THEORIZING REGIONAL INTEGRATION AMONG SOUTHERN AFRICAN STATES AND THEIR RELATIONS WITH THE EUROPEAN UNION

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THEORIZING REGIONAL INTEGRATION AMONG SOUTHERN AFRICAN STATES AND THEIR RELATIONS WITH THE EUROPEAN UNION

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The central argument of this dissertation is that the regional integration among Southern African states is in a continuous constitution and re-constitution process. In these processes of constitution and re-constitution, the European Union (EU) has three effects on the integration aspirations of Southern African states: neutral, integrating and disintegrating.

First, by critiquing the compartmentalized, epistemological pluralism of regional integration studies and looking at historical accounts and aspirations of Southern African states, this dissertation argues for re-conceptualization of integration as emancipation. In the Southern African context and this new conceptualization of "regional integration as emancipation," the EU has a neutral effect in regional integration aspirations of Southern African states.

Second, this dissertation argues for recognition of "norms of solidarity" as dominant picture of foreign policy making among Southern African states. "Norms of solidarity" portray a combination of ideational and material factors that define the value and identity of African-ness in the foreign policy making of Southern African states. At the moment, the degenerative state of feelings of African-ness or "norms of solidarity," and fear of loss of access to European markets, have overshadowed ideational concerns in contemporary Southern African negotiations with the EU. Furthermore, the EU's push for liberalized trade arrangements in its relations with Southern African states has shifted or minimized Southern African states' ambitions for emancipatory

regional integration. In other words, contemporary EU - Southern African states relations has resulted in making ideational concerns – that of the past in foreign policy making of Southern African states.

Third, in the constitution of regional integration, the EU had integrating effect. European colonial and racial domination was the central driving force for Africa's integration. By using historically sensitive methodologies, this dissertation deconstructs Eurocentric conceptions and engages in construction of Africanist conceptualizations of regional integration. In conclusion, this dissertation is an attempt at theorizing regional integration through historically sensitive methodologies and from Southern African perspectives.

BIOGRAPHICAL SKETCH

Luwam Dirar was born and raised in Asmara, Eritrea. She studied law and earned her LL.B., with honors, from the University of Asmara in July 2006. After finishing the requisite five years of academic training at the University of Asmara, she clerked for one year, pre-graduation, for the Honorary Judge Habteab Yemane of the Highest Appellate Court of Eritrea.

She was the legal advisor to Minister Fawzia Hashim. Working at the Minister's office exposed her to a very diverse set of legal issues and areas of practice. Some of her responsibilities included negotiating extradition treaties, collaborating with United Nations Development Program and the European Union, drafting laws and proclamations, and developing capacity-building models for the ministry.

From 2008 to 2009 she pursued an LL.M. degree at Cornell University, where she concentrated on trade and trade-related international-law and was named an Institute for African Development Fellow. When she subsequently joined Cornell's J.S.D. program she received several scholarships and awards, including the Schlesinger Comparative Law Fellowship and the Berger International Studies Fellowship.

During her doctoral studies at Cornell she served as an editor for the *Cornell International Law Journal*, as a board member of the Protestant Cooperative Ministry, as a member of the Cornell Hunger Initiative Funding Committee, as a teaching assistant for Professor Adam Klausner, and in various research-assistant positions. In the fall of 2012 she taught a chapter of Professor Klausner's class on Internet law under his supervision. During those years she published five articles and one book chapter. The articles appeared in the *Journal for International and Comparative Law in Africa*, *Emory International Law Review*, *Michigan*

State International Law Review and New York University's *Globalex* project. The book chapter is under contract with Cambridge University Press.

In addition to her studies at Cornell, she has been a visiting researcher at Harvard Law School, visiting scholar at the University of Pretoria, and research associate at the University of Turin and at Harvard University's Weatherhead Center for International Affairs. She has presented her work at multiple conferences in the United States and abroad, including at Harvard Law School, Cornell Law School, Oregon Law School, Albany Law School, Boston University, the University of Cape Town, the University of Pretoria, and the University of Witwatersrand.

To my Dad and Mom

Gebretinsae Dirar

&

Ethiopia Mehari

I dedicate this work as recognition of their love, sacrifices and devotion for me.

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The success and viability of this project depended largely on the support and help of many others. Throughout my J.S.D. project in particular and my education in general I am indebted to so many souls.

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My gratitude goes to the Cornell Law School community in particular and Cornell University in general. Specifically, some of the people who have been instrumental in the success of this project are Dawne Peacock, Dean Charles Cramton, Dean Laura Spitz, Geoff Collins, Michael Pillera, Evangeline Ray, Taryn Matice and Toby Goldbach. I am also grateful to the staff and administration of Cornell Law Library for providing me with access to the extensive collection of the library and their support for the completion of the project.

Outside of Cornell Law, I am grateful to the Center for International and Comparative Law in Africa (ICLA) of Pretoria University. My stay at ICLA gave me the opportunity to interact, with legal scholars who were working on regional integration in Southern African

states. Furthermore, it gave me the opportunity and the necessary networks to interact with people working both for governments and think tanks throughout the region. Similarly, I am grateful to the Institute for Global Law and Policy (IGLP) of Harvard Law School and the Weatherhead Center for International Affairs of Harvard College, for giving me academic affiliation and support to complete the last stages of my project.

Lastly, I want to acknowledge the contributions of my family. Without my parents love for me and their love of education I would never have been able to work on this project or even go to school. As the youngest in the family, I have benefited from my siblings' excellence in their studies and wanted so much to be like them. Similarly, my partner, Kibrom, has been very supportive throughout my personal and academic struggles.

Sincerely,

Luwam Dirar

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ACP	African Caribbean Pacific
AEC	African Economic Community
AU	African Union
BLNS	Botswana, Lesotho, Namibia and Swaziland
CEMAC	Central African Economic and Monetary Community
COMESA	Common Market for Eastern and Southern African Countries
CM	Common Market
CU	Customs Union
DRC	The Democratic Republic of the Congo
EAC	East African Community
EBA	Everything But Arms Initiative
ECOWAS	Economic Community of West African States
EC	European Community
EEC	European Economic Community
EPA	Economic Partnership Agreement
EU	European Union (including its predecessors)
FLS	Front Line States
FTA	Free Trade Agreement
GATT	General Agreement on Trade and Tariffs
GDP	Gross Domestic Product
GSP	Generalized System of Preferences Initiative
ICLA	Center for International and Comparative Law in Africa
IGAD	Intergovernmental Authority for Development
IGLP	Institute for Global Law and Policy
LDC	Least Developed Countries
NATO	North Atlantic Treaty Organization
NIEO	New International Economic Order
MAT	Mozambique, Angola, and Tanzania
OAU	Organization of African Unity

PTA	Preferential Trade Area
TDCA	Trade, Development and Cooperation Agreement
TWAIL	Third World Approaches to International Law
RTA	Regional Trade Agreement
SA	South Africa
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SADC-IEPA	Southern African Development Community Interim Economic Partnership Agreement
S & D	Special and Differential Treatment
US	United States
UN	United Nations
VCLT	Vienna Convention on Law of Treaties
WB	World Bank
WTO	World Trade Organization

CHAPTER – ONE: INTRODUCTION

PART-I- INTRODUCTION

This dissertation is a critical assessment of regional integration aspirations among Southern African states and proposes an alternative Africanist conception of integration. The central argument of this dissertation is that regional integration is in a continuous constitution and re-constitution processes. In these processes, the European Union (EU) has three effects on the integration aspirations of Southern African states: neutral, integrating, and disintegrating.

Europe's integrating effect can be summarized in three. First, European colonialism had an integrating effect in Southern African integration initiatives. During colonial times, European powers integrated colonial territories to further their imperial interests. This European policy led to the formation of EAC and SACU among Eastern and Southern African colonies. Secondly, integration was part of Africa's emancipation project. It was an African resistance movement against European colonialism and racial domination. The OAU was an incarnation of Africa's resistance against European colonial and racial domination.[1] Thirdly, Europe had an integrating

[1] Sekou Toure noted:

> At Berlin in 1885, the European states with their anarchical economic development, motivated by an arbitrary feeling for power and for the horizontal expansion of a civilization, proceeded to divide Africa which was then regarded as a cake. But in May 1963, at Addis Ababa, city of freedom the qualified representatives, the authentic and worthy sons of the African people, met, under the banner of their awareness of their common destiny and fidelity to their personality and to the original character of their homeland. Africa – this time to undertake, legally and legitimately, the reunification of their States in a single and unique Charter, the Charter of their brotherhood, of their rights and interests to be defended and developed , the Charter of their solidarity henceforth indomitable, the Charter of freedom and peace, justice arid progress in Africa.

Sekou Toure, President of Guinea, Address at the 1963 African Summit (May 23, 1963), *in* CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, *infra* note 231, at 42.

effect through its financial contributions to African integration initiatives.[2] The SADCC, the forerunner of the SADC, for example, received generous support from the EU.

Africa's integration initiatives are African projects at the same time. African states define the objectives and aspirations of their integration projects. As African states conceptualize integration aspirations the EU remains neutral – with no direct involvement. This does not, however, mean that the EU has no effect at all. The constant pressure of losing access to European markets negatively affects "norms of solidarity." This affects the way Southern African states behave towards each other and disintegrates "norms of solidarity."

In the African context to ask whether integration is economic or political project is perhaps to ask the wrong question, because the two are intertwined. The debate during the First Ministerial Meeting of African Heads of States rests on the role of regional integration on the Continent's emancipation project, which encompasses both political and economic aspirations. The emphasis on integration as a means for political independence took precedence over aspirations for economic aspirations. This is not to claim that economic aspirations were not considered. Kwame Nkrumah asserts:

> [o]n this continent it has not taken us long to discover that the struggle against colonialism does not end with the attainment of national independence. Independence is only the prelude to a new and more involved struggle for the right to conduct our own economic and social affairs; to construct our society according to our aspirations, unhampered by crushing and humiliating neo-colonialist controls and interference.[3]

[2] *See* generally Christopher R. Hill, *Regional Integration in Southern Africa,* 82 AFR. AFF. 215, 215-239 (1983) (discussing how the participants during the formation of SADCC and the financial contributions and donations made by European states.)
[3] Nkrumah Address, *supra* note 239, at 34.

Nkurmah's statement was the general sentiment among African founding fathers. They agreed on the need to form political unity.[4] They also understood that political union will help them tackle all other problems facing Africa.[5] African integration initiatives have both economic and political objectives as Chapters Three, Four, and Five of this dissertation detail. This shifted, although not fully, with the end of European colonialism and Apartheid. The SADCC, for instance, transitioned to SADC with a new focus on liberalization of domestic and regional markets.

Southern African integration aspirations are different from European integration project. Conventionally, regional integration is the voluntary association of states for a "common good." It is the complex social, economic, legal and political pursuit of the "common good." In the European context, it started as an economic project that later spilled over to politics and human rights. The SADC started as a political and economic resistance movement. The European experiences do not have comparable historical, economic, and political experiences to be fully applicable in the African context. This is not to dismiss the achievements of the EU but rather to understand its limitations in explaining African aspirations. There are lessons to be learned from the EU particularly in international negotiations. However, what integration in Europe is not what integration ought to be in Africa. The researcher contends that in Africa one needs to understand what integration is or ought to be by looking at what it means to the member states.

Most academic discourses that are developed to explain European integration lack conceptual and historical framework with which to adequately understand regional integration among Southern African states. Generally, Southern African regional integration schemes are

[4] *See* Selassie Address, *infra* note 231, at 3 ("[W]e agree that the ultimate destiny of this continent lies in political union ….").
[5] Nkrumah Address, *supra* note 239, at 37. ("By creating a true political union of all the independent states of Africa, we can tackle hopefully every emergency, every enemy, and every complexity.")

concerned not only with economy, peace and development but also with emancipation. The concern for emancipation, in the Southern African region, emanates from shared experiences of colonial and racial domination. These integration aspirations do not confirm to classical theories of integration. They are rather based on feelings of comradeship among African states. Southern African integration aspirations thus marry Pan-Africanist and economic integration models.

But why has not the successes of African integration that materialized on the political frontier replicated in the economic front? The emphasis on economic integration is recent phenomenon compared to political integration. The logistical and institutional demands of political integration took precedence over economic integration. The economic structures of several Southern African states did not advance sufficiently to meet the demands of the region. As a result Southern African trade patterns show low intra-regional trade. Europe remains the largest export destination for the region's raw materials. In April 2015, the SADC Summit decided to enhance cooperation on regional industrialization.[6] Economic structures of the region will be transformed if regional industrialization policies materialize.

PART-II- BACKGROUND OF THE STUDY

In the Southern African region, there are numerous regional integration initiatives including the Southern African Development Community (SADC), the Common Market for Eastern and Southern African states (COMESA), the East African Community (EAC), and the Southern African Customs Union (SACU). SADC, COMESA, SACU and EAC are sub-regional

[6] *See* SADC Industrialization Strategy and Roadmap 2015-2063, Approved by Summit in Harare on 29 April 2015.

groupings under the auspices of the African Union (AU) that address the continental integration agenda.[7]

This dissertation addresses the socio-economic, legal and political integration aspirations of fifteen SADC member states, referred to here as Southern African states. At the time of this study, these states covered approximately 19,136,388 km^2 of the African continent and had a total population of approximately 294 million people. (See Table 1 and Figure 1.)

The World Bank (WB) country classification system categorizes Southern African states into three income categories. Angola, Botswana, Mauritius, Namibia, Seychelles, and South Africa with GNI of $4,126 to $12,745 are categorized as upper middle-income states. Lesotho, Swaziland and Zambia with GNI of $1,046 to $4,125 are lower middle-income states. The Democratic Republic of Congo (DRC), Madagascar, Malawi, Mozambique and Zimbabwe with GNI of $1,045 or less are categorized as low-income states.

Table 1: Data of South African States across five indicators[8]

State	Area km^2	Population (millions)	GDP $ (billions)	GNI $ per Capita	Income Level
Angola	1,247,000	21.47	124.2	5,170	Upper middle income
Botswana	582,000	2.021	14.78	7770	Upper middle income
DRC	2,345,095	67.51	32.69	430	Low income
Lesotho	30,355	2.074	2.335	1500	Lower middle income
Madagascar	587,051	22.92	10.61	440	Low income

[7] These four integration schemes contain almost half of the member states of the African Union. Among SADC, SACU, COMESA and EAC there are twenty-five African states. These are: Angola, Botswana, Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Lesotho, Libya, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.
Geographically one might categorize the EAC as an East African integration initiative. However, because of the definition ascribed for Southern African states in this dissertation the EAC is categorized as a Southern African integration scheme. In this dissertation Southern African integration initiative is understood as any integration scheme that has all African member states and one or more Southern African state. Since Tanzania is a member of EAC this dissertation understands EAC to be a Southern African integration initiative.

[8] This data is compiled by the author from two sources. One data set was extracted from SADC website on member states profile. Second set of data was extracted from the World Bank Data Set, http://data.worldbank.org/indicator/NY.GNP.PCAP.CD (last visited Mar. 17, 2015).

Malawi	118,484	16.36	3.705	270	Low income
Mauritius	2040	1.296	11.93	9290	Upper middle income
Mozambique	799,380	25.83	15.63	610	Low income
Namibia	825,615	2.303	13.11	5870	Upper middle income
Seychelles	455	0.08917	1.443	13210	Upper middle income
South Africa	1,219,090	52.98	350.6	7190	Upper middle income
Swaziland	17,364	1.250	3.791	2990	Lower middle income
Tanzania	1,0219,090	49.25	33.23	630	Low income
Zambia	752,612	14.54	26.82	1810	Lower middle income
Zimbabwe	390,757	14.15	13.49	860	Low income

Although these Southern African states cover a vast area, population, and diverse economies of the African continent, the integration process is far from complete. At the moment, the integration process among Southern African states is generally understood as a linear trajectory of trade-based integration. It is measured following a trajectory of activities of the Free Trade Agreement (FTA), Customs Union (CU), Common Market (CM), Monetary Union and Economic Union.[9] However, the trade-based integration, and the linear integration model in particular, are incomplete and erroneously portray Southern African aspirations as entirely economic aspirations, without any political objectives. But, even in linear integration models, the integration aspirations of Southern African states are in the early stages of the integration process. None of the existing integration initiatives have formulated a monetary union. This achievement gap is often attributed to lack of capacity, multiplicity of membership, inadequate transport and communication infrastructure, and lack of complementarities of modes and factors of production.

[9] Integration Milestones, http://www.sadc.int/about-sadc/integration-milestones/ (last visited Mar. 17,2015).

Despite the limitations the roots for continental and sub-regional integration initiatives are founded and based on aspirations for independence.[10] The decolonization and anti-racial segregation movements of the continent in general, and particularly of Southern African states, define the value, nature, and approach to integration initiatives on the continent. The SADC, for instance, initially placed little emphasis on trade integration, mainly pursuing integration on the normative values of liberation. The current integration process, however, has focused on trade-based integration. At the time of this research, all Southern African integration aspirations, with the exception of SADC, are customs unions. However, despite the emphasis on trade-oriented integration, intra-regional trade among Southern African integration schemes remains low, and the EU remains the biggest destination market for Southern African states.

[10] In this dissertation the focus of study is on fifteen Southern African states: (1) Angola, (2) Botswana, (3) D.R.C., (4) Lesotho, (5) Madagascar, (6) Malawi, (7) Mauritius, (8) Mozambique, (9) Namibia, (10) Seychelles, (11) South Africa, (12) Swaziland, (13) Tanzania, (14) Zambia and (15) Zimbabwe.

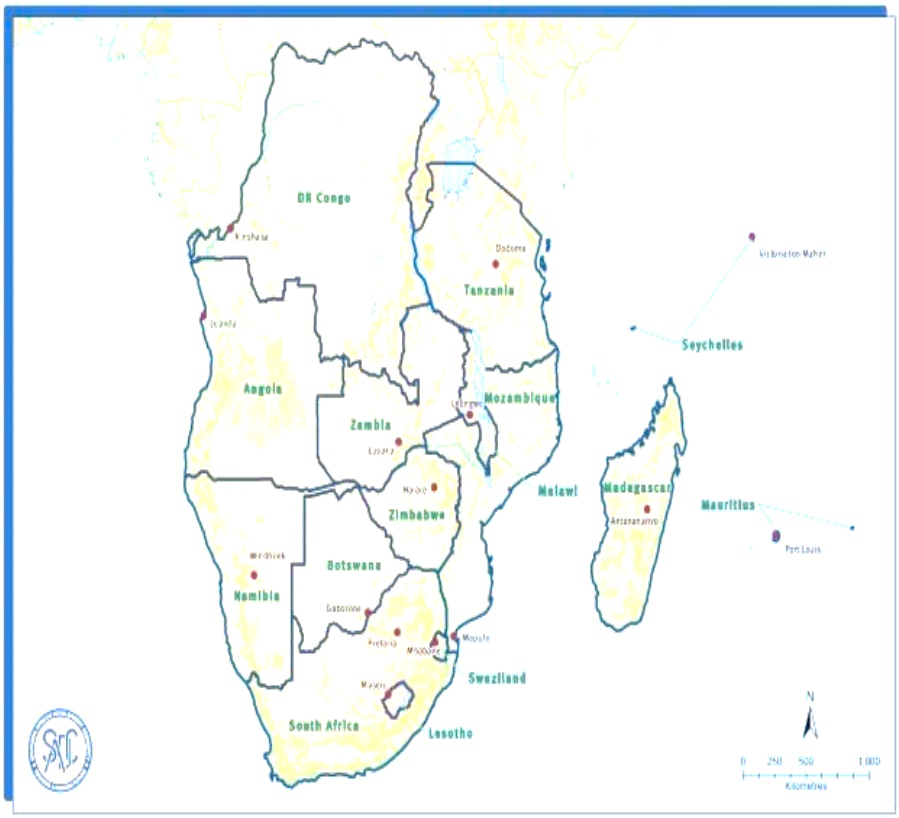

Figure 1: Map of Southern African States[11]

Economic relations between the EU and Southern African states are governed by multiple legal regimes that date back to colonial times. First, EU-Southern African trade relations are subject to specific laws governing the integration aspirations of Southern African states. The various integration initiatives in the region, COMESA, EAC, SACU, and SADC have direct effects in governing EU-Southern African relations. Second, the national constitutional laws of Southern African states govern the domestic application of integration aspirations of the region. National constitutions also affect EU-Southern African economic relations. Third, EU-Southern African economic relations are subject to the 1957 Rome Treaty and the subsequent treaties of the EU. Fourth, economic relations between the EU and Southern African states are governed through various treaties including: Yaoundé I, Yaoundé II, Lomé I, Lomé II, Cotonou, bilateral

[11] Figure 1 is from SADC website http://www.sadc.int/member-states/ (last visited 06/22/15).

trade agreements between the EU and Southern African states, and interim Economic Partnership Agreements (EPAs). Fifth, at the global level, EU-Southern African states relations are subject to public international law and international economic law regimes.

PART-III- METHODOLOGY

How does one study regional integration to meet the demands of the ever-changing global economic order? Is it relevant to incorporate non-legal research in a law school dissertation? Alternatively, what is the dissertation's contribution to knowledge, or whose and which knowledge? I understand law in integration studies does not exist in a vacuum, but is rather a manifestation of economic and political relations among states. Hence, legal scholarship, specifically regional integration studies of law should reconsider studying law as a freestanding enterprise.[12] A multi-disciplinary approach goes far in enabling J.S.D. candidates to fulfill the requirement of "new" or "significant" contributions to knowledge.

2.2. New Contribution to Knowledge as New Thinking in Integration Studies

A Cornell J.S.D. candidate is required to make a "significant contribution to legal scholarship."[13] How can one make such a contribution to the present understanding of regional integration studies? What kind of "contributions" will qualify? Robert J. Morris correctly noted that contributions of a research project to knowledge could take the following forms: (1) paradigm-changing or incremental, and/or (2) creative or discovery.[14] Morris also noted that contribution to knowledge could come through: "(a) the creation of new data, (b) a new

[12] *See* Jan M. Smits, *Redefining Normative Legal Science: Towards an Argumentative Discipline, in* METHODS OF HUMAN RIGHTS RESEARCH 45, 46 (F. Coomans *et. al.*, ed., 2009). ("The usual criticism is mainly directed towards the black letter or 'doctrinal' approach, in which legal rules, principles and cases are studied from an internal perspective and in which the law is looked at as operating in a 'social, economic and political vacuum'.)

[13] J.S.D. Degree Requirements, available at http://www.lawschool.cornell.edu/international/legal_studies/JSD-Degree-Requirements.cfm (last visited on May 20, 2012) (discussing requirements for JSD conferral from Cornell Law School).

[14] Robert J. Morris, The 'New Contributions to Knowledge': A guide for Research Post Graduate Students of Law, 29-31 (June 2011) (unpublished manuscript) (on file with Hong Kong University Scholars Hub) (discussing what new contribution to knowledge entails).

organization of existing knowledge, (c) a new presentation or analysis or interpretation of existing knowledge or data, (d) a new application of existing knowledge or data, or (e) a combination of these."[15] I have repeatedly asked myself, "Am I making a contribution to knowledge? If so, does it amount to a 'significant' contribution, or even better 'new' contribution to knowledge?" To start with, whose "knowledge" is under scrutiny when one speaks about contribution to knowledge?

If one starts a project with a benchmark of making a noteworthy contribution to existing scholarship, it seems that there must be a reason for such contribution. Apart from fulfilling the J.S.D. degree requirements, I understand that one has an interest to effect change. "Effecting change" in legal scholarship is not free from the author's personal conviction. I have to confess here that my previous experience in human rights movements influences my interpretation and narration of African integration projects. In this project, with respect for justice, how to shape new thinking in integration studies was an ideal that I set for myself. Regardless of one's moral conviction and irrespective of its importance, knowledge production is not a subjective task, but rather an objective one.

In conclusion, what makes this dissertation a "substantial contribution" to knowledge? Is it the immediate relevance of the topic - the fact that EPAs are being negotiated right now? Or, does it actually add value to integration studies? I would argue that the timely essence of the project makes it important, but it does not *per se* make it a new contribution to knowledge. I leave it up to the reader to judge if this dissertation has made a new contribution to knowledge.

2.2.2. Learning and Unlearning

Earlier on in my prospectus defense, I set a task for myself - a sincere and genuine task but a complicated one at the same time. I committed to producing a work that would in some

[15] *Id.*, at 37-38.

way advance integration studies of Southern African states. This process was both educational and humbling; I did a lot of learning and unlearning throughout the writing process.[16] I started the project as an integration optimist but I ran into contradictions and – at times - frustrations. By the end of my first year, even though I did not stop believing in normative objectives of integration, I became pessimistic about regional integration in Africa. Through this learning and unlearning process I realized that my role in this research project must be objective, which led to my current state of indifference to the integration projects of Southern African states. I have no intention to advocate for or against Southern African integration schemes. Rather, I intend to analyze existing Southern African integration schemes in light of ongoing negotiations with the European Union.

2.2.3. Research Questions

One of the most difficult tasks of this project was to identify gaps in the existing scholarship on integration studies of Southern African states in particular and Africa in general. The first step to identify gaps and thereby pave the way for a "new" contribution was to identify the central research question. Through various dialogues the central research question this dissertation raises is: *How does the EU in general, and EPAs in particular, affect regional integration among Southern African states?* To answer this question, I first needed to answer the following sub-questions: What is regional integration? Why and how do Southern African states choose to integrate? How do Southern African states behave toward each other in their integration aspirations? How do Southern African states behave towards the EU? What law or laws are pertinent in integration agreements, and what is the role of law in these agreements? In

[16] *See* generally Virginia S. Lee, *Unlearning: A Critical Element in the Learning Process*, 14 ESSAYS IN TEACHING EXCELLENCE, 2002-2003, http://www.asa.mnscu.edu/facultydevelopment/resources/pod/Packet14/unlearningacriticalelement.htm, (last visited May 20, 2012) (arguing unlearning makes new learning possible.)

order to obtain a just or fair-trade relationship, what is the role of law in the integration aspirations of Southern African states? Above all, I needed to understand how the vast literature on integration studies among Southern African states has attempted to deal with these questions.

2.3. Research Design: Dimensions, Limitations and Significance

Regional integration is a normative project of the voluntary association of states. The study of the colonial association of states, though relevant for understanding the historical underpinnings of existent integration schemes, does not fall within the discourse of integration studies. Colonial integration schemes lack the peculiar "non-coercive" character of post-colonial regional integration, making the study of those schemes dubious on multiple levels.[17] In the Southern African context, analyzing colonial integration projects poses two obvious challenges: (1) the debate over statehood, and (2) free will of association. Acknowledging that contemporary African states are colonial constructions, this dissertation focuses on postcolonial integration schemes.

2.3.2. Research Design: Data collection

In addition to secondary sources that are either cited or in my bibliography, I also relied on primary sources. Every conference, lecture, and talk is an opportunity for gathering qualitative data. Furthermore, these are opportunities to test one's theory, hypothesis, and/or arguments. I have been fortunate to present my draft work at multiple conferences and gather comments and feedback to develop my thinking.

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[17] Ernst B. Haas, *The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing, International Organizations*, 24 INT'L ORG., 607, 608 (1970) (Ernst Haas in distinguishing the difference between other forms of political unification and integration rightfully noted that peculiarity of regional integration is its 'non-coercive' character. "The study of regional integration is concerned with tasks, transactions, perceptions and learning, not with sovereignty, military capability, and balance of power." Haas did not rule out the purpose of regional integration studies on alternative conflict resolution mechanisms, hegemony, knowledge sharing, development, industrialization, and social justice among others. For Haas, "the main reason for studying regional integration is thus normative.")

Central to my qualitative data collection was an opportunity during my third year of study to spend a semester at the Institute for International and Comparative Law in Africa (ICLA) at the University of Pretoria. Whilst there, I had various informal conversations on the future and history of regional integration in light of negotiations with the EU. I posed open-ended question: *"What are the prerequisites for successful regional integration among Southern African states?"* seeking to pick the thoughts and understanding of scholars and practitioners based in the region. I met with several personalities from both governmental and non-governmental organizations including lawyers, academics, government officials, members of the Legal Service of the European Commission, researchers and representatives of non-governmental institutions, and a Malawian presidential candidate. Approaching government officials and asking questions on government policies with regard to the integration agenda of the region was a bit tedious compared to my conversations with people from non-governmental organizations. Most of the informants preferred to talk off the record. Hence, most of these conversations were informal. (See List of Informants Annex 1 at the end of this dissertation.)

2.3.3. Research Design: Roadmap

Following the introductory chapter, this dissertation consists of four substantive chapters and a conclusion. The four substantive chapters were constructed with the aim of eventually developing four separate articles. Therefore, this dissertation does not have a particular chapter or part that specifically deals with literature review. Chapter Two of this dissertation reviews the different domestic, regional, and international laws of Southern African states. Chapters Three builds on the literature of Chapter Two. It reviews works dealing with the history of EU-Africa trade relations. Chapter Four deals with works dealing with classical theories of integration. Chapter Five reviews works dealing with state behavior.

From here, a chapter-to-chapter thematic analysis follows.

Chapter Two—Diversity of Law and Regional Integration among Southern African States

In integration studies, law is understood as either an impediment or a facilitator for the regional integration aspirations of Southern African states. It is considered a facilitator when it establishes a dispute settlement mechanism. But, it is viewed as impediment when there is diversity of law – with vertical and horizontal application. Overall, however, there is no empirical evidence that shows a link between diversity of law or dispute settlement mechanisms and the success of an integration scheme.

Chapter Three—Parallel and Intersecting Narratives

While discourses of EU-Africa trade relations is possible from different angles and is based on the ideological orientations, most scholars engaged in analysis of EU-Africa relations fail to appreciate intra-African integration. Chapter Three aims to appreciate intra-African relations in post-colonial EU-Southern African states relations. It provides the reader a historical account of trade-relations between Africa and EU. It also provides the reader a brief introduction of regional integration among Southern African states.

Chapter Four—Rethinking and Theorizing Regional Integration in Southern Africa

Regional integration studies is characterized by, and normally understood as, a combination of inquiries from various disciplines. Conventionally, integration requires the amalgamation of political and economic policies. Yet, integration projects transcend political and economic cooperation and might even require harmonization of laws and principles. Scholars from legal, economic, and political sciences have engaged in intra-disciplinary conceptualization of integration. Some of the theories that developed in relation to integration schemes in the developed North reflect socio-economic, political and historical factors of the North, casting doubt on the applicability of those theories to integration schemes in southern Africa. Hence, this

chapter is an attempt to conceptualize integration through a multidisciplinary analysis in order to proffer a broader conception of integration that encompasses local and regional emancipation movements in Southern African countries.

Chapter Five—Norms of Solidarity and Regionalism: Theorizing State Behavior among Southern African States

Despite many recognized ambivalences, in this Chapter, the term "norms of solidarity" is used to describe the driving force of foreign policy practices of Southern African states. The central argument of this chapter is that "norms of solidarity" and state behavior among Southern African states, as well as regional integration arrangements, are developed not only about material interests, but also social concerns. They draw on ideational concerns formed during the continent's decolonization and emancipatory movements. Through time the practice and consistency of "norms of solidarity" have been contested, constituted and re-constituted. This chapter specifically interrogates the relationship between economic pressures and "norms of solidarity." It looks at EU-Southern African states relations to analyze if states under dire economic situations follow the value and consistency of "norms of solidarity." This chapter concludes that the self-identity of African statehood, known as "African-ness," persists beyond the confines of membership in regional integration schemes and legality. This chapter does not claim to be the sole explanation of how and why states behave the way they do in Southern African integration schemes, but, it is an attempt to theorize norms of solidarity in relation to Southern African integration arrangements.

Chapter Six—Conclusion.

CHAPTER – TWO: DIVERSITY OF LAW AND REGIONAL INTEGRATION AMONG SOUTHERN AFRICAN STATES

PART I - INTRODUCTION

In integration studies, some scholars and practitioners, such as Pascal Lamy, look at regional integration initiatives not as a freestanding system, but rather as a part of the global economic order.[18] This group of scholars argues that regional integration initiatives and global economic order mutually constitute a liberalized global economy.[19] Global economic order is dependent on sub-regional and regional integration initiatives for the promotion of free-market oriented policies.[20] Global economic order, as represented by the WTO, for example, determines what each member of an integration scheme can individually do to promote marketization. While members can have WTO-plus liberalization for regional integration schemes, the WTO sets the

[18]Pascal Lamy was the fifth WTO Director General and a former EU Trade Commissioner. Lamy argues that "multilateralism and regionalism are not mutually exclusive, but are complementary instruments to manage the complexities of an independent world. *See* generally Pascal Lamy, *Stepping Stones or Stumbling Blocks? The EU's Approach Towards the Problem of Multilateralism vs. Regionalism in Trade Policy,* 25 WOLRD ECON. 1399, 1399-1413 (2002) (discussing the relationship between regionalism and multilateralism). Similarly *see* also Carsten Fink and Mario Jansen, *Services Provisions in Regional Trade Agreements: Stumbling or Building Blocks for Multilateral Liberalization?* 1-25 (2007), http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219022561266_125796.pdf (In this piece Fink and Jansen argue that in the liberalization of the services trades, regionalism has a building block effect for the global aspirations of WTO-governed trade liberalization.)

[19] *See* for instance C. Fred Bergsten, *Commentary: The Move Toward Free Trade Zones,* 76 ECON. REV. 27, 27-34 (1991) (discussing how regionalism is complementary and desirable as part of global multilateral system).
In contrast, Paul Krugman in his 1991 article argued that regionalism is an alternative to failed multilateralism. Krugman, in 1991, was pessimistic of the WTO coming into existence and functionality. Hence, although for him the move towards regionalism is wrong in theory, without multilateral cooperation that is the only pragmatic for trade liberalization. *See* generally Paul Krugman, *The Move Toward Free Trade Zones*, 76 ECON. REV. 5, 5-24 (1991). Similarly *see* also Raquel Fernάndez and Jonathan Portes, *Returns to Regionalism: An Analysis Nontraditional Gains from Regional Trade Agreements,* 12 WORLD BANK ECON. REV. 197, 197-220 (1998) (for a summary of the literature on the debates and welfare impacts of regionalism versus multilateralism).

[20] Collier and Gunning argue that the debate on regionalism versus multilateralism did not play in Africa. They do not claim that Africa's historical struggle for emancipation as the reason for lack of major discourse on multilateralism versus regionalism. To the researcher of this dissertation, however, the absence of a major discourse in African integration studies is the result of Africa's history, ideologies and theories of integration. Collier and Gunning in this article argue that for trade policy to be the centrality of regional integration in Africa three steeps need to be taken. "First, collusive trade policy must be superior to unilateral trade policy. Secondly, reciprocal discrimination must be superior to reciprocal non-discrimination. Thirdly, regional reciprocal discrimination must be superior to South - North reciprocal discrimination." *See* Paul Collier & Jan Williem Gunning, *Trade Policy and Regional Integration: Implications for the Relations between Europe and Africa*, 18 WORLD ECON. 387, 388 & 402 (1995).

minimum standard that integration members should adopt. These scholars engage in rationalist legal thinking and use Darwinian evolutionary models to argue that regional integration initiatives are the building blocks of a multilateral liberalized global economic order.

The rationalist model of integration claims a kinship between the SADC and the WTO systems. For rationalist model of integration, Southern African states make no distinction between global and regional liberalization. But this understanding fails to account for the socio-economic and political forces that produced Southern African regional integration aspirations. This dissertation shows that Southern African integration aspirations have promoted an emancipation movement with its own internal order. It also shows that regional integration was based on feelings and comradeship of African-ness. Therefore, Southern African regional integration at its inception had no kinship with the WTO system.

Arguing that regional integration schemes are constitutive of liberalized global economic order advances and legitimates the legality of WTO rules and economic theories.[21] Analyzing historical emancipatory integration agendas under WTO rules leads to capitalist or market-

[21] Counter argument to the idea that law and legality of WTO rules are "locked-in" in contemporary integration aspirations is a legalistic argument that WTO rules govern regional trade agreements and not necessarily the regional integration aspirations of Southern African states. As noted in Chapter Four of this dissertation, African founding fathers, focused mostly on political integration rather than economic integration. In addition, regional integration both as a concept and field of study does not limit aspirations for integration to linear economic integration. Therefore, what this line of argument misses is the power distribution that emanates from capitalist integration and its relationship with global economic order.
Gerry Nkombo Muuka, Dannie E. Harrison, and James P. McCoy argue that one of the impediments of economic integration in Africa is parochialism. Muuka and his colleagues studied COMESA and concluded that member states failed "to internalize COMESA agreements in their national administrations and development plans." For Muuka and his colleagues this failure is attributed to lack of capacity and information sharing among the different organs within national governments. In addition, Muuka and his colleagues' internalized Africa's integration impediments as lack of political will of African states. Understanding those limitations, however, it seems Muuka and his colleagues have failed to capture the value of global economic order and its effect in integration aspirations of COMESA member states. Gerry Nkombo *et. al.*, *Impediments to Economic Integration in Africa*, 2 J. BUS. DEVELOPING NATIONS (1998).
Ironically, Saif Al-Islam Al-Qadhafi, son of former Libyan dictator Muammar Al-Qadhafi, criticizes lack of democratic governance and participation of the governed in the WTO framework. Al-Qadhafi notes that critics of the WTO can be categorized as: (1) critics of the economic theories underpinning WTO principles and (2) democracy deficit critics. *See* generally Saif Al-Islam Al-Qadhafi, *Reforming the WTO: Toward More Democratic Governance and Decision Making,* 1-53 (2007) https://www.wto.org/english/forums_e/ngo_e/posp67_gaddafi_found_e.pdf

centered integration in the region with contested welfare gains.[22] Yet such an analysis is rationalized, based on the current linear liberalized integration models adopted by all Southern African integration initiatives.[23] Likewise, notification of SADC, EAC, COMESA, and SACU to the WTO, symbolizes the acceptance of sub-regional groupings as building blocks of global economic order.[24]

Despite notification to the WTO, the role of the state and law in integration schemes of Southern African states is debatable. Assessing Southern African integration from the perspective of, for instance article XXIV of GATT could have an impact on the future of integration aspirations of SADC. Article XXIV of GATT ignores the historical factors of colonial and racial oppression that united African states. It also limits the role of law in integration aspirations as a regulatory tool in global aspirations for liberalized global economic order. Further, in the name of legality or lawfulness it abducts the democratic participatory process of law making from domestic constituencies. It also allows and implicitly imposes global laws of free market as the virtue and context under which Southern African integration aspirations ought to function.

The central aim of this chapter is to understand the different laws and legal regimes governing Southern African regional integration aspirations.

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[22] Krugman *supra* note 15 (discussing how welfare gains of regionalism is contested).

[23] *See* for instance, SADC-Integration Milestones, http://www.sadc.int/about-sadc/integration-milestones/ (last visited Apr. 17, 2015) (discussing integration milestones of SADC). For a critic of linear integration model *see* Hartzenberg *infra* note 119 (arguing that linear integration model of integration is one of the explanations for lack of implementation of integration commitments).

[24] *See* for instance, Common Market for Eastern and Southern African States (COMESA), http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=121 (last visited Apr. 17, 2015) (discussing COMESA's notification to the WTO).

PART II - LAWS GOVERNING SOUTHERN AFRICAN INTEGRATION ASPIRATIONS

In Chapter Five, this dissertation argues that relations among Southern African states, are based on "norms of solidarity" that are agnostic to formal legality. In addition to "norms of solidarity," Southern African integration aspirations are governed by several legal regimes that include treaties, protocols, and framework agreements.[25] Understanding the arguments made in Chapter Five in this Part, therefore, "community law" is defined as formal and informal rules and principles which are binding upon members of an integration scheme.

2.2. SADC Organs: Composition, Functions, and Decision Making

John Dugard rightfully noted that most international legal scholars have some background in municipal law. This background inaccurately inclines them to believe that the

[25] In general Public International law, state-to-state relations are regulated by: (1) treaties, (2) customary international law, (3) general principles of law, and (4) opinion of jurists. Statute of the International Court of Justice, Art. 38(1), ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.") *See* also art. 38(2) (The list is not exhaustive in and might include *ex aequo et bono* upon the parties agreement.) Article 2(1(a)) of the Vienna Convention on Law of Treaties defines treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."
BROWNLIE, *infra* note 347, at 6 (discussing general practice accepted as law. Brownlie defines "general practice accepted as law" as a general acceptance of a certain practice as obligatory.") *See* also JOHN DUGARD, INTERNATIONAL LAW A SOUTH AFRICAN PERSPECTIVE, 29-37 (3rd ed., 2009). "General principles of law" constitutes a secondary source of international law. For Shaw, Art. 38 incorporated "general principles of law" as a source of law to fill any legal gap that might exist in the international arena. *See* MALCOM N. SHAW, INTERNATIONAL LAW, 98, 112-113 (6th ed. 2008).
Daniel Bethlehem noted that Southern African integration aspirations are largely treaty based. It includes both bilateral and multilateral treaties. Daniel Bethlehem, *International Economic Relations*, *in* INTERNATIONAL LAW A SOUTH AFRICAN PERSPECTIVE 428 (3rd ed. 2003).These laws include the SADC Treaty, the SACU Treaty, the COMESA Treaty and the EAC Treaty as. Furthermore, several bilateral agreements between and among the Southern African countries have a role in determining economic relations in the region. For instance, Malawi and SA signed a bilateral treaty in 1967 that dealt with preferential treatment to Malawian exporters in South African markets. Likewise, an agreement between South Africa and Zimbabwe dates to 1964. *See* Minara Chamber of Commerce, *Bilateral Trade Agreement*s, available at http://www.minara.org.za/index.php?option=com_content&view=article&id=52&Itemid=35 (last visited Feb. 21, 2012).

international legal order is characterized by three branches of government.[26] Hence, when international legal scholars think about regional integration systems, they look for the three branches of government. However, as shown in Table 2, Southern African integration institutions in general, and SADC in particular, lack developed institutions with functions comparable to those of a municipal legal order. For instance, the SADC's Summit [composed of heads of member states] has overlapping functions of legislative, executive and powers to enforce Tribunal decisions.[27] Similarly, and in contradiction to the domestic organization of three branches of government, the SADC Summit shares executive authority with the SADC Secretariat.[28] Judicial authority is vested in the suspended Tribunal and the Trade Panel. But, ultimate enforcement authority rests on the SADC Summit, which has powers not only to decide which decisions are to be enforced, but also to dissolve or reconfigure judicial authority at will.[29]

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[26] DUGARD *supra* note 23, at 2-3.

[27] The Summit is the main legislative organ of the SADC. It also has the power to enforce the rules of the community. It has traditional executive powers. In addition, the Summit has powers to enforce Tribunal decisions. Besides the Summit, the Council of Ministers also exercises legislative function either upon delegation or on matters dealing with the day to day governing activities of the SADC. The Council also has executive function of overseeing the functioning and development of the SADC.

Article 10(3) of the SADC Treaty. ("Subject to Article 22 of this Treaty, the Summit shall adopt legal instruments for the implementation of the provisions of this Treaty; provided that the Summit may delegate this authority to the Council or any other institution of SADC as the Summit may deem appropriate.") Article 10(2) of the SADC Treaty ("The Summit shall be responsible for the overall policy direction and control of the functions of SADC.") Article 32(5) of the SADC Tribunal Protocol ("If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.") Art. 11 (1) of SADC Treaty. ("The Council shall consist of one Minister from each Member State, preferably a Minister responsible for Foreign or External Affairs"). See also Art. 14 (1(p)) of SADC Treaty, ("The Secretariat….shall be responsible for … preparation and submission to the Council, for approval, administrative regulations, standing orders and rules for management of the affairs of SADC.") Article 11(2(a)) of SADC Treaty, ("It shall be the responsibility of the Council to: oversee the functioning and development of SADC.")

[28] Article 14 (1) of SADC Treaty. ("The Secretariat shall be the principal executive institution of SADC….")

It coordinates, harmonizes and furthermore, implements regional policies upon approval by the Council. It also implements the decisions of Summit and Council and is responsible for the financial and general administration of SADC.

[29] Article 16 (1) of SADC Treaty. ("The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.")

The Extraordinary Summit of Heads of States decided the following:

> (1)That it mandated the Ministers of Justice and Attorneys General to initiate a process aimed at amending the relevant SADC Legal Instruments and submit a progress report at the Summit in August 2011 and a final report to summit in August 2012; (2) That it decided not to reappoint members of the Tribunal whose

Table 2: Composition, Function and Decision making of SADC Organs

	Composition	Functions	Decision Making Process
Summit	Heads of states of member states (14 members in total)	Legislative Executive Judicial (Appointment of Judges, Enforcement of Tribunal decisions and Dissolution or re-configuration of judicial branches.)	Consensus
Organ on Politics, Defense and Security Cooperation	Ministers of foreign affairs, defense or security of member states (14 total)	Issues of defense and security	Consensus
Council of Ministers	Ministers of respective member states (14 members in total).	Legislative (Upon delegation of Summit or on administrative regulations and rules governing SADC) Executive (overseeing the functioning and development of SADC.)	Not specified
Integrated Committee of Ministers	Ministers in their respective governments (28 members in total).	Implementation of Integration Agenda. Policy Guidance to the Secretariat.	Consensus
Standing Committee of	Representatives of member states	Technical advisory council	Consensus

term of office expired on 31 August 2010, (3) That it decided not to replace members of the Tribunal whose term of office will expire on 31 October 2011, and (4). And it reiterated the moratorium on receiving any new cases or the hearing of any cases by the Tribunal until the SADC Protocol on the SADC Tribunal has been reviewed and approved.

Statement by the SADC Lawyers Association following the decision of the Extraordinary Summit to extend the suspension of the SADC Tribunal, Jun., 8th, 2011, available at http://www.swradioafrica.com/Documents/Statement%20on%20the%20continued%20suspension%20of%20the%20SADC%20Tribunal%5B1%5D.pdf. *See* also statement by Mr. Boichoko Ditlhake, Statement of SADC Extraordinary Summit of Heads of States and Government, May 25, 2011, available at http://www.africandemocracyforum.org/attachments/-01_SADC-CNGO%20Statement%20on%20the%20SADC%20Extra-Ordinary%20Summit%20May%202011%202doc1%20(2).pdf (accessed on 02/21/2012).

Officials	(14 members in total)		
Secretariat	Executive Secretary and Deputy Secretary	Principal Executive body of SADC. Harmonization and Implementation of regional policies upon approval by Council. Implements decisions of Summit, Council and ICMs. Ombudsman. Financial and general administration of SADC.	Not specified
Tribunal	Judges	Supreme judicial organ; Powers to interpret SADC treaty and its subsidiary instruments; Advisory opinion to the Summit and Council.	Vote of Majority
National Committees	National Steering Committee (government officials of respective states plus or minus national stakeholders), sub committees and technical committees	Link between government agencies and SADC; Overseeing implementation of SADC policies at national level.	Not specified
SADC Parliamentary Forum	Four parliamentarians from respective member states (so far no representatives for Seychelles and DRC).	Election monitoring and supervision	Not specified

Overlap of functions of SADC organs demonstrates the lack of participatory democratic processes in Southern African integration projects. For instance the SADC summit composed of heads of states is the highest regional legislative organ. Therefore, the executive organs of national governments enjoy a monopoly of regional legislative processes. In the European

context, Joseph Weiler critiqued similar organizational structures and its impact on democracy.[30] Weiler contends that democracy in integration schemes brings both theoretical and practical questions to mind. Theoretically, one wonders if constitutional democracy is possible in the context of regional integration.[31] This is because the SADC is not intended to replace its member states. It relies on its member states to implement and finance its programs. Therefore, the democracy deficit discourse might be unpractical.

2.3. Law as an Impediment and/or Facilitator of Regional Integration

Several legal scholars look at diversity of law as an impediment to integration. These scholars propose harmonization of law for integration aspirations to materialize. Several legal scholars also argue for the establishment of a dispute settlement system. These scholars view dispute settlement system as a facilitator of integration aspirations. Although there is no empirical evidence to support arguments that law is either impediment or facilitator of integration aspirations, these views have shaped the role of law and legal scholarship in regional

[30] The classical democracy deficit problem is the lack of direct representation of the common citizenry. When a country signs on to the EU this direct representation goes to a certain extent to the community. There is also a shift of the legislative power from the national parliament to the executive branch of the EU. The exercise of domestic representation by the Parliament is lost to the Council and the Commission of the EU. To solve this problem the EU has increased the powers of the Parliament. The decision-making process in the EU has shifted from just consultation to cooperation and co-decision. Furthermore, EU member states made the Luxemburg Accord to solve some of the democracy deficit problems. Weiler argues that the Luxemburg Accord maintains indirect citizen participation through the Council. Therefore, the Luxemburg Accord upholds and protects the interests of individual states. However, the democracy deficit problem is much more sophisticated than voting problems. Weiler identifies that the democracy deficit problem is a question of social legitimacy rather than a voting problem.

[31] Again, from the EU perspective, Andrew Moravcisk argues that empirical data, the existing checks and balances, indirect democratic control via national member states and the increasing powers of the European parliament makes the EU legitimate in the eyes of its citizenry. Furthermore, Moravcisk argues that constitutional democracy in its modern sense is not possible in the EU because of the constitutional constraints of the organization. One of those constraints has to do with the fact that the EU focuses on cross-border trade and lacks the competence to deal with internal affairs of the member states. The EU as an institution is also incapable to deal with all the internal issues of member states financially, given the fact there is no regional revenue to cover expenses of the institution. Secondly, the EU relies on member states for the implementation of its policies. Thirdly, Moravcisk makes a distinction between direct and indirect accountability to substantiate his argument. Direct accountability is the fair and open elections for the European Parliament, while indirect accountability is the fair election of national executive members who dominate the intergovernmental organs of the EU. The legitimacy of the ECJ or ECHR and its jurisprudence against member states and the Union shows the democratic traits of the EU as an organization. Andrew Moravcsik, *In Defence of the 'Democracy Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603, 605-614 (2002).

integration studies. Before proceeding further into my central argument, the next two sub-sections will map current positions in this argument.

2.3.3. Law as Facilitator of Regional Integration

Several legal scholars of Southern African integration projects regard the establishment of a dispute settlement system as a facilitator of regional integration. Amos Saurombe, in analyzing the position of law in integration aspirations of SADC states, argued for a "rules based dispute resolution system."[32] Similarly, Oliver C. Ruppel and Francois X. Bangamwabo noted that the success of regional integration aspirations depends on dispute settlement mechanisms.[33] These scholars find a dispute resolution system essential to the development of regional integration aspirations. This is despite existing supply side, economic and political constraints for deeper integration in the region.

The debate on the relationship between dispute settlement systems and the success of integration aspirations has both technical and ideological challenges. Dispute settlement mechanisms have not been central to regional integration agenda of Southern African states. It is one element in the integration processes.[34] Dispute resolution was not central driving force for Southern African integration aspirations. In actuality dispute settlement institutions were late

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[32] Amos Saurombe, *Regional Integration Agenda for SADC "Caught in the winds of change" Problems and Prospects*, 4 J. INT'L COM. L. & TECH. 100, 103 (2009).

[33] Oliver C. Ruppel & Francois X. Bangamwabo, *The SADC Tribunal: a legal analysis of its mandate and role in regional integration*, *in* MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA, 179 -180 (Anton Bösl *et. al.*, eds., 2008) (Ruppel and Bangamwabo quoted workshop proceedings that highlighted experiences of the EU and the Andean communities which emphasizes the need for dispute settlement mechanisms as central trait of successful integration project.)

[34] Choice and establishment of dispute settlement mechanism in regional integration projects is usually linked to neoliberal institutionalist logic. Dispute settlement preferences are based on economic asymmetry of member states and the depth of liberalization which an integration scheme is attempting to achieve. The establishment of dispute settlement systems in integration projects constrains the policy space of member states and the role of domestic policies and politics in shaping regional integration objectives. *See* generally James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 137-180 (2000) (discussing dispute settlement preferences in regional integration arrangements).

additions for Southern African integration projects.[35] Appreciating the value of dispute settlement mechanisms, however, there is no ideological junction between a successful integration arrangement of Southern African states and the establishment of a dispute settlement mechanism.[36] There is no empirical evidence to show that dispute settlement mechanisms are central in achieving African integration aspirations.[37]

2.3.4. Law as Impediment to Regional Integration: Diversity of Laws

A segment of legal scholars look at the role of law in regional integration schemes as a problem or an impediment that needs to be rectified. Gbenga Bamodu, for instance argues,

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[35] The SADC member states chose to emulate the EU and the WTO models of dispute settlement for their regional integration aspirations. Tobias Lenz, *Spurred Emulation: The EU and Regional Integration in Mercosur and SADC* 35 W. EUR. POL. 155, 155-173 (2012) (discussing how SADC member states chose to emulate the EU in their dispute settlement design). *See* also Joost Pauwelyn, *Going Global, Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231, 231-304 (2004) (discussing the SADC Trade Protocol and its dispute settlement system). For a discussion on multiplicity of dispute settlement mechanisms in African integration aspirations *see* Maurice Odour, *Resolving Trade Disputes in Africa: Choosing Between Multilateralism and Regionalism: The Case of COMESA and the WTO* 13 TUL. J. INT'L & COMP. L. 177, 177-217 (2005).

[36] Classical integration theories, as argued in Chapter Four of this dissertation, look at economic measures to assess the success of regional integration. At the moment, the use of trade flows to measure the success of regional integration is flawed. Similarly to look at the establishment of a dispute settlement mechanism as a measure of successful integration is equally flawed. The central objective for regional integration among African states has never been resolution of disputes. Rather the central objectives have been emancipation. Therefore, the success of regional integration in the African continent in general and Southern African states in particular should be measure by its contribution to emancipatory movements.

[37] As discussed in the Chapter Four and Five, the relationship between regional integration aspirations and law or legality was subjective to the problem at hand. Southern African states treated SADC treaties and protocols as either vital or irrelevant to the problem at hand depending on several factors, which did not necessarily employ legalistic interpretation. In addition, the 1963 discussion in the first ministerial meeting of heads of states of Africa reiterated the focus on solidarity rather than legality as an integration arrangement for African states. Nevertheless, legal scholars who aspire to curb the political process of regional integration advance the perception of law as facilitator of regional integration aspirations. Indeed, the establishment of dispute settlement system in an integration project constrains the policy space of member states. *See* P. Kenneth Kiplagat, *Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience* 15 NW. J. INT'L L. & BUS. 437, 439-440 (1995)

> Under this scenario the political influence of the leaders of the constituent entities is greatly exaggerated and it is only through political negotiation that decisions can be made. In these circumstances, the role of law is immensely circumscribed and even where a theoretical separation is possible, the political and legal outcomes always intersect. To this extent, integration processes in developing countries have suffered from the relegation of dispute settlement to the realms of politics and policy, bolstering the view that issues dealing with regional integration are matters of policy, not law.

This is not to argue that dispute settlement mechanisms are irrelevant in the integration projects of Southern African states. On the contrary, it seems to the researcher that dissolution of the SADC Tribunal did limit access to justice for Southern African citizenry. Cognizant of the benefits of dispute settlement systems, however, it would be ridiculous to claim that Southern African integration aspirations would not exist without dispute settlement systems.

"diversity of laws remains a major, if indirect, obstacle to African economic development which has not been the subject of any concerted consideration or attention by African states."[38] Similarly Bankole Thompson, from a Western African perspective noted that law, although not the sole impediment for regional integration, is one of the impediments to successful integration.[39] Thompson further identified seven major legal impediments to successful integration as:

> (1) Ratification and implementation of constituent instruments, protocols, acts and decisions of economic integration groupings; (2) Derogation from national sovereignty of member states; (3) Diversity and variations of constitutional law issues, especially their interaction with public international law issues among member states; (4) Dissimilarities and divergences in municipal laws of member states regulating key areas of economic cooperation, for example, industrial and trade laws (notably investment, incentive laws), nationality and immigration laws, customs and excise laws, exchange control laws, and taxation legislation; (5) Inherent conflicts between the indigenous or customary laws and the inherited Western laws in so far as they may affect key areas of economic cooperation among member states; (6) Lack of fully developed legal principles regulating, for example, contractual liability, liability in tort, corporate liability, bankruptcy and insolvency within the municipal law domain of some member states; (7) Lack of conflict of law rules regulating jurisdictional and choice of law matters and rules providing for reciprocal recognition and enforcement of civil judgments rendered in member states.[40]

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[38] What is interesting is that although Bamodu writes in 1994 to collaborate his claim that the diversity of law has a negative impact on African development and regional integration, he refers to outdated reports. In this particular instance he based his report from data collected in 1968-1970. Gbenga Bamodu, *Transnational Law, Unification and Harmonization of International Commercial Law in Africa*, 38 J. AFR. L. 125, 125 (1994).

[39] Bankole Thompson, *Legal Problems of Economic Integration in the West African Sub-Region*, 2 AFR. J. INT'L & COMP. L. 85, 86 (1990).

[40] *Id*.

To solve these seven major problems, Thompson proposes harmonization of laws.[41]

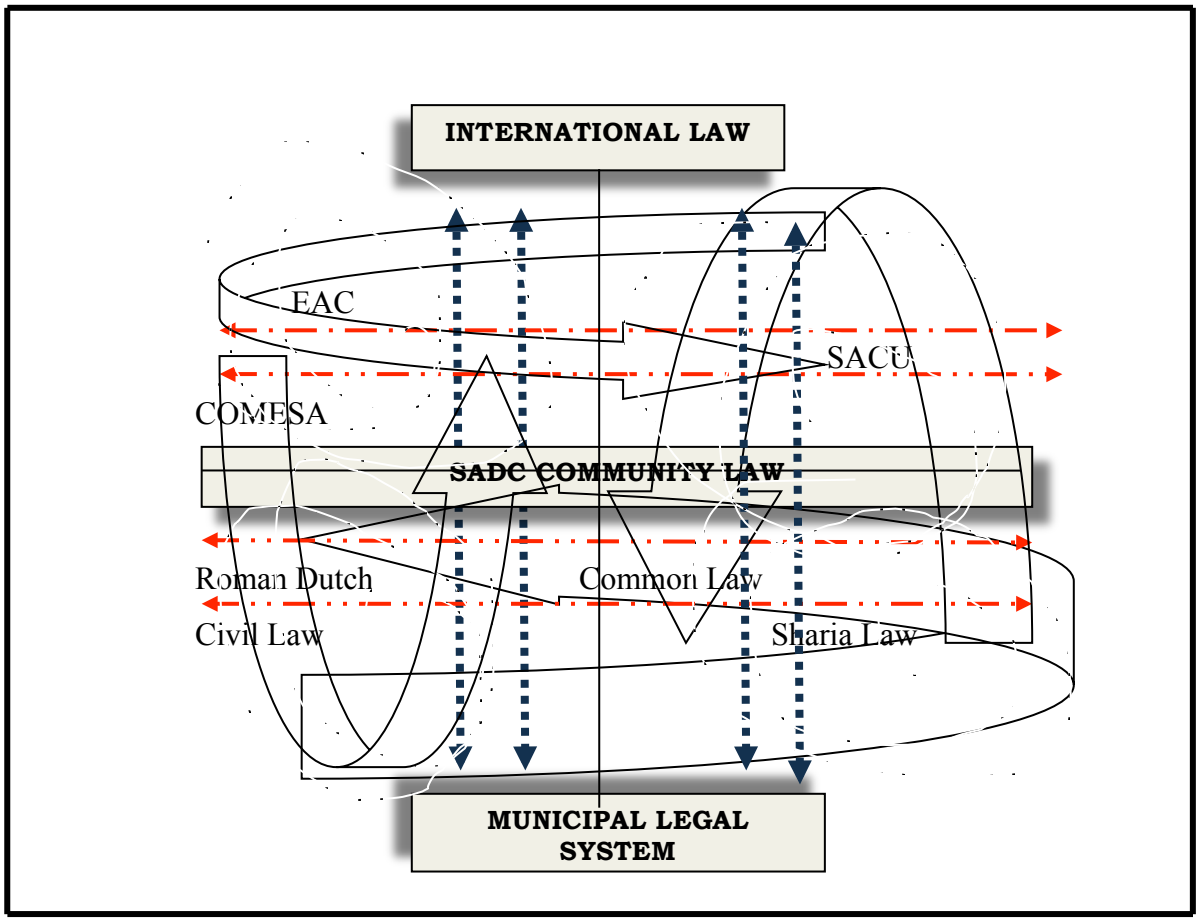

Figure 2: Vertical and Horizontal Diversity of Law

2.3.5. Law as an Impediment to Regional Integration: Horizontal Diversity of Laws

Horizontal diversity of law is the result of multiple municipal and regional integration laws. Diversity of regional integration laws are the result of the existing Spaghetti Bowl Syndrome of integration schemes in Southern African countries.[42] It complicates terms of access

[41] *Id.*

[42] Saurombe, *supra* note 31 at 102. See also Luwam Dirar, *Common Market for Eastern and Southern African Countries: Multiplicity of Membership Issues and Choices*, 18 AFR. J. INT'L COMP. L. 217, 219 (2010) (For instance, "Out of the 14 members of SADC, five are members of SACU, seven are members of the Common Market of Eastern and Southern Africa COMESA), and one is a member of the East African Community (EAC).")

to markets of Southern African states. Therefore, the SADC states devised intricate rules, called "rules of origin," that block goods emanating from non-member states from entering their markets.[43] When diversity of law is considered a problem requiring solution, legal thought seems to point to a new set of laws to resolve the multiplicity of regimes. This perception of resolving the multiplicity of laws through law, as in the case of rules of origin, apart from maintaining the Spaghetti Bowl Syndrome, does not in any way contribute to harmonize laws horizontally.[44]

Multiplicity of treaty obligations could result in horizontal coherence dilemma. It is logical to assume that coherence dilemma is the result of multiple and incoherent treaty obligations binding the same subject matter. Hence, one might argue that horizontal coherence dilemma is incoherence or contradiction among multiple horizontal treaty obligations with no clear superiority of one treaty obligation over the other. Unfortunately, however, for incoherence to exist there need not be actual contradiction between the different treaty obligations. The possibility of multiplicity of different treaty obligations binding different states, with some states belonging to a sub-set of states, at least creates a possibility of jurisdictional confrontation. This possibility of distinct treaty obligations governing similar state behavior is what Tomer Broude and Yuval Shany refer to as Multi-Sourced Equivalent Norms. This is one of the sources of horizontal coherence dilemma. This possibility is enough to show existing horizontal incoherence, as it results in multiplicity of dispute resolution mechanisms concurrently available to deal with a particular case. *See* Tomer Broude and Yuval Shany, *The International Law and Policy of Multi-Sourced Equivalent Norms*, *in* MULTI-SOURCED EQUIVALENT NORMS IN INTERNAITONAL LAW, 2-3 (Ed., 2011).

[43] SADC, Rules of Origin-Exporters Guide Manual, approved at the 7th Meeting of the Sub-Committee on Customs Cooperation, Nov. 2003. (Preamble "SADC Rules of Origin are the cornerstone of the SADC intra-regional trade and serve to prevent non-SADC goods from benefiting from the preferential tariff treatment offered under the trade regime.")

[44] Therefore, rules of origin, actually maintained multiplicity of membership, or multiplicity of treaty obligations as "the-new-normal" in the sub-regional integration schemes of the continent in general and of Southern African countries in particular.

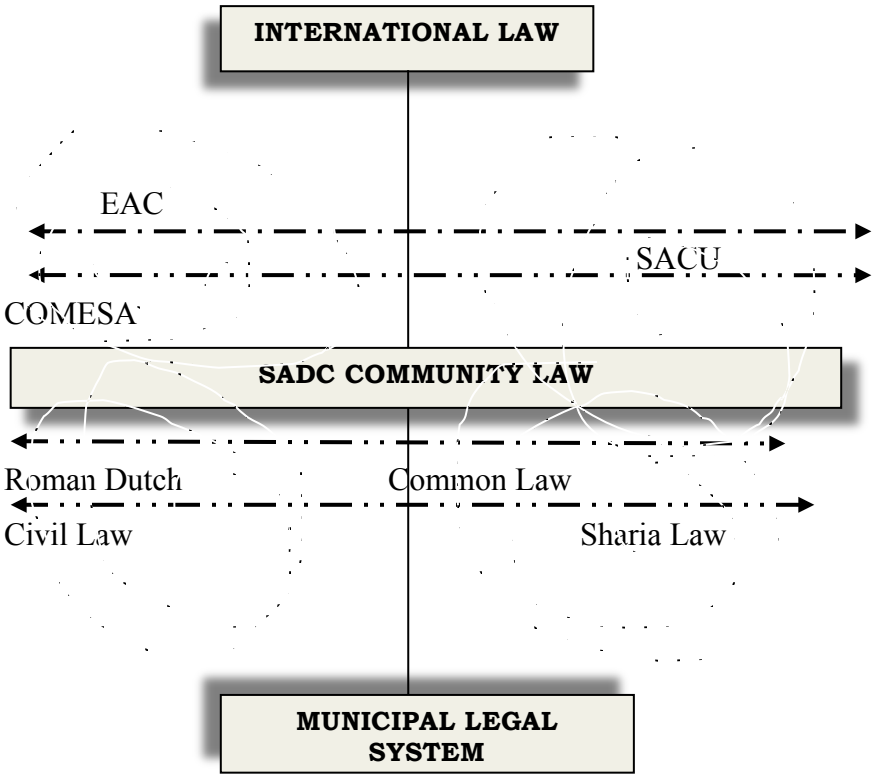

Figure 3: Horizontal Diversity of Legal Systems among Southern African states

The horizontal diversity of law has also been addressed by attempting to harmonize municipal legal systems. Among Southern African states as shown in Figure 3, and as Muna Ndulo rightfully noted, there are Common law, Roman-Dutch law, Sharia law and Civil law systems.[45] Despite the lack of complementarity in modes and factors of production among

[45] Muna Ndulo, *Harmonization of Trade Laws in the African Economic Community*, 42 INT'L & COMP. L.Q. 101, 102 (1993) (discussing diversity of domestic laws across Southern African states.)
Regional Integration arrangements, theoretically speaking, have an overall harmonization effect, as they are treaty-based agreements with normative prescription. Integration treaties can adopt a constitutional approach of legal harmonization through the adoption of uniform substantive laws relevant to the integration scheme. In the case of the SADC, for instance, the SADC Trade Protocol mandates member states to eliminate tariff and non-tariff barriers. That is to say, it provides a common obligation that requires member states to eliminate tariffs and non-tariff barriers. However, it is dubious to conclude that the drafters of the treaty were referring to legal harmonization in the region, as the treaty did not specify legal harmonization as one of its objectives. Article 5 of the SADC Treaty specifies the objectives of the SADC as to:

> (a) promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; (b) promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective; (c) consolidate, defend and maintain

Southern African states, several legal scholars argue that divergence of legal system has a positive correlation to weak intraregional trade among African integration aspirations.[46] On the contrary among Southern African states policies for enhancing trade-based integration need to solve supply-side constraints.

2.3.6. Law as Impediment to Regional Integration: Vertical Diversity of Laws

Vertical diversity of law is the result of the multiplicity of international laws and the relationship of those laws to municipal laws of member states. As shown in Figure 4, vertical diversity of law has two prongs. First, it is the vertical relationship between municipal laws and community law. Second, it is the relationship between international law and community law. The next Part of this chapter deals with the relationship between community law among Southern African states and municipal and international laws.

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democracy, peace, security and stability; (d) promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; (e) achieve complementarity between national and regional strategies and programs; (f) promote and maximize productive employment and utilization of resources of the Region; (g) achieve sustainable utilization of natural resources and effective protection of the environment; (h) strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region; (i) combat HIV/AIDS or other deadly and communicable diseases; (j) ensure that poverty eradication is addressed in all SADC activities and programs; and (k) mainstream gender in the process of community building. SADC Treaty Art. 5.

Similarly the Community Treaty failed to establish an institution or a committee responsible with harmonization of trade laws. Article 9 of the treaty established seven technical committees but none of them deals with legal integration. These institutions are: "(a) the Summit of Heads of State or Government; (b) the Organ on Politics, Defence and Security Co-operation; (c) the Council of Ministers; (d) the Integrated Committee of Ministers; (e) the Standing Committee of Officials; (f) the Secretariat; (g) the Tribunal; and (h) SADC National Committees." In addition, the SADC Parliament was established as an extra institution under the provisions of article 9(2). Hence, the impact of the SADC integration schemes as a tool for horizontal harmonization is rather limited and institutionally inadequate.

[46] *See* for instance, Bamodu *supra* note 37, at 130-142 (discussing African alternatives to solving diversity of laws.) *See* also John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: A comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe*, 19 HOUS. J. INT'L L. 1, 62- 63 (1996) (discussing the negative correlation between diversity of laws and successful regional integration schemes Fitzpatrick advocates the need for unifying or harmonizing laws).

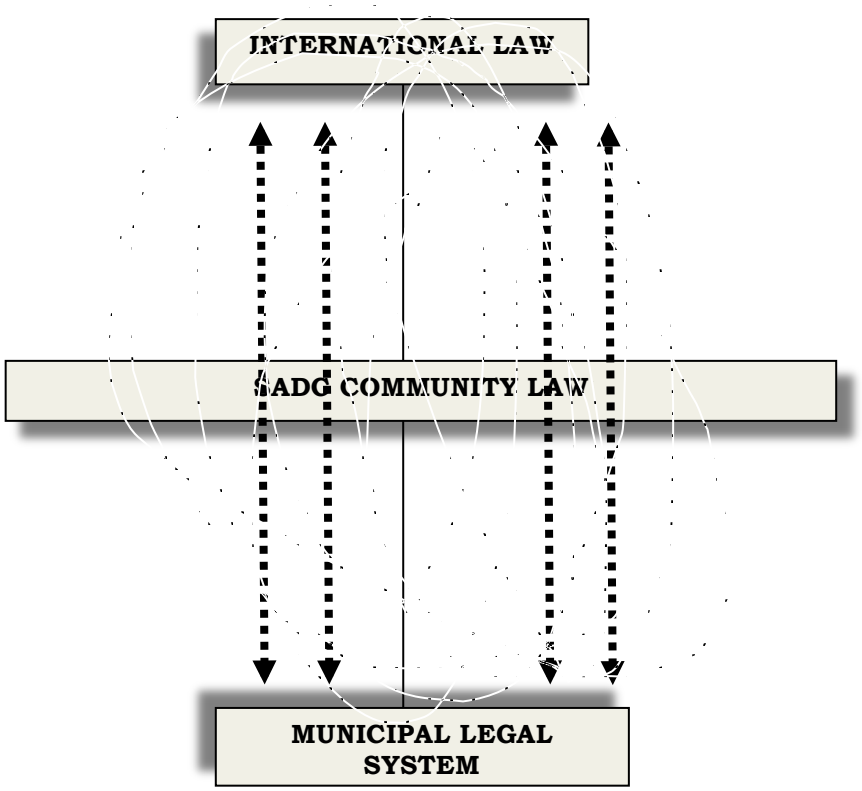

Figure 4: Vertical Diversity of Integration Law among Southern African States

2.3.6.2. Vertical Laws Governing Southern African Integration Aspirations & Municipal Legal Systems

Theorists have debated the relationship and role of community law in municipal legal systems for decades.[47] Those debates fall into two broad theoretical underpinnings: monist and dualist legal thought.[48] Monist legal thought argues that all laws are a unified body of rules.[49] It

[47] Municipal Legal Order is interchangeably used with "domestic legal order" throughout this chapter. For the purposes of this chapter, Municipal law is "a particular system of norms having validity over certain persons within a certain defined territorial area." *See* also J.G. Strake, *Monism and Dualism in the theory of International Law*, 17 BRIT. Y.B. INT'L 66, 66 (1936).

[48] The origins of the debate on the relationship between municipal law international law (or, in this case, community law) is linked to the doctrine of sovereignty. Historically, Catholic academics developed monist construction of law as a reconciling factor for the idea of the contention between international normative order and municipal sovereignty claims. On the other hand natural law theorists argued that sovereignty *ab-initio* is bestowed by international law and therefore there is no contention between the idea of sovereignty and international law. While monism has much older roots, dualist legal thought dates back to mid-eighteenth century and particularly to Hegel and Vattel. Both Hegel and Vattel saw contradiction between state or municipal sovereignty and the direct application of international law. For Hegel and Vattel state sovereignty is supreme and allows states to decide if they chose to allow direct application of international law. One could also conclude that the dualist understanding of the relationship between international law and sovereignty is within the realm of the positivist school of jurisprudence.

asserts that community law and municipal law are not separate sets of rules, but rather part and parcel of a unified legal structure. On the contrary, dualist legal thought argues that community law and municipal law are separate both in origin and purpose.[50] For dualists, community law and municipal law are different expressions of sovereign will – where the former is the manifestation of external sovereign will and the latter of internal sovereign will.

In post-colonial Africa, the roles of international law and community law in municipal legal systems are hugely influenced by legal traditions inherited from former colonial powers.[51] The majority, if not all, of the former British colonies adopted a dualist approach and required domestication of community law before the latter receives the force of law in their respective municipal legal systems.[52] On the other hand, most, if not all, former French, Portuguese, German, and Italian colonies adopted a monist approach and understand community law as part and parcel of their municipal legal systems.[53]

See generally Rosalie P. Schaffer, *The Inter-Relationship between Public International Law and the Law of South Africa: An Overview*, 32 INT'L & COMP. L. Q. 277, 277-315 (1983).

[49] Monist theory asserts the supremacy of community law both at the regional and domestic arenas. On the contrary, for dualists, the forum determines the supremacy of a particular law. Hence, for dualists, community law is supreme in regional arena, while municipal law is supreme at the domestic level. However, one might wonder of how dualist legal thought settles the issue of supremacy when there is a contradiction between community law and municipal law. For dualists, since community law is not automatically part of municipal law, whenever there is contradiction between municipal and community legal obligations, municipal law prevails. *See* for instance, Richard Craver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L. REV. 1, 9 (2010).

[50] *Id.*

[51] In the African context, Tiyanjana Maluwa noted that the relationship between international law and municipal law must be approached with three general observations in mind: (1) The domestic application of international law is governed by domestic constitutional law; (2) state practice with regard to the distinction between monist and dualist are not clear cut and alternative doctrines are possible; and (3) court practice might be different from the particular legal thought the state subscribes to. Even though Maluwa's analysis dealt with international law, in its broadest sense, it seems to the researcher that it can be applied in understanding the role of community law in domestic legal systems. Therefore, at the outset it is necessary to address the status of community law in municipal legal systems of SADC states. TIYANJANA MALUWA, INTERNATIONAL LAW IN POST-COLONIAL AFRICA, 35-36, (1999).

[52] *See* for instance A. O. Enabulele, *Implementation of Treaties in Nigeria and the Status Question: Wither Nigerian Courts?* 17 AFR. J. INT'L & COMP. L. 326, 328 (2009) (discussing Nigerian dualist approach to international law).

[53] MALUWA *supra note* 50, at 38 (discussing the influence of colonial experiences on African legal traditions.)

A survey of the constitutional law of Southern African states offers five models for community law. First, there are those states that are silent on the role of both international law and community law in their domestic legal systems. These are the constitutions of Lesotho, Madagascar, Tanzania, Zambia, Botswana, and Mauritius.[54] The Constitution of Lesotho states that the "Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."[55] Similarly, the Constitution of Botswana is silent on the status of international law in municipal legal system.[56] In a second model, the Constitution of Angola requires constitutional review of community law before the latter is domesticated. Article 227 of the Angolan Constitution states, "[a]ll acts which constitute violations of constitutional principles and norms shall be subject to a review of their

[54] The closest reference to international law one could find in the Mauritius' Constitution is under Art. 15(3(b)) imposing limitations on the right to free movement of people. It says, "for the imposition of restrictions on the right of any person to leave Mauritius in the interests of defense, public safety, public order, public morality or public health or of securing compliance with any international obligation of the Government, particulars of which have been laid before the Assembly." This sub article might imply that international obligations need to be laid before the Assembly first in order for it to be enforced in Mauritius. Hence, one might deduce that international law must be promulgated and passed as law before it can have effect in the municipal legal system of the country.

[55] Article 2 of Lesotho Constitution.

What is interesting about the Malagasy Constitution is that it reiterates that certain human rights instruments are an integral part of municipal law in the preamble. In its words, "[t]he sovereign Malagasy people, … faithful to their international commitments; adopting the International Charter of Human Rights, the African Charter of Human Rights, the Convention on Children's Rights, and considering these to be an integral part of their law…." Then again under article 82(8) it states:

> Ratification or approval of alliances or commercial treaties, treaties or agreements regarding international organization which commit State finances, which deal with the status of persons, peace treaties, treaties which involve the ceding exchange or acquisition of territory must be authorized by law. Prior to any ratification, treaties shall be submitted by the President of the Republic to the Constitutional Court. In case of non-conformity with the Constitution, ratification may take place only after Constitutional revision.

See also Constitution of Tanzania. *See* also the Constitution of Zambia.

[56] The Constitution of Botswana is silent on the status of international law in the municipal legal system. However, international law is used as an interpretative aid under the Interpretation Act. The Interpretation Act under Section 24(1) of the Interpretation Act specifies

> For the purpose of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any text-book or other work of reference, to the report of any commission of inquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment, to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject-matter, but not to the debates in the Assembly.

Interpretation Act CAP (01:04) of the Laws of Botswana, available at http://www1.eis.gov.bw/EIS/Policies/Environmental%20Policies/Interpretation%20Act.pdf.

See also generally OB Tshosa, *The Status and Role of International Law in the National Law of Botswana*, *in* ESSAYS ON THE LAW OF BOTSWANA, 229, 229 – 246 (C M Fombad ed., 2007).

constitutionality, specifically: a) Legislation; b) International treaties, conventions and agreements; c) Revisions of the Constitution; d) Referenda."[57] Third, there are constitutions that require transformation and reciprocity for domestication of community law. According to the Constitution of DRC,[58] once ratified, international law has supremacy over municipal law, subject to reciprocity by other contracting states.[59] A fourth is similar, with the exception of a reciprocity requirement, in Mozambique,[60] Malawi,[61] Zimbabwe,[62] Swaziland,[63] South Africa,[64]

[57] Article 227 of the 2010 Constitution of Angola. *See* also Article 226 of the 2010 Constitution of Angola that states, "[t]he validity of laws and the various acts of the state, the public administration and the local authorities shall depend on their compliance with the Constitution. 2. Laws or acts which violate the principles and norms enshrined in this Constitution shall be unconstitutional."

[58] The DRC Constitution specifies that community law needs to be incorporated to the municipal legal system through promulgation. Article 214 of the DRC Constitution states,

> Peace treaties, trade agreements, treaties and agreements relating to international organizations and to the settlement of international conflicts, those which involve public finance, those which amend legislative provisions, those which relate to the status of individuals, or those which entail the exchange and addition of territory may only be approved or ratified by virtue of a law.

[59] Article 215 of the DRC Constitution states, "[l]awfully concluded treaties and agreements have, when published, an authority superior to that of the law, subject for each treaty and agreement to the application by the other party."

[60] Article 18 of the Constitution of Mozambique states,

> (1) [v]alidly approved and ratified International treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State. (2) Norms of international law shall have the same force in the Mozambican legal order as have infra-constitutional legislative acts of the Assembly of the Republic and the Government, according to the respective manner in which they are received.

[61] Article 211(1) of the Constitution of Malawi provides, "[a]ny international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement."

[62] Article 111 B(1) of the Constitution of Zimbabwe states,

> Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations: (a) shall be subject to approval by Parliament; and (b) shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.

[63] Article 238 (2) of the Swazi Constitution states,

> An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by: (a) an Act of Parliament, or (b) a resolution of at least two-thirds of the members at a joint sitting of the two Chamber of Parliament.

[64] Section 231(5) of the Constitution of South African specifies that "[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

and Seychelles.[65] Community law here has the force of law, upon ratification and promulgation. A fifth model in Namibia incorporates community law automatically.[66]

All Southern African constitutions with the exceptions of two are silent on interstate cooperation. The DRC and Swazi Constitutions have provisions dealing with interstate cooperation. The Swazi Constitution explicitly states, "[i]n dealing with other nations, Swaziland shall… endeavor to uphold the principles, aims and ideals of … Southern African Development Community."[67] Article 217 of the DRC Constitution stipulates that the DRC must promote African Unity.[68] In conclusion, the relationship between community law and constitutional laws of Southern African states are very diverse.

2.3.6.3. Vertical Laws Governing Southern African Integration Aspirations & Municipal Court Systems

Similar to the constitutional practices of Southern African states, the practices of municipal courts' could be broadly divided into two categories. First, some municipal courts use international law or community law as interpretative aids. The constitution of South Africa, for instance, counts on municipal courts to interpret municipal law through the use of "international law as an interpretative aid."[69] Elaborating on this principle, Justice Chaskason P. in *State vs. T*

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[65] Article 64(4) of the Constitution of Seychelles states,

> A treaty, agreement or convention in respect of international relations which is to be or is executed by or under the authority of the President shall not bind the Republic unless it is ratified by− (a) an Act; or (b) a resolution passed by the votes of a majority of the members of the National Assembly.

See also article 64(5) states "[c]lause (4) shall not apply where a written law confers upon the President the authority to execute or authorize the execution of any treaty, agreement or convention."

[66] Article 144 of Namibian Constitution specifies "[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."

[67] Article 236 of the Swazi Constitution.

[68] Article 217 of the DRC Constitution states "[t]he Democratic Republic of the Congo may conclude association or community treaties or agreements entailing a partial relinquishment of sovereignty in order to promote African unity." The discussion of the Constitution of Congo are in relation to the Constitution of 2005 and is available at http://www.constitutionnet.org/files/DRC%20-%20Congo%20Constitution.pdf (accessed on 02/23/2012).

[69] Article 233 of the Constitution of South Africa states, "[a]pplication of international law. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

Makwanyane and M Mchunu reasoned, "[w]e can derive assistance from public international law and foreign case law, but we are in no way bound to follow it." [70] Likewise, Botswana courts, in *Dow vs. Attorney-General* reasoned that, "courts must interpret domestic statutory laws in a way as is compatible with the State's responsibility not to be in breach of international law."[71] In *Good vs. Attorney General*, the High Court of Botswana, reasoned that international law, which has not been domesticated, does not have the status of law in municipal courts.[72] Unlike other SADC state courts, Zimbabwean courts have had the opportunity to examine the application and effect of community law in their domestic legal system. In *Gramara vs. Zimbabwe*, the court adopted a positivist approach and concluded that both international law and municipal law are

[70] *See* State vs. T Makwanyane and M Mchunu, Case No. CCT/3/94.
[71] *Id.* at 46.
[72] Good vs. Attorney General, [2005] 1 BLR 462 (High Court) para 3("International treaties to which Botswana was a signatory did not have the force of law until incorporated in the domestic law.")
Similarly, the Malawian Supreme Court of Appeal in Chihan vs. the Republic reasoned that the African Charter of Human and People's Rights does not have a force of law, since it has not been domesticated.

> We were also referred to the African Charter on Human and People's rights. This Charter, in our view, must be placed on a different plane from the UNO Universal Declaration of Human Rights. Whereas the latter is part of the law of Malawi the African Charter is not. Malawi may well be a signatory to the Charter and as such is expected to respect the provisions of the Charter but until Malawi takes legislative measures to adopt it, the Charter is not part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provision the Charter would be enforceable in our Courts.

Correspondingly, jurisprudence of Tanzanian courts took similar approach and required domestication of international law to be applicable in municipal legal systems. *See* Chihana v Republic (MSCA Criminal Appeal No. 9 of 1992) [1993] MWSC 1, available at http://www.malawilii.org/mw/judgment/supreme-court-appeal/1993/1 (last visited Feb. 27, 2012) *See* also Chacha Bhoke Murungu, *The place of international law in human rights litigation in Tanzania*, *in* INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA, 61, 61-67 (Magnus Killander, ed., 2010).

supreme in the international and domestic arenas respectively.[73] The court reasoned that community law has no effect if it has not been domesticated.[74]

Now three decades old, the Angolan experience differs from those of other SADC municipal court experiences. In the 1976 Mercenaries trial, the People's Revolutionary Court of Angola recognized a "crime of mercenary" by referring to resolutions of the OAU and UN. The prosecution was based on: (1) statement of the heads of states of OAU of 1967; (2) statement on mercenary activities in Africa of 1971; (3) UN resolutions 2395, 2465, 2548, and 3103.[75] The defense argued that the crime of mercenary does not exist in the Angolan legal system.[76] The court reasoned that "crime of mercenary" is recognized as a crime in the legal system of civilized nations, and further looked at UN resolutions and OAU statements to justify their views of the crime.[77] In conclusion, however, it is not clear whether Angolan courts still follow this this practice.

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[73] Gramara (Pvt.) Ltd and Another v Government of the Republic of Zimbabwe and others (HC 33/09) [2010] ZWHHC 1 5-6 (26 January 2010), available at http://www.saflii.org/cgi-bin/disp.pl?file=zw/cases/ZWHHC/2010/1.html&query=gramara.
The Court reasoned,

> However, it does not follow, as is further contended on behalf of the applicants, that the primacy of treaty obligations at international law must necessarily and invariably be taken into account in applying domestic law at the municipal level, even where there is a clear conflict between the two regimes.

The resultant divergence between the two systems is reconciled on the basis that the State incurs international responsibility for having violated its international obligations and must accordingly effect the requisite reparations in order to satisfy its international responsibility. *See* BROWNLIE, *infra* note 347, at 34-37.

[74] *Id.*, at 4. The court further reasoned,

> It is common cause that Zimbabwe has not taken any specific internal measures to domesticate the SADC Treaty or the Protocol of the Tribunal. More specifically, no legislative or administrative steps have been taken to implement Zimbabwe's obligations under Article 32 or to transform those obligations into effectual provisions of the municipal law.

[75] George H. Lockwood, *Report on the Trial of Mercenaries: Luanda, Angola, June 1976*, 7 MAN. L.J. 183 183, 195 (1976-1977).

[76] *Id.,* at 199. ("This annuls the objection of the defence that the crime of mercenarism has not been defined and that there is no penalty for it. It is in fact provided for with penalty in most evolved penal systems.")

[77] *Id.* ("It is in fact provided for with penalty in most evolved penal systems. As a material crime, of course!…Reference is made to the United Nations resolutions on mercenaries and the statements of the Organization of African Unity with a comment that mercenarism is considered a crime in the view of nations.")

2.3.7. Regional Integration Law and Municipal Law: Regional Court Practice

Community law regulates government intervention to ensure equal treatment of foreign and domestic goods. At the regional level, the law has rarely been invoked, and when it has been, it was during a breach of contractual obligation. At times, community law has been contested as being unconstitutional. In the *East African Community vs. the Republic of Kenya*, the East African Community Court (EACC) held:

> [t]he constitution of Kenya is paramount and any law whether it be of Kenya, of the Community or of any other country which has been applied in Kenya, which is not in conflict with the Constitution is void to the extent of the Conflict…If the provisions of any Treaty having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void.[78]

The court concluded that it is within the constitutional power of the Kenyan government to enter into a treaty obligation that might even be in contradiction to integration treaties. Likewise, the EACC concluded the supremacy of domestic law over a regional integration treaty.[79]

On the contrary, in a more recent case the SADC Tribunal declared the supremacy of community law over domestic law and court decisions. In *Campbell vs. Republic of Zimbabwe*, the Tribunal dealt with the legality of land acquisition carried out under the Constitution of Zimbabwe. The plaintiffs in this case claimed that section 16B of the Constitution of Zimbabwe was discriminatory and in contradiction to community law.[80] The Supreme Court of Zimbabwe dismissed the applicants' claims in their entirety.[81] The court reasoned that municipal law is not

[78] AKINTAN *supra* note 105, at 141 (quoting the case).
[79] *Id*.
[80] Campbell v. Zimbabwe, Case No. 2/2007 (SADC(T) 2007).
[81] *Id*.

an excuse for breaching international law and unanimously decided that section 16B of the Constitution of Zimbabwe is in contradiction to community law.[82]

2.4. Diversity as Problem or Opportunity?

Diversity of laws creates administrative challenges for member states. However, diversity of laws could also be an opportunity that allows members of an integration scheme to ease into the integration agenda of the region. First, diversity of laws and legal regimes could allow for diversity of practices and gradual integration (with room for policy space). Second, diversity of laws is a manifestation of the domestic legislative process, rather than its abrogation. Third, diversity of laws limits regional, neoliberal integration projects through municipal constitutional and court processes. In conclusion, the existing diversity of laws functions as a buffer for the ideological and legal erosion of the policy space in Southern African states. The question remains, however, what will be the impact of EPAs on this homegrown buffer?

2.4.2 Conclusions: The EU & Diversity Of Law Among Southern African States

The ongoing negotiations for EPAs could have several impacts on the diversity of laws among Southern African states. First, ideologically, EPAs and existent milestones for integration among SADC states advocate for marketization and liberalization of trade. As such, the conclusion of EPAs could have an ideological (in this case neoliberal) unifying effect among Southern African states. Alternatively, since SADC states set integration milestones based on trade liberalization, one could conclude that by harmonizing diversity, EPAs will have a unifying or integrating effect. But, interestingly, harmonization of laws on the regional integration aspirations of Southern African state will have little or no effect. First, the claim that EPAs through harmonization could bring deeper integration is founded on a flawed and narrow

[82] *Id.*

understanding of regional integration as argued in Chapter Four of this dissertation. Second, existing supply-side constraints among African states are not necessarily the result of diversity of laws. Third, unwritten rules and "norms of solidarity" are not subject to the harmonization efforts of EPAs. In conclusion, the EU will not have a central role over shaping or reshaping the integration schemes of Southern African states by redefining the role of law in the region.

CHAPTER – THREE: PARALLEL AND INTERSECTING NARRATIVES

PART – I- INTRODUCTION

Scholars narrate EU-Africa or EU-Southern African relations from two perspectives. First, although this is a generalization, third-world scholars reviewed Europe's relations with its former colonies as Euro-centric, unequal and neo-colonialist.[83] This approach of analysis applies dependence theory and historically sensitive methodologies to critique existing global economic order.[84]

From a political economy perspective, Walter Rodney argues that Africa's underdevelopment is a demonstration of Europe's imperialist ambitions where European

[83] This view of third world scholars is consistent with Third World Approaches to International Law. *See* for instance, James Thou Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 26 (2011) (discussing how TWAIL is concerned with changing Eurocentric international law for more egalitarian world order.) One might question the use of historically sensitive methodology and its credibility as a methodology. Obiora Chinedu Okafor has dealt with the question and concluded that TWAIL is both a methodology and a theory for understanding international law. *See generally* Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 INT'L COMM. L. REV. 371, 371-378 (2008).
This is not to claim that all third world scholars use TWAIL to analyze EU-Africa relations. On the contrary, for instance, Peter Draper (a South African), dealt with contemporary negotiations for EPAs and its impact on regional integration. He cautions that EPAs are a means to externalize and export European integration model to Africa. *See* Peter Draper, *EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements*, 2 EUR. CENT. INT'L POL. ECON. 1, 1-36 (2007).
Non-African scholars have also criticized the impact of EU–Africa trade relations. Unlike TWAILers, however, these scholars analyzed EU-Africa relations without ideological approach. For instance, Matthias Busse and Harald Grobmann argue that trade liberalization through EPAs have negative impact on West African states. *See* generally Matthias Busse & Harald Grobmann, *The Trade and Fiscal Impact of EU/ACP Economic Partnership Agreements on West African Countries*, 43 J. DEV. STUD. 787, 787-811 (2007). Similarly, Mary Farrell engages with the issue of regional integration aspirations in Africa and criticizes EPAs as European pursuit of EU's interest at the cost of Africans. *See* Mary Farrell, *A Triumph of Realism over Idealism? Cooperation Between the European Union and Africa*, 27 J. EUR. INTEGRATION 263, 263-283 (2005).

[84] For instance, *see* generally Samir Amin, *Underdevelopment and Dependence in Black Africa- Origins and Contemporary Forms*, 10 J. AFR. MOD. STUD. 503, 503-524 (1972) (discussing dependency theory).
For a critic of dependency theory *see* Tony Smith, *The Underdevelopment of Development Literature: The Case of Dependency Theory*, 31 WORLD POL. 247, 248 (1979) (Smith argues that by absolving developing countries and the roles they play in shaping their own economic future dependence theorists give more credit to the international system).

development had an equal and opposite reaction on underdevelopment in Africa.[85] Guy Martin, similarly, analyzed the relationship between Africa's underdevelopment and Europe's development. Martin summarizes the continuity of the correlations between Africa's underdevelopment and Europe's development as "[t]rade, based on unequal exchange and specialization, constitutes the mainstay of this relationship, be it the slave trade from the fifteenth to the nineteenth centuries, the 'trade economy' of the 'colonial pact' from 1900 to 1960, or the neo-colonial trade since then." [86] Scholars who belong to Third World Approaches to International Law (TWAIL) share sentiments of dependence theorists' and reject Eurocentricism of EU-Southern Africa trade relations.[87]

In contrast, scholars from Europe (again this is an oversimplification), analyzed the benefits that Africa will receive because of its relationship with the EU.[88] J. J. Van Der Lee

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[85] *See* generally, WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 1-283 (1972) (discussing the direct correlation between European development and African underdevelopment.)

[86] Guy Martin, *Africa and the Ideology of Euroafrica: Neo-colonialism or Pan-Africansim?*, 20 J. MOD. AFR. STUD. 221, 227 (1982).

[87] Although not specifically dealing with Southern African states the works of several TWAIL scholars and are easily transferable in analyzing EU-Southern African trade relations. The focus on historicism by TWAIL scholars can give context to the ordinary experiences of third-world states and their citizens. Makua Matua eloquently summarized the aspirations of TWAIL scholars as:

> TWAIL is driven by three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.

Makua Matua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 31-32 (2000) *See* also B. S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELB. J. INT'L L. 499, 499-516 (2007) (discussing the need to incorporate experiences of third world citizens). Similarly *see* also David P. Fidler, *Revolt Against or from within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT'L. 29, 31 (2003) (arguing that TWAIL objective is post-hegemonic global order where the third-world "escapes structural and substantive marginalization."

[88] Methodically most of these scholars use formalist analysis. In this context, formalism is "adherence to a norm's prescription without regard to the background reasons the norm is meant to serve…. A norm is formalistic when it is opaque in the sense that we act on it without reference to the substantive goals that underlie it." Larry Alexander, *"With Me, It's All er Nuthin": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 (1999).

One should also note that the researcher's view that European scholars have a positive view of EU-Africa trade relations is a generalization. *See* Busse *supra* note 82.

concludes that association was beneficial for both continents.[89] For Van Der Lee the benefits for African states included preferential access to European markets and investment aid of $581 million for the period of 1958-1962.[90] The most important benefit for the EU was creation of a peaceful relationship between Europe and post-colonial Africa.[91]

While narration of EU-Africa trade relations is possible from different angles and based on the ideological tendencies of the narrator, most scholars engaged in analysis of these relations fail to appreciate intra-African integration.[92] This Chapter is a brief introduction to EU-Africa post-colonial trade relations. It gives the reader two parallel narratives with different actors.[93] At times, these two set of players influence and relate to each other and this is where "intersection" of the narratives happen. In this narrative, the two players started as a set of African states, struggling for their emancipation from colonial domination and oppression by the second set of players, in this case European colonists. Eventually, with the advent of independence, EU-Africa

[89] J.J. Van Der Lee, *Association Relations between the European Economic Community and African State*, 66 AFR. AFF. 197, 197 (1967) (discussing benefits that will accrue to African states as a result of their association with the EU).
[90] *Id.*
[91] *Id.*
[92] And several of those who engage in regional integration studies (when narrating EU-Africa trade relations) seem to take formalistic positions and conclude that EPAs will correct African failed integration projects. For instance, IMF economist Padmaja Khandelwal analyzing the impact of EPAs on SADC and COMESA argued:

> The EPAs have a development focus – they are to assist ACP countries in enlarging their markets by improving the predictability and transparency of the regulatory framework for trade and creating conditions for increased investment. In this context, the EU has placed strong emphasis on South-South integration through reinforcing existing regional integration initiatives, harmonization of rules and creation of customs unions. Negotiations are being conducted with regional economic groupings instead of individual countries. … The EPAs' emphasis on reinforcing RTAs can be beneficial because countries will be required to rationalize their overlapping memberships and because it counteracts the formation of 'hub-and-spoke' agreements.

Padmaja Khandelwal, *COMESA AND SADC: Prospects and Challenges for Regional Trade Integration* 28, 35 (Int'l. Monetary Fund, Working Paper No. 227, 2004).
[93] The choice of "narrative" in this chapter reflects the focus on thematic analysis rather than structural analysis of EU-Africa trade history. Alternatively, this chapter focuses on what is told rather than how it is told. For a detailed analysis of narrative analysis *see* Catherine Kohler Riessman, *Narrative Analysis*, http://cmsu2.ucmo.edu/public/classes/Baker%20COMM%205820/narrative%20analysis.riessman.pdf, (last visited Feb. 2, 2013).

trade relations went through successive revisions. Hence, this section is a historical narrative of those two parallel and at times intersecting Euro-Africa trade relations.

PART- II- RATIONAL AND MODALITIES OF CONTINENTAL INTEGRATION IN AFRICA

Regional integration aspirations of African states were socioeconomic, legal, and political processes that led to the formation of the OAU and its successor the AU. Starting from the late 1950s African aspirations for integration have been institutionalized both at the sub-regional and continental levels. At the continental level, the debate between Kwame Nkrumah and Julius Nyerere took a momentous position at the First Ministerial Meeting of African Heads of States. Nkrumah argued for the need to establish a supranational continental integration project –a United States of Africa.[94] On the contrary, Nyerere advocated for an incremental approach – intergovernmentalist – where newly independent African states could keep their sovereignty and gradually integrate to form the OAU through sub-regional groupings.[95] As detailed in Chapter Four of this dissertation, Nyerere's proposal took central stage and as the lowest common denominator for continental integration, received support from founding members of African unity. Consequently, gradual African integration was accepted as a process based on the idea of sub-regional groupings as building blocks of continental integration in Africa.

The next sub-sections explains the rationale for Africa's integration. Aspirations for regional integration are multilayered and complex. Chapter Four of this dissertation engages with classical economic theories and the Kantian theory or perpetual peace as rationales for integration among Southern African states. In this section, therefore, the discussion of the

[94] Nyirabu *infra* note 229 (discussing Kwame Nkrumah and Julius Nyerere and their positions on different integration modalities for Africa).
[95] *Id.*

rationale for Africa's integration schemes is limited. This section focuses on rectifying colonial mistakes, and emancipation.

2.2. Rectifying Colonial Mistakes

Colonial powers divided Africa into territories without due regard to ethnic, indigenous empires and national boundaries. Lord Salisbury noted, "[we] have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were."[96] Post-independence, African states and the OAU, solidified arbitrarily drawn European formulations with juridical statehood.[97]

Recognition of colonial borders received different reactions from scholars engaged in the study of Africa. Some scholars argued for recognition of colonial boundaries, borrowing Jeffery Herbst's nomenclature, as a "rational response", to arbitrarily drawn boundaries.[98] Others like, Makau wa Matua noted that de-colonization in Africa is a manifestation of the Eurocentric conception of statehood and was "exercised not by the victims of colonization but by their victimizers."[99] Despite the former views on recognition of colonial boundaries, there is a consensus on the need to rectify colonial mistakes.

[96]Jeffrey Herbst, *The Creation and Maintenance of National Boundaries in Africa*, 43 INT'L ORG. 673-692, 674 (1989) (quoting Lord Salisbury).
[97]*See* generally, Saadia Touval, *The Organization of African Unity and African Borders*, 21 INT'L ORG. 102, 102-127 (1967) (discussing the shift in perception of colonial borders among African states, Touval noted how in 1958, borders were considered to be humiliating legacies of colonialism. Yet in the formative years of the OAU there was a major shift to recognize and solidify colonial territories.)
[98] Herbst *supra* note 95 at 673.
[99] Makau wa Matua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L. 1113, 1116 (1995) ("…the West decolonized the colonial state, not the African peoples subject to it. In other words, the right to self-determination was exercised not by the victims of colonization but their victimizers, the elites who control the international state system.")

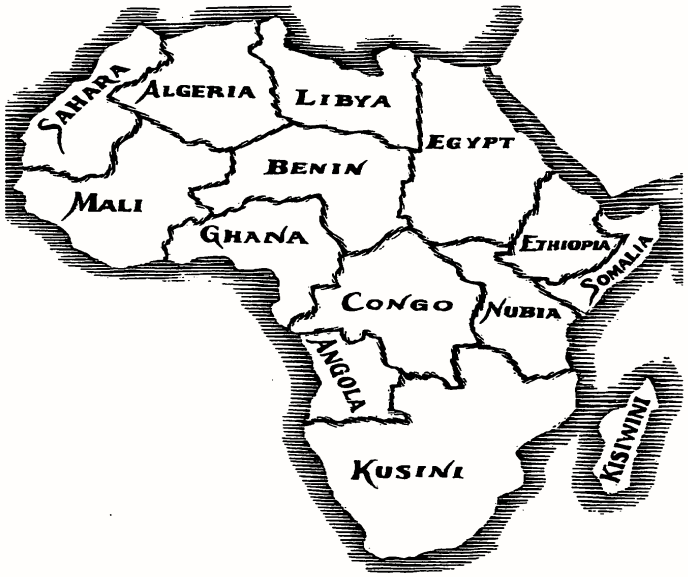

Figure 5: Matua's proposal for re-drawing map of Africa[100]

In order to rectify the colonial mistake of arbitrariness of boundaries Matua argues for a voluntary remapping and further suggests a regrouping of African states to fourteen larger groupings. For Matua those groupings would be:

(1) Republic of Kusini, Kiswahili for 'south' takes in South Africa, Namibia, Zimbabwe, Mozambique, Lesotho, Swaziland, Malawi, and Botswana. The new Egypt combines Egypt and Arabic Sudan while Nubia would bring together southern Sudan, Kenya, Uganda, and Tanzania, Somalia would be beefed up by Djibouti, the Ogaden province of

[100] *Id*. at 1117.

> Ethiopia, and Kenya's northern province, all areas inhabited by Somalis, Mali, named for the ancient empire, swallows up Mali, African (black) Mauritania, Senegal, Guinea, Sierra Leone, Liberia, the Gambia, Guinea Bissau and Cape Verde. Congo would combine Zaire, Congo, Burundi, the Central African Republic, and Rwanda while Ghana, another ancient kingdom, would consist of Ghana, Ivory Coast, Togo, Benin, Nigeria, Cameroon, Gabon, Equatorial Guinea, and Sao Tome and Principe. Benin, named for the kingdom, would take in Chad, Burkina Faso, and Niger. Algeria and Angola remain the same but Libya and Tunisia become one. Morocco, Arabic Mauritania, and Western Sahara become Sahara. Finally, Kisiwani combines Madagascar, Mauritius, Seychelles, and the Comoros. [101]

Matua explains that regionalism is not a solution for arbitrarily drawn territorial boundaries and proposes remapping of Africa.[102] Nevertheless, Matua's proposal is arbitrary and flawed. He does not elaborate the basis of his classification or why it has to be accepted as such.[103]

Duncan Kennedy on the other hand proposes a nation-state approach to solve colonial mistakes. Kennedy argues that Balkanization is a source of Africa's underdevelopment and proposes formation of African mega state. Even though, Kennedy proposes a hypothetical and ideological argument for African mega state, he does not specifically propose regional integration [as amalgamation of states] to be the ultimate solution. [104] Rather, his proposal of regional integration is limited to solving the small market sizes of African states. As a result,

[101] *Id.* at 1118 (Footnote number 13 of his work)
[102] Matua *supra* note 98 at 1167-1175 (discussing the need for redrawing map of Africa).
[103] Mutua incorporated Eritrea with Ethiopia without considering the Eritrean independence struggle from Ethiopia.
[104] *See* generally Duncan Kennedy*, African Poverty*, 87 WASH. L. REV. 205, 205-235 (2012) (discussing impact of Balkanization on African states.)

Kennedy's proposal fails to engage with broader discourses of pan-Africanist integration ideals.[105]

Despite Matua and Kennedy's contentions regionalism in Africa could be a response to the inadequacies and arbitrariness of colonial boundaries. The arbitrariness of territorial boundaries in Africa is a logical drive for African integration. Yet several of the existing integration schemes in Africa date back to the colonial era and seem to be a continuity of the colonial infrastructure of organization of political entities. For instance, colonists sought to combine separate administrations through customs union arrangements. Case in point, the SACU that was formed in 1910 among the former British Colonies of South Africa, Lesotho, Botswana, and Swaziland.[106]At least in its membership the postcolonial SACU seems to follow the colonial architecture of integration and to date covers only the geographical territories of the colonial SACU. Despite its membership structure, however, the SACU could rectify arbitrarily drawn borders among its member states, just as post-colonial integration architectures attempt to do.

2.3. Resistance and Emancipation

Postcolonial integration is rationalized as a continuity of Africa's continental independence struggles. The formation of the OAU, for instance, was a culmination of the Pan-Africanist movement for emancipation.[107] African thinkers and political leaders debated the

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[105] *Id.* at 208

> Balkanization meant that the size of the internal market in most of the *four dozen* sub-Saharan African states was much too small to permit the economies of scale necessary to make industrial production competitive with imports, even with heavy tariff protection. And even in the larger countries, it was impracticable to undertake more than a small sample of industrial projects. (Of course, a continental free trade zone could have cured that, but it is hardly surprising in retrospect that none was destined to emerge.)

[106] *See* History of SACU, http://www.sacu.int/about.php?id=394 (last visited 07/01/2015) (discussing that SACU is the oldest customs union in the world and it dates back to the 1889 agreement between British Colony Cape of Good Hope and the Orange Free State Boer Republic. SACU agreement was revised in 1910 and its membership expanded to include South Africa, Basutoland (Lesotho), Bechuanaland (Botswana), Swaziland and South West Africa (Namibia).

[107] *See* generally GINO J. NALDI, THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE (2d ed., 1999) (for detailed discussion on history of the OAU. Naldi explains the history of the OAU starting from the Pan-Africanist movement of 1816 and the anti-colonial movements of African states. Naldi, furthermore,

organizational structure and powers of the new organ they envisaged to architect. Jubilant and excited about the proposed integration project, they fiercely debated the future of OAU as a culmination of the continental emancipation project. For instance, the OAU Charter, declares that the Member States affirm and declare their adherence to "total emancipation of the African territories which are still dependent."[108]

According to the OAU charter and its formative discussions emancipation is the political decolonization and economic independence of African states. Unmistakably for African people without participation in global governance and inability to determine their fate, political decolonization was central to the overall emancipation project of the continent. Hence, Africa's emancipation project followed a linear model that started with political emancipation followed by economic emancipation. The quest for the former (political emancipation and formal parity of participation in global governance) might have ended with the end of colonization. Nevertheless, the search for economic independence and development is part of the continuous and complex struggle for emancipation.

2.4. Regional Integration, Unity, Emancipation, and Development

In the quest for emancipation, integration and unity were considered tools for the development and freedom of African states.[109] The idea of regional integration as a

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explains the two sides during negotiations for the formation of OAU). International Economic Institutions could be categorized based on: (1) the functions they perform, (2) their intended duration, (3) their jurisdiction, (4) their degree of legislative power, and (5) their set up (intergovernmental, interstate…etc. *See* S.A. AKINTAN, THE LAW OF INTERNATIONAL ECONOMIC INSTITUTONS IN AFRICA 6-13 (1977).

[108] Article II (2) of the OAU Charter. Similarly at the sub-regional level integration was sought to fight injustices in Africa. The decolonization of several African countries were significant power transitions with a major impact on regional integration in the Southern African region. The resistance to Apartheid rule resulted to the formation of SADCC. SADCC was transferred to SADC in 1993. *See* generally, Maxi Schoeman, *From SADCC to SADC: The Politics of Economic Integration*, available at http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf.

[109] Development is commonly defined as a move to positive change, which is conventionally understood to mean economic growth. By contrast, sociologists define development as a complex process of social change so that development does not necessarily mean positive change since there is nothing inevitable or automatic about the beneficial outcomes of economic growth. Deteriorating environmental conditions and increasing social alienation

developmental tool in the African context, in an unequal global trade regime, was part of a political alliance consolidated and legitimated by the "Africanized Socialism" of newly independent African states.[110] The newly independent states were struggling to adopt development agendas that not only embraced emancipatory regional integration but also were concerned about the influx of imports to their markets. Therefore, African states adopted import substitution policies and concurrently were integrating regionally.[111] These were complex, and at times contradictory, trade policies, based on the Keynesian model of development where the

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could very well be the effects of certain types of development. Some theorists therefore argue that development is no more than an expression of the nineteenth-century faith in the ideology of Progress. In this context, I am using development to denote positive change by subscribing to the South Commission's definition of development as "[A] process which enables human beings to realize their potential, build self-confidence, and lead lives of dignity and fulfillment. It is a process, which frees people from the fear of want and exploitation. It is a movement away from political, economic, or social oppression. Through development, political independence acquires its true significance. And it is a process of growth, a movement essentially springing from within the society that is developing." GILBERT RIST, THE HISTORY OF DEVELOPMENT: FROM WESTERN ORGINS TO GLOBAL FAITH 8 (3rd ed., 2008).

[110] "African Socialism" in this dissertation is a synthesis of African socialist ideas, but rather as heterogeneous, broad, and diverse practices of socialist values as understood by different societies in Africa For instance, for Nyerere and his human-centered theory of existentialism, communal conception of property ownership and egalitarianism are dominant values that eliminated formation of class hierarchy (which is different from Marx's conception of traditional capitalist societies and sources of class structure.) Nkrumah similarly utilized Nyerere's emphasis on pre-colonial society in his conceptualization of African Socialism. Yet, both Nkrumah and Nyerere differed in their end goal. Nyerere focused on rural transformation (a transformation to what it used to be). And Nkrumah understood the impossibility of reversing to the past infrastructures of administration and modes of production. As Steven Metz rightfully noted Nkrumah and Nyerere based their socialist understanding on three elements: "(i) an under-standing of the sociology of African states during the post-colonial period of partial transformation; (2) an analysis of the instigative factors and methods of the transition to socialism; and (3) a definition of a socialist society." Steven Metz, *In Lieu of Orthodoxy: The Socialist Theories of Nkrumah and Nyerere*, 20 J. MODERN AFR. STUD., 377, 377-378 (1982).

[111] Import substitution industrialization was not a policy of all post-independence African states. Even though the norm in development scholarship shows a shift from import industrialization to export-oriented industrialization, certain states among Southern African states, for instance Mauritius (the then sugar economy) preferred to adopt export-oriented industrialization from the beginning. Mauritius' decision to be the result of critical research on the need to revise import substitution policies and the fact that it got its independence at the era of transition to export-oriented industrialization. Deborah Bräutigam *et al*., *Business associations and growth coalitions in Sub-Saharan Africa*, 40 J. MODERN AFR. STUD., 519, 525, 529, 534 (2002). For a critique of import substitution policies in Zambia look Ann Seidman, *The Distorted Growth of Import-Substitution Industry: The Zambian Case*, 12 J. MODERN AFR. STUD., 601, 606 (1974) (Import substitution policies of Zambia were inadequate. Seidman argues that the focus on building industries that manufactured goods usually imported by Zambian elites distorted the overall economy of the state of Zambia.) *See* also PHILIP MCMICHAEL, DEVELOPMENT AND SOCIAL CHANGE: A GLOBAL PERSPECTIVE 32-40 (1996).

state would play a central role in the development projects.[112] This zeal to be part of this anti-apartheid movement and the need for trade integration resulted in countries like Zambia becoming founders and members of more than one integration scheme.[113] In other words, Zambia was able to be a founding member of both COMESA (trade based integration project) and SADCC (an anti-apartheid integration project).

In the late 70s and early 80s exogenous factors played significant role in opening African markets to the global market. By the late 1980s over 30 African states went through structural adjustment programs.[114] It was centered on neo-liberal ideals of development and imposed trade liberalization as a conditionality. It was a setback in the integration efforts of the region. These policies opened African markets to the global world before they could integrate regionally. Irrespective of the affect of these policies, African countries kept on formulating or joining regional integration schemes. However, the discrepancy between the political commitments of Pan-Africanism and the global competition of neoliberal policies resulted in weak integration schemes. The struggle among African countries' zeal for political Pan-Africanist integration with the WTO norms of regional integration further maintained the atmosphere for the existing discrepancy between regional integration commitments and reality. The ideological struggle of embracing neoliberal development projects through integration persists in the so-called era of "post-neoliberal" period. Changes in the conceptual framework and ideological shifts in development theories failed to have significant impact on the integration architecture and

[112] *See* DAVID M. TRUBEK AND ALVARO SANTOS (EDITORS), THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 5 (2006). *See* also MCMICHAEL, *supra* note 109 at 40.
[113] Zambia is the founding member of the COMESA and the SADC.
[114] By the late 1980s over 30 African countries went through structural adjustment programs. One of the major policies of the structural adjustment policies was that it was centered on neo-liberal ideals of development and demanded trade liberalization as a conditionality for development. *See* WORLD BANK, ADJUSTMENT IN AFRICA: REFORMS, RESULTS, AND THE ROAD AHEAD 284 (1994). *See* also, Henry Rempel, *World Bank, Adjustment in Africa: Reforms, Results, and the Road Ahead*, 30:3 CJAS, 482, 482-484 (1996) (a critical book review).

aspirations of African states. In conclusion, despite several theoretical and ideological shifts in Africa, the quest for development and integration is a continuous process.

2.5. Africa's Modalities of Continental Integration

Unlike the 1960s, as shown in Figure 6, the African pursuit for integration in the 1980s followed a dual schema of political integration through the OAU and economic integration through the AEC. Almost twenty years after the formation of the OAU, African states decided to form the AEC under the Lagos Plan of Action. [115] The AEC envisaged a multifaceted integration strategy. It aimed to establish deeper integration through the formation of FTAs at the regional and sub-regional integration levels. At the continental level, it predicted a common external policy towards non-African states.

The establishment of the AEC was coincidental and a continuity of the liberal and neoliberal conceptions of development and African governments' decision to review and align their development strategies. [116] The AEC was established on the premise of classical justifications for regional integration and assumed that economic integration could lead to development and peaceful coexistence among member states.[117] With this assumption in mind, thirty years after the formation of the OAU, in the 1990s, African states maintained a positive aura for a gradual continental integration.

However in late '90s, African states sought to revise the dual schema of integration. In Sirte it was rationalized that the dual schema of integration [with dual institutional set up]

[115] *See* Lagos Plan of Action Preamble para 3(v).
[116] Continental economic integration through (the AEC) was designed to come into effect within a period of 34 years and in six stages. The Lagos Plan of Action proposed creation of the AEC by the year 2000. At the time of research the AEC has not been formed and Africa is far from continental economic integration.
[117] One of the main objectives for the formation of the AEC was to promote economic integration and thereby achieve development and better lives for African people. Furthermore, it promotes peaceful coexistence among African states. *See* articles 2-6 of the AEC Treaty. *See* also Preamble para 3(v) of the Lagos Plan of Action.

created administrative costs and led to inefficiency of the OAU.[118] African states decided to form the AU as an institution entrusted to perform both economic and political integration agendas.[119] Just like its predecessor, the AU endeavors to promote sub-regional integration projects as building blocks for continental unity.[120] All this sounds good on paper, but the reality remains that Africa is far from continental integration.

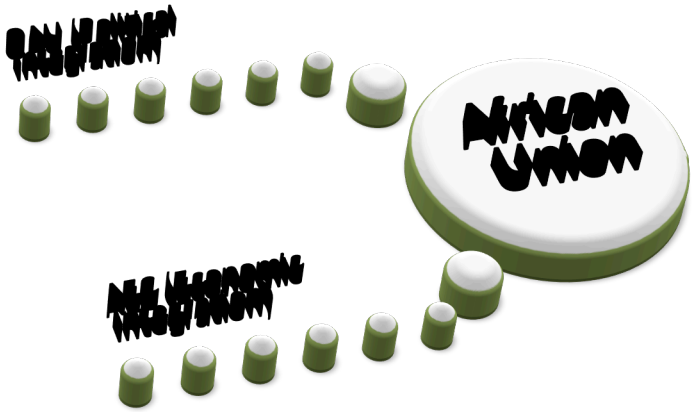

Figure No. 6 Dual Schema of African Unity`

The positive aura for integration among African states is complex and ambitious. Existing integration aspirations among African states have discrepancy between political commitments and the implementation of regional integration treaties in the African context. This discrepancy is rationalized by Trudi Hartzenberg as a result of the focus on linear market integration without addressing supply-side constraints.[121] For Alemayehu Geda and Haile Kebret, the gap between commitments and implementation of regional integration commitments

[118] Sirte Declaration of 1999 see http://www.au2002.gov.za/docs/background/oau_to_au.htm See also decisions of the Sirte Declaration ("Establish an African Union in conformity with the ultimate objectives of the Charter of our Continental Organization and the provisions of the Treaty establishing the African Economic Community.")
[119] Article 3(c)) of the AU Constitutive Act states, "Accelerate the political and socio-economic integration of the continent."
[120] Article 3(l)) of the AU Constitutive Act states, "Coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union."
[121] *See* generally Trudi Hartzenberg, *Regional Integration in Africa* 1-28 (WTO Staff Working Paper No. ERSD-2011-14, 2011) (discussing African regional integration efforts.)

is the result of economic, political and institutional constraints of integration aspirations in the region.[122] Despite supply side, resource, economic and institutional constraints, there seem to be a consensus that the main constraint for realization of Africa's integration aspiration is lack of political will.[123]

If Africa's lack of "deeper integration" is lack of political commitment of African states, one could question the rationale behind legally binding integration agreements when there is lack of adequate resources and capacity to enforce the integration agreement. For instance, as shown in Table 3, there are five major regional integration agreements among Southern and Eastern African states. Among these five major integration schemes of Eastern and Southern African states, the gap between commitments and the integration agreements that Hartzenberg, Geda, and Kebret noted are prevalent.

The complexity of continental integration agenda could raise conceptual and definitional issues of "integration." In the African context, integration during colonial era meant an amalgamation of resources of overseas colonial territories for the benefit of metropolitan powers. On the other hand, integration in post-colonial Africa is a south-south project that took different forms ranging from political to economic to social integration schemes. The focus of this dissertation is on the post-colonial integration schemes of Southern African integration schemes, specifically speaking those of the SADC member states. In line with the focus of this dissertation, regretting limitations of the above stated narrative, the next section introduces Eastern and Southern African integration schemes.

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[122] *See* Alemayehu Geda & Haile Kebret, *Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA*, 17 J. AFR. ECON. 357, 357-394 (2007) (discussing regional integration among eastern and southern African states).

[123] *See* generally Helmut Asche & Jonne Brücher, *Myth and Reality of African Regional Integration*, *in* RECHT IN AFRIKA 169, 169-186 (2009) (emphasizing the need for determined political action from African states to realize their commitments for regional integration.).

Table No. 3 Major Pre and Post-colonial Integration Schemes in Eastern and Southern African States[124]

COLONIAL INTEGRATION SCHEMES	
East Africa	1917 – Customs Union between Kenya and Uganda 1927 – Tanganyika joined the Customs Union 1948 -1961: East African High Commission 1961 – 1967: the East African Common Services Organization 1967-1977: the East African Community 1977 – the East African Community was dissolved
South Africa	1889 – a customs union between the British Colony of Cape of Good Hope and Orange Free State Boer Republic June 29, 1910 – Southern African Customs Union (SACU) agreement expanded and included South Africa and the British High Commission Territories (Basutoland, Bechuanaland and Swaziland 1910 - 1969 SACU was more or less administered by South Africa
POST-COLONIAL INTEGRATION SCHEMES	
Common Market for Eastern and Southern African Countries (COMESA)	Membership: - Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe December, 1981 – Heads of states and governments of eastern and southern African countries signed a treaty establishing Preferential Treatment Area (PTA) September 20, 1982 – PTA treaty came into effect November 5, 1993 – PTA was transformed to COMESA December 8, 1994 – COMESA treaty came into effect
East African Community (EAC)	Membership: - Kenya, Uganda, the Republic of Rwanda, the Republic of Burundi and the United Republic of Tanzania November 30, 1999 – EAC Treaty was signed July 7, 2000 – EAC Treaty came into effect for Kenya, Uganda and United Republic of Tanzania 2005 – EAC Customs Union came into effect July 1, 2007 – Republic of Burundi and Republic of Rwanda became members July 1, 2009 – Rwanda and Burundi join the EAC customs union November 20, 2009 – Protocol for the Establishment of EAC Common Market was signed January 1, 2010 – EAC Common Market came into effect 2012 – EAC Monetary Union and ultimately a political federation of east

[124] Data for this table is from African Union, COMESA, IGAD, SACU, SADC and EAC websites.

	African state
Intergovernmental Authority for Development (IGAD)	Membership - Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda are founding members - Eritrea joined in 1993 1986 – Intergovernmental Authority on Drought and Development (IGADD) established 1996- IGADD became IGAD
Southern African Customs Union (SACU)	Membership: - 1969 – SACU agreement was renegotiated with independent states of Botswana, Lesotho, Swaziland and South Africa - 2002 – SACU agreement was renegotiated with the end of Apartheid and independence of Namibia 1975 – Year of Establishment SACU from its inception, which was 1889, started as a customs union.
Southern African Development Community (SADC)	Membership - Southern African Development Cooperation Conference (SADCC) – Established in 1980 between: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe - SADCC was transformed to Southern African Development Community (SADC) on August 17, 1992 and membership grew to include DRC, Madagascar, Mauritius, Namibia, Seychelles, and South-Africa 1980 – Year of Establishment and attained free trade in 2008

PART- III- A BRIEF HISTORY OF SOUTHERN AFRICAN INTEGRATION

In the Southern African context a highly distinctive characteristic of integration is that the *ratio d'etre* for integration was resistance against another African state, the then Apartheid South Africa. Southern African states were divided to diametrically opposing views. On the one hand, the then Apartheid South Africa attempted to maintain its Apartheid system. On the other hand, Angola, Mozambique, Botswana, Tanzania, Zambia and Zimbabwe, collectively called Front

Line States (FLS) formed Southern African Development Coordination Conference (SADCC), as a form of resistance to Apartheid South Africa.[125]

Even if integration started as a form of resistance, in the early '90s with the end of Apartheid and South Africa joining the integration scheme of the region, there was a transformation of integration objectives. Richard Gibb eloquently summarized this transformation of SADC as:

> SADC's immediate goal was to incorporate a fully democratic South Africa into the 'new' regional organization, and hence the aim of reducing dependence on Pretoria was omitted from the 1992 treaty. In addition, SADC moved away from explicitly rejecting traditional integration theory, based on an essentially laissez-faire approach, and shifted towards accepting trade liberalization and free market principles as the most appropriate approach to integration. [126]

This transformation from an anti-Apartheid movement to economic *laissez-faire* integration raises many issues. How do you transform a resistance integration scheme to that of economic integration? What factors and objectives should an economic integration scheme have in order to be successful? Is transformation a mere declaration or does it require institutional, legal, economic, and political infrastructure to support it? If yes, how should the organizational

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[125] *See* generally Arne Tostensen, *Dependence and Collective Self-Reliance in Southern Africa: The Case of the Southern African Development Coordination Conference (SADCC)*, 62 SCANDINAVIAN INST. AFR. STUD. (1982).

[126] *See* Richard Gibb, *Southern Africa in Transition: Prospects and Problems Facing Regional Integration*, 36 J. MODERN AFR. STUD. 287, 290, 302-303 (1998). (Gibb rightfully noted that Southern African regionalism during Apartheid was characterized by political hostility. In the post-apartheid era Gibb notes the possibility of South Africa's hegemony given the striking economic inequalities among member states of the SADC. The researcher understands that South Africa could be a hegemon or an engine of development among the SADC states. Understanding the role of South Africa as a hegemon or engine of development is an interesting project. However, for the purposes of this discussion, the researcher focuses on conceptualization of integration and its possible transformation. Hence, it will be beyond this dissertation to discuss issues of inequality among Southern African states.)

structure of economic integration be different from that of an integration scheme designed as a form of resistance?

3.2. Transformation of the Integration Project from Resistance to Economic Integration

In integration studies, several scholars refer to the EU as an epitome of regional integration where the adequacy of rules and institutions of the integration scheme determine the outcome of the integration system.[127] The emphasis on rules is a belief that hard laws complemented with soft legal arrangements solve cooperation problems in the EU.[128] Hence, imaginations of the EU as an integration model erroneously assumes that the EU as an institution is a rules-based system where member states follow its rules without contestation. This simplistic understanding of the EU, however, fails to capture the experiences of African states in general and Southern African states in particular. In the African context, attempting to understand the transformation of an integration scheme from resistance to an economic movement, the European experience is of no or little help. Not only are the European and the Southern African drive for integration different, but also reflect different historical, socio-economic, and political experiences of different peoples.

3.2.2. Multiplicity of Membership and Resistance Movements

Integration scholars, for instance Jagdish Bhagwati, problematize the multiplicity of membership in regional trade agreements and propose untangling complexities that arise due to

[127] *See* for instance, Lukas Knott, *How to Reboot the SADC Tribunal: A European Perspective*, 2 SADC L. J. 304, 304-318 (2012) (analyzing the dissolution of the SADC Tribunal from the perspective of the European Union. Knott proposes establishment of a legislative assembly as an institutional addition to counter the current slow and inter-governmentalist approach of integration among Southern African states. Basically he is proposing the formation of an SADC parliament).

[128] Kenneth Abbott and Duncan Snidal argue that states choose to govern their relations through hard or soft legal arrangements to solve cooperation problems. *See* Abbott and Snidal, *infra* note 340, at 37-38 ("We argue that international actors choose to order their relations through international law and design treaties and other legal arrangements to solve specific substantive and political problems. We further argue that international actors choose softer forms of legalized governance when those forms offer superior institutional solutions.")

compounded commitments.[129] However, Bhagwati's criticism of multiplicity of membership in regional integration aspirations, centered under existing WTO rules, fails to capture the historical complexity of integration in Africa.[130] In the Southern African context, multiplicity of membership is part of the continent's emancipation project. Contrary to European integration model, which does not allow multiplicity of membership, Zambia's membership in both COMESA and SADC is not puzzling, for Africanist scholars.[131] Resistance integration schemes and norms of solidarity allow multiplicity of membership, as the reason behind membership is solidarity for a "morally superior cause."[132] Transformation of integration schemes from that of "resistance" to "economic" signifies the need to untangle multiplicities of membership.[133]

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[129] Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 L & POL'Y INT'L BUS. 865, 865-872 (1995-1996) (discussing the spaghetti bowl problem).

[130] Bhagwati's analysis, limited to regional trade agreements, which is purely economic, would yield a different result if examined under public international law (specifically speaking laws of treaty making). For instance, COMESA was established almost a decade before it was notified to the WTO. And most, if not all members of COMESA were not members of the WTO during COMESA's formation, which confirms that public international law, instead of WTO law, was central to African integration design.

COMESA–History, available at http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117, (last visited on 02/02/2013)

> In 1978, at a meeting of Ministers of Trade, Finance and Planning in Lusaka, the creation of a sub-regional economic community was recommended, beginning with a sub-regional preferential trade area which would be gradually upgraded over a ten-year period to a common market until the community had been established. To this end, the meeting adopted the "Lusaka Declaration of Intent and Commitment to the Establishment of a Preferential Trade Area for Eastern and Southern Africa" (PTA) and created an Inter-governmental Negotiating Team on the Treaty for the establishment of the PTA. The meeting also agreed on an indicative timetable for the work of the Intergovernmental Negotiating Team. After the preparatory work had been completed a meeting of Heads of State and Government was convened in Lusaka on 21st December 1981 at which the Treaty establishing the PTA was signed. The Treaty came into force on 30th September 1982 after it had been ratified by more than seven signatory states as provided for in Article 50 of the Treaty.

See also COMESA – WTO RTA Database, available at http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=121, (last visited on 02/02/2012) (Showing the date of notification for COMESA to be May, 1995.) *See* also Members and Observers – WTO, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, (last visited on 02/02/2013) (Showing WTO members and the year they joined.)

[131] COMESA-Member States, available at http://about.comesa.int/index.php?option=com_content&view=article&id=123&Itemid=121, (last visited on 02/02/2012) (showing Zambia as one of the members of COMESA). *See* also Member States – SADC, available at http://www.sadc.int/member-states/, (last visited on 02/02/2013) (showing Zambia as one of the members of the SADC).

[132] "Morally superior" integration project is reference to the works of Ali Mazrui and justifications for Africa's integration projects.

Table No. 4 SADC Regional Integration Milestones and Time Line[134]

Regional Indicative Strategic Development Plan (RISDP)	- Adopted by the SADC Summit in 2003 - It outlines integration plan of the region from 2005-2020. - It identifies milestones, target outputs and responsibilities for integration.
Priority Areas of Intervention	- 2007 – The SADC Council identified twelve priority areas for intervention to achieve overarching goal of regional integration and poverty eradication. These are: ▪ **Cross Sectoral Intervention Areas:** • Poverty Eradication; • Combating HIV and AIDS epidemic; • Gender equality and development; • Science and Technology • Information and Communication Technologies; • Environment and Sustainable Development; • Private sector; and • Statistics ▪ **Sectoral Cooperation and Integration Intervention Areas:** • Trade/Economic Liberalization and Development; • Infrastructure support for regional integration and poverty eradication; • Sustainable food security; and Human and social development
Integration Milestones	**1. Free Trade Area**: As outlined in the SADC Trade Protocol, SADC attained free trade in 2008. - From 2001-2008, SADC states achieved 85% of tariff reduction among themselves - SADC states expected to achieve zero tariffs in 2012 - **Exceptions:** ▪ SACU member states achieved zero tariffs in January 2007 ▪ Mozambique expects to attain zero tariff for imports from SA by 2015 ▪ Twelve out of the fifteen SADC member states are members of the FTA (Angola, DRC, and Seychelles are not part of the FTA) ▪ Malawi fell behind in its tariff liberalization schedule in 2004. In 2010, Malawi overtook tariff reforms to align with COMESA and SADC tariff commitments. ▪ Zimbabwe had a hard time implementing tariff liberalization on sensitive products and the Secretariat

There has been, in the language of African unification, the implied assumption that even if a united Africa, materially on a level with a divided Europe, did not prove equality in technological capacities, it would at least have established African superiority in terms that can almost be described as 'ethical.'
Ali Mazrui, *African Attitudes to the European Economic Community*, 39 INT'L AFF. 24, 25 (1963).

[133] Here the researcher is not arguing that there is binary opposition between resistances and economic integration schemes. SADC was a combination of a political and economic resistance initiative against Apartheid South Africa.

[134] Data and information for this table is available at http://www.sadc.int/about-sadc/integration-milestones/ (accessed on 11/30/2012).

	allowed it to suspend tariff reduction from 2010-2012. It is supposed to catch up with its tariff reduction program from 2012-2014. ▪ Tanzania was on schedule with the tariff reduction program, except that the government applied for derogation to levy a 25% import duty on sugar and paper until 2015 in order to enable those industries to adjust to tariff liberalization. **2. Customs Union**: As outlined in the SADC Trade Protocol, SADC expected to attain customs union in 2010. - Has not been attained and was anticipated to be achieved by 2013. - Has not attained CU status until now. - Delays in the implementation of CU will affects subsequent milestones - At the time of the research there are 11 tariff regimes within SADC and negotiations have been very difficult. **3. Common Market:** anticipated to be achieved in 2015 **4. Monetary Union:** anticipated to come into effect by 2016 - Plans supported by SADC Committee of Central Bank Governors - Operationalization of common payment clearing and settlement systems in 12 SADC Member States. - 14 member states implemented best banking practices, norms and standards. - 2009 – Model Central Bank Law was developed and approved that is development of institutional and legal framework. **5. Single Currency/Economic Union:** anticipated to be achieved in 2018. - South Africa, Namibia, Lesotho, and Swaziland have a common monetary area that uses Southern African Rand. Depending on the success of this, SADC states plan to create or expand the common monetary area to all SADC states.

3.2.3. Ideological Shifts and Regional Integration

Ideologically, post-Apartheid SADC shifted its development project to a neo-liberal integration project.[135] The ideological shifts in the SADC integration project can be explained by two examples. First, this shift is particularly seen in the expansion and current focus of cooperation on trade liberalization. The SADC, unlike its predecessor the SADCC, added trade as a sector of cooperation. Article 21(3) of the SADC Treaty states:

> In accordance with the provisions of this Treaty, Member States agree to co-operate in the areas of: (a) food security, land and agriculture; (b) infrastructure and services; (c)

[135] Gibb *supra* note 125 at 302-303 (discussing how SADC moved from rejecting traditional market based integration approach, and actually embraced market based integration.)

industry, trade, investment and finance; (d) human resources development, science and technology; (e) natural resources and environment; (f) social welfare, information and culture; and (g) politics, diplomacy, international relations, peace and security. [136]

Second, and most importantly, SADC states measure and identify deeper integration, on a linear model with the FTA, CU, CM…etc., as shown in Table 4. The five integration milestones identified and adopted by SADC states do not reflect appropriate measure for all areas of cooperation among SADC states, however. For instance, trade liberalization and the five integration milestones of the SADC in and of itself cannot be a measure for gender equality.

The attempt to transform an emancipation project to economic integration is quite complex and happens at multiple frontiers. The two examples show that regional integration among Southern African states is under constant reconfiguration. It is relevant to acknowledge that reconfigurations of integration initiatives require an indigenous or Africanist conception of regional integration. Or else, just like development is at times misunderstood as Westernization, concurrently, integration also will be misunderstood as Europeanization.

PART- IV- AFRICA-EU: TRADE RELATIONS IN HISTORICAL PERSPECTIVE

EU-Africa trade relations add complexity to the existing conceptual crisis of regional integration among Southern Africa states. Mazrui captured historical and contemporary sentiments of scholars engaged in the study of EU-Africa trade relations. Mazrui, put three typologies of African attitudes towards united Europe: (1) complete opposition to European unity; (2) indifference to European unity, but complete opposition to "association" of African states with united Europe, and; (3) for "association" but on different terms.[137] Mazrui's triad

[136] SADC Treaty, art 21(3). This article is a replica of SADCC areas of cooperation with the exception that in SADC art. 21(3(c)), trade is one of the areas of cooperation.
[137] Mazrui *supra* note 131 at 24 (discussing African attitudes to European integration). *See* also Tom Soper, *The*

typology, in contemporary times, is in actuality a dual typology, in that complete opposition to "European unity" has faded through time. On the other hand, his two other typologies seem to be prevalent discourses among scholars engaged in the study of postcolonial EU-Africa trade relations. The commonality of scholars who advocate for complete disassociation and those who advocate "association" on different terms, is that both seem to be skeptical of European intentions, based on historically sensitive criticisms.[138]

Africa-EU trade relations existed before, during, and after European colonization. At its beginning in the 1500s, as J. Vansina noted, Africa-EU trade started as trade over long distances.[139] A trade where Africa was exporting raw materials and labor, such as copper, rubber, and slaves, and importing processed products, like wine and firearms.[140] This long distance trade ended in the 1900s with the partition of Africa into colonial territories.[141] With the advent of colonization, Africa–EU relations became one of domination.[142] Africa's raw materials were no longer products for trade, but rather part of the colonial mentality of "dominion" and all the

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EEC and Aid to Africa, 41 INT'L AFF. 463, 475-476 (1965) (showing skepticism of former British colonies against European Union).

[138] Skepticism of EU's intentions in Africa are prevalent in contemporary times. On the ongoing EPA negotiations Marieke Meyn portrayed contemporary skepticism:

> EPAs embody a changing EU attitude and mark a new era in post-colonial history and relations between the EU and ACP countries. Contrary to the Commission's analysis, however, this changing relationship has not been marked by a 'partnership of equals' but by the EU's coercive power and its increasing neglect of ACP development concerns.

See Marieke Meyn, *Economic Partnership Agreements: A 'Historic Step' Towards a 'Partnership of Equals'?,* 26 DEV. POL'Y REV., 515, 526 (2008). *See* also Ole Elgström and Jess Pilegaard, *Imposed Coherence: Negotiating Economic Partnership Agreements*, 30 EUR. INTEGRATION, 363, 363-380 (2008) (discussing quest for coherence in terms of EU's foreign policy towards developing countries and how EPAs were/are instrumental, at least theoretically, to bring the coherence sought).

[139] J. Vansina identified three types of trade in Central Africa: (1) local trade from village to village but within the same state; (2) trade over greater distance either between different people within a state or/and neighboring states; and (3) long distance trade, which includes direct trade with Europe. *See* generally J. Vansina, *Long-Distance Trade Routes in Central Africa*, 3 J. AFR. HIST. 375, 375-390, (1962).

[140] *Id*. at 376-377 ("It consisted mainly of the exchange of European goods-such as cloth, cowries, beads, fire-arms, powder, wine and, in some instances, iron or copper objects for slaves, ivory and copper, and, in the later seventeenth century, wax, and in the late nineteenth century, rubber.")

[141] *Id.* at 377.

[142] Magnus Killander, *A Response to S Hennie; From Mandate to Economic Partnership: The return to proper statehood in Africa*, 2 AFR. HUM. RTS. L. J. 576, 578 (2007) (giving a historical overview of Europe and Africa relations).

vantages that come from it. As a result, Africa's economic devastation is beyond rational imagination.[143] In its post-colonial phase, EU-Africa trade relations are governed by treaty-based agreements. In short, suspending the question of EU's dominion on post-colonial African states for a moment, Africa-EU trade treaties went through a rotation of trade relations as shown in Figure 7.

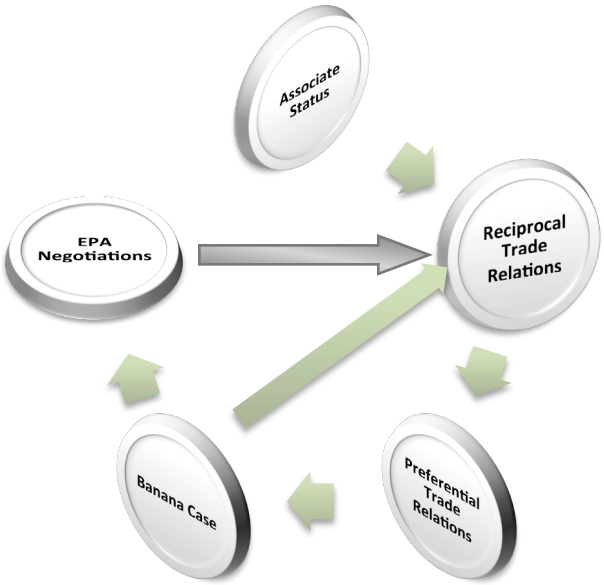

Figure No. 7: EU-Africa Trade Cycle in Historical Perspective; Back to Reciprocal Trade Relations

[143] *See* generally David E. Bloom *et.al., Geography, Demography and Economic Growth in Africa* 207-295 (Brookings Papers on Economic Activity, Working paper No. 2, 1998)

> In recent debate, six sets of factors have frequently been invoked to account for Africa's poor economic performance: (1) external conditions: the legacy of centuries of slave trading and colonial rule, as well as the manipulation of African politics during the cold war; (2) heavy dependence on a small number of primary exports, with declines and volatility in terms of trade; (3) internal politics: characterized by authoritarianism, corruption, and political instability; (4) economic policies: protectionism, statism, and fiscal profligacy; (5) demographic change: in particular, rapid population growth; and (6) social conditions: deep ethnic divisions, indicated by high levels of ethno linguistic and religious diversity and low levels of "social capital.

Recognizing these as causes of Africa's under development the Bloom and *et. al.* speculate that Africa's economic underdevelopment is tied to its tropical geography. They argue that tropical regions underperform as compared with other regions. Even though the authors acknowledge that it is more of "an informed speculation" rather than a conclusive argument, it seems to the researcher that to claim that Africa's causes of underdevelopment are tied to nature is a bit absurd.

The first phase is the association of former colonies to the EEC. Association agreements were based on reciprocal market liberalization policies. With the advent of decolonization, the time to revise Africa-EU, the first phase of post-colonial trade relations became apparent. In its second phase, the Yaoundé segment, trade relations between the two continents similar to the association period was reciprocal.[144] In the third phase, Lomé, a significant enlargement of European community of importance mainly United Kingdom (UK) joining the European community, resulted in a shift to a preferential trade agreement in favor of African states.[145] This phase, introduced *Stabex* and *Sysmin*, where the former gave preferential treatment to ACP bananas and compensation for price fluctuations, and the latter a compensation mechanism against price fluctuations in the mining sector.[146] The fourth and fifth phases of EU-Southern African states resulted in diminished or watered-down preferential market access to developing states as result of multilateral market liberalization.[147] The fourth phase in EU-Africa trade relations started with a WTO waiver, which ended in 2007, with the aim of bringing EU-SADC agreements in compliance with WTO rules.[148] Contemporary negotiations for an economic partnership agreement between EU and SADC states, partly a result of multilateral erosion of

[144] Farrell *supra* note 82 at 264 (discussing the introduction of the concept of 'partnership' for the first time as an innovative major shift in EU-Africa trade relations.)

[145] In 1975, Lome I, a landmark agreement that shifted reciprocal trade relations of EU and its former colonies into preferential trade agreement, came into effect to govern trade relations between EEC and 44 ACP countries. Lome II came into effect in 1980 for a period of five years. It maintained all the preferences of Lome I but increased the signatories of the treaty. Lome III came into effect in 1985. The peculiarity of Lome III was that for the first time in the history of EU-Africa trade relations the concept of human dignity was introduced into the convention. Lome IV came into effect in 1990 for ten years. Unlike its predecessors, Lome IV introduced human rights conditionality for ACP preferences. *See* generally Hegel Goutier, *Unique in the World: 50 years of North-South Cooperation,* COURIER, Mar. 2008, at 5.

[146] *Id.*

[147] Between 1976-2000 ACP states market share fell by 10%. In the context of EU-Southern African states erosion of preferences is the result of 1998- WTO decision on the Banana case. Wusheng Yu and Trine Vig Jensen, *Tariff Preferences, WTO Negotiations and the LDCs: The Case of the 'Everything But Arms Initiative*, 28 WORLD ECON. 375, 379 (2005) (discussing a sharp decrease, about 10% from 1976 to 2000, in ACP market share, irrespective of preferential treatment under Everything But Arms initiative.)

[148] *See* also Ibrahim Gassama, *Confronting Globalization: Lessons from the Banana Wars and the Seattle Protests*, 81 OR. L. REV. 707, 707 (2002) (discussing the Banana case).

preferences and internal discontent of European importers, is very complex and has a multifaceted impact on the future of regional integration in Africa.

Before I proceed further in my analysis, Table 5 represents a time-line of EU-Africa trade relations, with particular emphasis on Southern African states.

Table No. 5: EU- SADC Trade Relations in Timeline

AFRICA-EU TRADE RELATIONS	
1957	**Treaty of Rome** o Formation of European Economic Community o 17 African countries and Madagascar were associated with EEC o Formation of European Development Fund
1960s	**Decolonization and Independence of African States** o Time to rethink the "association" of former colonies o Somalia became the new associate state, thereby raising the number of associated states to 19 former colonies. o The associate status was meant to exist on a provisional status given a revision be made after the associates independence. All of the associated states except Guinea – Conakry joined the Yaoundé treaty. **1963 – Yaoundé Treaty I** o Signed for five years (1964 – 1969) o Reciprocal free trade agreement **1969 – Yaoundé Treaty II** o Signed for five years (1971-1976) **1969- New Proposals and Trade Agreements** o English speaking newly independent states, plus Germany and the Netherlands, called for the extension of membership of the Yaoundé treaty to states that were not former French colonies. o Nigeria and EEC signed a special FTA; however, due to the civil war in Biafra it did not go into effect. o Kenya, Uganda, and Tanzania singed the Arusha Free trade Agreement with EEC. The agreement came into effect in 1971. Arusha treaty brought Kenya, Uganda, and Tanzania into the Yaoundé treaty and later on Lomé Conventions.
1970s	**1973 - Enlargement of EEC membership** o UK, Ireland and Denmark joined the EEC. o European Development Fund was extended to common-wealth countries. **1973 - Lomé - Negotiations** o 21 common wealth countries, all independent nations of Sub-Saharan Africa, and non-common wealth countries (Ethiopia, Sudan, Liberia, Equatorial Guinea, and Guinea Bissau) negotiated a new agreement with the EEC. **1975 – Georgetown Agreement** o Formation of African Caribbean and Pacific (ACP) group **1975 - Lomé I**

	○ Signed for five years (1975-1980) ○ Between 9 EEC countries and 44 ACP states ○ Gave preferential treatment to ACP countries on selected products (beef, bananas, and sugar) ○ Introduced *Stabex*, a system of compensating ACP producers against price fluctuation.
1980s	**1980 – Lomé II** ○ Signed for five years (1980- 1985) ○ ACP membership increased to 58 ○ Introduced *Sysmin*, a mechanism for compensating mining industries in ACP countries against price fluctuation. ○ Maintained Lomé I preferences **1985 – Lomé III** ○ Signed for five years (1985 – 1990) ○ For the first time in EU-Africa trade relations, although it did not use the term "human rights", Lomé III recognized the importance of "human dignity."
1990s	**1990 – Lomé IV** ○ Signed for ten years (1990 -2000) ○ 12 EU countries and 68 ACP countries ○ "Human rights" conditionality for ACP preference was introduced in EU-Africa trade agreements. **Banana Case** ○ Guatemala, Honduras, Mexico, and United States called for consultation with the EU with regard to the preferential treatment given to ACP exports of bananas. ○ The claim was that the preferential treatment was inconsistent with Articles I, II, III, X, and XIII of GATT 1994; Articles 1 and 3 of the Import Licensing Agreement; and Articles II, XVI, and XVII of GATS. ○ 1996 – Dispute Settlement Body meeting – Established a Panel. ○ 1997 – Panel found the preferential regime granted by the EU to be in violation of GATT rules. ○ 1997 – The EU appealed panel decision. ○ 1997 – Appellate body confirmed panel decision with the exception of XIII violation decision. The Appellate Body concluded that Lomé waivers bar the finding of article XIII violation. ○ 1998 – Compliance Proceedings started and continued until 2012 **1999 – EU-South Africa Trade Relations** ○ 1999 – EU and South Africa signed the Trade and Development Cooperation Agreement
2000s	**2000 – Cotonoú Agreement** ○ 2000 – 2020 ○ Recognized the private sector and civil societies as cooperative players ○ Priority to Millennium Development Goals ○ Priority to regional integration in ACP ○ Flexible additional development assistance fund to exemplary countries ○ WTO waiver until end of 2007

	Economic Partnership Agreement (EPA) o 2007 – Tanzania initialed a framework EPA (the agreement is not yet in force) o 2009 – Botswana, Lesotho, Swaziland, and Mozambique signed interim EPA o 2009 – Mauritius, Seychelles, Zimbabwe, and Madagascar signed interim EPA o 2010 – Botswana, Lesotho, Swaziland, Namibia, and Mozambique informed the EU that they will not implement the interim EPA and stated their interest for a comprehensive EPA for SADC states. o 2011 – Eight rounds of negotiations between EAC (including Tanzania) o 2012 – Interim EPA between EU and Mauritius, Seychelles, Zimbabwe, and Madagascar was provisionally applied. o Zambia, Angola, Namibia and Malawi have not initialed EPAs yet.

4.2. Paradigms of EU-Africa Trade Relations: Imperialism, Division and Discrimination

In the formative years of the EEC the French government proposed the association of African territories with the EEC. The first associated territories were fourteen French colonies, three Belgian colonies, and Italian Somaliland.[149] Lorand Bartles argued that the French proposal for association of its former colonies was an ambitious attempt to maintain a French Union or "Modern French Empire". [150] In contrast, Tom Soper argues that association was the end of the French Union.[151] This is because the intended association was with all the EEC member states. Therefore, through association France actually lost its French Union. Irrespective of whether association created continuity for the French Empire or not, association by nature and effect was the continuity of the subjectivity of associated territories.

Associated territories did not participate in the negotiations of their association with the EEC; most, if not all, were still under colonization. Unquestionably, associations of colonized African territories, and the benefits that supposedly ensue, eventually accrue to the colonist state, rather than the colonized people. At its inception, principle of association had three components:

[149] Arnold Rivkin, *Africa and the EEC: New Inter-Regional Association*, 2 STUD. L. & ECON. DEV. 56, 57 (1967-1968) ("Of the "dependent" overseas territories, fourteen were in French Africa, three were in Belgian Africa, and one, the United Nations Trust Territory of Italian Somaliland, was under Italian jurisdiction.")

[150] Lorand Bartels, *The Trade and Development Policy of the European Union*, 18 EURO. J. INT'L L., 715,716 (2007) (discussing the French Union ambitions for "Modern French Empire" and rationale for associating African states.)

[151] Tom Soper, *A note on European Trade with Africa*, 67 AFR. AFF. 144, 146 (1968) (discussing how association of former French colonies actually meant French loosening its grip on its former colonies.)

(1) trade liberalization, (2) investment, and (3) aid.[152] It established a free trade regime among EEC and associated territories. The free trade regime mandated EEC member states to treat goods originating from associated states, as goods originating from EEC member states.[153] The EEC states called for progressive market liberalization by the associated states.[154] On investment, it followed the principle of non-discrimination. It gave investors from all EEC countries equal opportunity to invest in the associated states. This is irrespective of colonial relationship that existed between a particular EEC member and respective "associated" states.[155] With regard to development aid, EEC member states committed $581 million for a five-year period (January 1958 – December 1962).[156] What the three pillars of association, investment, trade liberalization and aid, had in common was through their causal relationship they benefit EEC states more than associated states. This is because all the associated states were still under colonization.[157]

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[152] *See* Van Der Lee *supra* note 88 at 198 (discussing principle of association and EEC-Africa trade relations.)

[153] G. Van Benthem Van Den Bergh, *The New Convention of Association with African States*, 1 COMMON MKT. L. REV. 156, 160-161 (1963) (discussing the free trade agreement that was established among the EEC and associated territories. Bergh also noted that at the Twelfth Session of GATT, EEC member states defended "association" as an FTA in line with the principles of article XXIV of GATT. Despite the EEC member states contention at the GATT level no decision was reached on the question of conformity of "association" (and the FTA it established) with article XXIV of GATT.)

[154] The associated states as a result of their association with the EEC were denied from treating EEC member states, with which they have a special relationship, more favorably than other EEC states. And they had to abolish customs on imports from all EEC states. *See* articles 132 and 133: Treaty Establishing the European Community as Amended by Subsequent Treaties, Mar. 25, 1957, available at http://www.hri.org/docs/Rome57/Part4.html, (accessed on 02/03/2013).

[155] *Id*.

[156] Bergh *supra* note 152 at 161. Bergh eloquently summarizes the contributions of EEC states and recipients of EEC development aid as:

> During the period 1958-1962 member States contribute annually to a total sum of 581. 25 million dollars. (France and Germany 200, Belgium and the Netherlands 70, Italy 40 and Luxembourg 1.25 million). These are distributed as follows: 511.25 million (311.25 nett) for the overseas countries and territories of France, 35 for those of the Netherlands, 30 for those of Belgium and 5 for those of Italy.

[157] *See* also Sidney J. Wells, *The EEC and Trade with Developing Countries*, 4 J. COMMON MKT. STUD. 150, 156 (1965) (discussing the EEC and its relations with developing states). *See* contra The Association of the African States and Madagascar with the European Economic Community and their industrial development (1963), available at http://aei.pitt.edu/33261/1/A82_1.pdf, accessed on May 23, 2012, pp. 1-18. (The authors refute the idea that "association" by its nature is detrimental to the development of associated states. Nevertheless, the authors acknowledge how the lack of statistical evidence affected their capacity to provide a conclusive analysis on the level of industrialization of associated states before and after the Rome Treaty. Furthermore, the conclusion that the authors eventually make [after analyzing four countries' increase of labor force and industrial turnover] was that association with the EEC has not held industrialization of the associated states. The researcher argues that the

In the late 1950s and early 1960s, African leaders criticized EEC's approach to associate African states, as imperialist. Van Der Lee summarized Africa's skepticism and fear of European imperialism as:

> The majority of the associated states lie in the African continent, and there was some hesitation among African leaders over the benefits of the system. They had taken no part in the negotiations among the Six and were afraid that association might become a block on the road towards the independence of the colonies in Africa. In fact, so long as the status of the associated territories remained subject to some control from a metropolitan country, the development of the system of association remained a somewhat hazardous undertaking.[158]

The African critique of association is a result of the limitations of Article 131 of the Treaty of Rome. For EEC member states, the purpose of association was furthering, "[t]he interests and prosperity of the inhabitants of these countries and territories in order to lead them to the *economic, social and cultural development* to which they aspire."[159] Colonial conception of development for African territories, based on dominion, limited to socio-economic progress, without political freedom of colonized territories, shows that association at its inception was an imperialist project. The question is, however, with the end of colonial subordination, renegotiation of association, and shift to Yaoundé phase and its subsequent revisions can one use discourses of imperialism to understand the current state of trade negotiations between Europe and Africa?

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authors of this report used inadequate measure of industrialization [labor force and industrial turnover]. In addition most if not all of the investors in associated states had western origin.)

[158] Van Der Lee *supra* note 88 at 198.

[159] Article 131 of the Treaty of Rome states: Treaty Establishing the European Community as Amended by Subsequent Treaties, Mar. 25, 1957, available at http://www.hri.org/docs/Rome57/Part4.html (accessed on 10/10/2012). Article 2(s) of the Treaty of Rome states that increasing trade and promoting economic and social development of the associated states is one of the principles of the EEC. See also Annex IV of the Rome Treaty Establishing the European Community, Mar 25, 1957, available at http://www.hri.org/docs/Rome57/Part4.html

The central issue, which decolonization contested, in Africa-EU trade relations, was division of political and economic space by Rome treaty. The central future of post-independence relations between EU and Africa - Yaoundé phase - was that formerly colonized African states were represented and negotiated terms of their relations with EU.[160] Although, Yaoundé represents the capacity of African states to directly negotiate with the EU it did not necessarily bring major economic change for African states. Revkin summarized his skepticism as:

> Whatever the original Eurafrican association may have been, the fact that the Eighteen and the Six are of unequal strength does not alter the character of the agreement as a voluntary pact among sovereign states. Seldom in international affairs are states equal in any sense other than their 'international sovereignty.'[161]

Unlike the turn to the Yaoundé phase, the significance of the Lomé round of negotiations, as shown in Table 5, in shaping EU-Africa trade relations is mainly the result of the UK's accession to the EEC.[162] The enlargement of the EEC gave preferential treatment to African exporters and introduced export earnings stabilization schemes.[163] Despite preferential trade

[160] Ismael Musah Montana, *The Lomé Convention from Inception to the Dynamics of the Post-Cold War – 1957-1990s*, 2 AFR. ASIAN STUD., 63 (2003) ("Among the significant changes in the Yaoundé Convention was that the eighteen AAMS states were no longer obliged to present their demands through their metropoles. They had to make direct contact with the EC without the interference of former colonial powers.")

[161] Rivkin, *supra* note 148 at 56 (Rivkin's reference to the eighteen and the six are respectively the associated states and the original members of the EEC.).
Decolonization guaranteed formal equality among former colonies and their colonial powers. In reality, however, Rivkin rightfully noted how existing global order is characterized by inequality in global governance and economy. Rivkin also noted that formal equality shadows existing inequality in global order.)

[162] Kojo Yelpaala, *The Lomé Conventions and the Political Economy of the African-Caribbean-Pacific Countries: A Critical Analysis of the Trade Provisions*, 3 N.Y.U. J. INT'L L. & POL. 807, 824-827 (1981) (discussing Lomé I and II).

[163] *Id*.

access and export earnings stabilization schemes, the Lomé period similar to its predecessors, failed to bring major transformative macro-economic impact for African states. [164]

Post-Lomé, EU-Africa trade relations have been subject to criticism as imperialistic. Margaret Lee, analyzing ongoing negotiations for EPAs between Africa and Europe, concluded EPAs, which for her alternatively mean "scramble for African markets" amplify existent inequalities between developed Europe and developing Africa, in favor of the former.[165] For Lee, EU-Africa trade relations are imperialist for the following reasons:

> (a) the inexorable expansion of capitalism as a socio-economic system on a world scale; (b) the necessarily competitive, expansionist, and warlike character of developed capitalist states; (c) the unequal nature of capitalist expansion, and the reproduction on a world scale of socio-economic inequalities; (d) the creation on a world scale of structures of inequality of power and wealth not only in the economic, but also social, political, legal, and cultural spheres; (e) The generation, through the very process of capitalist expansion, of movements of resistance, of anti-imperialism. [166]

In addition to "imperialist" criticism, African dissatisfaction with "association" and its subsequent revisions was that Europe's policy towards Africa is divisive. The argument is that in formative years of African integration, Europe divided Africa to "associated" and "non-associated" states and threatened African unity and aspirations. For some scholars, such as Lee,

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[164] *See* generally Dirk De Bièvre & Arlo Poletti, *The EU in trade policy: From regime shaper to status quo power*, *in* EU POLICIES IN A GLOBAL PERSPECTIVE: SHAPING OR TAKING INTERNATIONAL REGIMES? 20-38 (2014) (discussing how EU maintains its best interest and exports its trade regime globally. Bièvre & Poletti also argue that the Lomé Conventions failed to transform African economies.)

[165] Margaret C. Lee, *The 21st Century Scramble for Africa*, 24 J. CONTEMP. AFR. STUD. 303, 303-305,311 (2007). (Lee uses both "saving Africa" and "naked imperialism" as analytical tools in order to analyze EU-Africa relations. For Lee, the "saving Africa" argument emanates from the idea that Africa needs to be rescued. The argument concludes that Western powers rescue Africa by increasing official development assistance. For Lee, "naked imperialism," is exploitative accumulation of capital, disguised in the name of the "saving Africa" project. Furthermore, for Lee "naked imperialism" manifests itself as a scramble for either African market or resources.

[166] *Id.*

EU's divisive and anti-African integration activities carries over to ongoing EPA negotiations.[167] Lee's criticism of EU's policy towards African integration emanates from her observation of how members of an integration scheme are divided. For instance, the SADC member states are divided between SADC and COMESA in their EPA negotiations. Contrary to Lee's contention, however, postcolonial African states may not be on equal footing with EU states but are not the innocent victims of the West. Indeed, post-colonial states had formal negotiations to determine terms of their trade relationship with the EU.[168] Second, contrary to Lee's fear of disintegration in Africa in general and Southern African states in particular, the ongoing negotiations for a Tri-partite sub-regional grouping minimizes the criticism of the EU as a divisive force in Africa's integration project.[169]

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[167] *Id.* (discussing scramble for African markets).

[168] Rivkin *supra* note 148 at 56. *See* also Goutier *supra* note 144. *See* also, The Associated Territories, 2 COMMON MARKET, 1, 5 (1962). Goutier noted that "a strict interpretation of the Treaty would lead to the conclusion that the new association regime is, like the former, an internal matter between the six members of the community, this is considered unrealistic for practical and political reasons." *Id.*

[169] A cursory examination of Yaoundé phase treaties shows that in 1969 Germany and the Netherlands called for extension of the association agreement to their former colonies. Similarly the accession of the UK resulted to the inclusion of former common-wealth countries to EU-Africa trade relations. In August 1973 twenty-one common wealth countries, all independent nations of sub-Saharan Africa, and non-common wealth countries (Ethiopia, Sudan, Liberia, Equatorial Guinea and Guinea Bissau) negotiated a new agreement with the EU. Article 24(2) of the Act Concerning the Conditions of Accession and The Adjustment of the Treaties, Jan. 22, 1972, available at http://www.eurotreaties.com/ukaccessionact.pdf, (accessed on 03/04/2012).

This is not to diminish the relevance of members of an integration scheme negotiating as a united block. Here, the researcher will give two examples that could lead to practical problems in integration projects of Southern African states. First EPA negotiations, for Southern African states are carried out under both the COMESA and the SADC. Negotiating under COMESA Zambia, Zimbabwe, Seychelles, Mauritius, Comoros, and Madagascar signed interim EPA with the EU. These Southern African states have dual membership in the SADC and there is ongoing negotiations between the SADC and the EU. This creates practical problems for negotiations and implementation of agreements. Secondly, four SACU member states (namely Botswana, Lesotho, Namibia and Swaziland) signed an interim EPA. Theoretically members of a CU are supposed to have a common external policy. This could lead questions of possible disintegration of the SACU. Whether, it was EU that divided African states to negotiate EPAs in different blocks or African states willingly chose their groupings, what is important is for integration studies, the researcher believes, is to understand its impact on regional integration. Here again, this critique is diminished, by the ongoing negotiations to merge Eastern and Southern African integration schemes. *See* European Commission, *Economic Partnership Negotiations: SADC,* The European Commission Trade, available at http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/negotiations/#_sadc, (accessed on 11/02/2013).

See also Agatha Nderitu, *From Cape to Cairo: The birth of Africa's largest Free Trade Area*, 1 GREAT INSIGHTS 3, 3-4 (2012). (The negotiations of Cape-Cairo FTA are meant to bring together COMESA, SADC, and EAC and is eventually form one common FTA.)

Equally, non-associated states were unhappy with "association" and its implications. For the non-associated states, association by its mere objective, was discriminatory and a violation of GATT non-discrimination principle. In the 1957 Report of the Working Party on the Association of Overseas Territories with the Economic Community (1957 Working Party), the EU insisted that association amounts to free trade agreement (as per article XXIV of GATT) among associated states and the EU.[170] Contrary, to EU's claims, however, most participants of the 1957 Working Party "did not consider that the association of overseas territories, in the manner proposed, would constitute a free trade area in conformity with Article XXIV of the General agreement. In their view a new preferential area, contrary to Article I of GATT, was being created."[171] For one thing it discriminated against producers and goods from non-associated states, namely Latin American, Asian and non-associated African states. Among the twelve goods examined by the 1957 Working party, bananas, were central to the discontent of non-associated, later on non- ACP states.[172] This discontent led to the banana saga in the GATT, and later on WTO dispute settlement mechanism.[173]

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[170] In late 1957 the Intercessional Committee of GATT established a working group to study "association" of overseas territories and counties with the EEC. The working group was mostly composed of representatives from non-associated states. It included France and the Netherlands from the EEC. The UK and the US from general members of GATT. And Brazil, Ceylon, Chile, Dominican Republic, Ghana, Greece, India, Indonesia, Pakistan, Rhodesia and Nyasaland as non-western and non-associated members. Report of the Working Party on the Association of Overseas Territories with the Economic Community including Commodity Trade Studies, GATT, Geneva 1958, available at www.wto.org/gatt_docs/English/SULPDF/90710163.pdf *(accessed on June 11, 2012) at 5.*

[171] *Id*.

[172] ACP is an organization of 79 African, Caribbean and Pacific states. It was formed in 1975. Its main objectives are: "(1) sustainable development of its Member-States and their gradual integration into the global economy, which entails making poverty reduction a matter of priority and establishing a new, fairer, and more equitable world order; (2) coordination of the activities of the ACP Group in the framework of the implementation of ACP-EC Partnership Agreements; (3) consolidation of unity and solidarity among ACP States, as well as understanding among their peoples; (4) establishment and consolidation of peace and stability in a free and democratic society" ACP Group – available at http://www.acp.int/content/secretariat-acp, (accessed on 02/10/2013).

[173] European Communities Regime for the Importation, Sale and Distribution of Bananas, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm, (accessed on 02/10/2013). *See* also Alter *infra* note 178 at 367 (discussing EU banana regime. EU's banana regime was first contested in 1992 under GATT rules. EU's banana regime was later on contested under the WTO rules. The authors discuss that WTO rules were more effective in reshaping EU banana regime.)

4.3. European Reaction to African Caribbean Pacific Banana Regime

Cartoonist Köhler illustrated the sentiment of German *demos* and their dismay with French proposal to associate and fund development projects of French colonies in the name of European Union.[174] Similar to German reluctance, the Dutch government was hesitant of being labeled "neo-colonialist." Van Der Lee eloquently noted:

> Germany and the Netherlands in particular disliked the principle of associating these territories with the Common Market. The German Federal Republic had no direct responsibilities in overseas countries, and the Netherlands was afraid of jeopardizing her post-colonial policy of establishing relations with the newly independent nations of the world through the intermediary of the United Nations.[175]

On the other end, the French proposal gained support among Belgian and Italian governments.[176] Belgium and Italy had colonial claims to the Congo and Somalia respectively.[177] Irrespective of German and Dutch reluctance, all the EEC members unanimously agreed to incorporate the principle of association in the treaty establishing the EEC.[178]

In its post-colonial state the Germans aired grievances in juridical avenues and opposed EU regulations on preferential treatment for African states. German's opposition, or for that

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[174] For Köhler's cartoon *see* http://www.cvce.eu/viewer/-/content/3cb9e142-6ac4-4184-8794-fc3cf619cf33/4a518ca3-27bf-4086-8bbd-d947487c3198/en (accessed on April 27,2012) and for Conrad's cartoon *see* http://www.cvce.eu/viewer/-/content/3cb9e142-6ac4-4184-8794-fc3cf619cf33/2196a3df-7bb5-4745-9850-7fd5f20739f1/en (accessed on April 27, 2012)

[175] *See* Van Der Lee, *supra* note 88 at 197. *See* also The Associated Territories, 2 COMMON MARKET, 5,5-8 (1962).

[176] In post-colonial association negotiation, the Netherlands and Germany, on the one hand, and France and Belgium, on the other hand proposed different alternatives. The former planned to abolish preferential treatment for Associated African exporters, while the latter wanted to maintain the status quo. Eventually, what happened was that the Netherlands and Germans conceded and a so-called 'new' post-colonial association ensue. Lee, *supra* note 88 at 197.

[177] *Id*. ("Belgium, however, still responsible for the Congo, and Italy, who held the trusteeship of Somalia for the United Nations, were willing to support the French demand.") *See* also http://www.cvce.eu/object-content/-/object/02904be2-7409-421d-8ee2-f393eb409fef (accessed on April 27, 2012) (discussing history of the debates and conversations of association of overseas colonies and territories).

[178] *See* the Treaty of Rome, Annex IV.
The French negotiators demanded "association" at the very last stage of negotiations for the EEC Treaty. France insisted that without "association" it will not sign into the EEC Treaty. France gave no alternative to the other five original members of the EEC. *See* also Bartels *supra* note 149 at 719.

matter French or British support for preferential treatment in favor of African producers, had little or nothing to do with African interests, but rather with their own economic interest.[179] Karen Alter and Sophie Meunier correctly noted that European banana market was fragmented. For instance in 1989 there were three distinct banana regimes:

> France, Italy, the UK, Greece, Portugal and Spain offered tariff protection for the sixty-nine African-Caribbean-Pacific (ACP) country producers, most of which were former European colonies benefiting from special trade agreements through the Lome´ Convention. Belgium, the Netherlands, Luxembourg, Denmark and Ireland had an across-the-board 20 per cent tariff for banana imports. Germany relied on a special 'banana protocol' attached to the Treaty of Rome that allowed duty-free access for Central and Latin American bananas.[180]

In early 90s, regulation 404/93 harmonized the fragmented banana regime through import licenses and quota systems.[181] It created a single, multilayered, and complicated European banana regime. And to the dismay of Germany it favored ACP bananas. Germany imports 99.7% of its bananas from Central and Latin American producers. For Germany, ACP bananas were more expensive than Central and Latin American bananas. Therefore, Germany contested the

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[179] *See* generally Karen J. Alter and Sophie Meunier, *Nested and overlapping regimes in the transatlantic banana trade dispute*, 13 J. EUR. PUB. POL'Y 362, 369 (discussing how Germany loses and the French and the UK stand to gain as a result of common European banana regime.)

[180] *See id*. *See* also Germany v. Council, ECJ C-280/93 [1994] ECR I-4973.

[181] The EU's banana import system was very complex.

The import system was incredibly complex: supplies from the EEC (including overseas territories) were unrestricted; imports from the ACP countries were tariff-free up to 857,000 tons, after which they were subjected to a 750 ECU (European Currency Unit) per ton tariff; and imports from other countries (mostly from Central and Latin American producers) were allotted a yearly quota of two million tons with a 20 per cent tariff, and a 170 per cent tariff beyond this quota. The Commission kept track of this regime by issuing import licenses that allocated quotas among banana distributors: two-thirds to traditional European and ACP importers, and one-third to other importers.

Alter *supra* note 178 at 366.

legality of the new European banana regime.[182] In its case against the European Council, Germany unsuccessfully challenged legality of common European banana regime based on European procedural laws, fundamental rights and GATT rules.[183] Similarly, yet unsuccessfully Germany challenged the legality of common European banana regime under the framework agreement between the EU and Central and Latin American states.[184] Nevertheless, German's challenge of the EU's banana regime failed to bring forth the change that Germany sought.

A WTO case brought by the US affected Africa-EU trade relations. The WTO dispute settlement organs concluded that EU's preferential treatment for ACP bananas was discriminatory and in contravention of non-discrimination rules. As a result all EU member states are pushing for reciprocal trade regime. Explaining the role and rational of the US in the Banana case President William Clinton noted:

> In pursuing and winning our case at the World Trade Organization, our target was a discriminatory European system, not the Caribbean nations. I made it clear that as we work toward a solution with our European partners, we will continue to support duty-free access for Caribbean bananas in the European market, and we will seek ways to promote diversification of the Caribbean economies.[185]

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[182]Council Regulation 404/93, Establishing a common European banana market, 1993 J.O. (L047) 1, 1-11 (Note that regulation 404/93 was later amended by Council Regulation 2013/2006).

[183] *See* generally Summary of Germany v. Council, ECJ C-280/93 [1994] ECR I-4973 -4979.
See also that Anne Peters, *The Banana's decision (2000) of the German Federal Constitutional Court: Towards Reconciliation with the European Court of Justice as Regards Fundamental Rights Protection in Europe*, *in* 43 GER. YEARBOOK INT'L L. 276, 276-282 (2001). (The German Federal Constitutional Court (FCC) decided that the common European banana regime is not a violation of fundamental rights of Germans).

[184] *See generally* Opinion 3/94 on the Framework agreement on bananas, decision of 13 December 1995 [1995] ECR I-4593 (The Framework Agreement between Colombia, Costa Rica, Nicaragua, Venezuela, and the European Union. The ECJ decided that there was no need to give an opinion on the consistency of the Framework Agreement with WTO rules.)

[185] William J. Clinton, XLII Pres. U.S., The President's News Conference with Caribbean Leaders, Bridgewater, May 10, 1997, http://www.presidency.ucsb.edu/ws/?pid=54133 (last visited 06/01/2015).

Putting the rationale why President Clinton pursued the banana case aside one can conclude that the Banana case closed a chapter in Africa-EU Trade relations.[186] It solidified and homogenized EU's pursuit for reciprocal liberalization of trade with African states.

PART-V- CONTEMPORARY EU-AFRICA TRADE RELATIONS: ECONOMIC PARTNERSHIP AGREEMENTS AND WTO COMPATIBILITY

The Cotonoú agreement (as amended in 2010) gives great emphasis to WTO compatibility. For instance, as per article 36(1) of Cotonoú 2010, "the Parties agree to take all the necessary measures to ensure the conclusion of new WTO-compatible Economic Partnership Agreements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade."[187] WTO laws oblige members of the SADC and the EU to frame WTO compatible agreements. The banana case decisions proved that preferential treatment for African produce by discriminating other equally vulnerable and developing states is WTO incompatible. Therefore, it is unlikely that EPAs will provide preferential treatment for African exports. However, the EU insists on WTO plus liberalization. For instance, both Cotonoú 2010 and the SADC-IEPA require WTO-plus liberalization. But if African states liberalize trade with their biggest trading partner (the EU) it will undermine their position at multilateral Doha development negotiations.

The difficulties encountered in the Doha Development Round, especially with EU's aspiration to incorporate Singapore issues at multilateral level blocked progress in the Round.

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[186] *See* for instance Michael Weisskopf, *Going Bananas: Chiquita's Slippery Influence: The Busy Back-Door Men,* Mar. 31, 1997 http://www.cnn.com/ALLPOLITICS/1997/03/24/time/banana.money.html (last visited 06/01/2015) (discussing how the head of the Chiquita Brand, Carl Linder, gave money to the Democratic Party.)

[187] Cotonoú 2010, art. 34(4) states,

> Economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development. It shall also address the effects of preference erosion in full conformity with multilateral commitments.

See also articles 37(4) and (5), 39, 46, 47, and 48.

Poorer members of the WTO were reluctant to take more liberalization obligations.[188] EU's persistence to include WTO-plus provisions, therefore in SADC-IEPA, irrespective of the reluctance of SADC states, shows that EU is trying to achieve WTO plus liberalization at bilateral and pluri-lateral levels. If SADC states in their relations with EU liberalize trade at WTO-plus standards the initiatives of Doha Development Round will be redundant and irrelevant for Southern African states.

Apart from Singapore Issues, two of the negotiating issues in the WTO-Doha Ministerial Declaration and their possible outcomes are of great importance for EPA negotiations. First, negotiations for more flexible and development-oriented regional trade agreements within the WTO framework are relevant for developing and developed states' FTAs.[189] Second, the call for revision of Special and Differential (S&D) treatment to make it friendlier for developing countries is of vital importance for Southern African states development projects.[190] Allowing S&D treatment in free trade agreements between North and South might be one of the possible outcomes of Doha Development agenda.

Historically, EU's position on North-South FTA was that GATT XXIV (8(b))[191] and XXXVI (8)[192] are related and should be read in conjunction. This would mean in a North-South FTA a

[188] Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System – A Cosmopolitan Perspective*, 8 J. INT'L ECON. L., 363, 364 (2005) (discussing EU's ambitious proposal on Singapore Issues.)

[189] Ministerial Declaration adopted on 14 November 2001, para.29 (WT/MIN(01)/DEC/1), 20 November 2001(discussing agreements to negotiate development aspects of regional trade agreement provisions of the WTO).

[190] *Id*. at para. 44

> We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.

[191] Article XXIV 8(b) of GATT states,

non-reciprocal preferential treatment can be awarded to states from the developing South. Therefore, the EU in the Banana II dispute argued, "its banana import measures, even if inconsistent with Article I, were justified under the provisions of Article XXIV relating to free trade areas."[193] Its contenders, Colombia, Costa Rica, Guatemala, and Nicaragua (CCGN) argued that EEC's banana regime is not an FTA. CCGN states argued that EU's conception of North-South FTA is discriminatory and against GATT rules.[194] CCGN states rightfully noted that the interpretative notes of article XXXVI (8) show that articles XXIV and XXXVI are not to be read in conjunction. Therefore, developing states cannot benefit from preferential treatment in their FTA arrangement with EU. This is because FTAs are by nature discriminatory and do not fall within the parameters of generalized system of preferences. The panel agreeing with the CCGN states noted:

> The Panel then examined Article XXIV in this light. It observed that Article XXIV was not specifically mentioned in the Note to Article XXXVI:8 and that the participants in the negotiations of a free trade area in the sense of Article XXIV, although involved in a process of tariff reduction, did not derive their negotiating status from the General Agreement, nor were they bound to follow procedures set out under the General Agreement for the conclusion of the agreement. The wording and underlying rationale of the Note to Article XXXVI: 8 thus suggested to the Panel that Article XXXVI:8 and its

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> A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

[192] Article XXXVI (8) of GATT states that developed countries "do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties."

[193] GATT, European Economic Communities – Import regime for bananas (DS38/R), para. 156.

[194] *Id*.("EC measures were not justified under Article XXIV, since the Lomé Convention did not meet the conditions of a free trade area as set out in that Article.")

> Note were not intended to apply to negotiations outside the procedural framework of the General Agreement, such as negotiations of a free trade area. [195]

In conclusion, EPAs have to confirm to the principles of article XXIV of GATT.

In addition, EPAs have to liberalize "substantially all trade" among the EU and Southern African states. Article XXIV (8(b)) of GATT mandates members of North-South FTA to liberalize "substantially all trade" among contracting states. What does "substantially all trade" mean?

Member states of the WTO have different views on what constitutes "substantially all trade." The Appellate Body in Turkey-Textiles case interpreted "substantially all trade." The Appellate Body noted that it "is not the same as all the trade, and also that 'substantially all the trade' is something considerably more than merely some of the trade."[196] Appellate Body's interpretation was in relation to trade among members of a CU. But, one could argue that it is also applicable to FTAs. This is because GATT XXIV sets the same internal standard for both CUs and FTAs. Nevertheless, this definition fails to provide pragmatic measurable value. It merely stipulates that that "substantially all trade" does not mean "all" trade.

The EU's view indicates that the term "substantially all" has both qualitative and quantitative aspects. The quantitative measure stipulates that 80% of trade within an FTA should be liberalized. The qualitative measure stipulates that no particular sector or industry should be excluded from liberalization. For the EU, SADC-IEPAs are WTO compatible if SADC states liberalize up to 80% of general trade volume without excluding a particular sector or sectors.

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[195] *Id*. para 161.

[196] Appellate Body Report, *Turkey — Textiles*, (DS34/AB/R) para. 48 (discussing "substantially all" as an internal trade standard in a CU.)

5.2. SADC-IEPAs and Negotiations

In 2002, seven SADC states —Botswana, Lesotho, Namibia, Swaziland, Mozambique, Angola, and Tanzania—agreed to negotiate as an SADC-EPA group. As the negotiations proceeded, Tanzania left SADC-EPA group and joined the EAC group and the DRC started negotiating with the CEMAC. The rest of SADC member states with the exception of South Africa, namely Zimbabwe, Zambia, Madagascar, Mauritius, Seychelles, and Malawi joined COMESA-EPA group.

The negotiation timeframe for SADC-IEPA was overly ambitious.[197] The plan was to complete substantive negotiations within two years (from 2005-2007). It was also planned that six months of preparatory period was to precede substantive negotiations. At the time of the research, SADC-IEPA negotiations are far from complete and a comprehensive EPA is yet to come.

States from the SADC and the EU agreed that EPA negotiations should ensure that EPAs are: (1) instrument for development; (2) support regional integration processes; (3) WTO compatible; (4) preserve the Everything But Arms initiative; (4) Special and Differential Treatment; (5) sustainability; (6) legitimacy and transparency; and (7) resources and support for adjustment.[198] Several of these principles for EPA negotiations are inherently incompatible. For instance, as discussed in Section 5.2, EPAs cannot be WTO compatible agreements and at the same time preserve S&D benefits. Nevertheless, with these principles in mind, in 2005 the parties identified five priorities for negotiations: sanitary and phyto-sanitary; technical barriers to

[197] Colin McCarthy *et.al., Benchmarking EPA Negotiations between EU and SADC*, TRALAC 1, 5(2007) (discussing the agreed time frame for substantive negotiations between the EU and the SADC states).
[198] *See* also Press Release, *European Commission and SADC states, Opening of the EPA negotiations with Southern African Development Community* (Jul. 15, 2004), available at http://www.fes.de/cotonou/downloads/official/ACPEU/SADC-EU-JOINTROADMAPEPA.PDF, (accessed on 04/12/2013).

trade; regional integration; market access for agricultural, non-agricultural and fisheries' products; rules of origin and trade facilitation.[199]

In February 2006, South Africa requested to join the SADC-EPA.[200] South Africa and EU trade relations are governed by the TDCA. South Africa's efforts to join SADC-IEPA was based on the rational of maintaining regional integration in the region. Deputy Minister of Trade and Industry of South Africa stated that

> South Africa joined the SADC EPA Group in February 2006 in an attempt to resist further fragmentation in SADC. We had hoped to align the Trade, Development and Cooperation Agreement (TDCA) free trade agreement that we have with the EU to the SADC EPA arrangement. In particular, we saw the negotiations as an opportunity to consolidate the customs union in SACU *vis a vis* the EU. [201]

With South Africa on board, the new SADC-EPA group put forth a four-element negotiating framework. First, SACU member states agreed to use the TDCA "as a basis for a negotiating outcome as long as their sensitivities under the TDCA were addressed."[202] Second, least developed countries, for instance, Mozambique, Angola and Tanzania (MAT), should be treated under Everything But Arms Initiative.[203] Third, duty-free access for SADC-EPA states to EU

[199] *Id*. (SADC and EU states agreed to negotiate EPAs in three sequenced stages: (1) stage one is setting priorities and preparations for negotiations with timeline of July-December 2004, (2) stage two is set for substantive negotiations from Jan. 2005 – Jun. 2007, and (3) stage three deals with finalization of EPA agreements from July-December 2007).
[200] *Id*., para. 5. *See* also McCarthy *supra* note 196 at 6 (discussing key elements identified by SADC states for their EPA negotiations).
[201] Rob Davies, Presentation by the Deputy Minister of Trade and Industry to various Parliamentary Committees, SADC EPA-EC negotiations report: Assessing the Emerging Outcomes, 30 January, 2008, Pretoria, South Africa, para. 3.
[202] Davies *supra* note 199 at para. 6.
[203] *Id*., para. 6.

markets "at the best available conditions[204] Fourth, all WTO-plus issues should be negotiated as "non-binding cooperative arrangements."[205]

The EU agreed to include South Africa in the SADC-EPA negotiations.[206] However, EU's response to the proposed negotiating framework of SADC states was rather disappointing. Davies rightfully noted that EU's response leads to "new generation of division".[207] He argues negotiating WTO-plus liberalization undermines regional, sub-regional, and multilateral economic integration. He noted:

> The shape of the outcome shows that South Africa will not obtain duty free market access (our tariff negotiations are based on reciprocity). LDCs will reciprocate tariff concessions in line with WTO obligations as interpreted by the EC (80% coverage). BLNS sensitivities are narrowly addressed. All SADC EPA States, except South Africa and Namibia, agreed to negotiate services and investment, and have further agreed to consider competition and government procurement for future negotiations. In this way, a new generation of division has opened in the region's trade policy. [208]

According to the EU WTO-plus liberalization is important for the development projects of SADC states. EU insisted that EPAs need to have WTO-plus liberalization to be compatible with the development objectives of Cotonoú Agreement.[209] Clearly, the idea of sovereign power of

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[204] *Id*., para. 7.
[205] *Id*., para. 7.
[206] *Commission proposal on Communication to modify the directives for the negotiations of economic partnership agreements with ACP countries and regions*, at 3, COM (2006) 673 final (Nov. 28, 2006).

> The EC believes that it can accept the inclusion of South Africa into the EC-SADC EPA. However this acceptance is subject to certain conditions and requests concerning the trade regime to be applied to South Africa, the situation of MAT', the scope of the future agreement and the definition of tariff offers.

[207] Davies *supra* note 199 at para 9.
[208] *Id*. para. 16. Davies further noted how negotiating these subjects would limit policy space of Southern African states and multilateral negotiations at the WTO level.
[209] *Commission proposal on Communication to modify the directives for the negotiations of economic partnership agreements with ACP countries and regions*, at 3, COM (2006) 673 final (Nov. 28, 2006). ("Excluding all commitments on trade-related rules (e.g. Services, Investment, Government procurement, trade facilitation, IPR and

Southern African states to define their development programs seems to be missing. The EU without regard to the wants of its Southern African counterparts insisted on WTO-plus EPAs [with new generation of trade-related rules]. For the EU any duty-free and quota-free access to European markets is conditioned on the SADC states signing into WTO-plus EPAs. The Commission, stating its firm stand on WTO-plus liberalization through EPAs noted:

> The EC tariff offer would be based on a situation which, de facto, already exists, the TDCA on the one hand and Cotonoú provisions on the other hand. Any additional tariff concession for the 'BLNS' and the 'MAT' would be the outcome of the EPA negotiation and depend on the efforts of these countries to take commitments on trade related rules.[210]

In conclusion, SADC-EPA will have WTO-plus liberalization.

Can Southern African states withdraw from EPA negotiations? Can they benefit from a generalized system of preferences? GSPs or EBAs are provided at the discretion of the EU. SADC states have no say on conditions attached to GSPs or EBAs. The EU rejected SADC states' request for contractual EBAs for MAT states. For the EU, contractualizing EBAs is a violation of GATT XXIV.[211] Nevertheless, it is possible (if the EU permits) for the MAT states to benefit from GSPs and EBAs. But even MAT states withdraw from EPA negotiations they could still suffer from influx of European products imported to one of the other SADC states.

Article XXIV (8(a)) requires members of CUs to maintain common external trade policy. Some LDCs as a result of their membership in CUs are required to maintain common external tariff policy. Both Lesotho and Tanzania signed interim EPAs with the EU. Both states are

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Competition) would be very difficult to reconcile with Cotonoú. Moreover rules are the essence of the development dimension of EPAs.")

[210] *Id*. at 3-4.

[211] *Id*. (discussing how "contractualizing" EBA regime for Mozambique, Angola and Tanzania is incompatible with WTO rules of non-discrimination.)

required to maintain common external trade policy with the SACU and the EAC respectively. As members of CU, all SACU and EAC states need to have a common trade policy towards the EU. Alternatively, all SACU and EAC states need to approve differentiated external trade policy. Obviously, the foreign trade policy of SACU is not consistently common. For instance South Africa's free trade agreement with the EU is not a common policy of BLNS states. Through SADC-EPA South Africa wanted to access EU markets at the level of BLNS states. The EU rejected South Africa's proposal. For the EU "South Africa being the most competitive economy of the region, it can't be treated as the other members of SACU."[212] In conclusion, several SADC states initialed EPAs despite their previous discontent with WTO-plus liberalization.[213]

5.3. SADC-IEPAs and Commitment for Regional Integration in Southern Africa

SADC-IEPA states support regional integration initiatives among Southern African states. One of the objectives of SADC-IEPA is, "promoting regional integration, economic cooperation and good governance thus establishing and implementing an effective, predictable and transparent regional regulatory framework for trade and investment between the Parties and among the SADC-EPA States."[214] SADC-IEPA objectives on regional integration shows its support for integration schemes that already exist in both continents. It also promotes the formation of EPAs as a new integration project between the SADC and the EU. As enumerated

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[212] *Id*.

[213] *See* Statement of the Chief Negotiators for SADC-IEPA, *in* Interim Economic Partnership Agreement Between SADC EPA States, on the one part, and the European Community and its member states, on the other part, Joint Text Initialed on 23 November 2007. (Discussing how SADC-IEPA is the outcome of negotiations of all SADC-EPA states including South Africa and Namibia, but on the other hand it gives ultimatum for the latter states to sign into the agreement until 30th of November 2007, or else the provisions of SADC-IEPA will have no effect in relation to both states. The most relevant of the joint statement states,

> [s]hould the Republic of South Africa and/or the Republic of Namibia fail to initial this text by Thursday the 29th of November 2007 at 12h00, the provisions of this text, its Protocols and Annexes specifically referring to the Republic of South Africa and/or the Republic of Namibia will be deleted and considered as not having any legal value. EC tariff offers made to South Africa, or tariff alignment reflecting specific requests of Namibia will also be withdrawn and considered as not effective.

[214] SADC-IEPA art. 1(b).

in article 4(3) of SADC-IEPA, "the Parties support in particular the integration processes based on the Southern African Customs Union Agreement…the Southern African Development Community Treaty … and the Constitutive Act of the African Union … development policies and political agendas…"[215] By reassuring its commitment to regional integration this provision calms the possible fear of disintegration within the SADC. In addition it also responds to accusations that the EU is disintegrating Southern African integration projects.[216] However, one might wonder if the SADC-IEPA is compatible with the integration initiatives of Southern African states. In addition, given the existing low intra-regional trade among Southern African states, one might question, the impact of the SADC-IEPA on intra-regional trade.

5.3.2. SADC-IEPAs: Trade Liberalization and Regional Integration

Neoliberalism, alternatively, trade liberalization in the context of EPAs, does not correspond to Africa's development project. Some economists, for instance Oliver Morissey *et. al.*, argued that trade liberalization in the context of EPAs, should be mitigated through offset mechanisms, as it will have negative consequences on intraregional trade among African states.[217] Similarly, Chris Milner *et. al.*, argued that in order to promote the overall welfare of the state in EPA negotiations, intra-regionally traded products should be categorized as sensitive products.[218] Likewise, G.O. Onogwu and C.J Arene, in a more specific study analyzing the welfare impact of Cape Verde's economic partnership agreement with the EU, concluded that

[215] SADC-IEPA, art. 4(3).
[216] *See* for instance, Lee *supra* note 164 at 313 (discussing STOP-EPAs campaign and role of EPAs in undermining regional integration in Africa).
[217] Oliver Morissey *et. al.*, *Designing Economic Partnership Agreements to Promote Intra-regional trade in ACP countries*, 4 (UNU-CRIS Working Paper Series No. 9, 2010) (discussing impact of Economic partnership agreements on intraregional trade).
[218] *See* Chris Milner *et. al.*, *EU-ACP Economic Partnership Agreement and ACP Integration*, 1 (CREDIT Research Paper No. 09/05, (2009) (discussing the welfare impact of EPAs on 34 member states of the ACP).

Cape Verde and all ECOWAS' states, will benefit from trade liberalization if they manage to get an exception for all the produce traded intra-regionally.[219]

EPAs and trade liberalization will lead to loss of revenue. For instance, Zambia and Zimbabwe will lose half their customs revenue as a result of trade liberalization.[220] For some Southern African states trade liberalization will not have significant effect on revenue loss. For instance, SACU member states would not experience significant revenue loss. SACU states are already receiving an influx of European products as a result of the TDCA between the EU and South Africa. In addition, SACU Treaty mandates South Africa to compensate states that lose as a result of trade liberalization. Nevertheless, other SADC states will experience substantial revenue loss. This revenue loss could lead to unemployment and political instability.[221] Therefore, Mathias Busse argues that trade liberalization should be gradual and properly balanced to counter possible negative repercussions.[222] This being the case, how should EPA negotiations proceed in identifying and negotiating gradual liberalization for African states?

In the Southern African context identifying regionally sensitive products is complex. The underlying assumption with the process of identification of "regional traded products" is that member states are complementary traders and have high intra-regional trade. This assumption is unfounded. As Chapter Four demonstrates, there is low intra-regional among Southern African states. In addition, states that belong to two integration schemes will have difficulty in excluding

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[219] *See* generally, G. O. Onogwu and C. J Arene, *Adjusting Liberalization due to Trade, Revenue, and Welfare Effects: An Economic Partnership Agreement Scenario between Cape Verde and the EU*, 3 J. AGRIC. & SUSTAINABLITY, 87, 87-107 (2013) (Onogwu and Arene used partial equilibrium methodology to analyze the welfare impact of EPAs on ECOWAS and Cape Verde. Through this methodology the authors concluded that for positive welfare impact of EPAs to materialize Cape Verde and ECOWAS need to have protectionist policies to offset the negative impacts of trade liberalization).

[220] Accessing Regional Integration in Africa Vol. 1 pp. 12

[221] Busse *supra* note 82 (discussing impact of EPAs on unemployment and political instability).

[222] *Id.*("lessons from other regional integration projects including the European case illustrate the need for a gradual and country-specific approach in trade liberalization and a proper sequencing of complementary, compensatory and institutional measures to counter possible negative repercussions of integration.")

certain products. For instance, states like Zambia that are members of both SADC and COMESA, but are negotiating for EPA under COMESA will only be able to exclude produce it exports to COMESA states.

PART- VI- CONCLUSIONS: INTERSECTION OF NARRATIVES

At the beginning of this Chapter, there is a dialogue of two parallel and intersecting narratives. Narratives of African integration and EU-Africa trade relations relayed separately show a parallel relationship. Hence, in this part, the researcher will conclude by discussing entry points of where and when intersections exist as related to Southern African integration initiatives.

The main juncture of intersection of these narratives is the result of imperialist colonial expansion and Africa's resistance movement. Integration is the emancipation of oppressed people. Continental integration is, therefore, the pursuit of freedom and negates imperialist agendas. First, integration as a resistance movement meant decolonization. It challenged terms of association with the EU. Second, the move towards neoliberal conception of integration in sub-regional integration efforts is a point of intersection. The focus on linear integration as shown by "five milestones of SADC" results to ideological intersection. Ideological intersection is a multi-faceted phenomenon that resulted out of the liberalization of global economic order.

A third point of intersection is a result of the WTO Banana case decision. The Banana case ended preferential treatment for African producers. In addition, it led to EPA negotiations. Today, out of the fourteen SADC member states, eight have already initialed interim EPAs. At beginning of the research (and during the prospectus defense), the researcher believed that EPAs will lead to disintegration among SADC states. This understanding was based on the fragmented negotiation syndrome in the region. Some Southern African states chose to negotiate EPAs with

COMESA, SADC, and EAC. However, current negotiations for a Tri-partite integration agreement between EAC, COMESA, and SADC challenged this hypothesis.

CHAPTER-FOUR: RETHINKING AND THEORIZING REGIONAL INTEGRATION IN SOUTHERN AFRICA

PART-I- INTRODUCTION

Existing theories of regional integration are characterized by a lack of consensus. Theorists from different disciplines have attempted to theorize and conceptualize integration.[223] However, most theorists focus on their own disciplinary inquisition rather than on a comprehensive conceptual framework for understanding regional integration. The different approaches to understanding regional integration resulted in the current epistemological pluralism, which lacking epistemic synergy, led to the correlation between disciplinary inquiry and the nature and character of the integration scheme.

Conventionally, integration means an amalgamation of political and economic policies to form a single community. However, theorists look at integration differently depending on their discipline. For instance, economists focus mainly on economic integration or integration schemes that require economic policy harmonization among member states. Similarly, scholars engaged in the study of the interrelationship between states and peaceful co-existence focus on the effects of integration on regional violence rather than on other economic or political factors.

Similar to theorists in other disciplines, legal scholars also have a particular approach to analyzing integration. Legal scholars focus on understanding the coherence, supremacy, and direct effect of integration law and assume the economic and political impacts of integration schemes are already known. Among legal scholars there is generally a positive appreciation for

[223] *See, e.g.*, Stanley Hoffmann, *Significant Books of the Last 75 Years: Western Europe*, FOREIGN AFF., Sept./Oct. 1997, at 224, 226–27 (reviewing ERNEST B. HASS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950–1957 (1958)) (explaining that Ernest B. Haas is considered one of the first international relations theorists of European integration schemes); *see also* C.A. Cooper & B.F. Massel, *A New Look at Customs Union Theory*, 75 ECON. J. 742, 742–47 (1965) (discussing economic aspects of regional integration through customs unions).

the effects of integration on development even though economic theories show less than positive results. Many non-legal theorists assume that integration agreements can apply domestically despite the fact that domestic application of integration schemes requires a sophisticated discourse involving domestic constitutional norms and principles based on monist or dualist legal thought. What is common among the non-legal theorists is most, if not all, assume the domestic application of integration agreements. However, the domestic application of integration schemes is a sophisticated discourse that requires domestic constitutional norms and principles based on monist or dualist legal thought. Furthermore, as discussed in Chapter Two in detail, the horizontal and vertical coherence dilemma of regional integration law further complicates existing domestic application of regional commitments.

Although various disciplines approach integration differently, the existing integration schemes in Africa, and in Southern Africa in particular, cannot be easily categorized as political or economic integration schemes, but rather as a combination of both.[224] In addition, existing theories of integration, such as the linear integration model, developed in relation to the integration schemes of the developed North took into account the particular historical, socio-

[224] Article 1 of the Southern African Development Community ("SADC") Treaty defines "Community" as "the organisation for economic integration established by Article 2 of [the] Treaty." Treaty of the Southern African Development Community art. 1, para. 3, Aug. 17, 1992, 32 I.L.M. 116 [hereinafter SADC Treaty].
Arguably, Article 1 only directs SADC Member States to establish an economic integration scheme and is otherwise silent on other forms of integration. However, the SADC created an organ on Politics, Defense, and Security Co-operation and set as the objectives of the organ political integration and regional cooperation in intrastate and interstate peacekeeping. Protocol on Politics, Defence and Security Co-operation, Aug. 14, 2001,http://www.sadc.int/documents-publications/show/809. An additional example of prioritizing integration in areas not directly related to orthodox economic integration is the Protocol on Mutual Legal Assistance in Criminal Matters, establishing the framework for the provision of mutual legal assistance in criminal matters among SADC states. Protocol on Mutual Legal Assistance in Criminal Matters, Oct. 3, 2002, http://www.sadc.int/documents-publications/show/807. In fact, out of the twenty-two protocols signed by SADC Member States, only few directly relate to economic and trade policy cooperation. *See Protocols,* S. AFR. DEV. COMMUNITY, http://www.sadc.int/index.php/documents-publications/protocols (last visited Mar. 19, 2014)

economic, and political factors of that region.[225] For this reason, there is doubt as to the applicability of these theories in the integration initiatives of other developing states.[226] The question then remains, how to overcome the existing epistemological pluralism and develop a comprehensive understanding of regional integration in Southern Africa. Hence, in order to proffer a broader, if not comprehensive, understanding of integration, the researcher proposes a multidisciplinary inquisition that investigates the concept by using historically sensitive methodologies.

First, to conceptualize regional integration, in Africa in general and Southern Africa in particular, the researcher looks at the views of three prominent African leaders and founding fathers: Emperor Haile Selassie of Ethiopia, [227]Julius Nyerere, the first president of Tanzania,[228]

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[225] *See* JAMES THUO GATHII, *African Regional Trade Agreements as Flexible Legal Regimes*, *in* AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES 1 (2011) (comparing African integration schemes with their counterparts in Europe and North America).

[226] *Id*.

[227] *See generally* HAILE SELLASSIE I, THE AUTOBIOGRAPHY OF EMPEROR HAILE SELASSIE I: 'MY LIFE AND ETHIOPIA'S PROGRESS' 1892–1937 (Edward Ullendorff trans., 1976) (discussing Haile Selassie's ascent to power); *see also* Reidulf Molvaer, *My Life and Ethiopia's Progress Vol. II*, 3 NE. AFR. STUD. (n.s.) 149, 149–54 (1996) (reviewing and critiquing Haile Selassie's autobiography); *see also* Gérard Chaliand, *The Horn of Africa's Dilemma*, FOREIGN POL'Y, Spring 1978, at 116, 117 (discussing the causes of resistance to Haile Selassie and his overthrow from power, in particular that Haile Selassie, by focusing on modernization of military, international relations and education, failed to address the needs of eighty-five percent of the Ethiopian population who were in need of land and economic policy reforms).

[228] Madaraka Nyerere, *A Short Biography of Julius Nyerere*, *in* AFRICA'S LIBERATION: THE LEGACY OF NYERERE, at xvi–xvii (Chambi Chachage & Annar Cassam eds., 2010). Julius Nyerere, who was also referred to as Mwalimwu, was elected to the head of the Tanganyika African National Party in 1954, began holding a parliamentary position in 1958, and successfully led Tanganyika to independence from British colonization. Tanganyika Republic Act, 1962, 11 Eliz. 2, c. 1 (U.K.). In 1964, Nyerere managed to unite Zanzibar and Tanganyika, leading to the formation of the United Republic of Tanzania. An Act to Ratify the Articles of Union Between Tanganyika and Zanzibar, Act No. 22 of 1964 (1964); *see also* Bonny Ibhawoh & J.I. Dibua, *Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Quest for Social and Economic Development in Africa*, 8 AFR. J. POL. SCI. 59, 60–78 (2003). Nyerere is remembered for the introduction of *Ujamaa*, a philosophy of development grounded in rural socialization, and oriented toward distributive justice and social equity. *Id.* at 62. Unlike the conventional understanding of socialism, the basis of which is class struggle, for Nyerere the basis of African socialism rests on African values. *Id.* For him the ideal society is characterized by freedom, equality and unity. *Id.* His enforcement of *Ujamaa* through coercion was nevertheless self-defeating and contrary to his conception of ideal society. *Id.* at 67. Even though the *Ujamaa* development plan failed to achieve economic development, it did solidify a sense of nationalism beyond the realms of ethnicity and family identity in Tanzania. *Id.* at 71. See Mwalimu Julius K. Nyerere, *Ujamaa: The Basis of African Socialism*, 1 J. PAN AFR. STUD. 1, 4–11 (1987), for an explanation of Nyerere's conception of African socialism.

and Kwame Nkrumah, the first president of Ghana.[229] The views of Nkrumah and Nyerere will help conceptualize integration in Africa, given that they both represent two of the main blocks of negotiation for unity in post-colonial Africa.[230] However, reference to Selassie as an African integration thinker might appear contentious. Selassie's persistent claim of how his Ethiopian kingdom is a continuation of the Kingdom of Judah makes him Zionist than Africanist. Nevertheless, discussions during the formative years of African unity show that Selassie's views are an intermediary between the views of Nkrumah and Nyerere. His persistent call for unity without regard to different approaches, in the researcher's opinion has led to the emphasis on "unity" as solidarity, even more than "unity" as integration.[231]

Second, this chapter challenges the classical theories and justification of regional integration and their applicability in the Southern African context.[232] Unlike the classical justification for integration in Europe, the main justification for integration in post-colonial Africa is emancipation from racial domination and colonial rule.[233] With the end of Apartheid rule and the independence of all African states, the common need for political emancipation has become less imperative.[234] The question then remains: Has integration ended with the end of

[229] *See* DAVID BIRMINGHAM, KWAME NKRUMAH: THE FATHER OF AFRICAN NATIONALISM 4–6 (rev. ed. 1998). Nkrumah. Nkrumah trained at Lincoln University and was influenced by great Pan-Africanism theorists like Du Bois and Marcus Garvey. *See id.*; Kwadwo Afari-Gyan, *Kwame Nkrumah, George Padmore and W.E.B. Du Bois*, 7 INST. AFR. STUD. RES. REV. 1 (1991). Nkrumah was a socialist and was acclaimed for leading Ghana to independence in 1957. *See* BIRMINGHAM, *supra*. Nkrumah renamed himself "Osagyefo," meaning "Redeemer," but his imposition of one party rule and other restrictions led to the dissatisfaction of many Ghanaians and his eventual overthrow in 1966. *See* Jonathan Zimmerman, *The Ghost of Kwame Nkrumah Zimbabwe and Africa*, INT'L HERALD TRIB., Apr. 24, 2008, at 8.

[230] *See* Mohabe Nyirabu, Feature, *Appraising Regional Integration in Southern Africa*, 13 AFR. SECURITY REV., no. 1, 2004, at 21, 21–22 (comparing Nkrumah's and Nyerere's integration models).

[231] *See* Haile Selassie, Emperor of Ethiopia, Address at the 1963 African Summit (May 23, 1963), *in* U.N. ECON. COMM'N FOR AFR., CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, at 2, (2013) [hereinafter Selassie Address].

[232] By classical theories of integration, the author is referring to the economic and political justifications for integration.

[233] *See* Selassie Address, *supra* note 231, at 1-2.

[234] In this part, the use of the phrase, "political emancipation" is limited to the independence of African states from colonization and the freedom of Africans from racial domination by colonial settlers. However, expansions of the

Apartheid? More specifically, has there been a transformation in how integration is understood, and is integration sought only for the conventional justifications like the economic and political reasons given in the case of the European Union?[235] By asking these questions and more, this chapter is a critical attempt to move toward a multidisciplinary re-conceptualization of integration in Africa in general and Southern African counties in particular. In conclusion, this Chapter intends to bring both theoretical and conceptual synergy by re-conceptualizing "integration as emancipation" among Southern African states.

PART-II- PAN-AFRICAN CONCEPTION OF INTEGRATION

This Part of the Chapter analyzes the ideas of African political thinkers regarding regional integration in order to proffer answers for understanding integration in the continent. Understanding the views of Selassie, Nkrumah, and Nyerere (referred to in this dissertation as the "founding fathers"),[236] leads to a sophisticated discourse of regional integration that allows one to assess the conceptual understanding of integration, or lack thereof, by exploring the intent of the founding fathers. Among African thinkers there was a shared enthusiasm for continental integration.[237] All the states represented in the formative years of the OAU supported African

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emancipation project to new post-independence emancipation projects of Africa, for instance minority rights movements, is advocated and argued for in the last part of this Article.

[235] The main justification for the origins of the EU in the 1950s is the creation of peaceful co-existence and economic development and prosperity among member states. *See* Robert Schuman, French Minister of Foreign Affairs, Declaration of 9 May 1950, *in* EUR. PARLIAMENT, 60TH ANNIVERSARY OF THE SCHUMAN DECLARATION 1950–2010: THE 9TH OF MAY SCHUMAN DECLARATION: HISTORICAL CONTEXT AND MAIN ACTORS 33 (2010).

[236] The call for African Unity can be traced back to Marcus Garvey, Henry Sylvester-Williams, W.E.B Du Bois and other Pan-Africanist thinkers outside the African continent, and while Nkrumah was an active member of the Pan-Africanism movement in the 1940s, the same cannot be said with regard to Nyrere and Selassie. *See* Afari-Gyan, *supra* note 228, at 1–2. Nevertheless, this Chapter will focus the discussion of Pan-Africanism on when it took continental dimension, specifically with the call for African unity by the heads of African states.

[237] *See, e.g.*, Gamal Abdel Nasser, President of the United Arab Republic, Address at the 1963 African Summit (May 23, 1963), *in* CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, *supra* note 231, at 110 (analogizing between the birth and survival of an individual and unity of African continent); *see also,* David Dacko, President of the Cent. Afr. Rep., Address at the 1963 African Summit (May 23, 1963), *in* CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, *supra* note 231, at 16 (explaining that the existence of the Central African Republic would be in danger if it were to stand by itself); Sekou Toure, President of Guinea, Address at the 1963 African Summit (May 23, 1963), *in* CELEBRATING SUCCESS: AFRICA'S VOICE OVER

integration.[238] In conclusion, this Part argues that African thinkers, in the formative years of African unity, did not have an agreed upon conception of regional integration; yet, they all believed that integration would lead and solidify the continental emancipation project.

2.2. Founding Fathers: African Unity or African Solidarity

The founding fathers acknowledged the existence of different approaches to integration and were divided on which approach to adopt. Nkrumah advocated for a federal approach, with vertical, central, and supranational authority over member states.[239] On the other hand, Nyerere promoted a more gradual and intergovernmental (confederal) approach that enabled member states to retain most of their sovereign power.[240] On the contrary, Selassie represented a centralist view that neither advocated for federalism nor confederalism, but rather for an agreement that shows that Africans stand united.[241] For him the difference was one of semantics.[242] In his words, "no clear

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50 YEARS 1963–2013, *supra* note 231, at 42–43 (stating that African Unity was an effort to correct the arbitrary actions of colonist in the scramble for Africa). Partly because of those reasons and other similar justifications, all states represented were in agreement of the need for integration.

[238] The 1963 Conference of Heads of African States and Governments led to the creation of the Organization of African Unity ("OAU"). Thirty-two African states were represented at the conference and expressed their interest and support for African integration. Those countries were: Algeria, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Dahomey, Ethiopia, Gabon, Ghana, Guinea (Conakry), Ivory Coast, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanganyika (Tanzania), Togo, Tunisia, Uganda, United Arab Republic (Egypt), and Republic of Upper Volta (Burkina Faso). Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39.

[239] *See* Kwame Nkrumah, President. of Ghana, Address at the 1963 African Summit (May 23, 1963), *in* CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, *supra* note 231, at 37–39 [hereinafter Nkrumah Address].

[240] *See* Julius K. Nyerere, Pres., Tanganyika, Address at the 1963 African Summit (May 23, 1963), *in* CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, *supra* note 230, at 101 [hereinafter Nyerere Address].

[241] Selassie Address, *supra* note 231, at 2–3 (emphasizing an agreement that unites Africa without actually focusing on one approach to integration). For some, African Unity was a Negro superiority project that sought to achieve and maintain African equality with Europe:

> There has been, in the language of African unification, the implied assumption that even if a united Africa, materially on a level with a divided Europe, did not prove equality in technological capacities, it would at least have established African *superiority* in terms that can almost be described as 'ethical.' The (Nigerian) Action Group Policy Paper on a West African Union issued in 1960 could thus view the creation of such a Union as a means by which Africans were to prove to the world that 'Negro states, though the last to come, are the first to use their brains for the conquest of the forces that have kept men apart.' Such Negro states were to have been almost the first multi-lingual sovereign states willingly to renounce their sovereignty for the unity of at least one group of peoples. To that extent they would have established superiority over a Europe which, in recent times, had had two enormously costly civil wars—a Europe which still remained in

consensus exists on the 'how' and the 'what' of this union. Is it to be, in form, federal, confederal or unitary? Is the sovereignty of individual states to be reduced, if so by how much, and in what areas?"[243] Selassie noted that all integration approaches have a common central objective of unity—a unity that symbolizes strength and facilitates the independence of all African people.[244] He noted that a united Africa would have more chances of transitioning from colonial history to active participation in world affairs.[245] He envisioned Africa free from colonization and racial discrimination. In his words,

> Africa's victory, although proclaimed, is not yet total, and areas of resistance still remain. …. Our liberty is meaningless unless all Africans are free. Our brothers in the Rhodesias, in Mozambique, in Angola, in South Africa cry out in anguish for our support and assistance. We must urge on their behalf peaceful accession to independence.[246]

For Selassie, the primary goal of integration was to secure independence for all Africans.[247] Although, he envisioned political union as the ultimate goal of unity, he noted the importance of social and economic cooperation to strengthen political unity.[248] In contrast, Nkrumah argued that political integration is vital and of primary importance for Africa's development.[249] In his

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> acute competition both within itself and in the advantages each little segment of Europe sought from the outside world.

Ali A. Mazrui, *African Attitudes to the European Economic Community*, 39 INT'L AFF. 24, 25 (1963). The question remains though, now that Europe is an epitome of regional integration in contemporary integration studies, what drives African integration? Additionally, despite the multiple promises, speeches and agreements for continental integration, Africa is still divided fifty years later and in quest of deeper integration. The fair conclusion is, therefore, that the idea of "Negro superiority" no longer serves as a justification for African integration following the formation of European Union.

[242] Selassie Address, *supra* note 231, at 2 ("[T]hrough all that has been said and written and done in these years, there runs a common theme. Unity is the accepted goal. We argue about techniques and tactics. But when semantics are stripped away, [t]here is little argument among us. We are determined to create a union of Africans.").

[243] *Id*., at 3.

[244] *See id.* at 2.

[245] *Id.* at 1 ("Africa is today at mid-course, in transition from the Africa of [y]esterday to the Africa of [t]omorrow.")

[246] *Id*. at 2.

[247] *Id*.

[248] *Id*. at 4.

[249] Nkrumah Address, *supra* note 239, at 35.

words, "African Unity is, above all, a political kingdom which can only be gained by political means. The social and economic development of Africa will come only within the political kingdom, not the other way round."[250] For Nkrumah, the justifications for Africa's integration were not limited to the impact of integration on the liberation of African people, but also included its impact on attracting foreign investment and peaceful coexistence.[251] For Nkrumah unity was not an option but a necessity based on cooperation in defense, foreign affairs, diplomacy, a common citizenship, and African economic and monetary integration.[252] Nkrumah refuted Nyerere's confederal approach to integration, labeling it as balkanization that was susceptible to the promotion of neo-colonialist agendas.[253] For Nkrumah, Nyerere's proposal for gradual integration ignored the inter-relationship and mutuality of problems facing African states.[254] To the contrary, Nyerere argued that just as liberation of Africa is gradual, so should its unity.[255] For Nyerere, gradual integration secured free agreement and consensual unionization.[256]

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[250] *Id*.

[251] *Id.* at 37 (describing the effect of the formation of the OAU on peace in the continent).

> The masses of the people of Africa are crying for unity. The people of Africa call for the breaking down of the boundaries that [kept] them apart. They demand an end to the border disputes between sister African states—disputes that arise out of artificial barriers that divided us. It was colonialism's purpose that left us with our border irredentism, that rejected our ethnic and cultural fusion.

Id.; *see also* Ama Biney, *The Legacy of Kwame Nkrumah in Retrospect*, J. PAN AFR. STUD., Mar. 2008, at 129, 136 (discussing how Nkrumah thought that regional integration is a prerequisite for the elimination of neo-colonialism).

[252] *See* Nkrumah Address, *supra* note 238, at 38 ("Unite we must. Without necessarily sacrificing our sovereignties, big or small, we can here and now forge a political union based on Defense, Foreign Affairs and Diplomacy, and a Common Citizenship, an African Currency, an African Monetary Zone and an African Central Bank. We must unite in order to achieve the full liberation of our continent. We need a Common Defense System with an African High Command to ensure the stability and security of Africa.").

[253] *Id.* at 39 ("It is this popular determination that must move us on to a Union of Independent African States. In delay lies danger to our well-being, to our very existence as free states. It has been suggested that our approach to unity should be gradual, that it should go piece-meal. This point of view conceives of Africa as a static entity with 'frozen' problems which can be eliminated one by one and when all have been cleared then we can come together and say: 'Now all is well. Let us unite.' This view takes no account of the impact of external pressures. Nor does it take cognisance of the danger that delay can deepen our isolations and exclusiveness; that it can enlarge our differences and set us drifting further and further apart into the net of neo-colonialism, so that our union will become nothing but a fading hope, and the great design of Africa's full redemption will be lost, perhaps, forever.").

[254] *Id.*, at 36-37.

[255] Nyerere Address, *supra* note 239, at 101.

Examining the thoughts of the founding fathers demonstrates that their focus was on unity. However, the founding fathers were vague in their definition of unity. Ambiguity exists as to what unity actually is, or should be. For one, unity can be used interchangeably with integration, meaning the "process of making a whole."[257] Second, unity can mean to act in concert against a common enemy.[258] There is no doubt that for the founding fathers unity as acting together for the liberation of all Africans; however, the question then remains whether they meant unity to also include integration.[259]

The ambiguity of the use of "unity" as both solidarity and as integration reflects the lack of conceptual clarity in the formative years of the OAU. The OAU Charter consistently used words such as "unity", "solidarity", and "cooperation" interchangeably without actually defining them.[260] When the OAU was transformed to the AU, the ambiguity surrounding use of the word "unity" continued and the duality exists today.[261]

The dual meaning of the word "unity" is also manifest in sub-regional integration efforts of the continent.[262] Solidarity, and other concepts such as human rights, democracy, and rule of

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[256] *Id.*, ("We are therefore left with only one method of bringing about African Unity. That method is the method of free agreement. That is why at the beginning of this speech I said our task is to discover how to bring about our freedom in unity and our unity in freedom.")

[257] BLACK'S LAW DICTIONARY 880 (9th ed. 2011) (defines integration to mean, "the process of making whole or combining into one.")

[258] *Id.,* at 1676 (defining unity as, "jointness of interest").

[259] Nyerere Address, *supra* note 239. For Nyerere, all of the African states had a common stance, or solidarity, against colonization. *Id*. That is to say, to Nyerere, unity meant solidarity. Nevertheless, he also made it clear that unity also meant integration. *Id*. However, it is also evident that solidarity and integration were understood as mutually interdependent concepts among the founding fathers. *Id*.

[260] Charter of the Organization of African Unity art II, May 25, 1963, 479 U.N.T.S. 79. The OAU Charter in general, but particularly Article II, never uses the term "integration." *See id.*

[261] Constitutive Act of the African Union art. 3, *adopted* July 11, 2000, OAU Doc. CAB/LEG/23.15 ("The objectives of the Union shall be to . . . achieve greater unity and solidarity between the African counties and the peoples of Africa . . . [and to] accelerate the political and socio-economic integration of the continent.").

[262] *See generally, e.g.*, SADC Treaty, *supra* note 223. Historically SADC was formed to end political and economic domination by then-apartheid South Africa. *See SADC Profile,* AFR. UNION, www.au.int/en/recs/sadc (last visited Mar. 28, 2014). One of the reasons for the inclusion of Article 6(2) of the SADC Treaty was to end racial domination. *See* SADC Treaty, *supra* note 223, art. 6(2) ("SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, or disability.").

law, are principles of the SADC and its member states.[263] These principles, with the aim of forging integration, theoretically guide the actions of SADC member state.[264] However, the SADC Treaty provides neither a mechanism, nor guidance, on how to interpret the principles of the organization. Hypothetically speaking, all the principles enumerated under Article 4 of the SADC Treaty are equal and carry the same weight. There is little doubt that the drafters of the SADC Treaty did not envisage a possibility of contradiction between the different principles. Nevertheless, the way SADC states have reacted to Zimbabwe's refusal to abide by the SADC Tribunal's decisions reflects that SADC member states prioritize solidarity above other principles of the organization.[265] Unlike the interpretation of solidarity in the 1960s, which then meant emancipation of all Africans,[266] the behavior of SADC states demonstrates an alternative interpretation of solidarity to mean standing together and supporting the actions of member state governments, even if doing so violates the emancipation project.

PART- III – CLASSICAL ECONOMIC THEORIES OF INTEGRATION

Along the same lines as the Washington Consensus, the neo-liberal economic theory of development argues that trade liberalization leads to economic growth.[267] It promotes regional

[263] *See* SADC Treaty, *supra* note 223, art. 4 ("SADC and its Member States shall act in accordance with the following principles: a) sovereign equality of all Member States; b) solidarity, peace and security; c) human rights, democracy, and the rule of law; d) equity, balance and mutual benefit; e) peaceful settlement of disputes.").
[264] SADC Treaty, *supra* note 223, art. 6(1) ("Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.").
[265] *See, e.g.*, Solomon T. Ebobrah, *Human Rights Developments in Sub-Regional Courts in Africa During 2008*, 9 AFR. HUM. RTS. L.J. 312, 334–35 (2009) (discussing SADC Tribunal's decision on Zimbabwe as an example of human rights prevailing over oppression, although Zimbabwe failed to abide by the Tribunal's decisions); *see also* Amos Saurombe, *An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States in the Light of the Suspension of the SADC Tribunal*, 23 S.H. AFR. MER. L.J. 392, 392–406 (2011) (discussing suspension of SADC Tribunal).
[266] *See* generally Saurombe, *supra* note 264.
[267] Olugbenga A. Onafowora & Oluwole Owoye, *Can Trade Liberalization Stimulate Economic Growth in Africa*?, 26 WORLD DEV. 497, 501–05 (1998) (arguing that trade liberalization directly correlates with economic growth and exploring the relationship between growth, trade policies, and investment in twelve sub- Saharan African countries). See also Michael J. Trebilcock, Critiquing the Critics of Economic Globalization 11–12 (Jan. 20, 2005) (unpublished manuscript), *available at* http://iilj.org/courses/documents/HC2005. Trebilcock.EconGlobal.pdf, for an

economic integration as a plan B to unilateral tariff reduction.[268] This theory based on the assumption that unilateral tariff reduction increases competition, argues a causal link between liberalization and trade creation.[269] Since states are not willing to unilaterally reduce or eliminate tariffs, the classical approach encourages states to prefer the discriminatory elimination of tariffs.[270] At the multilateral level, the WTO is case in point where states engage to eliminate tariffs and non-tariff barriers discriminatorily to non-member states.[271] At the regional level, several states have formed regional and sub-regional integration schemes that discriminate against foreign products.[272]

Contrary to unilateral tariff reduction, Jacob Viner, an economist, advances a theory on customs union that argues that discriminatory tariff reduction can have a trade creation and/or

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analysis of how open economies tend to grow larger and faster than closed economies. Trebilcock argues that global inequalities are more a failure of domestic policies rather than a failure of globalization. *Id*. He argues that income inequalities at the country level today are much higher than global inequalities and, therefore, it is really the failure of domestic government policies that do not mandate redistribution of wealth between the haves and have-nots. *Id*; *accord* MARIAN L. TUPY, CATO INST., POLICY ANALYSIS NO. 557, TRADE LIBERALIZATION AND POVERTY REDUCTION IN SUB-SAHARAN AFRICA 4–5 (2005). *But see* Frank Ackerman & Kevin P. Gallagher, *The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models: A Critical Assessment*, 37 INT'L J. POL. ECON. 50, 50–51 (2008) (discussing how mainstream economic models are flawed and unable to accurately predict the impact of trade liberalization).

[268] MARTIN RICHARDSON, UNIV. OF OTAGO, ECONOMICS DISCUSSION PAPERS NO. 0102, UNILATERAL LIBERALISATION IN A MULTILATERAL WORLD 2 (2001). The defining factor in unilateral tariff reduction is its lack of reciprocal tariff-reduction requirements. *Id*. Unilateral tariff reduction can have other conditions attached to it. *Id.* For example, tariff reduction can be tied to loan forgiveness. *Id*.

[269] ANTHONY P. THIRLWALL, AFR. DEV. BANK, ECON. RESEARCH PAPERS NO. 63, TRADE, TRADE LIBERALISATION AND ECONOMIC GROWTH: THEORY AND EVIDENCE 14 (2000). The trade creation effect of a particular tariff elimination policy is determined by its impact on trade costs. If country *A* has no tariffs at all on exporting product *Z* and produces *Z* at a cost of *X*. Country *B* produces product *Z* at a cost of *X* but charges export tariff of *T*. The cost of *Z* in the global market is cost of production plus profit (P). Both states have a fixed profit of *P*. The cost of product *Z* will be *X*+*P* in country *A* and *X*+*P* in country *B*. The cost of importing product *Z* from country *A* is just *X*+*P* while that of country *B* is *X*+*P*+*T*. Assuming all other variables are static importers from country *C* will rationally import product *Z* from country *A*. Therefore, unilateral tariff elimination by country *A* on product *Z* has led to more trade for country *A* than country *B*.

[270] *See* Richard E. Baldwin & Anthony J. Venables, *Regional Economic Integration*, *in* 3 HANDBOOK OF INTERNATIONAL ECONOMICS 1597, 1598 (G. Grossman & K. Rogoff eds., 1995) (2003) (discussing how Europe and North America have managed to liberalize their regional trade substantially more than the global trade liberalization project).

[271] *Principles of the Trading System*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited May 2, 2014).

[272] *Cf. List of all RTAs*, WTO, http://rtais.wto.org/UI/PublicAllRTAList.aspx (last visited Mar. 20, 2014). Since 1995, more than 300 regional integration schemes have been brought to the attention of the WTO. *Id*.

diversion effect.[273] For Viner, trade diversion, which negatively affects welfare of the home state, is a shift from a "high-cost domestic" producer to a "low-cost foreign producer," which could alternatively be called outsourcing production.[274] On the Other hand, trade creation by insourcing foreign production increases welfare of the home state at the disadvantage of foreign state.[275] For Viner, ambiguities in the welfare impact of customs unions are related to the capacity and limitations of members to define their own external trade policy.[276] The net effect of a customs union is calculated through the "sum of trade diversion and trade creation, less any loss of income through adverse terms of trade effects arising from the over-all expansion of trade."[277] Therefore, the net static effect of regional integration is positive if the formation of the integration scheme has a net trade creation effect.[278] However, static welfare analysis assumes that the respective member states of the integration scheme are complementary.[279] Applying Viner's theory on regional integration schemes in Africa, and SADC in particular, has led to ambiguous results partly, because of the low intra-regional trade.[280]

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[273] *See generally* JACOB VINER, THE CUSTOMS UNION ISSUE (1950).

[274] C.A. Cooper & B.F. Massell, *A New Look at Customs Union Theory*, 75 ECON. J. 742, 742 (1965) (discussing how Viner's theory of customs unions explains the trade creation and diversion effect of a preferential trade arrangement); *see also* Jagdish Bhagwati & Arvind Panagariya, *The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends*, 86 AMER. ECON. REV. 82, 82 (1996). 82 (1996).

[275] *Id*.

[276] *See generally* VINER, *supra* note 272.

[277] David Evans, *Options For Regional Integration in Southern Africa,* 94 IDS Working Paper 1,7 (1998).

[278] Baldwin & Venables, *supra* note 269, at 1605 (discussing how James Meade, a British economist, building on Viner's theory, argued that if all external trade barriers are fixed and unchanging, static markets, regional integration agreement has a positive correlation to welfare of member states).

[279] Jozef M. Van Brabant, *Economic Integration Among Developing Countries Toward a New Paradigm*, *in* ECONOMIC COOPERATION AND REGIONAL INTEGRATION IN AFRICA 31, 33 (Naceur Bourenane ed., 1996) (discussing the reasons for low intraregional trade in African integration schemes, one of which is the lack of complementarities to modes of production in the continent).

[280] *See, e.g.*, DAVID EVANS ET AL., SADC: THE COST OF NON-INTEGRATION 4–5, (1999); *see also* ECON. COMM'N FOR AFR., ECA POLICY RESEARCH REPORT, ASSESSING REGIONAL INTEGRATION IN AFRICA I, at 16 (2004) [hereinafter UNECA I] (estimating that the net gain from integration in the SADC will result in a one percent increase in GDP, while other economists have predicted either no effect, or a negative effect, of integration).

Table 6: Intra-REC Import (Im.) and Exports (Ex.) (2003-2007) in US ($) millions.[281]

REC	2003		2004		2005		2006		2007	
	Ex.	Im.	Ex.	Im.	Ex.	Im.	Ex.	Im.	Ex.	Im.
COMESA	2,797	2724	3,541	3,403	4,629	3,939	3,455	4,914	4,571	5048
EAC	720	631	946	828	1081	946	1279	1407	1587	1746
ECOWAS	3,037	3292	4,363	4,717	5,506	5,840	5,957	6,538	7,341	8,057
SADC	5,484	4726	6,508	6924	7,453	7958	8,466	9563	11,678	12802
UMA	1,338	1483	1,375	1512	1,886	2074	2,478	2725	3,076	3384

Conventionally, trade integration is measured by the level of intra-regional trade among member states.[282] Using transaction data as the sole measure of integration and its impact is deeply flawed. For one, the relationship between intraregional trade and growth is contestable. Trade integration is associated with four freedoms. These are the free movement of goods, services, capital and people.[283] Depending on the degree of integration, the freedoms guaranteed in the integration schemes can extend from trade liberalization that guarantees free movement of goods to trade liberalization that guarantees free movement of people. Goods transactions are the easiest to quantify among the four freedoms. Nevertheless, the existing data on the flow of goods in African integration schemes does not encompass transactions of goods performed under the rubric of the informal sector. For instance, the informal sector constitutes twenty to ninety percent of the national economy of West African states.[284] This critique of the lack of comprehensiveness of existing transaction or trade flow data in Africa is a clear example of what Shanta Devarajan, the World Bank's chief economist for Africa, calls "statistical tragedy."[285] Furthermore, it is a logical expectation for intra-regional imports and exports to be of equal

[281] ECON. COMM'N FOR AFR., ECA POLICY RESEARCH REPORT, ASSESSING REGIONAL INTEGRATION IN AFRICA IV, at 77, 82 (2010) [hereinafter UNECA IV]. The information in the chart was extracted from two different tables. *See id.*
[282] UNECA I, *supra* note 280, at 277.
[283] *Background*, EUR. FREE TRADE ASS'N, http://www.efta.int/eea/eu-programmes/application-finances/background (last visited Mar. 28, 2014).
[284] UNECA IV, *supra* note 280, at 143.
[285] *See* Nico Colombant, *New Research Confronts Africa's 'Statistical Tragedy,'* VOICE OF AM. (Dec. 5, 2011), http://www.voanews.com/content/new-research-confronts-africas-statistical-tragedy-135134213/159278.html.

value. An analysis of existing intra-regional transactions, as specified in Table 6 shows that intraregional imports do not match intraregional exports. For instance, according to available data of the year 2007, intraregional exports among SADC states were $11,678 million in value, while intra-regional imports amounted for $12,802 million.[286] Therefore, according to existing data, the SADC as a region has a deficit with itself. Statistically, it is possible for the SADC, or any other regional integration scheme, to show a trade deficit or surplus with other trading partners, as shown in Table 7. However, no adequate explanation, other than the continent's "statistical tragedy" has been extended to explain the data in intraregional trade deficit of the SADC.

Table 7: REC's average exports and imports (2000-2007) to select trading partners in US ($)[287]

REC	Intra-rec		EU		US		China	
	Ex.	Im.	Ex.	Im.	Ex.	Im.	Ex.	Im.
COMESA	3,192	3279	27827.5	19799.6	3432.0	4869.5	3986.8	5015.4
EAC	928	876	1515.9	2362.6	199.1	577.3	156.1	775.6
ECOWAS	4,287	4512	13556.4	15632.77	17073.2	2701.52	616.3	4364.23
SADC	6,512	6755	1327.7	25872.92	11266.5	5713.28	7139.5	5949.47
UMA	1,698	1866	50915.4	34453.9	9147.5	2472.8	1079.9	2852.5

Viner's theory was further developed by other economists, the latest being by Baldwin, who extended the classical theory of customs union to markets with imperfect competitions.[288] Baldwin's framework of welfare analysis looks at allocation, accumulation, and location effects of regional integration schemes in imperfect markets.[289] First, the allocation effect argues that formation of regional integration increases resource allocation.[290] This argument centers around

[286] UNECA IV, *supra* note 280, at 77,82.
[287] *Id*. at 77, 80–83.
[288] *See* Baldwin & Venables, *supra* note 269, at 1601–02.
[289] *Id.* Baldwin categorizes the trade effects of formation of integration schemes and analyzes it under both perfect and imperfect competition. The formation of regional integration has the output, variety and scale effects. *Id.*
[290] U.N. Conference on Trade & Dev., *Economic Development in Africa: Strengthening Regional Economic Integration for Africa's Development*, at 5, UNCTAD/ALDC/AFRICA/2009, U.N. Sales No. E.09.II.D.7 (2009) [hereinafter UNCTAD 2009].

the inverted relationship between protectionism and its impact on efficiency.[291] Moreover, regional integration has a variety effect and gives consumers choice of product quality and price.[292] Second, the accumulation effect argues that formation of regional integration schemes has a positive effect on economic growth as it increases both factor and knowledge accumulation.[293] Third, the location effect argues that market size affects investors' decisions of whether to invest.[294] Hence, investors are prone to invest in bigger markets formed under integration schemes than to invest in a single state with smaller market size.

Table 8: FDI flows 2004-2006 to SADC Member States in US ($) millions.[295]

	FDI Inflows			FDI Outflows		
	2004	2005	2006	2004	2005	2006
Angola	1449	-1303	-1140	35	219	93
Botswana	392	281	274	-29	56	21
DRC	10	-79	180	-	..	..
Lesotho	53	57	57	-	..	..
Madagascar	95	86	230	..	..	..
Malawi	22	27	30	2	1	1
Mauritius	14	42	105	32	48	10
Mozambique	245	108	154	-	-	-
Namibia	226	348	327	-22	-13	-12
Seychelles	38	86	146	8	7	8
South Africa	799	6251	-323	1352	930	6674
Swaziland	71	-50	36	-1	-24	2
Tanzania	331	448	377	..	..	-
Zambia	364	380	350	..	..	..
Zimbabwe	9	103	40	-	1	-

When looking at FDI flows in the SADC region, one might wonder if regional integration has had an impact on FDI inflow to member states. As shown in Table 8, Angola is the highest recipient of FDI inflow among SADC member states.[296] Malawi, on the other hand, is the lowest

[291] *Id.* at 7 (discussing how import substitution policies of several African countries resulted to protection of inefficient industries).
[292] *Id.* at 6.
[293] *Id*. (discussing relationship between investment flows and regional integration).
[294] *Id.*
[295] U.N. Conference on Trade & Dev., *World Investment Report: Transnational Corporations, Extractive Industries and Development*, at 252, U.N. Sales No. E.09.II.D.7 (2007) [hereinafter UNCTAD 2007].
[296] *Id*.

recipient of FDI inflow in the year 2006.[297] Malawi is more representative of the entire continent of Africa, which has not been a major recipient of FDI.[298] For instance, in the years 1999 through 2000, Africa's share of FDI inflow was 0.8 percent, putting the continent at the bottom of the list.[299] Only six years later in 2006, Africa's FDI inflow tripled and reached 2.7 percent of global FDI inflow.[300] The surge in FDI inflow is not a result of deep integration in the continent but rather of the quest for oil and other natural resources.[301] In addition to Angola, which is the major oil exporter in the region, other mineral producing countries among Southern African states (e.g., Mauritius, Lesotho, Swaziland, Tanzania, and Zambia) received larger inflows of FDI.[302] Therefore, the liberal claim of the relationship between regional integration and FDI inflow, at least as it pertains to Sub-Saharan Africa, lacks empirical foundation. However, the success of African integration, cannot be measured only by low intraregional trade or FDI inflow, but rather it must also be based on what the founding fathers imagined could be achieved through integration.

PART IV – KANTIAN THEORY OF PERPETUAL PEACE AND AFRICAN REGIONAL INTEGRATION

Earlier peace theorists predominantly focused on the importance of maintaining homogenous religious values for peaceful co-existence of the international system.[303] Without

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[297] *Id*.
[298] Chantal Dupasquier & Patrick N. Osakwe, *Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities* 6 (Econ. Comm'n for Afr., Afr. Trade Ctr., Working Paper No. 21, 2005) (discussing recent trends in Foreign Direct Investment).
[299] *Id.*
[300] UNCTAD 2007, *supra* note 70, at xvii.
[301] *Id.*
[302] *Id.*, at 74 & n.5 (discussing FDI inflow increase to specific countries with extractive resources.)
[303] IMMANUEL KANT, PERPETUAL PEACE 4–6 (M. Campbell Smith trans., 3rd ed., 1917) (1795) (noting that "for the barbarian, war is the rule; peace the exception. His gods, like those of Greece, are war-like gods; his spirit, at death, flees to some Valhalla. For him life is one long battle; his arms go with him even to the grave. Food and the means of existence he seeks through plunder and violence" and suggesting that what brought about the formation of states is a conscious necessity of forming a united front in the battlefield). This institution, the state, changed character of warfare into a systematic war of one nation against another nation but was not able to transform ancient

instilling tolerance to different religions, peaceful coexistence meant that a particular society or societies had to practice the same religion.[304] In a way, religion has a dual impact of peace and war.[305] Today, with the development of modern society, characterized by rationalization, the world has become what Max Weber calls "disenchanted"[306] and theorists have focused on integration as a means to end future wars.[307]

Immanuel Kant's analysis of the covenant of peace, *foedus pacificum*[308], is one of the earliest works that dealt with the correlation between integration and peace without instilling religion into the dynamic of peaceful coexistence.[309] For Kant, formation of a federation of states is one of three definitive articles for perpetual peace.[310] He reasoned that peace treaties might end

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world, of perpetual warfare, to perpetual peace. *See generally* Chadwick F. Alger, *Religion as a Peace Tool*, 1 GLOBAL REV. ETHNOPOLITICS 94, 94 (2002) (analyzing religion as a peacemaking tool).

[304] *See* Charles J. Halperin, *The Ideology of Silence: Prejudice and Pragmatism on the Medieval Religious Frontier*, 26 COMP. STUD. IN SOC'Y & HIST. 442, 442 (1984) (explaining how religious animosity was the central cause and basis for crusade and jihad and war among Christians and Muslims).

[305] *See* JONATHAN FOX, THE MULTIPLE IMPACTS OF RELIGION ON INTERNATIONAL RELATIONS: PERCEPTIONS AND REALITY 7 (2006), *available at* http://www.ifri.org/files/politique_etrangere/4_2006_Fox.pdf.

[306] Max Weber, Science as a Vocation, Speech at Munich University (1918), *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 155 (H.H. Gerth & C. Wright Mills eds., 2005) ("The fate of our times is characterized by rationalization and intellectualization and, above all, by the 'disenchantment of the world."). Max Weber's choice of word of disenchanted rather than secularization is an interesting choice. Disenchantment is the privatization of religious beliefs rather than full abandonment of once faith. *See id.*

[307] Note that the arguments above are not meant to imply that "religion" has lost its relevance as a peace or war tool. Rather, the argument is that the world has become more "disenchanted."

[308] *Foedus pacificum* is made of two Latin terminologies. *Foedus* means "league" or "treaty." *See* BLACK'S LAW DICTIONARY 716 (9th ed., 2009). *Pacificum* means "peaceful."

[309] *See* Patrick Riley, *The Abbé De St. Pierre and Voltaire on Perpetual Peace in Europe*, 137 WORLD AFF. 186, 186 (1975) (discussing how the Project for Perpetual Peace (Abbe' de St. Pierre's Project) is considered a comprehensive plan for perpetual peace in Europe, through the creation of federation of states, or through regional integration). Even though the Abbe de St. Pierre's Project is more comprehensive than earlier projects of the Perpetual Peace Project, it nonetheless contains internal limitations both in terms of geographic and religious specificity.

[310] There are three definitive articles of perpetual peace. KANT, *supra* note 302, at 121–23. First, "[t]he civil constitution of each states shall be republican." *Id.* at 120. Second, "the law of nations shall be founded on a federation of states." *Id.* at 128. Third, "the rights of men, as citizens of the world, shall be limited to the conditions of universal hospitality." *Id.* at 137. One should note that, for Kant, the three definitive articles for perpetual peace are interrelated and are not alternatives but rather it takes a combination of all three to achieve perpetual peace. So by singling out the second article in this Subpart, it might seem to the reader that the other two articles are not of great relevance. To the contrary, the author of this Article believes that the three definitive articles should be looked at together. The reason why this Article focuses only on the second article of Kantian Perpetual Peace is its direct justification for formation of regional integration agreements. While Kant's first article "Constitutional Republic State" will bring peace and harmony at the domestic level, it also diminishes the possibility of state-to-state wars.

current wars but not future wars.[311] Hence, Kant proposed "federation of states" rather than a "nation of states" governed by an international treaty to halt future wars.[312] This Part attempts to analyze the value and consistency of Kantian theory of perpetual peace as a justification for African integration schemes.

2.4.2. Mbeki and Hegel on Kant

Unlike George W.F. Hegel, who dealt with Kantian theory of perpetual peace theoretically and directly, Moeletsi Mbeki dealt with the question of peaceful coexistence practically and without any theoretical claim to Kant's theory of perpetual peace. Mbeki rightfully argues that perpetual peace could not be a justification for Africa's choice to integrate.[313] Mbeki substantiates his argument on recurrence of state-to-state wars and concludes that since most wars in Africa are ethnic based civil wars, regional integration has no correlation on the peaceful existence of states.[314] Although Mbeki does not define the term "war," he adopts

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That is to say, in a republic, which has participation of the public, it is highly unlikely for those who suffer calamities of war to consent to it. In his words, "[n]ow the republican constitution apart from the soundness of its origin, since it arose from the pure source of the concept of right, has also the prospect of attaining the desired result, namely, perpetual peace. And the reason is this. If, as must be so under this constitution, the consent of the subjects is required to determine whether there shall be war or not, nothing is more natural than that they should weigh the matter well, before undertaking such a bad business. For in decreeing war, they would of necessity be resolving to bring down the miseries of war upon their country. This implies: they must fight themselves; they must hand over the costs of war out of their own property; they must do their poor best to make good the devastation which it leaves behind . . . ." *Id.* at 121–22. Similarly, in Kant's third definitive article for Perpetual Peace, which Kant calls "citizenship of the world," Kant is engaging with the idea of justice as a natural right and explaining its limitations when it comes to aliens. *Id.* at 137.

[311] *Id.* at 134 ("Hence there must be an alliance of a particular kind which we many call a covenant of peace (*foedus pacificum*), which would differ from a treaty of peace (*pactum pacis*) in this respect, that the latter merely puts an end to one war, while the former would seek to put an end to war forever.")

[312] *Id.* at 129. Kant makes a clear distinction between "federation of state" and "state of nations." The former, guarantees equality of states while the later envisages a powerful state with command authority over the other member states. In his words: "This would give rise to a federation of nations which, however, would not have to be a State of nations…. For the term 'state' implies the relation of one who rules to those who obey…" *Id.* Put simply, federation of states in this Section is defined as the act where a group of "nation states" or "states" come together and form a central governing unity. On the other hand, "nation" state is defined when "nations" —homogenous peoples—decide to form a self-governing unit.

[313] MOELESTI MBEKI, ARCHITECTS OF POVERTY: WHY AFRICAN CAPITALISM NEEDS CHANGING, 133-34 (2009).

[314] *Id.*; J. Ndumbe Anyu, *The International Court of Justice and Border-Conflict Resolution in Africa: The Bakassi Peninsula Conflict*, 18 MEDITERRANEAN Q. 39 (2007). In Africa there have been around 103 ethnic conflicts; which can be attributed to three major categories of the causalities. *Id.* For Anyu, some conflicts are old-fashioned

a dual typology of war as either intrastate or interstate wars based on its participants. However, it is not clear how he came to conclude that in the past fifty years there were only two state-to-state wars. For Mbeki, these wars are: (1) the war between Tanzania and Uganda in 1970; and (2) the war between Eritrea and Ethiopia between 1998 and 2000.[315] In state-to-state war, if war is measured by hostile armed conflict, Mbeki's count of interstate wars in Africa is flawed. He has failed to consider, for instance, the border conflict between Nigeria and Cameroon. If Mbeki's distinction between what constitutes and does not constitute war is based on, for instance, "loss of life", then he did not make that distinction clear in his work. In conclusion, Mbeki's broader conclusion that most wars in Africa are intra-state is correct. But his failure to define war leads to inquiry of the Kantian conception of war.

For Kant, peace is an exception to "state of nature" which is war.[316] The Kantian conception of "state of nature" emanates from a pessimistic view of human nature that Kant uses to appraise states.[317] Kant qualifies his argument and explains that "state of nature" does not mean open warfare, but rather "a constant threatening that an outbreak may occur."[318] The distinction is that while warfare and its consequences are expected outcomes of open hostilities,

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land disputes, some are the result of discovery and access to natural resources, and others are a result of the Berlin conference and its impact on imposing artificially designed territorial boundaries among and between African people.

[315] MBEKI, *supra* note 312. See also Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, 18 CONFLICT MGMT. & PEACE SCI. 123 (2000), for a different definition of interstate war formulated by the Correlates of War Project. According to Sarkees, interstate war is a combat involving armed forces on both sides and fatalities of more than 1000. *Id.* Although, Mbeki does not specifically define war, if Mbeki has adopted this definition, it would be correct to conclude that in the past fifty years of post-independence Africa, there have only been two state-to-state wars. However, since he did not specify or clarify his definition of war it is difficult to understand how he came to his conclusion. Moreover, to critique Kantian theory of perpetual peace, one needs to understand Kant's conception of war. And Kant's goal was to eliminate all possibilities of war, irrespective of fatalities headcount. In addition, if one adopted *Black's Law Dictionary*'s definition of war and not just active hostilities, war is much broader and encompasses all sorts of conflicts that might arise out of different situations. *See* BLACK'S LAW DICTIONARY 1720 (9th ed., 2009) (defining "war" as "hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state").

[316] KANT *supra* note 302, at 117-18. ("A state of peace among men who live side by side is not the natural state (*status naturalis*), which is rather to be described as a state of war….")

[317] *Id.* at 128 ("Nations, as states, may be judged like individuals who, living in the natural state of society—that is to say, uncontrolled by external law—injure one another through their very proximity.").

[318] *Id.* at 117-18.

an unceasing threat of war is an unpredictable situation that puts everyone on alert and causes them to view their neighbors as possible enemies. Hence, Kant has a broader conception of war that included not only "open hostilities" but also any threat of war. Moreover, Kant believed a state is a voluntary association established by men that serves as a peace institution to avert "state of nature," which was war.[319]

However, the historical factors that led to the formation of modern-day African states presents a stronger theoretical challenge for Kant's theory of perpetual peace. The impact of colonial imposition of territorial boundaries on Africa's people negates voluntary association, which according to Kant, is central for the elimination of the natural "state of nature."[320] Kant's conceptualization of perpetual peace does not require the existence of nation states, but rather, centers around "voluntary association" be it among men or states.[321] For Kant, it is the "voluntary association" that is the means to eliminate the "state of nature."[322] The crucial question, then is how universal is Kant's conceptions of "state of nature" and "voluntary association", and their correlation to the formation of states in the African context?

It seems to the researcher that in the context of contemporary Africa, the "state of nature" that led to statehood is colonization and racial domination by colonial powers. In Africa, the distinction also needs to be made between formal statehood and the idea of nation states. However, the analysis of theorists, including Kant, relies on the idea of "voluntary" or "free"

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[319] Kant subscribes to the Hobbesian conception of statehood. *Id.* at 118 (quoting THOMAS HOBBES, LEVIATHAN II, ch. XVIII) ("A commonwealth is said to be instituted, when a multitude of men do agree, and covenant, every one, with every one, that to whatsoever man, or assembly of men, shall be given by the major part, the right to present the person of them all, that is to say, to be their representative; every one, as well he that voted for it, as he that voted against it, shall authorize all the actions and judgments, of that man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.")

[320] *See generally*, Makau wa Mutua, *Why Redraw the Map of Africa: A moral and Legal Inquiry*, 16 MICH. J. INT'L. 1113 (1995).

[321] KANT, *supra* note 302, at 109.

[322] *Id.* at 118-19.

association and formation of states, which was the case in Europe, but not necessarily in Africa.[323] Hence, a deconstruction of the Kantian theory of perpetual peace reveals dual conceptual incompatibilities that bar its application in African integration schemes.

Another theoretical criticism of Kant is Hegel's work on *Philosophy of Right*.[324] Hegel explains that the idea of perpetual peace through a federation of states is contingent on the private sovereign will, which for Hegel, supersedes any international treaty.[325] Understanding Hegel's criticism from a pragmatic level requires inquisition of the 1964 Cairo Declaration of African states on peaceful coexistence of African states.[326] In theory African states pledged to recognize colonial boundaries, but in reality, the ambiguity, incoherence, and multiplicity of colonial treaties and/or the discovery of mineral resources has led to several border conflicts in Africa.[327] One of the first border conflicts occurred during the very early stages of African independence between Ghana and Upper Volta, leading to the dissolution of a customs union between the two states.[328] Several other border conflicts in Africa have made their way to the

[323] Mutua, *supra* note 319, at 1115.
[324] G.W.F. HEGEL, PHILOSOPHY OF RIGHT 264 (S.W. Dyde trans., 2001).
[325] *Id.* ("Kant's idea was that eternal peace should be secured by an alliance of states. This alliance should settle every dispute, make impossible the resort to arms for a decision, and be recognized by every dispute, make impossible the resort to arms for a decision, and be recognized by every state. This idea assumes that states are in accord, an agreement which, strengthened though it might be by moral, religious, and other considerations, nevertheless always rested on the private sovereign will, and was therefore liable to be disturbed by the element of contingency.")
[326] Border Disputes Among States, AGH/Res. 16(1), Assembly of Heads of State and Government, Org. of Afr. Unity, 1st Sess., July 17–21, 1964 (solidifying colonial boundaries as the basis of territorial boundary formation of post-independence African states). The relevant provision of the Cairo Declaration states: "[A]ll member states pledge themselves to respect the borders existing on their achievement of national independence." *Id.*
[327] *See* Patricia Berko Wild, *The Organization of African Unity and the Algerian-Moroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes among African States*, 20 INT'L ORG. 18 (1966) (explaining the origins of the border conflict between Algeria and Morocco, the author shows that the causes for the dispute were a combination of colonial history, socioeconomic and political factors).
[328] Lincoln P. Bloomfield & Allen Moulton, *Cascon Case GUV: Ghana-Upper Volta 1964–66*, MASS. INST. TECH., http://web.mit.edu/cascon/cases/case_guv.html (last visitied Mar. 6, 2014) (giving a brief description of the dispute between Ghana and Upper Volta); *see also* Border Disputes Among States, AGH/Res. 19(1), Assembly of Heads of State and Government, Org. of Afr. Unity, 1st Sess., July 17–21, 1964. OAU Member States heard grievances of Upper Volta and Ghana and recommended that both states solve their problems amicably. *Id*

International Court of Justice or the Permanent Court of Arbitration.[329] Moreover, two recent conflicts, one between Cameroon and Nigeria and another between Eritrea and Ethiopia, were among states that had a common regional integration membership.[330] In conclusion, irrespective of formal commitments to honor colonial boundaries, in the African context, Kantian theory of perpetual peace is subject to "sovereign will" of states.

2.4.3. Marketization and Peaceful Coexistence

Hegle's criticism of Kant did not stop theorist Norman Angell from following Kant's theory of perpetual peace and theorizing on the relationship between marketization and peaceful coexistence. Angell's theory of interdependence, also called theory of vulnerability, argues that interdependence increases vulnerability of states, which, leads states to cooperate for peaceful coexistence.[331] Building on the interdependence theory, classical functionalist theorists explained that peaceful coexistence is actually a "spillover" effect of economic interdependence.[332] Central to both schools of thought is assessing the empirical impact of interdependence on peaceful

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[329] JOHN W. DONALDSON, PERCEPTIONS OF LEGAL AND GEOGRAPHIC CLARITY: DEFINING INTERNATIONAL LAND BOUNDARIES IN AFRICA, *in* ESSAYS IN AFRICAN LAND LAW 14–23 (Robert Home ed., 2011). In discussing international land disputes that have been adjudicated through adjudication and arbitration, Donaldson rightfully notes that the International Court of Justice ("ICJ") has adjudicated eight land boundary disputes in the past fifty years. *Id.* at 6. Out of these cases, only five were between African states: Burkina Faso/Mali from 1983 to 1986, Libya/Chad from 1990 to 1994, Cameroon/Nigeria from 1994 to 2002, Botswana/Namibia from 1996 to 1999, and Benin/Niger from 2002 to 2005. *Id.* Moreover, three international land boundary disputes involving at least one African state were arbitrated. *Id.* These are Egypt/Israel in 1988, Eritrea/Ethiopia from 2002 to 2008, and the Abyei arbitration in 2009. *Id.*

[330] Both Eritrea and Ethiopia are members of COMESA and IGAD and had several bilateral trade agreements among themselves.

[331] Cornelia Novari, *The Great Illusion Revisited: The International Theory of Norman Angell*, 15 REV. INT'L STUD. 341, 342 (1989) (analyzing Norman Angell's theory of interdependence, alternatively called a vulnerability theory). For Angell interdependence theory explains why states experience mutual harm, when things in one country that pose potential harm, whether economic, social or political, end up affecting things in another country. *Id.*

[332] *See* IAN BACHE ET AL., POLITICS IN THE EUROPEAN UNION 5 (3d ed. 2011)

> His scheme was to take individual technical tasks out of the control of governments and to hand them over to these functional agencies. He believed that governments would be prepared to surrender control because they would not feel threatened by the loss of sovereignty over, say, health care or the co-ordination of railway timetables, and they would be able to appreciate the advantages of such tasks being performed at the regional or world level. As more and more areas of control were surrendered, states would become less capable of independent action. One day, the national governments would discover that they were enmeshed in a 'spreading web of international activities and agencies.'

Id.

coexistence. This assessment may require answering the following questions: What is interdependence? How do you measure it? Is it through trade transaction? What about modes and factors of production?

In analyzing trade relations among African states and its impact on peaceful coexistence, one can adopt two modules. One is the parallel module, which argues that peace and trade can coexist separately. Thus, even if two states are at war and official trade ties are broken, informal cross-border trade can continue. For example, the border conflict between Eritrea and Ethiopia closed all formal trade and diplomatic ties between the two countries;[333] however, an informal trade sector among homogenous ethnic groups continued, irrespective of war.[334] The second module is the sequencing module, which is consistent with the functionalist theory, and argues that trade follows peace and trade helps sustain peace by creating interdependence.[335] The idea of the complementarity of goods and factors of production among trading states is at the core of impact of trade on peaceful coexistence. Then again, one needs to substantiate the idea of "economic interdependence" through empirical evidence and investigate if it makes states vulnerable among each other. Here, as discussed in the previous Part and Table 6, the low level of intraregional trade among African states accurately indicates the low level of economic interdependence among African states. Furthermore, the concept of "spill over" as theorized by functionalist-theorists contradicts trajectory of African integration schemes, which started with

[333] Partial Award: Economic Loss Throughout Ethiopia: Ethiopia's Claim 7 (Eri. V. Eth.) para. 15, 18 (Eri. Eth. Claims Comm'n 2005). Eritrea and Ethiopia had five bilateral agreements relating to trade and commercial practices between the two countries. *Id.* Yet, both countries went to war. *Id.* para. 16. The Ethiopian government claimed for compensation based on the argument that the relationship between trade and peace is parallel. *Id.* para. 18. The position of the Eritrean government cannot be categorized as falling to either modules but was more rather a theoretically weak defense based on factual rather than legal argument. *Id.* The Commission subscribed to the sequencing module and stated: "[T]here is a broad consensus that bilateral treaties, especially those of a political or economic nature, are at the very least suspended by the outbreak of a war." *Id.*

[334] UNECA IV, *supra* note 280, at 153–64 (noting that Ethiopian customs authorities impounded around 40,000 kilograms of the cereal grain *teff* that was supposed to be smuggled to Eritrea).

[335] *See* Dale C. Copeland, *Economic Interdependence and War: A Theory of Trade Expectations*, INT'LSEC., Spring 1996, at 5.

political integration instead of economic integration. To clarify, integration in the European context started as an economic interdependence project that had a spillover effect on politics, but in Africa, politics is at the core of integration projects. Therefore, it seems to the researcher that in theorizing the impact of regional integration schemes in Africa one needs to move beyond conventional understanding and challenge existing theories.

PART-V- LAW AND CONCEPTUALIZATION OF INTEGRATION

The previous two Parts of this Chapter challenged existing theoretical frameworks for understanding regional integration. This Part is an attempt to analyze how law or legal scholars conceptualize and engage in integration studies, specifically focusing on predictability and neutrality as positive features of law.

While previous integration studies from an economic perspective seek to study a dynamic economic integration, for peace theorists there is an underlying emphasis on creating predictable peaceful coexistence either through a federation of states or through economic interdependence. Both disciplines acknowledge that integration is a process that requires an incremental course of change. Similar to peace studies and contrary to dynamic or incremental course of change, legal scholars emphasize predictability as a positive feature of legal systems.[336] The idea of "predictability," despite making law chthonic and reluctant to change, foresees or eliminates unintended consequences and thereby creates certainty among contracting states. Although predictability of law may mean rigidity, one should note that law has internal flexibility mechanisms. For instance, variable geometry in regional integration agreements is a flexibility mechanism attempting to accommodate divergent preferences of member states of an integration

[336] Anna Gardella & Luca G. Radicati di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611, 612–13 (2003) (discussing features of a civil law system as predictability and neutrality of law).

scheme.[337] Hence, through its flexibility mechanisms, law provides a course of change, albeit a predictable change.

Moreover, the idea of neutrality and immutability of law, leads to what Mohammed Bedjaoui coined as "legal paganism".[338] Legal paganism is an intra-disciplinary inquisition of law with a fictional understanding. In other words, law is a freestanding, autonomous enterprise with no attachment to political, economic, and historical realities of the society.[339] It is beyond doubt that law does not exist in vacuum and, in integration studies, law is a variable that is shaped by economic, historical and political contexts that exist in a particular integration scheme. This Part offers a landscape of law as a variable of integration studies. After, providing a landscape of the nature and function of law, this Part will challenge and expose the limitations of the intra-disciplinary inquisition of law in integration studies of Southern African countries.

2.5.2. Nature of Law

International legal experts are less concerned with the distinction between "law making" and "non-law making" treaties. "Law-making" treaties are treaties whose purpose does not cease with performance of its obligations.[340] Human rights conventions fall to the category of "law-making" treaties. To the contrary, a "non-law making" treaty ceases to exist when the obligation of the treaty is met. For instance, the 1953 London Debt Agreement between the United States

[337] GATHII, *supra* note 224, at 609 ("In the African context, variable geometry refers to rules, principles and policies adopted in trade integration treaties that give Member states, particularly the poorest members; (1) policy flexibility and autonomy to pursue at slower paces timetabled trade commitments and harmonization objectives; (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalization commitments and policies aimed at the equitable distribution of the institutions and organizations of regional integration to avoid concentration in any one member; and (iii) preferences in industrial allocation among members in an RTA and preferences in the allocation of credit and investments from regional banks.").

[338] MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 98-101 (UNESCO trans., 1979).

[339] *Id.* at 100("[B]y detaching law in this way from the reality it governs and imprisoning it in legal formalism, lawyers end by mummifying law and worshipping it for its own sake.").

[340] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 12 (5th ed., 1998) ("Such treaties create legal obligations the observance of which does not dissolve the treaty obligation.")

and Germany ended once all the obligations it created ended when the United States cancelled German's debt in accordance with the treaty obligations.[341] Irrespective of the distinction, all treaties have the effect of law between parties.[342] Nevertheless, the distinction is relevant for legal scholars because "law-making" treaties have the effect of establishing general law as enumerated in Article 38 of the ICJ.[343] International law scholars such as Ian Brownlie and J. L. Brierly concur that "law-making" treaties are treaties with larger membership and conclude with the assent of contracting parties of their law-making effect.[344] In Southern African context, for instance Article 4 of the SADC treaty, provides principles of the organization that have a law making effect.[345] On the other hand, the SADC Trade Protocol, specifically provisions dealing with formation of free trade agreement will cease to have effect when Southern African states establish a customs union.[346]

2.5.3. Function of Law

If the nature of law in integration studies is a treaty-based agreement, which has both normative and interest-based contractual provisions, then what is the function of law? Edward Jenks, an international legal scholar, rightfully noted that at a domestic level, the idea of "law" implies "compulsion" and "order."[347] The former, "compulsion," denotes the correlation between

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[341] *See* Agreement on German External Debts, Feb. 27, 1953, 333 U.N.T.S. 3; Timothy W. Guinnane, *Financial Vergangenheitsbewältigung*: *The 1953 London Debt Agreement* (Yale Univ. Econ. Growth Ctr. Discussion Paper No. 880, 2004), *available at* http://www.econ.yale.edu/growth_pdf/cdp880.pdf (last visited Feb. 14, 2013).
[342] J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 57 (6th ed., 1963). All treaties are law and the Latin maxim, *modus et conventio vincunt legem*, has application in international law as much as in domestic law. *Id.*
[343] Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 38, para. 1(a), 59 Stat. 1055, T.S. 993, 3 Bevans 1179. The wording of the article is clear that a treaty should be rule establishing.
[344] *See* BROWNLIE, *supra* note 347, at 12; BRIERLY, *supra* note 125, at 58.
[345] *See* SADC Treaty, *supra* note 223, art. 4(c) (stating that SADC states must act in accordance with human rights).
[346] *See* Protocol on Trade in the Southern African Development Community, arts. 3–11, Aug. 1, 1996, http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf
[347] Edward Jenks, *The Function of Law in Society*, 5 J. COMP. LEGIS. & INT'L L. 169, 170 (1923).

law and chastisement, where disobeying of "law" leads to punishment of the lawbreaker.[348] The latter, "order" implies methodical harmony, which is inseparable and parcel of "compulsion" through the notion of "rights."[349] For Jenks, continuity in the association of law with "compulsion" and "order" is central in determining its regulatory function.[350] Alternatively, continuity of law through its regulatory function helps one predict the future.[351]

To explain the relationship between international relations and international law, legal scholars such as, Kenneth Abbott and Duncan Snidal, argued that states choose to govern their relations through legal arrangements to solve coordination problems.[352] Abbott and Snidal, analysis centers on two forms of legalization—soft legalization and hard legalization— and explains how different states with different coordination needs choose one over the other.[353] This Chapter will focus on hard legalization for the discussion in the topic. Hard legalization, which Abbott and Snidal measure through "obligation," "precision," and "delegation," increases the credibility of commitments.[354] Alternatively, law imposes consequences for violations of international law designed to solve coordination problems. Similar to Jenks's analysis of function of law at the domestic level, for Abbott and Snidal the function of law in a legalized state-to-state coordination is nothing but regulatory.

Using Abbott and Snidal's framework of analysis in the context of, for instance the SADC treaty, reveals that Southern African integration schemes had a legalized framework of cooperation with clear and precise obligations, backed by dispute resolution tribunal. In practice

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[348] *Id.*("Still, it is the general doctrine of jurists that there can be no true law (even in their sense) without a 'sanction'-some penalty or adhibition which makes the breaking of a law an unpleasant thing for the breaker.").
[349] *See id.* at 169-72.
[350] *See id*.
[351] *Id*, at 176. ("We do not, in fact, lawyers or laymen, think or speak of isolated commands or expedients as "laws." We regard it as one of the tests of a "law," that it enables us to predict, with varying degrees of certainty, the sequence of future events.")
[352] *See*Abbott & Snidal, *supra* note 340, at 37.
[353] *Id.*
[354] *Id.* at 37-38.

however, high-level of legalization does not guarantee compliance with integration obligations. [355] Then the question will be: how could law have a regulatory function if there is non-compliance?[356] Alternatively, has the function of law changed in African integration schemes?

2.5.4. Politicization of Law

Theoretically, at the regional level, community law is an apparatus used to further *raison d'être* of integration.[357] Treaty negotiation can be political, but lawyers either hope or believe that application of law is apolitical. The notion of neutrality of law argues that socio-economic and political situations of member states, with the exception of interstate war, does not hamper legality or binding nature of a treaty agreement. Nevertheless, socio-economic and political factors play a significant role in implementation of treaty obligations.

The "enforcement" or "implementation" of a treaty obligation is a logical expectation of the regulatory function of law.[358] In Southern African context, specifically SADC, the practice is a collection of politicization of law by Southern African governments and purposive

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[355] *See generally* Gerhard Erasmus, *Is the SADC Trade Regime a Rules-Based System*?, 1 SADC L. J. 17 (2011). Rules-based trade is defined as:

> [T]rade arrangement between states governed by international agreements which contain specific obligations regarding outcomes and practices. The parties have to comply with these obligations to ensure certainty and predictability, and transparency is a prerequisite. The substantive content of such trade rules can normally be distilled from the basic principles of the [WTO]—such as those relating to the most favoured nation and national treatment, or those dealing with market access—or other multilateral disciplines applicable to trade-related conduct involving the movement of goods and services across borders.

Erasmus used the following barometer in order to determine whether SADC is a rules based system: (1) "[t]he SADC legal instruments," (2) "[m]ember states' practice as regards the implementation of SADC legal instruments," (3) "[d]omestic implementation and enforcement of SADC legal instruments," and (4) "[d]evelopments around the SADC Tribunal." *Id.* at 37. After applying this four factor barometer, Erasmus eventually concludes that although SADC is a rules based system in reality it suffers from poor implementation and lack of compliance of regional treaty obligations. *Id.*

[356] *See id.*

[357] *See, e.g.*, David M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* (Univ. Wis. Law Sch., Law & the New Dev. State Working Paper, 2010). Classical developmentalists used law to ensure state intervention, while neo-liberalists used law as to prevent state intervention in markets. *Id.* at 8.

[358] *Id*. at 281. The ILC substantiates its characterization of WTO practice on treaty interpretation by refereeing to Appellate Body Reports on Brazil-Aircraft Case. *Id.* at 281 n.651.

interpretation by the SADC Tribunal.[359] In other words, enforcement of decision of the Tribunal can be subject to the politics of Southern African governments.[360] Hence, enforcement of community law in a politicized integration project is combination of legal reasoning and coercion. At community level, legal reasoning is a function of both community and domestic courts, while coercion is the function of the executive branches of member states. The argument here is that community law is a political tool for governments of Southern African countries to use. Here, one should make a distinction between community courts, which resorted to progressive legal analysis, and political authorities' reluctance to enforce community decisions. A classical question to ask will be, is law, in fact, politics at community level?[361] Alternatively, does "politicization of community law" mean the same as "law as politics"? Even though the distinction between both phrases might not be visible, for the researcher, "politicization of function of law" in Southern African context means that enforcement of community law is a highly politicized project of Southern African governments.

2.5.5. Consensus of Non-Enforcement

Politicization of law can render legalization of integration project irrelevant and even lead to "disassociation from law." In the African context, legal scholars analyzed the gap between regional treaty agreements and enforcement, alternatively called "disassociation from law," as

[359] *Id.* (noting a purpose-oriented interpretation by regional human rights courts). The SADC Tribunal, even though not specifically a human rights court, adopted purposive interpretation with regard to specific human rights provisions of the SADC Treaty. Campbell v. Zimbabwe Case No. 03/2009 SADC (T) 2009.

[360] *See* Franny Rabkin, *SADC Tribunal A Political Hot Pot*ato, BDLIVE (Aug. 6, 2012), http://www.Businessday.co.za/Articles/Content.aspx?id=146693.

[361] *See* Mark V. Tushnet, *Critical Legal Theory, in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 80, 80 (Martin P. Golding & William A. Edmundson eds., 2005). For critical legal studies scholars (CRITS), law is politics because: (1) legal reasoning is not different from political arguments; (2) disputes within law were resolved in the same way as disputes within politics; and (3) disputes do not disappear with rendition of authoritative decisions. *Id.* If law is politics at the community level, one will have to engage in a hair split analysis of those three elements. However, this author's focus is not on analyzing law as politics but rather on explaining that enforcement of law is highly politicized.

the result of "lack of political-will" or "lack of resources."[362] The most notable, alternative rationalization of disassociation of law from practice is James Gathii's analysis of flexibility in African integration schemes.[363] Disassociation of law from practice in integration schemes might be a "crisis of law," however it is a manifestation of "consensus of non-enforcement" among Southern African countries with treaty obligations. The researcher's choice of, "consensus of non-enforcement" over Gathii's "flexibility," seems to be a better phraseology, as Gathii's characterization of flexibility is broad and includes formal and informal flexibilities of integration schemes.[364] For Gathii, African regional integration treaties are flexible by design and practice.[365] However, "consensus of non-enforcement," acknowledging formal flexibilities is limited to the informal disassociation of law from practice. Hence, in the Southern African context, it focuses on the lack of enforcement of integration commitments and the mutual failure of member states to bring disputes against themselves to regional courts. In short, consensus of non-enforcement is a practice of Southern African integration schemes to subterfuge treaty obligations through political relations.

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[362] Percy S. Mistry, *Africa's Record of Regional Co-operation and Integration*, 99 AFR. AFF. 553, 554 (2000) (discussing Africa's integration initiative more as a rhetoric or instinct rather than an intellectually grounded rational choice).

[363] *See* GATHII *supra* note 224, at 576.

[364] *Id*. at 573. Gathii enumerates six defining characteristics of flexibility in African integration schemes:

> First, these RTAs are regarded as establishing flexible regimes of cooperation as opposed to containing rules requiring scrupulous and rigorous adherence. Second, African RTAs incorporate as a central feature the principle of variable geometry adopting steps for meeting time tabled and other commitments. Third, African RTAs adopt a broad array of social, economic and political objectives without giving salience to any set of objectives. Fourth, African RTAs demonstrate a particular preference for functionally specific objectives to undertake discrete projects and to serve as forums for the integrated development of common resources such as river basins that cut across national boundaries. Fifth, African RTAs demonstrate a remarkable commitment to the equitable distribution of gains from trade and a corresponding weakness in the adoption of nondiscrimination trade principles and the related objectives of trade liberalization. Sixth, African RTAs are characterized by multiple and overlapping memberships exemplifying a classic case of the "spaghetti bowl."

Id

[365] *See id*. For Gathii, African regional integration agreements show that flexibility is entrenched in the design and practice of constituting treaty. *Id.*

One could argue that consensus of non-enforcement is not different from the political rhetoric or lack of "political-will" critique of African integration schemes. For the lack of "political-will" argument to make sense one needs to answer the following question: why do African governments expend time, energy, and resources on treaty negotiations if there is no will in the first place? Furthermore, as a credulous argument, "lack of political will" makes African integration initiatives oblique, tautological, and exigent social affair functions of state officials. On the other hand, "consensus of non-enforcement" maintains the positive connotation of African integration initiatives.

"Consensus of non-enforcement" is an adventitious outcome of both internal and external politics of Southern African countries. As such, uncertainty is a central attribute of "consensus of non-enforcement," both in terms of outcomes of disputes and in terms of life span of existing consensus. Shifts in internal and external political relations can easily influence paradigms of integration schemes. Furthermore, the probability of punctilious enforcement of regional treaty obligations is historically non-existing among Southern African states. Internal politics, such as Botswana's problems with the Sun people, affect the way Botswana will react to human rights violations in Southern African region.[366] Hypothetically, Botswana might issue formal statements condemning human rights violations of another Southern African state, but for it to take legal action in the SADC Tribunal means that it is ignoring its vulnerability to similar action by other states. Therefore, internal politics among Southern African countries plays a vital role in creating a "consensus of non-enforcement" in the region and a move from meticulous enforcement of treaty obligations. Similarly, external politics or political relations among Southern African countries, rooted in the deep history of resistance against colonial and racial

[366] *See, e.g.*, K. Bojosi, INT'L LABOR ORG. [ILO], BOTSWANA: CONSTITUTIONAL, LEGISLATIVE AND ADMINISTRATIVE PROVISIONS CONCERNING INDIGENOUS PEOPLES 6 (2009), *available at* http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Botswana.pdf.

domination created a sense of solidarity among themselves. In conclusion, a combination of both internal and external politics led to secession from formalistic treaty relations in Southern African integration initiatives.

2.5.5. Integration Pessimism and Optimism

It is important for legal scholars engaged in the intra-disciplinary inquisition of integration schemes that their success rests on the legal architecture of the particular integration agreement and member states compliance with it. Without regard to the socio-economic and political impacts of integration initiatives, integration scholars will generally be pessimistic or optimistic of regional integration, based on member states' compliance or non-compliance with the laws governing the integration agenda.[367] One of the problems with this narrow approach to integration studies and measure of regional integration is that legal scholars are only focused on understanding the status of community law at the domestic level of member states and its coherence with the laws and international obligations of said states.[368] Furthermore, legal scholars are also engaged in understanding the governance structure and organizational architecture of integration projects, which further reinforces emphasis on treaty compliance, or lack thereof, as a measure of success of integration projects.[369] To clarify, the researcher is not

[367] *See* GATHII, *supra* note 224, at 575; *see also* Adebayo Adedeji, *Creating the Conditions for Integration*, AFR. RECOVERY (Sept. 1, 2002), http://www.globalpolicy.org/home/162-general/27778.html. *See generally* Mistry, *supra* note 372 (analyzing African integration schemes as overly ambitious and implying the extant disassociation between commitments and practice and thereby noncompliance with treaty obligations). In his interview, Adedeji alludes to the existent of third group of integration scholars. Adedeji, *supra*. The third tier of scholars are neither pessimist nor optimist of integration schemes but rather are indifferent. *Id.* Furthermore, Adedeji notes that those who are indifferent are those who have come to realize the realities of African economies. *Id.* In his words, "All the regional economic arrangements throughout the developing world did not fully achieve their objectives. But the European Community did. Of course, if you look at the period of the 1950s, 1960s, and 1970s, the European economies were moving fast, expanding. Therefore, the environment for regional integration was there. That is what has been absent in Africa. We don't have an enabling environment for integration, because we have stagnant, declining economies." *Id.*

[368] *See, e.g.*, Iwa Salami, *Legal Considerations for Devising a Governance Structure for the African Union*, 16 AFR. J. INT'L & COMP. L. 262, 272–73 (2008) (discussing the status of supremacy and how it relates to success of African integration initiatives).

[369] *See* Geda *supra* note 120 at 367-380(discussing lack of implementation as one of the failures of African integration projects).

arguing that understanding the coherence, supremacy, direct-effect, and organizational structure of integration scheme is irrelevant. Instead, the researcher wants to emphasize that understanding regional integration in the African context is a very sophisticated discourse while intra-disciplinary evaluation of integration is rather limiting.[370] In conclusion, it seems to the researcher that it is time to rethink the idea of law as a freestanding enterprise in integration studies.

PART-VI- CONCLUSIONS: TOWARDS A BROADER CONCEPTION OF INTEGRATION

The above sections show four approaches (namely historical, economic, political and legal), which are a representation of the intra-disciplinary inquisition of integration without epistemic synergy. The question then remains: how to combine the different approaches to offer a broader, if not comprehensive, conception of integration? The central argument of this Part is that conceptualizing "integration as emancipation"[371] can bring convergence both conceptually and substantively to the existing epistemological pluralism.

During the formative years of the OAU, the debate on emancipation was limited to colonialism, neocolonialism, and racial domination.[372] The founding fathers failed to deal with

[370] *See id.* at 382. The understanding here is that law is only one variable of an integration project.

[371] How do you define emancipation? Is it freedom? Is it self-determination? Alternatively, is it both? During the 1960s, self-determination movements of African people were part of the continental emancipation project. Emancipation simultaneously, with self-determination, meant removal of restraints imposed by former colonists over colonized peoples and territories. Those restraints were political; they limited African political establishments from participating equally with European states. Second, the constraints were also social; colonists imposed a social racial hierarchical structure that excluded Africans from participating equally with European races. Furthermore, laws imposed on African territories and peoples without any legitimate democratic procedure legalized those social and political restraints. With the advent of decolonization, restraint for anti-imperialist movements comes from former colonial masters. While for other human rights movements, restraints on freedom might come from national governments, foreign governments and society as a whole. Hence, for the purposes of this Article, emancipation is defined in accordance with Black's Law Dictionary definition but with some modification. *Black's Law Dictionary* defines "emancipate" as: "[t]o set free from legal, social, or political restraint." BLACK'S LAW DICTIONARY 598 (9th ed., 2009). Hence, for the purpose of this Article, emancipation is the removal of restraints on human freedom irrespective of its local or global origins, whether it is economic, social, legal or political.

[372] Although the founding fathers acknowledged the importance of freedom for development in Africa, their emphasis was on decolonization and movement against racial (white) domination. *See* Nkrumah Address, *supra* note 17, at 35; Nyerere Address, *supra* note 239, at 100; Selassie Address, *supra* note 230, at 2.

other forms of oppression that existed in the continent, irrespective of the eminent need for struggle from colonial oppression.[373] For instance, both Nyerere and Nkrumah, who were socialist in their political orientation, aspired for a society based on egalitarianism, equality, and unity.[374] However, both ran into contradiction during the implementation of their policies and resorted to coercion.[375] Similarly, Selassie maintained a feudal land ownership system to the dismay of peasants in Ethiopia.[376] Hence, it is fair to conclude that continental emancipation project excluded issue of minority groups, women, peasants and other forms of oppression which existed in the continent.[377] Similarly, classical theories of integration seem to lack the capacity to

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[373] *See* Thenjiwe Major & Thalia M. Mulvihill, *Julius Nyerere (1922−1999), An African Philosopher, Re-envisions Teacher Education to Escape Colonialism*, 3 J.MARXISM & INTERDISC. INQUIRY 15, 16 (2009).

[374] *Id.* (discussing how Nyerere thought that the economic system and ideologies introduced by colonists into African society were based on capitalist ideologies that encouraged individualism in contrary to African communal way of life).

> Capitalism fosters excessive individualism; promotes the competitive rather than the cooperative instinct in man; exploits the weak; divides the society into hostile groups and generally promotes inequality in the society." He believed that capitalism regarded some individuals as superior (the rich) and others as inferior (the poor). He further asserted that the major aim of capitalism was the production of goods and profits, not human satisfaction or the interest of the consumer. Capitalism encouraged inequality since each person was allowed to acquire as much as one can. According to Nyerere, these capitalist ideas could not be reconciled with African values; therefore, he advocated for Socialism.

Id. (quoting J.A. AKINPELU, AN INTRODUCTION TO PHILOSOPHY OF EDUCATION 115 (1981) (discussing Nyerere's conception of capitalism)).

[375] *See* Leander Schneider, *Freedom and Unfreedom in Rural Development*: *Julius Nyerere*, *Ujamaa Vijijini*, *and Villagization*, 38 CAN. J. AFR. STUD. 344, 369–71 (2004) (giving several examples of Nyerere resorting to coercion and his endorsement of coercion to enforce Ujamaa; *see also* Randi Rønning Balsvik*, Student Protest—University and State in Africa 1960–1995*, 2 F. FOR DEV. STUD. 301 (1998) (noting student protests against coercive government actions in Africa).

[376] *See* Alden Whitman, *Haile Selassie of Ethiopia Dies at 83,* N.Y. TIMES, Aug. 28, 1975, at A1, for information on the circumstances that led to the end of Haile Selassie's rule in Ethiopia.

[377] By focusing on forms of oppression that emanate from colonists, the 1960s emancipation project of the continent did nothing but white wash forms of oppression that existed in the society. *See, e.g.*, Francis K Makoa, *Gender and Politics: A Note on Gender Inequality in Lesotho*, 12 J. SOC. DEV. AFR. 5 (1997) ("Basotho women led by Lesotho's 70-member Federation of Female Lawyers, are waging a vigorous campaign against sex and other forms of discrimination based on gender. This campaign is directed, in particular, at the country's laws, customs, traditions and social norms that govern the relationship between men and women. They are calling for radical legal and social reforms that will end gender inequality and thus ensure their full participation in and contribution to the process of development."); *see also* Ngianga-Bakwin Kandala et al., *Spatial Distribution of Female Genital Mutilation in Nigeria*, 81 AM. SOC'Y J. TROPICAL MED. HYGIENE 784, 784 (2009) (discussing how the practice of mutilating female genitalia can be justified culturally and socially justified); *see also* MJ Maluleke, *Culture, Tradition, Custom, Law and Gender Inequality*, 15 POTCHEFSTROOM ELECTRONIC L. J. 1 (2012) (analyzing harmful customary practices and calling for a cultural revival to bring about gender equality and development.); *Information by Country,* INT'L GAY & LESBIAN HUM. RTS. COMM'N, http://www.iglhrc.org/cgi-bin/iowa/region/8.html (last visited Sept. 4, 2012) (arguing that the majority of African states criminalize consensual

fully explain African integration schemes, either due to a lack of adequate empirical data in the African context or due to the fact that they were developed in relation to integration schemes of developed north. Moreover, substantively speaking, emancipatory movements in the past sixty years of the continent's independence have taken all forms and shapes ranging from gay and lesbian rights, women rights, and human rights movements. Hence, the conceptualization of integration as emancipation allows one to look at human rights movements not as a spillover of economic integration, but rather as a central theme of the integration project of member states.[378] By including emancipation as an end of integration projects, it allows one to envision a development project as freedom in all its senses.[379] In conclusion, this Part is an attempt to create

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homosexual practices). Advocates and sympathizers of the movement for equality and decriminalization of homosexual activity face all forms of persecution. *See id.* While movements against racial domination and anti-colonization were recognized as emancipation projects; women's rights movements and other human rights movements were considered as national equality movements. The distinction being, as a continental project, emancipation was a priority for African governments. On the other hand, equality movements were left to the domestic political policies of Member States.

[378] *See* Andrés Malamud, Eur. Univ. Inst., Spillover in European and South American Integration. An Assessment, Delivered at Meeting of the Latin American Studies Association (Sept. 6–8, 2001), *available at* http://lasa.international.pitt.edu/Lasa2001/MalamudAndres.pdf (arguing that neo-functionalists like Ernst Haas view regional integration is not a passionate commitment but rather a process of voluntary unification of states through utilitarian and pragmatic decisions of political actors). Spillover is "a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more, and so forth." *Id.* (quoting LEON LINDBERG, THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION 9 (1963)). Simplistically put, the formation of the European Economic Community, which had narrow economic objectives, had a spillover to the development of human rights institutions at the EU level. *See id.*

[379] *See* generally AMARTYA SEN, DEVELOPMENT AS FREEDOM, (Alfred A. Knopf Inc., New York,1999) *See* generally, Des Gasper and Irene van Staveren, Development as Freedom v-v And What Else?, 9: (2-3) FEMINIST ECONOMICS, 137-161 (2003). *See* also Martha C. Nussbaum, Capabilities as fundamental entitlements: Sen and Social Justice, 9 (2-3) FEMINIST ECONOMICS, 33, 41-42 (2003). (Mainstream economists, for instance Milton Friedman, used freedom language to argue for neoliberal conception of development. With emphasis on negative freedom, mainstream economists advocated for wellbeing of individuals through GDP increase, giving consumers choice of product and price and free markets. On the contrary, for Amartya Sen, positive freedom is the means and end of development. Sen's emphasis on positive freedom moves welfare analysis from markets and commodities dynamics to a much more sophisticated measure of wellbeing based on a person's functioning and opportunities. Although, Sen did not make a list of what he considers to be basic freedoms or capabilities, Martha Nussbaum took Sen's analysis a step further by listing capabilities. For Nussbaum, acknowledging that Sen's capabilities approach and its link with human rights, argues that capabilities language has more precision and helps critical scholars overcome debates, for instance, duties debate, attached to rights language. For her, central capabilities deal with: (1) life, (2) bodily health, (3) bodily integrity, (4) senses, imagination and thought, (5) emotions, (6) practical reason, (7) affiliation, (8) other species, (9) play, and (10) control over one's environment. The central capabilities list for Nussbaum is open-ended to encompass different cultures, societies and capabilities. For me, my use of 'freedom' in this section is in line with Sen and Nussbaum's conception of positive freedom. However, at this point thought I

a synergistic effect of integration studies by re-conceptualizing regional integration in Southern Africa as process of forming a whole for emancipation of all.

2.6.2. Romantic Idealism Vis a Vis Broader Conception of Integration

Re-conceptualizing "integration as emancipation" opens the door to possible criticism that it is too idealistic. To challenge such criticism, this Subpart will theoretically and pragmatically justify why re-conceptualizing integration is not only relevant, but also necessary, for integration studies today. At the theoretical level, re-conceptualization of integration as emancipation requires showing the interconnectedness of abstractions and ideas of regional integration. With a pluralistic conceptualization of integration, the four approaches provide different interpretations, goals, and conceptual understandings of integration. Similarly, the four approaches focus on the different objectives, effect, and purpose of integration.

Table 9: Justifications of Regional Integration Projects among SADC states

+ means has relevance, - means no or little relevance				
	Apartheid Era		Post-Apartheid Era	
	1960 -1980	1980-1993	1994-2005	2006 till present
Emancipation	+	+	_	_
Peaceful Co-existence	_	_	+	+
Economic Development	+	+	+	+
Law	_	_	_	_

An alternative explanation for the choice and prominence of disciplinary understanding of regional integration, the researcher believes is through episodic integration studies and the corresponding relationship with the objectives of integration projects in the continent, as shown in Table 9. In the formative years of the voluntary association of African states, a cursory

agree with the need to list specific capabilities, I prefer to live it to specific social contract that exists between governments and people of a particular state.)

exploration of objectives of regional or sub-regional integration schemes reveals that the central objective of integration in most, if not all, African integration schemes was emancipation. With a limited understanding of emancipation for Southern African integration schemes, specifically the SADC, emancipation as a central objective of integration extends up to the early 1990s with the formal end of racial domination in South Africa.[380] Concurrent to the emancipation project of colonized people, the underdeveloped SADCC states gained independence and sought economic development and/or economic independence from the then Apartheid South Africa.[381] Hence, emancipation had a dual objective of leading to political and economic interdependence, while fighting against Apartheid South Africa and economic underdevelopment. In the next post-Apartheid era episode, emphasis on emancipation as both a political and an economic agenda ended and shifted to rhetoric of Eurocentric justifications of regional integration. Therefore, existing integration initiatives among Southern African countries adopted such conceptions as Kantian theory of perpetual peace and trade liberalization as landmarks of integration achievements.

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[380] *Regional Indicative Strategic Development Plan* (RISDP), SADC, http://www.sadc.int/index.php?cID=201 (last visited Mar. 3, 2014) (stating that the ultimate goal of SADC's current Regional Indicative Strategic Development Plan (RISDP) is to deepen integration in the region with a view to eliminate poverty and attain other economic and non-economic goals). The Front Line States, formed by Angola, Botswana, Mozambique, Tanzania and Zambia, initialed and promoted regional integration among southern African states. *Frontline States,* S. AFR. HIST. ONLINE, http://www.sahistory.org.za/organisations/frontline-states (last visited Mar. 25, 2014). Established in 1975, the initiative aimed at political liberation of all southern African states, and coordinated efforts to support national liberation movements, anti-colonialism, and anti-apartheid movements. *See Regional Indicative Strategic Development Plan* (RISDP), *supra*.

[381] Christine Ega Mbakile-Moloi, Copycat Theory: Testing for Fiscal Policies Harmonization in the Southern African Coordinating Community (SADC) and Sub-Saharan Africa (SAA) (Jan. 5, 2007) (Ph.D. dissertation, Georgia State University), *available at* http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1021&context=econ_diss. "Most of the countries of Southern Africa ultimately achieved political independence, but against a background of mass poverty, economic backwardness . . . [and the] threat of powerful and hostile white minority ruled neighbors . . . . [Thus], the leaders saw the promotion of economic and social development through cooperation and integration as the next logical step after political independence." *Id.*

2.6.2.2. Emancipation: between colonization and racial domination

If an ideal integration scheme is a legally binding voluntary association of states, for emancipation of all, the effluence in defining "emancipation" is central to re-conceptualizing integration. The continental emancipation project, as shown in Figure 8, sought both emancipation of the African citizenry from racial domination and that of the African state from colonization. This dual movement for emancipation, though related, is different and concentric. Emancipation of the state may end with decolonization.[382] Emancipation for the "individual" even in its narrowest sense as emancipation from racial domination, did not end with the end of colonization.[383] A plausible presentation of individual emancipatory movements in the continent include emancipation from oppressive societal norms and oppression by African states.[384] During decolonization, inequality was not rooted out, even though political oppression from colonists

[382] *See* BEDJAOUI, *supra* note 337, at 82 (explaining that decolonization as a "logical reversal of what preceded it, [and] implies, in theory, a fundamental policy of eliminating inegalitarian links" and discussing how decolonization can be a mirage of formal political independence, in era of neocolonialism and imperialism); *see also* Michael Adas, *Contested Hegemony: The Great War and the Afro-Asian Assault on the Civilizing Mission Ideology*, 15 WORLD HIST. 31, 62–63 (2004) (discussing decolonization as contestation of European civilizing mission).

[383] *See* Onyeonoro S. Kamanu, *Secession and the Right of Self-Determination: An O.A.U. Dilemma*, 12 J. MODERN AFR. STUD. 355, 355–66 (1974) (discussing Africa's support for self-determination from colonial Europe but denial of the same request in the postcolonial setting). Kamanu criticizes the concept of "pigmentational self-determination" of Ali Mazrui, as inconclusive. *Id.* at 356–57. For instance, the Southern Sudanese liberation movement from Sudan was considered illegal, even despite the different pigmentation of Northern and Southern Sudanese. *Id.* at 357. Kamanu contends that African nationalists' opposition to European rule was not because Europeans are not Africans, but rather because it was oppressive; therefore, it is hypocritical to turn a blind eye when oppression is internal. *Id.* at 358.

[384] *See* Campbell v. Zimbabwe, Case No. 2/2007 (SADC (T)) 2007. One may interpret the *Campbell* case as a case of oppression by the state of Zimbabwe. In that case, Mr. Campbell and other white citizens of Zimbabwe sought emancipation from racial domination by a majority black-ruled state. Indeed, Mr. Campbell sought justice from oppressive behavior of the state. One could also argue that since Zimbabwe's policy of discrimination against white minorities was not only supported but also fully endorsed by several members of Zimbabwean society, discrimination against Mr. Campbell and other white minorities was actually a societal form of oppression. Indeed, the question is where do you draw the line and say this is the act of the society and not the state? It seems both questions merge if the state advocates or tolerates racial domination in any form or way. On the other hand, when a state sanctions discrimination against any class of society for instance women but a society practices discriminatory practices, it becomes easier to make a binary division between societal and state forms of oppression. For an example of societal forms of oppression against women in Yoruba communities, *see* Adeyinka Abideen Aderinto, *Subordinated by Culture: Constraints of Women in a Rural Yoruba Community, Nigeria*, 10 NORDIC J. AFR. STUD. 176, 183 (2001).

ended.[385] For instance, the existence of intrastate ethnic conflicts in Africa illustrate racial domination, whereby an ethnic group framed as an interest group, guards its economic and political interests. This illustrates the need for emancipation from fear of future social, economic, or political domination.[386]

Table 10: List of major cases against Republic of Zimbabwe in SADC Tribunal

List of major cases against Republic of Zimbabwe in SADC Tribunal		
Parties	Cause of Action	Decision on Cause of Action
Campbell V. Republic of Zimbabwe	Violation of 4(c), and 6(2) of SADC Treaty	Decision in favor of Plaintiff
Luke Munyanda Tembani V. Republic of Zimbabwe	Violation of 4(c), and 6(1) of SADC Treaty	Decision in favor of Plaintiff
Gondo and others V. Republic of Zimbabwe	Violation of 4(c) and 6(1) of SADC Treaty	Decision in favor of Plaintiff
United People's Party of Zimbabwe V. SADC, Zimbabwe and others	Not SADC Treaty but power sharing agreement between political parties in Zimbabwe	Decision in favor of defendants

General practice in regional courts of the continent shows an importune for emancipation by African citizenry. For instance, the *Campbell* case, was the first of such supplications that the SADC Tribunal entertained.[387] As shown in Table 10, it is clear that the existing lack of respect

[385] *See* Alexander Naty, *Memories of the Kunama of Eritrea Towards Italian Colonialism*, 56 AFRICA: RIVISTA TRIMESTRALE DI STUDI E DOCUMENTAZIONE DELL'ISTITUTO ITALIANO PER L'AFRICA E L'ORIENTE 573, 573–75 (2001) (explaining criticizing a paradigm of colonist and resistance movements in post-colonial studies). Naty explains that a particular ethnic group's attitude towards colonizers is based on their previous status as either "dominators" or "dominated" in a particular society. *Id.* at 574. Therefore, Naty criticizes simplistic understanding of why the Kunama did not oppose colonization and contributed minimally to Eritrea's independence movement, explaining it as the result of their pre-colonial oppression by the highlanders of Eritrea and Ethiopia. *See id.* at 589–89. However, with the end of colonial domination in Eritrea, Kunama, labeled "collaborators" and other negative connotations, lost respect and equal treatment by the highlanders and hence follows their given status or lack therefore in post-independence Eritrea. *See id.* At 588.

[386] *See* Ibrahim Elbadawi & Nicholas Sambanis, *Why Are There So Many Civil Wars in Africa: Understanding and Preventing Violent Conflict*, 9 J. AFR. ECON. 244 (2000) (arguing that the cause of Africa's civil war is poverty and not ethno-linguistic fragmentation of the continent); *see also* David A. Lake & Donald Rothchild, *Containing Fear: The Origins and Management of Ethnic Conflict*, 21 INT'L SEC. 41, 41 (1996) (arguing that ethnic conflict is not a mere result of ethnic differences, but rather a collective fear of what the future holds for that particular ethnic group).

[387] In 2007, the SADC Tribunal dealt with two cases. The first, which is not relevant for this article's central argument, is of African citizenry petitioning for emancipation from oppressive states and was a case against the SADC Secretariat by its former employee. Mtingwi v. SADC Secretariat, Case No. (SADC (T)): 1/2007 (SADC, May 27, 2008). The second case involves a minority group of white Zimbabweans bringing a case against the Republic of Zimbabwe against a land reform in the republic that led to a constitutional amendment and barred

for equality and respect for human rights in Zimbabwe has led to four major cases against the Republic.[388] All of these cases except one dealt with Articles 4 and 6 of the SADC Treaty.[389] Individual claims for justice could have been brought to the SADC Tribunal, especially where no domestic forum was available for applicants, such as in the *Campbell* case.[390] The *Campbell* case differs from the *Gondo* case, in which applicants successfully litigated against violence inflicted upon them by agents of the Republic of Zimbabwe, in domestic courts.[391] From these cases, one can construct a view that the SADC Tribunal among Southern African states assumed the role of final adjudicator, not just for issues of racial discrimination as in *Campbell*, but also for issues of implementation of domestic court decisions, as in *Gondo*. Furthermore, one can deduct from the jurisprudence of both cases that the SADC tribunal, if faced with other human rights issues, would have adopted a progressive interpretation of member obligations, in favor of victims of human rights violations. Those who could not access justice at the domestic level sought it at in a regional forum. Similarly, other individual claimants of redress from SADC Treaty violations would have relied upon the Tribunal had it not been for the Tribunal's dissolution.

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minority groups from accessing the local courts to seek redress and/or challenge constitutionality of such land reforms. Campbell v. Zimbabwe, Case No. 2/2007 (SADC (T)) 2007). To the dismay of the Zimbabwean government, the Tribunal found in favor of the applicants, however, enforcement of the decision is yet to come. *Id.*

[388] In this part, when the author refers to "major cases" brought before the SADC Tribunal, the emphasis on "major" is meant to convey to the reader that the accounting of cases in this Chapter does not include interlocutory appeals.

[389] Article 4 is the human rights principle while Article 6 deals with non-discrimination. SADC Treaty, *supra* note 223, arts. 4, 6.

[390] Campbell v. Zimbabwe, Case No. 2/2007 (SADC(T) 2007).

[391] Gondo v. Zimbabwe, Case No. 5/2008 (SADC(T) 2008) (discussing how residents of Zimbabwe use SADC to request enforcement of a domestic court decision that Zimbabwe refused to enforced).

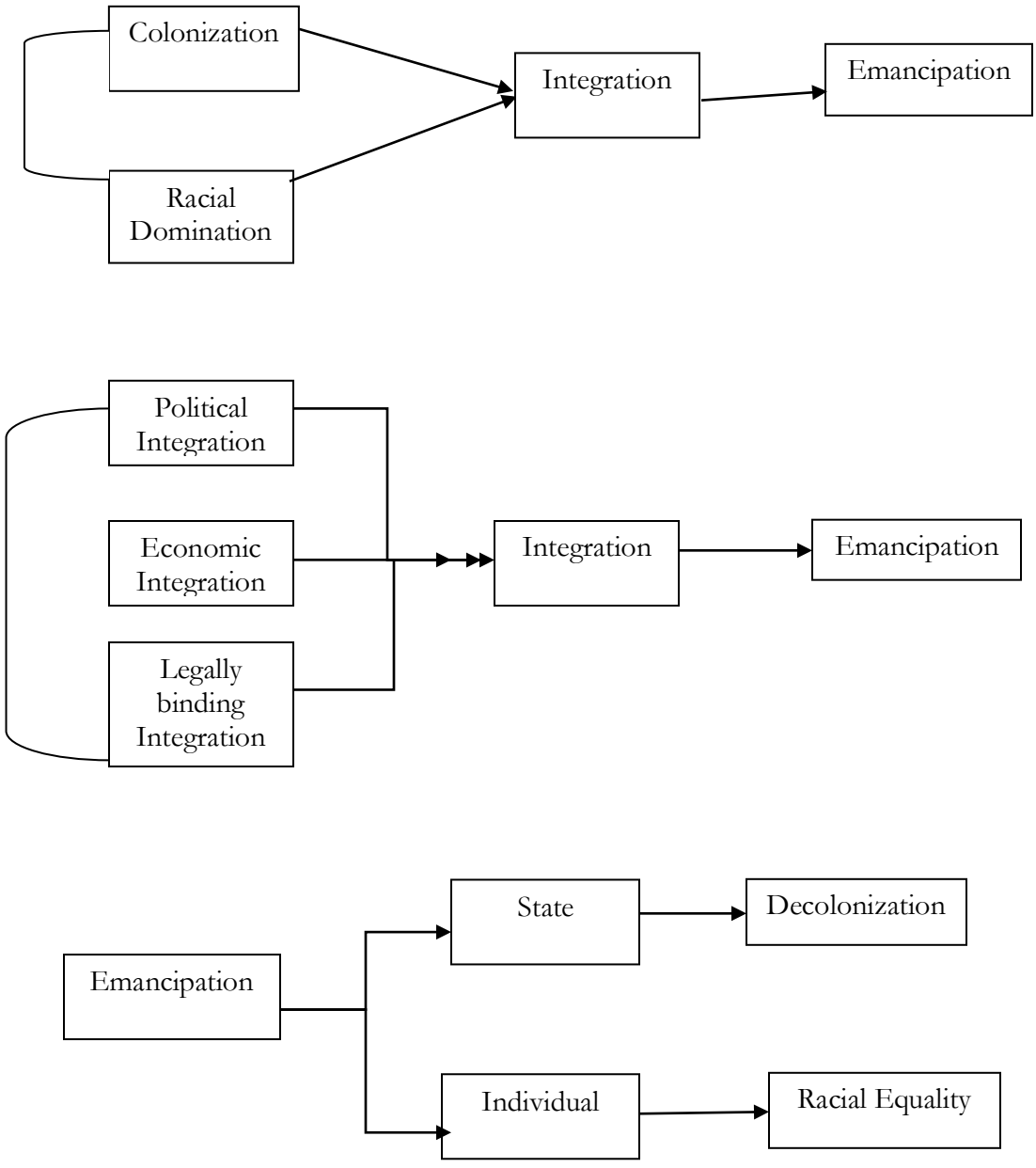

Figure 8: Causal Diagrams of the interrelationship between integration and emancipation movements.

2.6.2.3. Integration-Disintegration and Emancipation

In the 1960s, integration as emancipation entailed a trajectory between a state of colonialism and a state of decolonization. While the former, state of colonialism was oppressive, the expectation of decolonization was freedom and liberation of the oppressed people. Logically, if integration is emancipation then disintegration means oppression. As Nkrumah stated, "African states must unite" in order to end colonial oppression or else it will be subject to colonization.[392] In the early 1960s, the importance of African unity in its decolonization movement was clearly uncontested as the movement sought to oppose global power dominance through its unity.[393] In the early years of Africa's independence, integration and emancipation, broadly speaking, were directly linked. Even so, does this mean there ought to be a link between integration and emancipation in contemporary Africa? Alternatively, if there is regional disintegration, does it indicate a move towards a state of colonization and/or oppression?

Mohammed Bedjaoui, explains the distinction between colonization and decolonization. He categorizes colonization as legalization of domination, exploitation, and non-egalitarian relations, which ended, at least in theory, with the advent of decolonization.[394] On the other hand, decolonization, at least in its contemporary formation, includes not only independence movements from European colonizers, but also all forms of "oppression and resistance" paradigms that exist within and among societies and states in contemporary Africa. Understanding these paradigms can help one move beyond traditional colonialism discourse and include struggles for social protection in a liberalized market economy, minority rights movements, and several others. Hence, the emancipation project of the 1960s needs to carry on

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[392] Kwame Nkrumah, Speech at Casablanca Conference, Jan. 7, 1961, *reprinted in* 2 SELECTED SPEECHES KWAME NKRUMAH 1, 2 (Samuel Obeng ed. 1997).
[393] *See id.* at 1.
[394] BEDJAOUI, *supra* note 337, at 82 ("Colonization, as a social, economic and political fact, expressed itself in legal relations which were those of domination and exploitation…..Decolonization, the logical reversal of what preceded it, implies, in theory, a fundamental policy of eliminating inegalitarian links.")

with it a new mandate that encompasses a broader conception of emancipation. If emancipation encompasses different forms of "oppression and resistance" paradigms of Southern African states, what is the role of the ongoing integration initiatives for global economic order?

The role of integration initiatives in bringing about a just economic order for a world characterized by inequalities partly comes from the power of unity as negotiating blocks in multilateral negotiations. The 1970s movement for a more just economic order has created a better economic order. However, negotiations for a more just world, specifically third world states' role in setting the agenda for cotton negotiations in the Doha round,[395] show that the struggle for party of participation is consequently pursued by African states. Issues of just global economic governance can also be raised in relation to EU-Africa trade relations, and possible claims of European role in disintegrating Africa. If ongoing EPA negotiations are a disintegrating factor for Southern African integration initiatives would it mean oppression both in terms of global governance and individual emancipation projects? Although, EPA negotiations, and possible disintegration, as noted in Chapter One, might have been countered by the Tripartite negotiations, theoretically, disintegration should mean oppression. In reality, however, it seems to the researcher that regional disintegration is oppression, only in the sense that it does not give citizens an adequate forum to plea their grievances against their home state. This lack of forum or regional guarantor of emancipation can also happen when community institutions tolerate or favor oppressive behavior of states over the rights of oppressed citizens. Consequently, any disintegration that might result because of EPAs disrupts the continental emancipation project in the sense that it freezes the role of community institutions as guarantors of emancipation for the individual.

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[395] *See generally The Cotton Initiative*, WTO (Dec. 1, 2004), http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd20_cotton_e.htm.

2.6. Conclusion

In postcolonial Africa the integration project stemmed from a historical context of the Pan-Africanist movement. The Pan-Africanist movement sought integration not for conventional justifications given as in the case of the European Union, but for emancipatory movements against racial domination and neo-colonization. Today, with the end of Apartheid, one wonders what drives Southern African integration projects. No doubt, conventional justifications, political and economic benefits of integration, are legitimate causes for integration in the continent. Yet the existing "statistical tragedy" of the continent has led to dubious results as to whether economic benefits can be a drive for Africa's integration. Moreover, Kantian theory of perpetual peace as a justification for Africa's integration initiatives remains controversial. Similarly, when legal scholars assume the positive outcomes of integration initiatives and focus on intra-disciplinary inquisition, they limit integration studies and theorizing. Therefore, this Chapter theorizes the conceptual understanding of regional integration by bridging the gap across disciplines and making a case for conceptualization of integration as emancipation.

CHAPTER – FIVE: NORMS OF SOLIDARITY AND REGIONALISM: THEORIZING STATE BEHAVIOR AMONG SOUTHERN AFRICAN STATES

PART – I - INTRODUCTION

State behavior among members of regional integration schemes, such as Southern African states, is influenced not only by material interests, but also by social construction, including ideational concerns emerging from the continent's decolonization project. The central argument of this chapter is that relations among Southern African states are defined by "norms of solidarity," which combine ideational and material concerns. Before explaining theoretical approaches to understanding state behavior, it is relevant to explain "norms" and "norms of solidarity." A norm is "a standard of appropriate behavior for actors with a given identity."[396] Norms of solidarity form and regulate solidarity as logic of appropriateness among African states in general and Southern African states in particular. Alternatively, norms of solidarity are patterns of thought that prescribe state behavior by formulating concepts of the function and value of African-ness.[397] Through a process of socialization, continental and regional norms of

[396] There exist definitional problems that can be raised with the use of the word "norm" instead of "institutions." For sociologists the distinction is that "norm" indicates "single standards of behavior" while "institution" is a collection of interrelated norms. This definitional problem, is not however an issue for International Relations scholars in general and "constructivists" in particular.
International Relations scholars categorize norms as: regulatory, constitutive, and prescriptive norms. While the first "regulatory norms" and "constitutive norms" generally have straight forward meaning "prescriptive norms" are not always accepted as a third category but rather as part of either "regulatory" or "constitutive" norms. Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 891 (2005).

[397] Leopold Sedar Senghor, Pres. of Senegal, Address at the 1963 African Summit (May 23, 1963), *in* CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, supra note 230, at 85. Senghor defines African-ness as the basis of African Unity beyond shared experiences. In his words:

> Most of us feel that what brings us close to one another and must unite us is our position as under developed countries, formerly colonized. Nor is that wrong. But we are not the only countries in that position. If that could be said objectively to be whole truth, then African Unity ought one day to dissolve with the disappearance of under- development.
>
> I am convinced that what binds us lies deeper; and my conviction is based on scientifically demonstrable facts. What binds us is beyond history: it is rooted in pre-history. It arises from geography, ethnology, and

solidarity are internalized to establish the tenets of state behavior among Southern African states.[398] Norms of solidarity create the identity of African-ness as a destiny of African states beyond the confines of geographic proximity.[399] Thus, "norms of solidarity" based on unity and comradeship define "African-ness" as good and lack thereof as something bad.[400]

"Norms of solidarity" are incorporated in regional and sub-regional treaties. For instance, the AU aspires to achieve "solidarity between the African countries."[401] Similarly Article 4(b) of the SADC Treaty prescribes that all members of the SADC shall act in accordance with

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> hence from culture. It existed before Christianity and Islam; it is older than all colonization. It is that community of culture, which I call African-ness. I would define it as "the sum total of African civilized values: Whether it appears in its Arab-Berber aspect or its African Negro aspect, African-ness always shows the same characteristics of passion in feelings, and vigor in expression. I recognize an African carpet among those of all other continents. It is no mere chance that some mosaic in Bardo Museum resembles some Mali "pagne."

It seems to the researcher that Senghor's passion to tie feelings of African-ness as scientific or biological unity among Africans is a bit limited and actually flawed. For instance, it dismisses and ignores Kenyan Indian's from having feelings of African-ness and thereby declares them as non-African. Second, apart from Senghor's conviction, there is no scientific claim that shows that Africans [whether black, Arab or Berber] are genetically related. Therefore, in this chapter the understanding of African-ness is that African-ness is a constructed reactionary identity of anti-colonial and racial oppression.

[398] Norm socialization in this context is not used to signify the understanding of Thomas Risse and Kathryn Sikkink. For Risse and Sikkink, norm socialization is a process by which "international norms are internalized and implemented domestically." Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 5 (Thomas Risse et al. eds., 1999). On the contrary, here it is used to signify how regional or continental norms of solidarity are internalized and domesticated by African state.

[399] For Nelson Mandela, South Africa was linked with other African states by "destiny." He further emphasized that this "destiny" is "more than a mere geographical concept." Nelson Mandela's choice of the terminology "destiny" instead of "future," although both can be synonymously used, implies that "destiny" has more of a hidden force that controls the future. And this hidden force that exists among African states is what the researcher refers as "norms of solidarity" in this chapter. Nelson Mandela, *South Africa's Future Foreign Policy*, 72 FOR. AFF. 86, 86-97 (1993).

[400] The analysis and understanding of "norms of solidarity" in this chapter is a macro-state level analysis. The researcher understands that solidarity arrangements can and do exist at individual and group levels. It can exist across sectors and minority groups. On the other hand, it can also exist among majority groups and political elites. For instance Thomas Kwasi Tieku, analyzes solidarity arrangement among African political elites. *See* for instance, Thomas Kwasi Tieku, Solidarity Intervention: Emerging Trends in AU's Interventions in African Crisis, Address at Chatham House Workshop: Africa International: Agency and Interdependency in a Changing World (Oct. 9, 2009) (transcript available at http://www.open.ac.uk/socialsciences/bisa-africa/confpapers/solidarity-intervention.pdf (last visited 04/04/2014).

[401] AU Charter art. 3, para. A. states: "[t]he objectives of the Union shall be to: achieve greater unity and solidarity between the African countries and the peoples of Africa." Art. 3(A) identifies three strands of solidarity arrangements. These are: (1) solidarity arrangements between and among African states, (2) solidarity arrangements between and among African people, and (3) solidarity arrangements between and among African states and people. Understanding these possibilities, however, the focus of this chapter is on solidarity arrangements among states. Hence, for the purposes of this chapter reference to the AU's solidarity arrangements are limited to solidarity among members of the AU.

principles of solidarity.[402] Although "solidarity" is an explicit objective of both organizations, when it comes to how and when solidarity arrangements are to be invoked and/or implemented, both organizations are silent. This brings into question when, how, why and by whom "norms of solidarity" are to be observed? Are states able and willing to stand in solidarity with each other, even under dire circumstances? What consequences do economic pressures have for "norms of solidarity?" Under what circumstances do African states manage to observe "norms of solidarity" and on what grounds? This Chapter attempts to theorize 'norms of solidarity' in order to define and analyze foreign policy among Southern African states and in their relations with the EU.

Part I offers a brief introduction to rationalist and constructivist approaches to state behavior. The researcher builds on the works of constructivist scholars such as Martha Finnemore, Kathryn Sikkink, Amitav Acharya, and Jeffrey T. Checkel. With emphasis on the relationship between ideational and material concerns, the researcher attempts to explain the limitations and need for synergy of compartmentalized rationalist and constructivist understanding of state behavior. Part II analyzes the concept of "norms of solidarity" in the intra-regional relations of Southern African states. To understand the character and function of African-ness, preconceptions of "constructive engagement" or "quiet diplomacy" as the sole foreign policy tools of "norms of solidarity," are challenged. The researcher further argues that African-ness does not prohibit sanctions, neither does it advocate for "constructive engagement." Rather, African-ness (as the identity of Southern African states) and "norms of solidarity" (as a collage of several norms), condemns "interference in internal affairs of member states." After

[402] SADC Treaty art. 4, Aug. 17, 1992. (SADC Treaty art. 4 enumerates, "SADC and its Member States shall act in accordance with the following principles: (a) sovereign equality of all Member States; (b) solidarity, peace and security; (c) human rights, democracy, and the rule of law; (d) equity, balance and mutual benefit; (e) peaceful settlement of disputes.")

mapping the practice of "norms of solidarity" among Southern African states, Part III, discusses the relationship between economic pressures and "norms of solidarity" by looking at EU-Southern African relations. The central argument of Part III is that that Southern African states lack a common foreign policy toward the EU. In addition, fear of loss of access to European market shadows foreign policy-making among Southern African states. Part IV concludes.

1.2. Rationality And Norms Intertwined?

To understand state behavior among Southern African states, rationalist and constructivist understandings of state behavior are interrogated here.[403] First, rationalists in proposing a liberal and social scientific enterprise, albeit limited and narrowly understood, explain state behavior through a focus on the power of reason.[404] Conventionally, acting rationally means choosing the most feasible alternative, or self-interest maximizing choice. For example, Switzerland's relationship with Apartheid South Africa, although masked with the rhetoric of neutrality, was actually the preference of economic interests over ideational matters. Switzerland's ideational concerns were limited to the domestic arena, while self-interest

[403]One might wonder why there is a limited focus on rationalist and constructivist approaches to state behavior. The focus on rationalism and constructivism, in this chapter is not in any way intended to ignore the existence and value of other theories of state behavior, for instance, realism. However, there is a general conception that realists just like rationalists assume states to be rational actors. *See* generally Joe A. Oppenheimer, *Rational Choice Theory*, *in* THE SAGE ENCYCLOPEDIA OF POLITICAL THEORY 1150, 1150-1159 (M. Bervir ed., 2010) (discussing the conceptual understanding of rational choice). Compare with John J. Mearsheimer, *Reckless States and Realism*, 23 INT'L REL. 241, 241-256 (2009). (Explaining how realists and rationalists share common assumptions of the state Mearsheimer focuses on Kenneth Waltz assumptions of the state. For Mearsheimer, Waltz's rejection of states as rational self-interest maximizing actors makes Waltz conception of state behavior questionable.)

[404] Jon Elster noted:

> [R]ational choice theory appeals to three distinct elements in the choice situation. The first element is the feasible set, i.e., the set of all courses of action which (are rationally believed to) satisfy various logical, physical, and economic constraints. The second is (a set of rational beliefs about) the causal structure of the situation, which determines what course of action will lead to what outcomes. The third is a subjective ranking of the feasible alternatives, usually derived from a ranking of the outcomes to which they (are expected to) lead. To act rationally, then, simply means to choose the highest-ranked element in the feasible set.

Miles Kahler, *Rationality in International Relations*, 52 INT'L ORG. 919, 923 (1998) (quoting Jon Elster)

maximization defined its relationship with Apartheid South Africa.[405] Global policies such as UN sanctions on Apartheid South Africa, did not affect the material considerations of Switzerland.[406] The materialist ontology of rationalist understanding reasons that Switzerland's foreign policy towards Apartheid South Africa was the most feasible and logical behavior towards South Africa. Switzerland maintained a self-interest maximizing policy even if it meant going against established policies and collaborating with Apartheid South Africa.

Second, rational understanding, by adopting binary behavioral models – both rational and irrational – lacks the capacity to explain behavior based on the ideational realm, especially when rational understanding is associated with self-interest maximizing goals. The Reagan administration, for instance, based on purely materialistic values, supported the Apartheid regime in South Africa. President Reagan summarized the basis of American support for Apartheid South Africa as "a country that stood by us in every war we have ever fought, a country that strategically is essential to the free world in its production of minerals."[407] Contrary, to President Reagan's focus on economic interests, the US Congress acted on ideational anti-Apartheid policies and imposed sanctions on Apartheid South Africa.[408] The role of domestic norms of equality, and its correlation with the civil rights movement in the US, not only changed US

[405] Peter Hug in a study he conducted for the Swiss National Science Foundation exposes that Switzerland secretly supported the Apartheid regime until its abolition in 1994. Peter Hug detailed how economic interests took precedence over normative human rights concerns in Switzerland's policy towards Apartheid South Africa. *See* generally Peter Hug, *Aligning with the Apartheid Government against Communism: Military, armaments industry, and nuclear relations between Switzerland and South Africa and the UN Apartheid debate of 1948-1994*, 42+ NRP 1, 1-11 (2004).

[406] *See* generally Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464 (1996) (discussing UN's role in the anti-apartheid struggle from 1946-1990).

[407] *See* interview by Amy Goodman with Father Michael Lapsley, Director of the Institute for Healing Memories, in Democracy Now, N.Y. (Jun. 11, 2004) (quoting Reagan). *See* also Scott Bronstein, *Do Metal Sales Subsidize Apartheid*, N.Y. Times, Feb. 23, 1986 (discussing how South Africa next to the Soviet Union is the second biggest producer of platinum. And how politically and economically members of the Platinum Guild believed it is less costly for the US to import platinum from South Africa—even it meant supporting Apartheid in the latter.)

[408] Phillip I. Levy, *Sanctions on South Africa: What Did They Do?*, 89 AM. ECON. REV. 415, 417-418 (1999). (Discussing the imposition of sanctions by the US on Apartheid South Africa and its impact).

policies towards Apartheid South Africa but also offered a clear example of the compelling influence of circumstances beyond the duality of rational and irrational narratives.[409] This is not to argue that rational understanding does not consider ideational factors. Rather, when ideational concerns are entertained, they are rationalized in strictly materialistic scrutiny. The U.S. Civil Rights Act of 1964, passed under the Commerce Clause, prohibited segregation and discrimination against African Americans.[410] Instead of arguing for equality of men and women on principles of dignity, Congress's focus on the Commerce Clause is a clear example of how ideational concerns, analyzed under a materialistic lens, can consequentially dehumanize concerns of equality. Justice Robert H. Jackson eloquently summarized this dehumanizing effect, writing, "the migrations of a human being … do not fit easily into my notions as to what is commerce … to hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights."[411] In brief, ideational concerns can fall outside the duality of rational and irrational narratives. The aim here is not to dethrone reason as a model for understanding state behavior among Southern African states, but rather to show that state behavior is not always based on reason.

Constructivists, in contrast, consider emotional and moral factors to achieve political goals. Constructivism is human consciousness at its international level.[412] The identities and

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[409] *See* generally Audie Klotz, *Norms reconstituting interests: global racial equality and U.S. sanctions against South Africa*, 49 INT'L ORG. 451. 451-478 (1995) (Koltz in this article analyzes the role of norms in change US policies with regard to Apartheid South Africa.) *See* also William Minter and Sylvia Hill, *Anti-apartheid solidarity in United States – South Africa relations: From the margins to the mainstream,* in THE ROAD TO DEMOCRACY IN SOUTH AFRICA 745, 745- 822 (SADET ed., 2008). (Discussing the similarities and affinity between the civil rights movement in the United States and the anti-apartheid movement in South Africa.)

[410] *See* Commerce Clause, http://www.law.cornell.edu/wex/commerce_clause (last visited 04/05/2014) (Discussing how the Civil Rights Act of 1964 was passed under the commerce clause.) *See* also John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 855 (1998) (discussing how at times ideational factors are examined in materialistic perspective.)

[411] Chester James Antieau, *Equal Protection outside the Clause*, 40 CALIF. L. REV. 362, 370 (1952) (quoting Justice Jackson).

[412] Ruggie *supra* note 420 at 856. (Discussing constructivism and human consciousness Ruggie explains how constructivism "rests on an irreducibly inter-subjective dimension of human action.")

interests of actors are therefore socially constructed and rest with other ideational factors.[413] Similar to the flaws of pure rationalism, constructivism also displays a degree of naiveté in ignoring material interests as defining factors in changing or forming the logic of appropriateness.[414] In the African context, anti-Apartheid foreign policy was driven by ideational concerns of the inhumane treatment of South African people.[415] For constructivists, ideational concerns of African anti-Apartheid movements led to continental anti-apartheid policies. Such constructivist framing of foreign-policy making among African states might create arguments for the moral superiority of these states. But constructivist engagement fails to capture the role of calculated-materialist foreign-policy making among Southern African states. Malawi, for example, established and maintained formal relations with Apartheid South Africa based on rationalized materialistic calculations and contrary to the continental policy of isolating Apartheid South Africa. [416]

Understanding the limitations of their approaches to state behavior, several rationalist and constructivist scholars concur that norms and rationality are intertwined.[417] The difficulty of measuring ideational phenomena led to a correlation between "utility maximization" and "material terms," which consequently led to material ontology among proponents of

[413] *Id*.(discussing how identities and interests are social constructs).
[414] Milja Kurki and Adriana Sinclair, *Hidden in plain sight: Constructivist treatment of social context and its limitations*, 47 INT'L POL. 1, 1-25 (2010) (discussing theoretical and empirical limitations of constructivist theory).
[415] Similarly *see* also ZDENEK ČERVENKA, THE UNFINISHED QUEST FOR UNITY 23, 41, 110-122 (1977) (discussing the position and reaction of members of the African Union towards Apartheid South Africa and Malawi's relationship with the latter. After learning that Malawi established and maintained relations with Apartheid South Africa, some members of the OAU called for its expulsion from the Union.) *See* also Organization of African Unity, Resolution on South Africa, CM/Res.1019 (XLIII) (March 1986) (OAU member states condemning Apartheid in South Africa.)
[416] *See* for instance, Robert Davies and Dan O'Meara, *An Analysis of South African Regional Policy Since 1978,* 11 J. S. AFR. STUD. 183, 187-188 (1985) (discussing the relationship between Malawi and Apartheid South Africa in 1970s).
[417] *See* for instance Jeffrey T. Checkel, *International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide*, 3 EUR. J. INT'L REL. 473, 473-495 (1997) (In this article Checkel bridges the theoretical and methodical gap on the discourse of norms as constitutive and constraining of state behavior.) Martha Finnemore, Kathryn Sikkink, Miles Kahler and John Ruggie, whose works have been discussed and referenced in this chapter, also note that norms and rationality are intertwined.

rationality.[418] For proponents of constructivism, on the other hand, the propensity to counter norms and rationality fails to capture "strategic social construction" where normative behavioral changes are driven by rationality.[419] Hence, to draw a binary division between rationality and norms is to ignore that "rational choice theory can easily accommodate nonmaterial or non-selfish interests."[420] In conclusion, in this chapter, the discussions on "norms of solidarity" are cognizant of the relationship between material interests and the power of ideas in defining and formulating state behavior.

1.3. Are 'norms of solidarity' specific to Southern African states?

Whether seeking to claim superiority, exceptionality, or uniqueness, it is common to hear claims of regional or national specificity of norms. At times, through ignorance about a norm's presence in other parts of the world, advocates of regional or national norm specificity repeatedly claim their uniqueness. Such claims lead one to inquire whether there is a relationship between norms and geographic specificity. Are there norms that are particular to Africa, Asia or Europe? If so, what makes a norm or group of norms African, Asian, or European? And how does one identify regional specificity?

In the human rights field, advocates for Asian-values defense, such as Lee Kuan Yew, argue that Asian norms emphasize "order and discipline" over "freedom and liberty."[421] For Yew

[418] Finnemore and Sikkink *supra* note 406 at 889 (discussing how norms and rationality intersect.)
[419] *See* generally *id*.
[420] Jon Estler, *Rational Choice History: A case of Excessive Ambition*, 94 AM. POL. SCI. REV. 685, 692 (2000) (reviewing ROBERT H. BATES ET. AL., ANALYTICAL NARRATIVES).
[421] Lee Kuan Yew was the former Prime Minister of Singapore. The Asian values debate by challenging Human Rights discourse argues that Human Rights are western values and not in conformity with Asian culture. For his views on Asian values and its relationship to freedom and liberty *see* generally Fareed Zakaria, *Culture is a Destiny: A conversation with Lee Kuan Yew*, 73 FOR. AFF. 109, 109-126 (1994). Similarly *see* also Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 NYU J. INT'L L. & POL. 291, 311 (2000). *See* also Ian Taylor, *Sino-African Relations and the Problem of Human Rights*, 107 AFR. AFF. 63, 65, 63-87 (2007) (Notice how Ian Taylor's discussion of Human Rights took dual dichotomy of how socio-economic rights are discussed as Chinese and Civil and Political Rights as Western conceptions of Human Rights. Taylor noted, "China's current

and his supporters, norms that advocate for freedom and liberty are Western ideals that do not conform to Asian values. Yew's reasoning follows a methodologically flawed and a monolithic interpretation of Confucian thought, advancing oppressive behavior under the guise of resisting European hegemony.[422] Above all, it defines "us" as ordered and disciplined Asians and "them" as disordered and undisciplined others.

The idea of geographic norm specificity has also been used to justify superiority of one group over another. For instance, through discourse on "us" (civilized Europeans) and "them" (savage Africans), historical records show how geographic norm specificity was used to justify colonial ambitions.[423] Similarly, in a more contemporary setting, Ian Manners's work on Europe as a normative power reinforces the idea of Europe's normative superiority and its role as a global moral compass.[424] Manners stipulates that Europe's normative power positions it as the global compass of what is good. [425] Here again, irrespective of its Eurocentric logic, Manners's

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discourse on human rights is grounded in a communitarian focus on social solidarity and obligations towards others, coupled with an aspiration to advance societal concord.")

[422] For Sen the methodological claim with the Asian values defense research is that it tends to draw conclusion of what the past was from what the present is today. Therefore, it emphasizes the idea of Europe as the moral compass of the world and European enlightenment at the center of norm entrepreneurship and diffusion of what is good in this world. Sen eloquently argued:

> Authoritarian lines of reasoning often receive indirect backing from modes of thought in the West itself. There is clearly a tendency in the United States and Europe to assume, if only implicitly, the primacy of political freedom and democracy as a fundamental and ancient feature of Western culture – one not to be easily found in Asian. A contrast is drawn between authoritarianism allegedly implicit in, say Confucianism and the respect for individual liberty and autonomy allegedly deeply rooted in Western liberal culture. Western promoters of personal and political liberty in the non-Western world often see this as bringing Western values to Asia and Africa. …. Values spread by the European Enlightenment and other relatively recent development cannot be considered part of the long-term Western heritage, experienced in the West over millennia.

Amartya Sen, Human Rights and Asian Values, Address at the Carnegie Council on Ethics and International Affairs: Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy (1997).

[423] *See* for instance, Michael Adas, *Contested Hegemony: The Great War and the Afro-Asian Assault on the Civilizing Mission Ideology*, 15 J. WORLD HIST. 31, 31-63 (2004) (discussing European norm superiority and how it disguised colonial ambitions as civilizing missions.)

[424] *See* generally Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMMON MKT. STUD. 235, 235-258 (2002) (discussing the idea of Europe as a normative power.)

[425] Ian Manners argument for Normative Power EU has been subject to critique by several scholars as Eurocentric among others. *See* for instance, Thomas Diez, *Constructing the Self and Changing Others: Reconsidering 'Normative Power Europe*, 33 MILLENNIUM J. INT'L STUD. 613, 613-636 (2005) (critiquing the idea of Europe as a normative power Diez in this piece calls for more reflexivity.) Similarly, Storey and Durac by using the

conception of European normative power assumes norm superiority without analyzing the existence or absence of said norms in non-European societies.

In the African context, Tore Nyhamar argues rather boldly that there are four norms in Africa.[426] These are: (1) African solutions for African problems; (2) African states have three hierarchically ranked primary goals - independence, development, and unity; (3) the conquest of African states is outlawed; and (4) maintain the independence of all African states.[427] Nyhamar's question of which norms exist in Africa implies a list, which here is incomplete and limits the understanding of norms as standards of appropriateness in governing behavior among and between African states. Such codification from Nyhamar limits his work on norms and international relations in Africa. His decision to make a list, which excludes "norms of equality," could lead one to argue that norms of equality are un-African and by that measure are of European origin.[428] Nevertheless, his list, irrespective and as a result of its limitations, creates a dynamic of "us" vs. "them."

For Yew, Manners or Nyhamar, such specification of norms existing in a particular geographic region without examining its presence or absence in other parts of the world, creates a dynamic of "us" and "them" and thereby forms self-identity. This chapter does not explore or claim that norms of solidarity are solely African and absent in other parts of the world. Without claiming African exceptionalism, the chapter does attempt to analyze the impact of "norms" in

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example of Europe-Morocco relationship show that the idea of Europe as a normative power is flawed. *See* Andy Storey & Vincent Durac, *'Normative or Realist' versus 'Normative and Realist',* http://www.euce.org/eusa2009/papers/storey_01A.pdf (last visited 09/10/2014).

[426] Nyhamar cites and refers to I.William Zartman. However, it seems to me that Nyhamar misread Zartman's analysis of Africa's system and wrongfully attributes the codification of four African norms to Zartman. Zartman did not limit or codify African norms. In his work without limiting or excluding the existence of other norms Zartman described the workings of African subordinate system. *See* Tore Nyhamar, *How Do Norms Work? A Theoretical and Empirical Analysis of African International Relations*, 5 INT'L J. PEACE STUD. http://www.gmu.edu/programs/icar/ijps/vol5_2/nyhamar.htm (last visited 04/23/2014). *See* also I.William Zartman, *Africa as a Subordinate State System in International Relations*, 21 INT'L ORG. 545, 558-561 (1967).

[427] Nyhamar *supra* note 436.

[428] *See* for instance Klotz *supra* note 419 (discussing norms of equality in South Africa).

general and "norms of solidarity" in particular in framing foreign relations of Southern African states.

1.4. Norm Recognition: Observance & Breach – Approval & Disapproval?

There are conceptual and empirical problems in norm recognition. "Norms of solidarity" are not always legislated in regional integration agreements. If and when they are promulgated, such as those among COMESA member states, solidarity is legislated through sets of governing principles.[429] Yet, in the positivist legal tradition, principles are not always justiciable and take the role of mere guidance of behavior.[430] How can the existence of a particular norm or group of norms be recognized if its existence is not explicitly adopted in a treaty? When norms are promulgated as principles without legal force, how can their observance or breach be recognized if they are not justiciable before courts? In this chapter state behavior is used as a tool to recognize and understand how and why states behave in regard to certain normative commitments.[431] In order to identify normative commitments of Southern African states, this

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[429] COMESA Treaty, Art. 6(2),

> The Member States, in pursuit of the aims and objectives stated in Article 3 of this Treaty, and in conformity with the Treaty for the Establishment of the African Economic Community signed at Abuja, Nigeria on 3rd June, 1991, agree to adhere to the following principles … solidarity and collective self-reliance among the Member States.

[430] *See* for instance, Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823, 823 (1972) (discussing positivist assumptions that laws differ from principles and how such thinking draws limits of law and legality.) *See* also Eric Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights And The South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 321-386 (2007) (discussing justiciable and non-justiciable laws. In addition, see how Christiansen discusses the African National Congress's Charter. Christiansen notes how incorporating the principles in the final constitution needed some form of formal process, in order for the principles to have legal enforceability.)
In this chapter, despite notable difference between principles and norms, preference is given to the use of 'norms;' since both set standards of appropriate behavior despite their legislation status. Stephen D. Krasner, *Structural Causes and regime consequences: regimes as intervening variables*, 36 INT'L ORG. 185, 186 (1982) (For Krasner 'norms' and 'principles' are distinct. Principles are "beliefs of fact, causation, and rectitude." While 'norms' are "standards of behavior defined in terms of rights and obligations."

[431] State behavior in this chapter includes past actions, present actions, official and unofficial statements among others. One could argue that norm recognition through state behavior recognizes norms of the past and not necessarily of the future. Understanding such critique, however, the focus on state behavior is not limited to actions of the past but also of the present. *See* also Annika Björkdahl, *Norms in International Relations: Some Conceptual*

chapter looks at norm observance or breach and the reactions that a specific action generates in the Southern African community.[432]

Generally speaking, norm observance can generate popular praise or fail to attract public recognition, while norm breach can generate public condemnation. Norm observance, taken as the expected behavior of an actor, might go unobserved if there is no public recognition. However, since norm breach generally generates disapproval, it is easily recognizable. But whose approval or disapproval matters to render an act or failure to act as norm observance or breach? In today's globalized world, a set of norms can be shared at sub-regional, continental, and global levels, and a particular behavior can receive varied reactions at each levels. Looking at norm observance and breach and the approval and disapproval of a particular behavior could be the flip side of asking whose norms matter. Analysis of the hierarchy of norms is, however, concerned with the relationship between global and domestic norms.[433] The focus in this section is not on norm superiority, but rather, examines the approval and disapproval of norms to identify the existence or absence of a particular norm or group of norms.

During the Arab Spring, one could notice varied and at times striking reactions among African states and global actors towards the Libyan crisis. Members of the AU proposed a negotiated transition in Libya in contrast to Western powers that preferred armed intervention.[434] The central norms valued by members of the AU include the prohibition of foreign interference

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and Methodological Reflections, 15 CAMBRIDGE REV. INT'L AFF. 9, 13 (2002) (discussing the empirical and conceptual challenges in norm recognition.)

[432] One might argue that using state practice – norm observance and norm breach – among Southern African states is in a way alleviating "norms of solidarity" to the status of customary international law. *See* Statute of the International Court of Justice Art. 38(1(b)).

[433] *See* generally, Amitav Acharya, *How Ideas Spread; Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT'L ORG. 239, 239-275 (2004).

[434] *See* generally Alex Dewaal, *The African Union and the Libya conflict of 2011*, http://sites.tufts.edu/reinventingpeace/2012/12/19/the-african-union-and-the-libya-conflict-of-2011/ (last visited 05/08/2014). Paul D. Williams, *From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture*, 106 AFR. AFF. 253, 253-279 (2007) (generally discussing norms of non-interference in internal affairs of member states of the AU.)

in domestic affairs of member states.[435] While NATO and its allies rejected the AU's negotiated solution to the crisis.[436] The central question that this competing solutions raise, relevant to the broader questions of this chapter is: Whose approval or disapproval matters in rendering a behavior either norm observant or norm breaking? The disapproval by global actors of the African proposal for Libyan issues poses the question as to whose disapproval renders an act a norm breach. Clearly, there existed clashes of normative proposals and priorities between African states and global actors. In analyzing "norms of solidarity" and its observance or breach, the exploratory task of this chapter is limited to the community of African states, their historical and contemporary solidarity arrangements, and whose approval or disapproval matters.

1.4.2. Norm Recognition or Normative Shift among Southern African states

By establishing the SADC Tribunal, the Southern African states agreed that any breach of norms of justice (codified treaty law) must be rectified and penalized, thereby setting norms of justice as appropriate behavior among members of the community. However, the Tribunal's *de facto* suspension and subsequent decision to limit its jurisdiction have significantly limited access to justice of Southern African citizenry. But do the actions of Southern African states and their decision to dissolve the Tribunal amount to a breach of norm? If state behavior - which in this case is Southern African states - establishes the existence and/or breach of norms, does the dissolution of the Tribunal amount to a shift in normative stance rather than a breach of norm?

The dissolution of the Tribunal was both praised and criticized. Julies Malema, leader of the South African Economic Freedom Fighters Party and a controversial figure, implicitly

[435] *See* Organization of African Unity, Lomé Declaration of on the framework for an OAU response to unconstitutional changes of government, AHG/Decl.5 (XXXVI) (July 2000) (OAU member states condemning unconstitutional change of government.) *See* also Constitutive Act of the AU art. 4(G) (prohibiting interference in internal affairs of member states). *See* also African Union, Communiqué of the 265th Meeting of the Peace and Security Council, PSC/PR/COMM. 2 (CCLXV) (March, 2011).
[436] Dewaal *supra* note 444.

praised the Zimbabwean government and the dissolution of the Tribunal as a positive move toward redistributive justice.[437] On the contrary, Ariranga G. Pillay, former president of the Tribunal, labeled dissolution of the Tribunal a missed opportunity "for the advancement of principles of human rights, democracy and the rule of law in the SADC region."[438] Similarly, the SADC Lawyers Association condemned the dissolution as a setback in regional integration efforts and "disregard for the rule of law."[439]

The Pan African Lawyers Union and the Southern Africa Litigation Center questioned the legality of the dissolution of the Tribunal in front of the African Human Rights Court (AHRC).[440] Similarly, Luke Tembani and Benjamin Freeth petitioned the African Commission for Human and Peoples Rights (hereinafter the "Commission") to declare the suspension of the Tribunal a violation of the SADC Treaty.[441] In both cases the claimants' petitions were either dismissed or denied. The decisions of the AHRC and the Commission do not mean that either entity approved or disapproved the dissolution of the SADC Tribunal. Rather, both entities

[437] Although not directly praising dissolution of SADC Tribunal, Julius Malema by praising actions of the Zimbabwean government in relation to minority landowners indirectly dealt with the SADC Tribunal's decision. Implicitly, it seems to me that Malema supports dissolution of the Tribunal. Because if the Tibunal's decision against Zimbabwe was enforced, Zimbabwe's land policy would be nullified, which for Malema would mean Zimbabwe's land policy will fail to address issues of redistributive justice. *See* for instance Yahoo News, Malema praises Mugabe, 01/10/2014, https://za.news.yahoo.com/malema-praises-mugabe-062950369.html (last visited 04/09/2014).

[438] Ariranga G. Pillay, former president of SADC Tribunal, Reflecting on the SADC Tribunal, available at http://web.up.ac.za/sitefiles/file/46/1322/Pillay%20%20Reflecting%20on%20the%20SADC%20Tribunal.pdf (last visited 04/09/2014).

[439] SADC Lawyers' Association, Communiqué of the Fourteenth Annual General Meeting of SADC Lawyers' Association, http://www.sadcla.org/sites/default/files/Official%20Communique%20of%20the%2014th%20SADCLA%20AGM-Conference.pdf (last visited 04/09/2014) ("The suspension of the SADC Tribunal presents lacunae for the consolidation of regional integration efforts and facilitates the impugned disregard for the Rule of Law in the region, which should be minimized by SADC legal professionals through active and creative engagement of supranational courts and fora.")

[440] Suspension of SADC Tribunal, Advisory Opinion 002/2012, Afr. Ct. H. & Peoples R. (Mar. 15, 2013) (discussing the decision of the African Court for Human and Peoples' rights on request for advisory opinion of the legality of the dissolution of the SADC Tribunal).

[441] Freeth and Tembani also petitioned the court to rule that dissolution of the Tribunal was a violation of the African Charter and general principles of international law. Luke Tembani & Benjamin Freeth v. Angola & Thirteen Others, Afr. Comm'n H. & Peoples R., Communication No. 409/12, 54th Ordinary Session (2013).

offered legal analyses of the issues at hand from a purely legalistic approach.[442] This brings into question the relationship between courts and norm observance/breach. If dissolution of the Tribunal found not to be a violation of for example the African Charter can one conclude that there was no norm breach? What is the relationship between law and norms?

As noted at the outset, a norm is defined as "a standard of appropriate behavior for actors with a given identity."[443] Likewise, law sets standards of appropriate behavior for actors with a given identity. Norms [both legal norms and other norms] co-habit the same space and govern the same community of actors [Southern African states.] The broader question of this chapter aspires to understand is the influence of norms – including legal norms – in governing state behavior. In this context, it does not matter whether or not the norm is promulgated as law. It is not the legislation of the norm that matters but its acceptance by Southern African states as a basis for interaction. The focus of this chapter is not only observance/breach of the SADC Treaty and its protocols, but also on norms that were not promulgated by Southern African actors.

PART – II – NORMS OF SOLIDARITY

"Norms of solidarity" is a general label for a variety of related normative approaches to state behavior among Southern African states. "Norms of solidarity" comprise a variety of beliefs that manifest themselves as behavioral norms, which create regulatory or constitutive standards of appropriateness. Although the SADC Treaty and other formal treaty obligations among Southern African states create standards of appropriateness, "norms of solidarity" is agnostic to legality or membership of integration scheme. Therefore, "norms of solidarity" treat the SADC treaty as either endogenous or exogenous, depending on the problem under

[442] The AHRC concluded that it does not have jurisdiction to analyze the case on the ground that a similar issue was being entertained before the Commission. On the other hand, the Commission ruled on the merits of the case and concluded that it lacks jurisdiction to interpret and apply the SADC Treaty.
[443] Finnemore and Sikkink, *supra* note 406.

consideration. In short, "norms of solidarity" are reflected in mutual solidarity arrangements that expand beyond the confines of law, legality, and regionalism.

Norms of solidarity among Southern African states are better understood as a "part," whose characteristics are determined by the larger continental project of African-ness.[444] The continental sensibility of African-ness defines the internal structure and dynamism of "norms of solidarity" among Southern African states. This is not to claim that continental identity of African-ness originated in one part of Africa. Rather, the shared experience of colonialism and racial domination led to the social construction of African-ness among all African states.[445] Hence, to limit the era of Southern African "norms of solidarity" to the formalization of sub-regional anti-apartheid resistance through the SADC is to ignore the continental context of "norms of solidarity."[446]

"Norms of solidarity," although part of the continental emancipatory project, are also a whole in their own right. Several norms, including racial equality, self-determination, equality of states, and equal access to a just and participatory global order, among others, are at interplay in building the underlying logic and path of "norms of solidarity."[447] Larger continental "norms of

[444] Unlike in the colonial era conceptualization of Pan-Africanism, "norms of solidarity" in its post-colonial perspective is not a mere replication; it is narrow and state level analysis. In its first phase (Garvey's and Du Bois's struggle for Pan-African unity) "norms of solidarity" transforms the social relations of African-ness without altering the global order and state behavior. In the second phase (post-independence era of African states), formerly independent African states, as the framers of African order, behave and influence global order. The discussion of "norms of solidarity" in this chapter is limited to the second phase of post-independence Africa.

[445] This solidarity among Africans is the result of "anguish and dream" that created a feeling of what Thomas Kwasi Tieku calls "we-ness." Tieku *supra* note 410. *See* also Ali Mazrui, *Pan-Africanism: From Poetry to Power*, 23 J. OPINION 35, 35 (1995) (discussing solidarity among Africans to be the result of racial and colonial oppressions.)

[446] For "norms of solidarity" among Southern African states, if one was to limit the norm emergence era to the time when the SADC was formalized – which was in 1980s – makes it seem that, among Southern African states, feelings of African-ness emerged in 1980s. Alternatively, it could also justify a possible argument – which argues that "norms of solidarity" actually started in other parts of the African continent. Through the process of norm diffusion and localization (as theorized by Amitav Acharya) "norms of solidarity" were transplanted in Southern African states. In conclusion, by looking at Southern African "norms of solidarity" in its broader continental context it allows one to avoid debates and issues associated with identity of norm entrepreneurs in the construction and life cycle of "norms of solidarity."' *See* for instance, Acharya, *supra* note 443.

[447] Borrowing from Audie Klotz norms of racial equality "defines discrimination based upon racial categories (as evident in racist language, personal actions, and/or social policies) as bad and individual equality (lack of

solidarity" determines claims of norms of self-determination and norms of equality.[448] Theoretically, norms of racial equality are in harmony with "norms of solidarity," since the later were the platform that helped materialize norms of equality on the African continent. Notably, although "norms of solidarity" provide an account of natural destiny of being African, they have narrow geographical application, unlike norms of equality that have international application.[449]

"Norms of solidarity," or glamorized African-ness, could be considered to be in a degenerative state. The genesis of the feeling of African-ness is related to the process of decolonization and racial equality on the continent. With the end of Apartheid rule and the independence of all African states from Western colonization, it is rationalized that feelings of African-ness have declined. This degeneration manifests itself in three ways. First, the formation, direction and perception of home-grown organic norms of solidarity were diluted and eventually degenerated through inorganic policies of global financial and trade institutions that favored marketization rather than African-ness.[450] Second, degeneration is the result of contradiction between regional and global norms. Laurie Nathan describes the conceptual degeneration of "norms of solidarity," where regional "norms of solidarity" are elevated over global "norms of

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discrimination) as good." *See* Klotz *supra* note 419 at 451. For a definition of "norms of equal access to justice" *see* Deborah L. Rhode, *Access to Justice* 69 FORDHAM L. REV. 1785, 1786 (2001) ("'Equal justice' is usually taken to mean 'equal access to justice,' which in turn is taken to mean access to law.")

[448] Mazrui *supra* note 455 (discussing how solidarity was central to the struggles for self-determination and equality).

[449] This could be interpreted as saying "norms of solidarity" are solely African. This Chapter has not explored the existence or lack of "norms of solidarity" in other parts of the world. Hence, the researcher does not claim African exceptionalism. What the researcher aims to show in this section is that "norms of solidarity" has limited geographic application. "Norms of solidarity" govern behavior of African states. The researcher also understands such norms could govern behavior among – for instance Latin American states. In addition, the use of African-nature in this section, similar to pan-Africanist movements, should be understood the biological destiny of being black, darker race or non-Caucasian.

[450] African states are more passive and least active in their trade negotiations. Sheila Page noted that a third of African bureaucrats surveyed believe that domestic economic policies of their respective countries are formulated by global financial and trade institutions with little or no say from African governments. Hence, with little or no say from the African state it could be rationalized that degeneration of African-ness is the result of marketization. *See* Sheila Page, *Developing Countries: in GATT/WTO Negotiations* 42-43 (Overseas Development Institute, 2002).

equality."[451] Third, degeneration of "norms of solidarity" could be intra-regional or intra-state.[452] The aim of this chapter is not to assess the state of degeneration or renaissance of African-ness, but to explain the role of African-ness in shaping state behavior among Southern African states and Southern African regional integration arrangements.

2.2. Norms of Solidarity: Ambivalences of African-ness

To understand norms of solidarity one needs to recognize their ambivalences. First, norms of solidarity portray post-colonial African states as virtuous states that share common rhythms, lyrics and tunes of African-ness. This characterization paints a popular image of African-ness as altruistic, where the concerns of all African states are overwhelmingly present. For instance, Nyerere noted how "the whole of Africa speaks with one sincere voice."[453] In the spirit of African-ness, Nelson Mandela promised that post-apartheid South Africa would restrain self-interested considerations for the benefit of its neighbors.[454] In reality, relations among African states are fraught with tensions and the application of norms of solidarity has been

[451] *See* generally Laurie Nathan, *Solidarity Triumphs Over Democracy – The Dissolution of the SADC Tribunal*, 57 DEV. DIALOGUE, 123, 123-138 (2011) (arguing that dissolution of SADC Tribunal amounts to the triumph of "norms of solidarity" over democratic and legal principles of the SADC.)

[452] For an example of degeneration of "norms of solidarity" *see* for instance David Hirschmann, *The Black Consciousness Movement in South Africa*, 28 J. MOD. AFR. STUD. 1, 1-22 (1990) (discussing black consciousness movement in South Africa and how that has changed and weakened through time.)

[453] *See* Nyerere Address, *supra* note 239, at 101. (Note how Nyerere's speech is also titled "The Whole of Africa speaks with one sincere voice." For Nyerere, 'one voice' is solidarity against colonial and racial domination.)

[454] Nelson Mandela noted post-apartheid South African foreign policy will "resist any pressure or temptation to pursue its own interests at the expense of the sub-continent." Mandela *supra* note 409 at 86.
Indeed, apartheid South Africa had conflicting relations with its regional neighbors. Khabele Matlosa argues that South Africa's behavior with its neighbors is benign. Matlosa noted and referred to South Africa's decision to renegotiate Southern African Customs Union to create a more just compensation system for states like Lesotho and Swaziland. Moreover, Matlosa also infers that South Africa's intervention to resolve domestic problems of Lesotho and Swaziland was based on South Africa's self-serving interests. In short for Matlosa, South Africa's relationship with its neighbors is composed of self-serving policies in the political arena and redistributive justice policies in its regional economic interactions with Lesotho and Swaziland. Adam Habib on the contrary argues that considerations for economic interests of other African states are romantic ideals of the African National Congress, which will have detrimental impact on South African economy. Habib argues that South Africa should take hegemonic role in the region. *See* Khabele Matlosa, *Vulnerability and viability of small states in Southern Africa in a post-apartheid era; is South Africa still "Big Brother?*, 11 PULA J. AFR. STUD. 117, 117- 131 (1997). *See* also Adam Habib, Hegemon or Pivot? Debating South Africa's role in Africa, Address at the Center for Policy Studies and Open Source Foundation of South Africa (August 2003).

inconsistent. Even during the liberation struggle, support and solidarity for the continent's decolonization project was subject to contradictory and clashing interests between OAU member states.[455] Although the OAU's Liberation Committee channeled moral and material support to half of the states that achieved independence since its establishment, its early retirement failed to put an end to the question of Western Sahara.[456]

Similarly, when it comes to multilateral negotiations, the role of African-ness is questionable. Due to inadequate resources, several African states do not have representatives in multilateral negotiations, and it is common for states such as South Africa and Egypt to represent Africa in WTO forums and negotiations.[457] However, when South Africa represents Lesotho in multilateral negotiations, one questions South Africa's concern with the latter's welfare, given that inflation in Lesotho is driven by prices in South Africa.[458] Likewise, when Ethiopia's late Prime Minister, Meles Zenawi, represented Africa in the Copenhagen negotiations, he was criticized for using the negotiating platform for Ethiopia's diplomatic considerations to the

[455] *See* generally Amare Tekle, *A Tale of Three Cities: The OAU and the Dialectics of Decolonization in Africa*, 35 AFR. TODAY 49, 49-60 (1988) (discussing the role of the OAU and its member states in the decolonization movement of Africa.)

[456] The OAU Liberation Committee was formed in the first assembly of heads of states of Africa in May 1963. Since its establishment and up to its dissolution in 1994, it helped eleven out of twenty two states gain their independence. The issue of the Republic of Arab Saharawi Democratic Republic has not been resolved, yet the Liberation Committee was dissolved nevertheless. Morocco's invasion of Western Saharan territory has not been resolved, yet the OAU felt like the Liberation Committee is due for retirement. In dissolving the Liberation Committee, the OAU reasoned, "the mandate given to the Liberation Committee in 1963 has been satisfactorily accomplished." Organization of African Unity, Dissolution of the OAU Liberation Committee, Resolution AHG/Res. 228 (XXX) (June 1994).

[457] Page *supra* note 460 at 43 (discussion how representation by big states such as South Africa is provoking other African states to participate as well.)

[458] Trade Policy Review Body*, Trade Policy Review: Reports by the members of the Southern African Customs Union*, WT/TPR/G/222/Rev.1, 16 (Dec. 8, 2009) ("Inflation in Lesotho is driven by prices in South Africa, which remains the main source for almost 95% of imports for final consumption. Inflation rates peaked at 12.6% in 2002 as regional food shortages caused a significant increase in the price of agricultural products. A rapid reduction followed due to favourable price developments in South Africa, which brought inflation levels down to 3.4% by 2005. There has been a steady increase since then as inflation reached 11.2% in 2008 due to the substantial increase in food and fuel prices. Inflation is expected to fall to 6.8% in 2009 given sluggish economic activity and lower commodity prices under the current global economic downturn.")

detriment of the continent he represented.[459] Abdelkader Amara, Morocco's Minister of Industry, Trade and New Technologies, claimed Morocco will "defend the interests of the continent."[460] For Minister Amara, Morocco's status in the AU [Morocco is not member of the AU] is irrelevant to its motives to defend the interests of the continent.[461] This is not to argue that nonmembers, or states that are outside Africa lack positive intentions towards the continent, but rather to illustrate the irony of Morocco's relationship to other members of the AU.

Second, solidarity arrangements can be motivated by self-interested considerations rather than ideational concerns. Explaining substantive solidarity arrangements, Milton Obote eloquently summarized: "[o]n one single issue has Africa ever been as solidly united as on the question of Apartheid and colonialism."[462] But why were independent African states united to fight racial and colonial domination? Were they motivated by the enemy of my enemy is my friend politics? Understanding, the normative and principled ideas that drove decolonization and anti-apartheid movements on the continent, it is theoretically possible for African states to stand in solidarity against colonial powers out of self-interested considerations. Kwame Nkrumah reasoned that in post-colonial life, an independent state does not and cannot exist alone except in the midst of other independent African states.[463] Clearly, living with a friendly neighbor has a significant impact on the allocation of resources and development planning. For these reasons, independence for all African states reduces the fear of re-colonization, allowing newly

[459] *See* Jean-Christophe Hoste, *Where was united Africa in climate change negotiations?* 4 (Africa Policy Brief No. 2, 2010) (The late Ethiopian Prime Minister Meles Zenawi led the African delegation in Copenhagen negotiations. Several African states for instance, Sudan's chief negotiator Lumumba Di-Aping, accused Mr. Zenawi of betraying the African continent. Some even go further to suggest that Mr. Zenawi decided to use the opportunity to advance Ethiopia's self-interest.)

[460] WTO negotiations: Morocco spares no effort to represent African voice, http://www.lemag.ma/english/WTO-negotiations-Morocco-spares-no-effort-to-represent-African-voice_a4639.html (last visited 05/22/2014).

[461] Morocco suspended its membership in the African Union as a result of the African Union's decision to recognize and admit Sahrawi Arab Democratic Republic.

[462] Milton Obote, Prime Minister, Uganda, Address at the 1963 African Summit (May 23, 1963), *in* CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013, *supra* note 230 at 108.

[463] Nkrumah Address, *supra* note 238, at 126 ("As I have said over and over again, the independence of our separate States is meaningless unless the whole of Africa becomes free and united.")

independent states to achieve other aspirations. In addition, some states received material benefits as a result of their normative stance. For instance, Southern African states massed tons of foreign aid during the formative years of the SADCC. This led for Martin Adelman to argue that the formation of a Southern African integration arrangement was a materialistic policy disguised by an ideational anti-apartheid stance.[464]

Third, some scholars have long been critical that aspects of norms of solidarity have legitimated authoritarian states.[465] As a result of norms of solidarity, some African states enjoy membership in regional and sub-regional integration schemes, although lacking legitimacy in their domestic constituencies. For instance, without legitimacy from its actual citizenry, the Zimbabwean government enjoys regional support and membership in the SADC.[466]

Despite ambivalences, however, "norms of solidarity" play a central role in defining the foreign policy of African states in general and Southern African states in particular. Particularly, in the anti-apartheid movement of Southern African states, the role, function, and value of "norms of solidarity" led to contemporary post-apartheid South Africa. Nevertheless, the question remains whether "norms of solidarity" hold value in the post-apartheid era, and if they

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[464] *See* generally Martin Adelman, *Fundraising or Common Foreign Policy? 30 Years of SADC Consultative Conference, in* MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA 356, 359-361 (Anton Bösl et.al., eds., 2008) (Between the years of 1980-1987, Martin Adelman shows that the anti-apartheid movement of SADC states received over a billion US dollars.)

[465] *See* for instance Tieku *supra* note 410. *See* also Tim Murithi, *African Approaches to Building Peace and Social Solidarity*, 6 AFR. J. CONFLICT RESOL. 9, 29 (2006) (Another possible ambivalence of 'norms of solidarity' like regional integration is focused on the role of states in continental foreign relations. For a critic of how continental pan-African integration alienated the African people and failed to establish Pan-African solidarity.)

[466] Elias Mambo, *Irony of SADC's Mugabe endorsement*, Aug. 23, 2013, http://www.theindependent.co.zw/2013/08/23/irony-of-sadcs-mugabe-endorsement/ (discussing the relationship between legitimacy and regional integration membership with particular focus on Zimbabwe and SADC).
Similarly, despite popular protest in Kenya - "don't be vague, let's go to the Hague" - AU's decision on the relationship of Africa with the International Criminal Court (ICC) called for suspension of Uhuru Kenyatta's trial at the ICC. Gabrielle Lynch and Miša Zgonec-Rožej, *The ICC Intervention in Kenya*, 4-5 (Chatham House Afr./Int'l Group, Paper No. 01, 2013) (discussing the road to ICC and the popular protest in Kenya for ICC trial.) *See* also African Union, Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (2013) (especially note how the justifications provided by the AU do not mention or put into consideration the popular protest in Kenya that calls for ICC trials.)

do, how do they work? How do South Africa's historical wrongs affect its current status in the region? How are "norms of solidarity" practiced? What foreign policy tools do Southern African states use in their solidarity arrangements? The next section attempts to answer why, when and by whom "norms of solidarity" are practiced.

2.3. Is African-ness Penance for Apartheid?

The end of Apartheid is celebrated as the rebirth of African-ness in South Africa's foreign policy. South Africa's Apartheid foreign policy was best summarized by John Barratt as, "one of trying to ensure the security, status and legitimacy of the state within the international system against the background domestically of preserving a white controlled state."[467] Additionally, Apartheid South Africa resorted to "coercive hegemony" and power politics to influence behavioral shifts in the majority black controlled Southern African region.[468] Therefore, during the pre-post-apartheid era, Southern African foreign policy focused on making minor shifts in diplomatic relations between South Africa and the rest of Africa.[469] On the contrary, in the post-Apartheid period, the need for re-immersion of South Africa into the pool of African states brought not merely the transformation in racial equality policies of South Africa, but also a shift in its relationship with states and people of the African continent. This transformation was led by Nelson Mandela and his outline of South Africa's post-apartheid foreign policy pillars including, human rights, democracy, justice and respect for international

[467] Graham Evans, *Myths and Realities in South Africa's Future Foreign Policy*, 67 INT'L AFF. 709, 712 (1991) (quoting John Barratt).

[468] *See* for instance, Roger Pfister, *South Africa's Recent Foreign Policy Towards Africa: Issues and Literature* (Ctr. for Int'l Stud., Paper No. 29, 2000) (discussing South Africa's foreign policy during and post-apartheid period. During Apartheid era, Pfister noted how South Africa based on self-interested policies focused on destabilizing Southern African states. In short, during Apartheid era South Africa's foreign policy towards other African states was based on "coercive hegemony.")

[469] Evans *supra* note 477 at 709-721 (discussing the role of the pre-post-apartheid era on foreign policy making in South Africa. Evans noted how the then Director General of South Africa's Department of Foreign Affairs affirmed South Africa's commitment for "new diplomacy" but not necessarily for "new foreign policy." Evans argues the choice of phrase by the then South Africa's government officials of "new diplomacy" over "new foreign policy" shows the limited shift one would see in post-apartheid South Africa.)

law, peace and non-violence, African-ness, and regional and international economic cooperation.[470] In the economic policy sphere, the post-apartheid South African government focused on building consensus and asserting its African-ness through different foreign policy initiatives. For instance, Thabo Mbeki's African renaissance movement espouses South Africa's support of Pan-Africanism.[471] Similarly, despite historical intentions of incorporating Botswana, Lesotho and Swaziland into the Republic of South Africa, post-apartheid South Africa chose to renegotiate the terms of the SACU to create a better profit-sharing mechanism in favor of Botswana, Lesotho and Swaziland.[472] The hierarchy, relationship, and application of South Africa's pillars of foreign policy, however are dubious and problematic.[473] Hence, in the next two sub-sections, the question of whether African-ness or observance of norms of solidarity is a penance for South Africa's historical wrongs will be analyzed by looking at two specific foreign policy incidents.

2.3.2. Nelson Mandela's Presidency: African-ness & South Africa's relations with Nigeria

In the continental context and during Nelson Mandela's presidency, execution of Ken Saro-Wiwa, Nigerian environmental activist, was one of the major post-apartheid foreign policy

[470] Mandela *supra* note 409 at 87.
[471] *See* for instance, Gerrit Olivier, *Is Thabo Mbeki Africa's savior?*, 79 INT'L AFF. 815, 815 (2003) (Discussing how Mbeki articulates his ideas for Africa as a continuation of Pan-Africanist movement and calls himself neo-pan-Africanist. The distinction being for "the original pan-Africanists sought the 'political kingdom' for Africa, Mbeki casts himself as a neo-pan-Africanist, seeking the 'economic kingdom' for the ailing continent.")
[472] *See* Peter Robson, *Economic Integration in Southern Africa*, 5 J. MOD. AFR. STUD. 469, 469 (1967) (discussing both South Africa and Britain assumed that Botswana, Lesotho and Swaziland will ultimately be part of the Republic of South Africa.) *See* also Mandela *supra* note 409.
[473] *See* generally James Barber, *The new South Africa's foreign policy: principle and practice*, 81 INT'L AFF. 1079, 1079-1096 (2005) (Here James Barber does a good job showing the inconsistencies between South Africa's foreign policy principles and practice. He illustrated that in its post-apartheid era, South Africa concern was pursuit of human rights, democracy among others. South Africa's role in peacekeeping missions in the continent is consistent with the post-apartheid principle of promotion of human rights, democracy and the like. Yet, there is a clear shift in its foreign policy with regard to Zimbabwe's land policy.)

contentions of African-ness for South Africa.[474] At the beginning of the Saro-Wiwa crisis, South Africa's policy towards Nigeria was based on "constructive engagement," which Mandela summarized as: "[m]y own approach is to be in direct contact with them,...I do not think, from my own point of view, I can call for sanctions at this stage. If persuasion does not succeed, it will be time to consider other options."[475] South Africa's constructive engagement failed to halt Saro-Wiwa's execution. This led critics to draw similarities between South Africa's policy of constructive engagement and Margaret Thatcher's policies towards Apartheid South Africa, where "constructive engagement" became synonymous with lip service.[476] Unlike Thatcher's Apartheid policy, South Africa's policy towards Nigeria took a major turn after the execution of Saro-Wiwa. South Africa advocated for sanctions against Nigeria.[477] Nonetheless, South Africa's foreign policy towards Nigeria was subject to criticism; activists criticized "constructive engagement" for its timidity, while African states criticized South Africa's call for sanctions as defiance of African Solidarity.[478] Several members of the AU, saw Nigeria as a continental leader, and "accused Mandela of breaking African unity."[479] Even Nigerian reactions to Mandela's condemnation of the Saro-Wiwa incident were mixed. For instance, Ken Saro-Wiwa

[474] *See* Kenule Beeson Saro-Wiwa, *Final Statement from Nigeria*, 5 INT'L J. MULTICULTURAL STUD. (1996) (Saro-Wiwa was arrested for his peaceful protests against multinational oil companies, such as Shell, which played a devastating role in damaging the ecology of the lands of Ogoni people in Nigeria. As a result of his activism he was condemned to death and executed on Nov. 10, 1995.)

[475] Jack McKinney, *Mandela Missed A Chance to Save Nigerian Dissident*, PHILADELPHIA INQUIRER Nov. 17, 1995, http://articles.philly.com/1995-11-17/news/25682842_1_ken-saro-wiwa-mandela-ogoni (quoting Nelson Mandela).

[476] James Barber, *The Commonwealth, Nigeria and South Africa* 1-4 (The S. Afr. Inst. of Int'l Aff., The Int'l Pol'y Update No. 5,1997) (discussing constructive engagement of South Africa and its similarities with western policies towards apartheid South Africa.) Gavin Evans, *Margaret Thatcher's shameful support for apartheid*, MAIL & GUARDIAN, Apr. 19, 2013, http://mg.co.za/article/2013-04-19-00-margaret-thatchers-shameful-support-for-apartheid (discussing constructive engagement as practiced by Margaret Thatcher and Ronald Reagan in relation to apartheid South Africa.)

[477] Barber *supra* note 483, at 1084. (As a result of its defiance of international human rights norms Mandela called for economic sanctions and diplomatic isolation to be imposed on Nigeria. However, Nigeria's punishment was suspension of its membership in the Common Wealth.)

[478] *Id*. (discussing Liberia's criticism of how South Africa reacted against Nigeria.)

[479] *Id*. (discussing how other African states viewed Nigeria, Barber noted that African states did not view Nigeria as a human rights abuser but rather as continental leader, supporter of liberation movements, major contributor to the OAU.)

Jr., spokesman of Nigeria's President Goodluck Jonathan, called South Africa's foreign policy towards Nigeria rather timid.[480] On the other hand, some Nigerians were not only dismayed by South Africa's position towards Nigeria but even went further to label South Africa "a white state with a black head."[481]

South Africa's experience, of the Saro-Wiwa incident raises several descriptive accounts of "norms of solidarity." First, South Africa was called a 'born-again' African state needing to constantly pledge its allegiance and observance of "norms of solidarity." South Africa's African-ness is, in general, subject to more contestation. States that have participated in the anti-apartheid struggle or decolonization project of Africa maintain their African-ness despite their actions. For instance, calling for an audit of Zimbabwe's election, Botswana broke what Simon Allison calls the "unwritten rule of African diplomacy."[482] In the same way, Botswana has condemned several other African states and their leaders including Libya's Muammar Gadaffi and Sudan's Omar Al-Bashir.[483] Unlike South Africa, however, Botswana's African-ness was not subject to examination.

A second possible explanation for contestation of South Africa's 'born-again' African-

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[480] Heidi Vogt, *Mandela Leaves Divided Legacy in Africa*, (WALL STREET J. Dec. 6, 2013) http://online.wsj.com/news/articles/SB10001424052702303497804579241800418069602 (speaking of Mandela Ken Saro-Wiwa Jr. said "We felt he'd failed us.") *See* also Ken Wiwa, *We Nigerians are celebrating Mandela as the kind of hero we've never had: There is no doubt we envy South Africa for Mandela's iconic profile and global status,* GUARDIAN, Dec. 7, 2013, http://www.theguardian.com/commentisfree/2013/dec/08/ken-wiwa-on-nigeria-response-to-mandela, (discussing how Mandela was a paradox for human rights activists).

[481] Barber *supra* note 483 at 1084 (discussing Nigerians reaction to South Africa's condemnation of Nigeria).

[482] Simon Allison, *Analysis: Ian Khama's renegade foreign policy makes him a lonely figure in Africa*, DAILY MAVERICK, Sep. 7, 2013, http://www.dailymaverick.co.za/article/2013-08-08-analysis-ian-khamas-renegade-foreign-policy-makes-him-a-lonely-figure-in-africa/#.UzSeql7_seN (discussing Botswana breaking the unwritten rule of African diplomacy.)

[483] Malawi Today, *Botswana condemns the African Union on Sudan's al Bashir*, Jun. 15, 2012, http://www.malawitoday.com/news/125605-botswana-condemns-african-union-sudans-al-bashir, (Botswana standing in solidarity with Malawi condemned decision of African Union to move meeting cite from Malawi to Ethiopia, since the former denied entry to Sudanese president Omar Al-Bashir. "Botswana condemns this action as it is inconsistent with the very fundamental principles of democracy, human rights and good governance espoused by the AU, and which Malawi upholds," reads the statement.") *See* also Wene Owino, *Botswana seeks Gaddafi departure, welcomes Gbagbo capture*, AFR. REV., Apr. 13, 2011, http://www.africareview.com/News/-/979180/1143582/-/hp9sqjz/-/index.html (discussing how Botswana condemned Gadaffi's violence on peaceful protesters.)

ness, is not the result of South Africa's historical wrongs, but rather the foreign policy tools (persuasion, constructive engagement, and sanctions) it employed. What are the foreign policy tools of African-ness? How do "norms of solidarity" affect behavioral changes among African states? Does African-ness condemn sanctions? Indeed, South Africa's initial policy of "constructive engagement" during the Saro-Wiwa incident did not result in contestation of South Africa's African-ness. Criticisms against South Africa arose after it called for economic and political sanctions against Nigeria. Does this mean that African-ness condemns sanctions? Certainly, South Africa is not the only country to call for sanctions against another African state. Several African states, backed by the IGAD and the AU, called for sanctions against Eritrea for its alleged support of *Al-Shabab* group in Somalia.[484] The African-ness of the states that called for sanctions on Eritrea was not questioned. Therefore, African-ness does not have restrictive foreign policy tools, and "norms of solidarity" accept both persuasion and sanctions as a means of effecting change.

A third possible explanation for contesting South Africa's African-ness is that African-ness prohibits interference in the internal affairs of member states.[485] The idea of sister-hood of African states solidifies norms of non-interference, racial equality and independence of states as constituting norms of African solidarity.[486] Alternatively, the function of "norms of solidarity" is

[484] *See* generally S.C. Res. 1907, U.N. Doc. S/RES. 1907 (Dec. 23, 2009) (Discussing the call of AU and other AU member states to impose sanctions on Eritrea for its role in Somalia and refusal to withdraw troops from disputed areas with Djibouti.)

[485] A.U. Charter art. 4, para. G., ("The Union shall function in accordance with the following principles…non-interference by any Member State in the internal affairs of another.") *See* generally Paul D. Williams, *From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture*, 106 AFR. AFF. 253, 253-279 (2007) (generally discussing norms of non-interference in internal affairs of member states among African Union.) *See* also Dr. A. Bolaji Akinyemi, *The Organization of African Unity and the Concept of Non-interference in Internal Affairs of Member States*, 46 BRIT. Y. B. INT'L L. 393, 394 (1972-1973) (Quoting Justice T.O. Elias conception of non-interference as "the desire to be left alone, to be allowed to choose one's particular political, economic and social systems and to order the life of one's community in one's own way.")

[486] *See* for instance Charter of the OAU, May 25, 1963, 479 U.N.T.S. 79 ("Inspired by a common determination to promote understanding among our peoples and cooperation among our states in response to the aspirations of our peoples for brother-hood and solidarity, in a larger unity transcending ethnic and national differences.")

to uphold multiple norms, among which are the "norms of non-interference" in relations among African states. The debate is whether South Africa's reaction to the Saro-Wiwa incident and Eritrea's alleged support for terrorist groups amounts to interference in internal affairs of Nigeria and Somalia respectively. For the African community, Eritrea and South Africa both breached "norms of non-interference." This led African states to react within the realms of norms of solidarity. In conclusion, South Africa's African-ness was questioned because it broke norms of non-interference in internal affairs as constitutive norms of solidarity among African states. And use of sanctions, as a foreign policy tool is permissible under "norms of solidarity."

2.3.3. Mbeki and Zuma: African-ness & South Africa's Relations with Zimbabwe

In the post Saro-Wiwa period, South Africa's foreign policy choices towards other African states were based on "norms of non-interference" as integral to "norms of solidarity." Chris Alden and Millis Soko, in contrast, oppose alternative explanation and argue that South Africa's policies after the Saro-Wiwa crisis are the result of South Africa's penance for its historical wrongs.[487] Yet, Alden and Soko failed to explain why other Southern African states, in accord with South Africa, followed "quiet diplomacy" against Zimbabwe.[488] Tanzania, for example, although it galvanized anti-apartheid stance in Africa, its contemporary policy towards Zimbabwe's land policy is not dramatically different from that of South Africa.

Others, for instance Ceila W. Dugger and Barry Bearak, argue that South Africa's foreign policy towards Zimbabwe, especially during Mbeki's presidency, was the result of Mbeki's personal relationship with Mugabe, rather than South Africa's sacrament for its historical

[487] Chirs Alden and Millis Soko, *South Africa's economic relations with Africa: hegemony and its discontents*, 43 J. MOD. AFR. STUD. 367, 379 (2005) (discussing South African regional diplomacy and how it has focused on building consensus to rectify historical wrongs.)
[488] *See* generally Victoria Graham, *How firm the Handshake? South Africa's use of quiet diplomacy in Zimbabwe from 1999 to 2006*, 15 AFR. SEC. REV. 114, 114 -127 (2006) (discussing the concept of "quiet diplomacy" in relation to South Africa's foreign policy towards Zimbabwe.)

mistakes.[489] For Dugger and Bearak, "constructive engagement" stemmed from personal kinships and relationships between individual Southern African leaders rather than "norms of solidarity" or African-ness. Despite the personal relationship between Mbeki and Mugabe, however, Mbeki's uncompromising reaction to western critics of Zimbabwe's election is a question of African integrity – where Africans have the ultimate power and responsibility to define their future. Mbeki argued: "[w]e have a common responsibility as Africans to determine our destiny and are quite ready to stand up against anybody else who thinks that, never mind what the thousand African observers say about elections in Zimbabwe, we sitting in Washington and London are wiser than they are."[490] Moreover, Mbeki contended that Zimbabwe's land policy is an internal matter, which does not warrant South Africa's interference.[491] In addition, post-Mbeki South Africa has not only showed support for Zimbabwe, but also called for sanctions against the latter to be lifted. Ms. Lindiwe Zulu, South African President Jacob Zuma's foreign policy advisor noted, "It's not just Zimbabwe that's saying the sanctions are not working. The entire continent is saying that." [492]

The actions and behavior of South Africa post the Saro Wiwa incident show the value of

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[489] *See* Ceila W. Dugger & Barry Bearak, *Complex Ties Lead Ally not to Condemn Mugabe*, N.Y. TIMES Jun. 27, 2008, http://www.nytimes.com/2008/06/27/world/africa/27mbeki.html?pagewanted=all&_r=0, (discussing the special bond between Mugabe and Mbeki).

[490] Murithi Mutiga, *Why Zimbabwe Sanctions Boomerang*, N.Y. TIMES, Nov.9, 2013, A21. (quoting Mbeki).

[491] Mbeki noted:

> The way the land reform was done offended other players in the world. I told them [Mugabe and Zanu-PF], they could not listen; they did what they wanted with their own country. They set a bad example, which we don't want any country in Africa to follow. So they must pay a price. I think this is the reason why, apart from diamonds, there is too much attention on Zimbabwe.

Thabo Mbeki blasts Mugabe's 'chaotic' Land Reform, BULAWAYO24.COM, Aug. 28, 2013 http://bulawayo24.com/index-id-news-sc-national-byo-35298.html.

Mbeki did not publicly criticize Zimbabwe's land policy. It was rather licked documents that showed his personal frustration with Mugabe and ZANU-PF. *See* David Blair, *Zimbabwe: Robert Mugabe warned by Thabo Mbeki at African Union Summit*, TELEGRAPH, Jun. 30, 2008, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/2223643/Zimbabwe-Robert-Mugabe-warned-by-Thabo-Mbeki-at-African-Union-summit.html.

[492] *See* for instance, *Zimbabwe: South Africa wants anti-Zim sanctions lifted*, HERALD, Jun. 15, 2012, http://allafrica.com/stories/201206160268.html (quoting Ms. Lindiwe Zulu, South African President Jacob Zuma's foreign policy advisor.)

"norms of solidarity" and their tenets such as "non-interference in internal affairs" in shaping the ethos and formation of foreign relations in Africa. South Africa's policy towards Nigeria during the Saro-Wiwa incident and its major shift in its policy towards Zimbabwe is not penance for its historical wrongs. Rather, it is acceptance of "norms of solidarity" and "norms of non-interference." In addition, if South Africa's behavior is an attempt to rectify its historical wrongs, one might wonder why allies of the Apartheid regime are free from paying penance for these same wrongs. Why was Malawi, which sympathized with Apartheid South Africa, not required to prove its African-ness?[493] In addition, why aren't South Africa–Zimbabwe relations similar to Tanzania–Zimbabwe relations? Tanzania, which was not only anti-apartheid but also hosted, and funded anti-apartheid movements followed similar, may be even the same, policy as South Africa in its relation towards Zimbabwe.[494] Therefore, these examples show that African-ness or "norms of solidarity" strongly prohibits interference in internal affairs of other African states.

2.4. Norms of Solidarity and Regional Integration Arrangements

The discussions on norms of solidarity above deal mainly with the practice of individual member states rather than Southern African states as a group. This leaves lingering questions like, how are norms of solidarity practiced at a regional level? Are norms of solidarity, as organic practices of individual member states, entrenched in regional integration practices? Given the fact that Southern African states belong to three regional integration arrangements – SADC,

[493] During Apartheid Malawi defined its foreign relations in alignment with South Africa. This was a deviation from the accepted norm of African states' policy towards Apartheid South Africa. African states policy towards Aparthied South Africa was deep-rooted condemnation. On the contrary, Malawi called for cooperation with white ruled South Africa as an alternative to better opportunities in the continent. This led to a lot of bickering and words war between the then President Banda of Malawi and his African counterparts. Nevertheless, Malawi did not have to go through re-emersion or re-baptism in African-ness as South Africa did. In its post-apartheid foreign policy, Malawi's penance was for instance, honoring President Mugabe by renaming a major road. *See* generally Eugenio Njoloma, A Study of Intra-African Relations: An Analysis of the Factors informing the Foreign Policy of Malawi towards Zimbabwe (Nov. 2010) (unpublished M.A. thesis, Rhodes University).

[494] Lift Zim Sanctions – Chikwanda, LUSAKATIMES.COM, Aug. 6, 2013, http://www.lusakatimes.com/2013/08/06/lift-zim-sanctions-chikwanda/ (discussing Zambia's call for sanctions against Zimbabwe to be lifted.)

COMESA and EAC – one might wonder how and where solidarity arrangements lie. For instance, as a member of both the SADC and the EAC, Tanzania has multiple solidarity arrangements with members of both organizations. In this context, Tanzania has solidarity arrangements with both Kenya and South Africa. So the question is, would this translate into a solidarity arrangement between Kenya and South Africa, even though neither Kenya nor South Africa belong to the SADC and the EAC respectively? Since Kenya belongs to the same regional arrangements as Tanzania through the EAC, can one conclude that Kenya has a solidarity arrangement with any member state with which Tanzania is in a regional integration arrangement? Alternatively, what are the relationship between member states and the community on the application of norms of solidarity?

The historical background of regionalism in the African continent is rooted in emancipatory aspirations of its member states, which led to continental feelings of African-ness. Although regional integration is regionalization or internationalization of solidarity arrangements among African states, one should note that the practice and existence of solidarity arrangements among African states exist beyond the confines of regionalism and membership in integration schemes. Fundamental to the relationship between "norms of solidarity" and regional integration arrangements in Africa is the emancipatory project of the continent.[495] As solidification of decolonization and anti-racial movements, therefore, norms of solidarity for Southern African states are agnostic to membership in regional or sub-regional grouping.

PART – III – NORMS OF SOLIDARITY AND ECONOMIC RELATIONS

Although, "norms of solidarity" are intensely ideational concerns, particularly in the anti-apartheid and de-colonization struggles of the region, material concerns and particularly

[495] *See* generally Luwam Dirar, *Rethinking and Theorizing Regional Integration in Southern Africa*, 28 EMORY INT'L L. REV. 123, 123- 165 (2014) (discussing the relationship between continental and Southern African emancipation project and regional integration arrangements.)

economic pressures are pressing issues affecting EU-Southern African relations. Several times the EU has been criticized for disintegrating regional integration efforts of Southern African states.[496] But simply understanding disintegration as members of the Southern African community relinquishing their membership in SADC and joining COMESA is a practically and theoretically flawed measure of disintegration. First, with the ongoing negotiations for a tri-partite integration among SADC, COMESA and EAC, withdrawal from SADC does not have long-term effects for regional and continental integration efforts.[497] Second, sub-regional integration as a means to continental integration does not prescribe where and with which sub-regional grouping a state should join to meet its continental aspiration for integration.[498] Third, theoretically the conceptual understanding of regional integration, as discussed in Chapter Four of this dissertation, is a continental emancipatory project that has its origins and spirit beyond the confines of membership in integration schemes. In this context, among Southern African states, regional integration was nothing but a solidification of "norms of solidarity" for continental decolonization and racial equality movements.

This Part attempts to understand how "norms of solidarity" fare under economic pressures. The welfare approach of trade liberalization in European foreign policy is used as a test that allows one to understand the function and role of "norms of solidarity" in defining

[496] *See* generally Stephen R. Hurt, *The EU-SADC Economic Partnership Agreement Negotiations: 'Locking-In' the Neoliberal Development Model in Southern Africa?*, 33 THIRD WORLD Q. 495, 495-510 (2012) (arguing how the EU poses a threat to the coherence of regional integration policies of the SADC).

[497] The Final Communique of COMESA-EAC-SADC Tripartite Summit of Heads of State and Government art. 14 (i), Oct. 22, 2008 (discussing approval of the plan to form a tri-partite integration scheme among COMESA, EAC and SADC.)

[498] *See* for instance *id*., art. 11 (discussing the relationship between aspiration of the Tripartite Summit and African Economic Community.) *See* also Treaty Establishing the African Economic Community art. 4(1(d)), Jun. 3, 1991 ("The objectives of the Community shall be… to coordinate and harmonize policies among existing and future economic communities in order to foster the gradual establishment of the Community.") Likewise, aspirations for African Economic Community apart from advocating for gradual continental integration and using sub-regional groupings as building blocks for continental community, there is no requirement that a state should belong to one integration scheme and not the other. *See* Treaty Establishing the African Economic Community art. 6, Jun. 3, 1991 (discussing modalities for the establishment of the Community).

foreign relations of Southern African states towards the EU. The central argument of this Part is that economic pressures that threaten revenue and market access for Southern African states diminishes the value of "norms of solidarity." For Southern African states (in their EPA negotiations), maintaining access to European markets has overshadowed concerns between Southern African states. This need for access to EU markets and the end of white racial and colonial domination have diminished the commitment to common ideational concerns among Southern African states.

It is relevant to pose some disclaimers before advancing further in substantive discussions of relations between the EU and Southern African states. From the 1960s until now, the narrative of EU-Africa trade relations, where wealthy developed Europe and the poor developing states of Africa entered into trade agreements, to the detriment of the later, dominated scholarship.[499] Structural economic inequality between EU and African states today is higher than the gap that existed in the 1960s.[500] However, the parameters of the North-South engagement in EU-Africa relations have changed slightly. To start with, the original "developed North" in the context of the EU, particularly with its expansion from its original core-members, has created its own internal "South."[501] Second, the idea of the "South" in the context of Southern-African states has

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[499] This was part of the global discourse on North-South divide, where the North has framed multilateral, regional or bilateral trade deals to further its interests at the detriment of interests of developing South. See for instance, THE SOUTH COMMISSION, THE CHALLENGES TO THE SOUTH: THE REPORT OF THE SOUTH COMMISSION, OXFORD UNIVERSITY PRESS, 1990, pp. 216 "the negotiations that have taken place, notably the Uruguay Round on trade, have been called by the North, with an agenda devised to further its global interests. They have been imposed by the North on the South."

[500] Branco Milanovic, World Bank economist interview with Max Fisher, (discussing his book he said,

> [a]nd of course these income gaps, historically, have risen tremendously, despite the fact that in the last 15 or 20 years, China and India have grown at very high rates. Still, the number of countries in Africa where income today is lower than in the 1960s [when they won independence] is large, I think about 15 countries. So, clearly, the gap between Africa and Europe has increased.

[501] *See* for instance Damjan Kukovec, *A Critique of the Rhetoric of Common Interest in the European Union Legal Discourse*, available at http://www.harvardiglp.org/new-thinking-new-writing/a-critique-of-rhetoric/, (last visited 08/29/2014) (using center-periphery discourse in this piece Kukovec argues that although all members of EU, states like Germany and France are examples of the center within the union and states like Portugal, Greece and Hungary make examples of states in the periphery of EU).

changed and produced its own internal "North."[502] Understanding these limitations of North-South discourse, the focus in this Part is not to reintroduce North-South dialogue in the context of EU-Southern African states relations, but rather to test the relationship between economic relations and "norms of solidarity."

To understand the relationship between economic relations and "norms of solidarity," it seems relevant to explore current trends of trade flow between both trading partners and their impact on the global fair trade movement. New International Economic Order (NIEO), as a negotiation process, represents the aspirations and goals of Southern African states in the unequal global economic order.[503] Seeking a more equitable global economic order, the NIEO eases economic pressures by creating flexible mechanisms to accommodate policy spaces of developing states.[504] The historical status of third world states within the unequal global economic order, which failed to transform modes of production and global value chain relationships, led to third world consensus for reform of global trade relations.[505] Reform of global economic order and a call for fair trade rules from third world states are exemplified in several examples, some of which include call for flexibility in implementation of trade rules and

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[502] Here, a good example would be the economic disparity between for instance, South Africa and Lesotho. Where if one was to use North-South, alternatively Center-Periphery discourse to understand economic relations among Southern African states. In other words, one would consider South-Africa to be the north of Southern African states while states like Lesotho represent the south or the region.

[503] In this context, reference to NIEO is as a negotiation process. Robert W. Cox noted,

> [T]he NIEO is a negotiation process, broadly speaking, between countries of North and South but taking place through a variety of institutions and forums in which are represented wider or narrower ranges of functional and geographical interests. This negotiation process is concerned with the possibilities of agreement concerning both revised international policies and reformed or new institutions (including the power relationships governing these institutions.)

Cox noted that there are four levels of understanding of the NIEO and five opinion clusters. *See* Robert W. Cox, *Ideologies and the New International Economic Order: Reflections on Some Recent Literature*, 33 INT'L ORG. 257, 258 (1979).

[504] *See* generally Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT'L ECON. L. 405, 405- 424 (2005).

[505] This line of argument, a critic of the global trading system that has failed to transform modes of production and global value chain relationships is similar with historical materialist school of thought as analyzed by Robert Cox. For Cox, the school of historical materialist, which includes such scholars as Samir Amin, is an ideology of the NIEO movement. Cox *supra* note 513 at 266.

preferential treatment for goods originating from third world states. The most recent round of negotiations for fair trade, the Doha Development Round, with initiation of third world states to negotiate more concessions and preferences in their favor, was a continuation of NIEO.[506] The current negotiations for EU-Southern Africa trade relations, however, have had the effect of eliminating preferential treatment for Southern African products in EU markets. Therefore, one can argue that EPAs - if and when signed - have the power of sustaining unequal global order and eroding the reforms and landmarks of NIEO, however limited they might have been.[507]

To prevent erosion of NIEOs reforms in contemporary trade negotiations between the EU and Southern African states, solidarity arrangements among the latter could play a positive role for sustaining and advancing concerns of fair trade. From a negotiation perspective, unlike the current fragmented approach, united Southern African states would benefit from regional and global fair economic order movements.[508] Nkrumah eloquently noted, how "[a] single representation, resting on the strength of a whole continent, would be more positive in its influence than all the separate representations of the African states put together."[509] Nkrumah's

[506] As a result of third world states insistence for a more development oriented global economic order, at the moment global trade liberalization negotiations are at a stalemate. *See* Hoekman *supra* note 514.

[507] For a similar argument but at a broader global economic order issue *see* for instance, James Thou Ghatti, *International Law and Eurocentricity,* 9 EUR. J. INT'L L. 184, 203-205 (1998) (reviewing SURYA PRAKASH SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW (1996) & SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996)) (discussing how third world aspirations for NIEO might have already died.) This statement implies that trade liberalization or eradication of NIEO is detrimental for development projects of developing countries. This view is held on multiple reasons. For instance, global liberalization project has successfully limited developed states imposing liberalization on third world states while they themselves practice chose and pick protectionism. Hence, NIEO to a certain degree by providing flexibility of global economic order regulations left a birthing space for development policies among developing states.

[508] *See* generally Gabriel Cepaluni, Manoel Galdino and Amâncio Jorge de Oliveira, *The Bigger, the Better: Coalitions in the GATT/WTO*, 6 BRAZ. POL. SCI. REV. 28, 28-55(2012) (arguing that since the WTO works through consensus, negotiating in numbers has a positive contribution in shifting or leveling unequal negotiating platform in international economic order.) *See* contra Peter Drahos, When the Weak Bargain with the Strong: Negotiations in the World Trade Organization, 8 INT'L NEGOT. 79, 79-109 (2003) (Drahos in this article argues that the source of bargaining power in multilateral negotiations are eschewed towards the developed North. He notes that the idea of strength in numbers does not always level the negotiation platform.)

[509] KWAME NKRUMAH, AFRICA MUST UNITE, 195 (FREDERICK A. PRAEGER INC. 1963) (For Nkrumah one of the positive outcomes of African Unity is the possibility of speaking with one voice instead of each African

call for single representation for Africa is based on "norms of solidarity," where concerns of all African states are presented in the particular negotiating platform with the combined voting power of all African states. For instance, Nkrumah explains how concerted pressure from African states elevated Africa's anti-colonization movement to the global platform.[510] However, Africa's contemporary lack of common foreign policy resulted in a fragmented negotiation syndrome, where African states negotiate individually outside their regional groupings.[511] In the Southern African context, negotiations with the EU fell into four camps under COMESA, EAC, CEMAC and SADC.[512] In addition to the fragmented sub-regional grouping in EPA negotiations, each Southern African state continues to guard its ability to conduct an independent foreign policy towards EU. [513] And this returns us to the lingering puzzle of the role and value of "norms of solidarity" in contemporary Africa in general and Southern African states in particular.[514]

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state having to fend for itself.) Similarly *see* also James Thou Gathii, *The High Stakes of WTO Reform*, 6 MICH. L. REV. 1361, 1361 (2006) (reviewing FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF TRADE NEGOTIATIONS/ THE LESSONS OF CANCUN (2004)) (discussing how developing countries through unity could be effective in their WTO trade negotiations.)

[510] *See* NKRUMAH *supra* note 519 at 197. (Nkrumah gives several examples of how the power of ideas of African states changed the atmosphere and moral stance of the UN in the anti-apartheid and decolonization project. He summarized African role in spreading the power of ideas as the reason why the position of the great powers and UN has shifted towards colonialism. He concluded, "[n]othing like this busy concern with the African surge for freedom could ever have happened without the concerted pressure of the newly independent states within the world organization of nations.")

[511] Fragmented negotiation syndrome is allowed under SADC Treaty. *See* for instance SADC Treaty Art. 24 (1) stating, "[s]ubject to the provisions of Article 6(1), Member States and SADC shall maintain good working relations and other forms of cooperation, and may enter into agreements with other states, regional and international organizations, whose objectives are compatible with the objectives of SADC and the provisions of this Treaty."

[512] The following states negotiated under SADC: Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland and South Africa. Tanzania and DRC negotiated under EAC and CEMAC respectively. Zambia, Zimbabwe, Seychelles, Madagascar, Malawi and Mauritius negotiated under COMESA.

[513]This is particularly visible, in the case of Zimbabwe, with a possible mission of appeasing the West in general and EU in particular, although under sanctions from EU, initialed interim EPA in September 2009. Zimbabwe's initialization of EPA could also be the result of Zimbabwe's fear of losing access to EU markets as much as it is for sanctions to be lifted. Like Zimbabwe, Botswana, Lesotho, Swaziland and Mozambique (BLSM), for similar reasons as Zimbabwe and obviously without a need to "appease" EU, were among the early signatories to interim EPAs. Nevertheless, despite the fear and need to appease, what is common to all those five states (Zimbabwe, Botswana, Lesotho, Swaziland and Mozambique) is that in their respective EPAs all of them have not agreed on certain contentious issues such as: export taxes and extending most favored nation (MFN) treatment to EU.

[514] The puzzle is not so much the result of negotiations in different regional and sub-regional integration agreements. On the contrary, as explained earlier norms of solidarity are not dependent on membership to a particular integration scheme. The puzzle here is whether African states will be able to maintain their solidarity commitments

3.2. Reality of EU-Southern African States Trade Relations

Evaluating contemporary trade between the EU and Southern African states gives four major perceptions of the impact and types of relationship that exist between both trading partners. First, Southern African states' trade deficit or surplus is not based on whether a particular Southern African states is beneficiary of the EU's preferential treatment for developing states. Since some states benefit from the EU's EBA and GSP initiatives, one could argue that they have better opportunities in accessing European markets.[515] Several scholars, however, have shown that the impact of this preferential treatment for developing states in improving market access is contestable.[516] For instance, among Southern African states, Botswana, Lesotho, and Swaziland benefit from EU's GSP initiative and all have surplus against EU.[517] Similarly, Angola, DRC, Lesotho, Madagascar, Malawi, Mozambique, Tanzania, and Zambia are beneficiaries of EBA initiatives.[518] As shown in Table 11, out of these eight beneficiaries of EBAs in the region, only Tanzania and Zambia have a deficit in their trade with the EU.

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compartmentalized to one sub-regional grouping or not. And should they keep their solidarity arrangements compartmentalized.

[515] The EBA initiative of the EU is an arrangement for least developed states, which provides duty free and quota free access for all products except for arms. GSP initiative allows developing states exporters lower or no duty in order to facilitate their access to EU markets.

[516] For instance, *see* Paul Brenton, *Integrating the Least Developed Countries into the World Trading System: The Current Impact of European Union Preferences under "Everything But Arms"*, 33 J. WORLD TRADE 623, 623-646 (2003) (In this piece Brenton notes although the impact of EBAs is state specific and with considerable variation, one could argue that its overall impact are relatively minor. This is partly because the EU has one of the highest liberalized tariff regimes and as a result of EU's complex and restrictive rules of origin laws.) . *See* also generally Lucian Cernat, *et. al.*, *The EU's Everything But Arms Initiative and the Least-developed Countries* 1-61 (World Institute for Dev. Econ. Res., Working Paper No. 47, 2003) (by using computable general equilibrium simulation model the authors show that the impact of EBAs on EU are minimal and as a result of EBAs the welfare of sub-Saharan African states increases to the detriment of other developing states.) *See* also Marcel Adenäuer *et. al.*, *Impact of the "Everything but Arms" initiative on the EU sugar sub-sector* 3-35, (CAPRI, Working Paper No. 05, 2003) (through the EBA initiative and its impact on sugar trade in EU, the authors of this piece argued that the EU's sugar imports from least developed states increased while its sugar exports decreased.)

[517] European Commission, *EU publishes revised preferential import scheme for developing countries*, http://trade.ec.europa.eu/doclib/press/index.cfm?id=840 (last visited Feb. 5, 2015) (discussing the different system of preferences and list of beneficiaries.)

[518] Commission Delegated Regulation 1421/2013, Amending Annexes I, II and IV to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalized tariff preferences, Annex III, 2013 O.J. (L 355) 1,13 (list of EBA beneficiaries.)

Unfortunately, the existence of a trade surplus by, for instance Angola against the EU, does not mean that EBAs have had a positive trade creation effect on Angola. On the contrary, as shown in Table 12 Angola's trade surplus is the result of increasing demand for oil from Europe. Moreover, since all beneficiaries of EBAs do not have trade surplus against EU, one can conclude that for Southern African states, preferential treatment does not necessarily convert to trade surplus against the EU.

Table 11: EU's trade balance with Southern African states in million Euros[519]

	Total Trade	EU imports	EU exports	EU trade balance
South Africa	40046	15544	24502	8958
Angola	15516	9309	6206	-3103
Botswana	4046	3442	964	-2478
DRC	2198	1135	1063	-72
Mozambique	2166	1332	834	-499
Mauritius	1948	1086	862	-225
Namibia	1696	942	753	-189
Tanzania	1457	525	932	408
Madagascar	1277	738	539	-200
Zambia	1023	453	570	117
Zimbabwe	628	387	240	-147
Seychelles	614	294	320	26
Malawi	394	223	171	-53
Swaziland	253	230	23	-208
Lesotho	201	187	15	-172

Second, an existing trade deficit could be the result of a liberalized trade relationship

[519] This table is constructed from data compiled by the European Commission that deals with Client and Supplier Countries of the EU28 in Merchandise Trade (value %) (2013). Note that EU's trade balance with Botswana was not available on the date. Therefore, for the purposes of this study, EU's trade balance with Botswana has been calculated by deducting EU's exports from imports.

between South Africa and the EU.[520] As shown in Table 11, South Africa, the biggest economy among Southern African states, has the highest trade deficit with the EU. All SACU states, with the exception of South Africa, have surpluses in their trade with the EU.[521] SACU member states as a group, in their total trade with the EU, have 5912 million euros trade deficit. Several explanations are worth mentioning here. To start with, as a result of the free trade agreement between South Africa and the EU, the latter's produce receive liberalized access to the South African market.[522] Access to South Africa's market for European produce indirectly extends beyond the confines of South Africa's territory to all SACU member states.[523] This is because South Africa is member of the SACU, which allows free movement of goods between South Africa on the one hand and Botswana, Lesotho, Namibia, and Swaziland on the other.[524]

Table 12: EU's Merchandise Trade with Southern African states by product breakdown in million euros.[525]

[520] EU – Southern African Trade is governed by the Trade and Development Cooperation Agreement. *See* Trade and Development Cooperation Agreement, EU – S. Afr., Oct. 11, 1999, O.J. (L 311).

[521] SACU is comprised of South Africa, Swaziland, Namibia, Lesotho and Botswana. It is the oldest customs Union in the world. For a history of SACU *see* P. M. Landell-Mills, *The 1969 Southern African Customs Union Agreement*, 9 J. MOD. AFR. STUD. 263, 263-281 (1971) (discussing the colonial legacies of SACU agreement and its profit sharing modalities through time.)

[522] Catherine Grant, *Southern Africa and the European Union: the TDCA and SADC EPA* 3 (TRALAC, Trade Brief No. 1, 2006) (Grant discusses how South Africa is actually in the losing side as a result of the TDCA. As a result of trade liberalization of TDCA the EU and South Africa are required to eliminate tariffs on 95% and 86% of currently trade goods. The impacts of such liberalization are "EU tariff changes affect only 25% of current trade goods and their weighted average tariff is only 2.7%. South African tariff changes affect 40% of currently traded goods in a context of a weighted average tariff of 10%.")

[523] SACU Treaty Art. 2(a) states one of the objectives of the organization as free movement of goods between and among the member states. *See* also Trade Policy Review Body, *supra* note 55. Similarly *see* Central Bank of Lesotho, *Lesotho's Consumer Inflation: A closer look at numbers*, http://www.centralbank.org.ls/publications/MonthlyEconomicReviews/2012/March%202012%20ER.pdf (last visited Feb. 6, 2015) (discussing how South African economy affects economy of Lesotho.) For a similar example on Swaziland *see* Christopher Vandome *et. al.*, *Swaziland: Southern Africa's Forgotten Crisis*, http://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20130900SwazilandVandomeVinesWeimer.pdf (last visited Feb. 6, 2015) (discussing the impact of Swaziland's dependence on SACU's profit sharing system and South African economy on Swaziland's economy.)

[524] *Id.*

[525] This table is constructed from data compiled by the European Commission on EU's Merchandise Trade with Southern African states. The product breakdown in this table is based on WTO categorization and Standard International Trade Classification. AMA and NAMA stand for Agricultural and Non-Agricultural Products

	AMA		NAMA		FOOD & RAW MATERIALS		FUELS		CHEMICALS		MACHINERY		TEXTILE & CLOTHING		OTHERS	
	Imp	Exp	Imp	Exp	Imp	Exp	Imp	Exp	Imp	Exp	Imp	Exp	Imp	Exp	Imp	Exp
Angola	1	1.184	9309	5022	15	1265	8885	242	0	474	18	2317	0	114	392	1795
Botswana	22	5	3420	959	22	5	37	1	0	14	1	68	0	1	3382	875
DRC	16	249	1119	814	58	270	889	13	2	186	1	127	0	22	185	144
Lesotho	1	1	186	14	1	1	0	0	0	1	0	9	1	0	185	4
Madagascar	180	49	558	489	293	86	92	5	18	92	3	157	300	98	33	101
Malawi	219	12	4	158	219	16	0	6	0	77	1	34	0	1	3	36
Mauritius	323	115	763	747	617	216	31	6	15	94	14	247	278	37	130	262
Mozambique	210	82	1123	751	232	107	1066	12	0	90	3	396	1	10	29	219
Namibia	105	32	837	722	370	32	356	233	104	24	5	393	0	2	106	69
Seychelles	0	28	294	292	288	131	1	3	0	8	3	114	0	4	2	60
South-Africa	2293	1494	13251	23007	2575	1524	4370	1049	734	3586	2742	12990	45	248	5078	5104
Swaziland	218	5	13	17	211	4	0	1	12	6	0	7	0	0	7	5
Tanzania	287	79	238	854	352	90	89	70	0	172	37	442	2	4	45	154
Zambia	115	17	339	553	115	26	228	1	0	68	3	370	0	2	107	102
Zimbabwe	220	15	167	226	221	15	20	2	0	25	1	156	3	2	143	41

Third, by looking at contemporary merchandise trade between Southern African states and the EU, one could conclude that it replicates classical narratives of North and South trade.[526] Table 12 elaborates and categorizes merchandise trade between EU and Southern African states. Breakdown of merchandise trade between the EU and Southern African states shows two trends. First, generally speaking the EU has a trade deficit in fuel, food and raw materials. In fuel trade, all Southern African states except Malawi, Seychelles, and Swaziland have a trade surplus against EU. Angola – the biggest Southern African fuel exporter – has a surplus amounting to

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respectively. *See* also European Commission, *Statistics*, http://ec.europa.eu/trade/policy/countries-and-regions/statistics/index_en.htm (last visited Jan. 26, 2014).

[526]Classical trade in this section is understood as roles where states in the South are raw material exporters and states in the North export processed and manufactured. It is also understood as what Paul Krugman's theory of product cycle theory takes for granted, "product cycle in which it is taken as given that there is continuous introduction of new products in the developed region, the North; at the same time the less developed region, the South, learns in each period to produce some of the goods formerly produced only in the North." For Krugman a state's terms of trade are improved when that particular state increases the range of products it can produce. Krugman's theory is consistent with the history of economic development of South East Asian Tigers. David Dollar, *Technological Innovation, Capital Mobility, and the Product Cycle in North-South Trade*, 76 AM. ECON. REV. 177, 177 (1986).

approximately 95% with the EU.[527] Likewise, the EU has a deficit in food and raw materials trade against all Southern African states with the exception of Angola and DRC. Second, generally speaking when it comes to processed goods and sophisticated production of machinery and chemicals, the EU has a surplus against Southern African states. As shown in Table 12, in machinery trade, the EU has a trade surplus against all Southern African states. Similarly as shown in Table 12, the EU has a surplus in trade in chemicals with all Southern African states except with Swaziland.

Table 13: EU-28 trade in goods leading trade partners, 2013 (billion EUR)[528]

EU Exports		EU Imports	
	Billion Euro		Billion Euro
USA	289.5	China	280.1
Switzerland	15516	Russia	206.9
China	4046	USA	196.1
Russia	2198	Switzerland	94.6
Turkey	2166	Norway	90.3
Japan	1948	Japan	56.6
Norway	1696	Turkey	50.7
U.A.E.	1457	India	36.8
South Korea	39.9	South Korea	35.8
Brazil	39.9	Brazil	33.1

Fourth, from EU's perspective, Southern African states are not significant trading partners. Most of the EU's sources and destinations for goods are found outside the Southern African hemisphere. As shown in Table 13, the US and China are the main export destination and import sources for the EU respectively. Although Southern African states are not the main

[527] The percentage of fuel trade was calculated by the author by looking at specific details of trade flows between Angola and EU. For the year 2013 EU's fuel import from Angola was worth 8885 million Euros. Likewise, EU's trade deficit against Angola [in fuel trade] was 8643 million Euros. Total EU's imports from Angola were worth 9309 million Euros. This shows lack of diversified industry, goods and modes of production on the Angolan side. *See* European Commission, *Angola*, http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122071.pdf (last visited Jan. 28, 2015).

[528] Data for this table is extracted from, European Commission, *EU Trade in the World-Trade Statistics*, http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122532.pdf (last visited Jan. 26, 2014).

trading partners for the EU, yet the EU remains the main trading partner for Southern African states. Between the years of 2000-2009, SADC exports to the EU represented an average of 26.3% of SADC's exports to the world.[529] For the same period, for EAC states with a slight increase from SADC, records show an average export of 30.2% to the EU.[530] Similarly for COMESA member states, half of all of their exports are destined to European markets.[531] When it comes to imports, SADC states have the highest share of imports from the EU – an average of 31.8% of total world imports.[532] In conclusion, given current realities of trade between both trading partners, do Southern African states have equal partnership with the EU? Or is the idea of partnership just a customary platitude?

3.2.2. EU-Africa Relations: Partnership or Customary Platitude?

The existence of historical ties between both Africa and the EU – no matter how unequal, oppressive and exploitative it has been – resulted in divergent views of contemporary relationships between both continents. From the European perspective, José Manuel Barrosso, President of European Commission, argues that the EU and Africa are equal partners.[533] In a more skeptical tone, Hage Geingob –Namibia's Minister for Trade and Industry - notes, "[a] partnership means that all partners are equal. Why else would you include the word partnership in the EPA?"[534] Minister Geingob's skepticism about partnership with the EU is a critique that

[529] ECON. COMM'N FOR AFR., ECA POLICY RESEARCH REPORT, ASSESSING REGIONAL INTEGRATION IN AFRICA V, at 19-20 (2012) (shows direction of trade among regional integration arrangements.) *See* also Dirar *supra* note 505 at 136 (Particularly see table 2.2.2, which shows trade between and among major regional integration arrangements of Africa and the European Union, US and China. It shows how extra-regional trade is bigger than intra-regional trade).
[530] *Id.*
[531] *Id.*
[532] *Id*.
[533] *See* for instance José Manuel Barrosso, *EU and Africa enjoying 'partnership of equals'*, 390 PARLIAMENT 16, 16 (2014) ("This was my third summit as president of the European commission and I can confirm that it was one of the most successful summits ever held between our two continents, illustrating the shared commitment to maintain and deepen relations as equal partners.")
[534] Jo-Maré Duddy, *Namibia: Geingob Lays Into EU*, NAMIBIAN, June 1, 2009 (quoting Minister Geingob). *See*

highlights the existing power gap in the negotiations platform for EPAs.

Controversies surrounding the idea of "equal partnership" were also manifest in the recent EU-Africa summit.[535] The EU took the sole power of defining who should and should not be invited to participate from Africa.[536] As a result, the idea of "equal partnership" between both continents became controversial. Jacob Zuma, President of the Republic of South Africa, eloquently summarized the African critique of the EU's role in defining who could or could not represent Africa. He said,

> I think that time must pass wherein we are looked as subjects, we are told who must come, who must not come, we have not attempted to decide when we meet Europe; who must come and who must not come. It is wrong and causes this unnecessary unpleasantness. I thought the AU and EU are equal organizations representing two continents but there is not a single one of them who must decide for others. [537]

In conclusion, African skepticism on the idea of "equal partnership" is a manifestation of the complexity of EU-Africa relations that has deep ideological and historical roots. The memory and effect of a long history of colonial and racial-oppression perpetuated by European colonists

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also Claire Gammage, *(Re)conceptualizing International Economic Law: A socio-legal approach to regionalism*, *in* SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW 64,71 (Amanda Perry-Kessaris ed., 2013) (discussing Minister Geingob's comments on the issue of partnership with EU questions the motives of the Minister. She noted that the Minister's comments are not based on ideological anti-neoliberalism rather a possible maneuver to get election votes. Minister Geingob critic and skepticism of EU negotiation platform and style address broader concerns of power – which could be normative, military or economic – between EU and Southern African states and its impact on the negotiation platform.)

[535] The 4th EU-Africa Summit was held at Brussels in April of 2014. *See* generally Fourth EU-Africa Summit Declaration Apr. 2-3, 2014.

[536] In the 4th EU-Africa summit, EU barred Eritrea and Sahrawi Arab Democratic Republic (SADR). The EU barred Eritrea for its human rights records. In the case of the SADR the justification was reasoned to be the result of its territorial dispute with Morocco. It is interesting that EU chose to invite Morocco, which is not a member of African Union and bar SADR. Similarly, the AU suspended Egypt as a result of the unconstitutional overthrow of elected government. Nevertheless, without Egypt settling its affairs with the AU, the EU not only recognized the new military government in Egypt but also invited the latter to participate in EU-Africa summit. In short, without consideration of AU's membership and AU's concerns the EU decided the list of attendees. *See* for instance, Abayomi Azikiwe, *Several African States Boycott the EU Summit in Belgium,* http://www.globalresearch.ca/several-african-states-boycott-the-eu-summit-in-belgium/5376073 (last visited Jan. 10, 2015).

[537] Gillian Pillay, *SA joins other African countries in boycotting EU-Africa summit*, SABC, Mar. 30, 2014, *available at http://www.sabc.co.za/news,* (last visited Apr. 31, 2014).

is still felt. Ideologically, the debate is centered on the EU's interest in promoting neoliberalism across the African continent. For African states in general and Southern African states in particular, borrowing Kingsley Ighbor's phrase, the focus on partnership is nothing but a "customary platitude."[538]

3.2.3. Negotiations for EPAs and Global Trade Liberalization

The EU's multilateral trade liberalization policies are at the heart of EPA negotiations with Southern African states. EPAs not only fit the WTO model of trade liberalization, but also narrow the policy space of African states by promoting WTO plus liberalization agendas.[539] In its foreign relations, the Lisbon treaty mandates the EU to aspire for a free and fair trade.[540] The pursuit of "free" trade policies has, however, shadowed initiatives for "fair" trading arrangements between Southern African states and the EU.[541]

For African states, trade liberalization with the EU, which is the biggest trading destination for Southern African products, has significant impact on an African state's position on global trade liberalization efforts. Africa's position of reluctance and a timely stalemate on global trade liberalization would lack consistency both in terms of value and substance if African

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[538] Kingsley Ighbor, *Trade between two unequal partners: Africa and Europe search for an elusive agreement*, 28 AFR. RENEWAL, Aug., 2014, at 3 (discussing how sixty one heads of government and top level officials both from Africa and Europe in their discussion of EU-Africa relations came out with "customary platitudes", one of which was "We take particular pride in the breadth and depth of our *partnership*.")

[539] *See* generally Stephen R. Hurt, *The EU-SADC Economic Partnership Agreement Negotiations: 'Locking-in' the Neoliberal Development Model in Southern Africa?* 33 THIRD WORLD Q. 495, 495-510, (2012) (discussing how negotiations for trade liberalization between EU-Africa could lead to shrinking of policy space of African states).

[540] Lisbon Treaty article 2(5) of Lisbon Treaty,

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, *free and fair trade*, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

[541] *See* generally Alasdair R Young & John Peterson, *'We care about you, but …': the politics of EU trade policy and development*, 26 CAMBRIDGE REV. INT'L AFF. 497, 497-518 (2013) (discussing the complex trade policy of the EU. Young and Peterson argue that the EU's approach on trade as a tool for development shows a paradox between promoting development on the one hand and promoting global neoliberal market policies.)

states were to liberalize trade with their major trading partner.[542] In other words, it would be difficult for African states to argue against liberalized global economic order if and after they have liberalized trade arrangements with their biggest trading destination. Of course, when one presumes that it could pave the way to African states signing on to multilateral liberalization, in a way one is assuming that African states are not capable of negotiating their stance at the multilateral level. Second, one is also assuming that African states will never be able to renegotiate EPAs once they sign into the agreement. On the contrary, no such assumption is made here, although the possibility of one or both of the assumptions coming into reality is possible.

3.3. Norms of Solidarity and Trade Relations with the EU

Given dependence of Southern African exporters on European markets and the unequal negotiation platform, loss of preferential access to European markets has a significant impact on revenues for Southern African states.[543] How do fears of loss of revenues and market access affect "norms of solidarity" among Southern African states? Historically, "norms of solidarity" are a reactionary construction of identity to European racial and colonial domination.[544] Now,

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[542] *See* Michael Friis Jensen and Peter Gibbon, *Africa and the WTO Doha Round: An Overview*, 25 DEV. POL'Y REV. 5, 5 (2007) (discussing how preference erosion will lower Africa's competitiveness in European market.)

[543] San Bilal and Vincent Roza, *Addressing the Fiscal Effects of an EPA* 11-12 (Eur. Ctr. for Dev. Pol'y Mgmt., 2007) available at http://ecdpm.org/wp-content/uploads/2013/11/Addressing-Fiscal-Effects-EPA-2007.pdf (last visited Feb. 13, 2015) (showing that as a result of trade liberalization with Europe, it is estimated that Tanzania and Zambia would loss revenue amounting to 32.5% and 15.8% respectively.) *See* similarly Phillip Oladunjoye, *Nigeria Rejects EPA over U.S. $1.3tr Revenue Loss –Man*, DAILY INDEP. (Lagos), Aug. 15, 2014) (discussing how trade liberalization with the EU would cost Nigeria over a trillion US dollars).

[544] Mazrui *supra* note 455. *See* also Samir Amin & Cherita Girvan, *Underdevelopment and Dependence in Black Africa – Their Historical Origins and Contemporary Forms*, 22 SOC. & ECON. STUD. 177, 177 (1973) (discussing how interaction with other cultures – for instance European colonialism – did not break African united identity. In his words,

> The image of an ancient, isolated and introverted Africa no longer belongs to his age: isolation –naturally associated with so-called "primitive" character – only corresponded to an ideological necessity born out of colonial racism. But these exchanges with other cultures did not break the unity of the African personality. On the contrary, they helped to assert and enrich it. The colonial conquest of almost of the whole of the continent strengthened this feeling of unity of Black Africa."

that white colonial and racial domination has ended in the Southern African hemisphere, how influential are economic pressures in constituting or re-constituting solidarity arrangements of the region? Among Southern African states, are ideational concerns of "norms of solidarity" limited to decolonization and anti-apartheid aspirations?

"Norms of solidarity," among Southern African states are a culmination of the recognition of the relationship between ideational and material concerns. The history of the SADC shows that in their anti-apartheid struggle, Southern African states emphasized ideational concerns at the multilateral level and limited material concerns to the state level. In other words, Southern African states galvanized global condemnation of Apartheid practices, while at the same time forging agreements with Apartheid South Africa.[545] Zimbabwe, for instance, despite its concerns of equality for majority South Africans, forged relations with Apartheid South Africa.[546] Timothy Scarnecchia argues that during Robert Mugabe's presidency Zimbabwe maintained relations with Apartheid South Africa. Scarencchia discusses the rationalist and interest maximizing policies of Mugabe in his efforts to suppress dissent through the help of Apartheid South Africa.[547] Similarly, the Department of International Relations and Cooperation of the Republic of South Africa noted "South Africa and Zimbabwe severed official diplomatic ties in 1980 when Zimbabwe gained its independence. However, during the period 1980 to 1994, South Africa maintained unofficial relations with Zimbabwe through its Trade Office in

[545] All Southern African states with the exception of Malawi severed formal relations with South Africa. Despite lack of formal relations, however, several Southern African states maintained unofficial relations with the Apartheid regime. Botswana, Lesotho and Swaziland, as members of SACU, had formal trade relations with apartheid South Africa while at the same time condemning the latter's discriminatory policies. *South Africa's Foreign Relations During Apartheid 1948*, http://www.sahistory.org.za/print/20th-century-south-africa/south-africas-foreign-relations-during-apartheid-1948 (last visited Feb. 16, 2015) *See* also *Zimbabwe*, http://www.dfa.gov.za/foreign/bilateral/zimbabwe.html, (last visited Feb. 16, 2015) (discussing history of relations between South-Africa and Zimbabwe).

[546] *See* ˆgenerally, Timothy Scarnecchia, *Rationalizing Gukurahundi: Cold War and South African Foreign Relations with Zimbabwe, 1981-1983*, 37 KRONOS 87, 87-103 (2011) (discussing how in 1983 Zimbabwe's ruling party (ZANU-PF) colluded with apartheid South Africa to limit support for ANC's anti-apartheid operations from Zimbabwe.)

[547] *Id.*

Harare."[548] In short, Southern African states although advocating ideational concerns for equality of all races in South Africa, constantly checked and re-checked material or self-interest maximizing policies as well.

In the context of relations with the EU, Southern African states fragmented negotiation syndrome, where each state attempted to advance its concerns individually and as a member of a group in a balancing act of "norms of solidarity." However, what is not clearly defined in EPA negotiations is a common ideational concern of Southern African states. Review of current negotiations seems to focus on maintaining access to European markets rather than normativity. In conclusion, EPAs and trade liberalization are not capable of uprooting the continental identity of African-ness. Nevertheless, as a result of a lack of common ideational concerns, in their negotiations with the EU, the value of "norms of solidarity" in framing foreign relations has diminished.

PART – IV – CONCLUSIONS

"Norms of solidarity" have defined the way Southern African states behave towards each other for decades. By establishing the identity of African-ness, "norms of solidarity" have harnessed support for decolonization and anti-apartheid movements to successfully triumph over racial and colonial oppression. "Norms of solidarity," now that white colonial and racial domination have ended, emphasize material concerns in economic relations with the EU. Indeed, Africa's emancipation movement has changed and moved beyond the struggles against white racial and colonial oppression and includes new forms of social emancipatory movements. The role and application of "norms of solidarity" in changing faces of African emancipatory movements has been overshadowed by concerns to maintain access to European markets. Future

[548] *Zimbabwe*, http://www.dfa.gov.za/foreign/bilateral/zimbabwe.html, (last visited Feb. 16, 2015) (discussing history of relations between South-Africa and Zimbabwe).

re-constitution of "norms of solidarity" has the force to bring social emancipatory and global fair trade movements to light without challenging feelings of African-ness. To date, however, the ideational concerns of "norms of solidarity" have become past triumphs. In conclusion, this chapter is an attempt at theorizing norms of solidarity among Southern African states.

CHAPTER-SIX: CONCLUSIONS

The late twentieth-century marks the birth of and transformation of Southern African integration schemes. This concluding chapter is more of a thought experiment based on the inter-relationship of emancipation, African-ness, colonization, Apartheid, and economic development in the integration aspirations of Southern African states. Indeed one could ask counterfactual questions of what if there was no continental or sub-regional integration project, would there be emancipation? Or what if Africa in general and Southern African states in particular were never colonized? What would pre-colonial African societies think about regional integration or African-ness? If regional integration was a resistance movement for decolonization and racial equality of Africa and Africans, then what if Africa was never colonized? Instead of focusing on what has failed to happen or what could have happened in this chapter the researcher will mostly focus on what has happened and what should happen.

There has been a radical shift in the past three decades thinking about integration. In the 1960s Africa in general and in the 1980s Southern African states in particular, there was preference for political integration rooted in ideals of emancipation. In both cases of integration (both political and economic) the objective was to achieve what was or is absent and build what was or is better or new. However, the paradigmatic shift of the conception and practice of integration in post-apartheid Southern African states led to the preference of trade-based integration rooted in the ideological and theoretical inclinations of neoliberalism. Nonetheless, despite the shift in conception and regional policies, both political integration and trade integration failed to create the envisaged and imagined outcomes of Southern African aspirations for integration.

Revolutionary and emancipatory ethos and imaginations of regional integration predominantly articulated the identity of African-ness. Feelings of African-ness, alternatively "norms of solidarity," defined the way states behave towards each other in the Southern African context. Remarkably, despite written incorporation of neoliberal policies in integration treaties, unwritten rules of "norms of solidarity" defy rationalist, self-interest maximizing foreign policy and infuse complex normativity in explaining state behavior in the region. This is not to romanticize relations among African states but rather to generalize the practice. During the anti-apartheid era state behavior among Southern African states defied the then existing international relations theories and created feelings of comradeship and unity in the integration projects of Southern African states.

While several integration scholars have compared and advocated African integration to EU's integration project, it is relevant to distinguish South Africa's integration aspirations. In this endeavor, this dissertation briefly gives an account of the limitations of Eurocentric conceptions of integration in analyzing regional integration among Southern African states. The distinction between the EU's and Africa's integration projects becomes clear when one looks at the objectives that led to the birth of the African integration project. Attempts to compare African integration to EU's institutional process of integration, where the expectation is that the former should emulate the latter's integration design, has a universalizing effect for experiences and episteme of integration. In this context, such theorization equals "integration" to "Europeanization" and disregards narratives of Pan-Africanism.

The move in this dissertation in re-conceptualizing integration as emancipation might sound like romantic idealism and raise questions on the practicality of how one achieves emancipation. On the contrary, the end of white colonial and racial domination in Africa is a

manifestation of how practical emancipatory movements can be. However, the end of colonial and racial oppression in the Southern African context provides an illusion of the end of the emancipatory project of Africa. This illusion is correlated to the end of political emancipation. When political emancipation is narrowly and erroneously construed as the end of colonial or white man's oppression, it excludes social oppression from the discourse. First, to understand emancipation as only limited to political emancipation without economic emancipation is equally erroneous.

The need to move beyond this narrow construction of emancipation will encompass both social and economic emancipatory movements. Putting social emancipatory movements to the side – the African founding fathers never relinquished attempts to achieve economic freedom both in the global order and at the national level. In the Southern African integration aspiration, one ought to ask, what is economic freedom and how does one envisage its achievement? The idea of economic freedom or emancipation presupposes oppression – both of the political and economic type – both at the national and global level. Questions for global economic order and issues of redistribution are pertinent aspirations for the regional integration efforts of Southern African states. Yet the implementation would require a narrative of adequate policy space for Southern African states to formulate alternative or new thinking in their development agendas.

SADC states' policy of trade-based integration needs to be supplemented with efforts to solve existent supply-side constraints among member states. The recent move by the SADC Summit towards industrialization is one of the positive changes for the region to be self-sustaining. Through regional industrialization policies, Southern African states will rely on regional suppliers. Indeed, economistic questions of efficiency, comparative advantage, and competitiveness of Southern African states with the rest of the world would be some of the

central tenets that regional industrialization policies would need to address. One could also argue that regional industrialization policy sounds like a return to the historical Import Substitution Industrialization (ISI) and protectionist policies. One could also wonder if ISI is possible with the existent and new global rules of free market. Although the move towards regional industrialization is a commendable idea, it seems that Southern African states are late in making this decision, and have various bilateral and multilateral commitments for marketization that will complicate their decision to move to regional industrialization.

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ANNEX - 1

LIST OF INFORMANTS

Ben Winks	Webber Wentzel Attorneys
Hannelie Basson	Rooth and Wessel Attorneys
Kennedy Gihana	Gihana Kennedy Associates
Lloyd Kuveya	South African Litigation Center
Erika De Wet	Co-director of ICLA, Faculty of law University of Amsterdam, and faculty of law University of Pretoria
Christof Heynes	Co-director of ICLA, Faculty of Law at University of Pretoria
John Dugard	Leiden University and University of Pretoria
Fernando Loureiro Bastos	University of Guinea-Bissau and University of Lisbon
Danny Bradlow	Director of center for International Development at UP and professor at American University Washington College of Law
Frans Viljoen	Director of the Center for Human Rights at University of Pretoria
Magnus Killander	Head of research, Center for Human Rights at the University of Pretoria
Benita Meyersfeld	Wits University
Amos Saurombe	UNISA
Charles Fombad	University of Pretoria
Gift Manyatera	Dean of MSU Law Faculty, Zimbabwe
Lineo Ntoane	High Commissioner of Lesotho
Mr. Pacheko	Secretary of Economic Affairs – Angolan Mission to SA
Sonia Adriano	Secretary of Political Affairs – Angolan Mission to SA
Sarafina Gruner	Secretary – Angolan Mission to SA
Dorothy Hlajoane	South African Reserve Bank
Sibusiso Jama	Department of Trade and Industry of SA
Dennis Davis	Judge High Court of Cape Town
Ottilia Maungandize	Institute for Security Studies in Africa
Fudzai Pamacheche	Trade Marks South Africa
Memory Dube	South African Institute for International Affairs
James Nyondo	Malawian 2009 – independent presidential candidate
Karl De Gucht	EU Trade Commissioner
Margarida Afonso	Member of the Legal Service of EU Commission

N.B. Copy of this list was submitted to Dean Charles Cramton after my field work in South Africa)