import tariffs and import quotas among its members. This will liberalise trade between its members. The accord may include a formal or legal body to solve business disputes. An example is the ASEAN Free Trade Area (AFTA) which was founded in 1992 and had a preferential tariff system.²⁹⁹ The accord included a protocol on 'Enhanced Dispute Settlement' resolution of a robust inter-governmental nature, and states that failed to observe the rules also had to vote for the resolution.³⁰⁰ Another example is the North American Free Trade Agreement (NAFTA), formed in 1993 by Mexico, USA and Canada.

²⁹⁷ CRIS UNU 2001 op cit note 112 at 5.

²⁹⁸ B Balassa *The Theory of Economic Integration* (1961) Richard Irwin, inc., Homewood, 11.

²⁹⁹ C H Vhumbunu, J R Rudigi & C Mawire 'Consolidating African Regional Integration through the African Continental Free Trade Area: Lessons from the ASEAN Free Trade Area' (2022)11(2) *Journal of African Union Studies* 77-101.

³⁰⁰ S Dosenrode 2010 op cit note 165.

Secondly, there is the customs union, which is an extension of the FTA with the requirement of harmonisation of the external trade policies of the participating states and imposes a common external tariff on imports from non-participating states. It does not operate with a free movement of labour and capital among its members. According to Balassa, one of the primary forms of economic integration is the customs union. Based on the GATT definition, a customs union must meet the following criteria of substantially eliminating all tariffs and other forms of trade restrictions among the participating countries and creating homogeneous tariffs and other guidelines on foreign trade with non-members. One example is the Southern African customs union (SACU), consisting of five southern African countries. It runs a common external tariff (CET) received by South Africa and shared among members according to a revenue-sharing formula. In SACU, goods are exchanged freely among members, and the organisation comprises a council of ministers, a commission, a tribunal which works by consensus, and a secretariat which runs its daily operation or activities.³⁰¹ These first two stages of integration can be regarded as negative integration because they only require the elimination of trade barriers without the need for a supranational institution.

Thirdly, there is common market which, according to Holden, “represents a major step towards significant economic integration.”³⁰² In addition to the customs union, a common market requires the free movement of capital, labour and other resources. At this stage, there is greater interdependence, which calls for policy harmonisation. It makes it difficult for Member States to implement individual economic rules. A significant example is the European Economic Area between the European Union and EFTA states (excluding Switzerland) established in 1992. The EFTA states are permitted to participate in the Single European Market, although they are not members but are required to implement the same economic and legal rules as the EU members.³⁰³ Therefore, this severely limits their ability to carry out a self-governing economic policy.

Furthermore, there is an Economic Union. In addition to the components of a common market, there is a need to harmonise a number of the major policy areas, mainly monetary and

³⁰¹ Ibid.

³⁰² M Holden ‘Stages of Economic Integration - From Autarky to Economic Union’ (2013) Government of Canada Economics Division, PRB 02-49E.

³⁰³ S Dosenrode 2010 op cit note 165 at E-7.

fiscal policies, including transportation, labour market, industrial guidelines and regional development. To ensure a uniform application of the rules, a supranational organisation will be necessary to regulate trade within the union. These same laws would be applied at the national level, but individual States would give up control in this area. The EU is a good example of an economic union, where the ability to act on monetary issues of the 28 European Monetary Union members,³⁰⁴ for instance, has been delegated to a supranational institution. More so, the internal market regulates, *inter alia*, regional development, transportation, industrial policies and parts of the labour market. Member states within the EU have also relinquished their physical territorial borders. In Africa, the AU is still battling with implementing a Continental FTA. Even at the level of RECs, no REC has attained this level of integration. African countries are finding it difficult to open their physical borders to their fellow African nations. They are too tied to their national sovereignty for integration of policies to be implemented.

Finally, there is full integration which means ‘the unification of monetary, fiscal, social and anti-cyclical policies and requires the establishment of supranational authorities whose decisions are binding on the Member States’.³⁰⁵ Here, the Member States officially relinquish their ‘sovereignty’ to the new entity, and they are no longer directly subjected to public international law.³⁰⁶ The new entity formulates and implements economic policies. An example is the United States of America, an organised Federation, and the EU.

Below is a summary of the stages of regional integration.

³⁰⁴ Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and UK.

³⁰⁵ Balassa 1961 op cit note 298 at 2. See also M Eduard 2014 note 296 at 369.

³⁰⁶ S Dosenrode 2010, op cit, note 165 at E-7-8.

Table 2.1: Forms/stages of regional integration

Preferential trade area	An arrangement in which members apply lower tariffs to imports produced by other members than to imports produced by non-members. Members can determine tariffs on imports from non-members.
Free trade area	A preferential trade area with no tariffs on imports from other members. As in preferential trade areas, members can determine tariffs on imports from non-members.
Customs union	A free trade area in which members impose common tariffs on non-members. Members may also cede sovereignty to a single custom administration.
Common market	A customs union that allows free movement of the factors of production (such as capital and labour) across the national borders within the integration area.
Economic union	A common market with unified monetary and fiscal policies, including a common currency.
Political union	The ultimate stage of integration, in which members become one nation. National governments cede sovereignty over economic and social policies to a supranational authority, establishing common institutions and judicial and legislative processes – including a common parliament.

Source: Economic Commission for Africa, ‘Assessing Regional Integration in Africa’ (2004) Addis Ababa: Economic Commission for Africa at 10.

2.4 The conceptual underpinning of legal harmonisation

Legal harmonisation is a multidimensional concept. Harmonisation of laws involves varied processes and implications that are defined by the concept. It is worth noting that there has been no official legal definition of harmonisation, most notably in the European Community treaty from which African economic integration takes its inspiration.³⁰⁷

³⁰⁷ J E Lohse ‘The Meaning of Harmonisation in the Context of European Union Law – a Process in Need of Definition’ in Andenas, Mads ; Andersen, Camilla Baasch (ed.): *Theory and Practice of Harmonisation* (2011)

The legal harmonisation of rules, trade practices, and legal systems regarding NTBs is the viable option for integration. The concept of harmonisation is an integral aspect of regional integration. The term harmonisation can be defined as the coming together of different legal systems, laws or rules, principles, policies, standard practices, or regulations, which institutions, governments, or states freely agree to make identical.³⁰⁸ Regarding the EU, the harmonisation of law means creating common standards across the internal market to achieve a uniformity of laws in the Member States.³⁰⁹ Harmonisation strives to synchronise diverse laws and structures by eliminating key dissimilarities and crafting minimum principles.³¹⁰ The EU aims to achieve a uniformity of laws among its members to facilitate trade and protect its citizens.³¹¹

The harmonisation process includes identifying and establishing a shared legal framework, eliminating dissimilarities in handling and boosting cross-border businesses, securing deals thanks to modern laws, eliminating or limiting conflicts of laws, and creating an accessible and comprehensive legal system.³¹²

Regarding the harmonisation of EU private law, the purpose is to remove dissimilarities in the legislations of EU member countries that limit the free movement of people and goods and services.³¹³ Conversely, this has not been an easy task as varied opinions compete on the issue of how a harmonised private European law should be.³¹⁴ The diverse opinions range from minimum to maximum harmonisation. As Ferreira-Snyman and Ferreira put it, some prefer a European civil code regarded by others to be inhumane and destructive of other legal cultures.³¹⁵ Others believe that the EU private law should protect the fragile parties, while others argue for creating

Cheltenham, 282-313. The word 'harmonisation' has been used in Art 93, Art 174(2) of the EC treaty without any precise definition.

³⁰⁸ D W Leebron 'Claims for Harmonization: A Theoretical Framework' (1996) 27(1) *Canadian Business Law Journal* 63-107.

³⁰⁹ Turnbull 2010 op cit note 15.

³¹⁰ W J Kamba 'Comparative law: A theoretical framework' (1974) 23(3) *International & Comparative Law Quarterly* 485-519.

³¹¹ P E Nygh & P Butt *Butterworths Australian legal Dictionary* (1997) 543.

³¹² B Martor 'The OHADA Legal Harmonisation Process: The Benefits for Africa's Development' (A paper delivered at the OHADA seminar on the Applicability of the OHADA Treaty in Cameroon, 18-19 September 2003 in Buea Cameroon) 17-27.

³¹³ L Kahler 'Conflict and compromise in the harmonization of European law' in Wilhelmsson, Paunio and Pohjolainen (eds) *Private law and the many cultures of Europe* (2007) 126.

³¹⁴ M P Ferreira-Snyman and G M Ferreira, 'The Harmonization of Laws within the African Union and the Viability of Legal Pluralism as an Alternative' (2010) 73 *THRHR*, 608-628.

³¹⁵ Ibid. see also Kahler 2007 op cit note 313 at 137-138.

a free market.³¹⁶ These divergent opinions further create uncertainty about what should be harmonised and how. The depth of harmonisation is also debatable. Regarding the EU harmonisation process, Foster distinguishes between total or complete harmonisation, optional harmonisation and minimum harmonisation.³¹⁷ By total or complete harmonisation (also known as exhaustive harmonisation), Foster refers to the process of ‘one rule being enacted for the whole Union and which precludes the Member States from legislating in the same area’.³¹⁸ Optional harmonisation stipulates that Member States should apply a harmonised rule only if they want to trade across the borders of another member country.³¹⁹ On the other hand, minimum harmonisation can be seen as the creation of minimum standards in the Union’s legislation, however, Member States are permitted to apply a higher standard locally.³²⁰

Within the AU, the Constitutive Act and the Abuja Treaty envisage a wider scope of harmonisation, but it is doubtful whether such aspiration could be attained especially as there is no area of economic integration in the AU where harmonisation has been attained. To this effect, the scope of harmonisation in the EU or AU, depends principally on the level of integration a region desires to attain. Where there is the formation of a unitary state through a merger, (uniting independent states into one region), it means there is exhaustive harmonisation, whereas converting some independent nations into a federal state means minimum harmonisation and a broader margin in appreciating the integral units.³²¹ The choice of harmonisation therefore depends on the extent to which parties to the integration project are willing and ready to transfer some degree of national sovereignty to the supranational body to create a new community. The AU is neither a federal nor a confederal body where Member States have ceded some aspects of their sovereignty. This raises the question as to whether the AU's Member States are indeed committed to their aspirations and commitments.

³¹⁶ Ibid.

³¹⁷ N Foster, *Foster on EU law* 5ed (2015) 261-264. See also M P Ferreira-Snyman & G M Ferreira 2010 note 314 at 615

³¹⁸ Ibid at 262.

³¹⁹ Ibid.

³²⁰ See M P Ferreira-Snyman & G M Ferreira 2010 note 314 at 615.

³²¹ Ibid at 616.

2.4.2 Methods of legal harmonisation

This section of the chapter deals with methods of or approaches to legal harmonisation.³²² Legal harmonisation is usually linked to business and commercial law because of the need to facilitate trade between members of a regional integration arrangement to reduce legal uncertainties associated with international commercial transactions. In practice, the CFTA will be enhanced if competition remains an undistorted and free movement of factors of production and services are not prohibited by prevailing discrepancies between national legal systems. For economic integration and regional trade to heighten, it is argued that creating common trade rules and practices is essential. This thesis identifies four methods of legal harmonisation that can be implemented in a regional economic integration project. They are treaties or conventions, directives and regulations, model laws and standardisation of business norms. They have been examined below.

The first method is when organisations introduce standards and norms formulated and expounded in an agreement. This usually involves adopting a convention to be implemented by community members as one of the methods of legal harmonisation.³²³

The second method is through directives and regulations. Directives and regulations are also drawn up to approximate national laws.³²⁴ To attain rapid harmonisation that cannot be completed through the adoption of treaties, RECs in Africa have replicated the example of the EU by making provisions for directives and regulations in their instruments.³²⁵ The difference between a directive and a regulation is that a directive sets a common goal and standard indicating the expected outcome of a law which states are individually responsible for implementing to give effect to the directive within a stated time frame.³²⁶ A regulation, on the other hand, has the nature of general application and sets a common rule that has direct applicability in the Member States.³²⁷ While some RECs, like the EAC, employ community acts, the Economic Community

³²² The words 'methods, approaches or models' of legal harmonisation will be used interchangeably in this thesis to mean the ways in which legal harmonisation can be achieved.

³²³ In the EU, this approach is available under Article 220 of the Treaty of Rome, 1957.

³²⁴ EU employs this approach of harmonisation. Article 94 of the treaty of Amsterdam brings in the term 'harmonisation' used for indirect taxes while article 95 uses 'approximation of laws' for direct taxes.

³²⁵ Directives and regulations have been adopted by COMESA, ECOWAS and EAC.

³²⁶ K Magnus, 'Legal Harmonisation in Africa: Taking Stock and Moving Forward' (2012) 47(1) *The International Spectator, Italian Journal of International Affairs* 83-96.

³²⁷ Ibid.

of West African States (ECOWAS) uses supplementary acts, and the Organisation for the Harmonisation of Business Law in Africa (OHADA) adopts uniform acts. Supplementary acts, community acts or uniform acts and regulations have the same effect of direct applicability once the appropriate leading body, like the Assembly of the Heads of States and Governments of the particular REC, has adopted them. Therefore since directives, on the one hand, permit Member States to have some flexibility in the formulation of legislations and supplementary acts and regulations, on the other, are directly applicable, it can be argued that directives have the objective of legal harmonisation while regulations are aimed at legal unification.³²⁸ Direct applicability usually requires Member States to review their legal frameworks to allow supranational legislation to be incorporated into their local systems. Direct applicability in the OHADA Member States, for example, may not pose a problem as they follow the monist tradition of African civil law and regard international law as a source of law.³²⁹

Nonetheless, it has been observed that some regulations adopted by some RECs are not directly applicable in the different jurisdictions of Member States as they require domestic formulation. This is mostly the case with countries that practice a dualist constitutional framework.³³⁰ For example, COMESA treaty in article 5(2)(b)³³¹ requires the Member States to give legal effect to the regulations enactments. Even where the EAC treaty in article 8(4) provides for the supremacy of community legislation, some Member States have not implemented these provisions. It should be noted that the AU has not adopted any regulations or directives.³³²

The example of some of the RECs in Africa indicates that the form of the harmonising instrument offers much variety and innovation. International treaties and conventions do not follow universal models. In the EU, there is an important difference between directives and regulations, but also, the regulations, which have a direct effect without any legislative

³²⁸E Carbonara & F Parisi, 'The paradox of legal harmonization' (2007) 132(3) *Public Choice* 367—400, See also Magnus 2012 note 326 at 88.

³²⁹ See Magnus 2012 op cit note 326 at 88.

³³⁰ Ibid.

³³¹ provides that: 'Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.'

³³² See Magnus 2012 op cit note 326 at 89.

transposition, often require different implementation measures to have effect in national law.³³³ Some main types of directives are minimum standard directives, maximum standard directives, framework directives, and directives in the process of the open method of coordination.³³⁴ The relationship to the fundamental freedoms in the EC Treaty is another issue. Generally, international treaties and conventions relate to customary international law and other treaties and conventions. This indicates that international treaties, at times, are derived from customary international law.

Transposition in national law takes a different form in national legislation, and the procedures also vary. Harmonisation has affected the form of national legislation and the sources of law in the national legal system. Court practice in applying harmonised law follows yet other principles and patterns.³³⁵ The response to case law as a new source of law that can assist in promoting uniformity, or in some fields, how the lack of such sources are compensated for, is of particular interest. One current issue is using judgments from other international or national bodies. Informal networks of judges cooperate across jurisdictional boundaries in the application of international instruments, assisting one another in finding sources and practical solutions to uniformity problems.³³⁶ Amendment and monitoring of the transposition and subsequent practice under national law in some areas are highly developed and, in others, practically nothing follows the adoption of a convention. Other methods of legal harmonisation, such as model laws, may require an independent international monitoring body, more judicialised institutions, or combinations of supranational monitoring and court institutions. Novel forms of institutionalised peer review have been developed over the last few decades. Enforcement and sanctioning provide other challenges closely related to monitoring and amendment. The experiences with harmonised regimes provide extensive material that is well-suited for research. In the EU, there is an emerging scholarship comparing the transposition of directives in different national laws. This provides a basis for the Review of the Consumer Acquis, which is another of the harmonisation projects of the European Commission, currently limited to eight directives, including the Consumer Sales Directive and the Unfair Terms Directive. These do not include

³³³ A Mads & C Andersen eds. *Theory and practice of harmonization* (2012) xi--xii.

³³⁴ *Ibid* at xii.

³³⁵ *Ibid*.

³³⁶ *Ibid*.

other directives in the consumer field, such as the Consumer Credit Directive, the Unfair Commercial Practices Directive and the Product Liability Directive.³³⁷ Maximum harmonisation and the use of mandatory rules in the directives may have had a profound effect on the privacy of the Member States, which, if it has had such an effect, remains underexplored. The international conventions in the long-established tradition for harmonisation of commercial law provide another field of emerging scholarship. See, for instance, the United Nations Convention on Contracts for the International Sale of Goods, 1980), the UNCITRAL Model Law on International Commercial Arbitration 1985, UNIDROIT's Principles of International Commercial Contracts, the European Bank for Reconstruction and Development's (EBRD) Secured Transactions Project, and the ICC's Uniform Customs and Practice for Documentary Credits.³³⁸ In comparative law, there is a current discourse about legal transplants.³³⁹ There is also a challenge to the idea of convergence between national legal systems and traditions. One issue is to link the theoretical models that have emerged here with the scholarship on harmonisation in different fields.

The third method of legal harmonisation involves formulating model laws, which will guide the adoption of home-grown principles and unvarying laws to be incorporated by states into domestic regulation. As adopted by OHADA, this approach allows for considerable consistency without demanding the exact equivalent as a convention does. The drawback here is that sometimes the uniformity established with more effort may be lost in the national implementation process. Further, there is the AU's model legislation for the protection of the rights of local communities, farmers and breeders, and for the regulation of access to biological resources.³⁴⁰ Model laws can have a direct or indirect harmonisation effect.

The fourth method involves the standardisation of business norms and traditions based on the business locality practices. This could either involve formulating recommended standard

³³⁷ Ibid at xiii.

³³⁸ Ibid.

³³⁹ Legal transplant is the importation of foreign legal systems. The term legal transplant was coined in the 1970s by the Scottish legal scholar Alan J. Watson. Alan Watson indicated legal transplant is the moving of a rule or a system of law from one country to another (A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974). The notion of legal transplantation is diffusionism-based and according to this concept most changes in most legal systems occur as the result of borrowing. As maintained by Watson, transplantation is the most fertile source of legal development.

³⁴⁰ See Magnus 2012 op cit note 326 at 91.

practices or extracting minimum common rules from national laws to evaluate regional standards. Some examples of this approach are: the Incoterms 1953 and 1990, the Uniform Customs and Practice for Documentary Credits prepared by the International Chamber of Commerce (ICC), the various General Conditions of Sale and Standard Forms of Contract sponsored by the Economic Commission for Europe (ECE)³⁴¹ and the Civil Conditions of Contract 1987 developed by the Fédération Internationale des Ingénieurs Conseils (FIDIC).³⁴²

Legal integration seeks to harmonise the legal systems of Member States of each region to regulate NTBs measures. The law is essential in any institution to set out rules and procedures. When this is achieved, the fundamental principles for successful regional integration can follow. The trend of regional integration in Africa during the period of the OAU had been so deplorable for reasons such as the fight for independence, state sovereignty, inter- and intra-state conflicts, legal barriers, and low levels of intra-regional trade. In this era of the AU, however, these external and domestic factors that impeded Africa's regional integration in the past have improved, giving grounds for cautious optimism. Greater harmonisation of macroeconomic policies, and the identification and establishment of a common legal framework would positively impact regional integration in Africa.

2.4.3 The case for and against legal harmonisation

Where harmonisation has occurred, there is certainty in the rules and principles needed to define the applicable laws to solve practical commercial cross-border transactional difficulties consistently. It implants an attitude whereby community citizens are legitimately protected and have access to free movement and intra-regional trading with calm and confidence about the applicable rules. It also facilitates the legal right to justice with redress and enforces the same rulings throughout the states within that regional grouping. This goes together with the objective of legal simplification of NTBs in the administration of justice, as courts will be spared the perplexing task of deciding which law applies.

Even where harmonisation has occurred, individual countries continue to maintain their legal system. The benefit of this move is that different legal traditions will come together,

³⁴¹ N Muna 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42(1) International and Comparative Law Quarterly, 101-118.

³⁴² See Fédération Internationale des Ingénieurs Conseils, Conditions of contracts for works of Civil Engineering Construction (Parts I & II) 1987.

supplementing the various legal systems. Moreover, it fosters the creation of the community court of law to offer an identical interpretation of various topics, notions, and matters that may come up from the community treaty. This will subsequently inspire autonomous jurisprudence from a cosmopolitan method to interpreting standards, tenets, and notions.³⁴³

The harmonisation of laws is necessary for regulating conflicts of laws in intra-regional transactions. There is the present regime of private international law inadequacy in resolving such disputes, traceable most especially to state sovereignty. Moreover, harmonisation of NTBs is necessary since most of the issues which arise in the intra-regional trade do not occur in domestic, commercial transactions. For instance, an agreement to sell goods, whose delivery may involve carriage by sea, air, rail, or road over several national territories, presents different issues from one where the parties are in actual physical contact.³⁴⁴ As Goldstein writes:

Une harmonisation régionale des politique, des projets d'infrastructures conjoints, permettront d'ouvrir plus largement l'accès aux marchés mondiaux, d'accroître les flux de capitaux et de stimuler les échanges entre pays Africains.³⁴⁵

This means that regional harmonisation of policies and common projects allows greater access to the world market, increases capital flow, and eases trade between African countries.

Harmonisation could be justified as a public policy and social convenience concern. It is not proper for citizens of the same state or common market to be governed by different laws in their legal relations. An integrated legal system is more suitable to the people's needs than an inchoate and, to some extent, rules of indigenous heritage and esoteric received laws.

Choosing the harmonisation approach stems from the fact that full-scale unification has often been resisted as being too close to a complete political union until recently. Without the political will to thoroughly and efficiently support economic integration,³⁴⁶ it will be too much to expect African countries to support a closer political union. This could explain why neither the African Economic Treaty nor RECs in Africa contemplated integration beyond the economic realm.

³⁴³ A Yakubu 'Harmonisation of laws in Africa' (1999) *Malthouse Press Lagos* 27–40.

³⁴⁴ *Ibid.*

³⁴⁵ G Andrea 'Le Nouveau Régionalisme en Afrique Sub-Saharienne: L'Arbre cache-il une Forêt ?' 2000 Centre de Développement OCDE, *Cahier de Politique Economique* No 20.

³⁴⁶ G Moye 'CEMAC: Intégration or Coexistence?' (2004) 8 *Annales de la Faculté des Sciences Juridiques et Politiques* 31, 42–45.

The case against, or one of the disadvantages of legal harmonisation has to do with the legal culture of Member States. To depart from a system rooted in a long-standing tradition and reinstate it with regulations new to the members may be less familiar with the local culture and environment. However, this may not be regarded as a disadvantage in the case of the African continent, as there is a need to depart from the colonial legal system and legislate in the spirit of the African renaissance to achieve Agenda 2063.

Another disadvantage of legal harmonisation is that there are limited exit rights. There is a limited possibility of leaving a harmonised legal system for another legal system since harmonisation is a combination of different legal systems.³⁴⁷ Harmonisation hinders the mobility between legal systems because of jurisdictional differences. With harmonisation, parties to the legal order usually request mandatory rules for their benefit.³⁴⁸ This creates inefficiencies because compulsory rules are essential where there is competition among legal systems, since parties can evade obligatory rules by switching legal systems. That notwithstanding, limited existing rights should instead be advantageous to the African continent as this would limit concerns regarding leaders' commitment to the integration project.

2.5 Conclusion

This chapter has defined and outlined the different theoretical underpinnings of regional integration, such as federalism, functionalism, neo-functionalism, intergovernmentalism, interdependence, structuralism and organisational theories. What became evident from the discussion is that although there is no grand theory of integration, the organisational theory, though not without its limitations, seems to be a more appropriate theory to explain the African experience of integration. This is so because the AU is regarded as an organisation where interest-driven and resource-interdependent members are its stakeholders.

The conclusion underscores the views of Rosamond that as a theory of integration, power in international organisations is possessed by the Member States who seek gains from the

³⁴⁷ E Baffi & S Paolo 'The Economics of Legal Harmonization' (2011) 12(7). *Encyclopedia of Law and Economics* 1—13. See also Ribstein LE and Kobayashi BH 'The economics of federalism' (2006) U Illinois Law & Economics Research Paper No. LE06-001, George Mason Law & Economics Research Paper. (06-15).

³⁴⁸ Ibid.

organisation, which serves as a vehicle to satisfy their interests.³⁴⁹ However, the power of each state is ceded to an organisation that is run by a system of management that decides and implements policies for the organisation. A challenge, though, is that African countries are still reluctant to relinquish their sovereignty to a supranational authority even under the Constitutive Act. Faced with this challenge, it becomes difficult to argue for a federalist model, where states are expected to surrender their sovereignty to a supranational. States may thus want to delegate power to the AU as this would best serve their interests. Therefore, it is suggested that whilst sovereignty resides with individual Member States within the AU, it would be in the interest of states to pool their sovereignty and delegate certain powers to regional organisations.

An assessment of the above theories also reveals that none of them aptly considers the fundamental nature of African integration. This is because most of the theories have an exclusive European foundation. Contrary to the EU, which has gone through a chain of historical stages of integration (which can be traced from the European Coal and Steel Community of 1951 through to the European Economic Community of 1958 and then to the European Community of 1993, up until its present form), African integration has remained a top-down approach, or what one may call integration from above. Thus, while going through a bottom-up strategy, the European community established a single market and lessened passport control inside the Schengen zone. While the EU has experienced the professed “spillover” effects by endorsing common foreign and security policies, “spillover” is largely an elusive phenomenon in African integration.

The concept of legal harmonisation has been examined in relation to regional integration bringing out the different methods/models of legal harmonisation, including advantages and disadvantages. The analysis of the models of harmonisation gives an idea of what model might be preferable for RECs in Africa.

Having examined the concepts and theories underlining this research, the next chapter will focus on the current political, economic, and legal keystones of regionalism in Africa. The chapter will focus on the AU and the CFTA, tracing its foundations from the OAU. It will appraise the Abuja Treaty, the Constitutive Act of AU, the 2007 Protocol on Relations between AU and RECs, and the AU Agenda 2063, which are defined legal frameworks to advance African regional trade within the framework of Agenda 2063.

³⁴⁹ Rosamond 2000 op cit note 195 at 139.

3. CHAPTER THREE: AN OVERVIEW OF REGIONALISM IN AFRICA

3.1 Introduction

The effects of colonialism, imperialism and colonial fragmentation of Africa stimulated the commitment to regionalism through Pan-Africanism. The Pan-Africanist cravings for independence from foreign domination and political unity of African nations through integration led to the creation of the OAU in 1963. The OAU was transformed in 2000 into the AU to accelerate the drive towards Pan-African political and economic integration. However, the new setup at the continental level led to the question of how the regional and sub-regional initiatives and the AU could become mutually reinforcing.³⁵⁰

In the last three decades, there have been some attempts to move towards economic integration on the continent. For example, efforts like the Regional Integration Facilitation Forum (RIFF) commenced in 1992 as a Cross-Border Initiative (CBI), a structure of harmonised policies to ease a market-driven notion of integration in Eastern, Southern, and the Indian Ocean countries in Africa.³⁵¹ The main contention of this initiative is that if cross-border trade and investment are promoted, economic integration will be expedited because economic reforms are occurring in these countries. Unlike former regional initiatives, the CBI/RIFF is distinguished by its outward orientation, market-driven integration process, private sector involvement, and peer pressure to increase the speed of integration. The CBI/RIFF has been criticised for advocating a market-driven concept of regionalism contrary to the Economic Commission for Africa's developmental model of regionalism.³⁵² However, its interest in private sector direct involvement is worth emulating by other African regional groupings as it encourages general participation.

The new hope and impetus for regional integration in Africa attract divergent opinions on operationalising integration arrangements. There is a widespread belief that the 'United States of

³⁵⁰ T Dinka & W Kennes 'Africa's Regional Integration Arrangements: History and Challenges' (2007) Discussion paper No74 *European centre for development policy management (ECDPM)* 5.

³⁵¹ F Söderbaum *The political economy of regionalism: The case of southern Africa* (2004) Springer 73. See also K Mbirigenda Shukrani 'The Future of East African Regional Cities: The Potential Contribution of Corporate Social Responsibility' (2016) 7(1) *Syllabus Revue scientifique interdisciplinaire de l'École Normale Supérieure Série Lettres et sciences humaines Numéro spécial* 139-152.

³⁵² K Mbirigenda Shukrani 2016 op cit note 351 at 146.

Africa' dream and the bottom-top type of integration should be rejected.³⁵³ Instead, Africa should focus more on straight forward, economic, creative, and gainful models of regionalism via projects to develop priority areas such as industry, power, transportation, and agriculture on a community basis. Another group supports the outward-looking orientation, which focuses on trade and effective private sector involvement with less restrictive institutional structures. Lastly, the traditional model of top-down African integration adopted by the OAU and supported by African leaders is symbolic of a substantial political connotation. Unarguably, this is the era where African regionalism should focus on a resilient economic and private sector involvement model of integration. This can only be achieved by harmonising trade principles and practices such as NTBs within the AU and RECs following Agenda 2063 and starting with the CFTA.

Therefore, this chapter focuses on the political development of African regionalism, the three selected RECs, Agenda 2063, and the CFTA. It also addresses the existing legal and institutional frameworks for harmonising NTBs practices of trade in Africa's effective CFTA achievement process. Finally, it provides an appraisal of the Abuja Treaty, the Constitutive Act of AU, 2007 Protocol on Relations between AU and RECs, which are defined legal frameworks for achieving the CFTA. This chapter seeks to establish the link between the theories of African regionalism and the political and legal developments that have shaped the debates on legal harmonisation.

3.2 The political development of regionalism in Africa

The sequential occurrences in African history commenced with pre-colonial empires, slavery and slave trade, and annexation. The haphazard and chaotic partitioning of Africa by the colonial powers paralysed Africa. This record of foreign dominance and imperialism laid the foundation for enlightened Africans at home and abroad to yearn for a common identity and purpose – Pan-Africanism.³⁵⁴ African citizens abroad viewed Pan-Africanism as the reinstatement of a connected bond, shared identity and the restitution of African dignity and freedom from oppression. Pan-Africanism was considered a strength for integration and a crusade for emancipation to liberate Africa from colonialism and gain independence. However, when

³⁵³ A Oloo 'The Quest for United States of Africa: top-down or bottom-up approach' (2007) 1(1) *The Bulletin of the Fridays of the Commission* 2-33.

³⁵⁴ V Thompson Africa and unity: The evolution of Pan-Africanism (1969) 33.

African nations gained independence, they concentrated on consolidating their national sovereignty without emphasising integration.

The first idea of regionalism through Pan-Africanism can be traced back to the 1920s. A group of scholars from West African British protectorates (Gambia, Sierra Leone, Nigeria and Gold Coast – present Ghana) advocated for closer collaboration and integration of West African Nations.³⁵⁵ A request for the creation of a West African University and a Court of Appeal was sent to the colonial office in London by Joseph Hayford, one of the prominent advocates from the Gold Coast.³⁵⁶ Although the colonial authorities rejected the request as being 'premature', it was the birth rock of political awareness that ushered some political activists such as Kwame Nkrumah to the activism of the 1940s. This period observed an enriched commitment to the integration agenda and an attempt to include other West African nations from the French protectorate. Kwame Nkrumah went to France to discuss this with his West African counterparts of the Francophone divide.³⁵⁷ As a result, Nkrumah and his cohort of the West African National Secretariat to the sixth Pan-African Congress³⁵⁸ of October 1945 held in Manchester settled on the idea of 'a West African Federation'.³⁵⁹ This idea was considered a requisite instrument to attaining the absolute target of 'a United States of Africa' at the West African National Secretariat conference held in August 1946. Thus, African integration became integral to the Pan-Africanism story, although the path to achieving this was divided between the federalists and those favouring the gradual functional approach.

Ghana got its independence in 1957. However, Nkrumah emphasised that its independence was pointless if Africa, in general, was not liberated from political and economic domination and the desire to embrace regionalism. During the Accra conference of the Independent African States of 1958, the eight countries that participated had, by this time, gained independence.³⁶⁰ They created a Joint Economic Research Committee for the promotion of intra-

³⁵⁵ Ibid at 28.

³⁵⁶ G I C ELUWA 'The National Congress of British West Africa: A Study in African Nationalism' (1971) 77*Présence Africaine*, 131–49.

³⁵⁷ They were: Houphouët-Boigny, Léopold Senghor, Sourou-Migan Apithy and Lamin Gueye. See Thompson (1969) 90.

³⁵⁸ C Legum *Pan-Africanism a Short Political Guide* (1965) New York: Praeger 31.

³⁵⁹ A Ajala *Pan Africanism: Evolution, progress and prospects* (1973) London: St. Martin Press 12. See also Thompson (1969) 90–91, Legum (1962) 31–33.

³⁶⁰ They were: Libya, Ghana, Morocco, Sudan, Liberia, the United Arab Republic, Ethiopia and Tunisia.

African trade and to consider the possibility of forming the African common market.³⁶¹ The second conference of Independent African States was held in Addis Ababa in 1960 from 14-24 June and attended by eleven countries that had gained independence.³⁶² During this meeting, Emperor Haile Selassie of Ethiopia, while addressing the participants, emphasised the need to establish an African development bank to encourage cooperation in trade. The Ghanaian delegate proposed a Pan-African organisation, an association of economic cooperation to coordinate the economic policies of African nations, a customs union centred on eliminating barriers to trade (tariffs and NTBs) vis-à-vis African nations, among others.³⁶³ The Nigerian envoy contended that such a top-to-bottom administrative style was premature, although closer cooperation between them was vital.³⁶⁴ It was proposed at the end of the conference that forming a joint African development bank and a joint African commercial bank are other means of promoting an African economic union.³⁶⁵

Nevertheless, the diverse opinions of the delegates to the conference created two factions with divergent approaches to African integration, namely, the Monrovia and the Casablanca factions.³⁶⁶ These two opposing groups shaped the politics of regional integration in Africa. The Monrovia bloc consisted of Nnamdi Azikiwe of Nigeria, Félix Houphouët-Boigny of Côte d'Ivoire, Jomo Kenyatta of Kenya, and Julius Nyerere of Tanzania, who were the gradualists. They called for functional cooperation where RECs will be constituted, uniting African nations from the grassroots and gradually leading towards a complete political union. They promoted a gradual, step-by-step approach to African regionalism, beginning with creating subregional communities. The Casablanca bloc (the immediate Pan-Africanists) consisting of Kwame Nkrumah of Ghana and his cohort Patrice Lumumba of the Congo, Ahmed Ben Bella of Algeria, Ahmed Sékou Touré of Guinea, and Modibo Kéita of Mali were federalists. Their approach

³⁶¹ C A Johnson 'Political and regional groupings in Africa' (1962)16(2) *International Organization* 426—429. See also Final Communiqué of the Conference of Independent African States, 15 April to 22 April, 1958, in Thompson (1969) 348—9.

³⁶² These independent countries were: Cameroun, Ethiopia, Ghana, Guinea, Libya, Liberia, Morocco, the Sudan, Tunisia, Togoland, and the United Arab Republic. However, other countries such as the provisional government of Algeria, Congo (Leopoldville), Nigeria and Somalia that had not yet gained independence were also invited to attend. There were also nationalist leaders as guests from Northern and Southern Rhodesia, Kenya, Uganda, Tanganyika, South Africa, and South West Africa. See Johnson (1962) 428.

³⁶³ Ibid Johnson (1962) 428.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Legum 1965 op cit note 358 at 50.

consisted of two vital aspects: political union and a functional relationship.³⁶⁷ Accordingly, they opted for an immediate political and economic union as charted in Nkrumah's *Africa Must Unite*, comprising African Committees on common market, monetary union, military base, and a continental government.³⁶⁸ All these debates finally paved the way for the establishment of the OAU in 1963. After decades of debates on the form and approach to African integration, the OAU united the different theories of African integration into one comprehensive banner. Based on mutual understanding, the divergent blocs later harmonised their opinions into a functional organisation. Nonetheless, Nkrumah reiterated that Africa deserves a more robust organisation than the OAU. Along similar lines, Baimu argued that Nkrumah made his last attempt to re-influence the creation of a stronger union in 1965 in Accra, Ghana, during the OAU summit, which created mistrust among some of his peers.³⁶⁹ A summary of the main political developments of African regionalism has been conceptualised and presented in Figure 3.1.

³⁶⁷ G Nweke 'The Organisation of African Unity and intra-African functionalism' (1987) 489. *Annals of the American Academy of Political and Social Sciences*. 135—7.

³⁶⁸ G Martin Pan-Africanism and African Unity In: *African Political Thought* (2012) Palgrave Macmillan, New York. https://doi.org/10.1057/9781137062055_5. see also Legum (1969) 56-7, Nweke (1987) 136.

³⁶⁹ E Baimu 'The African Union: Hope for Better Protection of Human Rights in Africa' (2005)1(2) *African Human Rights Law Journal* 299-314.

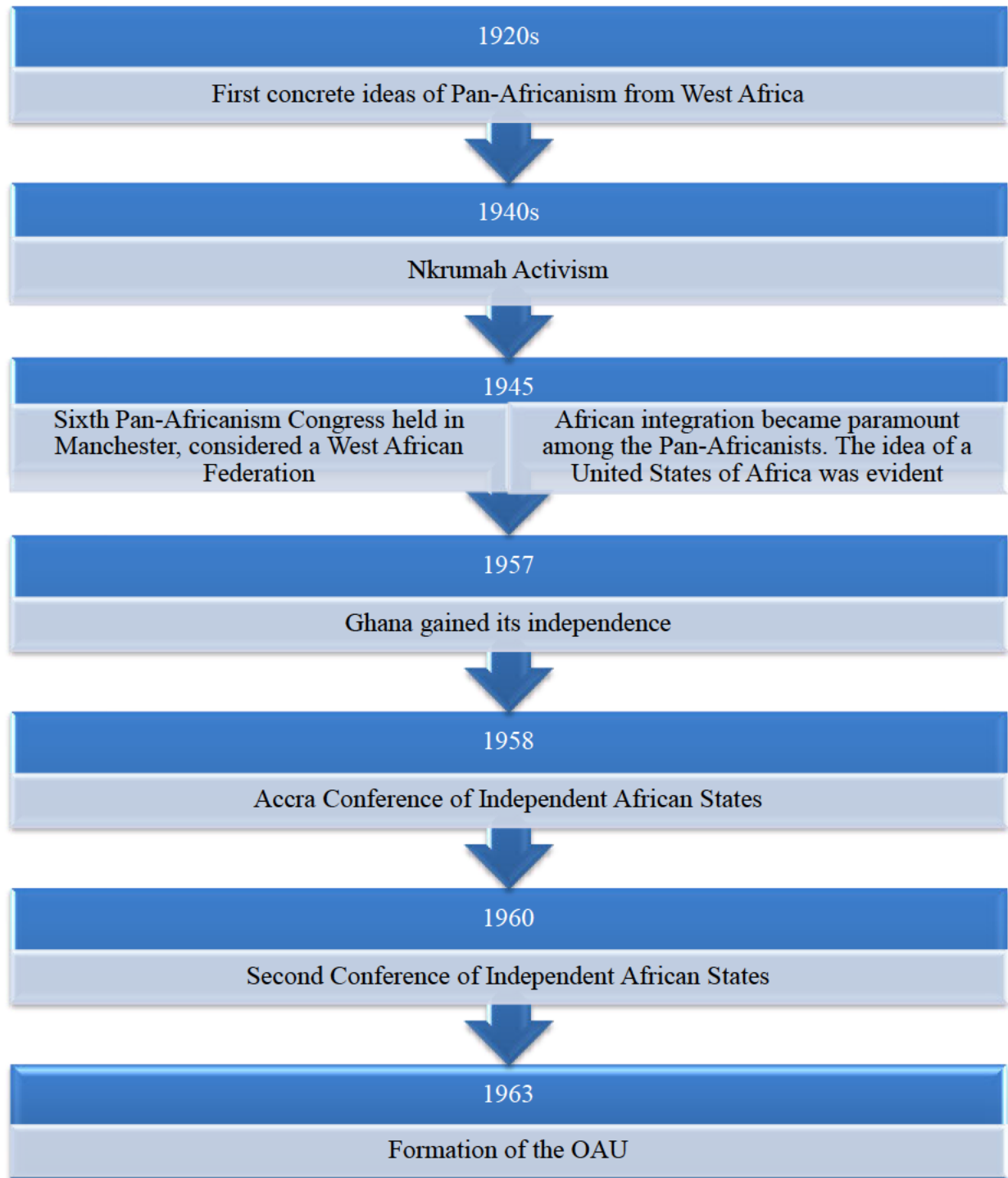


Figure 3.1: Summary of the main political developments of African regionalism.

A careful examination of the functionality of the OAU revealed that the achievement of political stability and economic freedom would not be possible. This is because the formation of the OAU, from its onset, resulted from African States' disinclination to relinquish part of their newly found sovereignty to a supranational body. This shielded standpoint is also reflected in the ill-formed RECs that emerged. For nearly six decades today, the gradual, step-by-step functional approach to African unity has been plodding, if not inexistent. The regional economic groupings have made insignificant progress on economic unity. It is contended that the revolutionary, radical approach proposed by Nkrumah would have yielded better results. The Abuja Treaty of 1991 followed the 'gradualists' approach of establishing the AEC with the RECs as building blocks. According to Adogamhe,³⁷⁰ the RECs have failed because they have functioned as independent units instead of incrementally coordinating efforts. The goal of legal harmonisation of trade practices by eliminating trade barriers (NTBs), as enshrined in OAU's Abuja Treaty, cannot be achieved if RECs operate as autonomous and independent entities.

It is argued in this thesis that the ability to adapt the debates on political unity and regionalism to African realities and use them for the developmental benefit of the local population is essential. The daunting task, which is the core of this thesis, is to translate the OAU/AU idea of legal harmonisation of NTBs into a transformative agenda of the AfCFTA to fast-track Agenda 2063. To achieve this, efforts should be geared towards legal harmonisation as an integrative tool to foster the effective operationalisation of the AfCFTA.

3.3 Institutional frameworks for regionalism in Africa

3.3.1 OAU to AU

The OAU was created on the 25th of May 1963 in Addis Ababa, Ethiopia, by thirty-two African countries as the attainment of independence was the criterion to become a member. With time, more African states joined the organisation, with South Africa joining in 1994 as the 53rd state. As discussed above, differing opinions on African regionalism made the idea of full political and or economic integration unsustainable. This made the OAU Charter settle on some loose objectives such as: encouraging unity and solidarity,³⁷¹ coordinating and building up states'

³⁷⁰ G P Adogamhe 'Pan-Africanism revisited: Vision and reality of African unity and development' (2008) 2(2) *African Review of Integration* 1-34.

³⁷¹ OAU Charter, article II (1)(a).

cooperation, and determination to achieve an improved life for the African citizenry.³⁷² Another major goal was to eliminate all forms of colonialism³⁷³ while defending the territorial integrity and sovereignty³⁷⁴ of their newly acquired independent states. To achieve the OAU objectives, there was a need to harmonise all policies in all spheres of cooperation, including education, culture, health, defence, politics, and economic cooperation.³⁷⁵ This fragile version of African unity was further watered down by the OAU's principle of non-interference in the domestic affairs of countries and their overvalued sovereignty, territorial integrity, and the right to independent existence.³⁷⁶ Although the OAU emerged as a diluted vision of some of its founding fathers' ideas, it made significant strides in achieving some of its aims. For example, it successfully ended colonial regimes in Africa, fought against racism, the rise of an insurgency in post-independent Africa,³⁷⁷ and apartheid in South Africa. Furthermore, African states also agreed in Article 3(4) of the OAU Charter to settle disputes through peaceful means through negotiation, conciliation, mediation, and arbitration. The OAU resolved several border disputes resulting from the colonial legacy, for example, the Algerian and Moroccan dispute of 1963-67.³⁷⁸ It also settled disputes between Senegal and Guinea, Somalia-Ethiopia-Kenya, the Congo and Zaire, Uganda and Tanzania, and dealt with issues of refugees.³⁷⁹ In the economic domain, it encouraged the formation of RECs and subsequent efforts to create the AEC through a treaty signed in 1991 in Abuja, Nigeria. This treaty was a blueprint for the gradual step-by-step attainment of full economic integration within thirty-four years.

Despite the above achievements, it is observed that the OAU confronted many challenges. The divisive and dissimilar views of the founding fathers visible in the organisation that still shape debates on African regionalism today positioned the OAU albeit on a frail foundation. As a result of this confusion and turmoil, African states were not taken seriously on the world stage

³⁷² Ibid article II (1)(b).

³⁷³ Ibid 1(d).

³⁷⁴ Ibid 1(c).

³⁷⁵ See article II (2) ((a)(b)(c)(d)(e)(f)).

³⁷⁶ Article III (2) and (3).

³⁷⁷ A S Gusau 'Littering the landscape: An analysis of the Role of Nigeria in the transition of OAU to the African Union' (2013) 9(8) *European Scientific Journal* 165-180.

³⁷⁸ Ibid at 171.

³⁷⁹ Ibid at 171-72.

as united people.³⁸⁰ The post-colonial period witnessed the advent of economic crisis due to political instability, resource deficiencies, dependence on foreign aid, and underdevelopment, irrespective of the developmental efforts of the OAU.³⁸¹ The OAU Member States could not meet their financial obligations to the OAU and international financial institutions for debts owed to them.³⁸² This made the OAU persistently underfunded, and the lack of enforcement ability by the OAU to enforce Member States' financial obligation made it rely uniquely on an irresolute and poor political drive.

An indispensable challenge created by the OAU was the overvalued and treasured sovereignty of states and non-interference in the affairs of independent states. This policy had a plethora of detrimental and undesirable implications. The RECs created did not act as pillars of the OAU, nor did they synchronise their objectives; instead, they advanced their interests, obstructing the continent's socio-economic progress. The principle of non-interference in states domestic issues came at a considerable cost, emerging dictatorships, coup d'états, counter overthrow, intense political instability, and all sorts of internal conflicts.³⁸³ The OAU incredibly observed how some of its founding fathers, like Kwame Nkrumah of Ghana, Sekou Toure of Guinea, Abubakar T. Belewa of Nigeria, and Haile Selassie of Ethiopia were overthrown and murdered, respectively.³⁸⁴ Similar coups, conflicts, and civil wars occurred in many Member States, like the Democratic Republic of Congo, Chad, Mali, Guinea Bissau, Liberia, Nigeria, Sierra Leone, Gambia, Somalia, Mozambique, Angola, Rwanda, and the Central African Republic.³⁸⁵ It was predictable that the OAU would not record any significant scores on its peacekeeping mission as it made itself powerless with its concept of preserved state sovereignty and non-interference. The promotion of individuals against collective states' interests and factions in the OAU meant drawbacks on any cohesive attempt to respond to conflicts, uprisings, and civil wars.

³⁸⁰ S R Duthie 'African Integration: Many challenges, few solutions (2011)' *Journal of International Organizations Studies* 37-40.

³⁸¹ B Schalk, C J Auriacombe & D J Brynard 'Successes and failures of the Organisation of African Unity: Lessons for the future of the African Union' (2005) 40(si-2) *Journal of Public Administration* 496-511.

³⁸² Edo V Osaro & M Abiodun Olanrewaju 'An Assessment of the Transformation of the Organization of African Unity (OAU) to the African Union (AU), 1963-2007' (2012) *Journal of the Historical Society of Nigeria* 41—69.

³⁸³ Ibid at 47-48.

³⁸⁴ Ibid at 48.

³⁸⁵ B Schalk 2005 op cit note 381 at 503.

With the fall of Apartheid in South Africa and the attainment of independence by the rest of the African states, OAU's most successful purpose of decolonisation was achieved, and the buoyant and resilient potency of the organisation was now a thing of the past.³⁸⁶ In his speech at the OAU summit held in Arusha in 1992, Nelson Mandela affirmed that Africa had reached the end of the long terrifying moments of apartheid and colonialism.³⁸⁷ Therefore, the necessity of focusing on African integration, which was pushed into the background at the inception of its charter, became relevant again. Accordingly, the thirty-fifth summit of the OAU held in Libya activated discussions on restructuring the OAU into a more inclusive and liberal AU.³⁸⁸

The changes in global politics in the 1990s as a result of the collapse of the Soviet Union and the end of the cold war meant the fall of the western world-leading role for conflict resolution in Africa. As a result, Africa was increasingly marginalised, and the OAU had to search for African solutions to African problems and equally assert herself on the new global stage to be relevant. In the words of Wubie & Zelalem,³⁸⁹ the prominent discourse by Kwame Nkrumah, which says 'Africa must unite or disintegrate individually', turned out to be of great significance during this period.

i. Formation of the AU

The idea of establishing the AU was conceived and consolidated within the OAU. According to Evarist,³⁹⁰ it was theoretically articulated in some OAU declarations, resolutions, and plans of action adopted between 1968 and 1980, and concretely in forming several sub-regional groupings. The development of the AU within the OAU was evident in some declarations, assertions, pronouncements, and decisions approved by the OAU Assembly to nurture the idea of economic regionalism.³⁹¹ For example, during the Monrovia Declaration of commitment to socio-economic growth, the African Economic Market was formed as a forerunner to the African

³⁸⁶ Ibid at 502.

³⁸⁷ Ibid.

³⁸⁸ Edo V 2012 op cit note 382 at 53.

³⁸⁹ H Wubie & T Zelalem 'African Union Law: Teaching Material' 2009 available at https://dphu.org/uploads/attachements/books/books_3823_0.pdf, accessed on 10 April 2021.

³⁹⁰ Baimu 2005 op cit note 369 at 302.

³⁹¹ See Wubie & Zelalem 2009 op cit note 389 at 11.

Economic Community (AEC) and the Lagos Plan of Action (LPA).³⁹² The second extraordinary OAU summit in April 1980 adopted the LPA that envisioned the formation of AEC in 2000.³⁹³

On 3 June 1991, the OAU concretised the idea of Africa's economic integration with the Abuja Treaty, which established the AEC. The Treaty became operational on 12 May 1994.³⁹⁴ The OAU setup at the time, and the operation of the Abuja Treaty indicated that it was essential to create an entity that would combine the OAU's political character with the AEC's economic nature.³⁹⁵ At the same time, it was necessary to reform the OAU and put Africa through the new millennium's route to peace and development. Following this urgent need, there was an extraordinary summit of the 44 African leaders of the OAU from 8-9 September 1999 in Libya to deliberate on establishing a 'United States of Africa'.³⁹⁶ During this meeting, OAU member countries approved the Sirte Declaration advocating the creation of the AU. The OAU legal unit was tasked with drafting AU's Constitutive Act, considering the OAU Charter and Abuja Treaty creating the AEC. The draft Constitutive Act was to be fashioned on the EU model and was later deliberated upon in Tripoli from 31 May to 2 June 2000 during a ministerial conference.³⁹⁷ The OAU Assembly adopted the Constitutive Act in July 2000 at Lome, Togo, and the legal requirement of ratification was met on 26 April 2001. The Constitutive Act finally came into effect on 26 May 2001, giving the AU a political and legal character.³⁹⁸ Adopting the Act meant a significant move to regionalism and supranationalism in Africa.

The AU, unlike its predecessor, was more inclusive in its objectives and principles. In addition to the OAU's four relevant objectives,³⁹⁹ strengthened in the AU Act, the AU aims to accelerate Africa's political, social, and economic integration.⁴⁰⁰ It also aims at upholding and

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Ibid at 12.

³⁹⁶ Ibid.

³⁹⁷ Ibid at 13.

³⁹⁸ Ibid.

³⁹⁹ These are objectives that were carried over and strengthen in the AU Act. These are: (A) To promote the unity and solidarity of the African States (see article 2(a) OAU Charter and article 3(a) of the Constitutive Act of the AU) (B) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa (see article 2(b) of OAU and 3(k) of AU). (C) To defend their sovereignty, their territorial integrity and independence (article 2(c) of OAU and 3(b) of AU). (D) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights (article 2(e) of OAU and 3(e) of the AU).

⁴⁰⁰ The 2000 Constitutive Act of AU, article 3(c).

defending the common interest of Africans,⁴⁰¹ promoting peace and stability in Africa, democracy, good governance and civil society participation, human rights,⁴⁰² research, good health, and the suppression of avoidable diseases in Africa.⁴⁰³ It further aims to ensure that Africa plays an equitable role in the global economy, ensure sustainable socio-cultural and economic development and integrate the continent's economies.⁴⁰⁴ Finally, the AU aims to coordinate and harmonise the policies of RECs to achieve the Union's purpose.⁴⁰⁵ Therefore ten novel objectives were incorporated into the Act. In the same vein, the AU's principles are extensive compared to those of the OAU. Four out of seven principles of the OAU were put back into the Act,⁴⁰⁶ while the Act itself has twelve novel principles, indicating the AU's scope had been expanded compared to that of the OAU (see Figure 3.2 below).

This thesis argues that embracing regionalism with the adoption of more inclusive objectives and principles will only have a sound positive continental impact if the AU affiliates transcend mere theoretical articulations and encourage applauded principles for effective integration in praxis. This bolsters the view that effective legal harmonisation of NTBs within RECs will ensure the effective operationalisation of the AfCFTA to enhance Agenda 2063 and African regionalism as a whole.

3.3.2 Regional Economic Communities (RECs) for regionalism in Africa

It is assumed that close collaboration between Africa's regional communities and the AU will accelerate the continent's socio-economic development. RECs have been considered building blocks of the AU as enshrined in the 1991 Abuja Treaty, and coordination and harmonisation of policies between them are of great importance. Article 28 of the 1991 Abuja Treaty made the issue of strengthening RECs critical.⁴⁰⁷

⁴⁰¹ Ibid art 3(d).

⁴⁰² Ibid art 3(f), (g) and (h).

⁴⁰³ Ibid art 3(m) and (n).

⁴⁰⁴ Ibid art 3(i) and (j).

⁴⁰⁵ Ibid art 3(l).

⁴⁰⁶ These four principles are: 1. The sovereign equality of all member states. 2. Non-interference in the internal affairs of States. 3. Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration. See article 3 of the OAU Charter. 4. Unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other States.

⁴⁰⁷ Article 28 Strengthening Regional Economic Communities:

1. During the first stage, member states undertake to strengthen the existing regional economic communities and to establish new communities where they do not exist to ensure the gradual establishment of the community; and 2. The member states shall take all necessary measure aimed at promoting increasingly closer cooperation among the

The AU was intended to be a medium that would accelerate sub-regional economic integration, which would, in due course, fuse to create the African Economic Community (AEC). To achieve this expectation, the AU has recognised eight RECs and is collaborating with them to create an integrated Africa in the future.⁴⁰⁸

Inter-governmental Authority on Development (IGAD) came into existence in 1996. It began as the Intergovernmental Authority on Drought and Development (IGADD), founded in 1986. It was initially established to develop a regional approach to drought control in the region. It has eight member countries in the East and Horn of Africa.⁴⁰⁹ The IGAD was established to address the frequent and harsh droughts and other natural disasters that caused severe famine, ecological degradation, and untold economic hardship in the Eastern African Region.⁴¹⁰ Its members felt that a collective and integrated measure could successfully help reduce such problems compared to non-integrated national efforts. Its activities are geared towards maintaining peace and security and tackling development and economic integration issues.⁴¹¹ The primary objectives of IGAD include, inter alia, the promotion of joint strategies and harmonisation of macroeconomic policies in trade, customs, transport, communications, agriculture, and natural resources, the promotion of free movement of goods, services, and people within the region.⁴¹² Since its creation, IGAD has recorded several achievements, such as establishing effective and efficient mechanisms, networks, processes, specialised institutions, and partnerships to execute its regional activities. For example, specialised institutions have been established, such as the Conflict Early Warning and Response Mechanism (CEWARN), IGAD Business Forum, East Africa Standby Brigade, and the IGAD Climate Predication and Application Centre for Monitoring and Forecasting (ICPAC).⁴¹³ However, IGAD has failed to attain food security for the people of the Horn of Africa. Moreover, its goal of achieving peace

communities, particularly through coordination and harmonisation of their activities in all fields or sectors to ensure the realisation of the objectives of the community.

⁴⁰⁸ These RECs are highlighted below. However, three (EAC, COMESA, and SADC) out of the eight have been selected as case studies in this study and will be examined in-depth in the subsequent chapters.

⁴⁰⁹ Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, South Sudan and Uganda.

⁴¹⁰ IGAD 'The history' <https://igad.int/about/?tab=the-history> accessed on June 15 2021.

⁴¹¹ Ibid.

⁴¹² See article 7 of the Agreement establishing IGAD 1996.

⁴¹³ M Muinde *Assessment on The Role of Intergovernmental Authority on Development (Igad) in Regional Peace and Security A Case of Somalia (2000-2010)* (Doctoral dissertation, Daystar University, School of Arts and Humanities 2021) 59.

and stability in the region has been a failure because of the intra-state conflicts in its Member States (Sudan, Uganda and Somalia)⁴¹⁴ and inter-state conflict between its Member States, e.g. Ethiopia and Eritrea.

The Common Market for Eastern and Southern Africa (COMESA) was created by a treaty signed on 5 November 1993 in Kampala, Uganda and was ratified on the 8 December 1994. It began with a Preferential Trade Area that was formed on the 30 September 1982.⁴¹⁵ COMESA established an FTA on 31 October 2000, a customs union on 7 June 2009 and envisages becoming a common market by 2017 and a full economic union by 2025.⁴¹⁶ COMESA began with nineteen Member States and now has 21,⁴¹⁷ with Tunisia and Somalia joining in 2018. The vision of COMESA is ‘to have a fully integrated internationally competitive regional economic community with high standards of living for its entire nation, ready to merge into the African Economic Community’.⁴¹⁸ Its main focus is to attain sustainable economic growth and harmonious development in all economic and trading fields and strive to overcome barriers to trade among Member States. COMESA likewise identifies that peace and security are preliminary elements that promote investment, intra-regional trade and, above all, regional economic integration.⁴¹⁹ It is understood that political instabilities such as civil wars and cross-border differences⁴²⁰ in the region have hampered individual countries' economic development and their ability to reap the gains of the regional integration agenda under COMESA.⁴²¹ Notable achievements of COMESA are the elimination of tariffs among COMESA countries, Free Trade Area, the customs union with a common external tariff, and an established legal framework and

⁴¹⁴ Ibid at 60.

⁴¹⁵ Treaty establishing COMESA, 1994, article 188(1).

⁴¹⁶ COMESA Medium Term Strategic Plan 2016–2020 at 7.

⁴¹⁷ Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

⁴¹⁸ COMESA ‘COMESA in brief’ (2018) corporate communications available at, https://www.comesa.int/wp-content/uploads/2020/05/COMESA-in-brief-FINAL-_web.pdf, accessed on 25 April 2022.

⁴¹⁹ S Mancuso ‘Trends on the Harmonization of Contract Law in Africa’ (2007) 13(1) *Annual Survey of International & Comparative Law* 157-178.

⁴²⁰ Political crises in Zimbabwe, Lesotho, Madagascar and Kenya as well as conflicts in Sudan, Burundi, Ethiopia and Eritrea since the turn of the 21st century have affected COMESA’s economic development. This is because the time, financial commitment and efforts devoted to resolving these crises and conflicts could have been devoted towards making COMESA an economic community through legal harmonisation. While the efforts and commitment cannot be measured quantitatively, there is no doubt that attention directed towards coming up with solutions to the predicaments could have been utilised to come up with policy directions, recommendations and solutions to the slowness of progress of legal harmonisation in COMESA as envisage in the treaty.

⁴²¹ See Mancuso 2007 op cit note 419 at 172.

administrative structure for managing the customs union. However, despite its achievements, COMESA is faced with the challenge of ensuring that all its Member States participate in this economic integration process; many countries have raised their tariffs substantially in their trade with fellow COMESA Member States. Therefore, economic cooperation and integration between the COMESA Member States will not be easy.

Regional integration in the East African Community (EAC) can be traced back to 1897. During this period, the Kenya-Uganda railway was constructed in 1897-1901. A customs collection centre for Uganda and Kenya was created in 1900 in Mombasa, the East African Currency Board and a Postal Union in 1905, the Eastern African Court of appeal 1909, a customs union and a CET in 1919, the East African Governors Conference 1926.⁴²² Tanzania (then Tanganyika) joined the Postal Union in 1933, and a Joint Income Tax Board and Economic Council were formed in 1940. However, the treaty establishing the EAC was only signed in 1967 between the three countries. Ten years after its establishment, the EAC collapsed. According to the preamble of the renewed and revitalised 1999 EAC treaty, this occurred as a result of a lack of robust political will and participation of the private sector and civil society in community activities, the constant uneven allocation of benefits of the Community between Member States because of differences in their levels of development and lack of adequate policies to address the situation.⁴²³ The above reasons led to the official dissolution of the EAC treaty in 1977.

A renewed and refreshed EAC treaty was signed on 30 November 1999 and entered into force on 7 July 2000 with the ratification of the primary three Member States.⁴²⁴ The EAC presently consists of seven Member States with its headquarters in Arusha, Tanzania.⁴²⁵ Rwanda and Burundi joined the EAC on 1 July 2007, South Sudan joined on 5 September 2016, and the Democratic Republic of the Congo recently joined on 8 April 2022. The vision of the EAC is to be a prosperous, competitive, secure, stable and politically united East Africa.⁴²⁶ The principal focus is to widen and deepen cooperation in the political, economic and social fields among

⁴²² J Otieno-Odek 'Law of regional integration – A case study of the East African Community' in Döveling, Johannes, Hamudi I. Majamba, Richard Frimpong Oppong, and Ulrike Wanitzek (eds) *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities* (2018) 5 Law Africa, 15-55.

⁴²³ See the preamble of the EAC treaty 1999.

⁴²⁴ Kenya, Tanzania and Uganda.

⁴²⁵ The Democratic Republic of Congo, Burundi, Kenya, Rwanda, South Sudan, Uganda and Tanzania.

⁴²⁶ EAC 'Overview of EAC' <https://www.eac.int/overview-of-eac> accessed on 28 May 2022.

Member States for their common benefit.⁴²⁷ To achieve this, the EAC has been robust in pursuing the regional integration process by establishing a customs union in 2005, a common market in 2010, a Monetary Union Protocol signed in 2013 and a single currency expected to be in place by 2024 and ultimately a Political Federation of the East African States.⁴²⁸ The EAC is undoubtedly the most advanced REC in Africa and is among the world's fastest-growing REC.

The objective of the EAC, as enshrined in Article 5(1) of the treaty, is to develop policies and programmes aimed at widening and deepening cooperation among the Member States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit. Paragraph 2 of Article 5 further indicates that the Member States shall undertake to establish among themselves and under the provisions of the Treaty, a customs union, a common market, a Monetary Union subsequent to that, and ultimately a Political Federation. This is intended to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the partner states/Member States⁴²⁹ to accelerate a harmonious, balanced development and sustained expansion of economic activities. The benefit of this shall be equitably shared. However, the EAC is yet to realise many of the grand objectives outlined in its treaty. For example, the EAC has not developed harmonised policies and laws in several areas. This includes: negotiating as a bloc, establishing a development fund to support the promotion of infrastructure development, reducing reliance on donor funding, and eradicating non-tariff barriers to make the customs union more effective.⁴³⁰ In addition, the harmonisation of domestic tax laws and implementation of strategic infrastructure projects in roads, railways and energy,⁴³¹ are also objectives still to be attained.

The Economic Community of Central African States (ECCAS) was established in 1983 and became operational in 1985. It was largely dormant until 1998 due to a lack of funds and

⁴²⁷ Ibid.

⁴²⁸ Otieno-Odek 2018 op cit note 422 at 23.

⁴²⁹ The EAC uses 'Partner States' to mean 'member states' of the community. Therefore, this thesis will continue to use member states for consistency.

⁴³⁰ C Kamanga Khoti 'An Enquiry into the Achievements and Challenges of East African Regional Integration' (2016)43(1) *The African Review: A Journal of African Politics, Development and International Affairs* 51—74.

⁴³¹ T Aleem 'Harmonization in the EAC' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill, 2017) 486–500.

constant conflict in its Member States, which handicapped it.⁴³² Presently, ECCAS has eleven Member States.⁴³³ The main objective of ECCAS is to achieve harmonious and self-sustainable development, raise the standard of living of its citizens and maintain economic stability, maintain peaceful relations between members and contribute to the development of the African continent.⁴³⁴ However, the ECCAS countries have begun to phase in free trade in the past few years and have created some technical and development institutions. Among the vital steps taken by ECCAS are: adopting a protocol establishing a Network of Parliamentarians of Central Africa (REPAC) and the Early Warning Mechanism of Central Africa (MARAC) in June 2002.⁴³⁵ Further, ECCAS has adopted the standing orders of the Council for Peace and Security in Central Africa (COPAX), the Defence and Security Commission (CDC), and the Multinational Force of Central Africa (FOMAC).⁴³⁶ These instruments have not been effective, however. There has been ongoing conflict between ECCAS members, with inadequate funding to the organisation.⁴³⁷ Similar to other RECs in Africa, they have missed their target dates⁴³⁸ for establishing a customs union.

The Economic Commission of Western African States (ECOWAS) is another sub-regional grouping established in 1975. The treaty establishing ECOWAS was revised on 24 June 1993.⁴³⁹

⁴³² AU 'Economic Community of Central African States (ECCAS)' <https://au.int/en/recs/eccas> accessed on 06 June 2021.

⁴³³ Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Rwanda and Sao Tome and Principe.

⁴³⁴ Article 4(1) of the ECCAS treaty

⁴³⁵ AU 'Economic Community of Central African States (ECCAS)' <https://au.int/en/recs/eccas> accessed on 6 June 2021.

⁴³⁶ Ibid.

⁴³⁷ Examples of conflicts in ECCAS region are; ethnoreligious conflicts, border issues, civil strife, civil wars, and genocides. The conflicts in Burundi and Rwanda, for instance, were ethnoreligious in nature. The 1994 Rwandan genocide reportedly claimed about 800 000 lives. While Angola was in turmoil following the battle for control of its government by three ethno-political factions, The CAR was embroiled in a series of revolts and attempts at ethnoreligious cleansing involving the government of François Bozizé, the (Muslim) Séléka rebel coalition, and the (Christian) Anti-balaka militias. Following the ousting of Bozizé, the Séléka-led mutiny in the CAR polarised the country's security and impaired its infrastructure and ethnic composition. In turn, this led to an increased risk of mass atrocities amid a deluge of human rights violations, war crimes, ethnoreligious clashes, intra-Séléka fights, and the influx of fighters purportedly coming from Chad and Sudan. All these conflicts are within the confines of ECCAS's jurisdiction. See Accord 'the Economic Community of Central African States and conflicts in the region' <https://www.accord.org.za/conflict-trends/the-economic-community-of-central-african-states-and-conflicts-in-the-region/>, accessed on 30 August 2021.

⁴³⁸ The establishment of a Customs union in ECCAS was planned for 2008 but this has not materialised because even the free trade area created in January 2004 is yet to go operational.

⁴³⁹ ECOWAS 'Treaty' <http://www.ecowas.int>, accessed on 10 July 2021.

It has fifteen member countries.⁴⁴⁰ The principal objective of ECOWAS is to promote cooperation and integration, leading to the establishment of an economic union in West Africa to raise the living standards of its peoples and maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African continent.⁴⁴¹ ECOWAS has the ultimate goal of total integration of the national economies of its Member States. This has to be achieved through the harmonising measures and standards and establishing a common market.⁴⁴² To date, ECOWAS has recorded many successes relating to the integration project. These include the abolition of visas and entry permits for Member State citizens, the introduction of the ECOWAS passport, and the introduction of the Brown Card Motor Vehicle Insurance scheme to facilitate road transport within the ECOWAS region.⁴⁴³ There is also the introduction of harmonised customs documents. In addition, several institutions have been established, such as the Commission, the Community Parliament, the Community Court of Justice, the ECOWAS Bank for Investment and Development (EBID), the West African Health Organisation, the Monetary Agency, and the West African Monetary Institute.⁴⁴⁴ However, some shortcomings still hinder the integration process. For example, a Monetary Union goal has not been achieved. Furthermore, the protocols on the freedom of movement, residency, and rights of establishment for ECOWAS citizens have also suffered a series of setbacks, and the impact of the regional institutions created is yet to be felt.⁴⁴⁵

The Southern African Development Community (SADC) was established in 1992. It consists of 16 Member States,⁴⁴⁶ with Comoros being its most recent member which joined in 2018. The SADC began with the objective of a conference to coordinate development in 1980, known as the Southern African Development Coordination Conference (SADCC), and transformed into a development community (SADC) on 17 August 1992 in Windhoek, Namibia. Its main focus was to integrate the economies of Southern African Member States by promoting

⁴⁴⁰ Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea, Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

⁴⁴¹ Article 3(1) of ECOWAS revised treaty 1993.

⁴⁴² Ibid article 3(2).

⁴⁴³ A E Joe Eric 'A Polemic on ECOWAS' Efforts at Realising the Benefits of Economic Integration for West Africa' (2021) *South-South Journal of Humanities and international Studies* 95-111.

⁴⁴⁴ Ibid.

⁴⁴⁵ ECOWAS 'Travel: Free movement of people' <http://www.ecowas.int>, accessed on 110 July 2021.

⁴⁴⁶ Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe and Comoros.

economic growth and socio-economic development to eradicate poverty and enhance the standard and quality of life of the people.⁴⁴⁷ It also aims to promote peace, security and stability while combating HIV/AIDS or other deadly and communicable diseases.⁴⁴⁸ As an achievement, the SADC established a standby peacekeeping force in 2007,⁴⁴⁹ and the organisation has had some success in mediating conflicts in Lesotho, Zimbabwe, Madagascar, Mozambique and the Democratic Republic of Congo.⁴⁵⁰ Further, more than two-thirds of SADC protocols on regional integration have entered into force, and most substantive provisions of the regional integration policy are, in various degrees, being implemented. For example, the SADC has had some success in the building and rehabilitation of transport links among its Member States regarding infrastructure.⁴⁵¹ That notwithstanding, SADC faces numerous challenges, such as the over-ambitious targets set by the SADC as a roadmap to regional economic integration (like the deadline for the customs union, which was not met), multiple and concurrent memberships of different regional economic communities, duplication emanating from the activities of the SACU and the SADC and varying levels of economic development within the SADC Member States.

The Arab Maghreb Union (AMU) was established in 1989 with five Member States: Algeria, Libya, Mauritania, Morocco, and Tunisia. It aimed to protect and promote the region's economic and cultural interests with the ultimate goal of establishing a North African common market.⁴⁵² In addition, it sought to guarantee cooperation with other regional institutions and among its Member States. AMU was initially formed to allow its members to negotiate with the

⁴⁴⁷ Consolidated text of the treaty of SADC, article 5(1). The Consolidated Treaty of SADC is a consolidation of the following texts: - The Treaty of the Southern African Development Community, 1992 - The Agreement Amending the Treaty, 2001 - The Agreement Amending Article 22 of the Treaty, 2007 - The Agreement Amending the Treaty, 2008 - The Agreement Amending Article 10A of the Treaty, 2009 and - The Agreement Amending Articles 10 and 14 of the Treaty, 2009. This edition of the consolidated text of the Treaty replaces the 2011 edition. And it is done by the Legal Affairs Unit of the Secretariat 2015.

⁴⁴⁸ Ibid.

⁴⁴⁹ A Ndaguba Emeka 'Task on Tank model for funding peace operation in Africa—A Southern African perspective (2018) 4(1) *Cogent Social Sciences* 1484414.

⁴⁵⁰ S Desmidt and V Hauck 'Understanding The Southern African Development Community Peace and security: how to fight old and new demons' (2017) *Political Economy Dynamics of Regional Organisations (PEDRO) Paper Series, ECDPM* 1-23.

⁴⁵¹ R Rupa & V Foster 'The SADC's infrastructure: A regional perspective'(2011) *World Bank Policy Research Working Paper* 5898, 1-67.

⁴⁵² E Marinov 'Economic Integration in Africa – Overview, Progress and Challenges' (2014) 1/2014 *Journal of Global Economics* 42—55, ISSN 2343-9521.

EU to benefit from a single European Market.⁴⁵³ It also aimed to encourage trade and economic cooperation that would permit free movement across boundaries.⁴⁵⁴ The principal objective of the AMU agreement is to strengthen all forms of collaboration between the Member States and progressively introduce the free circulation of goods, services, and factors of production among them.⁴⁵⁵ The Union proclaimed that creating the regional group was a step towards the ultimate unity of all Arab Member States. AMU has succeeded in connecting electricity within the five Member States, establishing a joint groundwater monitoring system for the Sahara, the Albian Aquifer Systems shared by three Member States (Algeria, Libya, and Tunisia),⁴⁵⁶ and creating a Union of Maghrebine Banks in Tunis.⁴⁵⁷ It is argued, though, that among the main challenges of AMU is the absence of a harmonisation of standards which hampers the establishment of the proposed Free Trade Area. There is also a tendency for some Member States to be willing to sign agreements outside the same region, but they find it challenging to sign similar agreements amongst themselves. For example, Morocco signed a Free Trade Agreement (FTA) with the US in 2004 and several other agreements with the European Union on economic cooperation and the establishment of a free trade zone for industrial goods.⁴⁵⁸

The Community of Sahel-Saharan States (CEN-SAD) was established in 1998. It is a framework for integration and harmonisation with 29 member countries.⁴⁵⁹ Its goal is ‘to become the leading organisation among RECs in Africa,’ although no concrete action has yet been taken.⁴⁶⁰ The main objective of CEN-SAD is to create a comprehensive economic union of its Member States. Some of CEN-SAD’s successes include its strategy, developed in 2007, which

⁴⁵³ Institute for Security Studies ‘Arab Maghreb Union’ <https://issafrica.org/profile-arab-maghreb-union-amu> accessed on 12 July 2021.

⁴⁵⁴ Article 2 of the treaty of AMU 1989.

⁴⁵⁵ A Dehbi ‘THE MAGHREB ARAB NEEDS INTEGRATION MORE THAN EVER’ (2021)5(2) *WORLD POLITICS* 580-596.

⁴⁵⁶ UNECE ‘Policy brief highlights the benefits of strengthening transboundary water cooperation in North Western Sahara Aquifer System shared by Algeria, Libya and Tunisia’(2020) <https://unece.org/environment/press/policy-brief-highlights-benefits-strengthening-transboundary-water-cooperation> accessed on 12 July 2021.

⁴⁵⁷ M Omoro Fatuma Akoth ‘*Organisational effectiveness of regional integration institutions: A case study of the East African community*’ (a Masters Dissertation submitted to the Department of Public Administration, University of South Africa 2008) 50.

⁴⁵⁸ Ibid.

⁴⁵⁹ Benin, Burkina Faso, Cape Verde, Central African Republic, Comoros, Côte d’Ivoire, Chad, Djibouti, Egypt, Eritrea, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, São Tomé & Príncipe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia.

⁴⁶⁰ Marinov 2014 op cit note 452 at 49.

covers poverty eradication, food security, water management, and desertification.⁴⁶¹ In addition, CEN-SAD played a crucial role in bringing Sudan and Chad together during the Sudan/Chad conflict.⁴⁶² However, it has been observed that programs instituted by CEN-SAD have primarily been vehicles for Libyan hegemony. The CEN-SAD Development Bank and the organisation's headquarters are found in Tripoli. The organisation's sole regional security operation has widely been criticised as a solely Libyan organised mission to the Central African Republic.⁴⁶³

Based on the above facts, many sub-regional organisations aim to create a harmonised and integrated region in many fields. This facilitates the pursuit of the AU goal of accelerating the political and socio-economic integration of the continent. The RECs are empowered to put into practice the decisions arrived at by the African Union Assembly. For instance, where an unconstitutional change of government occurs, economic sanctions may be imposed on the relevant member by the AU. This can successfully be carried out through the REC, where the particular state with a problem is a member.

However, AU economic sanctions through RECs have not been realised because of Member States' reluctance to pool their sovereignty in favour of regional integration. More complicated is the multiple memberships of many African countries in different RECs that complicate efforts to ensure harmonisation and coordination. Although there is a dire need to rationalise the RECs based on the principle that a state can only be a member of a single REC, there is still reluctance to accept the move to rationalise because of vested interests amongst others. It remains to be seen whether, when, and how RECs will accept and implement this principle.⁴⁶⁴

Furthermore, the economic progress of African integration through RECs is mixed across sectors. There have been some strides in trade, communications, macroeconomic policy, and transport within some RECs. For example, COMESA has made significant progress in trade liberalisation and facilitation, and ECOWAS has made progress in the free movement of people. SADC and the EAC have made progress in infrastructure development, and ECOWAS and SADC have made some strides in peace and security. The overall position, though, is that there

⁴⁶¹ Omoro 2008 op cit note 457 at 47.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ F Viljoen 'African Union (AU)' 2011 In Max Planck Encyclopedia of Public International Law. Oxford University Press, Available: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law_9780199231690-e452, accessed on 6 June 2021.

are considerable discrepancies between the aspirations and attainments of most RECs, especially concerning greater internal trade, macroeconomic union, production, and physical connectivity regarding road transport.⁴⁶⁵

3.4 Legal frameworks for Africa's regional integration

3.4.1 Abuja Treaty 1991

Before the end of apartheid in Southern Africa, the challenges of global change had already necessitated some amendments to the OAU charter. As stated above, the OAU had been criticised for its inability to handle conflicts and dictatorial regimes in Africa due to its non-interference policy. According to Cervenka,⁴⁶⁶ the OAU's performance in the economic field was worrisome compared to its headway on decolonisation and struggled against apartheid. Displaying his concern about the pathetic situation, Cervenka said:

After so many years, the real struggle for the liberation of the continent of Africa from economic domination by outside powers had hardly begun.⁴⁶⁷

An appraisal of the OAU after close to two decades of existence showed a disappointing economic record, especially with the advent of the economic crisis on the continent. As a result of this poor economic performance after independence,⁴⁶⁸ social disintegration, and the need to rescue the fallen quality of life of most African people, there was an economic recovery programme from 1977 to 1980.⁴⁶⁹

To provide a framework for economic growth and promote equitable economic development,⁴⁷⁰ the LPA of April 1980 was adopted to be implemented over twenty-five years.

⁴⁶⁵ UNECA 'Assessing regional integration in Africa (ARIA 1)' 2004 ECA publication; Addis Ababa Ethiopia.

⁴⁶⁶ Z. Cervenka 'The unfinished quest for unity: Africa and the OAU' (1977) Friedmann; Nordiska Afrikainstitutet. See also Cervenka 'The Organisation of African Unity (1976)9 Africa Contemporary Record: Annual Survey and Documents, edited by Colin Legum (London Rex Collings, 1977) A68-A75.

⁴⁶⁷ A Saurombe 'An analysis of economic integration in Africa with specific reference to the African Union and the African Economic Community' (2012)27(1) *Southern African Public Law* 292—314. See also Shaw 'The Organisation of African Unity: Prospects for the second decade' (1973) Sep/Oct *International Perspectives* 31-34. And Shaw 'Inequalities and conflict in contemporary Africa' (1978) *International Perspectives* 44-49.

⁴⁶⁸ AUC '2019 African Regional Integration Report: Towards an integrated and prosperous and peaceful Africa' (2019), Addis Ababa (Ethiopia) 6.

⁴⁶⁹ See Saurombe (2012) op cit note 467.

⁴⁷⁰ T Bankole & R S Mukisa 'Legal integration as a key component of African economic integration: A study of potential legal obstacles to the implementation of the Abuja Treaty' (1994)20(4) *Commonwealth Law Bulletin* 1446-1457.

This remarkable OAU initiative envisaged the establishment of the AEC following the gradual integration process. It was the first concrete plan toward the continent's socio-economic integration through the realisation of the African common market by 2000. The LPA intended to implement a transport system and communication plan, strengthening intra-continental trade and developing novel technologies and skills.⁴⁷¹ However, the Pan-African agenda of the OAU did not support economic development, and therefore promoting economic advancement and raising the living conditions of the African people under it was bound to fail. The ambitious plan did not materialise as it was abandoned a few years after approval. A lack of funds, an inability to meet the targeted socio-economic performance, and opposing international initiatives such as the World Bank Report have all been cited as reasons for the failure of the LPA.⁴⁷²

By being aware of the factors that impede the economic and social development of the continent, Member States of the OAU established the Abuja Treaty. With the adoption of the treaty, there were hopes for the transformation of the OAU to the AU for fear of it failing like the LPA. The Abuja Treaty was signed on 3 June 1991 and came into force on 12 May 1994, establishing a 34-year roadmap for complete economic integration to be crowned with the African Economic Community. It was an applauded bold step taken in the direction of a legal framework for attaining economic integration on the continent by the OAU Member States. The treaty's objectives were to stimulate economic self-reliance and promote endogenous and sustainable development that would raise the African populace's standard of living. The vision of the treaty is to integrate all sub-regional markets, which will, in due course, amalgamate into one giant African market to form the African economic union. Whether these sub-regional groupings have the same vision is another cause for concern and will be covered in the next chapter. Article 3 of the treaty enumerates the guiding principles of the community integration plan and requires the observance of the community legal system. To achieve this, the treaty in Article 4 has as major integrative objectives the following:

- a) to promote economic, social and cultural development and the integration of African economies to increase economic self-reliance and indigenous and self-sustained development;

⁴⁷¹ AUC 2019 op cit note 468 at 6.

⁴⁷² Ibid.

- b) to establish, on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa to achieve self-reliant development;
- c) to promote cooperation in all fields of human endeavour to raise the standards of living of African peoples and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and economic integration of the continent; and
- d) to coordinate and harmonise policies among existing economic communities to foster the gradual establishment of the community.

If successful, the AEC will be the largest economic community worldwide, comprising 53 African States.⁴⁷³ To achieve the above-stated objectives, the Abuja Treaty offers several techniques in its Article 4(2), including trade liberalisation and the abolition of NTBs among the Member States to establish an FTA in each REC.⁴⁷⁴ Some of the most important aims of the treaty are the harmonisation of Member States' policies in all fields and having a communal trading policy.⁴⁷⁵ The treaty also strives to eliminate barriers to the free circulation of people, goods, services, and capital and the rights of residence and establishment.⁴⁷⁶ These are perilous NTB barriers to economic integration everywhere, at all times. Suffice it to say that diverse legal systems constitute a huge NTB to African regional integration, and harmonising these will enhance the integrative process. With at least four main inherited legal systems (Common law, Civil law, Islamic law, and Roman-Dutch law) and the juxtaposition of customary and traditional rules of AU member countries, impediments to its integrative agenda are bound to be enormous. Moreover, cross-border trade is hampered by the fragmented regulatory road transport environment and the uncoordinated law enforcement operations in corridors and border posts. The treaty, in Articles 29 to 32, requires the Member States to ensure the elimination of customs duties, quotas restrictions, and all other NTBs to intra-community trade and establish a common external customs tariff.⁴⁷⁷

⁴⁷³ R F Oppong, 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18(1) *Afr J Int'l & Comp L* 92—103.

⁴⁷⁴ Abuja Treaty 1991, art 4(2) para(d).

⁴⁷⁵ Ibid para (e) and (f).

⁴⁷⁶ Ibid para (i).

⁴⁷⁷ See art 29, 30, 31 and 32 of the Abuja Treaty.

The absence of a legal harmonisation model or regulations to ensure harmonisation and institutional architecture for implementation is a deepening challenge. The daunting task of legal harmonisation cannot be left to the caprices of RECs, which cannot harmonise community trade laws. The RECs lack a central platform to coordinate legal harmonisation, even if they were given a clear mandate. Also, their priorities are not aligned with those of the AU. It is incumbent on the AU to adopt a legal harmonisation model for community trade, especially NTBs, and create effective implementation machinery for its treaty proviso. Until this is done, the effective operationalisation of the African Market envisaged in Article 6(2), beginning with the CFTA, will remain a work in progress. Not every REC has established an FTA, which is a requirement in the stages of forming the AEC as outlined in the treaty. There is no sufficient evidence that every REC will comply with the dictates of the present AfCFTA. Developing a legal harmonisation model for NTBs to ease and boost community trade is a starting point to accelerate regional trade and growth.

3.4.2 The Constitutive Act of AU 2000

From the debates leading to the transformation of the OAU to the AU, it can be deduced that the AU was created to strengthen African regionalism and its institutions by addressing the continent's current socio-cultural, economic, political and security needs. For Africa to significantly impact global geopolitics and be a global economic player, the OAU had to give way to the AU. The AU, determined to succeed where the OAU had failed, decided to strengthen the existing objectives and principles of OAU and adopted novel ones with broader perspectives in articles 3 and 4 of the Constitutive Act (see Figure 3.2 below). The Act outlined nine principal organs⁴⁷⁸ and the Assembly of Heads of States and Government as the supreme organ of the Union.⁴⁷⁹ The Commission, the Pan African Parliament and the Economic, Social, and Cultural Council are all charged with the socio-economic development and integration of the continent.⁴⁸⁰ One of the Commission's functions is the advancement, coordination, and harmonisation of the

⁴⁷⁸ They are: The Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions. See article 5(1) of the 2000 Constitutive Act of AU.

⁴⁷⁹ Ibid Article 6(2).

⁴⁸⁰ Ibrahim Kane & Nobuntu Mbelle 'Towards a People-driven African Union: Current Obstacles & New Opportunities' (2007) *African Minds* 34.

programmes and policies of the AU with those of RECs. The Pan African Parliament further ensures the coordination and harmonisation of laws and policies of Member States together with their programmes and activities. The AU was expected to bring about the much-required transformation and economic integration while providing ‘African solutions to African problems’.⁴⁸¹

⁴⁸¹ P Thean ‘Exploring African Solutions to African Problems’ (2021) 4(1) *Africa Journal of Public Sector Development and Governance* 5-25.

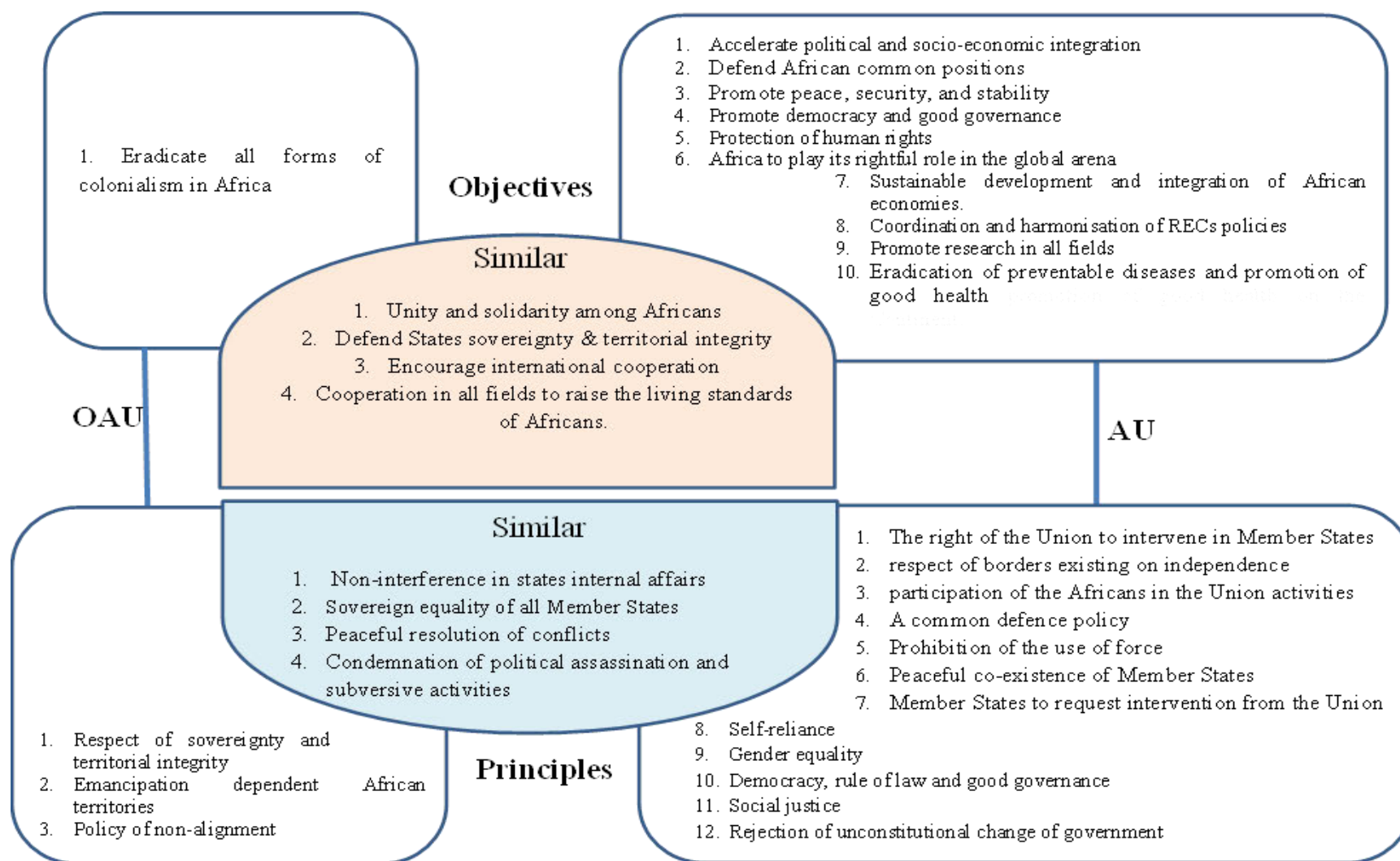


Figure 3.2: A comparative analysis of the objectives (Article 2 of the Charter and Article 3 of the Act) and principles (Article 3 of the Charter and Article 4 of the Act) of the OAU and the AU.

Source: author's conceptualisation

Based on these elaborate principles and purpose, the AU has opted for non-indifference in the internal affairs of Member States.⁴⁸² It has the right to intervene in the Member States in cases of gross human rights violations, genocide, and war crimes to address the inefficiencies of the OAU.⁴⁸³ The AU intervenes in conflicts in Member States via the regional peacekeeping forces through the security framework for Africa. The Peace and Security Council (PSC) was created to drive the security agenda, including the Continental Early Warning System (CEWS) and Military Staff Committee, which advises on matters of troop deployment. In addition, the New Partnership for African Development (NEPAD) and the African Peer Review Mechanism (APRM) were initiatives to foster socio-economic integration, governance, and political reforms following the Act.⁴⁸⁴

However, the author believes that the AU is still confronted with the traditional challenges the OAU faced and more. Member States are still not robust in playing their role in the African unification process, and as noted earlier, they are still attached to state sovereignty. Financing the AU remains an inherited challenge inhibiting the smooth functioning of the union as Member States' contributions keep dwindling. Implementing the self-financing decision of 0.2 percent levy on imports outside the AU adopted by the union remains a major challenge as the AU still depends largely on foreign donors. However, the AU decided in 2018 to strengthen its sanctioning methods to ensure its Member States meet their financial obligations timeously.⁴⁸⁵ The short- and long-term sanction measures apply to those members who fail to pay part or full contributions within six months to two years.⁴⁸⁶ The sanctions are classified as: cautionary, intermediate and comprehensive.⁴⁸⁷ This has,

⁴⁸² See article 4(g) of the 2000 Constitutive Act of AU.

⁴⁸³ Ibid art 4(h).

⁴⁸⁴ P Jiboku Akudo & Ufo Okeke-Uzodike 'Regional Economic Integration and the Governance Challenge in Africa: Missing Links in the African Peer Review Mechanism' (2016) 41(2) *Africa Development* 47—70. See also AU 'African Peer Review Mechanism (APRM)' <https://au.int/en/organs/aprm> accessed on 12 September 2022.

⁴⁸⁵ AU 'African Union sustainable funding strategy gains momentum' <https://au.int/en/articles/african-union-sustainable-funding-strategy-gains-momentum/> accessed on 12 September 2022.

⁴⁸⁶ Ibid.

⁴⁸⁷ Cautionary sanctions will be applied to member states who do not pay 50% of their assessed contributions within six months. Such states will be deprived their right to take the floor or make any contributions in the meetings of the African Union. Intermediate sanctions shall apply to members who are in arrears for one year. In this instance, the member states shall be suspended from being a member of a Bureau of any organ of the Union; host any organ, institution or office of the Union; lose the right to have their nationals participate in electoral observations missions, human rights observation missions and will not be invited to meetings organized by the Union and further, such states will not have their nationals appointed as staff members, consultants, volunteers or interns at the African Union. Under the comprehensive sanctions which kick in after a member state defaults its payments for two years, such states are liable to the cautionary and intermediary

however, not resolved the financing problem as Member States have yet to comply with their obligations.

The achievement of peace and security remains a challenge, as conflicts, clashes, and fierce zealotry in Mali, South Sudan, the Sahel, Libya, Sudan, the Lake Chad Basin, Burundi, and Somalia have not been permanently resolved. Political conflicts due to controversial re-elections have been predominant in some African states, such as Côte d'Ivoire and Guinea. The debate on whether to create a supranational entity that would fast-track the Pan-African dream of a United States of Africa continues. This can be seen in the declaration of Agenda 2063 in 2013, where African leaders reviewed their past challenges and recommitted themselves to 'the Africa we want' a renewed trajectory for the next fifty years. However, the gradual approach to economic and political integration through the RECs as pillars of the AEC has been slow, and the stages of economic integration outlined in the Abuja Treaty have not been met.⁴⁸⁸

Although the AU has abandoned the OAU principle of respect for each state's sovereignty and territorial integrity and its inalienable right to independent existence, there is ample ground to believe that the possibility of normative supranationalism has not been considered in the Act. This is because supranationalism requires that some degree of sovereignty be relinquished to the supranational entity, requiring the supremacy of the organisation's policies over those of Member States and that they have a direct effect. This has not been explicitly stated in the Act. However, some of the objectives and principles of the Act prove that the AU is considering moving from a mere intergovernmental OAU to a Supranational AU.⁴⁸⁹ For example, the stance of Article 3(1) and Article 4(d) and (h) of the Act are indications of normative supranationalism. Although AU aspires to supranationalism, it has failed to uphold the constituents of supranational objectives. The philosophy of clinging to state sovereignty by African countries is antagonistic to supranationalism. Some AU institutions, such as the AU Commission, the African Court of Justice, and the Pan-African Parliament, have not been empowered enough to exercise their legislative powers. The

sanctions and their right to participate in the meetings of the Union will be suspended. Exceptions will be granted to members who demonstrate conditions beyond their control to meet their financial obligations. See AU 'African Union strengthens its sanction regime for non-payment of dues' <https://au.int/en/pressreleases/20181127/african-union-strengthens-its-sanction-regime-non-payment-dues> accessed on 12 September 2022.

⁴⁸⁸ This will be elaborated in chapter four.

⁴⁸⁹ B O Fagbayibo 'Looking back, thinking forward: Understanding the feasibility of normative supranationalism in the African Union' (2013) 20(3) *South African Journal of International Affairs* 411–426.

effectiveness of PSC is also limited due to financial and human capital.⁴⁹⁰ Evidence suggests that the AU is extremely far from supranational adeptness. Fagbayibo propounds that AU affiliates have not demonstrated sufficient political will to attribute supranational powers to the organisation.⁴⁹¹ There is a need to strengthen the African framework for integration and integrative processes to tackle the current challenges and achieve the AU vision of a politically and economically integrated Africa. It is suggested that the actual harmonisation of laws, policies, activities, and programmes of RECs, especially NTBs, for the effective implementation of the AfCFTA is one of the necessary measures to be taken. Article 3(l) envisages the coordination and harmonisation of the policies of RECs so that the purpose of the AU can be achieved. If the different frameworks of RECs are synchronised, this will be the starting point for economic integration in Africa.

3.4.3 Protocols on relations between the AU and RECs

In underscoring the importance of the relations between the AEC and RECs, the Abuja Treaty in Article 88 streamlined the activities of the AEC and RECs. While the Member States are expected to coordinate and harmonise their activities at the sub-regional level, the community is supposed to coordinate and harmonise the activities of RECs at the regional level. This relationship was further elaborated in the 1998 Protocol on relations.⁴⁹² Since the RECs have been considered the pillars of the AEC, the 1998 Protocol on relations between the RECs and the AEC was designed to harmonise inconsistent policies.⁴⁹³ The Protocol functioned as a guide for harmonising integrative undertakings between the RECs and the RECs vis-à-vis the AEC.⁴⁹⁴ To strengthen this relationship, this Protocol was amended and replaced by the 2007 protocol on relations between the AU and RECs.

Evidence illustrating the significance of this relationship confirms that the 2007 Protocol is designed to ensure the smooth implementation of the provisions of the Constitutive Act, the Abuja Treaty, and the protocol among the parties.⁴⁹⁵ The Protocol's main objectives are to strengthen the RECs and encourage the coordination and harmonisation of all their activities

⁴⁹⁰ Ibid at 415.

⁴⁹¹ Ibid at 421.

⁴⁹² The 1998 Protocol on relations between the Regional Economic Communities and the African Economic Community.

⁴⁹³ Ibid Article 4(a) which provides that; 'The Parties undertake to promote the coordination of their policies, measures, programmes and activities with a view to avoiding duplication thereof. To this end, the Parties agree: a) to ensure that their policies, measures, programmes, and activities do not duplicate efforts or jeopardize the achievement of the objectives of the Community;' see also Amos 2012 op cit note 465 at 300.

⁴⁹⁴ Saurombe 2012 op cit note 467 at 300.

⁴⁹⁵ See Art 2 (scope of application) of the 2007 Protocol on Relations between the AU and RECs.

and policies to attain the provisions of the Act and the Abuja Treaty.⁴⁹⁶ It also aims to ensure and reinforce stronger collaborations between RECs and the provisions of a framework that will coordinate the activities of the RECs to realise the objectives of the Union and the Abuja Treaty. The protocol equally requires the RECs to review their treaties by aligning their programmes and policies with those of the union and ensuring their ultimate fusion into the African Market as a prelude to establishing the AEC as their final purpose.⁴⁹⁷

Therefore, it is assumed that the AU intended to legalise the relations between the RECs and between the AEC and the AU. The question to be addressed is whether the RECs have harmonised their programmes, measures, activities, and policies. Have they reviewed their treaties with the ultimate aim of a fusion with the AEC? After more than a decade of establishing this protocol, most RECs have continued to pursue their individual purposes. Shittu⁴⁹⁸ puts forward a view that intra-continental trade accounts merely for 12 per cent of Africa's total trade, while its part in global trade is estimated at an insignificant 3.2 per cent. These percentages do not encourage nor indicate the desire to want to promote an African common market. Furthermore, there is no sign that the RECs are even collaborating among themselves in policy harmonisation. Free movement of persons – an element that increases cross-border trade, is one of Africa's biggest challenges to economic integration. Mwangi and Katrin⁴⁹⁹ posit that although most RECs have signed protocols on free movement with the elimination of visa requirements and other NTBs to cross-border trade and business operations, the free circulation of persons continues to be a daunting challenge. This challenge can be eliminated through the legal harmonisation of NTBs to trade within RECs.

However, there are no binding obligations on the RECs and the AEC (see Figure 3.3 below), and this impedes the achievement of the objectives of the union, especially the harmonisational objective. This is exemplified by the fact that most RECs do not aim to fuse into the African common market as the final purpose of their treaties.⁵⁰⁰ Therefore, the consensus view seems to be that the scope of application in Article 5 of the protocol is just a

⁴⁹⁶ Ibid art 3.

⁴⁹⁷ Ibid article 5.

⁴⁹⁸ Shittu A Bello 'The Prospects and Challenges of African Continental Free Trade Area Agreement' (2018) 26 *Sri Lanka J Int'l L* 121.

⁴⁹⁹ S Mwangi Kimenyi and K Kuhlmann 'African Union: Challenges and Prospects for Regional Integration in Africa' (2012) 13 *Whitehead J Dipl & Int'l Rel* 7.

⁵⁰⁰ For example, RECs such as AMU, IGAD and CEN-SAD are not following the stages of economic integration as provided in the Abuja Treaty and there is no provision for fusion into the African Common Market in their treaties.

requirement to indicate that the RECs have to fulfil the duties entrusted to them by Articles 6 and 88 of the Abuja Treaty.⁵⁰¹

The fact that the AEC has been subsumed into the AU is problematic. The AU institutions are the same AEC institutions making it difficult for the AEC to exercise independent authority over its affairs. There is a possibility of distinguishing between political and economic integration. A good example is demonstrated by the achievement of the political objectives of the OAU when it did not have an economic character. The introduction of the economic arm in 1991 should have been treated as an independent arm of the OAU (AU) with independent institutions to fast-track its mission and vision. This legal relationship between the RECs, AEC, and AU can be termed a relational puzzle that has not been clearly articulated or have any enforcement mechanisms. The figure below has been conceptualised to illustrate the relationship between the AU and its members.

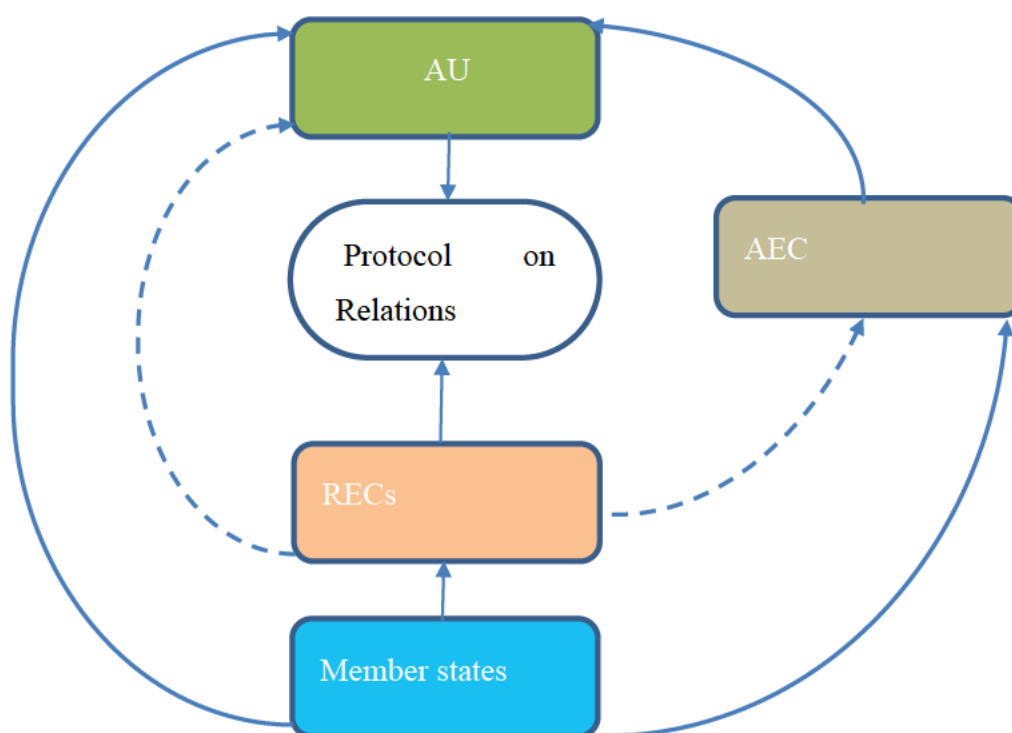


Figure 3.3: Relationship between the AU and its affiliates

Figure 3.3 demonstrates that there is a relational puzzle to be solved. The individual Member States are signatories to the RECs, AEC, and the AU, while the RECs and the AU are signatories to the protocol on relations. This means that the protocol legitimises the

⁵⁰¹ Saurombe 2012 op cit note 467 at 301.

relationship between the union and the RECs since the AEC has been subsumed into the union.

3.4.4 AU Agenda 2063

Agenda 2063 is a blueprint and leading framework for transforming Africa into a socially cohesive and economically vibrant continent in the next fifty years. In 2013, AU affiliates considered an appraisal of the achievements and challenges of the OAU/AU five decades after its formation.⁵⁰² They took cognisance of the mixed paths to African integration so far. These challenges and achievements include: the fight against colonialism, apartheid and imperialism; economic, debt and financing challenges; conflicts and wars; democracy and good governance; technological and regional infrastructures; and trade. As a result, they swore to bind themselves to Africa's advancement in eight strategic areas⁵⁰³ and rededicated themselves to the Pan-African vision of an integrated Africa that is blossoming and peaceful, centred on its citizens, and a global actor and partner.⁵⁰⁴ This decision culminated in Agenda 2063, which was adopted in January 2015 at Addis Ababa at the 24th ordinary session of the AU.⁵⁰⁵ It is a framework document in which the AU Member States pledged to right the wrongs of the past and follow a revised path for economic integration in Africa. The choice of the fifty-year agenda (2013-2063) can be attributed to: the analysis of the first fifty years' achievements and failures since the establishment of the OAU and a vision of the 'Africa we want' in the next fifty years. There are three key documents associated with Agenda 2063.⁵⁰⁶

Agenda 2063 is structured as follows: six chapters comprising seven aspirations (Figure 3.4),⁵⁰⁷ twelve flagship projects (Figure 3.5), 20 goals, 34 priority areas, and 256 targets.⁵⁰⁸

⁵⁰² Final Draft Agenda 2063 Framework Document Sept. 2015 at 6. See also the background note to Agenda 2063 at 2.

⁵⁰³ These 8 areas are: "African Identity and Renaissance, The struggle against colonialism and the right to self-determination of people still under colonial rule, Integration Agenda, Agenda for Social and Economic Development, Agenda for Peace and Security, Democratic Governance, Determining Africa's Destiny, and Africa's place in the world," in the Final Draft Agenda 2063 Framework Document.

⁵⁰⁴ Final Draft Agenda 2063 Framework Document Sept. 2015.

⁵⁰⁵ H Viswanathan 2018 op cit note 32 at 1-11.

⁵⁰⁶ We have the framework document, its popular version and the first ten-year implementation plan. See also the background note to Agenda 2063, 2015.

⁵⁰⁷ The first part which covers chapter one to three is its vision, context, challenges and opportunities for its achievement. Second part which is the transformation framework covers chapter four and five outlining the goals, priority areas, targets and strategies as well as the success factors. The third part is how to make it happen as outlined in chapter six covers the execution, monitoring and evaluation. See also Agenda 2063 framework document 2015.

⁵⁰⁸ UNECA, AUC, ECOSOC 'Progress report on the first 10-year implementation plan for agenda 2063 and the integrated measurement framework for the 2030 agenda for sustainable development' 2016. UN. ECA Statistical Commission for Africa Meeting (5th session: 2016, 28 November-2 December: Abidjan, Côte d'Ivoire); UN. ECA Committee of Directors General of National Statistics Offices (10th session: 2016, 28

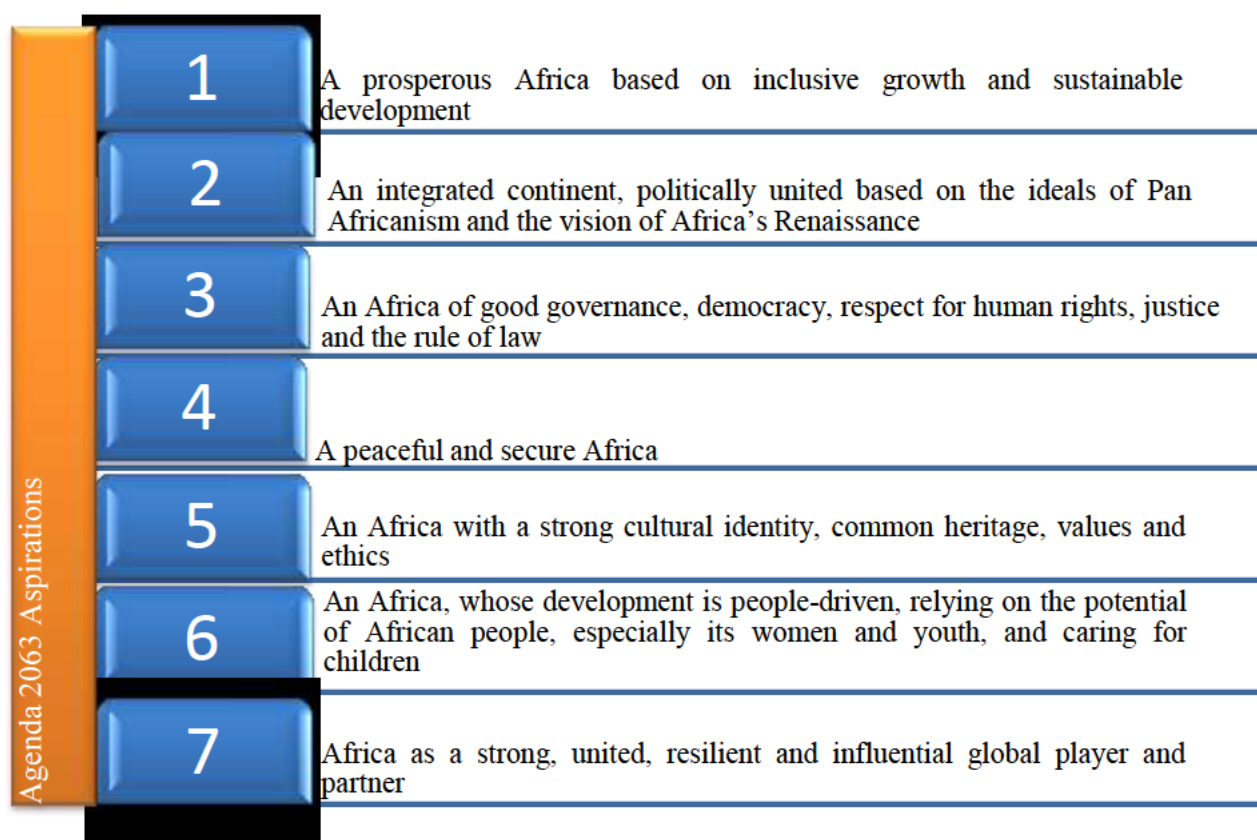


Figure 3.4 AU Agenda 2063 aspirations on which the attainment of African unity rests.

Source: author's conceptualisation 2022.

These aspirations form the core of the AU vision, and national, regional, and continental plans, specific goals, and strategies have been developed to facilitate its realisation. These aspirations indicate that the AU desires a supranational entity, empowered independent institutions, and a united Africa (federal or confederate) with strong institutions in all fields. Agenda 2063 stipulates that by 2045 all legal requirements (executive, legislative, judicial) for a united Africa would be in place, and governance structures (regional, state, and local) would be formed appropriately.⁵⁰⁹ As a rebuttal to this point, it might be convincingly argued that it is practically impossible for this aspiration to be achieved for the following reasons:

First, the gradual step-by-step approach to African integration adopted by the AU is not appropriate for realising the above aspiration. It does not allow the Member States to relinquish some degree of sovereignty, which is a mandatory component to realising this

November-2 December: Abidjan, Côte d'Ivoire). Addis Ababa. © UNECA, <https://hdl.handle.net/10855/23551>, accessed on 20 September 2021.

⁵⁰⁹ Ibid at 11.

aspiration. The old divide between the Casablanca and Monrovia approaches to how Africa should be integrated has not been settled. The OAU was formed out of the weak functional approach where states believe they should have complete authority over their decisions. According to Viswanathan,⁵¹⁰ the OAU/AU functioned and continues to function as an inter-governmental entity, and there have been no efforts to change it to a supranational body.

Again, as mentioned above, the present integrational institutions, such as the AUC, PSC, the African Court of Justice, and the African parliament, including the AfCFTA Secretariat, have not been empowered enough to move the integration agenda forward. It is argued that this aspiration cannot be achieved if these institutions are not allowed to exercise independent authority. As with the Abuja Treaty, the RECs are the pillars of Agenda 2063. Although specific goals, priority areas, and strategies have been developed to achieve Agenda 2063, RECs' priority programmes and activities are not aligned with those of the AU. The AU, on the other hand, does not have an enforceable mechanism for binding decisions. Nevertheless, there is growing support for the assertion that Agenda 2063 is one of those ambitious programmes that confirm the claim that Africa has definitive and substantial thoughts, but implementation remains a constant challenge.

⁵¹⁰ Viswanathan 2018 op cit note 32 at 5.



Figure 3.5 Key flagship programmes of Agenda 2063

These flagship programmes form the First Ten-Year Implementation Plan (2014–2023) in a sequence of five ten-year implementation plans to be established.⁵¹¹ However, this study attempts to address issues of the short-term plans (2014–2023), particularly the CFTA.

⁵¹¹ Agenda 2063. First Ten-Year Implementation Plan, 2014–2023, September 2015 at 10.

As the First Ten-Year Implementation Plan of Agenda 2063 comes to an end, it is evident that this first phase has not been without challenges. First, the domestication of Agenda 2063 and alignment of its priorities at the national levels, with AU organs and RECs is challenging.⁵¹² Many African citizens do not have adequate information about Agenda 2063 and its First Ten-Year Implementation Plan, and the Member States have not aligned their policies with the implementation plan. Again, because of the UN's financial power, there is more domestication of 2030 SDGs than Agenda 2063, necessitating the synchronisation of both agendas. Concerning the continental financial institutions, most programme protocols have not been signed (Pan-African Stock Exchange) or ratified (the African Monetary Institution, African Investment Bank, African Monetary Fund).

Although the Pan-African Integrated High-Speed Train Network plan was signed in October 2016, not all the RECs took part as required.⁵¹³ The project of silencing guns by 2020 has not been successful. More fierce conflicts are still recorded in Sudan, the Central African Republic, South Sudan, Mali, Nigeria, Cameroon, Libya, the Democratic Republic of Congo, Somalia, and Chad. The failure of this project has been attributed to institutional challenges, policy interpretation, continuous export of arms to Africa, and the involvement foreign powers in domestic insurgencies.⁵¹⁴ For example, most of these programmes have been launched: SAATM and Free Movement in January 2018 and the Pan-African E-Network in March 2017.⁵¹⁵ Nonetheless, they have not been effective or operational because of financial resources and the slow pace of commitment by AU Member States. Further, the commodity strategy has not yet been adopted.⁵¹⁶ These results confirm that African countries are not yet prepared to put in the degree of commitment required to propel an economically sustainable and integrated continent.

In the present study, the issue under scrutiny focuses on the CFTA, one of the flagship programmes. This project, as detailed below, has not only missed its timeline like most African programmes, but its operationalisation is a big challenge, especially with the presence of the COVID-19 global pandemic.

⁵¹² UNECA, AU specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration 'Progress Report on the Implementation of Agenda 2063 First Ten Year Implementation Plan' 2016.

⁵¹³ Ibid.

⁵¹⁴ W Okumu, A Atta-Asamoah and Roba D Sharamo 'Silencing the guns in Africa by 2020; Achievements, opportunities and challenges' (2020) Monograph 203 Institute for Security Studies 1-46.

⁵¹⁵ AUC and AUDA-NEPAD 'First continental report on the implementation of Agenda 2063' 2020.

⁵¹⁶ Ibid at 32.

3.4.5 The AfCFTA 2018

In January 2012 in Ethiopia, a decision to establish a CFTA by an indicative date of 2017 was taken at the 18th Ordinary Session of the Assembly of Heads of States and Governments of the AU.⁵¹⁷ The Assembly also validated the Action Plan on Boosting Intra Africa Trade (BIAT), which acknowledged seven clusters.⁵¹⁸ As a result, the CFTA will be composed of 55 African countries, with a total population of more than one billion people and a joint gross domestic product of more than US\$3.4 trillion.⁵¹⁹

The creation of a CFTA by 2017 was reiterated in Aspiration 2 of AU Agenda 2063. One of the key goals of the African CFTA is to form an exclusive continental marketplace for goods and services, with free movement of corporate and commercial persons, and eventually create an environment conducive to the formation of a continental customs union. It will stimulate an upsurge in intra-regional trade through harmonisation and coordination of trade liberalisation within the RECs and AU. It is anticipated that the CFTA will increase competitiveness and effectiveness at the business and industrial levels by grasping opportunities for large-scale production, large market access, and improved reallocation of resources. In a nutshell, the creation of AfCFTA will eliminate all impediments to effective intra-regional trade and investment. It is also expected that the CFTA will rationalise the overlapping membership in Regional Economic Communities (RECs) to enable the Member States to direct their resources to required trade policy activities in each REC.

In June 2015, in Johannesburg, South Africa, the 25th Ordinary Session of the Assembly of Heads of State and Government of the AU launched negotiations to create the AfCFTA. The launch of these negotiations could be seen as a remarkable achievement of the January 2012 decision to establish the CFTA. The goal of these negotiations was to finalise an all-inclusive and equally beneficial trade arrangement among AU countries. Accordingly, the Assembly adopted the roadmap for the negotiation and creation of the CFTA, which classifies the different stages of negotiation, such as the post-launch preliminary stage, the negotiations phase, the finalisation and launch of the CFTA, and the naturalisation of the CFTA agreement by the Member States. In addition, there was the Capacity Building Session and the first Negotiating Forum in February 2016. In 2017, the negotiations intensified, leading to the draft agreement. Earlier in March 2018, the negotiation forum met to conclude

⁵¹⁷ Decision of the Assembly/AU/Dec.394 (XVIII).

⁵¹⁸ They are: trade information, trade finance, trade policy, productive capacity, trade related infrastructure, trade facilitation and factor market integration.

⁵¹⁹ AUC 'Update on the Report on the Continental Free Trade Area (CFTA)' 2015.

some unresolved legal issues. These unresolved issues were the mechanisms for dispute settlement and some annexes to the protocol on trade in goods and to conclude legal scrubbing while preparing for the signing of the CFTA agreement on March 21st 2018. This constituted phase one of the negotiations, and a transition and implementation work program was agreed upon to prepare product-specific rules of origin.⁵²⁰

On March 21st 2018, an Extraordinary Summit on AfCFTA was held in Kigali, Rwanda, whereby an agreement creating the AfCFTA was signed with the Kigali Declaration and the Protocol to the Abuja Treaty relating to the Free Movement of Persons, Right to Residence and Right to Establishment. Article 23(1) of the Agreement establishing the AfCFTA stipulates that the agreement, together with the three signed protocols (Goods, Services, and Disputes Settlement), will come into force after 22 AU member countries have ratified the instrument. Accordingly, with ratification by 24 Member States, the agreement came into force on 30 May 2019. The operational phase was inaugurated during the 12th Extraordinary Session of the Assembly of the AU on 7 July 2019, in Niamey, Niger. The operational phase is guided by five key instruments.⁵²¹

As it stands now, 54 AU Member States have signed the AfCFTA Agreement, with 44 ratifications.⁵²² The aspiration of the AU is that the CFTA will bring together the 55 African countries with more than one billion people and an overall GDP of more than US\$3.4 trillion,⁵²³ which will position the AfCFTA as the world's largest since the World Trade Organisation (WTO) in 1994 with 164 members. Trading under the AfCFTA began on 1 January 2021.⁵²⁴

Below is a conceptualised table of the legal process for the creation of the AfCFTA.

⁵²⁰ ATPC 'African Continental Trade Area: Questions and Answers' (2018) UNECA, Addis Ababa, Ethiopia, p5 available at www.uneca.org/atpc, accessed on 30 June 2021.

⁵²¹ They are: 1) AfCFTA product-specific rules of origin covering 90 per cent of tariff lines 2) Continental Online Mechanism for Monitoring, Reporting and Eliminating Non-Tariff Barriers 3) Pan-African Payments and Settlements System 4) Online Portal for Trade in Goods Tariff Negotiations 5) AU Trade Observatory.

⁵²² Tralac 'Status of AfCFTA ratification' <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>, accessed on 10 November 2022.

⁵²³ Tralac 'African Continental Free Trade Area; A Tralac guide' 3ed (2018) 8 <https://www.tralac.org/documents/resources/booklets/2313-afcfta-a-tralac-guide-3rd-edition-august-2018/file.html>, accessed on 10 November 2022.

⁵²⁴ Tralac 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' 2021 available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html>, accessed on 30 June 2021.

Table 3.1 The legal chronicle of the AfCFTA

Dates	Acting body	Legal achievements
January 2012	Eighteenth Ordinary Session of the Assembly of Heads of States and Governments of the AU	Decision to establish the CFTA by an indicative date of 2017
May 2013	Heads of States and governments of the AU during the 50 th anniversary of the OAU/AU	Aspiration 2 of AU Agenda 2063 reaffirming the establishment of a CFTA by 2017
June 2015	25th Ordinary Session of the Assembly of Heads of State and Government of the AU	Launching of negotiations
February and May 2016	Negotiating forum	First negotiating forum held and adoption of the negotiation guiding principles.
February and July 2017	Negotiating forum	First meeting of the 7 technical working groups and Agreement to liberalise 90% of products at the sixth negotiating forum
December 2017	Negotiating forum	Agreement on AfCFTA text and Protocol on Services
March 2018	Negotiating forum	Phase one negotiating forum convened
	Extraordinary Summit on AfCFTA	Agreement establishing the AfCFTA, including Protocols on trade in Goods, Services and Dispute Settlement.
July 2019	Twelfth Extraordinary Session of the Assembly of the AU	Launching of the Operational Phase
December 2020	Thirteenth Extraordinary Summit of the AU Assembly on the AfCFTA	Approved the start of trading under the AfCFTA regime as of 1 January 2021

Source: author's findings (2021)

The table above presents the evolution of the AfCFTA ground-breaking text, which, if effectively implemented, will change the face of Africa.

It is envisaged that the CFTA will boost African economies with the harmonisation of trade liberalisation across RECs and AU. Per the stipulations of the AfCFTA, AU Member States have indicated their commitment to remove 90 percent of tariffs on goods.⁵²⁵ In conformity with the UN Economic Commission on Africa, trade between AfCFTA members

⁵²⁵ D Luke & L Sommer 'How to ensure Africa's bold free trade area propels industrialisation' 2018 p3 available at <https://africanarguments.org/> accessed on 30 June 2021.

will rise to 52.3 percent with the implementation of the CFTA, and there will be a geometric upsurge if non-tariff barriers are eliminated.⁵²⁶ The benefits that will arise if intra-African trade is promoted are enormous. There will be competition in the industrial sector, a diversified economy, and economies of scale. African companies will produce manufactured goods, and by 2030, Africa may become a potential market of US\$2.5 trillion for household consumption and US\$4.2 trillion for business-to-business consumption.⁵²⁷

Primarily, substantial economic opportunities are expected from the CFTA. Trade liberalisation among African countries will bring about economic growth and a decline in the poverty situation of the countries with a positive welfare outcome.⁵²⁸ The AfCFTA would expand trade flows among AU and add up to US\$34.6 billion (52.3percent) to the baseline in 2022, with a decrease in imports from the rest of the world amounting to US\$10.2 billion.⁵²⁹ This would, however, be compensated by boosted intra-African trade.

African countries themselves are optimistic about the achievement of the CFTA. They are all expecting the CFTA to handle the problem of overlapping and entangled spaghetti bowl arrangements of their RECs. Some belong to as many as four RECs with limited resources, which impede the efforts of each of them to achieve the overall objectives of the AU, such as implementing trade agreements or regional protocols. For example, Kenya is a member of; COMESA, CEN-SAD, EAC, and IGAD. In the same manner, Zimbabwe is finding it challenging to honour its commitments under SADC, but she is also a member of COMESA and will face even more complex challenges implementing the extra liberalisation obligations under the CFTA.

In this fragmented situation, the AfCFTA is expected to downsize and restructure AU members overlapping and entangled spaghetti bowl arrangements of their RECs' Free Trade

⁵²⁶ United Nations ECA AU and AfDB 'Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About' (2017) p65 Addis Ababa: ECA. See also UNECA 'Signing AfCFTA giant stride forward for the development of Africa: ECA's Vera Songwe' <https://www.un.org/africarenewal/news/signing-afcfta-giant-stride-forward-development-africa-eca's-vera-songwe>, accessed 10 July 2021.

⁵²⁷ M Asiedu 'The African continental free trade agreement (AfCFTA)' (2018) Global Political Trends Center (GPOt) policy brief No 52 at 3. See A Bello Shittu 'The Prospects and Challenges of African Continental Free Trade Area Agreement' (2018) 26*Sri Lanka J. Int'l L.* 121. See also L Signe 'Africa's big new free trade agreement, explained' (2018)

<https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-african-continental-free-trade-area-starts-now/>. See also <https://www.export.org.uk/news/400900/New-African-Continental-Free-Trade-Area-is-potential-2.5-trillion-target-market.htm>, accessed on 10 July 2021.

⁵²⁸ D Luke & J MacLeod 'Bringing the CFTA About: Key Factors for Success' (2017)6(6) *Bridges Africa* p7.

⁵²⁹ United Nations ECA, AU and AfDB 'Assessing Regional Integration in Africa V: Towards a Continental Free Trade Area' (2012) p 4 Addis Ababa: ECA, AU, and AfDB.

Areas. This arrangement will enable African countries to cut down on spending scarce resources and undertake trade policy actions in each of the RECs since they are the building blocks of the AfCFTA. In addition, each country could designate an agency that will be responsible for the implementation and communication of the CFTA activities. These agencies could also be established at the RECs level if every REC was evolving on an equal or similar platform. This approach has already been successful in EAC, where each country's agency coordinated and implemented the EAC activities at the national level.

The AfCFTA agreement is the first legal document required to establish the AU's continental market agenda. However, three protocols (Protocol on trade in Goods, Protocol on trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes) representing phase I of the negotiations have already been added. In addition, more protocols (Protocols on Investment, Intellectual Property Rights and Competition Policy) will be added, including annexes and appendices. This constitutes phase II of the negotiations,⁵³⁰ which is still to be concluded. Phase III, which constitutes e-commerce, will begin after phase II is completed. After being adopted, these instruments shall form an integral part of the AfCFTA agreement.⁵³¹

The governance of the AfCFTA is established in part III, Article 9 to 15 of the agreement. The institutional framework for implementation, administration, facilitation, monitoring and evaluation of the AfCFTA consists of the assembly, the council of ministers responsible for trade, a committee of senior trade officials, and the secretariat as set out in article 9. In addition, supplementary specialised bodies will be formed from the protocols that are still to be negotiated.

However, the AfCFTA will be an independent institutional body under the AU. The AU envisages the creation of the AfCFTA secretariat, which will be a functional autonomous institutional body with a sovereign legal character.⁵³² The AfCFTA is a comprehensive agreement. In the wordings of Article 1(b), agreement means *'the Agreement establishing the African Continental Free Trade Area and its protocols, annexes and appendixes which shall form an integral part thereof'*. As indicated above, the goal is to form an exclusive continental marketplace for goods and services, with free movement of persons, and eventually create a conducive environment for meaningful economic integration of the

⁵³⁰ Article 7 of the Agreement establishing the AfCFTA 2018.

⁵³¹ Ibid Article 8.

⁵³² Ibid Article 13.

continent. Ghana hosted the AfCFTA Secretariat, and its first Secretary General was appointed in February 2020.

a) Implementation of the AfCFTA – the complexities

The current expectation for achieving economic integration in Africa has once again been renewed; AU Member States are now confronted with the reality of making the AfCFTA work, matching words with actions. This means the release of some degree of sovereignty, full commitments to the project – the concessions to offer to other members for goods and services, and the groundwork to realise comprehensive product-specific rules of origin. A significant area of interest that needs to be given more attention is the Rules of Origin, one of the annexes to the AfCFTA text. Although trading under the AfCFTA began on 1 January 2021, negotiations under phase I have not been completed. Rules of trade in services,⁵³³ outstanding schedules of tariff concessions, and rules of origin are yet to be finalised.⁵³⁴ This means phases II and III would be on hold until phase I is finalised. There is a need to harmonise the rules of origin and NTBs of the RECs since they are the pillars of the AfCFTA.

It should be noted that the traditional hindrance of a lack of implementation of these soaring ideas, decisions, and declarations has not been resolved. When considering the history of African States' treaty engagements, the question of what will occur next after the ratification of the AfCFTA remains. Available evidence indicates that state compliance and domestication of regional trade engagements have not been effective. According to Apiko et al.,⁵³⁵ states are likely to implement agreements that fit their individual economic and political interest. A good example is Nigeria, which had been instrumental in the AfCFTA negotiation but withheld its signature from the agreement in March 2018. Nigeria pointed out that the aspirations of the CFTA must coincide with those of its members, without which they will not be a party to the agreement. The president of Nigeria, Muhammadu Buhari, indicated that Nigeria would not want to be a dumping ground for finished products, thereby harming its home industries.⁵³⁶ He wants the national interest of Nigeria to be protected. Although

⁵³³ Schedules for five important services sectors (communications; finance; business services; tourism and transport) are ongoing. See also updated Tralac AfCFTA FAQs March 2021.

⁵³⁴ Report submitted to the 13th Extraordinary Session of the Assembly on the African Continental Free Trade Area (AfCFTA) on 5th December 2020 by His Excellency Mr. Issoufou Mahamadou, President of the Republic of Niger, Leader and Champion of the African Continental Free Trade Area (AfCFTA) Process.

⁵³⁵ P Apiko, S Woolfrey and B Byiers 'The promise of the African Continental Free Trade Area (AfCFTA)' 2020 ECDPM discussion paper No 287.

⁵³⁶ Africanews 'Nigeria's Buhari explains failure to sign continental free trade agreement'

Nigeria was among the last countries to sign the AfCFTA, it finally signed in July 2019 and ratified in November 2020. This should signal that such an agreement is not easily implemented. This creates an implementation gap in Africa's struggle for intra-regional trade and economic integration.⁵³⁷ It is time for Africa to remove this lack of implementation stumbling block before more new lofty ideas are released.

b) The COMESA-EAC-SADC Tripartite FTA and the AfCFTA: what nexus?

The COMESA-EAC-SADC Tripartite FTA, launched in June 2015 in Sharm-El-Sheikh, Egypt, has as its main objectives: the promotion of market integration and industrial and infrastructural development.⁵³⁸ The idea is to, first of all, remove tariffs and NTBs. This would enhance intra-regional trade and continental economic integration. The AU considered the TFTA as the pillar of the AfCFTA.⁵³⁹ It aimed at using the best practices of the TFTA to shape the CFTA. The question arises as to whether the claim that the TFTA is the backbone of the CFTA is well founded. Attempts at answering this question would potentially address the extent to which the RECs in their present form can deliver the AfCFTA to Africans and the rest of the world.

Currently, 24 out of 28 Member States have signed the agreement. There is a need for 14 Member States to ratify for the agreement to be operational, as per article 39(3) of the TFTA agreement. Six years after the launch of the TFTA, a threshold of 14 ratifications is yet to be reached for the TFTA to go operational. Presently, eleven countries have ratified the TFTA,⁵⁴⁰ with three outstanding to reach the required threshold of 14 for the agreement to go operational.⁵⁴¹ This is after a deadline of June 2021 was being set to reach the target by the

<https://www.africanews.com/2018/03/23/nigeria-s-buhari-explains-failure-to-sign-continental-free-trade-agreement/>, accessed on 4 June 2021. See also <https://www.vanguardngr.com/2018/03/cfta-wont-allow-nigeria-dumping-ground-buhari/>, accessed on 4 June 2021.

⁵³⁷ P Apiko 2020 op cit note 535 at 10.

⁵³⁸ Part 1 article 4 of the agreement establishing the COMESA-EAC-SADC TFTA, 2015.

⁵³⁹ Article 19 of the AfCFTA Agreement provides that the AfCFTA State Parties "that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves. Article 8(2) of the Protocol on Trade in Goods states that "State Parties that are members of other RECs, which have attained among themselves higher levels of elimination of customs duties and trade barriers than those provided for in this Protocol, shall maintain, and where possible improve upon, those higher levels of trade liberalisation among themselves. (Emphases added.) Article 5 says the AfCFTA shall also be governed by the preservation of the *acquis* and best practices in the RECs, in the State Parties and International Conventions binding the African Union.

⁵⁴⁰ Burundi, Egypt, South Africa, Kenya, Rwanda, Uganda, Botswana, Namibia, Eswatini, Zambia and Zimbabwe.

⁵⁴¹ COMESA 'Tripartite framework win accolades at the AU Mid-Year Summit' 2022 available at <https://www.comesa.int/tripartite-framework-win-accolades-at-the-au-summit/#:~:text=To%20date%2C%2022%20of%20the,Namibia%2C%20Zambia%20and%20Zimbabwe,>

second Extraordinary Meeting of the TFTA council of ministers held virtually on 15 February 2021.⁵⁴² TFTA is also among the communities to set ambitious timelines, which are always missed. Outstanding rules of origin and country-specific tariff schedules were delayed.⁵⁴³ Several timelines (June 2016, April and October 2017) were set for their conclusion.⁵⁴⁴ As already noted, the agreement is yet to go into operation after over half a decade since its establishment. The most serious difficulty here is that tariff negotiations are yet to be completed,⁵⁴⁵ and final tariff schedules for the TFTA are yet to be available. The same goes for the AfCFTA, which came into operation in 2019.⁵⁴⁶ This indicates that partner countries are slow in pushing forward the integrative agenda. This sluggishness could be attributed to the varying stages of each state's economic development, multiple memberships to different RECs by states, individual interests of states, low level of commitment, and financial and human resources.

The AfCFTA came into operation in 2019, and trading began in 2021. The second Extraordinary Meeting of the TFTA council of ministers used the commencement of the AfCFTA to urge partner states to ratify the TFTA agreement.⁵⁴⁷ The ministers also indicated that countries that have ratified the TFTA could not benefit from it because of those who have not. Could the TFTA Member States now perceive the TFTA as redundant? Is the AfCFTA now giving impetus to the TFTA? According to Albagoury and Anber,⁵⁴⁸ the fact that the three RECs are in varying levels of integration may impact the negotiation process. COMESA established an FTA in 2000 and a customs union in 2009; this was almost the same period as the TFTA negotiations.⁵⁴⁹ Trade negotiations for Uganda and Ethiopia to join the COMESA FTA and customs union were only completed in 2014.⁵⁵⁰ A transition period of three years, with an extension of two years where some sensitive product tariff rates are

accessed on 25 October 2022. See also Busiweek 'EAC-COMESA-SADC tripartite not ratified 7 years on' 2022 available at <https://www.bilaterals.org/?eac-comesa-sadc-tripartite-not>, accessed on 25 October 2022.

⁵⁴² COMESA website 'New deadline set for the ratification of the TFTA' available at: <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/>, accessed on 05 July 2021.

⁵⁴³ T Mutambara and B Nonceba 'The proposed Tripartite Free Trade Area: Challenges and expected benefits' (2019). *South Africa: Rhodes University* 95-120.

⁵⁴⁴ Ibid at 97.

⁵⁴⁵ G Erasmus 'Advancing the intra-African trade agenda by implementing the Tripartite FTA' 2019 Tralac Trade Brief No S19TB03/2019.

⁵⁴⁶ Ibid.

⁵⁴⁷ See COMESA website op cit note 542.

⁵⁴⁸ S Albagoury & M Anber 'COMESA-EAC-SADC tripartite free trade area: challenges and prospects' 2018 *University Library of Munich, Germany* 1-15.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid.

considered common external tariffs, was agreed upon by COMESA partner countries. In the same light, EAC established a customs union in 2005 and a common market in 2010, and SADC formed an FTA in 2008. While COMESA and SADC accept free trade from other countries that are not members of their RECs, EAC imposes a common external tariff on imports.⁵⁵¹

NTBs exist within the three RECs due to poor implementation of commitments.⁵⁵² These barriers could undermine future trade agreements as restrictive rules of origin hinder cross-border trade and investment. While the rules of origin of EAC and COMESA are similar with slight differences, those of SADC are significantly different, complex, and complicated for intra-regional trade.⁵⁵³ Although the TFTA has implemented an NTB monitoring and reporting system, NTBs continue to be a considerable challenge to intra-REC trade. From the time of inception of this system in 2009, some NTBs have not been resolved many years after being reported.⁵⁵⁴

Notwithstanding the above challenges, the TFTA has inspired the AfCFTA. The instruments of legal harmonisation of NTBs adopted by the TFTA have been replicated under the AfCFTA rules. The AfCFTA has used the online monitoring and reporting system on NTBs. According to the second Extraordinary Meeting of the Tripartite Council of Ministers, the groundwork of the TFTA facilitated the speedy commencement of the CFTA.⁵⁵⁵

3.5 Conclusion

This chapter has provided an overview of the political, economic, and legal bases for regionalism in Africa. African history has seen the struggle for freedom from colonial rule, apartheid and the desire to reinsert the Pan-African idea of shared identity and sustainable development among Africans. This desire led to the creation of the OAU, which fought for African state independence, and later the AU was mandated to lead Africa through economic development and unity. The quest for Africa's economic integration has been expressed in several AU legal frameworks (the Constitutive Act, Abuja Treaty, Protocol on Relations, Agenda 2063 and the AfCFTA agreement) analysed here.

⁵⁵¹ Mutambara 2019 op cit note 543 at 98.

⁵⁵² Albagoury 2018 op cit note 548 at 11.

⁵⁵³ Ibid.

⁵⁵⁴ For instance, in 2019 there were 51 unresolved complaints some of which were reported since 2009. The resolution of these complaints are still "in progress". There have been seven non-actionable complaints in 2009 and one in 2015. These are complaints which cannot be resolved and as such would continue as NTBs. See also Mutambara 2019 op cit note 543 at 101-102.

⁵⁵⁵ COMESA website op cit note 542.

A critical examination of the process and recent measures to implement the AfCFTA and selected RECs (SADC, EAC, and COMESA) reveals that more work still needs to be done. There is a need for an institutional capacity for trade negotiations, harmonisation of NTBs, AfCFTA policy formulation, and the future African common market. It could be concluded that the success of AfCFTA depends on independent, empowered institutions for proper implementation, monitoring, and evaluation of harmonised trade and business policies and standard African practices to achieve a successful CFTA following the aspiration of Agenda 2063.

The AfCFTA provides an excellent opportunity for Member States to harmonise their regional trade setting and enhance intra-African trade. Therefore, this means that the AfCFTA must be designed to benefit the dissimilar, unequal and complex array of countries, especially the vulnerable ones. The achievement of this vision will entail the harmonisation of NTBs while adjusting some carefully selected policies for vulnerable groups. The extreme commitment of Member States cannot be over-emphasised while rationalising the overlapping membership with the RECs.

The next chapter will examine the ability of COMESA, EAC, and SADC among the selected RECs to drive home the CFTA. It further analyses the unaddressed legal harmonisation issues among the three selected RECs, such as the rationalisation of overlapping membership. It argues that, to a large extent, there has been no legal harmonisation of NTBs practices within Africa's RECs for achieving the CFTA. Finally, it draws lessons from other RECs outside Africa (Europe, Asia, and North and Latin America).

4. CHAPTER FOUR: EXISTING SHORTCOMINGS OF LEGAL HARMONISATION

4.1 Introduction

The previous chapter interrogated the political, economic and legal underpinnings of regionalism in Africa and the complexities surrounding the implementation of the AfCFTA. One of the issues raised was the need to harmonise trade policies. It is, therefore important to address impediments to intra-regional trade in Africa, one of which is the diversity of laws within RECs. It is argued that to reap the gains of global trade and overcome Africa's colonial legacy of foreign legal systems, the question of legal harmonisation must be examined. The emergence of various legal harmonisation initiatives at the regional level justifies the need for legal harmonisation in Africa.⁵⁵⁶ Since 1963, the Charter of the OAU, now the AU, obliged the Member States 'to co-ordinate and harmonise their general policies' in several fields, including economic cooperation.⁵⁵⁷ Among the objectives of the AU is the coordination and harmonisation of the policies of the RECs. To sustain these regional objectives, especially the achievement of the AfCFTA, a robust legal harmonisation model is essential.

However, while emphasising the significance of economic integration, no distinct allusion was made to legal harmonisation or the role of law in the integration process.⁵⁵⁸ The necessity for legal harmonisation can be inferred from the declared ambitions of the AU. The AU is not a body for the harmonisation of laws; nonetheless, it is the core of regional integration from where the legitimacy of integration in African RECs also emanates.⁵⁵⁹ The African RECs are considered pillars of African integration. Article 88 of the Abuja Treaty provides the Protocol on Relations between the AEC and RECs for the coordination, harmonisation, and amalgamation of these RECs under the AEC.⁵⁶⁰

To expand on the discussion in this chapter, a general analysis of the unaddressed issues of legal harmonisation in the AU and RECs will be carried out. In the selected case studies for this thesis, three RECs (SADC, COMESA, and EAC) that embarked on legal

⁵⁵⁶ T Shumba 'Revisiting legal harmonisation under the Southern African Development Community Treaty: The need to amend the Treaty' (2015) 19 *Law, Democracy & Development* 127-147.

⁵⁵⁷ See Art II (2) of the Charter of the Organization of African Unity, 49 UNTS 39/2 ILM 766 (1963).

⁵⁵⁸ R F Oppong 'Private international law and the African economic community: a plea for greater attention' (2006) 3 *Journal of South African Law* 497 at 504.

⁵⁵⁹ Shumba 2015 op cit note 556 at 129.

⁵⁶⁰ See Preamble to the Protocol on Relations between the African Union and the Regional Economic Communities adopted on 28 February 1998. See also Oppong (2011) op cit note 44 at 165-187.

harmonisation will be included. These three have formed a TFTA, which is considered the anchor for the AfCFTA. The approach these RECs use to achieve legal harmonisation of NTBs demonstrates gaps in the harmonisation model, especially as they appear to be the most advanced RECs in Africa, including ECOWAS. Africa continues to be confronted with internal conflicts of law and legal integration. Besides OHADA, an intergovernmental organisation for harmonising business law in Africa, there is no other legal harmonisation body or regulation enacted by the AU or the RECs. The factors hindering the effective legal harmonisation of NTBs in these RECs are common to all other RECs in Africa. Some are overlapping memberships, non-alignment with community priorities, the unwillingness to relinquish part to state sovereignty and lack of implementation of key community decisions, declarations, protocols and regulations. All of these challenges are discussed in this chapter.

To offer a uniform analysis of the issues of legal harmonisation, it is essential to consider examples from other regional groupings beyond Africa. Hence, this chapter engages in the analysis of legal harmonisation in the ASEAN Free Trade Area (AFTA), North American Free Trade Agreement (NAFTA), Southern Common Market (MERCOSUR) and Latin American Integration Association (LAIA). These regions have been chosen because the percentage of intra-regional trade between them is higher when compared to the African region, although they are not the most advanced regions of the world. Moreover, it is vital to investigate the implications of external trade arrangements on the AfCFTA.

4.2 Unaddressed issues of legal harmonisation in the AU and RECs

This section of the chapter tries to answer whether there have been attempts at legal harmonisation by the AU and RECs. The AU has made efforts towards promulgating legislation for harmonising priority sectors of the integration agenda, considering the diversity of legal systems that exist in the continent as a result of colonialism and customary practice. The desire for legal harmonisation of community activities in Africa has been explicitly articulated in the Abuja Treaty establishing the AEC and the AU Constitutive Act. In the formation or reforms of their founding treaties, most of the RECs have incorporated this essential prerequisite to effective intra-community trade. The question then is; why have these RECs, who are the pillars of the AEC, not succumbed to the implementation of these explicit provisions of legal harmonisation inscribed in their treaty objectives? Attempting to answer this question will allow us to glimpse the Abuja Treaty and harmonisation of NTBs and the extent of attempts to legal harmonisation of trade policies of the RECs.

4.2.1 Abuja Treaty and harmonisation of NTBs

Article 6(2)(b)(i) of the Abuja Treaty aims to harmonise the NTBs of RECs and gradually eliminate the same for regional and intra-community trade. Following the modalities laid down by the treaty, the AEC shall be achieved in six stages within 34 years from the date the treaty was entered into force in 1994. The first stage of reinforcing RECs was to occur within the first five years. The second stage, which involves harmonising tariffs and NTBs, was supposed to materialise within eight years after the first stage. To date, these aspirations have not been realised, however.

The first stage of strengthening the RECs, from 1994 to 1999, was a failed phase because some of the approved RECs had ceased operation. A pertinent question then arose: how was the OAU going to strengthen what is not yet in existence? For example, the EAC was initially founded in 1967, collapsed in 1977 and was only re-established in 2000.⁵⁶¹ ECCAS, formed in 1983, ceased operation from 1992 to 1998, and was only revived in 1999.⁵⁶² These RECs collapsed due to either internal challenges between Member States, as in the case of the EAC, or financial hitches and conflicts, as in the case of ECCAS. ECCAS only had formal contact with AEC in 1999 due to ECCAS's inactivity.⁵⁶³ This demonstrates the OAU's failure to strengthen the RECs, as inscribed in the Abuja Treaty. As a result, stage two of the harmonisation program could not be achieved, and the cycle continued. This necessitates an interrogation of the theoretical foundations of the OAU. The gradual functional approach to African integration favoured states' attachment to national sovereignty after independence, a 'state of affairs' that remains in practice today. In this way, states were more focused on consolidating nationalism than the integrationist agenda. This thesis argues that the functional theory has not advanced African regionalism, and there is therefore a need to apply a more pragmatic approach, especially in the sphere of economic integration, which is the harmonisation of NTBs. Despite adopting the AU Constitutive Act and African integration agenda following the EU model, African states and governments have failed to adopt the principle of supranationality of community law that governs the EU. The primacy or

⁵⁶¹ See details on the collapse of EAC in chapter three.

⁵⁶² B Byiers 'Understanding regional economic policies in Central Africa: Struggling to integrate in an intertwined region' (2017) *ECDPM* 1-23.

⁵⁶³ A Meyer 'Preventing conflict in Central Africa ECCAS caught between ambitions, challenges and reality' (2015) 3 *Institute for Security Studies* 1-20.

supremacy principle in the EU is applied where community regulation overrides national law.⁵⁶⁴

Although the RECs were already in existence before the Abuja Treaty, it would be assumed that modalities put forth by the treaty would be prioritised. Still, the provisions of this treaty have not been attained. Though these provisions have been inscribed in the RECs' founding treaties, legal harmonisation is still not a priority. It is, therefore, doubtful if the RECs in their current form can deliver the AfCFTA.

The table below presents the targeted objectives of the Abuja Treaty and their outcomes.

⁵⁶⁴ Candra Irawan 'Legal harmonization in Asean economic communities (looking for the best legal harmonization model)' (2018) 3(2) *University of Bengkulu Law Journal* 134-141.

Table 4.1: Outline of stages for the achievement of the harmonisation program and complete economic integration

Stages	Maximum timelines/ corresponding years	Activities for implementation	Present status
Stage 1	Five years (1994-1999)	Strengthening all existing RECs	Not attained
Stage 2	Eight years (1999-2007)	Harmonising tariffs and NTBs, customs duties and internal taxes and preparation of a timetable for the elimination of tariff and NTBs. Harmonisation of customs duties for third parties and activities of RECs	Not attained
Stage 3	Ten years (2007-2017)	Creation of FTAs through the steady elimination of tariffs and NTBs to intra-regional trade and set up of a customs union at the level of RECs	Not attained
Stage 4	Two years (2017-2019)	Harmonisation of tariffs and NTBs systems and the establishment of a customs union at the continental level	Not attained
Stage 5	Four years (2019-2023)	Formation of African common market through; harmonisation of monetary policies, adoption of common policies in all sectors and free movement of persons.	Would not be accomplished
Stage 6	Five years (2023-2028)	Consolidation of the common market through free movement of all. Integration of all sectors, ultimate harmonisation process for all activities, a single continental currency including central bank, Pan-African parliament and executive organs of the community.	Would not be accomplished
Supplementary stage	Six years (2028-2034)	Final maximum period for all the above to be achieved if delayed.	

Summary of stages and findings 2021

From the table above, it can be deduced that the objectives of each stage were not attained as projected. For instance, the objective of strengthening RECs like EAC and ECCAS could not be attained in stage one, because they collapsed. It was in the years of stage two that they

were reinforced. Under stage two, the harmonisation of tariffs has occurred in some RECs like the EAC and COMESA; however, NTBs and the absence of harmonised customs duties continue to impede customs unions and a CET in these sub-regions. The AfCFTA to be created in stage three was merely launched in stage four, and its operationalisation commenced in stage five. Therefore, establishing a continental customs union and a common market earmarked for stages four and five, respectively can be classified as an overambitious dream of the AU. In the same vein, stage six is far from becoming a reality since its activities depend on the previous stages. It could be observed that the Abuja Treaty anticipated the delay in attaining the milestones of the treaty's provisions on harmonisation and economic integration by the AU and the RECs. Consequently, it added a supplementary stage for attaining all the stipulated objectives. Nevertheless, it is perceived that this supplementary stage may not assist in achieving the treaty's goal due to the routine delay in ratification and implementation of AU policies.

4.2.2 Legal harmonisation in RECs

This section will highlight all the eight recognised RECs that are pillars of Africa's economic integration before doing an in-depth analysis of the three RECs selected as case studies for this thesis.

During the treaty endorsement of AMU, Member States agreed to harmonise, coordinate and rationalise their policies in all sectors. They also agreed that to achieve economic union, they have to create an FTA, dismantle tariffs and NTBs to trade, create a customs union and common market and ensure free movement. However, intra-regional trade in AMU remains low as they trade more with the EU and US.⁵⁶⁵ AMU is also challenged by political disruptions and the absence of the harmonisation of principles, which hinders the anticipated FTA.

As an inclusive objective for forming an economic union, CEN-SAD, in its treaty, itemised the harmonisation of economic policies among its member countries. However, CEN-SAD has failed to stabilise and harmonise tariff barriers and NTBs within the sub-region, indicating that it lags behind stage two of the integration process as outlined in the Abuja Treaty.⁵⁶⁶ CEN-SAD is also struggling with the multiple RECs memberships.

⁵⁶⁵ M Finaish and E Bell 'The Arab Maghreb Union' In *the Arab Maghreb Union*, USA: INTERNATIONAL MONETARY FUND (1994) Available From: IMF eLibrary <https://doi.org/10.5089/9781451969122.001> Accessed 3 February 2021.

⁵⁶⁶ Article 6(2)(b) of the 1991 Abuja Treaty Establishing the AEC.

Harmonisation in the agreement creating IGAD is specified in Articles 7 and 13A. IGAD Business Forum, revitalised in 2010, promotes the harmonisation of transport, customs and trade policies for trade facilitation. The IGAD initiative is also an EU-Africa strategic plan for infrastructural development and inter-sub-regional connectivity between Member States. However, prioritising the provisions of the Abuja Treaty on the stages of integration in the horn of Africa is practically difficult because of a lack of will by member countries, including their multiple memberships to other RECs. All the eight-member countries of IGAD belong to CEN-SAD, COMESA or EAC, with Kenya belonging to all four. Djibouti, Eritrea, Sudan and Uganda belong to three, while Somalia, Ethiopia and South Sudan belong to two. Their membership to more advanced RECs, like COMESA and EAC, that have also launched a TFTA with SADC, makes it complex for them to pursue concurrent initiatives. One of the principal goals of IGAD is to realise the aims of COMESA,⁵⁶⁷ which makes the institutional arrangement for the quest for an FTA vague.

The harmonisation of activities in all fields, including trade and the abolition NTBs, is the core aim of ECCAS, as specified in article 4.⁵⁶⁸ Article 33 emphasizes NTBs' elimination of intra-community trade. In line with the Abuja Treaty, article 6 of the ECCAS treaty stipulates that the economic community shall be established after twelve years of three stages of four years each. In the first stage of four years, the fiscal and customs regime will be stabilised, and a timetable for the gradual elimination of tariffs and NTBs for intra-community trade will be drawn.⁵⁶⁹ The second stage will envision the formation of an FTA, and another timetable for the gradual removal of tariffs and NTBs to trade among Member States will be implemented.⁵⁷⁰ This means that the formation of an FTA and application of the timetable drawn in stage one will occur in stage two, while a customs union will be established in stage three with the adoption of a CET. ECCAS successfully launched an FTA in 2004 with the aspiration of creating a customs union with a CET in 2008.⁵⁷¹ These dreams have not been achieved because of member countries' reluctance to domesticate community procedures.

⁵⁶⁷ Article 7(i) of the Agreement Establishing the IGAD 1996.

⁵⁶⁸ 1983 Treaty Establishing the ECCAS, Article 4 (Aims of the Community).

⁵⁶⁹ Ibid, art 6 (2)(a).

⁵⁷⁰ Ibid, art 6(2)(b).

⁵⁷¹ UNECA, ECCAS trade and market integration. Available at <https://archive.uneca.org/oria/pages/eccas-trade-and-market-integration> accessed on 30 March 2022.

Within the core aspirations of the ECOWAS treaty, as enshrined in Article 3,⁵⁷² are the harmonisation and coordination of trade policies to promote integration and the elimination of NTBs among member countries to establish an FTA, customs union, common market and total economic union. The harmonisation of policies as a fundamental principle is stated in Article 4, and Article 2 of the treaty reaffirms its commitment to the AEC. ECOWAS adopted a Trade Liberalisation Scheme (ETLS) in 1979 with the realisation of the FTA.⁵⁷³ The ETLS is the gateway for a common market in ECOWAS. In order to advance intra-ECOWAS community trade, the ETLS provides for the gradual elimination of tariffs and NTBs such as prohibitions and quotas.⁵⁷⁴ ECOWAS achieved a functioning common external tariff in 2015 to fast-track the customs union.⁵⁷⁵ It is believed that the customs union's actual formation may inspire the harmonisation process. Besides, member countries are constantly using the ECOWAS Single Customs Declaration Form in managing their customs processes. However, the ETLS is poorly domesticated by the Member States, and this poses a challenge to trade integration in the region.⁵⁷⁶ Also, Intra-regional trade in ECOWAS is predominantly weakened by NTBs predominantly quantitative restrictions. The ETLS have been slow in eliminating NTBs like export bans and seasonal imports.⁵⁷⁷ There is a need for an effective monitoring mechanism for NTBs in the region.

The treaty establishing COMESA is conventional in its policy of harmonisation. Harmonisation of all activities and integrating its programmes is a fundamental principle within COMESA. Article 4 of the 1993 treaty establishing COMESA is particular about the harmonisation and elimination of NTBs. It abolishes all NTBs⁵⁷⁸ and harmonises trading documents⁵⁷⁹ among Member States. Adherence to the provisions of the 1991 Abuja Treaty by COMESA is flagged in Article 6 of the COMESA Treaty. In 2000, COMESA commendably created an FTA and launched a customs union in 2009, parallel to the negotiations of the TFTA. Since establishing an FTA in 2000, NTBs in COMESA have been

⁵⁷² ECOWAS Revised Treaty, 1993 article 3 (aims and objectives). See also article 4(fundamental principles).

⁵⁷³ Regional Integration and Non-Tariff Measures in the Economic Community of West African States (ECOWAS) (UNCTAD/DITC/TAB/2018/1) available at, <https://www.tralac.org/documents/news/2389-regional-integration-and-non-tariff-measures-in-ecowas-unctad-october-2018/file.html>, accessed on 3 February 2021.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid at 15.

⁵⁷⁶ UNECA, ECOWAS trade and market integration. Available at; <https://archive.uneca.org/oria/pages/ecowas-trade-and-market-integration>, accessed on 31 March 2022.

⁵⁷⁷ UNCTAD/DITC/TAB/2018 note 571 at 16.

⁵⁷⁸ See also Article 45 and 49 of the Treaty establishing COMESA, 1993.

⁵⁷⁹ Ibid art 63(1) (b), art 69-71.

used for health matters and infant industries protection.⁵⁸⁰ COMESA has eliminated customs tariffs and is working towards eliminating quantitative restrictions and other NTBs.⁵⁸¹ It has implemented NTBs regulations that have controlled operational NTBs. These regulations require member countries to create National Focal Points along with a National Monitoring Committee on NTBs.⁵⁸² This was necessary to reinforce the provisions of Article 49(1) of the COMESA Treaty.⁵⁸³

However, the multiple “behind the border” type of NTBs imposed internally remain predominant and yet to be contained. Border restriction measures imposed because of the advent of the COVID-19 pandemic have increased NTBs. In addition, embargoes, sanctions, levies, and quotas linked to state struggles to care for their nationals and protect their economies against COVID-19 have remained prevalent.⁵⁸⁴ This continues to impede the growth and advancement of trade in the sub-region. Harmonising these measures will go a long way towards facilitating intra-regional trade and promoting economic development.

The EAC treaty does not explicitly call for the harmonisation of trade policies. Nonetheless Article 75 calls for eliminating NTBs. The protocol on the EAC common market formed in 2009 requires the elimination of NTBs and technical barriers to trade the harmonisation of standards with implementing a common trading policy in the EAC. That notwithstanding, NTBs in the EAC remained prevalent among Member States, restricting trade facilitation. To curb NTBs, members of the EAC have enacted policies to remove them and deter novel NTBs in the region. The Time Bound Programme for the Elimination of

⁵⁸⁰ Mukwena & Kurebwa 2019 op cit. note 255 at 34.

⁵⁸¹ COMESA, ‘Overview of COMESA’ available at; <https://www.comesa.int/overview-of-comesa>, accessed on 1 April 2022.

⁵⁸² Tralac News, ‘COMESA: 96% of all the reported Non-Tariff Barriers resolved’ <https://www.tralac.org/news/article/8660-comesa-96-of-all-the-reported-non-tariff-barriers-resolved.html>, accessed on 31 January 2021.

⁵⁸³ The novel Regulations came as a result of a decision of the 33rd Council of Ministers of COMESA meeting that took place in Zambia in 2014 to break the standing deadlock in resolving NTBs and calls on member countries to eradicate all NTBs and to abstain from imposing new ones as required according to article 49(1).

⁵⁸⁴ During the COVID-19 pandemic period, there was a remarkable increase in the number of NTBs as member states progressively took discretionary actions to contain the spread of the virus. COMESA Director of trade Dr Chris Onyango told delegates to the fifth Meeting of the COMESA Trade and Trade Facilitation Sub-Committee of 6-8 October 2020, that during the COVID 19 era, measures put in place by member states have disrupted global value chains, drastically reduced reliance on imports and rallied States towards the path of protectionism. He said, “Despite the significant milestones in dealing with NTB issues including rules, regulations, working procedures and online NTB monitoring systems, they have remained a major hindrance to growth and expansion of intra-COMESA trade.” He beseeched member states to keep on revising and refining prevailing regulations and instruments taking into consideration varying eco systems, appreciating main causes, examining regulatory regimes, manufacturing techniques and technological developments. See also COMESA, notable rise in trade barriers as countries responded to covid-19 available at, <https://www.comesa.int/notable-rise-in-trade-barriers-as-countries-responded-to-covid-19/> accessed on 4 April 2022.

Identified/Reported NTBs of 2009 and the Elimination of NTBs Act of 2017 are all measures aimed at offering a legal framework for observing and fast-tracking NTBs in the sub-region.⁵⁸⁵ Despite all the above measures put in place, the results are disappointing. The elimination of NTBs remains a major challenge in the sub-region. Feeble enforcement mechanisms, the preponderance of domestic regulations over community provisions, lame political will and compliance with regional protocols account for the slow integration process.

The harmonisation and elimination of NTBs are part and parcel of the objectives of the 1992 SADC treaty. To achieve economic growth and development, the SADC shall harmonise political and socio-economic policies⁵⁸⁶ and cultivate policies to remove barriers to the free circulation of goods and services, capital, labour and people within the sub-region.⁵⁸⁷ The SADC Secretariat shall be responsible for the harmonisation of these policies.⁵⁸⁸ The 1996 SADC Protocol on trade was amended in 2010, and Article 6 provides for the elimination of NTBs among member countries. In 2003, SADC embraced a Regional Indicative Strategic Development Plan (RISDP) to be implemented within 15 years.⁵⁸⁹ The RISDP, which finally became operational in 2005, had a bold timetable for achieving trade integration in the SADC sub-region by 2018 (established an FTA by 2008, customs union by 2010, common market by 2015, Monetary Union by 2016 and Common currency by 2018). Besides the RISDP, SADC adopted a trade protocol in 1996, amended in 2010 and a finance and investment protocol in 2006. Another protocol on trade in services was drafted in 2012. The FTA project was launched in 2008 with a tariff reduction scheduled in 2001, with 85 per cent of trade among its members reaching a zero duty.⁵⁹⁰ Although this minimum condition

⁵⁸⁵ TralacBlog, perspectives on Africa's trade and integration; Non-tariff barriers and related dispute resolution: Is the East African Community all hat and no cattle? by Akinyi J. Eurallyah (2021) <https://www.tralac.org/blog/article/15069-non-tariff-barriers-and-related-dispute-resolution-is-the-east-african-community-all-hat-and-no-cattle.html>, accessed on 1 February 2021.

⁵⁸⁶ Treaty of SADC 1992, article 5(2)(a), see also the Consolidated Text of the Treaty of SADC 2015.

⁵⁸⁷ Ibid, article 5(2)(d).

⁵⁸⁸ Ibid article 14(1)(f).

⁵⁸⁹ The original 15-year strategic plan was approved by the Summit in 2003 and was launched in March 2004 in Arusha, Tanzania. The revised RISDP 2015–2020 was approved by the SADC Extraordinary Summit, held in April 2015, in Harare, Zimbabwe. Then the RISDP 2020–2030, in Gaborone, Botswana, 2020. See SADC - Trade and Market Integration available at <https://archive.uneca.org/oria/pages/sadc-trade-and-market-integration> accessed on 30/03/2022. See also SADC, Regional Indicative Strategic Development Plan (Gaborone, Botswana, 2003). available at https://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf, accessed on 30/03/2022 page 66-67.

⁵⁹⁰ SADC, Free Trade Area. Available at <https://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> accessed on 30 March 2022.

was met on time, maximum tariff liberalisation was only achieved in 2012 when the phase-down tariff process for sensitive products was completed.⁵⁹¹

Like any other REC in Africa, the SADC is still battling to implement its targets for the stages of regional integration in the region. Apart from launching the FTA in 2008, the customs union has not been established, indicating that every subsequent target will be delayed. The SADC is also flawed with a multiplicity of RECS and the presence of NTBs. Impediments to the progress of intra-community trade in the SADC are due to the complexity of SADC trade policies, limited trade facilitation systems, human resource constraints and poor infrastructure.⁵⁹²

From the foretaste of instruments instituting RECs in Africa, it can be concluded that the legal harmonisation of trade policies, specifically NTBs in RECs, had been well carved out. However, these depictions are far from practical. The attempts at legal harmonisation have not been adequately implemented. The articulations in these texts assure the reader at the outset that Member States are determined to integrate their sub-regions, only to reveal that what separates them is more significant than what unites them. The reasons for the absence of implementation or inadequate execution of these principles are varied. For Africa to be integrated, Member States must overcome the philosophies of self-interest and lame political will and ensure compliance with harmonisational provisions. There is also a need for the AU and RECs to desist from setting over-ambitious goals and targets, knowing fully that the will and capacity to implement them are limited.

4.3 Harmonisation of NTBs in the Tripartite FTA (COMESA-EAC-SADC)

The COMESA, SADC and EAC are the three RECs chosen as case studies for this thesis. They happen to be the ones that opted to advance the course of economic integration in Africa by signing the first and sole existing tripartite free trade area on the continent. This agreement, considered a springboard to the achievement of the AfCFTA, is yet to go into operation, while the AfCFTA came into operation on 1 January 2021. The operationalisation of the TFTA is hampered by unresolved issues of harmonisation of trade associated policies such as NTBs, trade liberalisation, trade remedies and the implementation of rules of origin. The harmonisation of NTBs in the TFTA is a significant concern to the community because

⁵⁹¹ Ibid.

⁵⁹² UNECA, 'SADC Trade and Market Integration' <https://www.uneca.org/archive/oria/pages/sadc-trade-and-market-integration> accessed on 4 February 2021.

they impede intra-community trade and clamp down on the overall AU integration agenda. Some of the following NTBs have been identified as the most prevailing NTBs within the COMESA-EAC-SADC TFTA: inconsistent and lengthy documentation requests, clearance and administrative processes, domestic regulations, border delays and inadequate infrastructure.⁵⁹³

To successfully monitor, identify and eliminate NTBs in the region, a mechanism known as the Tripartite NTBs Online reporting, monitoring and eliminating mechanism was created in 2009 to handle concerns about NTBs to trade.⁵⁹⁴ The Short Messaging System (SMS) was also launched in 2013. This SMS reporting tool was developed as an alternative method of reporting NTBs by participants who did not have access to the internet and other reporting tools at any point in their trading transactions.⁵⁹⁵ In addition, each of the RECs in the TFTA has created an online reporting system for businesses to identify and report matters of NTBs across the community borders to enhance the harmonisation of the NTBs process. At the national level, National Monitoring Committees and Focal Points have been instituted to define the process of removing the NTBs and blockades reported.⁵⁹⁶

Although this online reporting mechanism has helped monitor and report several NTBs within the community, they are still far from being eliminated, indicating that member countries of the TFTA need to do more to promote trade integration in the sub-region and the continent as a whole. Usually, member countries prioritise the gains of holding onto an NTB over the cost of implementing rules to facilitate regional provisions to tackle NTBs. Again, member countries are reluctant to enforce regional commitments to enhance the elimination of NTBs even when they know that it will benefit the regional economy. The lack of finance and technical capacity to implement community rules have also been identified as challenges to the legal harmonisation of NTBs within the TFTA community.⁵⁹⁷

⁵⁹³ W Viljoen 'Non-tariff barriers affecting trade in the COMESA-EAC-SADC Tripartite Free Trade Agreement' (2011) 15 <https://www.tralac.org/publications/article/4240-non-tariff-barriers-affecting-trade-in-the-comesa-eac-sadc-tripartite-free-trade-agreement.html>, accessed on 10 November 2021.

⁵⁹⁴ Tralac 'Non-Tariff Barriers: reporting, monitoring and elimination mechanism' available at <https://www.tradebarriers.org> accessed on 14 September 2021.

⁵⁹⁵ Tripartite task Force, 'Report of the Tripartite NTBs Online Reporting, Monitoring and Eliminating Mechanism Meeting to Launch the SMS Reporting Tool' 9th-10th April 2013; Cresta Golf View Hotel, Lusaka, Zambia.

⁵⁹⁶ Trade Mark Southern Africa. Establishing a Regional Non-Tariff Barrier Reporting and Monitoring Mechanism. WTO-OECD, 2011.

⁵⁹⁷ UNCTAD 'Non-Tariff Measures and Regional Integration in the Southern African Development Community' 2015 United Nations publication 1-28. Available at; https://unctad.org/system/files/official-document/ditctab2014d5_en.pdf, accessed on 2 May 2022.

4.4 Unaddressed issues of legal harmonisation in the SADC, COMESA and EAC

Legal harmonisation exists when individuals and business persons can rely on regional law in case of conflicts during intra-regional trade transactions.

This thesis opines that since African states are increasingly interested in promoting trade and investment, it is vital to solve the problem of diverse legal regulations that continue to hinder intra-regional and external trade. The agreement establishing the AfCFTA identifies the pivotal role that REC institutions play in ensuring the coordination and effective implementation of AfCFTA policies.⁵⁹⁸ It is opined that RECs have to ensure the harmonisation of regional trade standards, NTBs and all other restrictive intra-regional trade practices embarked upon by Member States that undercut community commitments.⁵⁹⁹ Examining the unaddressed issues of legal harmonisation challenges or hindrances to the implementation of harmonisation objectives of SADC, COMESA and EAC is vital in understanding the obstacles to continental integration.

4.4.1 The SADC

In Article 9 (1) of its treaty, the SADC establishes eight institutions to achieve the organisation's overall objectives. They are the Summit of the Heads of State or Government; the Organ on Politics, Defence and Security Cooperation; the Council of Ministers; the Sectoral and Cluster Ministerial Committees; the Standing Committee of Officials; the Secretariat; the Tribunal; and the SADC National Committees. In addition, the treaty provides the creation of other institutions when and where necessary.⁶⁰⁰ Legal harmonisation is not provided as an objective in the SADC treaty; although some sections refer to the harmonisation of political and socio-economic policies, strategies, plans and programmes of Member States. For example, to achieve its objectives, the SADC shall harmonise the political and socio-economic policies and plans of Member States and promote the coordination and harmonisation of their international relations.⁶⁰¹ The secretariat is further

⁵⁹⁸ A Bisong 'ECOWAS and the Role of the RECs in AfCFTA Implementation' (2020) 9(1) *ECDPM Great Insights* 23—24. See also Article 3(c), 5(b) and (l) of the AfCFTA Agreement.

⁵⁹⁹ D Owiro & J Akoth 'Fundamental Lessons from Regional Economic Communities for AfCFTA: A Case Study of EAC' (2021) *Institute of Economic Affairs* 1-42.

⁶⁰⁰ Consolidated text of the treaty of SADC, article 9(2). The Consolidated Treaty of SADC is a consolidation of the following texts: - The Treaty of the Southern African Development Community, 1992 - The Agreement Amending the Treaty, 2001 - The Agreement Amending Article 22 of the Treaty, 2007 - The Agreement Amending the Treaty, 2008 - The Agreement Amending Article 10A of the Treaty, 2009 and - The Agreement Amending Articles 10 and 14 of the Treaty, 2009. This edition of the consolidated text of the Treaty replaces the 2011 edition. And it is done by the Legal Affairs Unit of the Secretariat 2015.

⁶⁰¹ Ibid article 5(2)(a) and (h).

afforded the responsibility of coordinating and harmonising the policies and strategies of Member States; submitting harmonised policies and programmes to the council for consideration and approval; and mobilising resources, coordinating and harmonising programmes and projects with cooperating partners.⁶⁰² Member states shall equally coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects in cooperation with each other.⁶⁰³ The treaty also provides a list of sectors where Member States shall cooperate in article 21(3).⁶⁰⁴

The SADC has, however, failed to consider the significance of legal harmonisation in its treaty. The list of areas of cooperation enumerated in article 21(3) does not include legal harmonisation. Article 21(4) further stipulates that the council will decide upon additional areas of cooperation. Perhaps this infers that legal harmonisation could still be decided upon. However, it remains uncertain as the SADC has also failed to meet its milestones for trade integration, as seen above. Although the SADC REC includes different legal systems, such as English common law, civil law and Roman-Dutch law, it is not clear why the treaty does not contemplate legal harmonisation. The realities of legal barriers to intra-regional trade due to multiple legal traditions cannot be ignored.

Although the SADC has created organs to oversee cooperation in different fields, none of them has been charged with the task of legal harmonisation. It is argued that the SADC lacks well-built institutional arrangements to synchronise, streamline and carry out the harmonisation process. The tribunal, which should have been charged with the harmonisation process, merely has Advisory Opinions⁶⁰⁵ in addition to ensuring the interpretation of provisions of the treaty and other subsidiary instruments and its role of adjudication.⁶⁰⁶ The tribunal, like any other SADC institution, cannot make binding community rules since the treaty does not impose such obligations. According to Ngaundje,⁶⁰⁷ the tribunal has no compulsory status and jurisdiction. This is a result of the failure of Member States to afford

⁶⁰² Ibid article 14(f) (h) and (l).

⁶⁰³ Ibid, art 21(2).

⁶⁰⁴ In accordance with the provision of the treaty, member states agree to cooperate in the areas of: a) food security, land and agriculture; b) infrastructure and services; c) trade, industry, finance, investment and mining; d) social and human development and special programmes; e) science and technology; f) natural resources and environment; g) social welfare, information and culture; and h) politics, diplomacy, international relations, peace and security.

⁶⁰⁵ Ibid note 9 art 16(4).

⁶⁰⁶ Ibid art 16(1).

⁶⁰⁷ D Ngaundje Leno 'Regionalism: Lessons the SADC May Learn from OHADA' (2012) 75(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 256-270.

the tribunal the authority and status that it ought to be afforded.⁶⁰⁸ The secretariat merely coordinates and harmonises the policies and strategies of Member States and submits the same to the council for consideration and approval. Article 3(1) of the SADC treaty expressly states that the SADC is an international organisation whose Member States must respect the sovereign equality of the others as enshrined in Article 4(a). It is consequently not a supranational entity that, to some extent, could be conferred with some degree of authority to make binding decisions on Member States. Regarding the wording of the treaty, the SADC framework does not make provisions for Member States to pursue legal harmonisation.⁶⁰⁹ It is my opinion that the SADC should consider legal harmonisation. This can be achieved by empowering its institutions, such as the tribunal, to take binding decisions. It is observed that legal harmonisation in the SADC will eliminate the legal barriers to intra-regional trade within the sub-region.

4.4.2 The COMESA

COMESA Member States have agreed to pursue the aims and objectives, specific and general undertakings and fundamental principles of COMESA as enshrined in the treaty (see table 4.2). Evidently, the harmonisation of policies is a fundamental principle of COMESA.

⁶⁰⁸ Ibid at 259.

⁶⁰⁹ Shumba 2015 op cit note 556 at 141.

Table 4.2: Some aims, objectives, undertakings and fundamental principles of COMESA

Aims and objectives	<ul style="list-style-type: none"> - to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures; - to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its people and to foster closer relations among its Member States; - to co-operate in the creation of an enabling environment for foreign, cross-border and domestic investment, including the joint promotion of research and adaptation of science and technology for development; - to cooperate in the promotion of peace, security and stability among the Member States to enhance economic development in the region; - to co-operate in strengthening the relations between the common market (CM) and the rest of the world and the adoption of common positions in international fora; - to contribute towards the establishment, progress and realisation of the objectives of the AEC.
Some specific undertakings	<p>To promote the achievement of the objectives of the CM and per the relevant provisions of the Treaty, the Member States shall:</p> <ul style="list-style-type: none"> - establish a customs union, abolish all NTBs to trade among themselves, establish a common external tariff, and cooperate in customs procedures and activities; - simplify and harmonise their trade documents and procedures; - co-operate 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; - harmonise their macro-economic policies; - adopt a common agricultural policy and enhance regional food sufficiency; - harmonise the methodology of collection, processing and analysis of information required to meet the objectives of the CM; - harmonise or approximate their laws to the extent required for the proper functioning of the CM; - remove obstacles to the free movement of persons, labour, capital and services, right of establishment for investors and right of residence within the CM.
Some general undertakings	<ul style="list-style-type: none"> - Member states shall abstain from any measures likely to jeopardise the achievement of the aims of the CM or the implementation of the provisions of the treaty. - Each member state shall take steps to secure the enactment of and the continuation of such legislation to give effect to the treaty and, in particular: confer upon the CM legal capacity and personality required for the performance of its functions, and confer upon the regulations of the council the force of law and the necessary legal effect within its territory.
Some fundamental principles	<p>According to the objectives of the Treaty, and in conformity with the Abuja Treaty agree to adhere to: solidarity and collective self-reliance among Member States; inter-state co-operation, harmonisation of policies and integration of programmes among the Member States.</p>

Source: author's conceptualisation 2022.

In deepening the integration process, Member States are expected to adopt comprehensive measures such as harmonisation and approximation of their laws to the extent required for the proper functioning of the common market.⁶¹⁰ There is also a monetary and fiscal policy harmonisation programme where Member States agreed to harmonise their tax policies to remove tax distortions affecting commodity and factor movements to bring about a more efficient allocation of resources within the common market.⁶¹¹ They equally undertake to: harmonise the provisions of their laws concerning the equipment for and markings of vehicles, formalities and documents required for the vehicles and cargo used in inter-State transport within the common market, and harmonise rules and regulations concerning special transport requiring an escort.⁶¹² In the field of railways and rail transport, Member States shall: harmonise their legal and administrative requirements for inter-state railway transport within the common market to eliminate related barriers and inconsistencies that exist among themselves;⁶¹³ adopt measures for the facilitation, harmonisation and rationalisation of railway transport within the common market; harmonise and simplify documents required for inter-State railway transport among themselves; and harmonise procedures concerning the packaging, marking and loading of goods and wagons for inter-state railway transport among themselves.⁶¹⁴

In the field of air transport, they shall harmonise civil aviation rules and regulations by implementing the provisions of the Chicago Convention on International Civil Aviation, with particular reference to Annex 9 thereof,⁶¹⁵ while promoting the coordination and harmonisation of their maritime transport policies and the eventual establishment of a common maritime transport policy.⁶¹⁶ The Member States with common navigable inland waterways shall adopt, harmonise and simplify the rules, regulations, administrative procedures and tariff structure governing their inter-state inland waterway transport.⁶¹⁷ Member states shall also harmonise and simplify regulations, goods classification, procedures and documents required for their multimodal inter-state transport.⁶¹⁸ Telecommunications, radio and television are not left out. Member states agreed to harmonise and apply non-

⁶¹⁰ COMESA treaty, art 4 (6) (b).

⁶¹¹ Ibid art 76(1) and (2) (e)

⁶¹² Ibid art 85 (b), (d) and (i).

⁶¹³ Ibid art 86 (2) (d).

⁶¹⁴ Ibid (e) (f) (g).

⁶¹⁵ Ibid art 87 (3) (d).

⁶¹⁶ Ibid art 88(a).

⁶¹⁷ Ibid art 89 (a) and (d).

⁶¹⁸ Ibid art 91(a).

discriminatory tariffs among themselves and, where possible, shall agree on preferential tariff treatment applicable within the CM;⁶¹⁹ harmonise their technical equipment for the manufacture of radio and television equipment; and apply non-discriminatory radio and television tariffs for the exchange of electronic media programmes.⁶²⁰ In summary, Member States shall take measures directed towards the harmonisation and maximum use of programmes within their existing institutions for the training of personnel in the field of transport and communications.⁶²¹

Despite the treaty stipulations, there are significant gaps in the COMESA legal harmonisation process. It is apparent that there has been no legal harmonisation in COMESA. This is because COMESA began to create a uniform commercial law, but when compared to OHADA, little or no progress has been made. The COMESA Court of Justice contributed to the development of the common market law. Still, this court is available only to public authorities and governments, suggesting that private litigants cannot directly refer to the court where an individual or government has failed to fulfil an obligation under the treaty.⁶²² Although COMESA provides other services to the private sector and enhances international trade by limiting customs barriers,⁶²³ little or nothing has been done to harmonise the legal systems of Member States. It is observed that legal harmonisation in COMESA will be a daunting task as it involves countries that practice a dualist constitutional framework, unlike the monist tradition of African civil law practised by the OHADA Member States.⁶²⁴

COMESA established eight organs in its treaty to manage different responsibilities.⁶²⁵ For example: the authority enforces policies to enhance the aims of the CM,⁶²⁶ the council monitors and ensures the development of the CM,⁶²⁷ and the Intergovernmental Committee is responsible for the development of programmes and action plans in all the sectors of co-operation except in the finance and monetary sector.⁶²⁸ At the same time, the technical committees are charged with preparing the implementation of programmes within their

⁶¹⁹ Ibid art 96(e).

⁶²⁰ Ibid art 97 (b) and (c).

⁶²¹ Ibid 98(1).

⁶²² Ibid art 24-36.

⁶²³ Mancuso 2007 op cit note 417 at 173.

⁶²⁴ See chapter two at 72.

⁶²⁵ COMESA Treaty art 7.

⁶²⁶ Ibid art 8.

⁶²⁷ Ibid art 9.

⁶²⁸ Ibid art 14.

sectors. However, no organ has been set for harmonisation, and there is no harmonisation task explicitly assigned to any particular institution of COMESA.

Another challenging factor to legal harmonisation in COMESA is the dissimilar stages of integration in which the Member States find themselves. Out of the 21 Member States of COMESA, only seventeen are participating in the FTA and each to varying degrees.⁶²⁹ Although COMESA has made progress in the free movement of persons, goods and capital, among others, the challenges associated with free trade have outweighed the benefits of trading freely within the common market.⁶³⁰ Moreover, state egocentrism and the unilateral pursuit of individual interest hinder the attainment of a full regional economic community.⁶³¹ These challenges also impede legal harmonisation in the community. In addition, the customs union launched in 2009 is yet to go operational.⁶³² The harmonisation of industrial refunds and exemptions, alignment of national laws to Customs Management Regulations (CMR), and alignment of national tariffs to COMESA Common Tariff Nomenclature (CTN) and Common External tariff (CET) have been identified as challenges to the customs union.⁶³³

In summary, COMESA has also failed to attain its milestones for economic union (that is, the establishment of an FTA in 2000, customs union in 2004, common market in 2017 and economic community by 2025). Apart from establishing the FTA in 2000, COMESA missed the customs union target date of 2004. The customs union was merely launched in 2009 and is yet to go operational.⁶³⁴ Furthermore, little or no efforts were made towards the attainment of the customs union from 2017, and it is only recently (in 2021) that attempts were made to revitalise it.⁶³⁵ These challenges continue to persist as there is no legal harmonisation, which further impedes the achievement of full economic integration in the sub-region.

⁶²⁹ Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia, Zimbabwe launched the FTA in 2000. Burundi and Rwanda joined in 2004, Comoros and Libya in 2006. The Democratic Republic of Congo, Seychelles Ethiopia and Uganda joined in 2016. See also Tralac 'COMESA Legal Texts and Policy Documents' available at; <https://www.tralac.org/resources/by-region/comesa.html>, accessed 02 May 2022.

⁶³⁰ T Mude 'Challenges and Prospects for the Transformation of the Common Market for Eastern and Southern Africa by 2025' (2018)12(6) *Journal of Pan African Studies* 122-131.

⁶³¹ Ibid at 123.

⁶³² Tralac op cit note 629.

⁶³³ M Gakunga, 'calls to restart the regional customs programme' (2021) available at; <https://www.comesa.int/call-to-restart-the-regional-customs-programme/>, accessed on 04 May 2022.

⁶³⁴ L Haiyun, E Yassin et al 'The effect of integration processes of the Common Market for Eastern and Southern Africa on the economic growth of the member states' (2021) *International Journal of Finance & Economics* 1-19.

⁶³⁵ See Gakunga 2021 op cit note 633.

4.4.3 The EAC

The EAC is the only REC in Africa that has made legal cooperation among its Member States a prime objective in its treaty.⁶³⁶ Legal harmonisation is, therefore, a fundamental area in the economic advancement of the EAC. To enhance legal harmonisation in the EAC, Member States generally consent to confer upon the legislations, regulations and directives of the community the force of law as provided in the treaty. The treaty provides that community organs, institutions and laws shall take precedence over similar national institutions and laws on matters on the implementation of this treaty.⁶³⁷ Member states shall make the necessary legal instruments of the community take precedence over similar national ones.⁶³⁸ Article 9 establishes seven organs⁶³⁹ and institutions of the community.⁶⁴⁰ The council is the policy organ of the community and is responsible for making policy decisions for the community's efficient and harmonious functioning and development.⁶⁴¹ It initiates and submits bills to the Assembly, makes regulations, issues directives, takes decisions, makes recommendations and gives opinions, among others, per the provisions of the treaty.⁶⁴² The regulations, directives and decisions of the council are binding on the Member States and on all organs and institutions of the community except the summit, the court and the Assembly.⁶⁴³ The secretariat is responsible for coordinating and harmonising the policies and strategies relating to the development of the community through the Coordination Committee.⁶⁴⁴ The Assembly is the legislative organ of the community. The enactment of legislation of the community is completed using bills passed by the Assembly and assented to by the heads of state; every bill that has been duly passed and assented to shall be known as an Act of the Community.⁶⁴⁵

⁶³⁶ The 1999 EAC treaty in Article 5(1).

⁶³⁷ Ibid art 8(4).

⁶³⁸ Ibid art 8(5).

⁶³⁹ They are: the Summit; the Council; the Co-ordination Committee; Sectoral Committees; the East African Court of Justice; the East African Legislative Assembly; the Secretariat; and such other organs as may be established by the Summit.

⁶⁴⁰ The East African Development Bank established by the Treaty Amending and Re-enacting the Charter of the East African Development Bank, 1980 and the Lake Victoria Fisheries Organisation established by the Convention (Final Act) for the Establishment of the Lake Victoria Fisheries Organisation, 1994 and surviving institutions of the former East African Community shall be deemed to be institutions of the Community and shall be designated and function as such.

⁶⁴¹ Article 14 of the EAC treaty.

⁶⁴² Ibid.

⁶⁴³ Ibid art 16.

⁶⁴⁴ Ibid art 71(1)(e).

⁶⁴⁵ Ibid art 62(1).

The treaty lists the various fields of cooperation among the Member States, which are; cooperation in trade liberalisation and development;⁶⁴⁶ co-operation in investment and industrial development;⁶⁴⁷ cooperation in standardisation, quality assurance, metrology and testing;⁶⁴⁸ monetary and financial cooperation;⁶⁴⁹ infrastructure and services;⁶⁵⁰ development of human resources, science and technology;⁶⁵¹ free movement of persons, labour, services, rights of establishment and residence;⁶⁵² agriculture and food security;⁶⁵³ environment and natural resources management;⁶⁵⁴ tourism and wildlife management;⁶⁵⁵ health, social and cultural activities;⁶⁵⁶ enhancing the role of women in socio-economic development;⁶⁵⁷ political affairs;⁶⁵⁸ legal and judicial affairs;⁶⁵⁹ private sector and civil society;⁶⁶⁰ and cooperation with other regional and international organisations and development partners.⁶⁶¹ Harmonisation in all of the fields mentioned above, especially legal harmonisation, is given due consideration. The treaty requires the Member States to harmonise their legal training and certification, and to encourage the standardisation of the judgements of courts within the community.⁶⁶² It also requires them to establish a common syllabus for the training of lawyers and a common standard to be attained in examinations to qualify and to be licensed to practice as an advocate in their respective superior courts and harmonise all their national laws pertaining to the community.⁶⁶³ They have to revive the publication of the East African Law Reports or similar law reports and such law journals to promote the exchange of legal and judicial knowledge and enhance the approximation and harmonisation of legal learning and the standardisation of judgements of courts within the community.⁶⁶⁴ The EAC uses the approximation of laws, model laws, community acts, and directives in its harmonisation of

⁶⁴⁶ Ibid art 74.

⁶⁴⁷ Ibid art 79.

⁶⁴⁸ Ibid art 81.

⁶⁴⁹ Ibid art 82.

⁶⁵⁰ Ibid art 89-101.

⁶⁵¹ Ibid art 102-103.

⁶⁵² Ibid art 104.

⁶⁵³ Ibid art 105-110.

⁶⁵⁴ Ibid art 111.

⁶⁵⁵ Ibid art 115-116.

⁶⁵⁶ Ibid art 117-120.

⁶⁵⁷ Ibid art 121.

⁶⁵⁸ Ibid art 123.

⁶⁵⁹ Ibid art 126.

⁶⁶⁰ Ibid art 127.

⁶⁶¹ Ibid art 130.

⁶⁶² Ibid art 126(1)

⁶⁶³ Ibid art 126(2)(a) & (b).

⁶⁶⁴ Ibid art 126 (2)(c).

Member States' national laws and regulations. These methods of legal harmonisation are used by the different organs of the community.

Articles 47 and 22 of the Protocol on the Common Market and Monetary Union, respectively, induce Member States to align their national laws, rules and procedures to enable the actual functioning of the Common Market and the Monetary Union. The EAC created a sub-committee on the harmonisation of national laws of Member States. This sub-committee was created in 1997 and had existed before the EAC treaty. The initial harmonisation approach used by this sub-committee is the approximation of Member States' national laws. Approximation of laws is a method of aligning national laws to mutually agreed-on legal principles without necessarily making them the same.⁶⁶⁵ The approximation of laws in the EU is also known as partial or minimum harmonisation.⁶⁶⁶ The process of approximation of laws in the EAC is a systematic one. Member states' national laws are identified, analysed, and examined with guiding principles of best practices from international instruments. This is to identify gaps, flaws, divergences or similarities and recommend to the Member States concerned to incorporate the lacking norm, standard or principle in their respective national legislations. To this end, insolvency, partnership, company, business name registration, sale of goods, labour, employment and immigration laws have been approximated.⁶⁶⁷

Another method of harmonisation adopted by the sub-committee uses model laws. The sub-committee recommends the model laws to the Sectoral Committee for legal and judicial affairs. The Sectoral Committee has adopted the model contract law for EAC, and other model laws for intellectual property have been considered.⁶⁶⁸ The secretariat equally prioritised commercial and economic laws in banking, insurance and reinsurance, business transactions, money and finance, trade, procurement and assets disposal, standardisation and investment laws for harmonisation. It submitted the legislation for endorsement to the sub-committee. The Assembly has harmonised some areas of economic laws. These are the EAC Joint Trade Negotiations Act 2008, Competition Act 2006 and Customs Management Act

⁶⁶⁵ M Ndayikengurukiye 'Some observations on practical aspects of the harmonisation of economic laws in the East African Community context' in Döveling, Johannes, Hamudi I. Majamba, Richard Frimpong Oppong, and Ulrike Wanitzek (eds), *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities* (Law Africa, 2018) Vol. 5, at 6.

⁶⁶⁶ Ibid. Also see chapter 2 of this thesis at 69-70.

⁶⁶⁷ Ibid. see also Report on the meeting of the Sub – Committee on Harmonisation of National Laws (6-7 March 2015, Kampala, Uganda) at 6-8.

⁶⁶⁸ Ibid.

2004.⁶⁶⁹ The assembly contributes to legal harmonisation through bills finally enacted as EAC laws.

The Council also participates in the harmonisation process through the use of directives. It adopted directives in the sector of the securities market in an attempt to harmonise this sector of economic integration. These are directives on public offers on equity and debt in the securities market, asset-backed securities, collective investment schemes, corporate governance for securities market intermediaries, regional listing in the securities market and admission to trading on a secondary exchange.⁶⁷⁰ These directives were developed by the Sectoral Committee on Finance and Economic Affairs and approved by the Council. In addition, other directives with inputs from the Sectoral Committee for legal and judicial affairs have been adopted. The sub-committee, inspired by the stipulations of the importance of community Acts and the binding nature of council directives, decided to use directives as another means of legal harmonisation. The sub-committee prepares draft directives and submits them to the council for approval. However, this approach may not work as the council adopts the sub-committee proposals as guiding principles to the harmonisation process. These guiding principles are not binding on the Member States, and they may choose to disregard them.

The final method to be used by the sub-committee is the use of Community Acts enacted by the legislative body – the Assembly. Acts of the Assembly are developed as EAC legislation with supremacy over Member States' national laws and have a direct applicability effect.

Despite the zeal and progress made on the harmonisation agenda of the EAC, they are far from harmonising Member States' national laws. The EAC has a broad harmonisation of policies and programs with no timeline for the process to be realised. Member states are slow in integrating and implementing harmonised rules such as customs procedures, import duties, and internal indirect taxes.⁶⁷¹ The implementation milestones discrepancies hinder the EAC treaty's nationalisation among Member States. Even in areas where there has been legal approximation or the formulation of model laws, a monitoring mechanism is lacking to ensure implementation and compliance with harmonised standards.⁶⁷² Harmonisation of law

⁶⁶⁹ Ndayikengurukiye 2018 note 665 at 7.

⁶⁷⁰ Report of the 29th Extraordinary meeting of the Council of Ministers 23—28 April 2014, Arusha, Tanzania, EAC/EX/CM 29/ Decision 17 at 30.

⁶⁷¹ Aleem 2017 op cit note 431.

⁶⁷² Ndayikengurukiye 2018 note 665 at 6.

is usually an intricate and complex exercise. Several pertinent questions arise; what to harmonise, why harmonise and how to harmonise questions of legal harmonisation make the process a challenging one. The sub-committee faces a financial constraint on identifying, studying and analysing the many areas of economic and commercial laws that should be harmonised.

There is another challenge of the suitable model of legal harmonisation that the sub-committee should adopt following the different approaches used without efficient outcomes. The approaches of approximation and model laws have not been effective because of a lack of appropriate monitoring mechanisms to track Member States' compliance and implementation. Transforming draft directives into guiding principles does not resolve the problem, as guiding principles are not binding. The most appropriate and recommended approach is the use of community Acts which have the force of law and direct applicability. Although this is an extensive technique of legal harmonisation in the EAC, it is the most suitable.

4.5 Common factors impeding the maximal realisation of legal harmonisation

This section identifies and presents some common factors responsible for the absent, slow or minimal legal harmonisation within the African RECs.

4.5.1 Aligning RECs priorities to that of AU

The subject of RECs' priorities not being aligned with those of the AU has been mentioned in chapter three.⁶⁷³ However, it is observed that the alignment of priorities will facilitate legal harmonisation. When national, sub-regional and regional priorities are not aligned, it will be challenging for legal harmonisation to occur. The AU vision, goals, priority areas and plans have been articulated in a masterpiece document – Agenda 2063,⁶⁷⁴ which aims to transform Africa into a continent of new opportunities following a trajectory of Pan-Africanism. It is recommended that the AU limit its continental priorities to political affairs, peace and security, economic integration and reinforce Africa's global voice to sustain continental impact for better results.⁶⁷⁵ Additionally, there should be a vigorous and flawless division of labour and effective collaboration between the AU, RECs, the regional mechanisms, Member

⁶⁷³ See page 115.

⁶⁷⁴ See chapter 3 of this thesis at 111-115.

⁶⁷⁵ AU, 'Continental Priorities' available at <https://au.int/en/aureforms/priorities>, accessed on 02 June 2022.

States and other continental institutions following the principle of subsidiarity.⁶⁷⁶ Agenda 2063 goals, priorities, targets and strategies are considered ‘Africa’s Development Goals’ or ‘MDGs for Africa’ and must attract political and financial commitment from AU affiliates.⁶⁷⁷ Member states and RECs are required to align their short, medium and long-term plans and policies with those of the AU. In this light, Agenda 2063 included the development plans of Member States and the strategic plans of RECs in its First Ten Year Implementation Plan (FTYIP) to facilitate the alignment of their priorities with those of the AU.⁶⁷⁸ One of these priority areas is the AfCFTA.⁶⁷⁹

To fast-track the alignment of priorities through the implementation of Agenda 2063 FTYIP, the AU policy organs developed a results-based approach to progress and reporting is a crucial means of assessing this alignment. To achieve these objectives, the African Union Commission (AUC) and the African Union Development Agency-NEPAD (AUDA-NEPAD) undertook to coordinate and prepare periodic performance reports on Agenda 2063 continental progress.⁶⁸⁰ To this end, only 31⁶⁸¹ out of the AU 55 Member States and six⁶⁸² out of eight RECs responded on their progress on implementing the FTYIP of Agenda 2063.⁶⁸³ This indicates that some Member States do not act per their international policy decisions. From this perspective, alignment with AU priorities remains a considerable challenge. These priority areas have not been domesticated at the national and regional levels; therefore, alignment becomes difficult. According to this report⁶⁸⁴ there is absolute necessity for more sensitisation and deepening of domestication and integration of Agenda 2063 in the planning, financial arrangements and execution at national, regional and continental platforms.

⁶⁷⁶ See chapter 2 of this thesis for the conceptualisation of the principle of subsidiarity.

⁶⁷⁷ Agenda 2063 technical document 2015 at 94.

⁶⁷⁸ Ibid at 32-38.

⁶⁷⁹ Ibid.

⁶⁸⁰ AUC & AUDA-NEPAD, ‘First continental report on the implementation of Agenda 2063’ (2020) at IV, available at <https://au.int/en/documents/20200208/first-continental-report-implementation-agenda-2063>, accessed on 7 May 2022.

⁶⁸¹ Algeria, Benin, Botswana, Burkina Faso, Central African Republic, Chad, Côte d’Ivoire, Egypt, Eswatini, Ethiopia, Ghana, Guinea, Lesotho, Liberia, Madagascar, Mali, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

⁶⁸² The East African Community (EAC), the Economic Community for Central African States (ECCAS), the Common Market for East and Central Africa (COMESA), the Southern Africa Development Community (SADC), the Arab Maghreb Union (UMA) and the Intergovernmental Authority on Development (IGAD).

⁶⁸³ AUC & AUDA-NEPAD (2020) op cit note 680 at 1.

⁶⁸⁴ Ibid at 2.

Following the second continental report,⁶⁸⁵ 38 Member States submitted their national performance reports.⁶⁸⁶ This reflects an additional seven countries leaving out 17 of the 55 Member States. Although the second report recorded some progress compared to the first, there is still the slow-moving pace of signature and ratification of protocols for the priority projects, insufficient financial and human resources and, above all, fragile domestication of Agenda 2063 in AU member countries.⁶⁸⁷ At just one year to the end of the timeline for the realisation of the FTYIP, it is evident that Member countries struggle to domesticate AU priority programmes with no alignment of regional regulatory frameworks. The pertinent question is, when will these programmes be implemented? The national and regional development plans and priorities were considered before these continental priorities were established. There exists no harmonised approach to integrating and implementing these programmes.

4.5.2 Overlapping membership

The overlapping membership of RECs is another significant and common challenge to the progress of economic integration and legal harmonisation in RECs. This section will demonstrate multiple overlaps within COMESA, EAC and SADC.

All EAC Member States except South Sudan belong to either COMESA or SADC. Out of the 21 members of COMESA, four belong to EAC and eight belong to SADC. Tanzania belongs to the EAC and SADC, while the Democratic Republic of Congo belongs to all three (see figure 4.2 below). Apart from COMESA and EAC, Kenya also belongs to CEN-SAD and IGAD. This overlapping membership is a key barrier to economic integration and creates enormous challenges.⁶⁸⁸

⁶⁸⁵ AUC & AUDA-NEPAD, 'Second Continental Report on the Implementation of Agenda 2063' (2022) AUC & AUDA-NEPAD, Midrand, South Africa.

⁶⁸⁶ Algeria, Benin, Botswana, Burundi, Burkina Faso, Cape Verde, Chad, Cote D'Ivoire, Egypt, Eswatini, Equatorial Guinea, Ethiopia, Ghana, Guinea Conakry, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Namibia, Niger, Nigeria, Rwanda, Saharawi Rep. Senegal, Seychelles, Sierra Leone, South Africa, South Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

⁶⁸⁷ AUC & AUDA-NEPAD 2022 op cit note 685 at 3.

⁶⁸⁸ See chapter one at 8.

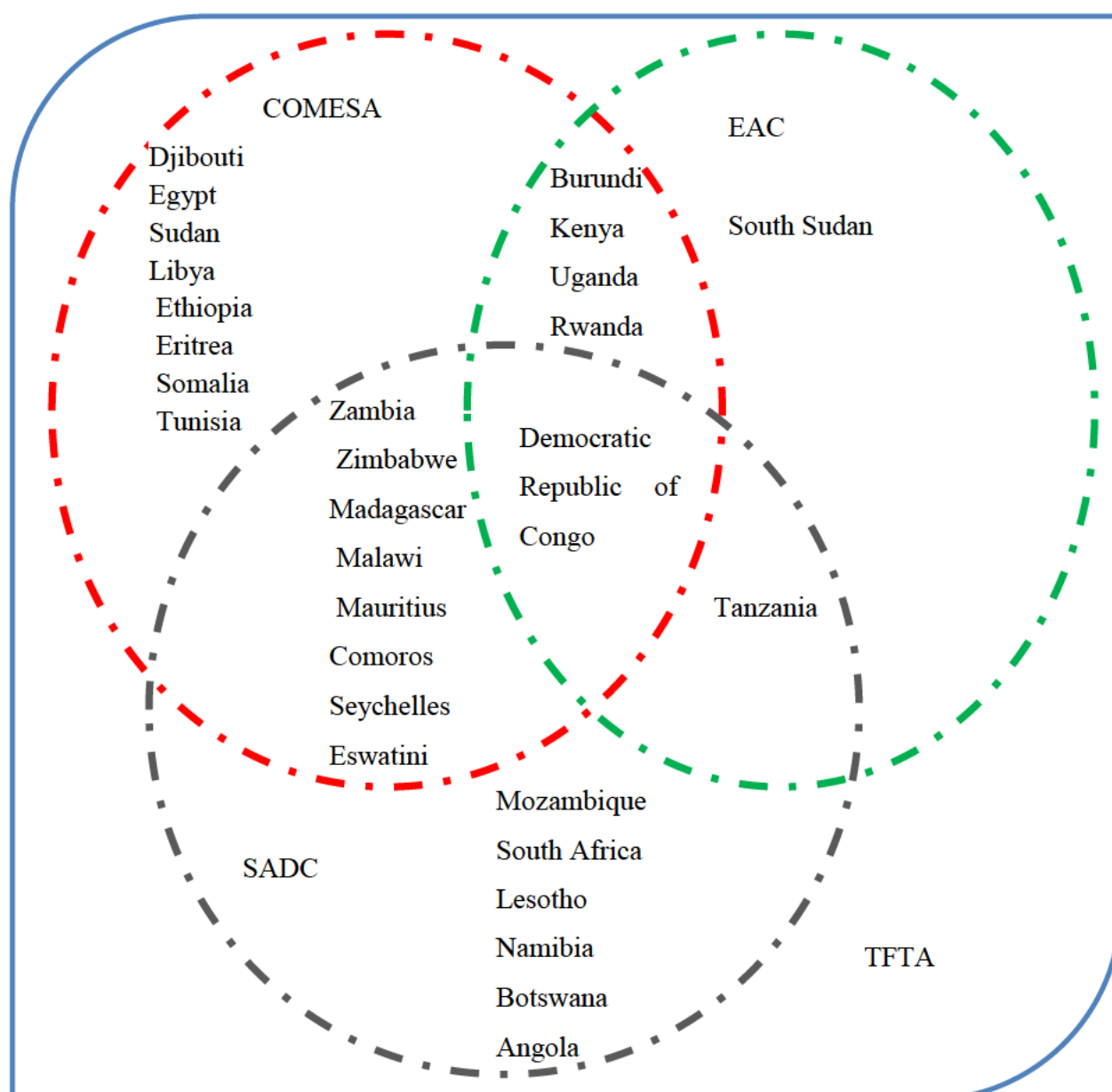


Figure 4.1: The intertwined relationship of COMESA, SADC, and the EAC.

The cost of maintaining these intertwined relationships further stretches the limited resources and capacity across RECs. The different and complex rules of origin, membership fees, contradictory objectives, different Common External Tariffs, and different legal traditions, among others, can be identified as stumbling blocks to RECs and Member States' alignment to AU priorities and legal harmonisation of NTBs. According to Otieno-Odek,⁶⁸⁹ this overlapping membership itself is an NTB to trade. Launching the TFTA between these RECs in 2015 was viewed as a commendable initiative that will resolve this overlap and

⁶⁸⁹ Otieno-Odek 2018 op cit note 422 at 35.

enhance the AfCFTA. However, the operationalisation of this TFTA is hampered by these challenges (harmonisation of trade-associated policies such as NTBs, trade liberalisation, trade remedies and implementation of rules of origin) as seen above. The AfCFTA was anchored on some of the TFTA provisions.⁶⁹⁰ Regrettably, the AfCFTA went operational in 2021, while the TFTA is yet to go functional, missing its projected timeline to realise its targets. The resolution of the problem of entangled membership is questionable as some Member States continue with this tendency. For instance, the Democratic Republic of Congo, which is already a member of COMESA and SADC, recently joined the EAC on 8 April 2022. This questions the strength, reliability, validity and advancement of the TFTA. Moreover, does it suggest there is no hope for harmonisation in the TFTA?

4.5.3 Non-implementation of key community regulations

Non-implementation, slow ratification or non-ratification of treaties, protocols, regulations, decisions, undertakings, declarations, guidelines and instructions of RECs and AU is a challenge to legal harmonisation.

One reason impeding the implementation of community instruments is the divergence of legal doctrines. For instance, the monist and dualist canons have differing views on the relationship between national and international legislation. Monism is the ideology that national and international legislations constitute the general body of legal rules similarly binding both individuals and states. Monist theories opine that international law and national law are a single creation of law, implying that upon ratification of an international treaty, it automatically becomes national law.⁶⁹¹ In this way, international law exercises supremacy over national law in case of a conflict between the two.⁶⁹² This doctrine contests the separate nature of national and international law.⁶⁹³ Some advocates of the monist tradition hold that the validity of national law emanates from international law while some contend that

⁶⁹⁰ Article 19 of the AfCFTA is in line with TFTA provision which states that in the event of inconsistency or a conflict between this Agreement and the Treaties and instruments of COMESA, EAC and SADC, this Agreement shall prevail to the extent of the inconsistency or conflict. The proposed timeline for the finalisation of TFTA was 2014, but TFTA was not officially launch until 2015 and as at 2022, the agreement is yet to go operational. See also W Olayiwola, 'Governing the Interface between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges' (2020) UNECA, a Final Draft Report at 80.

⁶⁹¹ M Retselisistoe Phooko 'Revisiting the Monism and Dualism Dichotomy: What Does the South African Constitution of 1996 and the Practice by the Courts Tell Us about the Reception of SADC Community Law (Treaty Law) in South Africa?' (2021) 29(1) *African Journal of International and Comparative Law* 168.

⁶⁹² Ibid at 169.

⁶⁹³ T Bankole 'Legal Problems of Economic Integration in the West African Sub-Region' (1990) 2(1) *African Journal of International and Comparative Law* 85-102.

international law is a broadening of national law.⁶⁹⁴ With this view, it is less cumbersome to implement an international regulation. On the other hand, dualism rejects the monist opinion that international and national law are the same system.⁶⁹⁵ Dualism posits that international and national legislations operate at different horizons displaying separate rules, each prevailing within its jurisdiction.⁶⁹⁶ This implies that an international norm is binding on states only when incorporated or adopted into national legislation, in the same way, that national regulations are incorporated into international norms before they become legislation binding upon states. This view is endorsed by countries that practice the common law system, while civil law countries validate monism.

Based on this evidence, considering the above ideologies in practice, ratifying or implementing community regulations becomes challenging as the Member States of these RECs follow these different legal traditions. This is due to colonial heritages instituting different legal traditions in African countries. The SADC, for example, consists of countries with civil law, common law and Roman-Dutch law traditions,⁶⁹⁷ consequently, retarding the ratification or implementation of community legislation. However, the problem of non-implementation persists not because the legislative organs of Member States do not adopt international or community legislations but because there is the absence of political will from the leaders to endorse this process.⁶⁹⁸

The differences in countries' legislative and constitutional approaches to ratifying or approving a treaty may slow down ratification and implementation. Some AU Member States struggle with lengthy and cumbersome legislative and constitutional processes for a treaty to be accepted or ratified, especially those countries following the dualist tradition. Sometimes they may confront technical difficulties in drafting and executing decrees or regulations and the absence of competent staff to handle ratification concerns. Logically, ratification of a highly technical agreement may depend on a state's capacity to first implement a decree of application for that agreement.⁶⁹⁹ Certain non-governmental bodies who have assumed treaty ratification campaigns in Africa have advanced that legislatures may hesitate to ratify a treaty

⁶⁹⁴ Ibid at 89.

⁶⁹⁵ Retselisistoe 2021 op cit note 691 at 170.

⁶⁹⁶ Ibid. see also Bankole 1990 op cit not 693 at 89.

⁶⁹⁷ South Africa, Lesotho, Zimbabwe, Namibia and Swaziland (Roman-Dutch); Angola and Mozambique (Civil Law) and Zambia, Tanzania and Mauritius (Common Law).

⁶⁹⁸ See also Bankole 1990 op cit note 693 at 89.

⁶⁹⁹ T Maluwa 'Ratification of African Union treaties by member states: law, policy and practice' (2012) 13(2) *Melbourne Journal of International Law* 636-684.

because of misapprehensions or because they are unable to appreciate the legal and political substance of the treaty as a result of the incompetence of officials in the appropriate government division to give the required expert guidance.⁷⁰⁰

In addition to the above, Maluwa attests that agreements or regulations addressing strategic policy areas that are at variance with national regulation and guidelines of member countries or necessitate fundamental modifications to domestic legislation to be effectively ratified will attract slow or non-ratification or are not likely to be implemented by the legislatures of those countries.⁷⁰¹ This is possible even when the executive branch of these countries originally signed the agreements.

Implementation and ratification of community instruments are also hindered by a lack of authority on the part of AU organs such as the parliament, Commission and Court of Justice and insubstantial enforcement mechanisms. These organs have not been empowered enough to enforce community policies. The AU Assembly of Heads of States and governments, a political summit of the Union, reserves the authority of decision-making and enforcement. However, this power can be delegated to other organs based on the Abuja Treaty.

For instance, the African Union Commission (AUC) plays a technical resource role instead of an implementation role.⁷⁰² A closer look at practical evidence the implementation of key instruments is at the latitude of Member States. Strategic matters are referred to the Council of Ministers via the Permanent Representative Council (PRC).⁷⁰³ This implies that for the AUC to enforce any binding decision enacted by the Assembly, the Member States via the Executive Council must be willing to relinquish some of their sovereignty to the AUC to exercise its appropriate authority as a Commission. This applies to the Pan-African Parliament, the African Court of Justice and other AU organs that are not empowered to execute their functions. The presence of an unempowered and ineffective Pan-African Parliament and Court of Justice impedes the making of binding policies and enforcement of sanctions on Member States that do not implement AU treaties and Protocols.⁷⁰⁴ It is observed that political obstacles cloud the creation of strong institutions or effective supranational organs by the AU, and the transfer of power to these institutions for the

⁷⁰⁰ Ibid at 669.

⁷⁰¹ Ibid at 663.

⁷⁰² AU, 'Governance of Integration in Africa: Challenges and Way Forward' (2014) available at https://au.int/sites/default/files/newsevents/workingdocuments/26630-wd-issue_paper_on_governance_of_integration_en.pdf accessed on 14 June 2022.

⁷⁰³ The PRC is composed of African Ambassadors and Representatives of member states to the African Union.

⁷⁰⁴ See AU 2014 op cit note 702 at 7.

realisation of the objective of legal harmonisation and the effective achievement of the AfCFTA is contestable.

Further evidence demonstrating the weak and ineffective organs of the AU is the skewed nature of responsibilities and powers accorded to the Pan-African Parliament in article 2(3) of the Protocol creating the Parliament. It states that:

The ultimate aim of the Pan-African Parliament shall evolve into an institution with full legislative powers, whose members are elected by universal suffrage. However, until such a time as Member States decide otherwise by an amendment of this Protocol, the Pan-African Parliament shall have consultative and advisory powers only, and the members of the Pan-African Parliament shall be appointed as provided for in Article 5 of this Protocol.

The basic premise of this clause is for states to retain autonomy, thereby restricting the legislative and supervisory authority of the Pan-African Parliament.⁷⁰⁵ Regarding the Court of Justice, the Abuja Treaty provides that the court shall ensure the adherence and implementation of the treaty's provisions, and its decisions are binding on the Member States and community organs.⁷⁰⁶ Nonetheless, the court does not have the authority to rule on the legitimacy of legislative actions and contraventions by Member States. This is because the court's decisions cannot be enforced without the influence of Member States.⁷⁰⁷

Another aspect is that the AU and REC treaties do not have provisions on the timelines for ratification of treaties. This indicates that as an 'intergovernmental organisation' in praxis, AU lacks the authority to oblige its affiliates to ratify, implement, domesticate or comply with its treaty stipulations.⁷⁰⁸ The decision to ratify or implement a treaty provision rest with the Member States, as the AU is deficient in enforcing implementation or monitoring compliance.

4.5.4 Considering surrendering part of state sovereignty

The issue of sovereignty is a fundamental concern in every regional integration arrangement. Although the AU drew its inspiration from the EU, it is yet to match its experience of transferring some degree of sovereignty to the supranational body and

⁷⁰⁵ Ibid. Even though the Constitutive Act of the AU intended that there should be a commitment to delegating decision-making powers to the Pan-African Parliament, its subsequent establishment in 2001 introduced an article which limits its powers as long as African Heads of State and Government deem it necessary.

⁷⁰⁶ See article 18(2) and 19.

⁷⁰⁷ See AU 2014 note 702 at 8.

⁷⁰⁸ Maluwa 2012 op cit note 699 at 170.

implementing common policies.⁷⁰⁹ In as much as sovereignty is a state's right, a successful economic integration result requires some release of authority to the supranational body making community objectives supreme over national ones.⁷¹⁰ In theory, it can be deduced that the legal instruments enacted by the AU and RECs advocate for the supremacy of community rules and supranationalism, but what is obtained in practice challenges this view. The Abuja Treaty in Article 10⁷¹¹ and 13⁷¹² recognises the supremacy of its decisions and regulations over RECs, community organs and Member States. The EAC treaty in Article 8(4) also endorses the supremacy of EAC law while COMESA in article 5(2) (b) warrants Member States to give legal effect to community regulations within their territories. Based on Aspiration 2 of Agenda 2063,⁷¹³ the AU advocates for a supranational body, a united Africa (federal or confederate), and declares that by 2045, all legal processes and strong institutions would have been in place for the realisation of a united Africa.⁷¹⁴ The Union will have a flag and an anthem, direct election of members of Parliament of the Union and a president elected by universal suffrage.⁷¹⁵ In summary, the Union will have all the characteristics of an independent sovereign state.

Notwithstanding the above provisions, there has been little or no release of some degree of sovereignty by Member States. The overwhelming evidence that article 3 of the AU Constitutive Act defends, safeguards and shields state sovereignty and territorial integrity complicate the issue even further. All RECs have followed the same pattern. The EAC, COMESA and SADC, among others, are all intergovernmental organisations without any

⁷⁰⁹ B Byiers and L Miyandazi, 'Balancing Power and Consensus: Opportunities and Challenges for Increased African Integration' (2021) *Istituto Affari Internazionali* at 11.

⁷¹⁰ See AU 2014 note 702 at 8.

⁷¹¹ Article 10 states that: 1. the Assembly shall act by decisions. 2. Without prejudice to the provisions of paragraph (5) Article 18, decisions shall be binding on member states and organs of the community, as well as regional economic communities. 3. Decisions shall be automatically enforceable thirty (30) days after the date of their signature by the chairman of the Assembly and shall be published in the official journal of the Community. 4. Unless otherwise provided in this Treaty, decisions of the Assembly shall be adopted by consensus, failing that, by a two-thirds majority of member states.

⁷¹² Article 13 states that: 1. the Council shall act by regulations. 2. Without prejudice to the provisions of paragraph (5) Article 18 of this Treaty, such regulations shall be binding on member states, subordinate organs of the community and regional economic communities after their approval by the Assembly. Notwithstanding the foregoing provisions, regulations adopted as aforesaid shall forthwith have a binding effect in the case of delegation of powers by the Assembly pursuant to paragraph 3(j) of Article 8 hereof. 3. Regulations shall be enforceable automatically thirty (30) days after the date of their signature by the chairman of the Council and shall be published in the official journal of the Community. 4. Unless otherwise provided in this Treaty, regulations shall be adopted by consensus or, failing that, by a two-thirds majority of member states.

⁷¹³ An integrated continent, politically united based on the ideals of Pan Africanism and the vision of Africa's Renaissance.

⁷¹⁴ AUC, 'Agenda 2063 Framework Document' (2015) 10-11.

⁷¹⁵ *Ibid* at 11.

obligation to transfer any form of sovereignty to the international organisation. The EAC, which is more advanced in its integration process and affirms the supremacy of EAC law, is not a supranational body, nor have its Member States released any form of sovereignty to the EAC. On the contrary, it is argued that the EAC regional legislation can only be supreme if EAC is a sovereign legal body.⁷¹⁶ Some scholars see Article 8(4) of the EAC treaty as a release of sovereignty to the community institutions, thereby raising community law above national laws.⁷¹⁷ This thesis underscores that there is no release of sovereignty. To portray this argument, in terms of the treaty, the community may undertake programmes or activities in common as decided by the Member States from time to time,⁷¹⁸ the treaty can be amended at any time if all the Member States so desire,⁷¹⁹ and the jurisdiction of the national courts remains in force irrespective of the fact that the EAC is involved.⁷²⁰ This implies that there is no release of any form of sovereignty.

National constitutions do not fall under article 8(4) and are consequently superior to the EAC treaty.⁷²¹ The community as a legal entity is subject to and not sovereign over Member States and has limited jurisdictional competence as sovereignty remains with the EAC Member States.⁷²² The Member States have merely ceded some functional and jurisdictional competence on issues relating to the community. In the case of *Samuel Mukiramohochi v Attorney General of the Republic of Uganda*,⁷²³ the issue of the state of Uganda's sovereignty was in question before the East African Court of Justice (EACJ). This equally applied to all other Member States. It was argued that sovereignty is the supreme power of an independent country and Uganda is an independent state, therefore its sovereignty was not submerged under the EAC. The court held that Uganda is an independent sovereign state, and its sovereignty was not submerged in establishing the EAC.⁷²⁴ The proposed constitution of Kenya in 2005 unambiguously stated that Kenya's law was supreme and the validity of its

⁷¹⁶ Otieno-Odek 2018 op cit note 422 at 42.

⁷¹⁷ R F Oppong, 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) 30(2) *Fordham International Law Journal* 296—345.

⁷¹⁸ See art 5(3)(h) of EAC treaty.

⁷¹⁹ Ibid art 150(1).

⁷²⁰ Ibid art 33(1).

⁷²¹ EAC Secretariat press release on meeting on Approximation of National laws in the EAC context held at Nairobi on the 18th of February 2010. See also Otieno-Odek 2018 op cit note 422 at 42.

⁷²² Otieno-Odek 2018 op cit note 422 at 42.

⁷²³ EACJ, Reference No. 5 of 2011. See also Otieno-Odek 2018 at 43.

⁷²⁴ Ibid.

constitution could not be challenged by or before any other court or institution.⁷²⁵ It also stipulated that the EAC law is only Kenyan law to the extent that it is consistent with the constitution.⁷²⁶ Where part of state sovereignty has been ceded to a supranational entity, Member States become the entity's primary subjects and individuals its secondary subjects in the area of ceded sovereignty. The EAC idea of a political federation may change the status quo. Nonetheless, this is doubtful as the AU has the ambition of a federation, but little or nothing has been actioned to advance this aspiration.

From the above and the discussion in chapter three, it can be contended that the impact of colonialism and the struggle for independence took an incremental toll on African countries to the extent that all efforts are geared towards guarding their hard earned sovereignty as independent nations. This has led to establishing continental and regional organisations devoid of supranationalism with weak and deficient structures and institutions without decision-making authority. Member states continue to exercise their sovereign identity over AU and RECs.

4.6 Lessons beyond Africa

This section aims to examine some external integration arrangements globally and consider insights on best practices for advancing the AfCFTA.

4.6.1 ASEAN Free Trade Area (AFTA)

The Association of South East Asian Nations (ASEAN) was formed on 8 August 1967 in Bangkok by five founding Member States.⁷²⁷ Brunei Darussalam joined on 7 January 1984, making them the preliminary six ASEAN. It currently consists of ten Member States.⁷²⁸ ASEAN was a regional economic cooperation established to attain regional peace and political stability. Due to the fact that the objective of the ASEAN at the time was not regional economic integration, trade among Member States was meagre.⁷²⁹ To respond to the

⁷²⁵ See Oppong 2007 op cit note 717 at 305. Also, Article 2 of the proposed new constitution of Kenya 2005, Kenya gazette supplement No 63.

⁷²⁶ Ibid, Article 3 of the proposed new Kenyan constitution 2005. This Constitution was rejected in a referendum held on 21 November 2005 for reasons mainly related to its provisions on presidential powers. See Marc Lacey, 'Kenya Voters Rebuff Leader on Revamping Constitution' (2005) *New York Times*, at A12.

⁷²⁷ They are: Indonesia, Malaysia, Singapore, Philippines and Thailand.

⁷²⁸ Ibid. Vietnam joined on 28 July 1995, Lao PDR and Myanmar on 23 July 1997 and Cambodia on 30 April 1999, making up what is today the ten member states of ASEAN. All the four latecomers were required to sign the AFTA agreement to join ASEAN, but were given longer time frames in which to meet AFTA's tariff reduction obligations.

⁷²⁹ Estimates between 1967 and the early 1970s showed that the share of intra-ASEAN trade was between 12-15% of total trade of member countries. See also M Hapsari, Indira & C Mangunsong 'Determinants of AFTA

need for economic integration 25 years after the existence of ASEAN, the AFTA was created on 28 January 1992 in Singapore and was effectively established on 1 January 1993. The region became an FTA in 2002. Its main objective was to reduce tariffs, eliminate NTBs among the ASEAN and attract foreign investment. All tariffs under the Common Effective Preferential Tariff (CEPT) system were to be reduced to between 0 and 5 per cent.⁷³⁰ All products from ASEAN members with a minimum of 40 per cent ASEAN content had to apply these tariff reduction rates.⁷³¹ The founding six members had applied the 0-5 per cent tariff range to all the products under the CEPT inclusion list, while the additional four members are also fulfilling their obligation under the CEPT with 80 per cent of their products transferred to their CEPT Inclusion List.⁷³² By 2010, tariffs had reduced to zero per cent among the six primary members; in 2015, the other four members followed suit.⁷³³ Since then, efforts have been made to widen the ASEAN economic integration agenda.

The adoption of ASEAN Vision 2020 in 1997 envisaged ASEAN as a highly competitive region with free movement of factors of production and equitable economic growth with reduced poverty and social inequalities.⁷³⁴ The issuance of the Declaration of ASEAN Bali Concord II in 2003 by Member States, which witnessed the establishment of the ASEAN Community in 2015, showed that economic integration of the region was evident.⁷³⁵ The establishment of the ASEAN Community was initially slated for 2020 but later fast-tracked for 2015. The declaration consists of three pillars of the ASEAN Community (the ASEAN Economic Community (AEC), the ASEAN Security Community and the ASEAN Socio-Cultural Community). In 2007, the AEC Blueprint 2015 was adopted, a roadmap to guide the establishment of the AEC. The Blueprint 2015 instituted seventeen “core elements” of the AEC and outlined 176 priority actions to be conducted within four implementation phases: 2008-2009, 2010-2011, 2012-2013, and 2014-2015.⁷³⁶ The achievements of the AEC

members' trade flows and potential for trade diversion' (2006) *Working Paper Series No. 21, Asia-Pacific Research and Training Network on Trade*.

⁷³⁰ S Hadi 'The ASEAN Free Trade Area: A critical assessment' (2002) 16(1) *The Journal of East Asian Affairs* pp. 20-53.

⁷³¹ Ibid.

⁷³² Ibid at 5.

⁷³³ ASEAN Briefing, 'ASEAN's Free Trade Agreements: An Overview' (2021) available at <https://www.aseanbriefing.com/news/aseans-free-trade-agreements-an-overview/> accessed on 20 June 2022

⁷³⁴ ASEAN, 'Economic Community' <https://asean.org/our-communities/economic-community#Enhanced-Connectivity> accessed on 21 June 2022.

⁷³⁵ Ibid.

⁷³⁶ See AU 2014 note 702 at 15.

Blueprint 2015 have been summarised in the new AEC Blueprint 2025 in Article 1, which states:

The implementation of the ASEAN Economic Community (AEC) Blueprint 2015 has been substantively achieved in, among others, eliminating tariffs and facilitating trade; advancing the services trade liberalisation agenda; liberalising and facilitating investment; streamlining and harmonising capital market regulatory frameworks and platforms; facilitating skilled labour mobility; promoting the development of regional frameworks in competition policy, consumer protection and intellectual property rights; promoting connectivity; narrowing the development gap; and strengthening ASEAN's relationship with its external parties.⁷³⁷

The AEC, one of the community pillars,⁷³⁸ was established on 31 December 2015 as a step forward for the advancement of ASEAN economic integration. It will be realised following the new AEC Blueprint 2025 based on four pillars.⁷³⁹ To guarantee the Blueprint's implementation, Member States of the AEC pledged not to withdraw from their obligation and are obliged to ratify the AEC Blueprint 2025 within six months.⁷⁴⁰

With the establishment of the AFTA and the AEC, intra-ASEAN trade increased as Member States began to trade more within themselves. For instance, from 2007 to 2014, ASEAN trade was worth almost \$1 trillion, of which 24 per cent was intra-regional trade, fourteen per cent was traded with China, ten per cent with Europe, nine per cent with Japan and eight per cent with the USA.⁷⁴¹ In addition, foreign direct investment augmented from US\$85 billion to US\$136 billion.⁷⁴² As a means to monitor and evaluate the implementation of the AEC agreement, ASEAN introduced a scorecard system to measure Member States' performance. The scorecard, being a monitoring and evaluation mechanism for implementing the AEC, points out precise actions that must be undertaken nationally or regionally to fast-track the AEC.⁷⁴³ The AEC scorecard offers qualitative and quantitative signals as to the

⁷³⁷ The ASEAN Economic Community Blueprint 2025, (2015) ASEAN Secretariat, Jakarta at 1.

⁷³⁸ The other pillars are: the ASEAN Political-Security Community and ASEAN Socio-Cultural Community. These two pillars with the ASEAN Economic Community were all established in 2015. Each pillar has its own Blueprint together with the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan Phase II (2009-2015), they form the roadmap to deepen integration in the ASEAN community.

⁷³⁹ Namely: single market and unity of production base, competitive, innovative and dynamic economic region, equitable economic growth and ASEAN that is integrated in the global economy. See also ASEAN Secretariat, <https://asean.org/asean-economic-community/aec-monitoring/> accessed on 21 June 2022.

⁷⁴⁰ C Irawan 'Legal Harmonization In Asean Economic Communities (Looking For The Best Legal Harmonization Model)' (2018)3(2) *University Of Bengkulu Law Journal* 134-141. See also article 82(ix) of the AEC Blueprint 2025 at 37.

⁷⁴¹ Ibid at 137.

⁷⁴² Ibid.

⁷⁴³ AU 2014 note 702 at 15.

level of implementation of the AEC enactments, provides statistical indicators on the AEC, monitors the respect of timelines as stipulated in the AEC Blueprint, and tracks execution and achievement of milestones under the AEC Strategic Schedule.⁷⁴⁴

However, as an intergovernmental organisation, the ASEAN community has not given due attention to legal harmonisation, nor does it contemplate supranationalism. With divergent national laws and a lack of mechanisms to ensure compliance with the ASEAN community agreements among member countries,⁷⁴⁵ the effective implementation and achievement of the AEC Blueprint 2025 remain to be seen. That notwithstanding, the evidence presented by the increase in intra-ASEAN trade with the establishment of the AFTA demonstrates that its Member States adhere to their treaty commitments. They are obliged to ratify community regulations and pledge to do so timeously. On the other hand, intra-African trade remains less than its peers even with the establishment of FTAs and customs unions within some of the RECs. The essence of legal harmonisation is to advance regional trade and investments, which is yet to be achieved in Africa.

4.6.2 North American Free Trade Agreement (NAFTA)

NAFTA was signed on 17 December 1992 and entered into force on 1 January 1994 between three States: Canada, Mexico and the United States of America. The overall objectives are to; abolish barriers to trade and ease intra-regional trade in goods and services within the territories of parties, promote fair competition in the FTA, increase investment opportunities, protection and enforcement of intellectual property rights and create a mechanism for effectively implementing the FTA agreement for its joint administration and resolution of disputes.⁷⁴⁶ It also aimed at creating a trilateral, regional and multilateral cooperation framework to expand and enhance the agreement.⁷⁴⁷

Intra-NAFTA trade had more than tripled with the coming into force of the agreement as trade among Member States grew more than trade with the rest of the world. Trade among the trio had reached the one trillion dollar threshold in 2011, and Canada and Mexico became the first and second principal markets for US exports in 2016, accounting for 34 per cent of

⁷⁴⁴ Ibid.

⁷⁴⁵ Irawan 2018 op cit note 740 at 139.

⁷⁴⁶ Article 102 of the NAFTA Agreement 1992. See also Irawan 2018 op cit at 138.

⁷⁴⁷ Ibid.

USA total exports in the same year.⁷⁴⁸ As far as imports are concerned, Canada was classified as the second and Mexico the third supplier to the USA, accounting for 26 per cent of its imports.⁷⁴⁹

Despite the above gains, the USA faced many issues related to NAFTA and global trade.⁷⁵⁰ As a result, on 18 May 2017, the US Administration under President Trump sent a three-month notice to congress about its preparedness to renegotiate NAFTA with Canada and Mexico.⁷⁵¹ The USA had wanted to withdraw from NAFTA but had to appraise the repercussions of that decision if executed. After the necessary consultations and renegotiations, the USA, Mexico and Canada, in September 2018, signed the United States–Mexico–Canada Agreement (USMCA), replacing NAFTA. The trio ratified the new agreement in March 2020. It was agreed that NAFTA would remain binding until USMCA was implemented. The USMCA finally became effective on 1 July 2020, substituting NAFTA, although the new agreement contains only a few modifications.⁷⁵²

From the above, it could be deduced that NAFTA Member States did not contemplate integration beyond an FTA, therefore, issues of supranationalism and legal harmonisation do not arise. The decision to dissolve the regional organisation and create a similar new agreement indicates that the region does not intend to create a harmonised community.

4.6.3 Southern Common Market (MERCOSUR)

Established under the treaty of Asunción on 26 March 1991, Mercosur is a regional trade agreement between Paraguay, Brazil, Argentina and Uruguay. Venezuela became a member

⁷⁴⁸ M Villareal & I F Fergusson 'The North American Free Trade Agreement (NAFTA)' (2017) available at: https://ecommons.cornell.edu/bitstream/handle/1813/78581/CRS_NAFTA_0517.pdf?sequence=1, accessed on 22 June 2022.

⁷⁴⁹ Ibid at 11.

⁷⁵⁰ These issues were the effects of the agreement regarding employment, the environment, intellectual property rights, digital trade and economic growth which were a subject of political disputes. The NAFTA agreement could be regarded as out-dated with the emergence of Ecommerce. Most economic analyses indicated that NAFTA was beneficial to the North American economies and the average citizen but harmful to a small minority of workers in industries exposed to trade competition. Economists held that withdrawing from NAFTA or renegotiating NAFTA in a way that re-established trade barriers would have adversely affected the U.S. economy and cost jobs. However, Mexico would have been much more severely affected by job loss and reduction of economic growth in both the short term and long term.

⁷⁵¹ Seelke C Ribando 'Mexico: background and US relations' (2018) Congressional Research Service 20. See also J Lee 'Skepticism, Unilateralism or Ultimatumism: Trump Administration's Trade Policy and the Korea-U.S. FTA' (2017) 12(2) *Asian Journal of WTO and International Health Law and Policy* 421-462.

⁷⁵² E Beaulieu & D Klemen 'You Say USMCA or T-MEC and I Say CUSMA: The New NAFTA-Let's Call the Whole Thing On' (2020) *The School of Public Policy Publications* available at: https://www.policyschool.ca/wp-content/uploads/2020/04/final2_NAFTA-Trade-Beaulieu-Klemen.pdf, accessed on 23 June 2022.

on 31 July 2012,⁷⁵³ while Bolivia joined on 7 July 2015. Mercosur was established when there were political conflicts between Argentina and Brazil, and the union scored some successes in their relations, including increased intra-regional trade. These South American nations later transformed the FTA into a customs union in 1994. The principal aims of the common market are to promote the free movement of goods, services and factors of production among its members through the elimination of customs duties and NTBs and any other related measures; the formation of CET and a common trade policy towards external countries and the synchronisation of positions in regional and international economic and commercial settings; the coordination of macroeconomic and sectoral policies in the fields of external trade, agriculture, industry and monetary matters, foreign exchange and capital, services, customs, transport and communication.⁷⁵⁴ The treaty also makes provision for additional areas of cooperation which may be agreed upon by Member States to ensure proper competition and the commitment of members to harmonise their laws in the relevant fields to enhance the process of integration.⁷⁵⁵

Mercosur has been able to reduce the long-standing political rivalry and tension among its members and instil mutual reliance and international relations with democratic principles.⁷⁵⁶ Intra-regional trade has increased tenfold, and Mercosur has attracted global recognition, which its member countries could not achieve individually.⁷⁵⁷ From 1990 to 2010, intra-regional trade increased from \$4 billion to more than \$41 billion, and Argentina and Brazil, in October 2021, granted a 10 per cent tariff reduction in Mercosur to advance

⁷⁵³ However, Venezuela has been suspended since 1 December 2016. It is said that failure to comply with the commitments made when it joined the group in 2012 account for its suspension. As a result of violations of human rights and Mercosur's trade rules by President Nicolas Maduro's government, the group made Venezuela's suspension indefinite in August 2017 (there are no provisions for permanent expulsion). And in 2019, Argentina, Brazil, and Paraguay called on Maduro to cede power to the Venezuelan opposition.

⁷⁵⁴ Mercosur treaty of Asuncion 1991, article 1.

⁷⁵⁵ Ibid.

⁷⁵⁶ Mercosur's initial goal was to fortify and reinforce the region's return to democracy, since all of its founding members had emerged from dictatorships in the 1980s. In 1998, the group signed the Ushuaia Protocol on Democratic Commitment stating that "the full force of democratic institutions is essential" to the integration of Mercosur States and that a "rupture in democratic order" would be a reason for a member's suspension. Mercosur members invoked the protocol for the first time in 2012 to suspend Paraguay, claiming that President Fernando Lugo had been unfairly removed from power after his domestic opponents accused him of mishandling a deadly clash between farmers and law enforcement. Some experts say Paraguay's suspension, which was lifted in 2013, was politically motivated, since Brazil's then left-wing government was seeking Venezuela's admission to the bloc and Paraguay's new, center-right government opposed it. See also Council on Foreign Relations 2021 note 758.

⁷⁵⁷ AU 2014 note 702 at 17.

economic integration between its states parties.⁷⁵⁸ Citizens or residents of the common market can live and work anywhere within Mercosur and Mercosur has its emblem on States Parties' passports and license plates.

However, full harmonisation (neither legal harmonisation nor harmonisation of economic policies) has not occurred in Mercosur. Although Mercosur has harmonised its competition law, trade mark law, substantive rules and national enforcement law in areas such as customs and transport, lack of ratification and incorporation has made implementation difficult.⁷⁵⁹ The laws of Mercosur are not directly applicable and are equally not binding on Member States until they observe internal procedures and policies and are incorporated by Member States.⁷⁶⁰ This is the dualist legal tradition. Mercosur is not a supranational entity but an intergovernmental body with community objectives.⁷⁶¹ It aspires to follow the EU type of integration route from a South-American FTA to a customs union and common market. Still, the full implementation of its customs union is yet to take place.⁷⁶² Customs duties are still imposed on some goods, and notwithstanding the agreement by States Parties to apply a CET on imports from non- States Parties, disparities on the application of this CET still exist.⁷⁶³ This suggests that the customs rules are not harmonised. Trade liberalisation and economic policies harmonisation has stagnated. There is no uniform implementation of the customs union due to economic instability and economic policies divergence. The customs union now includes fewer products than was at the start of the agreement.⁷⁶⁴ It has been difficult for Mercosur to have a stable monetary and exchange rate system, especially as some of its Member States (Argentina and Brazil) have different systems and the Brazilian Real currency went through a devaluation in 2001,⁷⁶⁵ making macroeconomic synchronisation challenging. This regional economic regression could be associated with a declining political commitment to embark on reforms needed to align the current programmes with the objectives of the treaty of Asunción.

⁷⁵⁸ Council on Foreign Relations, 'Mercosur: South America's fractious trade bloc' (2021) <https://www.cfr.org/backgrounder/mercosur-south-americas-fractious-trade-bloc#:~:text=Mercosur%20was%20created%20in%201991,common%20external%20tariff%20of%2035>, accessed on 24 June 2022.

⁷⁵⁹ A Vervaele John, D Hanf & R Muñoz 'Economic Integration and Judicial and Police Cooperation in Mercosur' (2007) *dspace.library.uu.nl*, 307-326.

⁷⁶⁰ Ibid at 314.

⁷⁶¹ Ibid at 313.

⁷⁶² Council on Foreign Relations 2021 op cit note 758 at 16.

⁷⁶³ The Editors of Encyclopaedia Britannica, 'Mercosur: South American economic organization' (2019) Encyclopaedia Britannica, <https://www.britannica.com/topic/Mercosur>, accessed 24 June 2022.

⁷⁶⁴ AU 2014 note 702 at 16.

⁷⁶⁵ Ibid at 17.

Despite the above challenges, trade statistics illustrate that Mercosur intra-regional trade has increased tenfold. There is free movement without NTBs. Citizens of the community can work and live anywhere within Mercosur. This thesis opines that political commitment and adherence to regional regulations must have assisted in achieving this goal. This is something which African RECs are yet to achieve. The need for legal harmonisation is to achieve some of these benefits.

4.6.4 Latin American Integration Association (LAIA)

The Montevideo treaty establishing LAIA was signed on 12 August 1980 by eleven Latin American countries.⁷⁶⁶ Presently, it consists of thirteen Member States, with Cuba joining in 1999 and Panama in 2012. LAIA came to replace the Latin American Free Trade Association (LAFTA), which was established in 1960 to become a common market for its members.⁷⁶⁷ This was to be effected through the gradual reduction of tariffs and total abolition of the same by 1973, but this timeline was stretched to 1980 and later replaced by LAIA. The main aim of LAIA is to pursue the integration agenda to promote the harmonious and balanced socio-economic development of the region; the ultimate long-term goal of such process shall be the gradual and progressive establishment of a Latin American common market.⁷⁶⁸ However, this treaty did not institute a timeline for the realisation of the common market and had limited responsibilities of encouraging free trade with greater flexibility between contracting parties. It should be noted that all the Member States of Mercosur belong to LAIA, and Mexico belong to both NAFTA, now USMCA and LAIA, creating a significant overlap. It has also been observed that all the regional trade arrangements analysed above are intergovernmental entities, some with community objectives without a supranational body, making harmonisation of laws difficult. However, African regional integration arrangements can draw significant lessons from their integration attempts.

It is worth noting that setting targets on macroeconomic policies synchronisation is important, however, these targets may not be achieved where monetary, and exchange policies are divergent and there are no strong institutions to ensure Member States' compliance with regional policies. To achieve a customs union or common market, there is a need for a monitoring and evaluation mechanism with robust and viable leadership.

⁷⁶⁶ They are: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.

⁷⁶⁷ R Caichiolo 'Mercosur: Limits of Regional Integration' (2019) 12(3) *Erasmus Law Review* 246-268.

⁷⁶⁸ The Montevideo Treaty 1980, article 1.

These results provide confirmatory evidence that once an agreement for intra-regional trade has been concluded, intra-regional trade within the said region increases more than trade with the rest of the world (see AFTA, NAFTA, Mercosur above). Although African countries have signed one or more regional trade agreement with their neighbours, the volume of trade within the region remains low as African markets are dislocated with little intra-regional trade.⁷⁶⁹ In 2014, trade within African RECs was at eighteen per cent of the continent's total exports, while trade within North America was 50 per cent, Asia 52 per cent and Europe more than 70 per cent.⁷⁷⁰ This is because AFTA, NAFTA, and Mercosur, have successfully implemented the free movement of persons, goods, services and factors of production and investments within their blocs.

Member states should take their regional and continental agreements seriously. Once an agreement has been reached, provisions should be made for each member state to honour their commitments. This has been achieved in AFTA, and there is a timeline for ratification of regional instruments with robust mechanisms and institutions to hold Member States accountable. In addition, integrating national policies with regional economic policies will enhance regional integration in Africa.

4.7 Implications of external trade on the AfCFTA

This section demonstrates that without legal harmonisation, Africa cannot negotiate external trade agreements with one voice. The establishment of the AfCFTA has been an applauded initiative in Africa and beyond, owing to the benefits that follow FTAs and what Africa will benefit as a continent. However, its interaction and peaceful coexistence with external trade arrangements of African countries and RECs are debatable, especially with the absence of legal harmonisation. It is also doubtful if the AfCFTA can represent African countries in external FTA negotiations. The different stages of trade liberalisation that African countries find themselves in, even within RECs, will only complicate issues since they do not have a common trade policy. Negotiating trade arrangements with an external bloc for states with a common policy under a custom union is standard practice, however, the RECs are yet to attain this level of synchronisation as illustrated below.

⁷⁶⁹ D Cissé 'Regional trade integration in Asia and Africa: what lessons can be learned' (2014)1 *The Emerging Powers Policy Brief* 1-5.

⁷⁷⁰ WTO, 'International trade statistics' (2015) at 27.

The most favoured nation's (MFN) principle under article 1 of the General Agreement on Tariffs and Trade (GATT) 1994 requires a WTO country to grant the same advantage or privilege accorded to one member to all other contracting members. In the same light, Article XXIV allows RTAs trading in goods to treat all other members equally, and tariff barriers with non-members must not be higher or more restrictive than before the establishment of the FTA or customs union.⁷⁷¹ Therefore, it is understandable if states that have formed a customs union negotiate other trade arrangements as a bloc, thereby preserving the CET. However, if one party decides to liberalise tariffs with a non-member and the others are not a party to the arrangement, there will be inconsistencies in the CET. This may explain why some customs unions of RECs in Africa have not been operational (COMESA), and some have not been established (SADC). Even the EAC, which has a CET, negotiating external Trade Agreements as a bloc has proven difficult. The EAC customs union is functioning with profuse challenges. Political pressures among its members have affected trade leading to border closures and refusal of access to airspace by commercial flights from Member States, numerous NTBs have been introduced to protect home industries, and Member States are increasingly implementing conflicting tariffs from the EAC CET.⁷⁷² It is observed that the EAC CET is losing its place, and there is a risk of the EAC returning to an FTA.⁷⁷³

The Economic Partnership Agreements (EPAs) with the EU is one of the external FTAs negotiated with African RECs. Under EAC, the EPA was concluded on 16 October 2014, while Kenya and Rwanda signed the agreement on 1 September 2016.⁷⁷⁴ All EU members have also signed the agreement. Meanwhile, most EAC Member States have not signed and

⁷⁷¹ Article XXIV of GATT 1994.

⁷⁷² W Sean 'What does the AfCFTA mean for an EU-Africa trade agreement?' (2021) ECDPM Briefing note 140 at 2. See also D Himbara, 'East African Community integration: One step forward, two steps back' (2020) *the Africa report*, <https://www.theafricareport.com/39264/east-african-community-integration-one-step-forward-two-steps-back/>, accessed on 2 July 2022. On 28 February 2019, Rwanda shut down its borders with Uganda and Burundi. This group of EAC states accuse each other of sponsoring political movements seeking regime change. As a result, Uganda's and Burundi's trade with Rwanda is down to a trickle due to political hostilities between the three EAC states. Tanzania locked out Ugandan timber, sugar and maize. Meanwhile, Kenya is reluctant to open its market to manufactured products from Uganda and more recently, milk. The Tanzanian government equally barred Kenya's national airline, Kenya Airways, from flying to Tanzania. This was in retaliation to Kenya's blockage of Tanzanian truck drivers from entering Kenya's territory, as a result of COVID-19. All manner of NTBs has rendered the EAC intra-regional trade a difficult. The stringent nature with which the EAC handled the coronavirus crisis has been regarded as an indication of the dysfunctional integration process in the region.

⁷⁷³ Ibid.

⁷⁷⁴ EU Commission 'Overview of Economic partnership Agreements' (2022) https://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf, accessed on 2 July 2022.

seem unprepared to do so.⁷⁷⁵ Given this, on 28 February 2021, the EAC Summit resolved that since some members are not ready to sign and ratify the EPA, those who are ready should do so under the principle of variable geometry.⁷⁷⁶ On 17 February 2022, EU and Kenya launched negotiations on an interim EPA with sustainability provisions. They discussed binding provisions on trade and sustainable development following the interim EPA, which will be bound by a dispute settlement mechanism.⁷⁷⁷ Although the EAC Summit approved the implementation of the EAC EPA by some Member States like Kenya, its execution of the agreement will undermine the EAC CET. Kenya has equally established an EPA with the United Kingdom and launched negotiations with the USA.⁷⁷⁸ This further thwarts and prejudices the EAC CET. In my view, legal harmonisation will assist in resolving these differences within the RECs.

Under COMESA, Mauritius, Madagascar, Seychelles, and Zimbabwe signed the interim EPA in 2009, and the EU parliament approved it on 17 January 2013, although the agreement has been tentatively functional for the Member States that assented to it since 2012.⁷⁷⁹ Comoros began applying this agreement on 7 February 2019. Discussions to broaden the agreement were formally launched in Mauritius in October 2019 and have since continued covering customary trade-related fields.⁷⁸⁰ The fact that COMESA contemplates a customs union poses the same challenges mentioned above as some of its members belong to external trade arrangements and others do not. This may indicate why negotiations on COMESA's customs union are hindered. This is the same trend with all other RECs in Africa,⁷⁸¹ indicating a lack of political will to implement a harmonised trade policy system. As long as

⁷⁷⁵ Sean 2021 op cit note 772 at 3.

⁷⁷⁶ Ibid. see also the EU Commission 2022 op cit note 774.

⁷⁷⁷ EU Commission 2022 op cit note 774.

⁷⁷⁸ See Sean 2021 op cit note 772 at 3.

⁷⁷⁹ EU Commission 2022 op cit note 774.

⁷⁸⁰ These are: rules of origin (ROO), trade barriers to trade (TBT), customs and trade facilitation (C&TF), sanitary and phytosanitary standards (SPS), agriculture, trade and sustainable development (TSD), trade in services, investment liberalisation and digital trade (TiS, IL&DT), intellectual property rights (IPR), public procurement (PP) and means of implementation ("MoI", ex-"economic and development cooperation").

⁷⁸¹ In SADC, the EPA negotiations were finalised in South Africa on 15 July 2014. The agreement was signed by the EU and the SADC EPA group on 10 June 2016 and the EU Parliament approved it on 14 September 2016. Pending ratification by all EU member states, the agreement came provisionally into force as of 10 October 2016. The provisional application for Mozambique started on 4 February 2018. In ECOWAS, Nigeria refuses to sign the West African EPA, preventing its ratification. Fearing loss of access to the EU market, Côte d'Ivoire and Ghana are now applying 'stepping stone' EPAs with the EU. As a result, different ECOWAS member states offer the EU different access to their markets, undermining the 'common' element of the ECOWAS CET (see also Sean 2021 op cit note 772 at 3). Cameroon is the only country in Central Africa that has signed the EPA.

individual state interests and state protectionist inclinations continue to have the edge over regional interests, instituting a harmonised trade policy in Africa will remain a dream.

More so, most African countries are reluctant to conclude EPAs with the EU since some already have trade relations with EU members under colonial ties and also have access to the EU market under the EU policy of Everything But Arms (EBA) preferential trade arrangement accorded to the less developed nations. Countries like Kenya and Ghana will be interested in consenting to the EPAs as they fall under middle-income countries and cannot benefit under the EBA arrangement. On the other hand, Northern African nations like Morocco and Egypt already have bilateral trade agreements with the EU. They will not be interested in further external trade arrangements under RECs or AfCFTA. Although during the signing of the AfCFTA in 2018, African countries consented to the decision to communicate collaboratively while engaging external partners in trade, a number of them continue to engage in individual trade arrangements. Mauritius, for example signed an FTA with China, Kenya engaged with the USA and others with the UK after its exit from the EU.⁷⁸² On these grounds, it will be difficult for African states to allow the AU to negotiate continental trade deals on their behalf. It is envisaged that in the future, the effective implementation of the AfCFTA will significantly impact the external trade arrangements of Member States.

When considering US-Africa trade relations, on 18 May 2000, the US congress signed the African Growth and Opportunity Act (AGOA) into law. A US unilateral and non-reciprocal preferential trade program that allows eligible Sub-Saharan African (SSA) countries to export duty-free and quota-free to the US market.⁷⁸³ It was initially for a period of fifteen years but later extended for another ten years on 25 June 2015 by the US under President Obama's administration. The program will lapse by 30 September 2025 following the amended legislation. SSA countries must meet US-imposed conditionalities (eligibility requirements) before a country qualifies to assent to AGOA membership.⁷⁸⁴ Even when

⁷⁸² Sean 2021 op cit note 772 at 4.

⁷⁸³ B Olufemi & S Wright 'Africa and the United States: Assessing AGOA' (2017)64(2) *Africa Today* 23—47. See also Williams Brock R, 'African Growth and Opportunity Act (Agoa): Background and Reauthorization' (2017) 10(3) *Current Politics and Economics of Africa* 229-259.

⁷⁸⁴ To take part in AGOA, the 49 countries that make up sub-Saharan Africa must be preselected by the US president as an eligible less developed country and must comply with stipulated preconditions of the trade legislation. These conditionalities are that the selected country must: be a market-based economy, remove barriers to trade and investment with the US, protect intellectual property rights, respect the rule of law, embrace political pluralism, implement anticorruption policies, respect and protect fundamental human rights, respect internationally recognised workers' rights and labour standards (including child labour), implement policies for

admitted into AGOA, the US can suspend or terminate a SSA country membership for failure to maintain membership criteria or continually make progress.⁷⁸⁵ For instance, in 2014, President Obama terminated Swaziland's (Eswatini) eligibility for reasons related to workers' rights issues. However, Swaziland had been the fifth largest top exporter to the US under AGOA in 2014.⁷⁸⁶ This termination was due to take effect on 1 January 2015.⁷⁸⁷ The eligibility of South Sudan and Gambia were also terminated with human rights concerns, while Madagascar and Guinea-Bissau benefits, previously suspended, were restored.⁷⁸⁸ Since the inception of AGOA, the US has unauthorised or reinstated about fourteen SSA states.⁷⁸⁹ So far, forty SSA countries have participated in AGOA.⁷⁹⁰

AGOA, has been criticised for the unpredictability of its membership since it is under US discretion to revoke members' eligibility. This deters investments because of the volatile nature of the business environment and weakens regional integration. Eligible SSA producers face strong NTBs gaining access to the US market, although this access is granted in theory.⁷⁹¹ AGOA is not geared towards promoting regional integration in Africa because it is structured on bilateral relations between the US and the individual SSA states. There is no indication that AGOA will be transformed to that effect instead, it will end in 2025.⁷⁹² Some RECs like the EAC and COMESA have made significant progress toward economic integration, which is the major goal of the AU, and AGOA sometimes discourages the creation of regional supply chains since a member can be summarily dismissed from the preferential trade program.

reducing and eradicating poverty, eliminate support for all acts of terrorism, and eschew all activities that undermine the national interests of the US. See also AGOA legal text 2000, section 104(a). In a nutshell, the selected country must continually observe the above conditions by implementing policies and economic reforms that will enhance its business environment to be in conformity with the US foreign and national interests.

⁷⁸⁵ Section 104(b) of the PUBLIC LAW 106-200 — AGOA legal text 2000.

⁷⁸⁶ R Williams Brock 'African Growth and Opportunity Act (Agoa): Background and Reauthorization' (2017) 10(3) *Current Politics and Economics of Africa* 229-259.

⁷⁸⁷ Ibid at 236.

⁷⁸⁸ Ibid.

⁷⁸⁹ Central African Republic and Eritrea were suspended on 1 January 2004, Cote D'Ivoire on 1 January 2005, Madagascar, Guinea and Niger on 23 December 2009, DR Congo on 1 January 2011, Mali and Guinea Bissau on 20 December 2012, South Sudan, the Gambia and Swaziland on 1 January 2015, Ethiopia suspended on 1 January 2022. Guinea and Niger were reinstated in 2011, Madagascar and Mali in 2014. Mali and Guinea were re-suspended again on 1 January 2022. Mauritania is the only SSA state that has been suspended on two occasions (2006 & 2009) and reinstated twice (28 June 2007 and 23 December 2009); Seychelles, however, is the only country that the US government has graduated from AGOA, effective 1 January 2017. See also Olufemi & Wright 2017 op cit note 783 at 24-28.

⁷⁹⁰ Olufemi & Wright 2017 op cit note 783 at 28.

⁷⁹¹ Ibid at 41.

⁷⁹² Ibid at 42.

BRICS (Brazil, Russia, India, China and South Africa) is another trade cooperation forum formed in 2008 by emerging economies leading world trade. It was originally called BRIC (Brazil, Russia, India and China) until South Africa joined in 2010. However, South Africa is the only African State that is a member of BRICS. How its trade relations with BRICS will impact AfCFTA is yet to be determined. Based on this, South Africa is in an exclusive position to use its foreign policy and economic discretion as a BRICS member to advance Africa's movement towards its continental agenda in 2063.⁷⁹³ As a result of South Africa's commitment to the Constitutive Act of the AU, African unity and integration, it is committed to Africa's progress. It will use its BRICS membership to boost cooperation among the emerging south economies and Africa's agenda.⁷⁹⁴ A bilateral arrangement that started with South Africa led to the signing of a preferential trade agreement between Southern African customs union (SACU) and Mercosur in 2008.⁷⁹⁵ Efforts have been made to harmonise the preferential trade arrangements with SACU, Mercosur, and the Latin American Trade bloc to form an India-Mercosur and SACU Trilateral trade arrangement following the long-standing India, Brazil and South Africa (IBSA) cooperation. However, following WTO rules as discussed above, belonging to multiple RTAs without a common trade policy, makes trading challenging and mars the overall objective of trade facilitation and liberalisation within the regions.

4.8 Is legal harmonisation of NTBs of RECs possible?

The attempt made by TFTA gives hope that with some more effort and political will from the member states, legal harmonisation of NTBs could be achieved. The examples of COMESA, SADC and EAC are worth emulating by other RECs in Africa. The instruments of legal harmonisation of NTBs adopted by the TFTA have been replicated under the AfCFTA rules. The AfCFTA has been considered the way out of the low intracontinental trade, but the benefits of a free market will not be achieved if the profuse NTBs in Africa are not eliminated through guided rules and procedures. The AU has adopted the AfCFTA Annex on NTBs,⁷⁹⁶ which established the AfCFTA NTB Coordination Unit to coordinate the removal

⁷⁹³ F A Kornegay Jr & N Sanusha 'BRICS in the Post-Liberal World Order: A New Agenda for Cooperation? Perspectives from South Africa' (2019) 43(6) *Strategic Analysis* 632-644.

⁷⁹⁴ South African Government, 'BRICS (Brazil, Russia, India, China, South Africa) <https://www.gov.za/about-government/brics-brazil-russia-india-china-south-africa-1>, accessed on 05 July 2022.

⁷⁹⁵ M Nkomo and B Olmos, 'The MERCOSUR-SACU Preferential Trade Agreement: a step forward in South-South relations?' (2013) *Monitoring Regional Integration in Southern Africa Yearbook 2012*, 194-210.

⁷⁹⁶ See Compiled Annexes to the AfCFTA Agreement, Annex 5.

of NTBs working with National Monitoring Committees and the National Focal Points established in State Parties.⁷⁹⁷ The development of operational guidelines and the implementation of these provisions are enhanced by the Sub-Committee on NTBs⁷⁹⁸ established by the Committee on Trade in Goods.⁷⁹⁹ While there is hope for improved results, a better model of legal harmonisation of these rules has to be considered.

4.9 Conclusion

Generally, it has been observed that African RECs are lagging behind legal harmonisation in their integration process. From the analysis of the harmonisation milestones set in the Abuja Treaty and those of RECs, it was observed that the timelines had not been honoured, and this phenomenon appears to run through RECs instruments of regional economic integration. Therefore, there seems to be no compelling reason to argue that there has been legal harmonisation of NTBs to achieve AfCFTA. The data gathered in the thesis suggests that even with attempts to harmonise national legislation, like in the EAC, the methods used (formulation of model laws and approximation approaches) have not yielded significant results. This has sometimes failed due to the lack of monitoring and enforcement of compliance mechanisms, weak or ineffective institutions and the absence of commitment to regional objectives by Member States. The multiple overlaps of membership and non-alignment with community priorities, non-implementation of community regulations, and non-release of some degree of state sovereignty have all been identified as impediments to legal harmonisation of NTBs, subsequently hindering effective regional integration. Although much has to be done to achieve legal harmonisation in the AU, the policies instituted by the three selected RECs (COMESA, SADC and EAC) and their launching of the TFTA give cautious optimism that the policy of legal harmonisation of NTBs is possible within the AU.

Lessons learned from external RTAs suggest that robust institutions and compliance mechanisms, and commitment to agreed policies are relevant for the success of any economic integration agenda. Even where external RTAs have not effectively harmonised the national legislations, at least the objective of increasing intra-regional trade flow has been achieved. This is the case with Mercosur, AFTA and NAFTA. It should be noted that negotiating external RTAs as individual states when there are regional obligations to pursue thwart the

⁷⁹⁷ Article 6 of Annex 5 on NTBs.

⁷⁹⁸ Ibid article 4 and 5.

⁷⁹⁹ This is done following article 31 of the Protocol on Trade in Goods.

entire process of the intra-regional quest for meaningful integration. RECs in Africa need to negotiate as a bloc with their external counterparts, which is the essence of harmonisation.

Based on the various issues discussed in this chapter, the next chapter will advance a legal harmonisation model of NTBs and assess the feasibility of implementing the model within the AfCFTA.

5. CHAPTER FIVE: PROPOSED MODEL OF LEGAL HARMONISATION

5.1 Introduction

In the preceding chapter, the thesis examined the existing gaps of legal harmonisation and challenges impeding legal harmonisation. It was contended that for effective operationalisation of the AfCFTA, these have to be addressed because even if all tariff barriers to trade are eliminated, NTBs will continue to impede the achievement of AU's integration objectives. Earlier, in chapter two, the thesis presented the different approaches to legal harmonisation, most of which have been effective in other regional integration agendas like the EU. However, the approaches to economic integration used by the AU raise vital issues like the absence of a protocol to address the issues of conflicting legal systems, synchronisation and harmonisation of the laws of Member States, and the effect of community laws on African citizenry.

It is the opinion of the author that Africa's economic integration process has not considered the relevance of legal harmonisation in an environment with complex legal systems. It proposes an adapted model of legal harmonisation which has not been used in the integration initiatives of the AU and RECs. However, it has been utilised by OHADA to advance a conducive business environment within francophone African countries. It is, therefore, essential to investigate the possibility of the application of this model by the Member States of RECs. It poses two pertinent questions: can the current status of the AU and RECs accommodate this model, and can the AfCFTA be achieved without legal harmonisation. This chapter aims to identify, analyse and suggest a legal harmonisation model that can promote and enhance a continental integration agenda considering the historical, political, economic and legal realities of African states. The overall goal of the AU is to attain a 'United Africa' (federal or confederal), and that of some of the RECs, like the EAC, is a political federation, while COMESA aims for an economic union. A robust legal harmonisation model is vital to sustain these regional and sub-regional objectives, especially the achievement of the AfCFTA.

This chapter suggests the enactment of secondary legal instruments to ensure the principle or doctrine of direct applicability and the direct effect of regional laws to bridge the gaps identified in the preceding chapter. Primary legislation comprises the founding treaties, while secondary legislations comprises subsequent instruments such as protocols, regulations, directives, decisions, guidelines, recommendations and opinions. The enactment of laws that are directly applicable and have a direct effect will ensure the supremacy of AU and REC

laws over national laws. The concept of supremacy of regional law will be emphasised, and the current stage of the implementation of the AfCFTA will be examined in line with the direct applicability and direct effect of trade facilitation and liberalisation policies. The EU example offers a guideline. This model has successfully been implemented by OHADA, and the author therefore suggests its use in this context. The proposed model will address the challenges of the lack of political will of Member States to recognise community laws and the national implementation of regional law procedures, overlapping memberships, non-alignment with community priorities and the unwillingness to relinquish any part of state sovereignty. It will also solve the problem of a lack of compliance mechanisms to enforce legal harmonisation, as identified in chapter four.

5.2 Direct applicability of community/regional law

Implementing community/regional law or international law at the domestic level is a complex task, especially in states with a dualist philosophy (as opposed to monist states).⁸⁰⁰ This is because of the procedural nature of legal transposition. However, in Africa, the situation is further compounded by the lack of political will of Member States to recognise community rules. Therefore, the author suggests considering the principle of direct applicability of community laws as an appropriate model of legal harmonisation. This principle has been applied in other regional communities and organisations to solve the challenges of national application procedures.⁸⁰¹ It fosters integration by allowing community regulations to be implemented directly in the Member States irrespective of domestic legal procedures for receiving a foreign rule.⁸⁰²

Based on the European Court of Justice (ECJ), direct applicability means that community laws are implemented in the Member States without observing national implementation measures or application procedures.⁸⁰³ This means that the principle deals with how regional law is received in the national legal system of a Member State. Nevertheless, it is silent on

⁸⁰⁰ R F Oppong *Relational issues of law and economic integration in Africa: Perspectives from Constitutional, Public and Private International Law* (PhD thesis, University of British Columbia, 2009) 43.

⁸⁰¹ For example: in the EU see art 249 of the consolidated version of the treaty establishing the European Community (EC) 1957, art 7(a) of the agreement on the European Economic Area (EEA) 1993, art 10 of OHADA treaty 1993.

⁸⁰² Oppong 2009 op cit note 800 at 44.

⁸⁰³ *Amsterdam Bulb v Produktschap voor Siergewassen*, 1976 Case 50/76 (ECR) 137 at 146. See also Oppong 2009 at 44.

the impact or influence of the regional law once it is received.⁸⁰⁴ For OHADA, the principle of direct applicability and the direct effect of Uniform Acts (UA) are inscribed in article 10 of the treaty.⁸⁰⁵ The meaning and interpretation of this principle was provided by the Common Court of Justice and Arbitration (CCJA) in its advisory opinion of 30 April 2001.⁸⁰⁶ Concerning the advisory opinion, article 10 implies the abrogation and prohibition of future national legislative or regulatory provisions of Member States conflicting with the provisions of the UA.⁸⁰⁷ The decisions of the CCJA are final, *res judicata* and directly enforceable.⁸⁰⁸

Given the centrality of this issue, it has been observed that the success of OHADA has resulted from the strong political will of Member States to create an appropriate, comprehensive and consistent African legal system for a reliable business environment and improved justice system in Africa.⁸⁰⁹ The supremacy of these UA over previous and subsequent national laws of Member States and its direct applicability principle provides OHADA with the status of a pacesetter organisation in legal harmonisation and unification in Africa.⁸¹⁰ The success of OHADA indicates that the Member States have willingly surrendered some part of their sovereignty in the business field to promote economic development. Since this principle is operational in Africa, it is a leading example for AU and RECs. RECs must adopt this model since most, if not all, are composed of Member States with different legal traditions, thus necessitating implantation of the principles of direct applicability and direct effect of community laws.

Direct applicability ensures that RECs with both dualist and monist Member States have a uniform platform for the reception of regional law.⁸¹¹ All parties will receive the law at once without restrictions imposed by domestic legislation. This model of legal harmonisation solves the problems of non-implementation, delay or limited application of regional laws.⁸¹² Direct applicability also assists in preserving regional law. Usually, dualist states receive

⁸⁰⁴ Ibid. see also J Tillotson & Nigel G Foster *Text Cases and Materials on European Union Law* 4 ed (2003) 81.

⁸⁰⁵ Art 10 of OHADA treaty 1993 as amended in 2008 states: 'Uniform Acts shall be directly applicable to and binding on the States Parties notwithstanding any previous or subsequent conflicting provisions of the national law.'

⁸⁰⁶ Advisory Opinion no. 001/2001/EP.

⁸⁰⁷ B Martor et al *Business law in Africa: OHADA and the harmonization process* (2002) Kogan Page Publishers at 21. See also C Buba 'The Effectiveness of the Harmonization Tool Adopted Under the Ohada Regime' (2020). Available at SSRN 3588342, 1-11.

⁸⁰⁸ Article 20 of OHADA treaty.

⁸⁰⁹ Ibid at 2.

⁸¹⁰ Ibid at 6. See also S Domoraud-Operi et al 'Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity' (2014) *EMPEA Legal & Regulatory Bulletin* 1.

⁸¹¹ Oppong 2009 op cit note 800 at 44.

⁸¹² Ibid.

regional law by transforming it into domestic law through an Act of parliament, decree of application, or legislative or executive provisions.⁸¹³ A parliamentary provision applying regional law is domestic law, except it is unambiguously indicated that the provision does not have any priority status in domestic law.⁸¹⁴ Consequently, the provision is subject to domestic law following a hierarchy of norms. The *lex posterior derogat priori*, which is an internal conflict of laws resolution rule, may be used to resolve conflicts from the provision and any other domestic regulation.⁸¹⁵ In monist states where international or regional law directly becomes domestic law, this problem is evaded since regional law is superior to domestic law. On this note, the principle of direct applicability ensures that conflicts between regional and domestic laws do not arise. This is especially with legislation that is not consistent with the constitutions of Member States.⁸¹⁶ Direct applicability maintains a distinct character of regional law and improves regional visibility in the Member States.

In the EU, the ECJ developed the principle of direct effect to complement direct applicability which was provided for in the EC treaty. On the other hand, the CCJA merely interpreted the principle of direct applicability and direct effect jointly, as these provisions were already included in the OHADA treaty to avoid the challenges of individuals not being able to rely on a received international rule.

5.3 Direct effect of regional law

The direct effect doctrine permits individuals to rely on regional law before national courts.⁸¹⁷ It enables the the general public to enjoy individual rights created in the regional space devoid of different national preconditions imposed by Member States before such rights can be enforced. National courts are free to use regional law directly and independently as a basis for their decision when a regional regulation has a direct effect.⁸¹⁸ Individuals and domestic courts become prime enforcers of regional law concerning the principle of direct effect. In summary, direct applicability implies the procedures or techniques used to implement

⁸¹³ See section 231 of the 1996 constitution of the Republic of South Africa.

⁸¹⁴ Oppong 2009 op cit note 800 at 44.

⁸¹⁵ Ibid.

⁸¹⁶ Even where regional law conflicts with a national law, since each is of a different category or each is subject to a different rule of recognition, it will be inappropriate to resolve the conflict using the *lex posterior derogat priori* rule. See generally S L Paulson 'On the Status of the Lex Posterior Derogating Rule' (1983) 5 *Liverpool L. Rev.* 45.

⁸¹⁷ P P Craig 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12 *Ox. J. L. Stud.* 453; Alan Dashwood 'The Principle of Direct Effect in European Community Law' (1977) 16 *Journal of Common Market Studies* 229.

⁸¹⁸ See Oppong 2009 op cit note 800 at 46.

regional law nationally, while direct effect implies the binding nature of the legal rights created at the regional level, which are enforceable at the national level. This distinguishes the principle of direct applicability from direct effect. When a regional or community law is directly applicable, it is not automatic that it will be directly effective except as otherwise stated.

However, it is irrelevant for a community rule to be directly applicable in a Member State, but reliance on it by the masses is not guaranteed or is dependent on some national preconditions. For instance, the treaty of NAFTA forbids state parties to allow individual right of action under the treaty in domestic courts.⁸¹⁹ Further, in transposing WTO rules in Canada, the Act implementing the WTO Agreement specified that individuals are not permitted to bring any action under the Act without the consent of the Canadian Attorney General.⁸²⁰ This implies that reliance on this international law is dependent on national preconditions which render claims to individual rights illusory, although section 8 of the Act gives the WTO Agreement the force of law in Canada. The principle of direct effect in the EU has overcome this perspective. Moreover, although the community laws of RECs are not directly applicable, this thesis supposes that the EAC and COMESA through their respective community courts are making significant efforts towards the principle of direct effect. These efforts through decided cases will be examined below.

Direct effect gives the regional rule the force of law. The ECJ developed the principle of direct effect to maintain an efficient implementation of the European Community (EC) rules.⁸²¹ Where an EC legal provision is directly effective, individual rights are conferred on

⁸¹⁹ NAFTA treaty 1992, Article 2021 provides that; ‘no Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement’.

⁸²⁰ World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47. See *Pfizer Inc. v. Canada* (T.D.) [1999] 4 F.C. 441, (1999), 2 C.P.R. (4th) 298. The court held that the provisions of section 3 (the purpose of the Act is to implement the Agreement) and section 8 (the Agreement is hereby approved) of the Act were not sufficient to establish that the WTO Agreement and the TRIPS Agreement had been legislated into federal law. Also, the plaintiffs were barred from commencing the present action by sections 5 and 6 of the Act which require the consent of the Attorney General. sections 5 states that: ‘No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right of obligation that is claimed or arises solely under or by virtue of Part I or any order made under Part I’. while section 6 states that: No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement’ See also US-Section 301-310 of the Trade Act of 1974, at para. 7.72. It was held that ‘neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect’.

⁸²¹ M Brid ‘Direct Effect, Indirect Effect and State Liability: An Overview’ (2007) 14 *Irish Journal of European Law* 97—160.

the citizens who can lay claims based on these rights before domestic courts.⁸²² This principle was later articulated by the ECJ in the case of *Van Gend en Loos v Nederlandse Administratie der Belastingen*, and it was held that treaty provisions have the capacity of direct effect in the Member States.⁸²³ The contentious issue was that the reclassification of a chemical product called urea-formaldehyde under Dutch law raised the right to be paid for the product.⁸²⁴ The matter was referred to the ECJ by the Dutch court. The question was to determine whether article 12 of the European Economic Community (EEC) Treaty had a direct effect within a Member State and also if the common people could lay claim to individual rights that the courts must protect concerning the article. The ECJ provided an interpretation of the article based on the EEC treaty objective, the task of the ECJ and the general scheme of the treaty, and set forth the foundation of the principle of direct effect in treaty terms:

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty, which refers not only to governments but to peoples. It is also confirmed more specifically by the institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition to the task assigned to the Court of Justice under Article 177 [now 234 EC], the object of which is to secure the uniform interpretation of the Treaty by national courts and tribunals confirms that the states which have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independent of the legislation of Member States, Community law, therefore not only imposes obligations on individuals but is also intended to confer upon them rights

⁸²² Ibid at 97.

⁸²³ *Van Gend en Loos v Nederlandse Administratie der Belastingen* 1963 Case 26/62 (ECR) I-1.

⁸²⁴ Article 25 EC (Ex Article 12 EEC) prohibit increases in customs duties. It states: 'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature'. EC treaty 2006 available at; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2006:321E:FULL&from=EN> , accessed on 30 July 2022.

which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasised that Article 8, which bases the Community on a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the ‘‘Foundations of the Community’’. It is applied and explained by Article 12.⁸²⁵

The ECJ indicated that directives, regulations and decisions of the EC have direct binding effects.⁸²⁶ Regulations and decisions are directly applicable by nature and, therefore should have direct effect.⁸²⁷ Article 249 of the EC treaty provides that a directive;

‘shall be binding as to the result to be achieved on each Member State to which it is addressed but shall leave to the national authorities the choice of form and methods.’

This implies that national implementation measures are required for directives.⁸²⁸ According to the ECJ, directives have a direct effect because of the estoppel principle, where a Member State is prohibited from depending on its failure to transpose community law (directive) to ensure its binding effect when one lays claim to it against the said Member State.⁸²⁹ Under the EC and as opined by the ECJ, Member States must adopt implementing measures necessary for a directive to be enforceable following a prescribed timeline set in the directive. In the event of a failure to respect this timeline, the directive becomes automatically

⁸²⁵ Van Genden Loos *supra* note 823.

⁸²⁶ Article 249 EC (ex Article 189 of EEC) provides for three types of binding EC legislations which are Regulations, Directives and Decisions. In the case of *Leonesio v Ministero dell'Agricoltura delle Foreste*,^o the ECJ held that Regulations were capable of direct effect while in the case of *Franz Grad v Finanzamt Traunstein* the ECJ held that Decisions were capable of direct effect. (See *Leonesio v Ministero dell'Agricoltura delle Foreste* 1972 Case 93/71 (ECR) I-287 and *Franz Grad v Finanzamt Traunstein* 1970 Case 9/70 (ECR) I-825). See also Brid 2007 note 821.

⁸²⁷ *Ibid.*

⁸²⁸ Generally, in the EU, directives are required to be transposed into national law before they become effective but if a Member State fails to transpose a directive within the required time limit or do not transpose at all, the directive will have direct effect. This means that individuals are capable of enforcing rights from the directive directly irrespective of it not being transposed into domestic law. The Directives are flexible to the extent that the national authorities of the Member States have the choice of the form and method of the implementation of the Directive. This takes into account the fact that Member States have differing legal systems. Hence this allows the establishment of a harmonised framework of laws whilst preserving the established national laws of each member. This is a vital benefit of harmonisation.

⁸²⁹ Brid 2007 *op cit* note 821 at 97.

enforceable, and individuals may rely on it against the state or contrary to national rule.⁸³⁰ However, as construed by the ECJ, for any community provision to be directly effective, it must be clear, free from ambiguity, and unconditional, and a Member State must impose no further action for its operationalisation.⁸³¹

There are two ways in which direct effect can occur; vertical and horizontal.⁸³² In line with the estoppel principle, vertical direct effect is when an individual can rely on a community legal provision against a Member State, while horizontal direct effect is when an individual can rely on the provision against another individual. However, a Member State that has failed to perform the requirement imposed on it by a directive cannot rely on the directive against an individual. Therefore, directives are not capable of horizontal direct effect.⁸³³ Individuals as well may not rely on directives against other individuals.⁸³⁴

The EAC Court of Justice (EACJ) in 2019 decided its first case since its inception in 2001 on international trade and EAC regional economic integration.⁸³⁵ This inaugural case (*British American Tobacco (U) Ltd v Attorney General of Uganda*) on EAC trade integration could be interpreted to mean promoting the principle of direct effect and to maintain a uniform implementation of the EAC treaty, Custom Union and Common Market Protocols.⁸³⁶ The EACJ held that the implementation of the provisions of section 2 (a) and (b) of the

⁸³⁰ Ibid at 103

⁸³¹ Ibid at 101.

⁸³² Ibid.

⁸³³ In *Marshall v. Southampton and South-West Hampshire Area Health Authority*, the ECJ decided against horizontal direct effect of directives. The plaintiff was employed as a dietician with the Southampton Health Authority. She claimed that her terms of employment, which allowed for the termination of her employment five years before her male counterparts, were in breach of the Equal Treatment Directive 76/207. Such discrimination was permissible under the UK Sex Discrimination Act 1975. The Court of Appeal referred the matter to the ECJ. The ECJ held that it was not possible for an individual to rely on a directive against another individual. The view that directives do not give rise to horizontal direct effect was confirmed in; *inter alia*, C-192/94 *El Corte Ingles SA v. Blacquez Rivero* 2 4 and again in C-80/06 *Carp Snc di L. Moleri e v Corsi v. Ecorad Srl*. See the above cases (*Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) (No.)*) 1986 Case 152/84 (ECR) 1-723. *El Corte Ingles SA v Blacquez Rivero* 1996 Case C-192/94 (ECR) 1-1281. *Carp Snc di L. Moleri e v Corsi v Ecorad Srl*. 2007 C-80/06 (ECR) 00000 n.y.r, para.20. See Brid 2007 op cit note 821 at 97,103 and 105.

⁸³⁴ See article 189 of the EEC treaty. Accordingly, the binding nature of a Directive, which constitutes the basis for the possibility of relying on the Directive before a national court, exists only in 'relation to each Member State to which it is addressed.' It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.

⁸³⁵ H O Mbori, 'Case Commentary on the British American Tobacco v Attorney General of Uganda (EACJ) and GETMA International v The Republic of Guinea (OHADA CCJA)' (2020) 1 *African Journal of International Economic Law* 339-403.

⁸³⁶ The British American Tobacco (U) LTD v The Attorney General of Uganda, Ref. No. 7 of 2017 (EACJ) (Mar 26, 2019). The applicant (the British American Tobacco Uganda Limited) challenged the legality of section 2 (a) and (b) of the Republic of Uganda's Excise Duty (Amendment) Act No 11 of 2017 for contravening various provisions of the EAC treaty, the EAC Customs Union and Common Market Protocols.

Excise duty (Amendment) Act No 11 of 2017 of Uganda on cigarettes produced in Kenya constituted misconstruction, misapplication and wrongful re-classification of the cigarettes as ‘imported goods.’⁸³⁷ This act infringed on articles 1 and 75(6) of the EAC treaty⁸³⁸ and articles 1(1) and 15 (1) (a) and (2) of the EAC Customs Union Protocol⁸³⁹ and article 6 (1) of the EAC Common Market protocol.⁸⁴⁰ The contentious issue was that the reclassification of cigarettes produced in Kenya by British American Tobacco Ltd under Ugandan law as ‘imported goods’ attracted a higher excise duty than that applicable to locally manufactured goods in Uganda. This, contrary to the provisions of EAC community law that goods produced in Member States should have a uniform tax rates within the sub-region was interpreted as constituting a breach of EAC community rules.

Similarly, the COMESA Court of Justice (CCJ) for the first time entertained an individual right of action to enforce an international agreement and to protect the trade related rights of the individual against a Member State. This is the goal of the principle of direct effect. In the case of *Polytol Paints & Adhesives Manufacturers Co. Ltd v the Republic of Mauritius*,⁸⁴¹ the CCJ held that imposing customs duties after the expiry of the time limit prescribed by the COMESA treaty constituted a breach of Article 46 of COMESA treaty.

⁸³⁷ 2. Amendment of the Excise Duty Act, 2014, Act 11 of 2014. The Excise Duty Act, 2014, is amended in Part I of Schedule 2— (a) by substituting for item 1(a) the following — “(a) Soft cup (i) locally manufactured Shs. 55,000 per 1000 sticks (ii) imported Shs. 75,000 per 1000 sticks.” (b) by substituting for item 1(b) the following— “(a) Hinge lid (i) locally manufactured Shs. 80,000 per 1000 sticks (ii) imported Shs. 100,000 per 1000 sticks.” (b) by substituting for item 1(b) the following— “(a) Hinge lid (i) locally manufactured Shs. 80,000 per 1000 sticks (ii) imported Shs. 100,000 per 1000 sticks.”

⁸³⁸ EAC treaty, art 1: "import" with its grammatical variations and cognate expressions means to bring or cause to be brought into the territories of the Partner States from a foreign country;.....

Art 75(6) provides: The Partner States shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Partner States.

⁸³⁹ The EAC Customs Union Protocol art 1(1) "import" with its grammatical variations and cognate expressions means to bring or cause goods to be brought into the customs territory; "imported goods" means goods other than Community goods;.....

Art 15(1) 1. The Partner States shall not: (a) enact legislation or apply administrative measures which directly or indirectly discriminate against the same or like products of other Partner States; 2. No Partner State shall impose, directly or indirectly, on the products of other Partner States any internal taxation of any kind in excess of that imposed, directly or indirectly, on similar domestic products.

⁸⁴⁰ The EAC Common Market Protocol art 6(1): The free movement of goods between the Partner States shall be governed by the Customs Law of the Community as specified in Article 39 of the Protocol on the Establishment of the East African Community Customs Union.

⁸⁴¹ *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius* (2013) Ref. No. 1 of 2012. The main arguments by Polytol Paints were that under Article 46 of the COMESA Treaty, Member States were required, by the year 2000, to eliminate customs duties and other charges of equivalent effect imposed on goods eligible for Common Market treatment. Mauritius initially complied with this obligation but in 2001 re-introduced a 40% customs duty on specific products imported from a Member State (Egypt) which included the products imported by the Applicant. Only Egyptian products were targeted. The Government of Mauritius lodged an appeal to the Appellate Division of this Court, which was later withdrawn. On 6 February 2015 the Court issued a final order that the matter has been settled between the parties; after having received a letter to

From the above examples, this thesis recommends that RECs adopt the principle of direct applicability and direct effect of regional laws. Regional legislation may not always have a direct effect as witnessed in the EU example. The AU and RECs could consider this approach because it is more flexible even when compared to the approach used by OHADA. The AU and the RECs could use directives to enact more flexible policies and regulations for stringent ones. The fact that OHADA Uniform Acts have the effect of direct applicability and enforceability provides the organisation with a supranational status. Supranationalism is inferred in AU by its goal of forming a political federation, as in some RECs. Articles 10 and 13 of the Abuja Treaty (AEC Treaty) provide for direct applicability and automatic enforceability of decisions of the Assembly and regulations of the Council, respectively.⁸⁴² It is commendable that the EAC has the goal of the supremacy of community rules as seen in its implementation of uniform trade laws. However, it is suggested that using community Acts with direct applicability and enforceability will advance the community objective. The COMESA Treaty in article 10 could be compared to article 249 of the EC treaty as it distinguishes between regulations, directives, decisions, recommendations and opinions.⁸⁴³ However, these legislations are not directly applicable in COMESA, as provided in article 2.⁸⁴⁴ The time limit criterion for the direct effect of directives is an effort worth emulating. If

that effect. See E Gerhard 'The Polytol judgment of the COMESA Court of Justice: Implications for rules-based regional integration' (2015) Tralac trade briefs available at: <https://www.tralac.org/publications/article/7604-the-polytol-judgment-of-the-comesa-court-of-justice-implications-for-rules-based-regional-integration.html>, accessed on 20 June 2023.

⁸⁴² Abuja Treaty 1991, art 10 states that: 1. The Assembly shall act by decisions. 2. Without prejudice to the provisions of paragraph (5) Article 18, decisions shall be binding on Member States and organs of the Community, as well as regional economic communities. 3. Decisions shall be automatically enforceable thirty (30) days after the date of the signature by the chairman of the Assembly, and shall be published in the official journal of the community. 4. Unless otherwise provided in this Treaty, decisions of the Assembly shall be adopted by consensus, failing that, by a two-thirds majority of Member States. Article 13 states that; The Council shall act by regulations. 2. Without prejudice to the provisions of paragraph (5) Article 18, of this Treaty, such regulations shall be binding on Member States, subordinate organs of the Community and regional economic communities after their approval by the Assembly. Notwithstanding the foregoing provisions, regulations adopted as aforesaid shall forthwith have a binding effect in the case of delegation of powers by the Assembly pursuant to paragraph 3(j) of Article 8 hereof. 3. Regulations shall be enforceable automatically thirty (30) days after the date of their signature by the chairman of the Council and shall be published in the official journal of the community. 4. Unless otherwise provided in this Treaty, regulations shall be adopted by consensus or, failing that, by two-thirds majority of Member States.

⁸⁴³ COMESA treaty in article 10(1)-(5) provides: 'The Council may, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions. A regulation shall be binding on all the Member States in its entirety. A directive shall be binding upon each Member State to which it is addressed as to the result to be achieved but not as to the means of achieving it. A decision shall be binding upon those to whom it is addressed. A recommendation and an opinion shall have no binding force.'

⁸⁴⁴ Article 2 states that 'Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular . . . to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.'

RECs could institute a time limit for Member States to transpose community rules into national law and these rules could have a direct effect if there is a failure or delay in doing so, would enhance the quick ratification and implementation of regional legislation. The proposed model has been summarised in figure 5.1 below. This figure has been conceptualised based on the challenges identified.

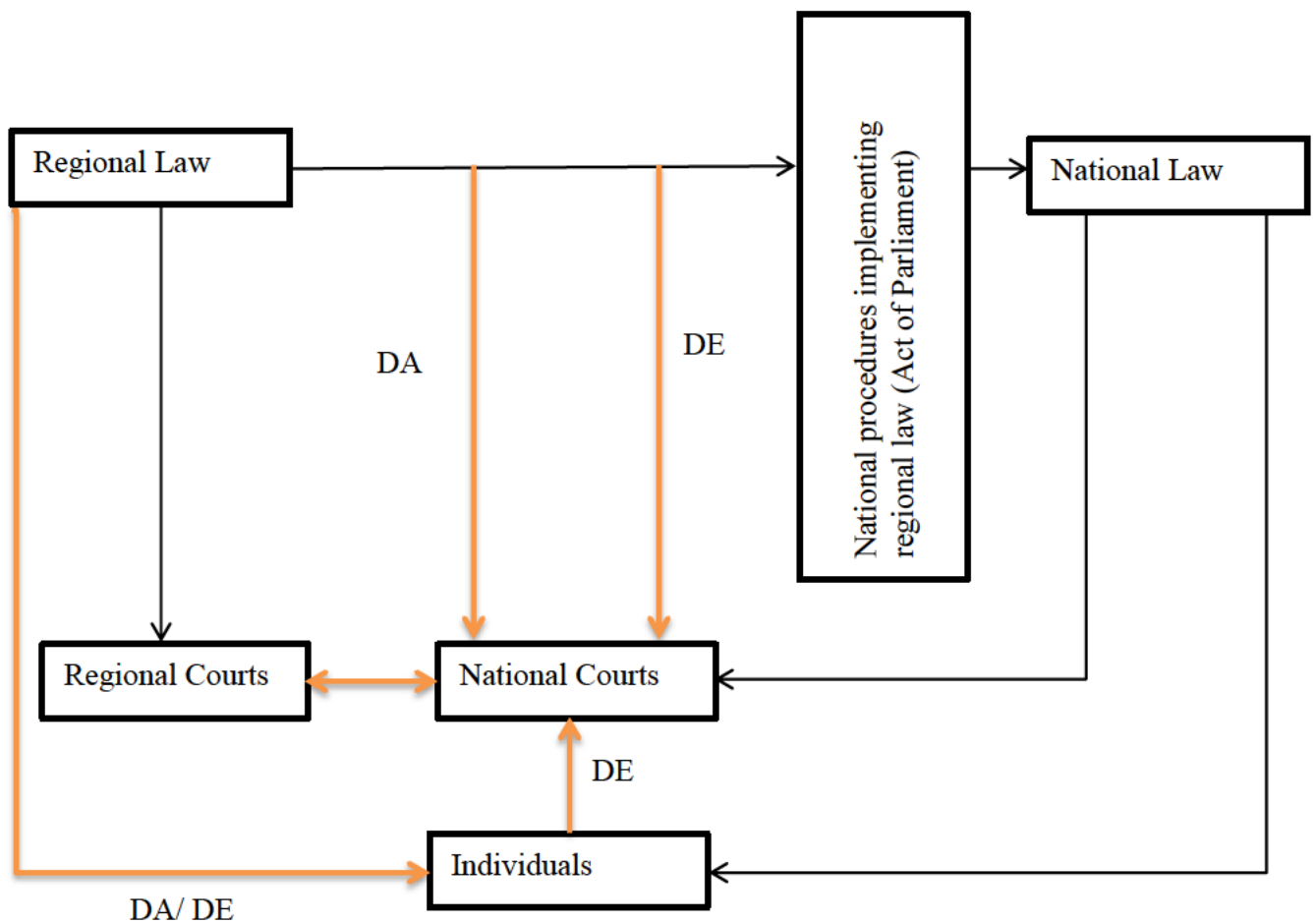


Figure 5.1: Summary of the proposed model of legal harmonisation

Key: Black arrows: current model; Red arrows: proposed model;

DA: Direct Applicability; DE: Direct Effect

5.4 AU/ RECs and the supremacy of regional law

The achievement of the overall objective of the AU and RECs will also depend on its ability to ensure that national courts give regional law precedence over national law. This requires the enhancement of the autonomy of regional institutions to make regional law supreme.

Supremacy of regional law minimises conflicts between community legislation and domestic regulations by affirming the independence of the regional legal system.⁸⁴⁵ In this way, the national legal system will not take precedence over the regional one, enhancing the regional legal system as individuals can rely on it. Compared with Private International Law (PIL), the doctrine of supremacy of regional law works like the choice of law rules in PIL. Where there is a conflict, it superimposes a choice of regional law as the applicable law. Nevertheless, it differs from PIL in that it permits no compromise, exclusions or exemptions. A domestic court cannot refute the application of regional law because it infringes upon the public policy of the region or that it is punitive. This distinguishes the doctrine of supremacy from PIL because supremacy goes beyond customary PIL doctrine on the relations between the *lex fori* and *lex causae* thus enhancing regional law. Supremacy of regional law should not be confused with provisions that oblige the Member States to make sure that their laws conform with regional norms as stipulated in the founding regional treaty.⁸⁴⁶ Principally, such provisos could be seen as law-implementation stipulations and not a conflict of law resolution specifications.⁸⁴⁷ The violation of such provisions could be viewed as a breach of international obligation rather than a national obligation, as it depends on the legislature and executive for action rather than the judiciary.⁸⁴⁸ In summary, the doctrine of supremacy denotes that domestic courts should prioritise and apply regional law where disagreement exists between domestic and regional rules.

The principle of supremacy of regional law could be provided for in the community treaty, such as that of the EAC⁸⁴⁹ or through a judicial interpretation of the treaty decreed by

⁸⁴⁵ Oppong 2009 op cit note 800 at 47.

⁸⁴⁶ WTO Agreement art. XVI: 4 provides that; 'each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.

⁸⁴⁷ Oppong 2009 op cit note 800 at 48.

⁸⁴⁸ Ibid.

⁸⁴⁹ See art 8(4) of the EAC treaty. See also NAFTA art 103(2). It provides that; 'in the event of any inconsistency between this Agreement and such other agreements [including the *General Agreement on Tariffs and Trade*], this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement'. The principle of supremacy of law has also been used in international organisations that are not typical economic integration organisations for example, see the case of OHADA art. 10; *Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI, art. 103.

the court, in the case of the EU by the ECJ.⁸⁵⁰ Usually, the legal supremacy of a community is inferred from its legal status, law-making authority, how its laws are applied and the nature of its dispute settlement mechanisms.⁸⁵¹ The supremacy of community law is not usually provided for in the founding treaty;⁸⁵² more often than not, the status of its institutions and the key functions of its personnel earn the community this autonomy. The supremacy of EU legal instruments was not stated in the EU treaty or any provision until the proposed EU Constitution of 2004, which was signed but not ratified.⁸⁵³ The notion of supremacy of community law was developed by the ECJ.⁸⁵⁴ As articulated above, article 249 of the EC treaty stipulates that the community shall legislate through regulations, directives, decisions, recommendations and opinions.⁸⁵⁵ Regulations of general application have direct effect and applicability and are entirely binding.⁸⁵⁶ Decisions are directly effective and binding on those to whom they are addressed, and directives depend on state actions before being enforceable.⁸⁵⁷ Recommendations and opinions are not directly enforceable.⁸⁵⁸ The proposed EU constitution, which was not ratified, provided for the supremacy of union law over the laws of Member States.⁸⁵⁹

⁸⁵⁰ See *Flaminio Costa v. ENEL*, 1964 Case 6/64 (ECR) 585 in which the European Court of Justice declared the supremacy of EC law.

⁸⁵¹ Oppong 2009 op cit note 800 at 41.

⁸⁵² For instance, the supremacy of the EC was the creation of the ECJ. Primarily, the court proclaimed that the Community constitutes 'a new legal order of international law'. *Van Gend en Loos v Nederlandse Administratie der Belastingen*, supra note 18. Secondly, that the 'EEC Treaty has created its own legal system'. *Flaminio Costa v. ENEL*, Case 6/64 [1964] E.C.R. 585. See Rene Barents, *The Autonomy of Community Law* 2003 The Hague: Kluwer Law International. Furthermore, the MERCOSUR Tribunal has also affirmed the autonomy of MECOSUR integration law. The case is discussed in: D P Piscitello & J P Schmidt, —In the Footsteps of the ECJ: First Decision of the Permanent MERCOSUR-Tribunall (2007) 34 *Legal Issue of Economic Integration* 283. See also Gabriel Albarrancin, Laura Aguzin & Selva Degiorgio 'The Relationship between the Laws Derived from the Organs of MERCOSUR and the Legal Systems of the Countries that Comprise MERCOSUR' (1998) 4(3) *ILSA J. Int'l & Comp. L.* 897.

⁸⁵³ I Salami 'Legal Considerations for Revising a Governance Structure for the African Union' (2008) 16(2) *African Journal of International and Comparative Law*, 262—273. See also the propose EU constitution, art 1-6.

⁸⁵⁴ Ibid at 265.

⁸⁵⁵ EC treaty article 249 states: In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.

⁸⁵⁶ EC treaty art 249 para 2.

⁸⁵⁷ Ibid para 3 and 4.

⁸⁵⁸ Ibid para 5.

⁸⁵⁹ The proposed EU Constitution art 1-6 (on Union law), states that 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'.

This implies that although the AU and some RECs have not explicitly made provisions for the supremacy of regional law in Member States, it could still be effective through robust institutions. The PAP and the African Court of Justice could be empowered to play this role. The ECJ, for example, was capable of developing the principle of direct effect because it was empowered to do so by the EU. Article 220 of the EC makes the ECJ responsible for interpreting and implementing the treaty, among others.⁸⁶⁰ National courts can refer matters to the ECJ, such as landmark cases⁸⁶¹ and their subsequent enforceability upholds the supremacy of the EU law.⁸⁶² The supremacy of EU law was interrogated in the first case, but the ECJ upheld that ‘the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields.’⁸⁶³ This indicates that the court was instrumental in corroborating the principle of supremacy of the EU law, and its jurisprudence contributes to the general body of EU law.⁸⁶⁴ In summary, the ECJ used this prerogative to advance the development of the European common market and the overall integration process. The AU and RECs need to revisit the status of regional institutions and provide them with the power and autonomy needed to move the African integration agenda forward.

5.5 The AfCFTA and direct applicability and effect of trade policies

The AfCFTA is operational, and its Secretariat is creating awareness among the African citizenry. Presently, 44 countries out of 54 signatories have ratified the continental free trade agreement.⁸⁶⁵ Trading under the AfCFTA regime, initially scheduled to begin on 1 July 2020,

⁸⁶⁰ The ECJ performs three main functions. First, it hears actions against community institutions (Arts 230–233 EC Treaty). Second, it hears actions against Member States (Arts 226–228, EC Treaty), and third, it provides preliminary rulings on the interpretations and validity of community at the request of Member State courts (Art 234, EC Treaty).

⁸⁶¹ Case 26/62, *Van Gend en Loos* 1963 (ECR) 1 and Case 6/64, *Costa v ENEL* 1964 (ECR) 585.

⁸⁶² I Salami ‘Legal and Institutional Challenges of Economic Integration in Africa’ (2011)17(5) *European Law Journal*, 667–682.

⁸⁶³ See *Van Gend en Loos* supra note 823.

⁸⁶⁴ Salami 2011 op cit note 862.

⁸⁶⁵ In order of date of ratification, they are: Ghana (2018), Kenya (2018), Rwanda (2018), Niger (2018), Chad (2018), Eswatini (2018), Guinea (2018), Côte d’Ivoire (2018), Mali (2019), Namibia (2019), South Africa (2019), Congo, Rep. (2019), Djibouti (2019), Mauritania (2019), Uganda (2019), Senegal (2019), Togo (2019), Egypt (2019), Ethiopia (2019), Gambia (2019), Sahrawi Arab Democratic Rep. (2019), Sierra Leone (2019), Zimbabwe (2019), Burkina Faso (2019), São Tomé & Príncipe (2019), Equatorial Guinea (2019), Gabon (2019), Mauritius (2019), Somalia (confirmation for ratification pending (2020)) Central African Rep. (2020), Angola (2020), Lesotho (2020), Tunisia (2020), Cameroon (2020), Nigeria (2020), Malawi (2021), Zambia (2021), Algeria (2021), Burundi (2021), Seychelles (2021), Tanzania (2022), Cape Verde (2022), Morocco (2022) and Democratic Republic of the Congo (2022).

only started on 1 January 2021 due to the COVID-19 delay.⁸⁶⁶ Although trading began on 1 January 2021, no trade has occurred under the AfCFTA system.⁸⁶⁷ Negotiations on rules of origin and tariff schedules are still slow to materialise. Rules of origin on automobiles, sugar, textiles and clothing are outstanding. A decision on the 90 per cent tariff lines has not been reached and hence, Member States were hesitant to make tariff offers when rules of origin have not been agreed upon.⁸⁶⁸ Tariff offers were submitted by 29 Member States with 87 per cent tariff lines, but these tariff offers were not even in the same tariff lines.⁸⁶⁹ The AU Assembly Summit of 5-6 February 2022 was expected to launch ‘commercially meaningful trade’ among the 29 countries that had submitted modality compliance tariff offers. The aim was to launch trade for those tariff lines that have agreed rules of origin. However, about 13 per cent of rules of origin were still to be agreed upon, and not all offers of tariff concessions had been presented.⁸⁷⁰

To show that the AU is committed to the realisation of the AfCFTA, a Council of Ministers meeting was held on 25-26 July 2022 to fast-track the AfCFTA. On 27 July 2022, the meeting launched the AfCFTA Facilitated and Guided Trade Initiative (AFGTI) for a selective number of Member States that have submitted schedules of tariff concessions following the agreed modalities.⁸⁷¹ As a result, these countries can start trading without being subject to tariff barriers. In addition, useful tools and supportive initiatives to enhance preferential trade under the AfCFTA regime, such as the AfCFTA website, rules of origin manual, and eTariff book, were launched during the meeting.⁸⁷² The AFGTI is to let commercially meaningful trading take place under the AfCFTA and to experiment with the operational, institutional, legal and trade policy environment.⁸⁷³ However, this ‘meaningful

⁸⁶⁶ Tralac ‘Status of AfCFTA ratification’ [https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html#:~:text=The%20operational%20phase%20of%20the,place%20under%20the%20AfCFTA%20regime](https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html#:~:text=The%20operational%20phase%20of%20the,place%20under%20the%20AfCFTA%20regime,accessed on 24 July 2022.), accessed on 24 July 2022.

⁸⁶⁷ Ibid.

⁸⁶⁸ Creamer media’s engineering news ‘Preparations under way for AfCFTA’s long implementation voyage’ https://www.engineeringnews.co.za/article/preparations-under-way-for-afcftas-long-implementation-voyage-2022-03-04-1/rep_id:4136, accessed on 27 July 2022.

⁸⁶⁹ H Trudi in a tralac AfCFTA Stakeholder Webinar titled ‘Trade under the AfCFTA – in sight? 29 July 2022. This webinar was co-hosted by Prof Gerhard Erasmus and I was in attendance.

⁸⁷⁰ Ibid.

⁸⁷¹ These countries are: Cameroon, Egypt, Ghana, Kenya, Mauritius, Rwanda, Tanzania and Tunisia. The AfCFTA Council of Ministers indicated that the AFGTI intends to demonstrate the AfCFTA is functional and to equally send a political message to states that have not submitted their provisional schedules of tariff concessions in accordance with agreed modalities to do so. An important message is also sent to economic operators that real trade opportunities have been created.

⁸⁷² Ibid.

⁸⁷³ Trudi 2022 note 869.

trading’ by the pilot group of countries is expected to commence by 26 September 2022.⁸⁷⁴ This ‘meaningful trading’ was later launched on 7 October 2022 by the AfCFTA Secretariat in Accra, Ghana, with the first shipment of Kenyan tea to Ghana.⁸⁷⁵ It is important to indicate that the incremental improvement and facilitation of this bold ‘meaningful trading’ step will be addressed by legal harmonisation of NTBs.

The percentage of intra-African trade currently still stands at between 15 to 18 per cent.⁸⁷⁶ NTBs, such as the behaviour of customs administrators and poor infrastructure, continue to hinder intra-African trade.⁸⁷⁷ It will be difficult for free trade to occur as long as goods continue to be delayed at border posts with the presence of embargoes, levies or quotas. It is understood that progress on implementing customs and border management annexes and removing NTBs will be a lengthy process since it requires national governance enhancement.⁸⁷⁸ Some commentators like Shafrir, Hartzenberg, Dingley and Subban believe that concrete benefits from the free trade area can only be noticeable from 2030.⁸⁷⁹ There is a need to reconcile conflicts from overlapping FTA agreements from individual states and RECs. For instance, conflicts from individual state FTA agreements such as that of Kenya and the US or UK and RECs such as EU and SADC.⁸⁸⁰ These agreements cover similar aspects of trade with the AfCFTA and wide-ranging liberalisation programmes that have to be decisively considered if the AfCFTA has to be attained.

The author contends that the effective implementation of the AfCFTA depends on trade policy options with direct applicability and direct effect. Although the benefit of AfCFTA will accrue from tariff reduction, much of the immediate and long-term benefits will come from eliminating NTBs through the harmonisation of trade policy frameworks. Based on the World Bank report 2020,⁸⁸¹ to successfully eliminate NTBs and technical trade barriers, and achieve trade facilitation with border management measures, among others, there should be

⁸⁷⁴ Ibid. the pilot stage means that Kenya or Tunisia can now have access to West and central African markets because of trading with Cameroon and Ghana without belonging to the various economic blocs and vice versa.

⁸⁷⁵ P Rao ‘AfCFTA’s Guided Trade Initiative takes off, set to ease and boost intra-African trade’ 2022 <https://www.un.org/africarenewal/magazine/october-2022/afcfta-s-guided-trade-initiative-takes-set-ease-and-boost-intra-african-trade>, accessed on 11 November 2022.

⁸⁷⁶ AU ‘Operational Phase of the African Continental Free Trade Area Launched’ <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched>, accessed on 26 July 2022.

⁸⁷⁷ Ibid.

⁸⁷⁸ See creamer media 2022 note 868.

⁸⁷⁹ Ibid.

⁸⁸⁰ Ibid. See also chapter four of this thesis at 169.

⁸⁸¹ World Bank ‘The African Continental Free Trade Area: Economic and Distributional Effects’ (2020) Washington DC: World Bank doi:10.1596/978-1-4648-1559-1. License: Creative Commons Attribution CC BY 3.0 IGO at 124.

definite policy and regulatory reforms to enhance the AfCFTA implementation. In assessing the unresolved strategic challenges of the AfCFTA, Albert argued that the unharmonised standards of trade of African countries and regions remain a significant barrier to continental trade.⁸⁸²

The implementation of harmonised standards and trade facilitation policies should be a priority to improve cross-border trade. To emphasise this point, reducing tariffs must be accompanied by trade facilitation policies, harmonisation of NTBs and a rise in infrastructural investment.⁸⁸³ Some trade facilitation policies have already been launched, such as the online reporting and monitoring mechanism to eliminate NTBs.⁸⁸⁴ There is also the Pan-African Payment and Settlement System (PAPSS), intended to facilitate clearing, settlement and payments through borders.⁸⁸⁵ This harmonised system will eliminate financial borders and synchronise payment systems in Africa. These are, however, not premised on solid legal harmonisation models that will ensure direct enforceability.

Enacting harmonised trade policies with direct applicability and direct effect should be a priority for the AfCFTA. Based on the AfCFTA agreement, the continental FTA is driven by Member States of the AU and RECs FTAs are its building blocks.⁸⁸⁶ Being the only members of the AfCFTA, State Parties have enforceable rights and responsibilities as they retain trade-related policy space. Firms, commercial companies and economic operators who are the actual traders are not members of the AfCFTA. Direct applicability and direct effect of the AfCFTA laws permit firms, commercial companies, individual traders, and businesspersons to rely on its regulations in national courts. On the part of the RECs being pillars of the AfCFTA, Only four of the eight recognised RECs have FTAs.⁸⁸⁷ It is doubtful how these RECs will advance the course of the AfCFTA, especially as they are not a party to the agreement. There are no obligations for RECs to form FTAs and even the existing ones are not without flaws.

This thesis recommends regional enactments on legal harmonisation of NTBs to ensure direct applicability and direct effect of regional regulations. The Abuja (AEC) treaty already provided for direct applicability and enforceability of community decisions and regulations.

⁸⁸² A Theophile 'The African Continental Free Trade Agreement: Opportunities and Challenges' (2019) Geneva: *CUTS International Geneva* 1-31.

⁸⁸³ Ibid at 22.

⁸⁸⁴ See the online reporting and monitoring mechanism to eliminate NTBs at <https://tradebarriers.africa>.

⁸⁸⁵ See the Pan-African Payment and Settlement System at <https://papss.com/>.

⁸⁸⁶ See art 5(a) and (b) of the AfCFTA Agreement 2018.

⁸⁸⁷ They are: ECOWAS, EAC, COMESA and SADC.

The AU can make use of this provision. The AfCFTA agreement in article 11(3) mandates the Council of Ministers to ensure effective implementation and enforcement of the agreement and provides for the use of regulations, directives, decisions and recommendations per the agreement's provisions. Nonetheless, whether these regulations and directives could be directly applicable, have direct effect, or even override national law is not stated. This, therefore, necessitates a protocol on direct applicability and enforceability of regional trade laws to provide economic operators and business persons the possibility to rely on regional instruments.

5.6 Conclusion

The principle of direct applicability and direct effect of regional law has been proposed as a suitable model to be adapted for harmonising NTBs to ensure the realisation of the AfCFTA. The doctrines of direct applicability and direct effect enhance regional institutions. Empowered institutions ensure the supremacy of regional law when national courts apply regional law. It is only when domestic courts give precedence of regional law over domestic law that supremacy of regional law occurs. Therefore, direct applicability and direct effect are a *sine qua non* for Africa's legal and economic integration. It should be noted that without enacting a protocol to implement the above-proposed model, the effective realisation of the AfCFTA will not occur even in 2030, as some commentators have predicted. The progress is slow, as exemplified by the movement from the operationalisation of the AfCFTA in January 2021 to the current struggle for the commencement of 'meaningful trading' in 2022.

The main focus of the next chapter will be on the conclusion and summary of the thesis and recommendations for further research.

6. CHAPTER SIX: CONCLUSION

6.1 Introduction

Africa seeks to assert itself on the world stage by playing a significant role in global trade, driving its development and inclusive and sustainable growth for a united and integrated continent. This is demonstrated by its efforts to promote continental integration through its call for unity in Agenda 2063, which commenced with the launching of the AfCFTA in 2018. The establishment of the AfCFTA indicates that Africa intends to address its economic, intra-regional trade and legal harmonisation challenges. In addition, the principle of direct applicability and direct effect has been recommended to address legal harmonisation difficulties, as revealed in the previous chapter. This will equally enhance the supremacy of regional laws and make the community and its institutions credible and autonomous.

This chapter commences with an introduction, addresses the conclusion and summary of each research objective of the study, and recommendations for further research and conclusion.

6.2 Conclusion and summary of the study

This thesis set out to examine the theoretical and conceptual underpinnings of regional integration and legal harmonisation and attempts to legal harmonisation of NTBs by AU and RECs to advance continental economic integration. This was based on research objective one, broken down into research questions one and two. In essence, it examined the theoretical and conceptual underpinnings of regional integration and legal harmonisation. The theory or hypothesis was that an effective legal harmonisation of NTBs practices in Africa significantly impacts achieving the AfCFTA. It is built on the premise that for the AfCFTA to be effectively implemented, the legal harmonisation of NTBs of RECs has to occur. After expounding this notion and interrogating the state of affairs of legal harmonisation in AU and RECs, the thesis concluded that the AU and the RECs have not vigorously considered the significance of legal harmonisation in their integration agendas.

The second research objective and research question three was to analyse the current political, economic, and legal reinforcements to regionalism in Africa and the practices needed to advance intra-regional trade within the framework of Agenda 2063. It was revealed that African politicians or heads of states and governments had not considered a robust

approach to regional economic integration, although such an approach was suggested by the founding fathers of Africa's regionalism.⁸⁸⁸ Again, Africa's integration organisations have not made unambiguous and concrete provisions for the legal harmonisation of NTBs in their guiding policies. Where some attempts are evident, such as in the EAC, they have been unsatisfactorily implemented, with a lack of monitoring, compliance or enforcement mechanisms. It has been contended that if legal barriers to free trade are not eliminated, even if all other barriers are removed, the effective realisation of the AfCFTA will be hindered.

The last research objective, which comprises research questions four and five, was to ascertain the abilities of three selected RECs (SADC, COMESA and EAC) to drive home the CFTA while advancing a model of legal harmonisation of NTBs. It was revealed that the lack of political will, multiple memberships to RECs, non-implementation of regional policies and the reluctance of states to release some degree of sovereignty were the major impediments to legal harmonisation.⁸⁸⁹ Therefore RECs in their current form cannot ensure the effective realisation of the AfCFTA. However, it is envisaged that this scenario can change because some of these countries have relinquished some degree of sovereignty and applied political will to harmonise business law in Africa under OHADA. The deepening of integration and legal harmonisation in EAC and the launching of the TFTA between the EAC-SADC-COMESA are evidence of progress for economic integration in Africa. However, with the advancement of economic integration, legal inadequacies will continually be exposed, and the necessity to address the same becomes paramount with communities longing to become effective in trade relations.

Regarding the design of the constitutive treaties, the AU and RECs have not made concrete provisions for legal harmonisation. The Constitutive Act⁸⁹⁰ and the Abuja Treaty indicate that they shall harmonise the policies of RECs and urges the Member States to promote cooperation through harmonisation without deliberate steps on how this should occur.⁸⁹¹ All RECs are aligned in this regard in drafting their founding treaties except for the EAC, which provided an institutional architecture for legal harmonisation. However, the

⁸⁸⁸ See chapter three.

⁸⁸⁹ See chapter four.

⁸⁹⁰ AU constitutive Act 2000 art 3(1) states that the objectives of the Union shall be to: 'coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union'.

⁸⁹¹ Abuja Treaty art 28(2) provides that: 'The Member States to take all steps required to foster closer cooperation between the communities, principally through coordination and harmonisation of their activities in all fields or sectors to ensure the realisation of the objectives of the community'.

results have not been satisfactory. The EAC has utilised some legal harmonisation models examined in chapter two. However, chapter three revealed that legal harmonisation could still occur if independent, empowered, and robust institutions for proper implementation, monitoring, and evaluation of harmonised trade policies are endorsed. The need for an institutional capacity for trade policies negotiations, harmonisation of NTBs and AfCFTA policy formulation cannot be overemphasised. This implies that the legal harmonisation of NTBs can assist in realising AU Agenda 2063 CFTA.

In addition, the provision of the supremacy of regional law has also been carefully disregarded by the AU and REC treaties, except for the EAC. The implementation of regional law shall be effected through domestic formulation as stipulated in the treaties.⁸⁹² Even though the treaties equally made provisions for different classifications of secondary regional legislations with divergent legal effects, these secondary classes of regional laws have been disregarded in formulating secondary regional laws.⁸⁹³ The AU has not used regulations or decisions as stipulated in the Abuja Treaty, even though they have the force of direct applicability and direct effect. The reasons why most Member States do not implement or partially implement community laws were examined in chapter four. Reliance on Member States' legal schemes for the implementation of regional law would be inadequate, illusory, catastrophic and illogical, as national legal institutions may not give preference to or prioritise regional law. In such circumstances, individuals will find it difficult to rely on regional law, rendering community law immaterial and impeding community progress. There is great expectation from the AU and RECs to harmonise trade facilitation and liberalisation policies to enhance the AfCFTA. Progress in Africa's economic integration has been slow. Realistic and meaningful advancement remains to be seen.

The AU must work collaboratively with the RECs to harmonise the numerous NTBs that cannot be eliminated. The AU and RECs do not necessarily have to reform their founding treaties to provide for the supremacy of regional law. As chapter five reveals, empowering regional institutions will be sufficient to transform intergovernmental organisations into supranational entities. This means Member States will have to relinquish some part of state sovereignty to that effect. No meaningful integration can occur without

⁸⁹² See for instance: Abuja Treaty, art. 5(2); SADC Treaty art. 6(5) and COMESA Treaty, art. 5(2); EAC Treaty, art. 8(2).

⁸⁹³ See COMESA treaty in art 10. It makes provision for regulations, directives, decisions, recommendations and opinions. The Abuja Treaty also makes provision of regulations and decisions but no allusion has been made to these secondary laws.

empowering regional institutions to decide on behalf of Member States in some fields of economic integration.

Although there has been a lot of progress in the implementation of the AfCFTA, the fact that trade has not yet begun is of great concern. Supplementary efforts still need to be added in trade policy harmonisation. Efforts to liberalise and facilitate continental trade under the AfCFTA are not progressing uniformly. Many countries are slow to comply with one policy requirement or the other even though they signed the trade agreement. For example, only 29 countries had submitted tariff offers, with different tariff lines making it difficult for the 90 per cent stipulated tariff lines to be reached for trade under the AfCFTA regime to commence. In addition, many states have not submitted their provisional schedules of tariff concessions following agreed modalities to enable the effective operationalisation of the AfCFTA. A protocol on legal harmonisation of NTBs measures using the proposed model is recommended as African countries consider their treaty engagements seriously. This is especially essential presently, as many regions of the world are collaborating and forming a resilient force in global trade. African countries should use this unique opportunity to operationalise the largest FTA in the world.

6.3 Recommendations for further research

This thesis focused on the ‘why’ and ‘how’ of legal harmonisation and the different approaches/methods/models of legal harmonisation. It is suggested that further studies could expand on the ‘what’ of legal harmonisation. Specifically, which aspects of trade policies should be harmonised. For instance, border management procedures, investment laws, banking and business transactions laws, and insurance and reinsurance policies. OHADA, for example, continues to identify areas of business law that require harmonisation and work in that regard. In addition, there is a need to identify commercial law areas under the AfCFTA to harmonise.

Another related area for further investigation is the accord and recognition of the supremacy of regional law by Member States of the AU and RECs. When domestic courts apply regional law, community policies will be supreme. This is the case with the EU, and African integration is modelled on the EU. All State Parties of the EU, irrespective of whether dualist or monist, recognise the supremacy of EU law and implement same.⁸⁹⁴ The

⁸⁹⁴ Salami 2011 op cit note 862.

willingness of states to respect their treaty engagement and defend the integration agenda will assist in fast-tracking African economic integration. It is essential to conduct an in-depth study of why African States do not accord the AU or RECs a supreme status in relevant domestic affairs. Conflict of community and national laws will be avoided if Member States' legislature and executives ensure that transposition processes are established and operational.⁸⁹⁵ Recognizing regional policies and their superior status at all levels of government in a Member State and by all states, whether unitary, federal or co-federal and their application in domestic courts will assist in avoiding the redundancy of regional courts. Most regional courts are not functional or semi-functional because of the absence of interaction between them and domestic courts. There is also a need to explore whether AU laws are superior to those of the RECs. What occurs in the case of a conflicting provision between the AEC and that of a REC?

Furthermore, this thesis has revealed various issues impeding legal harmonisation within the AU and RECs. Some of these are: the multiplicity of memberships in the RECs, slow ratification or non-implementation of regional legislation, alignment of the RECs' priorities with the AU and relinquishing some portion of states sovereignty. While the issues cannot be addressed simultaneously, it is essential to examine these challenges comprehensively. For example, with numerous rationalisation programmes implemented by the AU and the launching of the COMESA-SADC-EAC TFTA, what justifies the current joining of the EAC by the Democratic Republic of Congo, meaning that it now belongs to four RECs?

6.4 Conclusion

Legal harmonisation is integral to any successful economic integration project, as exemplified by the EU, OHADA and the EAC. The depth of legal harmonisation depends on the level of economic integration the Member States seek. African countries, in their treaties and other legal documents, have indicated that they wish to establish an economic union (COMESA) and a political federation (AU and EAC) which all require deeper levels of legal harmonisation. It is, therefore, imperative to implement a suitable model of legal harmonisation, with direct applicability and direct effect of regional economic laws. Regional organisations around the globe have recognised the challenges legal harmonisation poses to international or intra-regional commercial transactions. They have used different models of

⁸⁹⁵ Ibid at 681.

legal harmonisation mechanisms (approximation, formulation of model laws, standardisation, directives, regulations, conventions or treaties) to address these issues. Some African RECs have used some of these approaches but have been hesitant to apply others even when provisions were made in the treaties. As a result, the impact of legal harmonisation has not been felt in African regional integration. It remains to be seen whether the AU and the RECs will effectively use directives and regulations with binding effect. However, the activities of OHADA, EAC and the TFTA in the field of legal harmonisation leave the author cautiously optimistic, and their potential to advance economic integration has been evident.

To a greater extent, the future success of the AfCFTA, its customs union and the common market, and the overall AU objective of a 'united Africa' will depend on the model of legal harmonisation pursued to ensure the binding nature of community legislation.

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Mrs Elisabeth Achancho Etagha Epse Abia (219095913)
School Of Law
Howard College

Dear Mrs Elisabeth Achancho Etagha Epse Abia,

Original application number: 00015727

Project title: Legal harmonisation of non-tariff barriers of regional economic communities as a catalyst to the realisation of African Union agenda 2063 continental free trade area

Amended title: Legal harmonisation of non-tariff barriers of regional economic communities as a catalyst to the realisation of the African continental free trade area

Exemption from Ethics Review

In response to your **amendment** application received on 17 August 2023, your school has indicated that the amendment has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law

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