

OBSTACLES TO ECONOMIC INTEGRATION IN AFRICA

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FORWARD

The case for economic integration in Africa has been made for a long time now, before independence under colonial administrations and after by Africa's political leaders. Programmes for economic integration have included co-operation in major sectors such as agriculture, transport, energy, and education; and aimed for the establishment of free trade areas, customs unions, and economic unions, and in a few cases for political federations. It is generally felt that progress made on the programmes has invariably been disappointing. Targets have not always been met. Achievements made have in cases been reversed or lost.

Africa's Heads of State and Government have at the turn of the millennium again embarked upon economic integration with renewed vigour. Over a period of just under two years, they replaced the Organisation of African Unity, established in 1963 as the continental apex organisation for achieving the objectives of political and economic emancipation, with the African Union and adopted the New Partnership for Africa's Development as a core programme. The broad aims are, to achieve political union in terms of closer political co-operation, and to build the African Economic Community at an accelerated pace.

A key question is whether progress will be made and targets achieved. Without addressing the obstacles, it is likely that economic integration in Africa will not be as successful as desired. It is unlikely there will be an African Economic Community if the continental resources are not harnessed for this effort. It is unlikely that the Community will be built at all if groups of African countries continually enter regional and sub-regional economic communities in an uncoordinated manner that wastes resources and results in a complex web of overlapping communities; if it all becomes an institutional mess.

This paper addresses key obstacles to economic integration in Africa. It sets them out and proposes possible ways of dealing with them. It is a timely paper and can assist the process of economic integration in Africa.

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EXECUTIVE SUMMARY

A role for civil society

Poverty eradication is a core component of African economic integration. All the instruments, both at the continental and regional levels, contain provisions on co-operation in key sectors including food and agriculture, industry, science and technology, transport and communications, energy, education, money and finance, tourism, and natural resources and the environment. Further, there is clear realisation that equity in sharing the benefits of economic integration is necessary for the success of the process, and in this regard the instruments provide for assistance to depressed areas or disadvantaged areas. Poverty eradication programmes require resources and advocacy, and direct engagement with stakeholders including the poor themselves, among other things. In partnership with the public and private sectors, civil society organisations have a fundamental role to play building upon the existing institutional framework provided under the instruments and also charting out other appropriate ways to intervene.

The treaties establishing the African Union/ AEC, COMESA, ECOWAS and to some extent ECCAS, provide for the involvement of civil society in the activities of the technical committees. The committees initiate policy and make recommendations to the higher political organs. This provision for civil society involvement should be taken up and actively utilised. The specific activities of civil society could include representation in the meetings of the committees as observers, but perhaps more importantly the volunteering of papers and documentation that can inform the activities of the organs. The documents however would have to be well researched and balanced in order for them not to be taken lightly, bearing in mind that civil society advocacy is still looked at with some scepticism in certain governmental circles.

In their activities within Africa as a whole, civil society organisations should include African economic integration among their priorities particularly in the areas of poverty eradication, trade, peace and security, democracy and governance, environment, natural resources, infrastructure, and education. Development and empowerment will not be sustainable if restricted to isolated incidents; they are most likely only to be sustainable when Africa as a region provides the appropriate conditions. Regional development is sustainable because it is mutually reinforcing.

Obstacles to African economic integration

Solutions to obstacles concerning foreign markets, will depend on the extent to which the community framework achieves regional markets, and to which the private sector as well as community projects can begin to develop those regional markets. It is a gradual process, involves inculcation of commitment to the development of Africa, dissemination of awareness of opportunities in the regional markets, and availability of market leaders helps. The sector co-operation must create a framework to enhance the communications and transport, and the general physical and social infrastructure.

Courts of law, at national and regional levels, enjoying the usual independence, have to be disposed to evolving a jurisprudence that promotes harmony in the application and interpretation of the laws of the region, and that promotes economic integration as articulated in the relevant instruments but with a flexibility that responds to the times, so that development is not hampered by legal anachronisms. Steering clear of a political course will be tricky, but more activist attitudes can be kept within manageable limits by use of *amicus curiae* and experts so that informed decisions can be reached.

The success of economic integration in Africa will depend on the extent to which the question of equitable sharing of benefits is addressed. A good legal framework for ensuring an equitable sharing of benefits, provides a clear conceptual and interpretational basis for the case for equity, and has elaborate provisions spelling out appropriate measures, embodying the negotiated deal agreed by all the members. It spells out the criteria for qualifying for the preferential treatment, instead of deferring it to the time of action, for otherwise deserving cases may fail and candidates disagree with the criteria applied, leading to loss of confidence in the scheme. A good framework has an institutional structure to adopt and secure implementation of the measures, instead of relying on unlikely initiatives from dissatisfied members or areas. This structure, though, should contain an emphasis on initiatives by community institutions being co-opted by the dissatisfied members or depressed areas, through provision for joint action with designated national or local authorities, and for prior consultation with these latter authorities so the scheme remains relevant to efforts in those areas.

Some of these conditions feature in some RECs. For instance, the SADC Treaty carries the principle of equity and mutual benefit, but lacks concrete provisions applying that principle. The ECCAS Treaty contains undertakings and creates an organ, but does not indicate the

criteria for selecting the least developed areas, neither does the COMESA Treaty though the Council is appointed to designate underdeveloped and depressed areas. These shortcomings are likely to pose problems in administering the schemes. As equitable sharing of benefits is a cornerstone of success, it is proper that there be a concerted effort at the continental level to devise a comprehensive scheme properly thought through. The question of acceptable sources of funding for these schemes must be answered, and realistic objectives set in view of that answer, in order to avoid unfulfilled expectations. A thorough emphasis on, and co-ordinated, national regimes for promoting investment in depressed areas are appropriate.

As perhaps the only vital role for political leaders is conclusion of instruments given that technical organs are established to deal with the actual process of economic integration, and as the instruments concluded can set out in detail the process of the integration, making provision for the stages, and rules and policies that apply, the practical relevance of the organs of Heads of State and Government can be de-emphasized. The extent to which instruments set out in detail the rules and manner of the integration to follow, determines the degree to which political leaders will be required to conclude further instruments, especially where specific and general powers are granted to other organs, created for the purpose, to fill gaps left and those which arise. If the aim is to free the process of economic integration from political leaders, it will be necessary and important to make detailed provision for the manner of the integration, and appropriately empower technical organs to run the project.

By and large, economic integration is a technical matter, and can appropriately be implemented by technical organs. Political organs should participate at the level of ministerial meetings or committees, and not at that of Heads of State and Government, and further effective power should be shifted downwards from political to technical organs. The relation between the technical organs and the Ministerial Council is that recommendations of the former should normally be implemented. Technical organs and the secretariat can in fact be elevated to function as the policy making and policing organs respectively, once the treaties have been concluded by political authorities, provided there is provision for the member states to be appropriately represented on the organs, for instance through resident missions where the secretariat is located or officials from capitals. It is in this way those obstacles related to political factors like frequent and extra-legal changes in government and short-termism of political leaders, can begin to be addressed. The treaties for the RECs have stuck with the model giving undue prominence to the organ of Heads of State and Government, and in this manner not taken the crucial change to remove the integration process from the vagaries of Africa's political leaders.

However, excluding political leaders could run the risk of IFIs dealing directly with them to get governments to pursue policies without reference to the integration objectives. It seems necessary, then, for the treaties to provide that the community organs put in charge of harmonising, developing and implementing national programmes in specified sectors or areas, reserve the jurisdiction to deal with IFIs in matters of funding programmes or making recommendations for policies to be pursued in those sectors or areas, including the monetary and financial. The legal basis for such provisions could be that integration entails a surrender of a degree of sovereignty, and if indeed the governments create community organs empowered to carry on the development of certain domains of economic activity, it must be taken that sovereignty in those domains has been pooled into those community organs. Provisions such as those of the COMESA Treaty, that IFIs can come in for purposes pursuant to the treaty, and only those whose aims are compatible with the policies, programmes and activities of the common market¹; or those of ECOWAS requiring, for co-operation agreements, prior approval by the Council²; are appropriate, but could be more specific in regulating the dealings.

Elements of the way forward for a country – the case of Uganda

The Ministry of Foreign Affairs and the Ministry of Tourism Trade and Industry are the line ministries for economic integration in Africa. If one wanted to gauge how seriously Uganda takes economic integration, including regional trade and investment, a good indicator could be the priority accorded to these ministries especially in terms of resource allocations under the national budget. There is no doubt that allocations to these ministries must be increased.

Uganda needs to realise afresh that as a country it is far too small in the international arena, and should not pretend to punch above its weight. Solidarity with other African countries should be an important strategy in international relations including in forums such as the WTO, the Cotonou Arrangement, and AGOA. Also, the people of Uganda are in the end Africans, and will face the same fate that Africans face in humankind's long history.

The domestic consultative processes for formulating trade and investment policy should be strengthened and should give significant priority to African economic integration as a source of important regional markets. The Inter institutional Trade Committee, the apex advisory

¹ Article 181(2). Article 24 of the SADC Treaty is similar.

² Article 83 of the 1993 Treaty.

body on trade policy with representation from the public, private and civil society sectors, does not have legal status in the country and has no official resources to fund its activities. This anomaly must be addressed. The entire consultative processes should squarely include the element of regional markets in Africa as an integral part of the search for foreign resources and markets.

Africa at the moment needs leaders to lead its economic development. Mandela did not quite rise to the occasion and Nyerere passed away after helping to establish the South Commission / South Centre now based in Geneva. Families need to rise to the occasion by assisting to turn out children that will lead Africa. But also government needs to provide a framework for this to happen; particularly by teaching specialised subjects on African integration at all levels of learning and establishing a national philosophy for the people and Africa at large to live full lives and to celebrate God's Africa.

1. INTRODUCTION

1.1 The Objective and Modalities of Economic Integration in Africa

The main objective of economic integration in Africa is to consolidate conditions for the rapid economic development of the people of Africa, in order to eradicate poverty and free Africa from marginalisation. These conditions include:

- Increasing trade and investment through building large regional and continental markets to support production and investment at critical levels that have significant linkages into the economies;
- Maintaining peaceful co-existence within and between countries; and peacefully resolving any disputes or conflicts through common mechanisms that have been established at the continental and regional levels;
- Ensuring the rule of law including constitutionalism and democratic governance within countries and among them;
- Promoting the solidarity of Africa and of all the people of African origin outside Africa so as to strengthen the identity and the case for Africa in international relations, for instance, within the frameworks of the World Trade Organisation, the Cotonou Arrangement, and the African Growth and Opportunity Act.

They are simply conditions providing a framework within which specific development programmes should be implemented, in a manner that ensures the public interest of the individual country is protected and not prejudiced. For instance, to ensure equity between countries and the survival of important or strategic domestic industries, creation of free trade areas and customs unions should be done over an appropriate transition period that allows the less advantaged economies to adjust. Also, there should normally be development banks or funds or facilities established to assist depressed area within the community and to alleviate adjustment costs. Without equity, economic integration would be unlikely to function well.

These conditions must exist internally within countries and among African countries as a community. A country will not benefit from conditions that prevail at the regional or continental level for economic development, if internally it is torn by conflict or is governed in an ad hoc manner; a good symptom of which could be governments unconstitutionally eagerly enacting convenient laws, to further short term interests, which courts overturn with

glee or embarrassment.³ Rather priority should be given to national and regional stability that is built upon democratic governance and laws that are known in advance and on the basis of which long term economic planning can be done by the country and its people, and within the region.

1.2 The process of African economic integration

Africa, through the Heads of State and Government, has adopted economic integration as a development strategy. The economic integration is at the continental level and the regional level. At the continental level, the idea is to build the African Economic Community as an integral part of the African Union, the body that recently replaced the Organisation of African Unity generally considered to have performed below average. The African Economic Community (AEC) is to be built progressively in six stages, over a period of 34 years, counted from 12 May 1994 when the Treaty Establishing the AEC (AEC Treaty) entered force.⁴

The idea behind the six stages, set out in Article 6⁵ of the AEC Treaty⁶, is that economic integration should be first consolidated at the regional level, through creating regional economic communities (RECs), which would eventually merge to form the AEC. The RECs have been established in the five regions of Africa, namely, Southern Africa (SADC), Eastern Africa (COMESA, IGAD), Central Africa (ECCAS), West Africa (ECOWAS), and North Africa (AMU). In addition to these however there are sub-regional economic communities, such as the EAC in Eastern Africa, SACU in Southern Africa, UEMOA in West Africa, and SINSAD in North Africa. Recently, the Heads of State and Government adopted the New Partnership for African Development (NEPAD) as a mechanism allowing participation by development partners for implementing the development programme of the African Union

Table of stages under Article 6 of the AEC Treaty

³ In Uganda for instance the Supreme Court has found two major statutes – on parliamentary voting procedures and on publication of false information (by journalists) – to be unconstitutional and declared them null and void, the judgments closely following each other over a period of just two weeks (February 2004).

⁴ Once a treaty is concluded and is in force, it applies within the domestic legal system of the parties only in accordance with domestic systems for recognising and implementing international obligations. African countries do not have a particularly good record on implementing obligations under the African economic integration treaties; targets have not always been met.

⁵ Article 6(2)(d)-(f)

⁶ 30 ILM 1241 [1991]

stage	aim	activities	[years]
1	establish/strengthen RECs	[not specified, but in practice have included conclusion of treaties for the RECs]	5 - [1999]
2	stabilisation	1. At regional level - a] stabilisation of tariff and non-tariff barriers, and internal taxes; b] studies for trade liberalisation time table 2. Sectoral integration 3. Co-ordination and harmonisation among RECs	8 regional activities [2007]
3	1] regional FTAs, and 2] regional customs unions	1. observance of trade liberalisation time table at regional levels 2. Adoption of regional common external tariffs	10 - [2017]
4	continental customs union	adoption of continental common external tariff	2 - [2019]
5	African common market	1. Adoption of common policies - agriculture, transport and communications, industry, energy and scientific research; and harmonisation of monetary, financial and fiscal policies 2. Recognition of freedom of movement, residence and establishment 3. Constitution of community resources	4 - [2023]
6	African economic and monetary union	1. Deepening integration - policies, RECs, setting up African multinational enterprises for the sectors, etc 2. Creation of single currency 3. Establishment of panafrikan parliament 4. Setting up executive organs of the Community	5 - [2028]

As these stages show, the AEC Treaty projects the RECs as the building blocs for the AEC. The RECs have quite ambitious time-tables for creation of customs unions and are set on faster tracks than the AEC which envisages creation of customs unions in each of the regions only by the year 2017. The RECs, however, do not have complete timetables covering all the stages, and are open-ended on sector co-operation, whereas the AEC Treaty sets quite specific stages for the entire process of forming the AEC. These are reasons for proper co-ordination and harmonisation of activities of the RECs. It clearly is necessary, that the process at the regional level proceed in a manner that does not constitute obstacles to building the AEC; and that the RECs be viable, sustained by an appropriate institutional framework for creating the AEC.

It is generally felt that these RECs and sub-RECs form a complicated and resource-wasting duplication of efforts. It is also felt, According to the Sirte Declaration of 1999, adopted in Libya, which initiated the process of establishing the African Union, that the period is long

and some of the stages could be abridged or expedited. Thus the Pan African Parliament has already been established, though it was supposed to be established in the final sixth stage.

1.3 The African Union, Abridging the Stages

The OAU Heads of State and Government held a fourth extra-ordinary session of the Assembly on 8-9 September 1999 at the initiative of Colonel Ghaddafi, the Libyan leader, and adopted the quite radical Sirte Declaration with far-reaching objectives to form the African Union and establish the Panafrican Parliament almost immediately as well as to shorten the period for forming the AEC. Implementing the Declaration would be a fundamental milestone in the unity of Africa.

The passionate deliberations echoed the mood aroused by Nkrumah's vision for a united Africa, and it is a fair assessment that African leaders did emphatically adopt the position that the existing level of unity, within the framework of the OAU, was inadequate for Africa to assume its rightful and equitable place that would be appropriate for developments and challenges posed in international economic relations, especially in terms of placing Africa's concerns on the international agenda and achieving goals sought.

The concerns and goals relate to the agenda of international financial institutions in terms for instance of full debt cancellation and adequate donor funding for development programmes. They relate to the WTO in terms of market access for products of interest to developing countries, of the scope of its agenda for instance in relation to issues such as investment and competition policy, environment and labour standards, government procurement and electronic commerce, of protecting intellectual property rights in genetic modification and preserving the rights of farmers and local communities that are threatened by multinational companies seeking patents over indigenous plants and knowledge⁷, and of technical assistance and special treatment especially in implementing and complying with the extensive obligations imposed under the WTO Agreement. The international economic order including the multilateral trading system is increasingly integrated, approximating global governance through intertwining understandings and agreements between international organisations, leaving a marginalized Africa with no significant organisation solidly on its side. Africa's response must therefore include the mobilisation of a strong voice and promotion of pro-Africa positions in these fora, as well as formation of institutions for ensuring internal coherence in

⁷ Please see Article 27.3(b) of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights, requiring patent protection for micro-organism, micro-biological and non-biological processes, and plant varieties; but plant varieties may be protected under sui generis systems. What constitutes WTO-compliant sui generis systems is a matter of considerable doubt and developed countries are eager to have WTO members adopt their versions, which do not contain good protection for farmers' rights and the knowledge of local communities.

pursuing programmes agreed as suitable for the economic and social development of Africa.

The solution adopted under the Sirte Declaration was to strengthen African unity. The Assembly decided to "establish an African Union, in conformity with the ultimate objectives of the Charter of our continental organisation⁸ and the provisions of the [AEC Treaty]", and to "accelerate the process of implementing the [AEC Treaty]".⁹ The acceleration was to be in terms of shortening the implementation, that is the stages; speedily establishing all the AEC institutions such as the African Central Bank, African Monetary Union, African Court of Justice and particularly the Panafrican Parliament; and strengthening the African regional economic communities [RECs]. The Parliament was to be established by the year 2000 and the Union by 2001 at the adoption of the constitutive instruments by the Heads of State and Government at sessions of the OAU Assembly.

Following the adoption of the Sirte Declaration, given the short deadlines set, the OAU Secretariat established an in-house Implementation Task Force chaired by the Assistant Secretary General Responsible for Political Affairs, Ambassador Said Djinnit, and constituted by heads of divisions among others, to expedite the implementation of the Declaration.¹⁰ 7 consultants were engaged for the month of February 2000, to draft the legal instruments for establishing the African Union and the Panafrican Parliament. The drafts were subsequently discussed by the Permanent Advisory Committee that meets at ambassadorial level, and by the OAU Ministerial Council attended by ministers responsible for foreign affairs. The Assembly duly concluded the constitutive Act for the African Union at the June summit, and the member states commenced to ratify it. The required 36 ratifications were soon received and the Act entered force on 26 May 2001, within a year of concluding the Act. The Lusaka Summit of the OAU that year formally inaugurated the transition from the OAU to the African Union, launched in Durban at the June 2002 Summit.

The Protocol for the Panafrican Parliament too was finalised and entered force. The Panafrican Parliament held its inaugural session in Addis Ababa at the Commission of the AU on 18-19 March 2004, after the election of representatives in the member states.

The prospects for the RECs significantly depend on whether the obstacles to economic integration in Africa are properly addressed by the relevant instruments. The catalogue of major obstacles to economic integration in Africa includes: sharing benefits and costs, political-ideological differences, huge external trade sectors linking Africa with former colonisers and leading to dependence and asymmetry in Africa's relations with those states, institutional deficiencies, legal and political instability, absence of harmonised legal regimes,

⁸ "Our continental organisation" is the OAU, perhaps an appropriately tender way to refer to it.

⁹ Paragraph 8(i) and (ii) of the Sirte Declaration. Please see Appendix 3 for excerpts from the Declaration.

¹⁰ Please see the memorandum under reference CAB/LEG/23.15

reluctance to share sovereignty with community institutions, and shortage of transport and communication facilities between economies and generally inadequate infrastructure.¹¹

2. SPECIFIC OBSTACLES TO ECONOMIC INTEGRATION IN AFRICA

2.1 Political factors

Individual political leaders have every now and then decided to assume responsibility for economic integration. Besides, the institutional framework in Africa, generally speaking, predicates economic integration on the attitudes of the political leaders, in that the Assembly or Authority, the organ made up of Heads of State and Government, is the supreme organ assisted by a Ministerial Council, such that the projects live and die with them. Inaction on their part means that economic integration does not take place. Yet they are not known, due to endemic political instability, to enjoy particularly long periods in office, save for the few, again, who stay around for far too long till they are forcibly ejected, resulting in acrimony which paralyses activities of the political organs. These conditions do not make for economic integration as a sustained effort that can outlive individuals. Instead, economic integration should be a democratic agendum on which elections are contested, and incorporated into national laws, as a fundamental national policy, in order to put the programmes above the fleeting spans of African political leaders.

2.1.1 Political will

It appears that despite the speeches and conferences, and resolutions and treaties, on economic integration, by Africa's political leaders, the basic problem remains to be lack of political will.¹² Yet one would have expected the conclusion of treaties to be a concrete

¹¹ Guy Martin, *Economic co-operation and integration in Africa* - in A. Seidman and F. Anang, 21st Century Africa: towards a new vision of self-sustainable development, [Trenton, NJ: Africa World Press, 1992]; John Ravenhill, *Regional integration and development in Africa*, [1979] 17 Journal of Commonwealth and Comparative Politics, pp. 227-246; Anukpe Ouwrawah, *Harmonisation of Laws within ECOWAS*, 1994 African Journal of International and Comparative Law, p. 76; Ibrahim Gambari, Political And Comparative Dimensions Of Regional Integration: The Case Of ECOWAS, [New Jersey: Humanities Press International, 1991]; Peter Takirambudde, *Regional co-operation and trade liberalisation: the case of PTA* - in O S Saasa (editor), *Joining The Future, Economic Co-Operation And Integration In Africa*, [Nairobi: African Centre for Technology Studies, 1991].

¹² Arthur Hazlewood, *Problems of Integration Among African States* - in A. Hazlewood (editor), *African Integration and Disintegration*, [London: Oxford University Press, 1967], p. 3; Obasanjo and d'Orville, *Challenges of leadership in African development*, [New York: Crane Bussak, 1990], p. 5.

indication of support for policies to be pursued and, in the case of economic integration, of the strategy to be followed.

There could be several ways to account for this. First, the leaders who conclude the relevant treaties do not do so as a manifestation of popular opinion, and invariably the conclusion is not endorsed by parliament where there is one. The treaties remain the individual acts of political leaders. In this case, the conclusion of a treaty does not attract follow-up action from the people, who, moreover, may not even know of the treaty. The ratification process might never take off, or may drag due to lack of support by the relevant national institutions. In some cases, the treaties may be ratified, and incorporated into municipal law, but remain on the statute books without being disseminated and inculcated into the activities of relevant actors such as the business community and other service providers who would have been interested in expanded markets. Where this is the case, the leaders do not have to account to electorates for their performance on the treaties, and do not have the incentive to proceed with implementing the treaties, especially where even the government bureaucracy does not have the treaties on the priority list.

The treaty may not provide a suitable mechanism for implementing it, other than an administrative secretariat and a ceremonial Assembly or Authority. In such a case, upon conclusion, the secretariat will wait to respond to promptings from the Assembly which in turn will probably be acting on ministerial recommendations. The crucial link in the process of implementing the treaty will, therefore, be the effectiveness of the Ministerial Council in coming up with appropriate recommendations. Factors determining the effectiveness of the Ministerial Council include, the quality of technical expertise drawn on, continuity of membership of the Council in respect of specific sectors or areas, and ability of the Council to agree upon concrete recommendations and proceed. The Ministers must have the relevant skills in the area to enable them appreciate the nature and importance of results to be achieved which hopefully can motivate them, obstacles involved and appropriate solutions. At this ministerial level, therefore, supportive technical institutions are very important and can determine the success or failure of the project. However, effective technical institutions and Ministerial Councils can still fail to get the process going if the Assembly or Authority does not meet, which can happen due to personal differences, financial constraints, domestic priorities or problems, and lack of faith in the process or support for the aims to be pursued.

The better approach, therefore, must give sufficient power to the technical organs to proceed regardless of political paralysis, and those organs ought to be the actual mechanisms for implementing the treaties. This requires that the treaties be sufficiently comprehensive,

leaving their implementation to the relevant measures adopted by national technical agencies such as customs and immigration authorities and national financial institutions, on recommendations from relevant community institutions.

A crucial factor in renegeing on obligations assumed under the treaties, has been national emergencies that have made foreign policy and generally matters of long-term strategies of economic integration in conjunction with foreign governments, look like a luxury or unjustified disregard for domestic matters. Such emergencies include internal civil strife and suppression of popular political or civil dissent, ethnic conflicts, transitions to elected governments preoccupying incumbent governments, and natural disasters. By and large, apart from natural disasters, these national emergencies have been matters of governance, lack of democracy, and sustained gross violations of human rights of persons and peoples by government functionaries. Such emergencies usually attract the concern of governments and civil society at large, taking priority over matters of economic integration. Yet successful economic integration can be a positive factor in promoting good governance and good human and people's rights records, for membership in the communities could depend on those criteria and the meetings of community organs could be a forum for holding governments accountable for their deeds.

An embarrassing factor accounting for the absence of political will and lack of progress in implementing the treaties, reflects on numerous individual politicians in Africa. There have been cases of lack of basic ethics, where politicians have degenerated into thieves running very corrupt governments and plundering national coffers. Politics for many is primarily a career to make a living. This has led also to prolonged stay in power for the sole reason of self-enrichment. In such cases, the good of the people and development strategies like economic integration, hardly feature as government priorities. If not this malaise, politicians have lacked vision and failed to see the importance of African unity or regional economic co-operation and integration as necessary for Africa's economic development. Rather, national policies have been their sole domain. This short-sightedness is attributable to unfavourable education, inadequate exposure to global developments and priorities, lack of appreciation of benefits to be derived from economic integration, or sheer disregard for the common good.

To generate and sustain necessary political will, economic integration should be part of the political and social processes, through vanguard political, professional and business associations at the national level. The importance of the role of motivated individuals in leading such associations must be emphasised, especially with a view to making economic integration a people's demand, a democratic demand. Existing secretariats must assert

themselves, prodding governments and community organs into action, and fuelling civil society to maintain economic integration on national priority lists. Where community parliaments have been provided for in the treaties, they ought to start to function, so that the people are involved in the process in an institutionalised manner, but the parliaments should have a meaningful role to play.

2.1.2 Cleavages

Africa is divided. It has been difficult for Africans to take a common stand and the defeat and humiliation resulting from this disunity have not shocked Africans into necessary action yet. In our times, Africa, having been overtaken, is now being left far behind as already strong economies are uniting to form yet stronger blocs while Africa seems lukewarm about integration.

Before the end of the cold war, it was fashionable to blame the superpowers, though the non-aligned movement had radical leaders who tended to associate more with the Eastern bloc. Now hegemonic power has been dispersed, though USA's military edge over the other contenders, namely the EU, Japan and China, still leaves it very much in the lead. This should avail a generous selection of allies. Instead, Africa is finding fresh sources of hatred and divisions.

The nature of the disunity is multifaceted. Persistent cleavages arise from ethnic violence, which can be rife any moment anywhere, and in many cases spill over into neighbouring countries; and from differences over change of government as where forceful change of government makes the host of the deposed leader an enemy of the incumbent government. With some governments apparently committed to democratic governance, this is becoming a serious dividing factor, as there is yet no proven and consistent record of deposing or otherwise removing governments that forcefully seize power, leaving them to cohabit with democratic ones on the continent. A related aspect is that of a growing number of leaders who have seized power through popular revolts or guerrilla warfare, and who openly express solidarity with each other and empathise with such struggles to the chagrin of threatened incumbent governments. It is yet to be seen whether this new breed of leaders will form a core group for African unity.

Another emerging source of disunity seems to be the regional communities themselves, for the blocs tend to be exclusive. Perhaps the most celebrated case is that of the tension and acrimony between COMESA and SADC in the 1980s. The Maghreb Union, headquartered in Morocco, turned down Egypt's application for membership¹³, whereas Egypt falls within North Africa and therefore was entitled to membership in the union as the AEC pillar for North Africa. Yet Morocco is not a member of the AEC, as it purported to withdraw from the OAU upon the admission of the Sahrawi Republic. Related to this is the case of the strange division sometimes manifested as closer co-operation between Franco-phone countries, to the exclusion of Anglo-phone ones, in West and Central Africa.

Economic integration is an effective way of containing these divisions, on the basis of the resulting inter-linkages, as an extension of the functionalist and neo-functionalist methods to peaceful co-existence. But the divisions prevent the integration in the first place, and it becomes a case of how to break the vicious cycle. It seems the sources of economic integration should be economic- and sector-driven drawing on the universal appeals of enhanced business opportunities for commercial entities, and better prospects for economic development. Making this case for economic integration, again, is a matter of the political and social processes for determining national issues.

2.2 World markets

Further, the international system has been unfavourable to economic integration in Africa, and not supportive of efforts by Africa's political leaders for economic integration. The international system has been such as to push them to open-market economics and export promotion policies which have resulted in placing access to markets of developed countries higher on the national agenda. Therefore agreements of integration or association with developed countries have enjoyed quite tremendous emphasis, perhaps to the prejudice of intra-Africa integration. Examples include the Lome Conventions and now the Cotonou Agreement¹⁴, association agreements between some North African countries and the EC, the schemes for the Generalised System of Preferences, EC-South Africa FTA agreement, the USA-Subsahara Africa co-operation arrangement under the US African Growth and

¹³ Egypt was eventually admitted to COMESA in 1998.

¹⁴ The EU cooperated with African, Caribbean and Pacific countries under these conventions, offering preferential access but under conditions designed to nevertheless offer considerable protection for the EU market, especially in the area of textiles and agriculture. The Lome Conventions have been replaced by the Cotonou Agreement.

Opportunity Act¹⁵, and numerous bilateral investment treaties and investment codes.¹⁶ In addition to these formal agreements, economic policies have tended to focus on foreign markets, and not looked seriously in the way of the African market, and in this manner have considerably shifted emphasis away from the AEC and RECs. These sort of policies have further contributed to the maintenance of the small proportion of intra-Africa trade which has been advanced as an argument against economic integration. It is necessary to address this bias in favour of trade with developed countries and to complement it with policies for promoting regional markets through African economic integration. The African market can provide an alternative for a substantial part of the trade with developed countries.

The argument against this is that African economies are homogeneous or in competition as they produce similar products, and this is taken to be a basis for the conclusion that there is nothing for African countries to carry out trade exchange in, and that therefore without the trade, economic integration cannot arise.¹⁷ Yet it is obvious that developed countries find a lot to exchange in trade despite producing similar or competitive manufactured products. Technical developments for production processes and product differentiation, structures of industrial and commercial enterprises, considerations of market access and location, and differences in legal and political regimes, afford ground for decisions that can cause trade and competition between economies producing similar products. So even in the case of production of similar products or of substitutes, there can be trade on grounds of differences in production costs and externalities, which in fact is a basis of comparative advantage.

What is more, is that in fact African economies are not entirely competitive, but produce substantially different products due to differences in resource endowments. On the contrary, therefore, African economies are not homogeneous; they produce primary products on the whole, but varied primary products. There is a substantial level of processing industries, and this situation is conducive to transnational trade. The paucity of intra-Africa trade is caused by historical factors which have oriented the economies to be exporters into developed economies. The concept of comparative advantage of course applies, and by its nature, it has to apply - it applies even if given countries produce similar articles.

¹⁵ Emile Yakpo, Creating a New Market, US-Africa Relations - in *West Africa Magazine* of 15-21 December 1997 [Camberwell, London: West Africa Publishing Co].

¹⁶ Africa could take a common position in these agreements, AEC and REC organs constituting part of the negotiating teams. In the case of regional trade agreements with the USA, envisaged at some stage in under the African Growth and Opportunity Act, those countries which annually meet the criteria, unilaterally set by the USA and applied by the USA President, could then concert their position in dealing with the USA. Otherwise, this could be another source of detraction from the aims of the AEC Treaty and indeed the REC treaties for African economic integration.

Though it is correct that African economies have traditionally produced primary products, industrialisation has begun to take root. The strategies have changed over the years from import substitution to export promotion, and there are other strategies such as diversification and liberalisation, all of which have invariably sought to promote industrialisation. The nature of MNEs now is that economies of scale, externalities like cheap labour and inputs, credit and cost free insurance against political risks, market access and securing potential markets, are fundamental determinants in location. There is potential for industrialisation in developing countries, in this regard, and integration is a way in which larger markets to support industrialisation can be availed. The very paucity of the trade is an argument for increased intra-Africa trade, on many grounds such as getting access to markets yet untapped. It suggests also that trade creation and expansion, rather than trade diversion, will be more likely.

Though access to the global market is vital, economic development in Africa requires that the capacity to take advantage of the larger regional or global market through increasing local production, be put foremost. This in turn requires that the debt crisis which has now led to a net out-flow of capital from Africa be addressed urgently and comprehensively with tangible and concrete results.¹⁸

2.3 Sharing gains and losses

Economic integration yields benefits, largely in terms of economic development as increased market opportunities and economies of scale are exploited, usually manifested in access to the regional market created and the sector co-operation in ventures that would have been untenable. There are losses as well, such as, the foregone customs revenue as customs duties are reduced and eliminated on the internal trade among the partner countries. Besides, the process of economic integration tends to favour economies with a head-start over others. Those economies in positions of relative strength, with relatively more competitive enterprises, tend to dominate the regional markets, outperforming the weak enterprises as they supply the regional market. The stunted development of national enterprises which fail to successfully adjust to the competition, is usually perceived as a loss by national governments whose economies are dominated.

¹⁷John Ravenhill, *Regional integration and development in Africa*, [1979] 17 *Journal of commonwealth and comparative politics*, pp. 227-246.

¹⁸Kevin Watkins, "*Oxfam: US Initiative fall short - NGO urges more integrated approach to African trade, ad and debt*", in *Africa Recovery*, July 1997, p.7.

This has been an endemic problem in projects for economic integration. The attraction of regional markets is their size, in that economies are available to single enterprises supplying the huge markets. The linkages in practice tend to be concentrated around well-established industrial centres which have relatively developed infrastructure, the effect in the dispersed areas being only a trickle down. But there are quite political aspects to this. If the linkages do not yield as much gain as obtains in the best performing economies, political rhetoric may become economic nationalism, destroying the whole project for economic integration on the grounds of the imbalance, perceived as unfair gains or even exploitation. The questions of job creation and a deepening and widening tax base associated with industrialisation as an engine of economic development, as a public good, take precedence in practice over gains for consumers from the increased competition, lower prices, and wider choice, and for retail service providers from demand for ancillary services.

National policies should be designed to complement any economic development, to complement industrialisation, in partner economies. An economy's comparative advantage, should equip it to take in imports and incoming capital, through linkages. Such national policies, should be allowed and promoted by the project for economic integration. This approach may avoid the bureaucracy and dirigism that go with the following common approaches, namely, tax transfers, regional industrial planning, and allocation of foreign investment to specific economies. Another alternative common approach, which is preferable, is the creation of development or solidarity funds, but care must be taken that ventures into depressed areas at planned in a manner that ensures the sustainability of the entire programme. Regional development banks can be successful, if instruments governing their operations permit them to operate with commercial considerations, and in all other cases are properly managed, and the facilities they are properly planned out.

Regarding customs revenue, one approach is to designate a community institution to collect it, so it is applied wholly or in part to community operations such as financing community organs and activities. Alternatively, a formula for its collection or disbursement, may be adopted, such as collection by or disbursement to the administration of the place of consumption, sale or production, as the case may be. This latter approach does not adequately address the problem of imbalance. The former approach serves better. As, however, the process of economic co-operation and integration will only attract the support of a

government according to envisaged actual gains¹⁹, that approach needs the requisite political will for foregoing the revenue especially where customs revenue is a significant source of government revenue, as in the short-term losses will be more apparent, the gains coming usually in the long-term.

There is emerging a body of thought, that economic integration can make economic aid to Africa more productive and appropriate, which deserves closer examination and a trial. The aid could go into huge multinational projects benefiting the member states in laying infrastructure for regional economic activity. Aid could more directly solve the problem of imbalance in sharing the costs and benefits, by being channelled to the poor areas of the region.²⁰ But this view has not been generally accepted. The common practice seems to be that aid deals are negotiated with individual governments basing on the circumstances of individual economies. Thus aid has been applied to duplicate enterprises within the region, or in such a way that no linkages are created within the region, as when tied aid requires purchase of inputs and employment of expatriate personnel for the benefit of the creditor country. On the whole, aid has been applied without regard to the aims of economic integration in Africa.

The problem of imbalance in sharing benefits and bearing costs, has to be addressed right from the constitutive stages of the strategy or policies of economic integration. This means that each participating country must undertake analytical work to establish a case for participating in the integration, and to adopt appropriate negotiating positions to ensure that its interests are full taken into account in preparing the instruments for economic integration. The idea should be for the country to be aware of the benefits and costs, and to undertake necessary adjustments or preparations for the process of economic integration. Participating economies must be clear about not just the nature of available gains, and but equally importantly about the timing of such gains. Transition stages can take into account the different levels of economic development of the members. Economies less endowed to benefit from the process can be permitted derogations from the regional incentive regime, to offer a more enhanced incentive regime to attract investment into their depressed areas, in conjunction with the development fund or bank. The derogations most likely have to be uniform throughout the regional market, to avoid losses associated with competitively generous incentive regimes. The aim all the while should be to put responsibility for

¹⁹ Samuel K. B. Asante, *African development: Adebayo Adedeji's alternative strategies*, [London: Hans Zell, 1991], p. 102.

²⁰ Arthur Hazlewood, *Problems of Integration among African states* - in: A. Hazlewood (editor), *African integration and disintegration*, [London: Oxford University Press, 1967], p.21.

economic development and achieving benefits from the regional market, squarely on national governments and private entrepreneurs, rather than on community institutions, and to avoid unrealistic bureaucratic systems for allocating foreign investment to specific economies or areas.

2.4 Legal factors

The issues concerning the legal regime include, the law applicable to cross-border trade, establishment of enterprises and offices for provision of goods and services, and the right to work – complementing free movement of goods, capital, services and labour; and enforcement of obligations at the regional level. In common markets and economic unions, the issues will include regulations on standards in various areas, and economic and social policies, in order to harmonise or uniformise them, but such regulations are not uncommon even in customs unions and FTAs. The legal framework for, cross-border transactions, establishment or formation and operation of business organisations, jurisdiction of courts, recognition of judgments and of qualifications and so on, and for the regional jurisdiction of community institutions especially the technical ones, the courts and the secretariat, is a significant factor in the efficacy of the regional market and economy. If such law is there, is harmonised or uniform, it makes for efficiency and certainty in operations in reducing transaction costs. Without the enabling legal framework, the objective of economic integration to create a regional market, can hardly be achieved, as free movement of goods, services, capital and labour, and the operation of community institutions, can be lawfully resisted by national administrations. Creation of a regional market requires positive legislation to remove and prohibit barriers to the freedoms and the limitations on the operation and jurisdiction of community institutions.

In the absence of such a framework, the actual costs involved in cross-border transactions include not just the tariffs and costs of and restrictions under work permits and various licenses, but also the uncertainty of the applicable law and therefore of the exact nature of obligations assumed or arising under certain circumstances perhaps leading to unnecessary litigation and to excessive insurance, for instance, on obligations not actually incurred or which a party could have avoided incurring, which will be carried into costs of production; as well as the time taken to process the clearances and permissions, and prohibitions on access to certain sectors. Differing regulations on health, safety, environmental, labour, and other standards generally, and on packaging, can be protectionist, or lead to huge production costs

and thereby constitute barriers to market access. Also, multinational enterprises might find it necessary to locate in the various national markets in order to qualify as national entities and to avoid the barriers to market access, perhaps leading to higher costs associated with production and operations below capacity, or even to withdrawal from the market altogether.

Harmonisation of the legal framework can be done by treaty, a model law, commercial practice in the case of commercial transactions²¹, as well as through regulations and decisions of community institutions and judgments of regional and national courts. The process of interpretation of the rules set, is crucial in generating a uniform understanding and construction in their application. The institutions appointed to render interpretations of the rules, such as courts of law, arbitral tribunals and Assemblies of Heads of State and Government, therefore play a crucial role in developing the legal framework for attaining the aims of economic integration. As the function of interpretation is largely specialised, demanding good legal skills and an appropriate grounding in the law, courts of law ought to play a leading role in the interpretation, by having wide and flexible jurisdiction, being open to all actors in the process of economic integration, and rendering the final and binding decisions.

Though the legal framework merely implements the economic and political objectives laid down in the constitutive instruments of economic communities, and the concomitant measures taken by the community executive, administrative and technical institutions, a proper legal framework itself also promotes the process of economic integration, by providing the regional market. In Africa, the concomitant measures have been inadequate, and there has been little zeal in proceeding with the implementation of the constitutive instruments as reflected in the unimpressive progress. Further, the legal framework has not been adequately developed, due to absence of the necessary harmonising instruments, and institutions actively involved in the interpretation process.

Perhaps two major reasons for this inactivity in the interpretative process, are, the limited jurisdiction given to community courts in that *locus standi* is restricted to community organs and governments of member states, excluding private persons and individuals, who would be active actors in economic integration, on the one hand; and the low level of intra-regional trade and investment which has not generated ample opportunities for interpretation and a sustained load of court activity.

Even where individuals have a right of audience in community courts, there will need to be a process of educating lawyers and other actors particularly in the private sector, to enable them be aware of the community regime and participate in developing it. It is quite regrettable that African economic integration is not taught as a law subject in African institutions. African economic integration should be taught in other disciplines as well.

2.5 Exclusiveness of RECs

Whereas the RECs as building blocs of the AEC are supposed to merge or associate in due course, it does not appear that they are so inclined. Either instruments setting them up lack liberal or all-encompassing accession clauses, or certain RECs decline to merge when the matter is tabled²². This may obstruct progress towards the AEC.

There are also cases of sub-RECs which exclude other African organisations for economic integration, and attract more loyalty, and deeper and faster integration. Examples include, the Economic and Monetary Union of West Africa²³ and the rand monetary area²⁴ within the Southern African Customs Union²⁵, each of which has a common currency, perhaps as well as the East African Community²⁶, for the depth of economic integration attained, especially in the monetary, fiscal and immigration policies, is itself an impediment to widening. In the case of the Economic and Monetary Union of West Africa, the common currency, the CFA franc, is backed by the French Treasury, on the basis of the common colonial legacy of the members, except for Guinea Bissau, the latest entrant, which was not a French colony.²⁷ There is also the Economic and Monetary Union of Central African States. The legacy introduces exclusive historical links.

²¹ Anukpe Ovwah, *Harmonisation of laws within ECOWAS*, [1994] African journal of international and comparative law, p.76.

²² For instance, SADC declined to merge with COMESA when the matter came up, see *PANA News* 9 April 1997, *The East African* Jan 30 - Feb 5 1995 p. 10, and *Final Communiqué of the 11th Meeting of the Authority of the PTA* held in Lusaka from 20-21 January 1993 item VI.

²³ Members: Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.

²⁴ Members: Lesotho, South Africa, and Swaziland.

²⁵ Members: Botswana, Lesotho, Namibia, South Africa and Swaziland.

²⁶ Members: Kenya, Tanzania and Uganda.

²⁷ "Euro will inherit French Backing for CFA Franc", *PANA News* 25 June 1997.

A perhaps historical case of controversy over merging or associating towards the AEC, is that of the acrimonious and puzzling relation between COMESA²⁸ and SADC²⁹ in the 1990s.³⁰ There were cases of open acrimony between the two secretariats, in one instance the COMESA secretary-general accusing his counter-part of foot-dragging on merger of the two RECs, and in another the SADC Executive Secretary giving members who belonged to COMESA as well notice to choose between COMESA and SADC but denying it shortly afterwards. The COMESA secretariat, basing on developments going back to the original goal of the PTA developing into a common market for Eastern and Southern Africa³¹, took the position that the COMESA Treaty called for a merger of COMESA and SADC, while the SADC secretariat, backed especially by Botswana, South Africa and Zimbabwe, took the contrary view, that SADC should also continue. South Africa and Botswana did not join COMESA, and though the treaty made provision for their membership in the future³², there is yet no indication that those countries will seek membership. Zimbabwe had doubts about joining COMESA, but definitely declined to ratify the treaty when South Africa gave notice that it would not join COMESA.³³ Lesotho and Mozambique in December 1996 gave the one year notice to leave, for the reason that they preferred to be in a smaller organisation with fewer problems. Mozambique, though, had not ratified the COMESA Treaty. The argument against COMESA was, that Mozambique did very little business with COMESA members, and that Lesotho, a small country, short on resources, and already with responsibility in SADC, would do well to choose and specialise on SADC.³⁴ In fact Mr Joachim Chissano, the Mozambican president, signed the COMESA Treaty contrary to the advice of his economists. All other SADC members are also members of COMESA. Namibia came close to leaving COMESA, but with the dismissal of the secretary-general, reaffirmed its membership on the stated ground that the relation between COMESA and SADC had been clarified in a report of experts, yet Lesotho confirmed its withdrawal maintaining that the uncoordinated manner and duplication of the programmes of the two organisations made implementation difficult.³⁵

²⁸ Members: Angola, Burundi, Comoros, Congo Democratic Republic, Djibouti, Egypt, Ethiopia, Eritrea, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Somalia, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Lesotho, Mozambique and Tanzania withdrew from COMESA, preferring to be in SADC.

²⁹ Members: Angola, Botswana, Congo Democratic Republic, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

³⁰ It is appropriate to immediately point out that COMESA and SADC have been able to quite successfully address systemic issues between them and now maintain visibly harmonious relations. They co-ordinate their activities and a Task Force indeed been formed to oversee this.

³¹ Article 29 of the PTA Treaty. See also, Item VII of the *Final Communiqué of the 11th Meeting of the Authority of the PTA* held in Lusaka from 20-21 January 1993 [COMESA Secretariat, Lusaka]; paragraphs 11-16 and 46 of the *Report of the Ministerial Meeting of Plenipotentiaries on Draft COMESA Treaty* dated 29-30 October 1993 ref. PTA/LEG/MP/1/2, [COMESA Secretariat]; and the preamble to the COMESA Treaty.

³² Article 1(3).

³³ 32 [12] Africa Research Bulletin, Dec. 16, 1995-Jan 15, 1996, p. 12405.

³⁴ "Namibia decides to remain in COMESA", *PANA News* 8 April 1997.

³⁵ Id; and "OAU appeals to COMESA, SADC to resolve differences", *PANA News* 9 April 1997.

There is still duplication and wastage of resources, and arguments for a merger are yet to end.³⁶ Tanzania left COMESA for reasons that have remained controversial; but Tanzanian officials continue to attend some COMESA events and on occasion intimate that they plan to rejoin. Namibia has remained unclear about its stay in COMESA.

The matter of merger has been addressed at the level of Heads of State and Government. The agenda in establishing the PTA way back in 1981, included graduation into a common market for Eastern and Southern Africa³⁷, regions obviously understood, by all PTA members in which number were SADC members except Botswana and South Africa, to include all SADC members³⁸. In the case of South Africa, admission was conditional upon the end of formal apartheid.

At the 11th Meeting of the PTA Authority, held on 20-21 January 1993 in Lusaka Zambia, the Authority noted the decision in August 1992 by the SADC Summit that as the PTA and SADC had distinct objectives, they continue to exist as autonomous but complimentary entities, and decided that the matters of harmonisation and co-ordination, and of merger, be resolved by the PTA Authority with assistance from a ministerial committee comprising three PTA and three SADC Ministers, and further that dialogue between the chairmen of PTA and SADC commence³⁹. A meeting of the chairmen, held shortly afterwards in Gaborone Botswana on 27 February 1993, decided that there was need to avoid duplication, and that as the August 1992 SADC summit was against a merger, the matter remaining for consideration was of harmonisation, co-ordination and rationalisation, which the meeting agreed be referred, for a joint study - the PTA/SADC Joint Study, to the ministerial committee chaired by an eminent person and assisted by consultants.⁴⁰ The secretaries of PTA and SADC then met on 8 May 1993 in Gaborone to consider the terms of reference for and appointment of the consultants, and the budget involved.⁴¹ The ministerial committee, consisting of Botswana, Burundi, Mozambique, Tanzania, Uganda and Zambia, met in Harare, Zimbabwe from 4-5 June 1993, Mr K. Dadzie then UNCTAD secretary-general, chairing. It was decided that the team of consultants consider, the objectives and mandate, and policies and programmes of the PTA and SADC to sort out points of duplication and difference, and the manner set for

³⁶ "COMESA's future is not under threat", *Africa Economic Digest Magazine*, 10 February 1997, p. 7; and "COMESA - a slow death?" *Profit Magazine* February 1997, p. 10 - for a record of various views.

³⁷ Article 29, PTA treaty.

³⁸ Article 1, COMESA Treaty, which mentions all the countries of Eastern and Southern Africa as members, but Botswana and South Africa as potential members.

³⁹ Item VI of the Communiqué, COMESA Secretariat, Lusaka.

⁴⁰ Paragraphs 1-2 of the progress report on the joint PTA/SADC study, ref. PTA/CM/XIX/3, submitted to 19th the PTA Council of Ministers' meeting of 1-3 November 1993 at Kampala Uganda, COMESA Secretariat, Lusaka.

⁴¹ Paragraph 3, Id.

avoiding conflict and duplication of responsibilities, as well as the way that PTA and SADC could evolve towards the AEC.⁴² Meanwhile, the COMESA Treaty was being discussed and drafted. At the meeting of plenipotentiaries on the draft COMESA Treaty, of 29-30 October 1993 in Kampala Uganda, the Namibian delegate raised as AOB the matter of whether the conclusion of the treaty should not be postponed until completion of the PTA/SADC study, but met with the rather technical reply that the decision to create COMESA had already been taken in 1982 at the formation of the PTA, under Article 29 of the PTA Treaty, and that the PTA Authority required the draft COMESA Treaty for signature at its next, that is 12th, meeting, meaning that the meeting of plenipotentiaries did not have the mandate to consider the matter of postponement.⁴³ Though the first draft of the report of the consultants was expected in December 1993, and the final one by February 1994⁴⁴, at the 19th meeting of the PTA Council of Ministers, from 1-3 November 1993 in Kampala Uganda, the PTA secretary general stated that the draft would now be available by the end of January 1994, for submission to a joint PTA/SADC Council of Ministers⁴⁵. The council observed that the merger option had not been ruled out in the terms of reference of the study⁴⁶, though the chairmen's meeting clearly agreed otherwise.

The Report was finally published in July 1994.⁴⁷ Various options were considered, namely, maintaining the *status quo* - the two separate RECs, while harmonising, rationalising and coordinating; a merger of the two RECs; creation of four sub-RECs according to geographical and historical links; creation of PTA North and PTA South so that PTA South is composed of SADC members; harmonisation and rationalisation by the two secretariats; and COMESA as the institutional framework for the AEC.⁴⁸ The study quite strongly supported the last option, boldly recommending that the PTA/COMESA secretariat co-ordinate and harmonise the formation of the AEC.⁴⁹ (This recommendation has now been overtaken by the AEC's Protocol on RECs of June 1997, under which committees have been established to carry out the coordination and harmonisation.)

⁴² Paragraphs 4-7, Id.

⁴³ Paragraph 46 of the report, ref. PTA/LEG/MP/I/2, COMESA Secretariat, Lusaka.

⁴⁴ Paragraph 12 of the progress report on the joint PTA/SADC study, ref. PTA/CM/XIX/3, submitted to the 19th PTA Council of Ministers' meeting of 1-3 November 1993 at Kampala Uganda, COMESA Secretariat, Lusaka.

⁴⁵ Paragraphs 218-219 of the Report on the 19th meeting of the Council of Ministers of 1-3 November 1993, Kampala Uganda, ref. PTA/CM/XIX/5, COMESA Secretariat, Lusaka.

⁴⁶ Paragraph 220 of the Report of the Council of Ministers, COMESA Secretariat, Lusaka.

⁴⁷ I. Mandaza, et al, *The Joint PTA/SADC Study, on harmonisation, rationalisation and coordination of the activities of the PTA and SADC*, July 1994.

⁴⁸ Id, pp. 34-44.

⁴⁹ The Joint Study, July 1994, p.44.

But Zimbabwe took the view, as stated for instance at the Ministerial Meeting of Plenipotentiaries, that COMESA would be without prejudice to “smaller groupings within COMESA as (a) positive contribution to (the) development of COMESA”⁵⁰. As the only REC or sub-REC Zimbabwe then belonged to was SADC, this could mean that SADC was understood as a “smaller grouping within COMESA”, but this could have been a general statement. Indeed Mr Robert Mugabe, the President of Zimbabwe, became quite critical of the formation of COMESA declining, shortly after that ministerial meeting, to sign the COMESA Treaty at its conclusion in Kampala in November 1993, only signing subsequently. A study launched in September 1991 by the African Development Bank, carried out by a team of 16 experts, finally published a massive report in three volumes on “Economic Integration in Southern Africa”. It considered this matter of the PTA/SADC merger and co-operation, explored some available options, and also concluded that the two could co-exist, with SADC forming an integral part of the COMESA framework of agenda-setting and development towards the AEC.⁵¹

The position, then, seems to be that the two communities are to co-exist, harmonising their policies. Apparently, however, this has not been an entirely satisfactory solution, given the continuing refusal by South Africa and Botswana to join COMESA, and the departure of Mozambique and Lesotho citing lack of proper co-ordination as the reason. As COMESA has a wider agenda covering that of the SADC, it seems a fair suggestion that SADC be regarded as a part of COMESA. This alternative, though, would seem to ignore the fact that some SADC members do not belong to COMESA⁵², and that SADC members have been eager to declare the separateness of SADC from COMESA. Besides, many COMESA members are not in SADC, namely, Burundi, Comoros, Djibouti, Eritrea, Kenya, Madagascar, Rwanda, Somalia, Sudan and Uganda. This makes the two RECs indeed different and seems to put them on separate ways. However, the prospect of SADC getting increasingly interested in the large COMESA market with increasing elimination of barriers within COMESA⁵³, is real. Indeed, the business community seem to have started adopting a rather pragmatic approach, contented to go wherever liberalisation can be achieved regardless of the contention about membership.⁵⁴ This might have the effect of compelling progress towards increasing co-ordination and harmonisation, and therefore a de facto merger. COMESA and the East African Community are increasingly taking on a project- or sector-oriented approach to

⁵⁰ Paragraph 51 of the report, COMESA Secretariat, Lusaka.

⁵¹ P Mistry, et al, *Economic Integration in Southern Africa*, [Abidjan, Cote d’Ivoire: ADB, 1993], pp. 264-271. See also pp. 50-51 of the Executive Summary.

⁵² Of the 14 members of SADC, 9 are in COMESA

⁵³ “COMESA lowers tariffs”, *AED Magazine* 21 April 1997, p. 7.

⁵⁴ “SADC vs PTA, alternatives for economic integration?” *SADC Top Companies Report 1994*, p. 17.

economic integration, attracting the interest and partnership of IFIs and the general donor community. As it is this approach that originally marked out SADC⁵⁵, the fading distinction inclines both RECs to closer co-ordination and harmonisation, given that countries common to both organisations and their partners will likely ignore the separate memberships in matters concerning projects to be undertaken and financed. But as between these countries and those in only one of the RECs, co-operation and therefore progress with ventures will depend on whether the latter member is covered by such programme, but it seems unreasonable that gains available to a country in sector- or project- co-operation should be foregone on account of difference in membership. This in practice will cause a disregard for the distinctions of membership. In the area of trade, however, conflicting rules of origin, and different liberalisation timetables undertaken by a country in both RECs, will expose the impossibility of co-ordination, short of a full harmonisation of the entire regime, again tending towards a merger or a *de facto* merger.

There is however a valid technical argument against a merger at this stage. The AEC Treaty sets out a framework for incrementally building the AEC. The SADC is a separate such bloc, and therefore entitled under the AEC Treaty to exist until a merger is decided upon by the Assembly of the AEC. On this argument, the COMESA Treaty is premature in including, in a perhaps compulsory manner, membership of the entire two blocs of Eastern and Southern Africa. If, however, all members of the two blocs agreed to a speedier progress towards the AEC, as the early history of the PTA and COMESA seemed to suggest, the very issue about whether or not to merge would not arise. Also, if the continental trade liberalisation time table provided for in the AEC Treaty⁵⁶ were in place, it would be the proper reference for the harmonisation of trade liberalisation and progress towards a common external tariff for the two blocs. It seems the proper approach at this stage, is for each bloc to aim for a customs union to be achieved before the year 2017 when under the AEC Treaty the blocs are to form regional customs unions in readiness to further combine into a continental customs union. Indeed the two treaties are set to meet this target much earlier.⁵⁷

Given the proliferating sub-RECs in these regions, such as the East African Community, IGAD, SACU, and CMA, which are the exact building blocs for the AEC? If COMESA and SADC, it is necessary to have a *de facto* merger through harmonisation of the trade liberalisation programmes - perhaps the work of joint technical committees, for purposes of

⁵⁵ Until 1996, SADC concentrated on sector co-operation; while COMESA largely pursued market integration.

⁵⁶ Article 6(2)(b)(i).

progressing towards a continental customs union in time. The practical needs of sector- and project- co-operation also require obliteration of differences in applicable regimes which impinge on the operation of the programmes. As these blocs are in place, ever closer harmonisation should be the priority until a merger is achieved. In practice, though, faster and deeper integration will develop around the sub-RECs, around the East African Community for COMESA, and SACU for SADC. If these sub-RECs were to become the pillars of the two RECs, requiring other members in the REC to seek to accede to the level of integration attained, the issue of merger would be postponed to the time when the deep integration eventually widens into the other sub-REC. Then the issue of merger would re-emerge. But the deep integration widens at a much slower pace, and no clear programmes for expansion are set under either instrument for the sub-RECs, nor under the COMESA and SADC treaties, thus putting the matter beyond the scheme under the AEC Treaty for forming a continental customs union, common market and economic union at set periods.

On the other hand, multi-membership of African countries in RECs and sub-RECs leading to overlapping organisations, is in some respects an obstacle to building the AEC. The various organisations distract African countries from the scheme for the AEC in leaving the countries seeking to widen individual memberships rather than deepen the integration within the REC, and progressively disperse the resources available for building the AEC, not just in terms of contributions and commitments but fundamentally of duplication of projects, of meetings and travel, as well as of numerous organs and the entire functioning of the organisations. The conflicting commitments and regimes resulting from the intertwining of the organisations results in further costs associated with abandoning projects half-way, working one's way through the regime, making mistakes, and perhaps eventually rationalising.

Overlapping organisations have resulted because a country seeks to cooperate or integrate with another which offers some specific advantage such as resource endowments⁵⁸, access to sea ports⁵⁹, a more lucrative market⁶⁰, and strong political support⁶¹. Also or in addition, a

⁵⁷ Articles 45 and 47 of COMESA Treaty set 10 years, and Article 3 of SADC Trade Protocols sets 8 years, from the date of entry into force, in both cases leading to a customs union by the year 2005, but actual progress might be slower in both COMESA and SADC.

⁵⁸ For instance, South Africa was keen to have the Congo Democratic Republic in SADC because of the enormous water and hydro-electric resources of the CDR which in addition enjoys strong political support in the region - see "*Mugabe, Chissano rally to Kabila's cause*" *PANA* 19 November 1997; and *Africa Research Bulletin* September 16- October 15 1997 pp. 13174-5.

⁵⁹ Uganda has been dependent on Kenya for access to the Indian seaport of Mombasa, and so has Rwanda which has applied to join the East African Community. Libya has offered some Southern neighbours - Burkina Faso, Mali, Niger, access to the Mediterranean under a scheme for forming an economic union - the Libya-Sahel Area: see *Africa Research Bulletin* September 16- October 15 1997 p. 13174.

⁶⁰ Seychelles joined both SADC and COMESA to have access to the South African market as well as the entire growing regional market.

country may lose faith in the viability and doubt the prospects of a REC or RECs it has membership in, due to slow progress and perceived lack of commitment on the part of other members, and thus seek to secure the national interest by diversifying membership and trading or economic partners. The envisaged benefits offered by the REC may be minimal, thus leading to a search for ever better markets and better economic partners. But a general case for overlapping organisations can be that incremental integration, that is integration for quite specific projects and in functionally specific areas rather than grand schemes which do not show forth immediate and tangible benefits and therefore which do not attract strong political support and commitment, can yield more integration overall and lay a basis for eventually combining, in order to rationalise, the various organisations.

The resulting overlapping and multiplicity might be unstoppable and thus undermine prospects for any eventual merger or even rationalisation, unless concrete measures are taken to adhere to a broader overarching scheme that regulates the entire integration processes. Even incremental integration should be pursued within the scheme set out in the AEC Treaty in order to keep it orderly, and indeed to develop towards the goal of regional markets and economies. The case for economic co-operation and integration according to the AEC scheme has to continue being made, and the activities on the continent for economic co-operation and integration have to be firmly regulated and harmonised.

2.6 International financial institutions

A basic reason economic integration has not been implemented as thoroughly as intended, is that African governments have been pre-occupied with other priorities. Many of these are strategies thrust upon them by international financial institutions (IFIs) especially the World Bank and International Monetary Fund which have largely been responsible for the kind of structural adjustment economic and political policies implemented in Africa especially since 1980. The sheer size of the debt problem in terms of servicing, given the meagre resources available to Africa, and regressive economic development, have tended to place Africa in a weak position in the face of IFIs.

⁶¹ The Congo Democratic Republic and Uganda have embarked on projects to build roads linking up the two countries, since the new government of CDR toppled the regime of Mobutu with the support of Uganda.

The World Bank in 1980 issued a document, the Berg Report, setting out its programme of action in Africa for the next decade or so.⁶² The thrust of this programme was structural adjustment, and indeed the 1980s and 1990s in Africa were distinctly marked by huge reductions in the role of the public sector and public expenditure. Not much was made of regional integration, when the ECA and OAU were all out for an African economic community as the hallmark of the continental development strategy, as outlined in the LPA and FAL.⁶³ In fact SAPs were implemented at the time the LPA was supposed to have taken root, that is, largely during the 1980s. The effect of implementing SAPs was that economic integration received relatively less emphasis.

The focus of SAPs was internal reforms to be carried out by individual countries, and pressure was applied on individual African governments; for divided, and competing for foreign investment and resources from the IFIs, the governments did not take a united stand on this matter of implementing the Berg report though it came in for some criticism. Some governments objected, at least for a while, to the policies, and others avidly embraced them.

The IFIs could have set economic integration as part of the conditionality under the SAPs, so that there would have been application of similar programmes in a harmonised manner that could lead to predominance of policies favouring economic integration. Since there was in place the LPA calling for economic integration, one can conjecture that SAPs applied at the Africa level with economic integration as a major component, would have been less painful in terms of political appropriateness and considerations of sovereignty.

It is not the case that the Bank and LPA programmes were irreconcilable. The Bank wanted internal political and economic reforms and open economies. The LPA provided for economic integration as the broader aspect of collective self-reliance and self-sustaining development. Collective self-reliance was not autarchy, but a policy to resort to internal resources to the extent that the international system was unwilling to aid out developing countries in their development needs, which was quite reasonable, arising as it did from the catastrophes the demands for the NIEO became. The nature of investment activity, moreover, is that local resources, cheap and skilled labour, credit, and the social and physical infrastructure, are necessary and have been aspects of incentive regimes put forward by developing, including African, countries. Therefore LPA strategies were not incompatible with the Bank policies. The policies could have been implemented contemporaneously with the result that the Bank's

⁶² Elliot Berg, et al, World Bank Report, 1980.

⁶³ OAU, Lagos Plan of Action for Economic Development of Africa 1980-2000, 2nd revised edition, [Geneva: International Institute for Labour Studies, 1982].

policies would have applied at the regional level in the framework of and promoting economic integration.

The lack of sympathy for economic integration at that stage, arose in part from the position for a long time predominant that economic integration was essentially protectionist and deviated from free trade. It was the era of liberalisation. Since then, however, perceptions of economic integration have changed significantly. In 1989, the Bank issued yet another document and this time strongly recommended economic co-operation and integration in Africa.⁶⁴ The document set out the case for regional co-operation, described some problems faced and recommended solutions. But the case made was largely for regional co-operation, for emphasis was on transport and communications, capacity building in terms of training and education for acquisition of skills, food security, and energy, with industry taking a lesser position.

Though reference was made in the report to institutional obstacles such as top-heavy structures and reluctance to strengthen the secretariats⁶⁵, the report in prescribing solutions stressed functionalist co-operation, in areas of transport and communications, education, and natural resource management, in a way which in effect de-emphasised the fundamental need for radical institutional reforms, the need for strong community institutions, to oversee these programmes in the context of economic integration. In fact the document did not make any recommendation regarding an appropriate institutional framework or even a legal regime. This is not to downplay the importance of the recommendations made by the Bank, in a very welcome turnaround to realise the need for such joint efforts in Africa. It must be observed, nevertheless, that the functionalist recommendations amounted to preaching to the converted, for African intergovernmental organisations were already perhaps too many, and had generally been quite successful, as indeed described in the document.

The World Bank's strategy, set out in the report, was the following:

... designing incremental but comprehensive approaches to regional co-operation and integration, strengthening specific functional forms of co-operation, and creating an enabling environment for the free movement of goods, services, labour, and capital.⁶⁶

The report further stated that: “the preferred sequence is to introduce co-ordinated incentives and remove administrative barriers to trade and then to improve infrastructure in response to the growth in trade generated by the policy reforms. New investment in infrastructure should

⁶⁴ Landell-Mills, et al, Sub-saharan Africa, From Crisis to sustainable growth, [Washington DC: World Bank, 1989].

⁶⁵ Id, p.149

⁶⁶ Id, p. 152

be based on a thorough evaluation of current and potential trade and should be the leading element of an action programme only when poor infrastructure is the primary barrier to generating new trade or expanding existing flows".⁶⁷

This is the case of the egg and the chicken, and it is quite a remarkable proposition to consider embarking on the policy aspects while putting the creation of appropriate institutional structures on hold. A fundamental constraint to intra-Africa trade is the colonial legacy of export economies integrated, and geared to selling, into markets beyond Africa, partly due to barriers of transport and communications. Further, the nature of production itself, is such that, since colonial times, the markets are regarded to be overseas. These obstacles call precisely for structural changes to have in place the necessary infrastructure in the widest meaning of the word, to create or enhance intra-Africa trade and investment, and an African internal market. Successful creation of incentives is itself predicated upon actual conceivable opportunities available at the time in terms of trade, investment or movement based on absence of infrastructure-related obstacles.

These incremental and functionalist approaches are different from the systematic scheme of the AEC Treaty, under which the AEC is to be built out of specified RECs. The World Bank strategy altogether disregarded the AEC as established by the AEC Treaty.

The IFIs have the capacity to influence policies and can usefully gear governments to put priority on economic integration. This is a diplomatic matter, but though IFIs must speak softly, they must carry a big stick, because the playful disregard of peoples' welfare with which African leaders are wont to conduct public affairs, must not be afforded any ground. However, the extent to which IFIs can be held blameworthy for distracting African governments from economic integration, to SAPs, is the same as that to which African leaders failed to have a united stand against that distraction. Even more, given that the LPA could have been contemporaneously implemented, African leaders take the blame for back-peddling on their undertakings. It is a cock-tail of causes, but the responsibility falls upon African leaders to see to it that Africa develops and that they live up to their undertakings. There are serious causes for this powerlessness and endemic failure.

3. OBSTACLES IN THE PROMINENCE OF POLITICAL ORGANS

⁶⁷ Id, p. 153

3.1 Predominance of political organs in African economic integration

A systemic problem is that the institutional framework for African economic integration has on the whole not been designed to address these obstacles, including in the functions assigned to individual community organs. This is a serious issue, for institutions could be designed to effectively address all the major obstacles to economic integration in Africa.

3.1.1 The Role of Institutions

The institutions covered here are community organs and the administrative framework for attaining objectives set. The discussion here does not extend to the general aspects of institutionalism.⁶⁸

The basic rationale for institutions stems from the established values in respect of recurrent events, of certainty, transparency, order, and proper mobilisation and employment of resources in attaining desired goals. In addition, in the face of a common problem, it is prudent to cooperate, for each to achieve common goals⁶⁹. In economic integration, the people and governments have to interact as part of the experience of integration. Such interaction is governed by the very considerations that have given rise to governance in society. It is necessary, in order to interact in a meaningful and sensible manner, to ensure orderly conduct according to rules and principles which are or can be known, and are properly enunciated. Institutions serve the purpose of maintaining the framework for economic integration.⁷⁰

⁶⁸ The subject of institutionalism has expanded into disciplines as diverse as economics and international relations. In economics, institutional economics has further proliferated into sections, such as modern institutional economics: see, G. Hodgson, *Economics and institutions*, [Cambridge, England: Polity Press, 1988]; and radical institutionalism: see, W. Dugger, *Radical institutionalism*, [Westport, Connecticut: Greenwood Press, 1989]; and there are efforts to reach agreement on some sticking points: see, P. Klein, *Beyond dissent*, [New York: M E Sharper Inc., 1994]. In law, institutionalism is applied to, international institutions: see, A. Burley, *International law and international relations theory: a dual agenda*, *American Journal of International Law*, p. 205; and regional ones as well: see, F. Abbott, *Integration without institutions: the NAFTA mutation of the EC model and the future of the GATT regime*, [1992] *American journal of comparative law*, p. 917. But regional institutions are sometimes compared to national governments where the economic integration develops towards federalism: see, T. Hartley, *The foundations of the European Community: an introduction*, [Oxford: Clarendon Press], and M. Cappelletti, et al, *Integration through the law*, [Berlin: Walter de Gruyter, 1988].

⁶⁹ J. Setear, *An iterative perspective on treaties: a synthesis of international relations theory and international law*, [1996] *Harvard international law journal*, p. 139.

⁷⁰ For a discourse on theories of institutions for economic integration, see R. Keohane, *After Hegemony - Cooperation and Discord in the World Political Economy*. Princeton NJ: Princeton University Press, 1984.

Regimes are necessary for institutions to operate,⁷¹ for institutions function within regimes. Invariably the operation of institutions entails expounding the nature of the regime, and through a resultant jurisprudence contributing to further formation of the regime. A regime for economic integration should arise from a consensus on the desirability of economic integration as the manner of reaching the available benefits, which requires a clear understanding of the nature of integration, the benefits and costs involved, and available safeguards for participating economies. There has, as well, to be complete agreement in advance on the mechanism for dispute resolution, and if this is through Courts, there have to be in place the rules for enforcement of decisions.

In Africa, rather than through judicial means, enforcement of obligations has been a matter of political leaders reaching agreement over disputes through mediation and negotiation.⁷² One explanation for this is that in setting up institutions for co-operation and integration in Africa, judicialisation of disputes is avoided, apparently because the actors on the international scene are invariably the governments, and private persons are not given *standing* to enforce any rights under the instruments. Though enforcement is judicialised, political factors have to be taken into account, in order for the courts to enjoy the backing of political organs and for the integration process to sustain the necessary political will.

The need for taking into account the political factors has to do with the issue of wherefrom institutions derive their authority. Due to their importance, institutions have to be effective and this requires a considerable measure of authority. One view is that community institutions derive their authority from their competence, technical ability and efficiency.⁷³ Those factors indeed contribute to their authority, but above all, institutions will enjoy the required authority if they are seen as the bastion of policies for economic integration, where the importance of the integration is accepted. They should therefore have political support in the region, and it is this which ultimately gives them authority, so as to be taken seriously by national

⁷¹ A "regime" refers to:

... explicit or implicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given area of international relations and which may help to co-ordinate their behaviour.

Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of general rights and obligations. Rules are specific prescriptions and proscriptions regarding behaviour. Decision-making procedures are the prevailing practices for making and implementing collective choices.

See, J. Finlayson, at al, *The GATT and the regulation of trade barriers: regime dynamics and functions*, [1981] 35 International organisation, p. 561 at p. 563.

⁷² G. Ofori-Amaah, *Regional enforcement of international obligations in Africa*, [1987] 47 *Zeitschrift für ausländisches recht und volkerrecht*, p. 80.

⁷³ D. Sidjanski, *Current problems of economic integration, the role of institutions in regional integration among developing countries*. Geneva: UNCTAD, 1974, p. 151.

governments, and to be defended by the people, such defence taking the form of litigation and political censorship. This requires that initially, arguments for the necessity of economic integration for attaining the desired goals, should be won, so that the institutions enjoy popular support and attract the required skills and personnel. It should be understood and agreed by all parties involved, political leaders and the people, that attainment of the aims of economic integration significantly depends on and falls upon the institutions created for the purpose.

There are various models of institutional framework. The choice ranges from bloated bureaucracies firmly established as the underpinning of the project, to rather flexible ministerial meetings or meetings of some select staff, for purposes of consultations over concessions, disputes and policies. Each side has points for and against. Typically, extensive or powerful bureaucracies can save the project from the imponderables of politics and clumsy political deals in rule-formulation and dispute resolution. The attraction of the other end is the simplicity, the cost effectiveness, avoidance of formidable judicialisation of disputes, and ready access, through the political representatives, of interest groups especially the business community, to the decision-making processes. These points in favour of either side are all fairly important, and final choices can therefore be expected to depend on a careful evaluation. Generally, however, it is advisable to have institutions that are visibly firm and are geared to meet the tasks of economic integration.⁷⁴

Economic integration typically results in economic blocs, and these may at some stage be pitted against others in, for instance, negotiations. Leverage belongs to the stronger one. It is institutions, however, which face up to others. The strength of an economic bloc, in practice therefore, refers to that of its institutions. And as the authority of institutions derives from political support for them, the strength of the institution refers to the strength of the members of the bloc. The strength of community institutions refers to authority within the bloc, as well as to authority in interaction with other blocs. In both respects, however, it is the political support that forms the basis of the authority. Africa's quest for a powerful position in the international economic order, can get a boost if there arise strong institutions both at the level of the AEC and the RECs.

In the functioning of community institutions, it is necessary that clear demarcations be set for their jurisdiction and that of national governments: the principle of subsidiarity. Apart from

⁷⁴ F. Haines-Ferrari, *MERCOSUR: a new model of Latin American integration*, [1993] 25 Case western reserve journal of international law, pp. 413-448; and F. Abbott, *Integration without institutions: the NAFTA mutation of the EC model and the future of the GATT regime*, [1992] American journal of comparative law, p. 917.

the basic considerations of certainty this leads to, such demarcation protects the measures to promote the integration process, from protectionist national interests, as the national governments will lack the jurisdiction to tamper with community institutions.⁷⁵ In the case of Africa, jurisdiction of the institutions of the RECs vis-à-vis those of the AEC, will also have to be watched, and the concept of subsidiarity might acquire extra meaning in Africa, in including the principle that regional institutions too have a domain in which AEC institutions may not exercise jurisdiction.

3.1.2 Institutional tasks in economic integration

These are, broadly, the following: conclusion of constitutive instruments - usually treaties, implementation of programmes for the integration, policing that implementation in the sense of over-seeing and enforcing by orders or court action; and dispute resolution which includes judicial and alternative dispute resolution methods. Each of these tasks does not have to be performed by a separate institution, in fact a couple of them may fall under one organ. Whereas some tasks are continuous, others, such as conclusion of treaties, may be a one-off affair, subject of course to the exception that there might be protocols to be concluded, and this might require the original signatories or some organ to which the function is delegated.

One of the continuous tasks is policy formulation, a rather high sounding phenomenon but only referring to what can in advance be set out in constitutive and connected instruments, and then expounded in the implementation of the details by relevant organs. This means that the tasks of the subsequent detailed policy formulation and implementation go hand in hand. In comprehensive treaties, there will usually not subsequently be much scope for enactment of original policy which does not flow on from that already inscribed in the instrument. But in detailed treaties which are to cover a long period of time, there will most probably be need for adjustment to changing circumstances, which presents some prospect for policy formulation subsequently.

The procedure firmly established in Africa, and enshrined in the OAU charter⁷⁶ and the AEC Treaty⁷⁷, is that the Council of Ministers meets shortly before the summits, for the purpose, among others, of preparing instruments and policies for formal approval by Heads of State and Government. It is this procedure which explains why ministerial meetings can quite

⁷⁵ Lean Brown, *Developing countries and regional economic integration*. Westport, Connecticut: Praeger, 1994, p. 133.

⁷⁶ Article XIII:1

satisfy the need for involvement of political organs in the integration process, for Ministers have in effect been responsible for the results of summits. These long-term policies have involved the highest echelons of political leadership as a matter of ceremony. Regarding policy formulation, then, the participation of Heads of State and Government can be necessary only for purposes of the initial constitution of the integration projects.

There can be at least two kinds of policies: the long- and the short-term. The long-term policies will be of the nature that calls forth the very idea of economic integration, or discontinuation of it. They will include also, those that define the category of integration, as between economic and political, or some other form of co-operation, or extent of economic integration. The short-term policies can be formulated at ministerial level, and these would include matters such as the propriety and nature of harmonisation of measures for the integration: finance and monetary, and environmental and labour, policies, and so on. Where, however, there already was provision for those subsequent measures and stages, that would not any more be a matter of policy requiring ministerial intervention. They would be perfectly capable of being implemented by the relevant government departments co-ordinated by the secretariat, with the assistance, by way of provision of details and the know-how, of the relevant technical bodies of the community. Clearly, the bulk of policies in African economic integration will fall in this latter category, needing only the attention of executive secretariats and the technical committees or commissions concerned. These will be engaged in expounding policies already embedded in instruments.

Another continuous task involves attending to the technical aspects of the project, and it is here that the real business of economic integration is done, namely, constitution and implementation. Technical matters come up well before conclusion of instruments, in the initial stages of deciding whether or not economic integration should be considered with a view to its adoption as a strategy or policy. Of course consultation among governments will take place, but it is experts who will decide whether or not the proposal is good economics, or politics, or should be undertaken at all.

It seems to be in issue whether there ought to be a distinction between political and technical processes, regarding economic integration. Arguments for the primacy of politics include the actual power wielded by national governments by which they can force their will over all subordinate organs⁷⁸, and technical organs are typically constituted to be subordinate. The

⁷⁷ Article 12(1)

⁷⁸ A. Leftwich, *On the primacy of politics in development*, in: A. Leftwich (editor), *Democracy and development, theory and practice*, [Cambridge, England: Polity Press, 1996], p. 20.

political organs reserve the final say, and the actual results implemented will fully contain political considerations. Arguments for a separation, refer to the consideration of the technical aspects of the instruments and the process. It is argued that though politics and economics are intertwined, and the decision whether or not to integrate is a political one, and it is political considerations which determine the extent of the supranationality, there should be a period of de-politicised negotiations to arrive at what is technically feasible.⁷⁹ It is argued, similarly, that implementation of the integration agreements should be a technical matter, in order to promote the certainty necessary for commercial transactions.⁸⁰ But the problem with these arguments is that the two aspects - of political and technical considerations - are placed stages apart, whereas they occur contemporaneously. In addition, implementation of long-term policies may require involvement of political leaders at some level, perhaps the ministerial. There is, however, need to check excesses of interference by political considerations in the operation of the integration process, and the important roles to be played by technical institutions.

Regarding the arguments about the position of politics in economic integration, it appears that the meaning of politics has not been given due attention, for it includes basic economic and social processes - aspects which technical bodies ought to constantly keep before their eyes. Courts of law will, in an integration context, for instance, be called upon to adjudicate conflicts over measures ultimately concerned with social and economic processes, or even that directly concern resource allocation. The regime established and continually generated, must take proper account of resource use and distribution of benefits. The whole idea of economic integration is a political process.

Obviously, then, what is at issue must be the involvement of political leaders and how to keep out populist, short-term and many times self-serving interference with the functioning of the integration processes; not politics as such. Political processes can take various forms, and technical bodies ought to be in charge of the implementation, engaging in some of these processes by making political judgments. The policy tasks involved, whether at the constitution or implementation stage, then, require both political and technical processes operating simultaneously. Indeed, technical institutions should preferably be in charge of the implementation process, and expert opinion ought to be the basis of any decisions taken at any stage, but this is not in the sense of a divorce between political and technical processes.

⁷⁹ E. Nwabuzor, *Theory of economic integration, a political approach*, in: E. Edozien and E. Osagie (editors), *The economic integration of West Africa*, [Ibadan, Nigeria: Ibadan University Press, 1982], pp. 26, 36.

⁸⁰ K. Kiplagat, *Dispute recognition and dispute settlement in integration processes: the COMESA experience*, [1995] 15 (3) *Northwestern journal of international law and business*, p. 437 at p. 439.

Where economic integration is to go through various stages over a period of time, both processes apply at each stage. This is where implementation may entail further expert advice and consultations, which spreads the pre-integration economic, social and political considerations right through the stages involved. For the individual stages of economic integration, however, some tasks are quite standard, as for instance stipulated in Article XXIV of GATT - on conditions for customs unions and free trade areas, and Article V of GATS - on those for liberalisation of trade in services.

For free trade areas, rules of origin have to be formulated, and there are alternatives to choose from, reflected in the different formulae adopted in various regional projects. The criteria for qualifying products can be according to classification in the tariff schedules of the importing country. Another method is according to nationality of the producer. The other one is according to the value added. These varieties have advantages and disadvantages which are weighed in reaching a choice. The rules of origin, however, will have been agreed in the initial agreement setting up the project, and in this regard governments will not have any more significant functions to play, especially if there are no deferrals, on assumption of obligations, for some countries or products.

The treaty establishing the AEC does not have provisions on rules of origin, obviously meaning that this matter has been left for the future when it comes to creating free trade areas, and to the RECs. So far the RECs have not adopted uniform rules of origin. There might not be a problem in terms of progress towards the AEC, for the integration of the RECs will occur when full regional customs unions are formed. But if the integration happens before the RECs have adopted uniform rules of origin, there will clearly be the problem of inconsistent rules to be harmonised.

The Understanding on Article XXIV requires that if the customs union or free trade area is to be formed gradually, that interim period should exceed 10 years only in clear exceptional circumstances.⁸¹ There is a question of whether that period applies similarly to projects such as the RECs and AEC which include both free trade areas and customs unions, as well as common markets and economic unions. Perhaps the reasonable construction to be put on it is that the 10 year period refers to achievement of one of the stages set out there, that is, a free trade area or a customs union. It refers to plans and schedules for the interim periods which, typically, within the context of free trade areas and customs unions, entail tariff reduction and inclusion of substantially all the trade within the preference system. If the project includes a

⁸¹ Article 3 of the Understanding on Article XXIV.

free trade area and a subsequent customs union, the free trade area should be achieved within the 10 year period, and thereafter, the customs union should also be attained within another 10 year period. Where, however, what is aimed for goes beyond a customs union, up to political integration for instance, a 10 year period would be far too short according to experience so far. Besides Article XXIV does not include common markets, economic unions nor political integration within its provisions, and therefore the 10 year period does not govern these. It is possible to have separate agreements for each stage. It is then that 10 year periods could make good sense.

In a customs union there have to be negotiations with third countries where the common external tariff to be agreed will result in prejudicial alteration of existing bindings.⁸² That is a mandate for national governments, but the practice is for negotiations to be conducted by members participating in economic integration on the one part as a bloc. Second, governments have to determine the level of tariff. And in a common market, rules for movement of labour and services have to be agreed, which usually concerns setting conditions of establishment. This applies at the conclusion of the agreement for establishment of the common market. Beyond the customs union, however, government becomes a repeat and dominant player, for policies in the monetary and financial areas demand regular review. Where political integration is concerned, governments have to be actively involved on a regular basis.

The fourth category of institutional tasks is policing the implementation. This also relates very closely to implementation, but specifically includes looking out for non-compliance with or breaches of applicable instruments and policies, and enforcing the implementation by orders or court action, or some other mechanism for dispute settlement. Again this means that policing and dispute resolution can be treated together.

Of course upon discovery of non-compliance, all the ordinary options in enforcing obligations are available. One option in Africa has been quiet diplomacy, a prominent defence by African leaders against charges that they do nothing to solve the rampant conflicts. It can be expected that the usual functions of foreign affairs departments and diplomacy generally will continue, and there is no need to specifically legislate for these. The matter of importance is where the infringement of the treaty concerns rights conferred upon private persons and it happens that the government is not keen on taking up cases for its citizens. Also, a government may decide not to enforce its own rights. Such attitudes are to be discouraged, for the sake of achieving

⁸² Article XXIV: 6 of GATT.

the aims of economic integration, and it most probably will be necessary to have some jurisprudence on this matter. This is because in Africa there has been reluctance in international affairs to resort to litigation, and this can be a weakness if the cases require clear rules: expounded and practically applied by judicial organs.

Choice of the policing institution takes into account available remedies, forums or bodies empowered to settle disputes especially as between the judicial and non-judicial, and parties with *standing* or upon whom a right to remedies has been conferred. Possible policing institutions are the secretariat, a commission, a Ministerial Council, or the Assembly of Heads of State and Government.

For the AEC, the Assembly and member states are the bodies responsible for enforcing compliance with the treaty.⁸³ There is a court to hear disputes and matters regarding the treaty, and only the Assembly and member states have *standing* before it.⁸⁴ It can be moved to hear enforcement actions or to give advisory opinions. The condition for enforcement actions by the Assembly, however, is that there must be a confirmation of the breach by an absolute majority vote.⁸⁵ The court can either agree or disagree with the Assembly, and in both cases there is the wastage of duplication. Further, the actions may be instituted against a member state or organ of the community, and the grounds are: failure to honour an obligation, acting beyond limits of authority, or abusing power conferred by the treaty, by a decision of the Assembly or a regulation of the council.⁸⁶

The other option of policing is to confer upon private persons *standing* before the court. In Africa, there will probably be little room for GATT-like consultations for balance of trade concessions, because the level of intra-Africa trade is quite low. It is likely that most disputes or cases of non-compliance will concern putting into place policies, legislation, physical facilities like infrastructure, and generally meeting deadlines for trade liberalisation or graduation into succeeding stages. These are matters where the victims, or persons keen to have them enforced, will be other than member states, perhaps not even the Assembly if political enthusiasm ebbs: they will be the people. But the AEC Treaty does not give them *standing* before the court. Perhaps actions can be started in municipal courts if the integration instruments are applicable law within the country. Differences in interpretations of the instruments, however, could lead to uncertainty in the law. This is one of the reasons that it is

⁸³ Articles 8(2), 8(3)(b)-(c), and 18(3)(a) of AEC Treaty.

⁸⁴ Article 18(1)-(3) of the AEC Treaty. The Council of Ministers can seek an advisory opinion from the Court - Article 18(3)(b).

⁸⁵ Article 18(3)(k) of the AEC Treaty.

usually found necessary to have references to community courts which generate a uniform or harmonising jurisprudence.

Having set out the tasks to be performed, the role of political organs in various integration projects will now be indicated, to assess their necessity and importance.

3.1.3 The role of political organs

On the face of it, it is fairly sensible that political rather than technical organs have the role, of defining the direction that the project for integration is to take, of opening new paths and enlarging the spheres of activity, of settling difficult questions and acting as final arbiter.⁸⁷ The reason for this can be that political organs are charged to act on behalf of the common good, and represent the will of the people, whereas technical organs lack such a mandate and therefore might not take good care of the common good. Further, in order for the project to have utmost political impetus, and attract the serious attention of governments, it is necessary that Heads of State and Government be in charge. In addition, this helps expedite decision-making, for they would otherwise have to be consulted anyway.

The scheme for African economic integration gives tremendous prominence to political leaders in the following manner. For the AEC and the RECs, the Authority or Assembly of Heads of State and Government takes the decisions, other organs merely making recommendations to it. Abuse of its duties, by inaction or wantonness through refusal to cooperate, leads to failure of or shortcomings in the integration process. It is not entirely correct that involvement of Heads of State and Government has always generated political impetus, for there is lack of evidence to that effect. The evidence held out by the history of economic integration in Africa, shows how they have defaulted on obligations, failed to meet deadlines, and been responsible for non-performance. Their concern has been to see to unilateral, national gains within the context of political responsibility at home in the short-term, without being prepared to take the long-term view of regional gains from economic integration. This has pitted unilateralism against regionalism.

The major argument for their role in dispute resolution is that political solutions are reached. These are preferred to judicial remedies which make winners and losers, yet political leaders

⁸⁶ Id.

⁸⁷ Dusan Sidjanski, *Current problems of economic integration, the role of institutions in regional integration among developing countries*, [Geneva: UNCTAD, 1974], p. 145.

stake their reputations in these disputes. Because political settlements have been resorted to in dispute resolution, a rules-based order has not emerged. Instead a power-based one operates, where the party with greater leverage carries the day. A power-based order, a result of having disputes subjected to political settlements, thus puts the weaker party in a precarious position. It does not produce a regime as such, and certainty is totally absent from the administration of the system. And it does not lead to creation of a definitive set of rules or a jurisprudence. What does is a rules-based order, that is, one where the rules are applied impartially by an independent body, usually a judicial one.

The case for a rules-based order has been made adequately. It features in the need for certainty, transparency, fairness and a constitutional order for international economic transactions.⁸⁸ Though the function of diplomacy is never supplanted by operation of a rules-based order, diplomacy and a power-based regime are inadequate where private persons wish to enforce an obligation or right under a treaty against their state and community institutions, or even against foreign governments, where their government does not always take up the cases. This suggests that private persons should have a right of audience in respect of these matters in municipal and community courts. Effectiveness of the community order depends largely on such a framework.

So, for political organs, it can be maintained that they initiate and constitute the integration process, and may boost the implementation stage through active involvement and keeping it high on the agenda of governments. The problem is how to ensure that the political organs will not instead sabotage the implementation through inaction, or a breakdown of comity between the member governments, once they have been put in the position where they have to approve all implementation measures and therefore where the implementation depends entirely on them. It seems proper that technical organs instead take charge of the implementation, leaving political organs with the sanction of employers, but subject to the ordinary protection afforded to employees of a fair hearing before an impartial body, in the event of allegations. Technical organs should be accountable to the overall political organs, only in order to ensure that technical organs do not in turn sabotage the process. But it is possible that political organs can fail to wield any real sanctions. It therefore remains ultimately upon the people to appropriate the integration process. It must be part of the democratic agenda of member states, and in this way, the political momentum will originate ultimately from a people interested and actively engaged in the integration process.

3.2 The structure of organs for the RECs

The aim in this section is to set out the structure of organs created for the RECs, and indicate whether the treaties adequately address some major obstacles to economic integration in Africa relating to the structures for the RECs. The model adopted in African integration invariably puts the Assembly of Heads of State and Government at the helm, with ultimate responsibility for the projects. They approve stages and policies in implementation of the treaties, usually on recommendation from a Ministerial Council. Subordinate technical organs participate in proposing policies to the Ministerial Council. Regarding the obstacles arising from political factors and IFIs, much may depend on whether a democratic and panafrikan political culture is evolving within the RECs⁸⁹, either under or independently of instruments setting up the RECs⁹⁰; and the extent to which member states of the REC are part of that culture and to which there are institutions to sustain or promote it, is relevant in considering how the RECs lead to the AEC. The manner in which other obstacles, for instance, of sharing benefits and costs and of the legal framework, are dealt with, can be discerned from the relevant instruments.⁹¹

3.2.1 Central Africa

⁸⁸ E-U Petersmann, *Constitutional functions and constitutional problems of international economic law*, [Fribourg: University Press, 1991].

⁸⁹ Though, since the collapse of the USSR following the changes of *perestroika* and *glasnot* introduced by Mr Gorbachev then president [calling for realism and openness in facing national problems, and leading to widespread criticism of the communist system, and subsequent adoption of market reforms, with knock-on effects throughout communist Eastern Europe], and the related end of the cold war when the USA emerged as the sole super power, it has been widely believed that a democratic wind of change is blowing across Africa, and indeed many dictators were either forced or voted out of power, for instance, Mr Kenneth Kaunda of Zambia, Mr Milton Obote and Gen Tito Okello of Uganda [1985 and '86 respectively], Mr Mobutu of Zaire [renamed the Congo Democratic Republic] [July 1997], etc, there are in various countries very distressing circumstances, like of the elected government being denied assumption of power in Nigeria when the election result was annulled by the incumbent military government [1996] and Mr Abiola, the winner, unlawfully thrown into jail, or in Sierra Leone where the elected government was toppled on 25 May 1997, the coup leaders declining to step aside in the face of a unanimous condemnation by African leaders at the 33rd ordinary session of the OAU being held at that time, in Harare in Zimbabwe, and by the international community. One cannot therefore take it for granted that democracy has won the argument in Africa. Rather there are pockets of fledgling democracies, which need mutual support, and which are capable of positively influencing events in other African countries in identifying with and actively supporting democratic forces confronting dictators, while they form core groups of progressive democracies which can work towards a united Africa.

⁹⁰ At the moment, however, the treaties setting up the RECs have clear provisions for democratic governance: Article 4(g)-(j) of the ECOWAS Treaty, Article 4(c) of the SADC Treaty, and Article 6(e)-(h) of the COMESA Treaty; but the one for ECCAS stops at inter-state relations which are to be governed by good neighbourliness, non-interference and the rule of law, etc: Article 3 of the ECCAS Treaty.

⁹¹ Mere provisions are not the answer. They have to be implemented, and herein lies the test of whether the provisions carry any weight with the member states.

In the ECCAS Treaty, chapter three provides for the organs. A Conference of Heads of State and Government is established⁹² as the supreme organ of the community⁹³. The Conference is responsible for implementing the aims of the treaty⁹⁴, for instance through defining the basic policy and general attitudes of the community, and overseeing its operation⁹⁵. A Council of Ministers is established⁹⁶, constituted by the Ministers for economic development or any other minister appointed for the purpose by each member state⁹⁷. Its powers include responsibility for the operation and development of the community, by: formulating recommendations for the Conference on any action aimed at achieving the aims of the community in the context of the general policy and basic attitudes defined and ordered by the Conference, and guiding activities of other subordinate institutions of the community.⁹⁸

Apart from the secretariat, two technical bodies are created: the Consultative Commission⁹⁹ and Specialised Technical Committees¹⁰⁰. The secretariat performs quite technical and specialised tasks, for its powers include: preparing and carrying out decisions and directives, and regulations; promoting development programmes and community projects; and carrying out studies for achieving aims of the community and making proposals¹⁰¹. These are clearly executive functions, and this secretariat has a far more significant role than that ordinarily associated with secretariats in African economic integration. In practical terms, these provisions empower the secretariat to commission research, extract draft decisions and regulations, put them before the Council to be forwarded to the Conference, and then proceed to implement them upon approval by the Conference. In addition the Secretariat can play the public relations role to promote development programmes and community projects, following up compliance by national governments.

Technical Committees are to be established according to the various sectors and aspects of the economic integration set out in the protocols, and are to act according to the duties assigned them.¹⁰² It is expected that their work, like that ordinarily performed by technical committees, will entail application of specialised skills to community aspirations with a view to making

⁹² Article 8(1).

⁹³ Article 8(2).

⁹⁴ Article 9(1).

⁹⁵ Article 9(2).

⁹⁶ Article 12(1).

⁹⁷ Article 12(2).

⁹⁸ Article 13.

⁹⁹ Article 23.

¹⁰⁰ Article 26.

¹⁰¹ Article 20(2).

¹⁰² Article 26(1) and (2).

proposals about the suitability and feasibility, and the manner of proceeding with, community projects and goals. A bridge is created between these committees and the Council which naturally should receive the work of the technical commissions. A Consultative Commission, composed of experts appointed by member states, is established¹⁰³, and its powers include responsibility for studying or investigating, under the Council's responsibility, questions submitted to it by other community institutions¹⁰⁴. This means, as provided by paragraph (2) thereof, that it assists the council in the performance of its duties, and that it studies reports of Specialised Technical Committees and makes recommendations to the Council.

Perhaps this extra stage, of consideration by the Consultative Commission, affords a second opinion on the experts' work, before recommendations are formulated for approval by the Conference, and can be a positive step. The Consultative Commission deals mostly with reports of the Specialised Technical Committees, and the Conference and Council deal with matters initiated in these committees. But there can be cases where the Commission can be called upon to render expert advice to Council, as where there is no responsible technical committee. As it can hardly be expected that this Commission will have persons who are jacks of all trades, which would otherwise be a disservice in terms of the quality of the expertise applied in their functioning, the experts for each meeting or session should possess the relevant skills, without continuity in terms of a permanent staff.

The institutional framework set by the treaty shows that matters will reach the Conference as the last stage for purposes of the merely formal and procedural step of adopting them in the form of decisions or directives, for the Conference is to act by decisions and directives. This last stage does not alter in any substantive or substantial manner the nature of the recommendations from the Ministerial Council. The Conference has the role of defining the general policy and overseeing the operation of the community, but no doubt, this comes about in the manner of recommendations from the Council, and therefore from the Commission and the Committees; for since the general policy decision for economic integration, or, precisely, building a common market and then an economic union, has been taken and embedded in a treaty, what remains to be done by way of policy generation is implementation of that general policy through project formulation and execution, which is usually a matter requiring expert knowledge - the very reason that Committees are provided for.

¹⁰³ Article 23.

¹⁰⁴ Article 24.

3.2.2 Southern Africa

In the SADC Treaty, the Summit of Heads of State and Government is established as the supreme making institution.¹⁰⁵ The summit is responsible for the overall policy direction and control of the functions of the community, and for adopting legal instruments for implementing the treaty¹⁰⁶. A Council of Ministers, consisting of one minister from each member state, is established.¹⁰⁷ The role of the Council includes, responsibility for the functioning and development of the community, overseeing implementation of policies of the community and proper execution of its programmes, advising the summit on matters of overall policy, on the harmonious and efficient functioning of the community.¹⁰⁸

A number of technical institutions are created. Commissions are created, to guide and co-ordinate co-operation and integration policies and programmes in designated sectoral areas, working closely with the Secretariat and being responsible and reporting to the Council.¹⁰⁹ Protocols are to provide the further particulars of their constitution. A Standing Committee of Officials composed of one permanent secretary or the equivalent officer per member state, preferably from the ministry of economic planning or finance, is also provided for.¹¹⁰ This is the technical advisory committee to the Council. In contrast with the ECCAS Treaty, it is specified that the standing committee is to be composed of representatives from the respective ministries of economic planning or finance. This does provide some certainty and continuity about the membership of the committee, but the areas of co-operation and integration deal with such complex matters that economics by itself is certainly insufficient, and it must be presumed that specification of those ministries means that the envisaged skills are economic or financial. In the case of central Africa, there is a possibility of flexibility according to the matter under consideration.

The secretariat is established, with consultational and coordinational functions¹¹¹, and is the chief executive institution of the community¹¹², being responsible for: strategic planning and management of programmes of the community; and co-ordination and harmonisation of the policies, strategies and policies of member states. The executive secretary has powers of

¹⁰⁵ Articles 9(1)(a) and 10(1).

¹⁰⁶ Article 10(3).

¹⁰⁷ Article 11(1).

¹⁰⁸ Article 11(2).

¹⁰⁹ Article 12.

¹¹⁰ Article 13.

¹¹¹ Articles 14-15.

¹¹² Article 14(1).

consultation and co-ordination with governments and institutions of member states, and of undertaking measures aimed at promoting objectives of the community and enhancing its performance.¹¹³ The secretary is to liaise closely with the commission and other institutions, and guide, support and monitor the performance of the community in the various sectors to ensure conformity and harmony with agreed policies, strategies, and projects.

These functions entail more than just promoting integration policies. They are indeed executive, and this is a radical break with the traditional policy of relegating secretariats to administrative offices. It would appear that some traditionally ministerial functions such as management and co-ordination of policies, have been given to the secretariat. Indeed the Ministerial Council in this community performs the traditionally presidential functions, in effect policy.¹¹⁴ Rather than making recommendations, the Ministerial Council "advises" the summit on overall policy and efficient and harmonious functioning of the community.¹¹⁵ This is a more involved engagement with the Heads of State and Government. No wonder that the summit's functions now are to "control" the functions of the community¹¹⁶, implying a merely restraining influence in the event of exigencies; and to "adopt" legal instruments for implementing the treaty¹¹⁷. Perhaps this envisages the mode of implementation of the treaty by means of future protocols, throughout the progressive stages since the major constitutive instrument, the treaty, is already in force. There is a problem caused by absence of provision for law-making powers for any other body, not even the Ministerial Council. Perhaps, this is the manner in which the summit retains control over the integration process, for in this way it retains approval powers over any policies it will be sought to give the force of law within the community.

The difference between this treaty and the ECCAS Treaty, relate to provisions for the roles of the Ministerial Council and the Secretariat, and the composition of the Standing Committee of officials whose equivalent in Central Africa is the Consultative Commission. In addition the role of Heads of State and Government varies slightly, but it is not obvious where they play a larger role. In southern Africa, they adopt the instruments, whereas in Central Africa the Ministerial Council too prepares instruments by way of regulations. But in Central Africa, the Ministerial Council makes only recommendations to the Conference, whereas in southern Africa it advises the Summit. The Summit plays a rather humble role compared to the

¹¹³ Article 15.

¹¹⁴ Article 11(2)(d)-(f).

¹¹⁵ Article 11(2)(c).

¹¹⁶ Article 10(2).

¹¹⁷ Article 10(3).

Conference, for it can hardly be expected that it will decline to adopt instruments the Ministerial Council strongly advises it to. Besides, the tone of the functioning of the SADC Treaty, for instance, in its drafting, in the role of the secretariat - strategic planning and management of SADC programmes, and co-ordination and harmonisation of the policies and strategies of member states, seems to suggest that the process in southern Africa will be less legalistic, and policies rather than the form they appear in, will receive the regard of concerned parties. Overall, though, similar organs are established: one of Heads of State and Government, a Ministerial Council, a secretariat, unspecific technical committees and one advisory to the Ministerial Council.

3.2.3 West Africa

The ECOWAS Treaty provides for the Authority, comprising the Heads of State and Government, which is responsible for the general direction and control of the community. It is empowered to take all measures to ensure the progressive development and the realisation of the objectives of the community by: determining the general policy and major guidelines, and giving directives, harmonising and co-ordinating the economic, scientific, technical, cultural and social policies of member states; overseeing the functioning of the community institutions, and following up the implementation of community objectives, among others.¹¹⁸ The role of harmonising and co-ordinating policies of member states is in SADC performed by the secretariat.¹¹⁹

A Council of Ministers is established comprising, from each member state, the minister in charge of ECOWAS affairs and any other minister.¹²⁰ The Council is responsible for the functioning and development of the community, by making recommendations to the Authority¹²¹, approving the work programmes and budgets of the community¹²², etc, and acts by regulations¹²³. The Council is assisted by an executive secretary¹²⁴ and technical commissions¹²⁵. The functions of the commissions include preparing community projects and programmes which they are to forward to the Council through the Secretary, ensuring harmonisation and co-ordination of projects and programmes of the community, and

¹¹⁸ Article 7(1).

¹¹⁹ Article 14(1)(f).

¹²⁰ Article 10.

¹²¹ Article 10(3)(a).

¹²² Article 10(3)(g).

¹²³ Article 12(1).

¹²⁴ Article 17.

monitoring and facilitating application of treaty provisions.¹²⁶ The functions of the Executive Secretary include execution of decisions of the Authority and application of the regulations of the Council, promotion of community development programmes, convening sectoral ministerial meetings, preparation of draft budgets, and submission of proposals and preparation of studies for the efficient and harmonious functioning and development of the community.¹²⁷ There is provision also for a community parliament¹²⁸, an economic and social council¹²⁹, a Court¹³⁰, and an arbitration tribunal¹³¹.

3.2.4 Eastern Africa

The COMESA Treaty provides for the Authority composed of Heads of State and Government, as the supreme policy organ responsible for the general policy and direction, and controlling the performance of the executive functions of the common market and achievement of its aims and objectives¹³²; as well as the Council of Ministers, consisting of Ministers designated by each member state¹³³. The functions of the Council include, monitoring and keeping under constant review, and ensuring the proper functioning and development of the common market, making recommendations to the Authority on matters of policy, giving directions to subordinate organs, considering measures to be taken by member states for promoting the community aims, making recommendations to the Authority on designation of least developed countries of the community, and designating economically depressed areas of the community.¹³⁴ These last two functions are not expressly included in the list of functions of the Ministerial Council.

The treaty provides for an elaborate system of technical organs. There is established a Committee of Governors of Central Banks, whose functions include development of programmes and action plans in the field of finance and monetary co-operation, monitoring and keeping under review those programmes and action plans, considering reports from the Technical Committee on financial and monetary affairs, and making recommendations and

¹²⁵ Article 22.

¹²⁶ Article 23.

¹²⁷ Article 19.

¹²⁸ Article 13.

¹²⁹ Article 14.

¹³⁰ Article 15.

¹³¹ Article 16.

¹³² Article 8.

¹³³ Article 9(1).

¹³⁴ Article 9(2).

reports to the Council on the implementation of financial and monetary co-operation.¹³⁵ For matters other than the monetary and financial, there is established an Intergovernmental Committee, composed of permanent or principal secretaries, whose functions include, development of programmes and action plans in all sectors of co-operation except that of finance and monetary affairs; and monitoring, reviewing and ensuring the proper functioning of the common market.¹³⁶ This is a good way to cater for political considerations, for technical personnel at the level of bank governors and permanent secretaries, will likely go about integration processes including both technical and political considerations.

There are also technical committees¹³⁷, whose functions include responsibility for preparation of a comprehensive implementation programme, and monitoring and keeping under constant review the implementation of co-operation programmes with respect to each sector¹³⁸. The role of the Committee of Governors of Central Banks and the Intergovernmental Committee, it would appear, is different in that these organs implement the programmes drawn by technical committees, and consider reports from the technical committees on that implementation. Thus the actual responsibility for implementing the integration falls upon the governors and permanent or principal secretaries. Indeed these are the senior civil servants of government, and take responsibility for the technical matters of the ministries. Their part in the process of integration can be expected to contain excesses of political expediencies. If, however, they are in practice restricted to making recommendations to the Ministerial Council, and meeting to draft for that council its recommendations to the authority, which can in fact happen, they will certainly lack the confidence and responsibility to forge ahead with the process, awaiting the long process of final approval by the authority, of minute matters, before beginning to operate; but the treaty provisions clearly provide otherwise. The intention seems to be to remove the Authority from details of the implementation.

There are several enforcement mechanisms. In addition to the usual functions of an executive secretariat, the Secretary General has a policing role¹³⁹, with power to consult with an errant government, and cause the matter to be referred first to the Bureau of the Ministerial Council and then to the Council or the Court. Such an enforcement measure is quite unprecedented in Africa, and the real test of efficacy will be in the sanctions to secure compliance with orders finally made. Second, a member state can commence an action against another member state

¹³⁵ Article 13.

¹³⁶ Article 14.

¹³⁷ Article 15-16.

¹³⁸ Article 16(a).

¹³⁹ Articles 19(8)(f) and (h), and 25.

or the council.¹⁴⁰ Third, legal and natural persons have *standing* before the Court to start actions against the Council or a member state, but the proviso is that for actions against a member state, local remedies should be exhausted first.¹⁴¹ This proviso has led to a conclusion that legal and natural persons do not have any *standing* before the Court.¹⁴² The argument is that as the Court does not exercise appellate jurisdiction in respect of actions commenced in municipal Courts, and as actions against member states must start in municipal Courts, decisions of the municipal Courts will in effect bar access to the common market Court. But an action in the common market Court against a member state is clearly permitted under Article 26, and reference to appellate jurisdiction is uncalled for, save that the action will be premature before completion of local remedies.

4. OBSTACLES IN THE INTEGRATION INSTRUMENTS

4.1 Regional customs unions and common markets – ECOWAS as an illustration

All the RECs aim for elimination of barriers to trade followed by adoption of common external tariffs¹⁴³, and for freedom of movement of capital, services, and persons¹⁴⁴ and for common policies in several sectors¹⁴⁵ largely reflecting those spelt out in the LPA and AEC Treaty, especially food and agriculture, industry, transport and communications, tourism, science and technology, energy and natural and human resources, and money and finance. These are the usual attributes of customs unions and common markets. The treaties set time frames for achieving the objectives. For instance, the ECCAS Treaty, concluded in 1983, provided for achieving a customs union within 12 years in three four-year stages.¹⁴⁶ The COMESA Treaty aims for a customs union within 10 years of its entry into force, that is, of 1994.¹⁴⁷ These time frames have been missed. The time frames set under the RECs, and the entire structure of the organs for regional co-operation and integration, have some disturbing implications for the process of integration set out in the AEC Treaty.

¹⁴⁰ Article 24.

¹⁴¹ Article 26.

¹⁴² Kenneth Kiplagat, *Legal Status Of Integration Treaties And The Enforcement Of Treaty Obligations: A Look At The COMESA Process*, [1995] 23(2) Denver Journal of International Law and Policy, p. 259.

¹⁴³ But the moment in SADC only a FTA is aimed for - Art 3 of the Trade Protocol.

¹⁴⁴ Articles, 4(2)(a)-(e), 27, 29, 40, 41 and 42 of ECCAS Treaty, 3(2)(d), 35, 37, 53, 54, and 59 of 1993 ECOWAS Treaty, and 4(1)(a), 45, 47, 81 and 164 of COMESA Treaty.

¹⁴⁵ Articles, 4 of ECCAS Treaty, 21 of SADC Treaty, 3(2)(a) of 1993 ECOWAS Treaty, and 4 of COMESA Treaty.

¹⁴⁶ Article 6.

¹⁴⁷ Article 45. The COMESA Treaty aims also for transition from the common market into the Economic Community for Eastern and Southern Africa, at a date to be determined by the Authority - Article 177.

ECOWAS was set up by a treaty concluded on 28 May 1975 at Lagos¹⁴⁸, but re-established by another concluded at Cotonou on 24 July 1993 as the revised treaty of ECOWAS¹⁴⁹. The 1975 Treaty created a community to “promote co-operation and development in all fields of economic activity ... for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic stability, of fostering closer relations among its members and of contributing to the progress and development of the African continent”.¹⁵⁰ Implementation of this objective included, elimination of tariff and NTBs on imports and exports¹⁵¹, adoption of a common external tariff¹⁵², abolition of barriers to free movement of persons, services and capital¹⁵³, and adoption of harmonised policies and common projects in various sectors such as agriculture, transport and communications, energy, industry, and money and finance¹⁵⁴. Therefore, though unstated, the 1975 Treaty set out to create a customs union, and gradually, a common market and perhaps an economic union.¹⁵⁵ These aims and sectoral coverage were recast under the 1993 Treaty making them more systematic and detailed, putting a different gloss on the treaty.¹⁵⁶

The 1993 Treaty clearly specifies that “the aims of the Community are to promote co-operation and integration leading to the establishment of an economic community ...”¹⁵⁷, which entails “harmonisation and co-ordination of national policies and promotion of integration programmes, projects and activities¹⁵⁸ ..., establishment of a common market¹⁵⁹, [and] establishment of an economic union¹⁶⁰”. The treaty specifies activities for each of those stages, following the now standard characterisation of the stages of economic integration – free trade area, customs union, common market, and economic union.¹⁶¹ Thus to form the common market, tariff and NTBs are to be abolished to create a FTA¹⁶², a common external tariff is to be adopted¹⁶³, and barriers removed to freedom of movement of persons, goods, services and capital, and to the right of residence and

¹⁴⁸ 14 ILM 1200 [1975]

¹⁴⁹ ECOWAS Doc.ECW/LEX/IV/2A/Rev.3. See also 8 RADIC 189 [1996].

¹⁵⁰ Article 1(1) and 2(1).

¹⁵¹ Article 2(2)(a) and (b).

¹⁵² Article 2(2)(c).

¹⁵³ Article 2(2)(d)

¹⁵⁴ Article 2(2)(e)-(h).

¹⁵⁵ There are further and relatively detailed provisions on common policies and projects, in Articles 33-49.

¹⁵⁶ Even in matters such as the titles of the Heads of State and Government, the treaties are quite different, the 1975 one reflecting a region rife with military governments, whereas the situation was quite different in 1993. But the likelihood of coup d’etats seems to be ever present after a short period of optimism at the beginning of the 1990s.

¹⁵⁷ Article 3(1).

¹⁵⁸ Article 3(2)(a).

¹⁵⁹ Article 3(2)(d).

¹⁶⁰ Article 3(2)(e).

¹⁶¹ Bela Balassa, *The theory of economic integration*, [Richard D Irwin, 1961], pp. 1-3.

¹⁶² Sub-paragraph (i).

establishment¹⁶⁴. For the economic union, common policies in the economic, financial, social and cultural sectors are to be adopted, and a monetary union established.¹⁶⁵ Other related matters are included in the activities for integration, such as, creation of an enabling legal regime, harmonisation of investment codes into a community code and of standards and measures, facilitation of information flow among rural populations and women and youth organisations, and “socio-professional organisations such as associations of the media, business men and women, workers, and trade unions”.¹⁶⁶

The legal aspects of an enabling regime and harmonised investment codes, together with the overall regime for the common market, if successfully implemented can provide an integrated legal framework that continually generates a tangible regional market supporting long-term commercial decisions made in view of the regional income, supply of skills and resources, and of legal certainty and stability. A functional technical committee devoted to the task of putting forward the necessary instruments, greatly improves the prospects for achieving the economic union. It is to be hoped that the technical commission on Political, Judicial and Legal Affairs, Regional Security and Immigration¹⁶⁷, and charged with monitoring and facilitating application of the 1993 Treaty and the protocols¹⁶⁸, will be given the political recognition and backing to play its proper role in the integration process. The involvement of civil society envisaged and given prominence among the aims and objectives, suggests a willingness by the political leaders to actively involve the public. An active and *vigilante* public could prod the leaders on, and generate a political momentum translating into active community organs duly performing their designated roles.

But within the framework of the AEC Treaty¹⁶⁹, ECOWAS as the building pillar or bloc for the West Africa region¹⁷⁰, is supposed to become a customs union by the year 2017 and join the other RECs to form a continental customs union within 25 years from 1994 when the AEC Treaty entered

¹⁶³ Sub-paragraph (ii).

¹⁶⁴ Sub-paragraph (iii).

¹⁶⁵ Paragraph (e).

¹⁶⁶ Article 3(2)(h), (i), (j) and (l)

¹⁶⁷ Article 22(1)(f).

¹⁶⁸ Article 22(2)(c).

¹⁶⁹ Article 6 of AEC Treaty.

¹⁷⁰ Article 2(1) of the 1993 Treaty, provides that ECOWAS is ultimately the sole REC for West Africa for the purposes of building the AEC. At the 33rd ordinary session of the OAU, the Assembly requested members of each region to identify the economic community to serve as the regional pillar for purposes of the AEC: see Article 6 of *the Decision on the AEC* - ref. AHG/AEC/Dec.1 (XXXIII) Rev.1. 9 RADIC 477 [1997] at pp. 488-489. in view of Article 2(1) of the 1993 Treaty, ECOWAS may be considered duly constituted, and to be recognised under the AEC Treaty, as the regional pillar. But given the aims for total integration and the closer ties between some Sub-RECs, such as, the Franco-phone Economic and Monetary Union of West Africa comprising Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo; and the Mano River Union comprising Guinea, Liberia and Sierra Leone, it seems that this ECOWAS position is in practice being challenged despite the limited membership of the rival Sub-RECs: Please see *West Africa* magazine, 14-20 July 1997 p. 1125. The important thing, though, is recognition by the AEC organs for purposes of the AEC, which ECOWAS has already secured.

into force, a continental customs union by the year 2019¹⁷¹. This is not provided for in the stages set out in the 1993 Treaty.¹⁷² The scheme is that a customs union is to be established within 10 years from 1 January 1990, the date the ECOWAS Trade Liberalisation Scheme, adopted in 1983 by the ECOWAS Heads of State and Government under the 1975 Treaty, was launched¹⁷³: a customs union by the year 2000, and the economic union within the succeeding 5 years¹⁷⁴. On the face of it, therefore, the two schemes are at variance, for not conforming to the same time frames. But it can be argued that the scheme under the AEC Treaty does not prohibit faster progress at the regional level. Also, faster progress at the regional level does not constitute a legal barrier to complying at the designated time with the AEC time frames. Thus ECOWAS may attain the status of a common market, followed by that of an economic union well before the deadlines set under the AEC Treaty, and in time accordingly comply with the transitions provided for. Thus ECOWAS, though an economic union, could join a continental customs union when required under the AEC Treaty, while proceeding faster with the regional projects and activities under the 1993 Treaty.

Alternatively, as the time frames under the AEC Treaty are maximum periods, it could be that in practice all the RECs can proceed well ahead of those deadlines, perhaps being ready for a continental customs union ahead of the AEC schedule. Grounds for such a prospect would include, a process actually harmonised at the continental level with all the RECs following a common or coordinated trade liberalisation timetable. Such a timetable is still absent in Africa, and according to the AEC Treaty which provides for it, it is to be drafted during the second stage of forming the AEC¹⁷⁵, which is set to begin in the year 1999 after the first stage - establishing and strengthening the RECs - ends. Another ground could be evidence of a charted, concrete, and on-schedule progress towards regional customs unions. However, formation of a regional customs union can give rise to strong regional protectionism against other RECs, the reluctance to eliminate barriers to trade with other RECs deriving legal support from the time-frames under the AEC Treaty itself if the union is formed before the target year 2017 and if the AEC Assembly has not endorsed completion of the prior three stages supposed to lead to the continental customs union and approved the transitions.¹⁷⁶ The AEC Secretariat ought to collate progress of the various RECs, in the absence of a functioning committee on RECs¹⁷⁷, so it can be determined whether to move on to succeeding stages well ahead of the AEC stages and the relevant approvals made by the Assembly.

¹⁷¹ Article 6(2)(d) of the AEC Treaty.

¹⁷² Article 3(2) of the 1993 Treaty.

¹⁷³ Articles 35 and 54 of the 1993 Treaty.

¹⁷⁴ Articles 54 and 55 of the 1993 Treaty.

¹⁷⁵ Article 6(2)(b)(i) of the AEC Treaty.

¹⁷⁶ Article 6(4) of the AEC Treaty.

¹⁷⁷ Article 25(1) of the AEC Treaty creating technical committees does not establish one on the RECs. Paragraph (2) thereof, though, provides that the Assembly can restructure the committees or establish others, and it is to be hoped it will

The arguments thus far, for the position that formation of ECOWAS can proceed under the 1993 Treaty without in substance detracting from the AEC framework, could be resorted to, for practical considerations perhaps of political convenience, if RECs remain unattended to by the organs of the AEC. But strictly speaking, the 1993 Treaty detracts from the AEC framework, in so far as the elimination of tariff and NTBs within ECOWAS is not in accordance with the trade liberalisation timetable provided for under the AEC Treaty.¹⁷⁸ The AEC Treaty specifically provides that the trade liberalisation to form regional FTAs as a prelude to adoption of the common external tariff to form the regional customs union, is “through the observance of the time-table for the gradual removal of tariff barriers and non-tariff barriers to [regional trade]”.¹⁷⁹ The timetable is to be adopted during the second stage, in respect of “regional and intra-Community trade and for the gradual harmonisation of customs duties in relation to third states”.¹⁸⁰ In the absence of such a timetable, and without reference to it at all in the 1993 Treaty, it cannot be that trade liberalisation under the 1993 Treaty is in accordance with that timetable.¹⁸¹ Indeed, the ECOWAS treaties were adopted prior to the entry into force of the AEC Treaty, that is, before 1994. In the preamble to the 1993 Treaty, reference is made to the LPA and the target there to form an AEC by the year 2000, and then to the AEC Treaty which sets the different date of the year 2028 or 2030, that is, the period of 34 or a maximum of 40 years from the year of entry into force of 1994.¹⁸² Perhaps reference to the AEC Treaty was a mere formality without belief in its efficacy, and without regard to the framework set out there or the trade liberalisation time-table provided for. Such a trade liberalisation timetable covering all the RECs would facilitate harmonisation of the regional activities.

Similarly, under the 1993 Treaty, the economic union is to be formed within 15 years from 1990, that is, by the year 2005¹⁸³, whereas under the AEC Treaty, there is no provision for a regional economic union, not even a regional common market. Rather there is provision for a continental common market, to be formed within 29 years from 1994, that is, by the year

be used as the case for a committee on RECs seems abundantly clear, unless the committees established under the Protocol on RECs begin and continue to effectively function.

¹⁷⁸ Article 6(2)(b) and (c) of the AEC Treaty.

¹⁷⁹ Article 6(2)(c) of the AEC Treaty.

¹⁸⁰ Article 6(2)(b)(i) of the AEC Treaty.

¹⁸¹ If the definition of “intra-Community trade System” in Article 1 of the AEC Treaty is adopted, which refers to Article 33(1) dealing with trade within the individual RECs, intra-community trade may be construed to refer to intra-REC trade. With such an interpretation, the trade liberalisation time-table would refer to those adopted by the various RECs, and the scheme in Article 3(2) of the 1993 Treaty would amount to one. But the interpretation in Article 1 of the AEC Treaty, is clearly modified by the provision in Article 6(2)(b)(i) which refers to regional and intra-community trade, thus drawing a distinction between intra-REC trade and intra-AEC trade respectively; and further, reference is made to third states, that is, to non-AEC members. Therefore, the trade liberalisation time-table envisaged is one for all the RECs in forming FTAs.

¹⁸² Article 6(1) and (5) of the AEC Treaty.

¹⁸³ Article 54(1) of the 1993 Treaty.

2023.¹⁸⁴ Absence in the AEC Treaty of provision for a regional economic union, means that the scheme under the 1993 Treaty for creating a regional economic union, is not pursuant to the AEC Treaty. With a developed regional system of sector co-operation by the time of establishment of the economic union, formation of the African Common Market and economic union will likely be problematic, as the mechanisms for sectoral co-operation under the various RECs will likely be different. There are practical considerations as well. The sectoral co-operation will likely entail massive non-AEC investment on a long-term basis, most probably with stringent conditions attached regarding matters of management, purchase of inputs, marketing of products, intellectual property, and so on. The conflicts inherent in this scenario can ruin the entire scheme of the AEC for sectoral co-operation if the investors disagree with the harmonisation and co-ordination required under the AEC framework. The AEC technical committees on the sectors, must get actively involved at once with the RECs, so that the process of co-ordination and harmonisation begins straight away. Under the AEC Treaty¹⁸⁵ and ECOWAS¹⁸⁶, the process of sectoral integration is required to begin well before the stages set for formation of the common market and the economic union respectively. Fortunately most of the sectors covered are common to all RECs and the AEC, especially food and agriculture, industry, science and technology, transport and communications, energy, education, money and finance, tourism, and natural resources and the environment.

4.2 The differing legal framework for RECs

The RECs are each proceeding under a legal framework in many ways distinct and different, in respect of details such as rules of origin and criteria for preferential treatment under the community regime¹⁸⁷, product coverage for trade liberalisation¹⁸⁸, sources of funding community operations and organs¹⁸⁹, and powers and functions of community organs established. The RECs will be able to integrate to form a continental customs union and common market, if a common or harmonised

¹⁸⁴ Article 6(2)(e) of the AEC Treaty.

¹⁸⁵ Article 6(2)(b)(ii) of the AEC Treaty.

¹⁸⁶ Articles 25-53 of the 1993 Treaty.

¹⁸⁷ Rule 2 of the ECCAS protocol on Rules of Origin, annexed to the treaty, in addition to the usual methods of place of consignment and classification, substantial transformation, and equity holding, includes a power for the Council of Ministers to draw a list of products deemed to originate in a member state on account of their importance for the development of the member states: r. 2(1)(b)(iv).

¹⁸⁸ The lists are typically drawn subsequent to conclusion of treaties, whereas they should be an integral part of the negotiating process, if the treaty is to comply with the requirement in Articles XXIV GATT and Article V of GATS for substantial coverage of the intra-community trade.

¹⁸⁹ Thus whereas under Articles 28(1) of the SADC Treaty and 79(4) of the ECCAS Treaty, the community budget is funded by contributions made by members, under Articles 168(1)-(2) of the COMESA Treaty and 72 of the 1993 ECOWAS Treaty a common market/community levy is imposed in addition to members' contributions [Articles 166-167 and 73 respectively].

regime in all those areas has been agreed, otherwise the multiplicity of conflicting rules would be inconsistent with the very idea of freedom of movement or common policies.

Regarding the organs, though, there are at least two options. At the adoption of the continental customs union, or common market, organs established under RECs could be dissolved on the ground that jurisdiction under the AEC vests in AEC organs which then take over. If this happens, any inconsistencies in powers of and in organs created under RECs, will not feature after the transition. The other option, is for the RECs to then function as divisions of the AEC, on practical considerations that running the whole AEC from one station at the AEC headquarters in Addis Ababa, would require a bureaucracy exceeding Africa's resources, and that therefore organs of the RECs such as the Courts, technical committees, and secretariats, not perhaps the Assembly and Ministerial Councils, be subordinate organs of corresponding AEC organs. The RECs would maintain their organs, functioning under relevant AEC instruments. In both cases, differences in organs created and their functions, will not constitute fundamental obstacles to the transitions, provided a harmonising instrument can put REC organs under appropriate AEC organs. But such an instrument would be unnecessary if the RECs had uniform organs, for these would simply be designated as subordinate to AEC organs, and would at once start functioning as such even within the RECs before adoption of a continental customs union or common market, with the benefit of spreading out the financial burden and of locating the organs out in the field enabling an effective reach. Uniform organs would politically strengthen the AEC process, due to clear channels of co-ordination and interaction.

A problem with difference in organs created, is that citizens of RECs may enjoy different rights and benefits. For instance, the ECCAS¹⁹⁰, ECOWAS¹⁹¹ and COMESA¹⁹² Treaties establish proper community Courts, and the ECOWAS Treaty in addition provides for an Arbitration Tribunal¹⁹³, whereas SADC provides for only a Tribunal¹⁹⁴. Under the COMESA Treaty, the Court can hear references from member states, the Secretary General, legal and natural persons, national Courts, the Authority and the Council.¹⁹⁵ On the other hand, the ECOWAS Court is established¹⁹⁶ to ensure observance of law and the principles of equity in interpretation and application of the Treaty¹⁹⁷, and to deal with disputes against member states or community institutions, referred under Article 56 of

¹⁹⁰ Article 16.

¹⁹¹ Article 15 of the 1993 Treaty.

¹⁹² Articles 19-44.

¹⁹³ Article 16 of the 1993 Treaty.

¹⁹⁴ Article 16.

¹⁹⁵ Articles 24-26, 30 and 32.

¹⁹⁶ The protocol on the ECOWAS Court, A/P.1/7/91, was adopted by the Authority at the 14th session held from 4-6 July 1991 at Abuja.

the Treaty¹⁹⁸ by member states or the Authority¹⁹⁹, and express advisory opinions requested by the Authority, Council, a member state, the Executive Secretary or any other institution²⁰⁰. A member state may institute proceedings on behalf of its nationals.²⁰¹ The Court has exclusive jurisdiction over disputes on interpretation and application of the Treaty.²⁰²

Regarding participation of civil society in policy making for the integration process, the COMESA Treaty provides for the Consultative Committee of the Business Community and Other Interest Groups²⁰³, constituted by the relevant representatives²⁰⁴, which takes part in the proceedings of the Technical Committees and makes recommendations to the Intergovernmental Committee²⁰⁵. Apart from the Intergovernmental Committee consisting of Permanent or Principal Secretaries, and 12 Technical Committees on very specific matters departing from the amalgamating approach under the AEC²⁰⁶ and ECOWAS²⁰⁷, provision is made for the Committee of Governors of Central Banks²⁰⁸. Under the 1993 ECOWAS Treaty, a Community Parliament²⁰⁹ and a Committee of West African Central Banks²¹⁰ are provided for, and it is intended that the media play a role in the community process²¹¹. The COMESA and ECOWAS treaties apparently provide for the participation of civil society to a greater extent than the other RECs. The ECCAS Treaty creates the Consultative Commission consisting of experts appointed by member states, to study and investigate questions submitted by community institutions, assist the Council of Ministers, and study reports of the technical committees, which are established under the protocols to the Treaty²¹², making recommendations to the Council²¹³. The SADC Treaty provides for a Standing Committee of Officials constituted by Permanent Secretaries or officials of equivalent rank²¹⁴ to function as a technical advisory committee, responsible and reporting to the Council of Ministers²¹⁵, and for

¹⁹⁷ Article 9(1) of the protocol.

¹⁹⁸ This is a reference to the 1975 Treaty, which should be considered unfortunate given that the 1975 Treaty was superseded by that of 1993.

¹⁹⁹ Article 9(2) of the protocol.

²⁰⁰ Article 10(1) of the protocol.

²⁰¹ Article 9(3) of the protocol.

²⁰² Article 22(1) of the protocol.

²⁰³ Article 18.

²⁰⁴ Article 18(1).

²⁰⁵ Article 18(3)(d).

²⁰⁶ Article 25(1).

²⁰⁷ Article 22(1) of the 1993 Treaty.

²⁰⁸ Article 13.

²⁰⁹ Article 13.

²¹⁰ Article 52.

²¹¹ Articles 65-66.

²¹² Article 26.

²¹³ Articles 23-24.

²¹⁴ Article 13.

²¹⁵ Article 13(2) and (3).

technical commissions which are to be specified in a protocol²¹⁶. The SADC Treaty seems to embody the least involvement of civil society.

These differences in involvement and rights do not foster a community feeling at the continental level, and may enhance a regionalism that can subsequently undermine the aims of African unity generally and of the AEC. In addition, a more involved interpretative role for courts with such varying jurisdiction, can lead to REC and AEC jurisprudence developing at variance. And it would be manifestly improper for the REC Courts/Tribunal to be part of the AEC Court, perhaps as registries exercising jurisdiction under both the AEC Treaty and the relevant REC treaties, when they have such differing jurisdiction.

The East African Community as presently constituted is a revival of the East African Community that collapsed in 1977.²¹⁷ Since inception in March 1996, astounding progress has been made, such as harmonisation of fiscal and monetary policies through convertibility of the currencies, pre- and post-budget consultations, reading of budgets on the same day²¹⁸, agreement on macro-economic goals, consultations between the central banks and revenue authorities, tax agreements, and establishment of a mechanism of co-operation for the capital and securities regulatory authorities. Measures taken to promote trade and investment include, establishment of an umbrella organisation for national private sector organisations, introduction of an East African passport and an inter-state pass, removal of road checks from designated routes, and reciprocal opening of border crossing points. Other achievements relate to, co-operation in the area of infrastructure, such as completion of a digital transmission project, cross border communications, strengthening and involving civil society through forming regional professional organisations (the East African Law Society and the East African Business Council) and holding regional level cultural activities and trade fairs.²¹⁹

On 2 March 2004 the Heads of State and Government of the Kenya, Tanzania and Uganda²²⁰ eventually²²¹ signed the protocol establishing the East African Customs Union. The customs

²¹⁶ Article 12.

²¹⁷ A good account of the fall of the East African Community is Sam Tulya-Muhika's *Lessons from the Rise and Fall of the East African Community* (Kampala: Friedrich Ebert Foundation, 1995).

²¹⁸ But this has not been done consistently. In 1997, for instance, the budget for Uganda was read on 12 June, whereas those for Kenya and Tanzania on 19 June. See *African Research Bulletin*, "East African Budgets", June 16-July 15 1997, p. 13063.

²¹⁹ *Joint Communiqué of the heads of state* issued on 29 April 1997, on a meeting to review the progress made [Commission for East African Co-operation, Arusha Tanzania]; and *the East African Standard* Newspaper of 26 March 1997.

²²⁰ Mwai Kibaki, Benjamin Mkapa, and Yoweri Museveni, respectively.

union adopted a common external tariff. The common external tariff was simplified into three categories on: 0 per cent on raw materials, 10 per cent on intermediate products, and 25 per cent on finished products. Uganda's proposal for a (0-7-15 band was not accepted though this lower band would have been comparably better in terms of consumer prices and competitiveness. On the whole the common external tariff raises Uganda's low tariffs and lowers Kenya's high tariffs. Uganda was given a five year transition period for the common external tariff to apply, mainly because some of its raw materials were classified as intermediate products on which the tariff would increase. This would immediately make Uganda's products expensive and therefore uncompetitive, causing problems for the producers. In addition, provision was made for the possibility of suspending the application of the common external tariff when its application causes injury to a domestic industry. The challenge now is how the East African Community will contribute towards the economic integration of Africa as a whole, including within COMESA, SADC, and the AEC; bearing in mind that as a customs union the East African Community countries are to maintain a common external trade policy against all third countries of the world including those in Africa, and that the three countries are not members of the same African regional economic communities (Tanzania is not in COMESA while Kenya and Uganda are, Kenya and Uganda are not in SADC while Tanzania is). There should not be a big problem if the common external trade policy of the East African Community will be similar or co-ordinated with those to be adopted by COMESA, SADC and other regional economic communities as well eventually as the AEC; which will require close co-ordination and the supportive political will on the part of all governments in the region. It will mean also that the East African countries must strengthen their negotiating capacity and stand out as a bloc within the region and the continent; in order for its positions to be known and its concerns to be taken into account in the way forward with African economic integration.

4.3 Relations among the RECs

Though ECOWAS had been established in West Africa in 1975²²², and the LPA and FAL calling for an African economic community adopted in 1980²²³, concrete progress towards economic

²²¹ The signing had been postponed at twice due to differences on key provisions on which negotiations continued. These included the possibility of giving Tanzania and Uganda certain exceptions in view of Kenya's comparably advantageous position in the industrial sector.

²²² 14 ILM 1200 [1975].

²²³ OAU, *The Lagos Plan of Action for the Economic Development of Africa*.

integration in Africa was gradual. The land marks included the Abuja conference of 1987²²⁴, the recommendation in the 1989 World Bank Report for economic integration²²⁵, conclusion of the AEC Treaty in 1991²²⁶, and support in various UN programmes such as the System-wide Special Initiative for Africa. This dragged out process may have affected provisions on relations among RECs; those established later in time have better provisions on relations with others.

The ECCAS Treaty, concluded in 1983, lacks any specific provisions on relations with other RECs. It has provisions on “relationships of member states with other groups and third states”²²⁷, and on “co-operation between the community and third states”²²⁸, but none on a link between ECCAS and other RECs as such. Member states may join other regional or subregional groups, but then have to inform the secretary and provide copies of the instruments²²⁹, and other African states can apply to the Conference to enter co-operation agreements with ECCAS. The Conference is required to take advice from the Council, and to be unanimous for the application to succeed, when a co-operation agreement can then be concluded and submitted for ratification by the member states.²³⁰ Such co-operation agreements can be concluded with individual REC members, but there would be no basis within the ECCAS Treaty for amalgamation with other RECs. A separate instrument would be necessary, perhaps on the basis of the recitations and objectives in respect of contributing to the development of Africa as a whole.²³¹

The SADC Treaty concluded in 1992, takes into account the LPA and FAL, and the AEC Treaty. The SADC and the member states may conclude co-operation agreements with other states, regional and international organisations whose objectives are compatible with SADC’s.²³² The approach under the ECOWAS and COMESA treaties is similar, in reciting the AEC Treaty and providing for co-operation agreements²³³, but these treaties have more elaborate and clearer provisions on the relation with the AEC and other RECs. The COMESA Treaty states that the ultimate objective is to implement the AEC Treaty. It provides for a protocol on the relation between the AEC and the RECs, regard to the AEC Treaty in implementing the COMESA Treaty, conversion of COMESA or its successor into an organic entity of the AEC, and co-ordination of COMESA and AEC activities

²²⁴ Adebayo Adedeji, et al, *The Challenge of African Economic Recovery and Development*. Frank Cass, 1991.

²²⁵ Landell-Mills, et al, *Sub-saharan Africa: From Crisis To Sustainable Development*, [World Bank, 1989], p. 152.

²²⁶ 30 ILM 1241 [1991].

²²⁷ Article 86.

²²⁸ Article 89.

²²⁹ Article 86(1) and (2).

²³⁰ Article 89.

²³¹ Preamble, and Article 4(1).

²³² Article 24(1).

²³³ Articles, 79 of the 1993 ECOWAS Treaty, and 179 of the COMESA Treaty, which are more or less identical.

by the secretary who is to report to the COMESA Council from time to time.²³⁴ This is a clear basis for conforming progress with COMESA to the entire scheme of the AEC Treaty. The 1993 ECOWAS Treaty also provides for progress towards the integration of the African continent.²³⁵

The COMESA approach, in specifically providing for a conversion, is the better scheme though; but apparently sceptical of the time frames set by the AEC Treaty, provision is made that the conversion will be “at a time to be agreed upon between the Common Market or its successor and the AEC”²³⁶. Besides, the aim of the conversion is stated as making COMESA “an organic entity of the AEC”. If the ultimate aim of the COMESA Treaty is to implement the AEC Treaty, COMESA is already an organic entity of the AEC, for the AEC Treaty provides that the RECs are the building blocs for the AEC. But if by “organic entity” is meant integration with other RECs, the time for the integration, or “the conversion” as the COMESA Treaty would have it, is set at the year 2019 when the continental customs union would be created through the adoption of a continental common external tariff by the regional customs unions, and not left to further agreement, but a clear timetable is necessary. That the timetable on the process towards this continental customs union and common market is still pending could be accounted for by absence of an AEC or continental organ co-ordinating and harmonising activities among the RECs and between the RECs and the AEC, actively and visibly; and by a shortcoming on political commitment to single-mindedly pursue the establishment of the AEC.

4.4 Equity in the integration process

The looming problem of sharing benefits and costs of economic integration, is addressed in the treaties by provision for equity, preferential treatment, and/or a development fund.²³⁷ In the ECOWAS Treaty, there is provision for creating “a Fund for Co-operation, Compensation and Development of the Community”²³⁸ and for a protocol to spell out its status, objectives and functions²³⁹. The Fund has been established.

The ECCAS Treaty sets out in the preamble that progress will be made only by taking account of the situation and interests of every state, and recognises the different levels of economic development of

²³⁴ Article 178.

²³⁵ Article 78.

²³⁶ Article 178(1)(c) of the COMESA Treaty.

²³⁷ Articles, 75 of ECCAS Treaty, 25-26 of SADC Treaty, 21 of ECOWAS Treaty, and 143-150 of COMESA Treaty.

²³⁸ Article 21(1) of the 1993 Treaty.

²³⁹ Article 21(2) of the 1993 Treaty.

the members. The objectives include “the rapid development of States which are fully or partly land-locked and fully or partly islands and and/or belong to the category of least developed countries”.²⁴⁰ A special regime is provided for these countries. Members agree to grant them special treatment and support all measures to promote their economic and social development²⁴¹, as ordered by Council²⁴². The Protocol on the situation of land-locked, island, part-island, semi-land-locked and/or least developed countries²⁴³, establishes a Committee of experts responsible for questions relating to these countries²⁴⁴, consisting of one or more representatives of each member state²⁴⁵, charged with achieving the objectives of the protocol²⁴⁶, for the development of these countries and helping them participate fully and effectively in the development of the community²⁴⁷, and with undertaking studies and making appropriate recommendations to the Council²⁴⁸ which is then to put proposals to the Conference and other member states concerning the measures to be taken and the projects to be implemented²⁴⁹. Further, a Community Co-operation and Development Fund is established²⁵⁰, “to provide financial and technical assistance to promote the economic and social development of member states in the light of the various economic and other conditions within the community” and to finance projects²⁵¹. These conditions, in view of the underlying principles and the objectives, include the level of economic development. A considerable institutional framework is thus provided for redressing the problem, but the approach takes a country as a whole, and this can result in disregarding the state of depressed areas within the country.

In COMESA, an institutional framework is provided for least developed countries and economically depressed areas²⁵², which are so designated by the Council²⁵³, aiming to strengthen the capacities of those countries and areas through new investments and technologies, special programmes and projects to improve the supply side, to strengthen relevant national and regional bodies implementing programmes and projects of the common market²⁵⁴; to develop adequate and reliable infrastructure through completion of missing inter-state links, and development of adequate inter-

²⁴⁰ Article 4(2)(h).

²⁴¹ Articles 71-72.

²⁴² Article 73.

²⁴³ Annex XVIII to the treaty.

²⁴⁴ Article 5(1).

²⁴⁵ Article 5(2).

²⁴⁶ Article 5(3)(a).

²⁴⁷ Article 2(b).

²⁴⁸ Article 5(3)(b).

²⁴⁹ Article 6.

²⁵⁰ Article 75.

²⁵¹ Article 76.

²⁵² Article 144-150.

²⁵³ Article 9(2)(j).

²⁵⁴ Article 144.

state telecommunications facilities and training facilities²⁵⁵; give special consideration to these countries and areas in the sectors of industry, energy, agriculture, and services, through improvement of the investment climate, support services and programmes, and so on²⁵⁶. A special fund for co-operation, compensation and development, is established for “special problems of under-developed areas and other disadvantages arising from the integration process”.²⁵⁷ In addition, there are provisions for investment promotion and protection in terms of treatment of foreign investors, safeguards in the event of expropriation, and the right to remit earnings²⁵⁸; and member states undertake to publicise their investment incentives and opportunities²⁵⁹. In this way, an appropriate regime can attract investment into least developed countries and depressed areas. But there can arise excessively competitive investment regimes, leading to an irrecoverable loss of revenue in, for instance, tax holidays and subsidisation. In ECOWAS, national investment codes are to be harmonised²⁶⁰, and this can be a way of keeping the incentive regimes reasonable.

The SADC Treaty does not state that the Community Fund is to be applied to the problem of sharing benefits and costs. Rather, the provisions are general, that the community resources may be made available to member states to pursue treaty objectives²⁶¹. The sources of the fund are contributions of member states, income from community enterprises and other receipts.²⁶² These provisions ought to be understood in the light of the principle of equity, balance and mutual benefit which applies to the whole treaty in general²⁶³ and specifically to areas of co-operation²⁶⁴, and of the first objective which clearly aims to “achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration”²⁶⁵, thus making provision for redressing social injustice manifested in depressed areas. The approach under SADC and its predecessor, of allocating responsibility for particular sectors to member states²⁶⁶, is meant to enhance this principle. Besides, the Annotated Theme Document for the 1993 SADC Annual Consultative Conference, recognised that the benefit of all members is necessary for a viable community.²⁶⁷ Though the Trade Protocol provides for

²⁵⁵ Article 145.

²⁵⁶ Articles 146-149.

²⁵⁷ Article 150.

²⁵⁸ Article 159.

²⁵⁹ Article 160.

²⁶⁰ Article 3(2)(i).

²⁶¹ Article 25(4).

²⁶² Article 26.

²⁶³ Article 4(d).

²⁶⁴ Article 21(1).

²⁶⁵ Article 5(1)(a).

²⁶⁶ Article 11(2)(f).

²⁶⁷ Paragraphs 2.4.1 and 2.4.2. Source: SADC Secretariat, Gaborone, Botswana.

protection of infant industries²⁶⁸ and phased elimination of trade barriers²⁶⁹, the entire regime remains rather general, lacking a specific implementation mechanism. This approach, requires redress to be initiated by those responsible for depressed areas, or members losing out, which presupposes responsible governments concerned about social justice. Perhaps specific community organs, and explicit provisions on particular remedial actions, would have provided a consistent, more reliable and clearer basis, in addressing the problem of sharing benefits and costs.

That all RECs have provisions on this matter reflects the importance of addressing this problem. The very viability and survival of the community depends on the extent to which member states stand to gain remaining in the community. It is nevertheless realistic to envisage dissatisfied members, and to provide an exit option on appropriate terms that do the least harm to the community, taking account of good neighbourliness and the potential market of the departing member. Also there ought to be leading or core countries in the community interested in maintaining as large a market, actual and potential, as possible, and which therefore steer the community in consideration of all members. These core countries would be strong economies with governments out to promote and close to the private sector. There is therefore need for a voluntary and informal assumption of responsibility for an equitable sharing of benefits, by leading economies within the community.

5. CONCLUSIONS: ADDRESSING THE OBSTACLES

5.1 An appropriate African model

As perhaps the only vital role for political leaders is conclusion of instruments given that technical organs are established to deal with the actual process of economic integration, and as the instruments concluded can set out in detail the process of the integration, making provision for the stages, and rules and policies that apply, the practical relevance of the organs of Heads of State and Government can be de-emphasized. The extent to which instruments set out in detail the rules and manner of the integration to follow, determines the degree to which political leaders will be required to conclude further instruments, especially where specific and general powers are granted to other organs, created for the purpose, to fill gaps left and those which arise. If the aim is to free the process of economic integration from political leaders, it will be necessary and important to make detailed provision for the manner of the integration, and appropriately empower technical organs to run the project.

²⁶⁸ Article 21.

By and large, economic integration is a technical matter, and can appropriately be implemented by technical organs. Political organs should participate at the level of ministerial meetings or committees, and not at that of Heads of State and Government, and further effective power should be shifted downwards from political to technical organs. The relation between the technical organs and the Ministerial Council is that recommendations of the former should normally be implemented. Technical organs and the secretariat can in fact be elevated to function as the policy making and policing organs respectively, once the treaties have been concluded by political authorities, provided there is provision for the member states to be appropriately represented on the organs, for instance through resident missions where the secretariat is located or officials from capitals. It is in this way those obstacles related to political factors like frequent and extra-legal changes in government and short-termism of political leaders, can begin to be addressed. The treaties for the RECs have stuck with the model giving undue prominence to the organ of Heads of State and Government, and in this manner not taken the crucial change to remove the integration process from the vagaries of Africa's political leaders.

However, excluding political leaders could run the risk of IFIs dealing directly with them to get governments to pursue policies without reference to the integration objectives. It seems necessary, then, for the treaties to provide that the community organs put in charge of harmonising, developing and implementing national programmes in specified sectors or areas, reserve the jurisdiction to deal with IFIs in matters of funding programmes or making recommendations for policies to be pursued in those sectors or areas, including the monetary and financial. The legal basis for such provisions could be that integration entails a surrender of a degree of sovereignty, and if indeed the governments create community organs empowered to carry on the development of certain domains of economic activity, it must be taken that sovereignty in those domains has been pooled into those community organs. Provisions such as those of the COMESA Treaty, that IFIs can come in for purposes pursuant to the treaty, and only those whose aims are compatible with the policies, programmes and activities of the common market²⁷⁰; or those of ECOWAS requiring, for co-operation agreements, prior approval by the Council²⁷¹; are appropriate, but could be more specific in regulating the dealings.

²⁶⁹ Part IV of the Protocol.

²⁷⁰ Article 181(2). Article 24 of the SADC Treaty is similar.

²⁷¹ Article 83 of the 1993 Treaty.

Solutions to obstacles concerning foreign markets, will depend on the extent to which the community framework achieves regional markets, and to which the private sector as well as community projects can begin to develop those regional markets. It is a gradual process, involves inculcation of commitment to the development of Africa, dissemination of awareness of opportunities in the regional markets, and availability of market leaders helps. The sector co-operation must create a framework to enhance the communications and transport, and the general physical and social infrastructure.

Courts of law, at national and regional levels, enjoying the usual independence, have to be disposed to evolving a jurisprudence that promotes harmony in the application and interpretation of the laws of the region, and that promotes economic integration as articulated in the relevant instruments but with a flexibility that responds to the times, so that development is not hampered by legal anachronisms. Steering clear of a political course will be tricky, but more activist attitudes can be kept within manageable limits by use of *amicus curiae* and experts so that informed decisions can be reached.

The success of economic integration in Africa will depend on the extent to which the question of equitable sharing of benefits is addressed. A good legal framework for ensuring an equitable sharing of benefits, provides a clear conceptual and interpretational basis for the case for equity, and has elaborate provisions spelling out appropriate measures, embodying the negotiated deal agreed by all the members. It spells out the criteria for qualifying for the preferential treatment, instead of deferring it to the time of action, for otherwise deserving cases may fail and candidates disagree with the criteria applied, leading to loss of confidence in the scheme. A good framework has an institutional structure to adopt and secure implementation of the measures, instead of relying on unlikely initiatives from dissatisfied members or areas. This structure, though, should contain an emphasis on initiatives by community institutions being co-opted by the dissatisfied members or depressed areas, through provision for joint action with designated national or local authorities, and for prior consultation with these latter authorities so the scheme remains relevant to efforts in those areas.

Some of these conditions feature in some RECs. For instance, the SADC Treaty carries the principle of equity and mutual benefit, but lacks concrete provisions applying that principle. The ECCAS Treaty contains undertakings and creates an organ, but does not indicate the criteria for selecting the least developed areas, neither does the COMESA Treaty though the Council is appointed to designate underdeveloped and depressed areas. These shortcomings are likely to pose problems in administering the schemes. As equitable sharing of benefits is a

cornerstone of success, it is proper that there be a concerted effort at the continental level to devise a comprehensive scheme properly thought through. The question of acceptable sources of funding for these schemes must be answered, and realistic objectives set in view of that answer, in order to avoid unfulfilled expectations. A thorough emphasis on, and co-ordinated, national regimes for promoting investment in depressed areas are appropriate.

5.2 Elements of the way forward for a country – the case of Uganda

The Ministry of Foreign Affairs and the Ministry of Tourism Trade and Industry are the line ministries for economic integration in Africa. If one wanted to gauge how seriously Uganda takes economic integration, including regional trade and investment, a good indicator could be the priority accorded to these ministries especially in terms of resource allocations under the national budget. There is no doubt that allocations to these ministries must be increased.

Uganda needs to realise afresh that as a country it is far too small in the international arena, and should not pretend to punch above its weight. Solidarity with other African countries should be an important strategy in international relations including in forums such as the WTO, the Cotonou Arrangement, and AGOA. Also, the people of Uganda are in the end Africans, and will face the same fate that Africans face in humankind's long history.

The domestic consultative processes for formulating trade and investment policy should be strengthened and should give significant priority to African economic integration as a source of important regional markets. The Inter institutional Trade Committee, the apex advisory body on trade policy with representation from the public, private and civil society sectors, does not have legal status in the country and has no official resources to fund its activities. This anomaly must be addressed. The entire consultative processes should squarely include the element of regional markets in Africa as an integral part of the search for foreign resources and markets.

Africa at the moment needs leaders to lead its economic development. Mandela did not quite rise to the occasion and Nyerere passed away after helping to establish the South Commission / South Centre now based in Geneva. Families need to rise to the occasion by assisting to turn out children that will lead Africa. But also government needs to provide a framework for this to happen; particularly by teaching specialised subjects on African integration at all levels of learning and establishing a national philosophy for the people and Africa at large to live full lives and to celebrate God's Africa.

5.3 Way forward for civil society

Poverty eradication is a core component of African economic integration. All the instruments, both at the continental and regional levels, contain provisions on co-operation in key sectors including food and agriculture, industry, science and technology, transport and communications, energy, education, money and finance, tourism, and natural resources and the environment. Further, there is clear realisation that equity in sharing the benefits of economic integration is necessary for the success of the process, and in this regard the instruments provide for assistance to depressed areas or disadvantaged areas. Poverty eradication programmes require resources and advocacy, and direct engagement with stakeholders including the poor themselves, among other things. In partnership with the public and private sectors, civil society organisations have a fundamental role to play building upon the existing institutional framework provided under the instruments and also charting out other appropriate ways to intervene.

The treaties establishing the African Union/ AEC, COMESA, ECOWAS and to some extent ECCAS, provide for the involvement of civil society in the activities of the technical committees. The committees initiate policy and make recommendations to the higher political organs. This provision for civil society involvement should be taken up and actively utilised. The specific activities of civil society could include representation in the meetings of the committees as observers, but perhaps more importantly the volunteering of papers and documentation that can inform the activities of the organs. The documents however would have to be well researched and balanced in order for them not to be taken lightly, bearing in mind that civil society advocacy is still looked at with some scepticism in certain governmental circles.

In their activities within Africa as a whole, civil society organisations should include African economic integration among their priorities particularly in the areas of poverty eradication, trade, peace and security, democracy and governance, environment, natural resources, infrastructure, and education. Development and empowerment will not be sustainable if restricted to isolated incidents; they are most likely only to be sustainable when Africa as a region provides the appropriate conditions. Regional development is sustainable because it is mutually reinforcing.

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