



Supporting the Implementation of the Regional Integration Agenda – Achieving Compliance in the Member States of EAC, ECOWAS and SADC



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This study was commissioned by the the working group “Regional Economic Integration” of the GIZ sector network “Sustainable Economic Developmen in Africa” (NEDA).

This comparative analysis of the regional economic communities of EAC, ECOWAS and SADC is trying to

- 1) Identify its current legal and non-legal options for fostering Member States’ compliance with regional decisions;
- 2) Compare the options available in the three regions and analyse which options can be utilised more or better in the future.

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Executive Summary

This report looks at what can be learnt about improving national compliance with the law (community law) and commitments of regional economic communities (RECs) in the area of economic integration, for southern and eastern Africa.

For Africa, regional integration has long been recognised as essential for addressing the issues of the small economic size of many countries and the often arbitrarily drawn borders. As a response to these challenges African governments have concluded a large number of regional integration arrangements. However, in terms of “results” intra African trade remains low at 11% between 2007 and 2011, compared to 21% in Latin America and the Caribbean, 50% in Developing Asia and 70% in Europe¹.

While natural endowments, geography and history do play a role in limiting regional integration, policy barriers to trade are also a fundamental constraint. The private sector continues to face significant non tariff barriers² trading within Africa. There is also a greater need for regional co-operation on key infrastructure projects. Both policy and infrastructure barriers are addressed, in principle, by the agreements of the Regional Economic Communities within Africa. For the law of the RECs (community law) and commitments on regional co-operation to be more than “on paper”, Member or Partner States have to implement them, and implement them correctly.

National compliance with community law and commitments

In addressing the issues of national compliance with community law and commitments, several factors are considered. This includes the “conditioning” or “big picture” factors. For example, where the Treaties and Protocols are precise in the rights and obligations conferred on business and citizens, and offer them a direct and strong dispute settlement mechanism Government can be “litigated” into compliance.

Other conditioning factors relate to the “demand” for regional integration. Different economic and production structures will result in different pressures from the private sector to shape regional integration in a particular way. For example, where a single supplier country dominates the economic structure of a region tariff liberalisation is likely to be politically more sensitive, with the smaller countries more reluctant to liberalise tariff for fear of de – industrialisation and other mercantilist concerns.

Political leadership is another key conditioning factor that influences the extent to which community law and commitments are implemented. Political leadership is provided in part through creating a motivating vision and in part by underwriting the endeavour – either by bankrolling implementation or by financially supporting Members or Parties negatively affected by integration.

These conditioning factors are difficult to change in the short to medium term. Rather they should be taken into account when considering variables that can be influenced and which promote compliance at national level.

It is these “compliance variables” that are the focus of the assessment. Legal aspects are addressed - the clearer the rights and the clearer the manner of their application the more likely they will be exercised.

“Champions” of a particular issue or sector will also influence compliance with community law and commitments. Here the extent to which support for implementation can be harnessed or hindered is examined.

There are several practical factors that affect national compliance with community law and commitments. Where community law is easy to turn into national law, it is unsurprisingly more often turned into national law.

It is also to be expected that compliance will be more limited and slower where it is damaging to politically or economically sensitive sectors. Addressing these challenges with the negatively affected state and/or sector will influence compliance.

¹ UNCTAD, ‘Economic Development in Africa’ (UNCTAD 28 June 2013) http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf.

² Cynthia Chikura ‘Dealing with Regional Non-tariff Barriers: A Case Study of the COMESA-EAC-SADC Non-tariff Barrier Reporting Mechanism’ South African Institute of International Affairs (forthcoming).

The study does not offer a comprehensive assessment of compliance with regional economic community law within EAC, ECOWAS, SADC and COMESA. Such ambition is well beyond its scope. Rather it draws on experiences, and on other regions to gain insight and learn lessons.

It is also important to note that the report looks at compliance with regional commitments at national level. It does not address impact, either in terms of trade and resources flows³ or in terms of the impact on the structure of economies within the regions.

Summary of the findings

After the introduction, chapter 1 describes the framework for the assessment of compliance to regional economic law and commitments.

Chapter 3 reviews the conditioning factors affecting implementation of regional economic agreements. It highlights the importance of considering the legal and institutional framework together with the potential economic gains. The extent to which key players are prepared to take a leadership role is also important.

The two clearest examples of coherence between legal and institutional structures are the EU at one end of the spectrum and NAFTA at the other end.

Comparing the EAC, ECOWAS and SADC, there is greater scope for faster and deeper integration within the EAC. This is because the EAC has institutions with a higher degree of supra-nationality, supported by several partner states with a strong vision. Progress in implementing the economic integration agendas of ECOWAS and SADC needs to somehow take into account the challenges of the level of ambition, the “incomplete” legal contract of the Treaties, and the weaknesses of the REC institutions.

Without a key player being prepared to “write the cheque” there is no offsetting compensation at the region wide level. This makes it more likely that implementation will be directly affected by the short run costs of each of the measures put into effect.

Finally, where there is lack of a political vision and lack of political leadership provided by member states, this will need to be addressed by other actors, primarily the Secretariats.

Chapter 4 looks at legal and institutional aspects. In relation to the broader themes of the report it confirms the structural challenges of compliance in ECOWAS and SADC identified in chapter 2 in terms of relatively weak institutions to ensure the implementation of a broad agenda and the limited protection of private agents’ rights under the Treaties.

The response to these structural challenges can be characterised as legally driven on the one hand and co-operative on the other. However, it is notable that both approaches are adopting a focused approach – targeting issues of concern for the private sector. The “binding mechanism” for non tariff barriers is briefly reviewed and represents an attempt to increase the accountability of Nations for compliance with Community law by introducing legal sanction. It is not yet implemented so it is too early to assess its relative merit as an approach. Further in support of the legally driven approach is a “landmark” ruling by the COMESA Court of Justice which has demonstrated that private rights can be protected⁴.

However, the recent case of SADC suspending its dispute settlement mechanism following a successful case against the government of one of the member states (*Campbell*) cautions against relying on legal sanction alone to foster compliance.

An alternative, possibly complimentary, approach to legally driven integration is to focus on areas where there is a coalition of actors that are powerful enough and whose interests are sufficiently

³ Assessing Regional Integration in Africa IV (United Nations Economic Commission of Africa 18 May 2010).

⁴ Gerhard Erasmus, ‘The COMESA Court of Justice: Regional agreements do protect private parties’ [2013] Tralac Trade Brief No. S13TB09/2013 1–9.

aligned to see progress. Chapter 5 briefly reviewed the Trilateral, where political will seems set to make a significant impact on regional integration in the EAC – sanctioned but not driven by the Treaty or its Institutions. Also reviewed are cases where the regulators and private sector were sufficiently unified and powerful to implement SADC commitments in telecommunications and payments, again sanctioned but not driven by the Treaty or the Secretariat.

Chapter 5 also looks briefly at the process of peer review, which has been considered a way of engendering and harnessing political will. These mechanisms have increased transparency and involvement of stakeholders. There is little evidence of an impact beyond this in the African context. It is also noticeable that the WTO Trade Policy Review involves greater independent scrutiny of WTO members' implementation of the agreement that takes place in EAC, ECOWAS or SADC.

Compliance is also encouraged by monitoring national implementation of community law within a formalised monitoring structure. Chapter 6 reviews the experience with the Tripartite Non Tariff Barrier Monitoring Mechanism and selected monitoring processes in the EAC, ECOWAS, SADC and COMESA, drawing on the monitoring system in the EU.

In terms of achievements of the monitoring systems, the evidence is sparse in the region. However, it has been possible to provide some assessment of the implementation progress of the SADC FIP which again underlines the results of Chapter 5 in that the greatest progress has generally been made where strong public and private stakeholders have an interest and a capacity to propel application of the Treaties.

On the basis of the review of the REC the report developed an initial checklist for the monitoring system in the RECs:

- Comprehensive monitoring and problem identification
 - Does the system, collectively, monitor all key aspects of compliance from adopting or changing national laws appropriately to their implementation?
 - Related to this is the question of whether the collective monitoring framework allows the Secretariat/Commission to identify the source of the problem (transposition or implementation)
- Design
 - Do the indicators have a clear purpose (are they linked to results or to compliance? If both, is this clearly managed?)
 - Do the indicators embody sufficient technical expertise to be confident that verification of the indicators means compliance has been achieved?
- Coverage
 - Does the monitoring cover the resources required for effective implementation?
- Quality of Information
 - Can we rely on the information used?
- Verification
 - Can we be sure that the monitoring system is able to identify “in practice” whether there is compliance or not?
 - Is compliance independently addressed or is the system reliant on member/ partner states?
- Efficiency and comparability
 - Are the regional mechanisms built upon national systems or is there duplication and potential misalignment?
- Link to outcomes
 - Are the monitoring mechanisms linked to a process that can effect change? Are they linked together?
 - Are the processes timely?

Technical and practical issues are significant compliance variables in Sub Saharan Africa and are reviewed in Chapter 7. Challenges are at many levels and are multifaceted. They range from clarity regarding the body of law - the *acquis*⁵ and secondary regulation - required for implementation. Transposition or domestication is most prevalent, in the cases looked at, if community law is precise and can be “copied out” in domestic legislation – such as has been the case with the EAC Customs Law. The capacity of the implementing authorities or actors is, unsurprisingly, critical in particular where a

⁵ *Acquis* means “that which is agreed upon”. It refers to the accumulated legislation, legal acts and court decisions of the REC.

high level of trust is required, such as in the area of standards and payments.

There is significant scope for technical leadership to enhance compliance with community law. This can be from ensuring involvement of all relevant stakeholders in the negotiations of regional instruments, to embodying technical knowledge in guidelines, to reviewing national implementing legislation to programmes to build capacity and develop trust.

With regards to economic and political challenges, there is growing experience in the region to support painful or politically challenging adjustment. The COMESA Adjustment Facility has been extended, and SADC has recently been equipped with a facility to assist Member States with adjustment. The experience with safeguards is in one sense encouraging in that it has resulted in domestic strategies focussed on achieving liberalisation, but the granting of further extensions is eroding confidence that community laws will be applied within prescribed timelines.

Recommendations

Politically astute prioritisation

The regional integration agenda needs to prioritise relatively high impact areas that are of clear benefit to a relatively broad range of countries. This is particularly important in the context of Southern and Eastern Africa where no country is prepared to “underwrite” integration and directly mitigate uneven development within the region.

Prioritisation should take into account where to find relatively strong champions in support of the issue in more than one country.

A prioritised approach will make it more feasible to realise integration in key areas. The ambitious agenda and “incomplete legal contract” of the RECs in Southern and Eastern Africa requires a heavy institutional structure and bureaucratic resources, which member and partner states are often unwilling to fully fund.

A greater focus on implementing regulation, supported by a Secretariat with greater legal capacity.

While the agenda of regional integration probably needs to narrow, more resources are needed to support the development of implementing regulation. This is best led by the Secretariats in co-operation with member and partner states.

Developing implementing regulation is critical. Many countries have very limited capacity to develop appropriate regulation to transpose/domesticate and this has had a negative impact on compliance.

The absence of clear implementing regulation also impacts the ability of a monitoring system to track transposition domestication of community laws and commitments.

This is an area where there are efficiency gains from the Secretariats taking a leading and co-ordinating role. It is an irony that one of the successes of SADC, the payments mechanism, was concluded on the basis of bilateral agreements when a regional agreement would probably have been lower cost. However, it is unlikely that, given its current legal capacity, the Secretariat would have been able or trusted to lead this process.

An independent verification process

It is notable that, with the exception of the EAC’s Single Market Scorecard and SADC’s now defunct Trade Audit, there is a lower level of verification of compliance to REC commitments than to commitments made to the World Trade Organisation (WTO).

This is a key role for the Secretariat to at least co-ordinate. There are positive steps being taken in terms of monitoring, but an independent verification process of the situation on the ground in member or partner states will need greater resourcing.

Linking regional funds to compliance challenges, and strengthening the capability of the Secretariat to support economic adjustment

With several of the RECs receiving regional funds to support member states in the context of regional integration, there is an opportunity to enhance implementation by linking these funds to challenges of compliance. Currently the focus has been on fiscal challenges, for example with COMESA's adjustment support programme. While the regional funds need to continue to support economic adjustment (see below) there is a need to support member or partner states in the practicalities of transposing/ domesticating regional laws and commitments.

Where lack of implementation is a result not of practical challenges but of economic costs from e.g. liberalisation, the use of regional funds becomes a critical factor. The development of regional funds, such as the Trade Related Facility for SADC, provides an opportunity for the Secretariat to link support to economic adjustment directly to implementation of community laws and regulations. And derogations should be managed according to the Treaties. For example, the stay of application of tariff liberalisation should be managed within the context of a safeguard mechanism and accompanied by adjustment support. This would build confidence in the private sector that the non application of community law and commitments is transparent and managed.

In most of the Secretariats this will require a significantly greater technical capacity, even to implement and oversee adjustment support and the application of the safeguard mechanism.

Clarification of the legal status of community law at national level

The report has covered a lot of detail regarding this issue and several specific issues have been raised. The issues considered have included the ability of private actors to claim the freedoms offered the different RECs directly in national or regional courts.

While such issues are critical to the likely impact of the RECs, they are largely political decisions – in practice if not in principle.

What is required, irrespective of the broader political direction, is a clarification of the legal status of community law at national level. Currently the rights offered under the different Treaties and Protocols are uncertain and do not create the transparency and certainty that would promote cross border economic activity.

Coherent and co-ordinated monitoring mechanisms

Several of the monitoring mechanisms of the different RECs have been reviewed and benchmarked. There are several generic issues that need to be addressed.

The first is the need for appropriate indicators that are linked to transposition/ domestication of community laws and commitments. This challenge can be met relatively easily if implementing regulation has been developed. Where it has not, monitoring will involve missions to assess member state laws and regulation - in such cases the distinction between monitoring and verification is slim.

Second, the monitoring systems need to be coherent. In the EU, different monitoring systems perform different but coherent roles allowing the Commission to relatively effectively identify both the challenge and the underlying problem – transposition/ domestication, implementation or application by officials. For the RECs reviewed there are no frameworks for ensuring that the different monitoring systems collectively add up to a clearer and more comprehensive picture of implementation.

Much more can be said

Given a subject as multifaceted and complex as compliance with Community law there is always more that could be said, and any conclusion reached is by its nature subject to review as circumstances change. We have attempted to provide insights on practical measures that can be implemented at technical level by the RECs themselves. Even narrowing our analysis in this way, there are many areas that should be further explored, for example the scope for the private sector to act as champions for regional integration.

Chapter 1

Introduction

1. Introduction

1.1 Regional integration in Africa

Regional economic integration is the removal of economic barriers between two or more countries. The great majority of integration initiatives deals with free trade in goods, though increasingly services and to a lesser extent investment is being covered. Co-operation on trade facilitation and regional infrastructure are also of growing importance.

For Africa, regional integration has long been recognised as essential for addressing the issues of the small economic size of many countries and the often arbitrarily drawn borders. As a response to these challenges African governments have concluded a large number of regional integration arrangements. However, in terms of “results” intra African trade remains low at 11% between 2007 and 2011, compared to 21% in Latin America and the Caribbean, 50% in Developing Asia and 70% in Europe⁶.

There are many reasons underlying the relatively low level of regional integration. Similarities in economic structure and natural endowments mean that many countries produce the same goods, limiting the immediate opportunities for trade. Long distances over difficult terrain also create a natural barrier to integration. Moreover, the infrastructure that is in place is often designed for linking minerals or raw commodities to international markets rather than linking neighbouring countries.

So, natural endowments, geography and history play a role in limiting regional integration. Yet, policy barriers to trade are also a fundamental constraint as evidenced by the significant non tariff barriers⁷ the private sector faces in trading within Africa. Similarly, there is a greater need for regional co-operation on key infrastructure projects. Both policy and infrastructure barriers are addressed, in principle, by the agreements of the Regional Economic Communities within Africa. These agreements are “characterized by ambitious targets... [and] have a dismally poor implementation record.” Hartzenburg T. (2011). While the last year has led to a somewhat more positive perspective on regional integration, with the AfDB (2014) noting that “[O]ver the past decade, Africa’s longstanding commitment to regional economic integration has moved closer to reality” the implementation of regional economic community law and commitments at national level remains a fundamental challenge.

The Treaties and Protocols of Regional Economic Communities (REC) provide the primary framework for economic integration. Community law creates the rights for their businesses and citizens, and obligations for regional and national institutions, to free movement of goods and, increasingly services, capital and to a lesser extent labour. RECS also provide a framework for co-operation that creates non binding, often called “best endeavour” commitments. For the law of the RECs (community law) and commitments on regional co-operation to be more than “on paper”, Member or Partner States have to implement them, and implement them correctly.

1.2 National compliance with community law and commitments

This report looks at what can be learnt about improving national compliance with the law of regional economic communities (community law) and, to an extent, commitments on co-operation, in the area of economic integration.

In addressing this question several factors are considered. This includes the “conditioning” or “big picture” factors that influence the degree to which the rights provided by community law can be applied in practice. For example, where the Treaties and Protocols are precise in the rights conferred on business and citizens and offer them a direct and strong dispute settlement mechanism, Governments can be “litigated” into compliance. This situation is characterised in the literature as one with a “complete contract” between the Member or Partner States. Where RECs have an ambitious agenda that requires the rights and obligations of the Treaties and Protocols to be developed by regional and national institutions, ensuring compliance at national level is much more involved. On top of that, the ability of “litigation” alone to enforce compliance is more limited. In the literature this situation is referred to as one with an “incomplete contract” between the Member or Partner States.

⁶ UNCTAD, ‘Economic Development in Africa’ (UNCTAD 28 June 2013) http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf.

⁷ Cynthia Chikura ‘Dealing with Regional Non-tariff Barriers: A Case Study of the COMESA-EAC-SADC Non-tariff Barrier Reporting Mechanism’ South African Institute of International Affairs (forthcoming).

Other conditioning factors relate to the “demand” for regional integration. Different economic and production structures will result in different pressures from the private sector to shape regional integration in a particular way. For example, in regions where large corporations are developing cross border supply chains tariff reduction, investment promotion and trade facilitation are likely to be “demanded” by the regional economic communities. However, where a single supplier country dominates the economic structure of a region tariff liberalisation is likely to be politically more sensitive with the smaller countries more reluctant to liberalise tariff for fear of de-industrialisation and because of other mercantilist concerns.

Political leadership is another key conditioning factor that influences the extent to which community law and commitments are implemented. Political leadership is provided in part through creating a motivating vision and in part by underwriting the endeavour – either by bankrolling implementation or by financially supporting Members or Parties negatively affected by integration.

These conditioning factors are difficult to change in the short to medium term. Rather they should be taken into account when considering variables that can be influenced and which promote compliance at national level.

It is these “compliance variables” that are the focus of the assessment. A range of compliance variables is considered. Firstly, legal aspects are addressed. The clarity and status of community law at national level conferred by the Treaties and Protocols and secondary legislation will influence implementation. The clearer the rights and the clearer the manner of their application the more likely they will be exercised – promoting regional integration through the process of law.

Compliance with community law and commitments will also be influenced by the level of support at political level of “champions” of a particular issue or sector. Here the extent to which support for implementation can be harnessed or hindered is examined.

There are also practical/technical and political/economic challenges that affect national compliance with community law and commitments. In some areas, and for reasons considered in the report, it is simply easier to transpose/domesticate community law into national law. It is also to be expected that compliance will be more limited and slower where it is damaging to politically or economically sensitive sectors. Addressing these challenges with the negatively affected state and/or sector will influence compliance.

The study does not offer a comprehensive assessment of compliance with regional economic community law within EAC, ECOWAS, SADC and COMESA. Such ambition is well beyond its scope. Rather it draws on experiences, and on other regions to gain insight and learn lessons.

It is also important to note that the report looks at compliance with regional commitments at national level. It does not address impact, either in terms of trade and resources flows⁸ or in terms of the impact on the structure of economies within the regions.

1.3 Outline of the report

Chapter 2 briefly sets out the framework for the analysis – the “conditioning factors” and “compliance variables” discussed above.

Chapter 3 provides a review of some of the conditioning factors that affect the compliance of member or partner states with the law of regional economic communities. This identifies some of the challenges and helps set in context the different proposed strategic directions for furthering regional integration.

⁸ Assessing Regional Integration in Africa IV (United Nations Economic Commission of Africa 18 May 2010).

The variables that can be more readily influenced in the short to medium term form the body of the remainder of the report. The assessment starts with legal enforcement and accountability.

Chapter 4 examines the legal aspects of compliance with community law, providing an overview of its application and status in member states and reviews the current – differing – trends relating to whether or not it grants rights to private agents that can be enforced.

Chapter 5 looks briefly at how political will and the use of champions of change has had an effect on regional integration, in particular the Trilateral in the EAC and case studies of private sector involvement in regional integration in SADC. Though the interests of key stakeholders are largely a conditioning factor and are difficult to be influenced directly through technical intervention, the chapter does demonstrate some of the key principles and practices that can better harness this will. In this regard the peer review mechanism is also examined.

Chapter 6 looks at the monitoring of compliance. It provides a benchmark of the comprehensive approach of the EU and provides insights into the key issues for a monitoring process drawing on the approaches used in the Tripartite Non Tariff Barrier Monitoring Mechanism, the EAC Common Market Implementation, Non Tariff Barriers in ECOWAS, some of the developments in SADC and the transposition process in COMESA.

Chapter 7 looks at technical and practical challenges of compliance. It identifies where we have seen progress in member states implementing their commitments and complying with community law and where there have been significant challenges. Key issues relate to resource requirements versus resource availability – technical, institutional and financial; the extent to which compliance requires mutual trust between authorities/implementing bodies and the divergence of national capacity; and overall institutional capacity.

Chapter 7 also briefly reviews the political/economic challenges of compliance and the approaches that are being used to address them.

Chapter 8 provides conclusions and recommendations.

Chapter 2

Framework for the Assessment of Compliance to Regional Economic Law and Commitments

2. Framework for the Assessment of Compliance to Regional Economic Law and Commitments

The focus of the report is compliance with regional economic law (community law) and commitments at national level. If community law and commitments are not implemented (see box) by member states then, in general, the Regional Economic Communities (REC) make little difference to regional integration.

Compliance, Transposition, Domestication and Implementation

For community laws and commitments to have an impact generally requires member or partner states to take specific actions to implement them at national law.

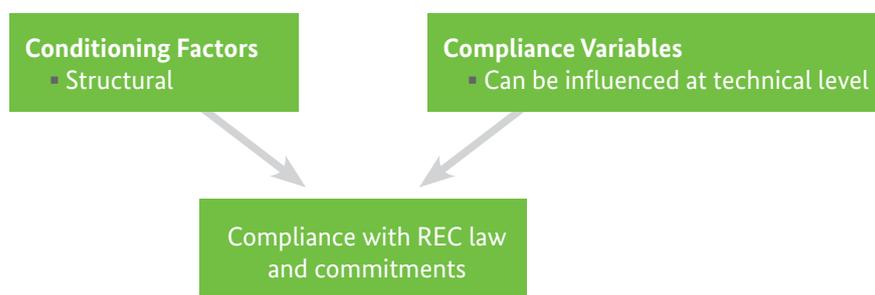
Various terms are given to the implementation of community law at national level, including “compliance” or “domestication” or “transposition”. These terms are used interchangeably in the report.

Note that for some communities and some community laws (notably the EU and its Single Market) “compliance” measures, “domestication” or “transposition” is not required; the laws have “direct effect”⁹ at national level.

There is a substantial literature on implementing regional integration law and commitments, characterised here into two broad categories. The first considers the compatibility of the legal nature of the agreement with the institutional structure¹⁰. The second, of a more practical nature, looks at the challenges of the application of regional economic law at national level – primarily looking at the European Union (EU)¹¹ but increasingly looking at other regions¹². There is also a rich and fast growing literature on compliance of sovereign states with international agreements, both hard and soft law, ranging from trade, finance to the environment and human rights¹³.

Each of these strands of the literature offers insights and have provided a framework for the analysis and allow us to separate what might be called “conditioning” factors, which are structural, and “intervening” variables which can be more easily influenced by the technical interventions and support (see Figure 1).

Figure 1: Influence on compliance



⁹ see http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114547_en.htm.

¹⁰ F Laursen, 'Regional integration: some introductory reflections' in F Laursen (ed), *Comparative Regional Integration* (Ashgate Publishing 2010).

¹¹ Oliver Treib, 'Implementing and complying with EU governance outputs' (2008) 3 *Living Reviews in European Governance* 1–30.

¹² Laura Gomez Mera, 'Obstacles to Regional Integration in Latin America and the Caribbean: Compliance and Implementation Problems. Jean Monnet/Robert Schuman Paper Series Vol. 7 No. 8 April 2007' [2007].

¹³ E D Shelton, 'Commitment and Compliance: the Role of Non-binding Norms in the International Legal System' (Oxford University Press 2013).

2.1 Conditioning factors

Drawing on Laursen (2010)¹⁴ we consider three conditioning factors that have a significant impact on the likelihood of regional integration commitments being complied with:

Coherence of the institutional with the legal framework:

- A strong and supranational structure can complement an “incomplete” legal contract between member states.
- A “complete” legal contract between member states together with a strong dispute settlement mechanism requires only an intergovernmental (limited) institutional structure.
- An incomplete legal contract with weak dispute settlement is not coherent with an intergovernmental (limited) structure in terms of ensuring compliance with regional commitments.

The “demand” for regional integration:

- This affects both institutional choice and the extent of compliance at sector level. Different economic structures, and geography, will influence where progress is made and where it is not. A region dominated by landlocked countries is likely to see results in transport corridors. Where trade is within a cross border supply chain, customs and trade facilitation and technical barriers to trade are more likely to be prioritised and see commitments implemented. At a different level, we are more likely to see non tariff barriers in a region dominated by a single exporter than in a region where several countries export.

Political leadership:

- There are different leadership roles to be played. This includes providing a vision for the region. It also often includes the role of paymaster. The same country does not necessarily play these roles.

The approach focuses on how regional integration can address collective action problems¹⁵. In particular it looks at the efficiency gains of regional integration balanced with a need to ensure a balanced distribution of these benefits.

2.2 Compliance variables

The report’s focus is those variables that can contribute to compliance at member state level and that can be influenced, to varying degrees, by technical intervention. In some instances they are related to the conditioning factors, in others not.

The following compliance variables have been developed based on the work of Krasner (1983)¹⁶, Laursen (2010)¹⁷, Treib (2008)¹⁸, Pelkmans and de Brito (2013)¹⁹ and Gathi (2011)²⁰ and identify the following compliance variables:

Legal enforcement and accountability

- Legal aspects
- Legal status of regional agreements
- Application of regional agreements
- Role of institutions

Champions of change and harnessing political will

- Champions of implementation
- Ensuring political will is harnessed and not frustrated within the regional economic communities

¹⁴ Laursen, ‘Regional integration: some introductory reflections’ (n __).

¹⁵ The analysis is rationalist institutionalist, see Laursen.

¹⁶ S D Krasner, *International regimes* (Cornell University Press 1983).

¹⁷ Laursen, ‘Regional integration: some introductory reflections’ (n __).

¹⁸ Treib, ‘Implementing and complying with EU governance outputs’ (n __).

¹⁹ Jacques Pelkmans and Anabela Correia de Brito, *Enforcement in the EU Single Market* (Centre for European Policy Studies 2013).

²⁰ James Thuo Gathii, ‘African regional trade agreements as legal regimes’ [2011] *North Carolina Journal of International Law & Commercial Regulation*.

Monitoring

- Framework for monitoring, including transparency
- Quality of information
- Role for peer review

Practical and technical challenges of compliance

- Technical capacity to transpose regional law at national level
- Resources and institutional challenges

Political and economic challenges of compliance

- Managing regional integration to address resistance from vested interests resulting from political concerns

2.3 Approach

The report:

- Looks at current instruments and methods to foster implementation of regional decisions at national level in EAC, ECOWAS and SADC – theory and practice
- Provides a concise summary of compliance mechanisms in other RECs
- Identifies good practices in supporting the implementation of regional decisions at national level

Given the limited availability of information on the status of implementation, a point of note in itself, a case study approach has been chosen. This provides insights into what practical issues and measures can encourage compliance, and what can hinder it.

Chapter 3

Conditioning Factors to Implementation

3. Conditioning Factors to Implementation

As outlined in the previous section, implementation of regional integration will be influenced by: (1) Coherence of the institutional with the legal framework; (2) the “demand” for regional integration; (3) political leadership.

These factors are very important but difficult to change over the short to medium term. They do, however, have implications in terms of institutional structures and for how key issues such as the uneven distribution of benefits of regional integration might be addressed.

3.1 Coherence of the institutional with the legal framework

The key insight of work in this area is to assess the nature of the legal framework, or “contract”, of the Regional Economic Community (REC) together with the institutional framework.

A “legal contract” which is clearly defined “ex ante”, is relatively narrow in scope and has a strong dispute settlement mechanism which is able to offer, for want of a better term, meaningful punishment for non compliance, and can achieve its aims with a light institutional structure²¹. Litigation is what drives implementation. This approach is best characterised by NAFTA, where there have been 59 investment cases during the period 1994 to 2009²² under Chapter 11, and 137 cases under Chapter 19²³. Compare this with SADC where no trade disputes have been brought before the Tribunal²⁴.

The EU is characterised as the opposite of NAFTA. The “legal contract” is defined in terms of objectives but does not have precisely defined terms and conditions at the outset, and is ambitious in scope. While there is a strong dispute settlement mechanism, the key issue is the comprehensive institutional structure, which allows “ex post” decision making²⁵.

The assessments of regional integration in Africa²⁶, Asia and Pacific and Latin America²⁷ highlight the incompatibility of “ex post” decision-making with weak regional institutions.

3.2 The demand for regional integration

A further conditioning factor of implementation is the “demand” for it. A higher level of economic interdependence will shape the economic and political interest in implementing regional integration agreements. It will also influence the choice of institutional structure. As set out by the WTO²⁸, intra regional trade both shaped and is shaped by regional integration agreements, with deeper cooperation enabling greater trade volumes and importantly the growth of trade within supply chains. Looking at intra regional share of trade outside of Africa, it is little surprise that the EU and NAFTA have amongst the strongest frameworks for removing barriers to trade (see Figure 2).

²¹ “Institutional structure” here relates to Commission/ Secretariat, Committees etc.

²² Lawrence L Herman, Trend Spotting, 2010 http://www.cdhowe.org/pdf/background_under_133.pdf.

²³ Donald McRae and John Siwiec, ‘NAFTA Dispute Settlement: Success or Failure?’ [2010].

²⁴ Gerhard Erasmus, ‘Is the SADC trade regime a rules-based system?’ (2011) 1 SADC Law Journal 17–34.

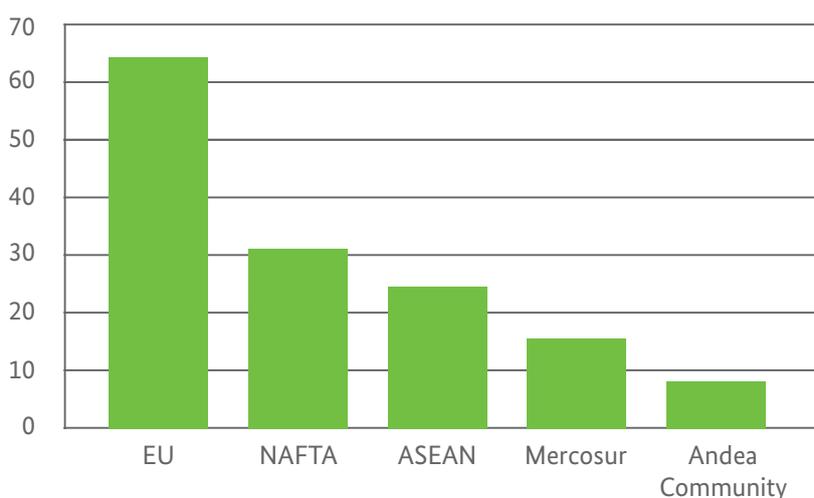
²⁵ A Warleigh-Lack, ‘The EU in comparative perspective: Comparing the EU and NAFTA’ in F Laursen (ed), *Comparative Regional Integration* (Ashgate Publishing 2008).

²⁶ T M Shaw, ‘New Regionalisms Post - Economic Partnership Agreement: what prospects for Sustainable Development in Africa and the Caribbean’ in F Laursen (ed), *Comparative Regional Integration* (Ashgate Publishing no date).

²⁷ L Belanger, ‘Incompleteness and Maintenance of International Cooperation: The Ex-post Politics of MERCOSUR and NAFTA’, 21 July 2009.

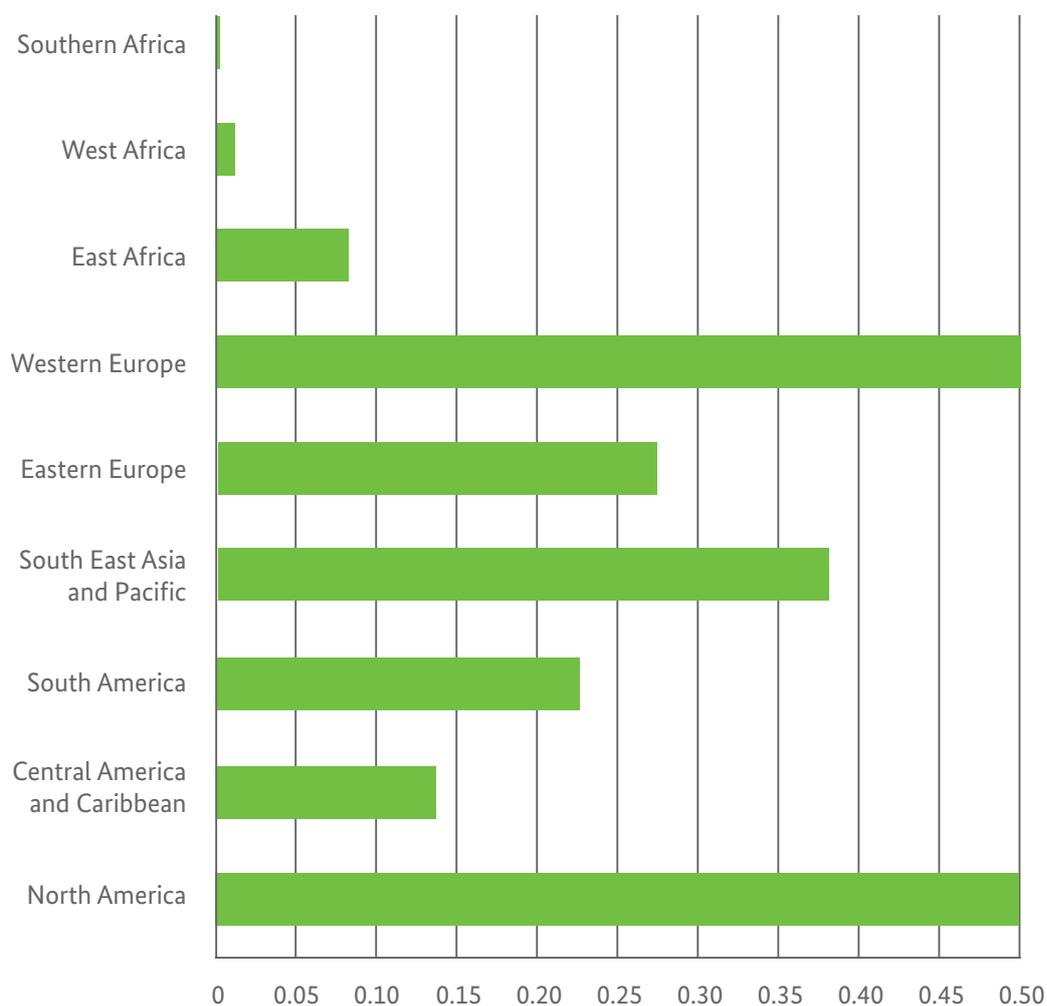
²⁸ World Trade Report 2011 (World Trade Organization 2011).

Figure 2: Percentage of Intra REC Trade 2010 (WTO)



The nature of trade also matters to the demand for regional integration. Intra industry trade creates a demand for lower border transaction cost throughout the regional supply chain. Where there is greater intra industry trade there is likely to be greater support for regional integration. Supply chains have played a significant role in shaping and promoting implementation of regional trade agreements²⁹ in the EU, North America and South East Asia and Pacific (see Figure 3).

Figure 3: Intra Industry Trade 2006 (Grubel Lloyds Index)



Source: Brulhart, WDR 2009.

²⁹ Sebastian Krapohl and Simon Fink, 'Different Paths of Regional Integration: Trade Networks and Regional Institution-Building in Europe, Southeast Asia and Southern Africa' (2013) 51 *JCMS: Journal of Common Market Studies* 472–488. They argue that integration within SADC is compounding existing economic structures within the region rather than transforming them.

3.3 Political leadership

Strong political leadership of regional integration has been fundamental in driving regional integration in Europe and assuring that the agreements have been implemented, even in the face of vested interest resistance. This leadership has been in terms of a strong vision and the willingness to “write the cheque”³⁰. In NAFTA, the leadership of the USA has been key, both in implementation and choice of a light institutional structure and enforcement through litigation. Political leadership in the USA has also been prepared to pay the “political cost” of unpopularity of NAFTA amongst vested interest groups negatively affected by the agreement.

By contrast, South Africa has played at best a limited role in driving regional integration in SADC³¹. The same has been said of Brazil in MERCOSUR³². In ECOWAS, while the role of Nigeria in peacekeeping has been central, it has not performed the role of paymaster or visionary – nor have Cote d’Ivoire or Ghana. In East Africa, the partners are more balanced in terms of size and economic structure than in ECOWAS or SADC and while the main economy of Kenya is not playing the role of paymaster, it – together with Uganda and Rwanda – are playing a key role in terms of providing political leadership and prioritising key areas for implementation.

3.4 Summary

The brief review of the conditioning factors affecting implementation of regional economic agreements highlights the importance of considering the legal and institutional framework together with the potential economic gains. The extent to which key players are prepared to take a leadership role is also important.

The two clearest examples of coherence between legal and institutional structures are the EU at one end NAFTA at the other.

At one extreme lies the EU, which establishes an “incomplete contract” between members but has strong supranational institutions and leadership.

Comparing the EAC, ECOWAS and SADC, we see greater scope for faster and deeper integration within the EAC. This is because the EAC has institutions with a higher degree of supra-nationality, supported by several partner states with a strong vision.

Table 1: Conditioning Factors to Implementation for RECs

Case	Legal – Institutional Coherence	Demand for Regional Integration	Political Leadership
EU	Supranational institutions coherent with incomplete contract and high ambition	Several important economies with strong trade and intra industry links.	Strong, from several players Strong vision
NAFTA	Limited institutions with no supra-nationality, compatible with relatively complete contract, strong dispute settlement and limited ambition	Dominant player, but strong trade and intra industry links.	Strong
ASEAN	Limited institutions with no supra-nationality, incomplete contracts, and culturally constrained dispute settlement	Dominant player, but moderate trade and intra industry links.	Limited leadership

³⁰ *ibid.*

³¹ S Amos, ‘The role of South Africa in SADC regional integration: the making or breaking of the organization’ [2010] *Journal of International Commercial Law and Technology*.

³² Warleigh-Lack, ‘The EU in comparative perspective: Comparing the EU and NAFTA’ (n __).

MERCOSUR	Limited institutions with no supra-nationality, incomplete contracts, and culturally/politically constrained dispute settlement	Very dominant player. And relatively low trade and intra industry links.	Limited Leadership
EAC	Intergovernmental institutions are central, but there are also supranational institutions Incomplete contract and high ambitions Coherence will depend on practical application	Dominant player but not to the same extent as in other regions considered. Moderate to limited trade and intra industry links.	Some leadership from several players Strong Vision
ECOWAS	Limited institutions with supra- nationality only relevant for the court (in principle), incomplete contracts, and culturally/ politically constrained dispute settlement	Very dominant player. Limited trade and intra industry links.	Limited leadership
SADC	Limited institutions with supra- nationality only for court (in principle), incomplete contracts, and culturally/politically constrained dispute settlement	Very dominant player. Moderate trade links. Limited intra industry trade.	Limited leadership

Moreover, progress in implementing the economic integration agendas of ECOWAS and SADC need to somehow take into account the challenges of the level ambition, the “incomplete” legal contract of the Treaties, and the weaknesses of the REC institutions. A wide and heavy agenda can only be carried by relatively large and strong institutions.

The lack of political and financial “underwriting” by the dominant economies and the economic structure of SADC and ECOWAS also means that the way winners and losers of integration are accommodated is different relative to the case of e.g. the EU. Without a key player being prepared to “write the cheque” there is no offsetting compensation at the region wide level. This makes it more likely that implementation will be directly affected by the short run costs of each of the measures put into effect.

Finally, where there is lack of a political vision and lack of political leadership provided by member states, this will need to be addressed by other actors, primarily the Secretariats.

Chapter 4

Legal and Institutional Aspects: Application, Status and Effect of Community Law, Institutions

4. Legal and Institutional Aspects: Application, Status and Effect of Community Law, Institutions

This section focuses on the application, status and effect of regional law in member/ partner states; the role of the institutions; and assess the potential limitations to legally driven integration.

4.1 Application, status and effect: an overview

Opong (2009)³³ notes that “[a] principal challenge in regional economic integration is how to make community laws legally binding and enforceable with national legal systems”. He calls this process one of “law translation”, others term this “domestication” and in the case of the EU it is most widely termed “transposition”. Whatever term is used, it is the process whereby regional law is given the capability of “enforcement or application within the national legal systems”.

Key matters of concern with regards to domestication/ transposition are whether community law (1) is directly applicable (2) has supremacy (3) has direct effect.

The issues of the application of community law relate to how they become part of the member/ partner states’ national law. Within the EU, community law – with regards to the single market – is directly applicable and supreme. This means that community law comes into force, and gives rights to citizens of the community, irrespective of transposition. Supremacy means that where national and community law conflict, community law applies.

In common law, or dualist states, it requires an act of parliament to give community law direct effect and supremacy, for example the Single European Act (1975) for the UK.

Community law has direct effect when it provides for specific and actionable rights and obligations, allowing natural and juridical persons to pursue their rights – given by the community – in national courts.

There is also the issue of ensuring that community law is correctly applied. This in part relates to allowing for a situation where national interpretation of community law is disputed. Here direct access of natural and juridical persons to the regional Court of Justice provides for such a referral. Direct access to the regional Courts also ensures breaches of application can be remedied even where “such breaches might have escaped the attention of the community”³⁴.

4.2 The law and institutions of the EAC, ECOWAS, SADC and COMESA

ECOWAS

The ECOWAS Treaty fulfils the role of a rules based system. It has clearly set out rules of conduct for identified subjects which are the member states, citizens and the community in general. However the effectiveness of the ECOWAS Treaty is compromised by the lack of a clear statement that the Treaty supersedes the domestic constitutions of the various member states. The ECOWAS Treaty establishes binding and non-binding provisions which are couched in both mandatory and non-mandatory language. It does not clearly establish the Treaty as the supreme law of the Community.

The ECOWAS Treaty is also not directly applicable in the community. As a matter of public international law, treaties are to be applied in good faith. There is no general obligation for member states to incorporate Treaty law into their domestic systems unless there is a clear provision mandating them to do so. The ECOWAS Treaty contains hortatory provisions instead of mandatory language for the member states to incorporate the Treaty into their domestic systems.

The ECOWAS Treaty could have provided for direct applicability but that is expressly denied in Article 5(2). Direct applicability would have ensured that the dualist nature of some members like Nigeria and Ghana does not thwart or delay the implementation of the Treaty within their jurisdictions. A Treaty like that of ECOWAS is faced with a challenge of transformation in various domestic systems.

³³ R F Opong, ‘Making regional economic community laws enforceable in national legal systems—constitutional and judicial challenges’ in *Monitoring Regional Integration in Southern Africa Yearbook* 2008, 2009.

³⁴ *ibid.*

In a bid to transform the Treaty and incorporate it into their legal systems it might lose some of its salient features. The ECOWAS members might not transform it at the same time meaning that it takes effect at different times. Transformation through individual legal system means that the ECOWAS Treaty might endure delayed implementation and result in partial implementation or non-implementation. One major challenge with the ECOWAS Treaty is that, considering the fact that it is not designated as the supreme law of the community or in the alternate directly applicable, when transformed through domestic legal processes it will be subjected to domestic legal hierarchies. In most of the member states in ECOWAS, the domestic constitutions are the supreme laws, a legislation giving effect to the ECOWAS Treaty might be found to be unconstitutional in a national tribunal like a constitutional court. Normally an expectation is that the ECOWAS Treaty should be superior to domestic legislation. When incorporated, it should not be subjected to the exigencies of domestic hierarchies.

The ECOWAS Treaty as it stands cannot bypass any potential inimical national legislation. It cannot be affirmed as an autonomous legal system within respective domestic systems. There are no strictures within the ECOWAS Treaty to ensure that it is not overridden by national law. This has a bearing on having a coherent community legal system. Overall, it affects the general compliance mechanism of the Treaty within the Community.

Another element missing in the ECOWAS Treaty is a reference procedure. This is a legal mechanism in which domestic courts are mandated to directly refer, interpret and apply community law in their cases.

It also does not allow domestic courts in member states to refer cases which they consider to be raising community law issues to the community court. The idea is that an organic linkage then gets created between the community legal system and the domestic courts. The ECOWAS Treaty does not make this mandatory. If it was mandatory legal compliance and the fusion of community law into members' domestic systems would have been expedited. This system is provided for in the European Union. It is found expressed in the COMESA Treaty (Article 30) and the EAC Treaty (Article 34). These articles mandate the national courts to make reference.

Court of Justice

The Treaty provides for seven judges to serve on the Community Court of Justice. The judges serve for a period of five years which is renewable. The ECOWAS Treaty mandates that judges be appointed by the Heads of States and Government. The ECOWAS Treaty itself read together with the ECOWAS Court Protocol has a built-in mechanism to ensure the transparency of the process. A judge of the ECOWAS court can only be removed after a plenary session of the Community Court has made a recommendation to the Heads of States. This is a more rigorous system of impeachment. The downside of the ECOWAS Court rules is that the terms of judges are not guaranteed. It does not have what is referred to in legal parlance as security of tenure. The fact that the terms of judges has a possibility of renewal after five years might influence judges who are in their first term to deliver judgements which are compromised so that their terms can be renewed. The best scenario would have been having the judges tenure fixed based on years or age.

Another issue related to the independence of the ECOWAS Court is the financial security of the judges. The ECOWAS Treaty does not guarantee personal independence of judges. This is because judges' remuneration is determined by the Heads of States and Government in accordance with Article 29. This leaves the judges at the mercy of an executive institution. The Treaty does not guarantee that the salaries of the judges will not be downgraded arbitrarily. Subjecting judges' remuneration to a political institution of the ECOWAS highly compromises the independence of the judges of the ECOWAS Court.

Individual Access

The ECOWAS Treaty provides for individual access. This is a commendable aspect of the community. This is because it increases the number of potential parties to the disputes. It overcomes the traditional reluctance of states to sue each other. This guarantees a greater government compliance with the provisions. The ECOWAS Treaty has addressed the court's jurisdiction, its relations with national courts, and sources of law and mode of access for individuals. However there is no individual access on enforcement of rights relating to the free trade area and economic integration – a critical omission when the focus is economic integration.

Direct Effect

This is a principle which would allow litigants to invoke community law in domestic courts. This would enable the ECOWAS Treaty to be easily implemented in the community. The ECOWAS Treaty is silent on the issue of it being directly effective at respective national courts within the community.

National Laws vs. Community Law within ECOWAS

The efficacy and implementing ability of the ECOWAS Treaty also depends on how various national legal systems react to its existence. It is interesting to note that the Constitution of Ghana in its Article 40 makes a direct reference to the ECOWAS Treaty. The preambles to the constitutions of Sierra Leone and Ivory Coast also refer to the ECOWAS Treaty. Constitutions from other member states are silent on the existence of the Treaty. As these constitutions are supreme law of their various lands, their positive attitudes towards the Treaty would be indispensable in its compliance and implementation. Overall, there is no justiciable provision in these constitutions which refers to the Treaty. ECOWAS also provides an arbitration procedure. What is commendable about the arbitration procedure is that the enforcement and compliance with its judgments is not parasitic upon domestic law.

Enforcement of Judgments

ECOWAS depoliticises the post adjudication process. This means the enforcement of judgments of ECOWAS follows a rule orientated system which is beneficial to the individuals. This is ensured through Article 25 of OHADA.

SADC

The Treaty establishing the SADC and its associated protocols is replete with provisions which are clear and some which are ambiguous. It is a rules based system. The SADC Treaty also establishes a rules based system in that it has clearly identified rules of conduct, subjects, sources of law and an obligation to obey the rules. The latter is the one which is problematic as it is not expressed in the most precise and mandatory language. The SADC Treaty also establishes institutions which have law-making powers. The most important of these institutions is the Heads of State and Government Summit. It does not have a legislative branch. The Treaty establishes a dispute settlement system in the form of a Tribunal.

The SADC Treaty does not state that it is the supreme law in the community. This is different from the EU which provides that the validity of its laws can only be judged in terms of community law. Domestic legal systems cannot usurp community law. This is not the case with the SADC legal system which in very weak language mandates the member states to take necessary measures to respect and implement community law.

The SADC legal system is generally meant to be subsumed into the different national systems within the SADC member states. The SADC Treaty like its sister ECOWAS system has no direct applicability. The member states within SADC have to use instruments within their domestic legal systems to make it applicable. The Treaty itself provides for this by stating that members have to take all necessary measures within their capabilities to ensure that this takes place. This is provided for in Article 6(5) of the SADC Treaty. The SADC is made up of various legal cultures. These are the civil and common law traditions. The Treaty is at the mercy of these two traditions for its transformation into domestic law. The common law tradition obtaining in member states like South Africa dictates that the Treaty first be given applicability through an Act of parliament.

It is in only Mozambique, Angola and the DRC where the SADC Treaty will have direct applicability owing to their civil law and monist tradition. The main challenge of leaving the SADC Treaty to the mercy of domestic legal systems for applicability is that the Treaty will not enjoy uniform compliance. The draftspersons in the various jurisdictions will surely not capture the import and spirit of the Treaty in a similar fashion.

The other challenge in terms of compliance is that the Treaty will not take effect at the same time. In essence the SADC Treaty as it stands is being applied partially in some jurisdictions, in others its implementation could have been delayed owing to legislative bureaucratic processes. In some there could be complete non-compliance with the Treaty at all.

One particular challenge of the Treaty not having direct applicability was exemplified by the Zimbabwean cases. One of the main requirements of the common law systems in enforcing foreign judgments is that the judgment must not be antithetic to a country's public policy. What entails public policy is a legal hard hat. The SADC Treaty compliance then gets constrained when a member state refuses

to recognise community Tribunal's judgments. What the SADC could have done is to pronounce on what public policy should entail. The Treaty could have narrowed down the meaning of public policy to avoid arbitrary reliance on it.

Supremacy of the SADC Treaty

In order to avoid the problems associated with transformation of the Treaty, it could have been made the supreme law of the community. As indicated in the ECOWAS study, once the Treaty has been changed into a domestic legislative instrument, it does not assume any superior status. This has the effect that a superior court such as the Constitutional Court of South Africa can make a finding to its unconstitutionality. In addition, the legislation resulting from the Treaty can also be subjected to the usual rules of juridical interpretation. For instance, it can be deemed to have obsolesced when a more recent statute came into being. This will be in spite of the SADC Treaty still being in force in its original state.

The SADC Treaty does not offer an organic linkage between itself and member states legislation. As things currently stand in the community, various national courts can interpret legislation giving effect to the Treaty in diverse ways. This has a negative effect on the general compliance with the Treaty by member states. This situation could have been avoided by making the reference procedure an aspect of the Treaty³⁵. This procedure would have allowed the domestic courts to refer matters which raise Treaty aspects to the SADC Tribunal for guidance. Whether domestic courts would have adopted and utilised this procedure is also debatable. This would have had to be provided in mandatory language in the Treaty.

One way in which the SADC Treaty could find more compliance in the member states is through the provision of individual access. It did provide for individuals to access the SADC Tribunal upon exhaustion of local remedies. This enhances the interaction between the national legislation and community law. However, as explored in the discussion of the Campbell case below, the ability to exercise this right has now been brought into question.

The SADC Treaty also lacks an adjudicative and interpretive relational principle. This is a provision which should demand national courts to take account of the community's goals and objectives when interpreting national legislation. This is currently lacking in the SADC Treaty and various national legislation.

Dispute Settlement

The judges in the SADC are appointed by the Heads of States and Government. This is a political institution established by the Treaty. It is the supreme organ of the community. The appointment of the judges is provided for in the SADC Tribunal Protocol's Article 11. The Protocol is quite vague on appointment, security of tenure, independence (both institutional and personal) and dismissal of judges. This constructive ambiguity has allowed the Heads of States and Governments to disband the Tribunal.

The SADC Treaty provides for individual access to the SADC Tribunal. This helps in bypassing the state-state litigation but which is an anathema in the SADC region and Africa in general. Generally individual access should depoliticise the whole dispute settlement process and ensure a buy-in from the member states. However, anecdotal evidence through the Zimbabwean experience has shown that the nexus between community law and national systems which must emerge from this practice can be thwarted by rules of mutual recognition. The best scenario would have been judgments of the SADC Tribunal having a direct effect and enforcement in the various domestic regimes. The SADC Treaty does not constrain members' reliance on public policy to defeat the spirit and purport of community law.

Direct Applicability

This principle was espoused by the ECJ as the entry into force of community law being independent of any domestic measures of reception. The SADC Treaty is not directly applicable. This results in compliance lacking uniformity throughout the community. In South Africa there was a case in which a dispute resulting from a bilateral agreement between South Africa and Malawi resulted in the court ruling that where there is conflict between a statute and the agreement, the statute prevails. This had the effect of nullifying the objective of the bilateral agreement. The same finding can be envisaged in situations regarding the SADC Treaty.

³⁵ The COMESA Treaty provides for a reference procedure in Article 30. The EAC Treaty provides it in Article 34.

EAC

The East African Community is the most organised of the four major Regional Economic Communities which constitute the African Economic Community. It also has the most relatively strong compliance mechanisms. The EAC is a rule-based system. It has clear rules of conduct, identified subjects which are the states and citizens of the community, the source of its laws are the Treaty itself and customary international law. The EAC Treaty has a clear enforcement mechanism. It establishes the East African Community Court of Justice.

The EAC Treaty also establishes a parliament which has law making powers. The EAC differs from other RECs in that it has made community law superior to other domestic legal systems. It provides in Article 8(4) thus 'Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty'. In terms of compliance this has the effect that domestic courts will have within their psyche, a duty to teleologically interpret laws within the context of the overarching community legal system.

The EAC is not a self-contained system. It is not divorced from the legal systems of Member states. This does not imply that it is a directly applicable system. National legislation has to be used to give it effect in terms of Article 8(2) of the EAC Treaty. The difference to the SADC, COMESA and ECOWAS is that the EAC stipulates a time frame which member states need to adhere to in enacting the legislation. Article 8(2) of the EAC Treaty provides that member states have to enact national provisions which empower the Treaty within twelve months. All EAC member states have indeed enacted domestic legislation effecting the founding Treaty.

Kenya has enacted the Treaty for the Establishment of the EAC Act of 2000. Uganda on the other hand has the East African Community Act of 2002. Ultimately, Tanzania has the Treaty for the Establishment of the East African Community Act of 2001. All countries have legislation which governs the customs union. It is a domestic legislation governing the member states. It is referred to as the East African Community Customs and Management Act of 2004. The EAC customs union actually has direct applicability in the community. This means that the Treaty can be invoked and enforced in local courts.

The EAC also has the preliminary reference procedure enshrined within its Treaty. This is a system which allows a lower court to seek interpretive guidance from a superior court. This reference creates a symbiotic relationship between the domestic courts and the community court. It then makes both court systems efficient enforcers of the EAC legal system. This duty imposed on national courts to refer cases for interpretation to the EAC Court of Justice is expressed in Article 34 of the EAC Treaty. This is because national legal systems are not generally obliged to defer to international or foreign law unless there is an express stipulation for them to do so in a Treaty. The EAC by expressly providing for this in Article 34 dispels this potential ambiguity. The preliminary reference procedure in the EAC creates a strong trilateral relationship among the individual citizens, national courts and the community court. This is very important in creating a moral duty to comply with the community law.

Legislature

The EAC has a parliament in which individual EAC citizens participate. This gives the community legitimacy within the citizenry. It further enhances interaction between the EAC national law making systems with the general community law making system. This bodes well for implementation as the normative values of community law become intertwined with those of national legal systems.

The DSU

The EAC establishes a dispute settlement system aimed at ensuring compliance with its provisions. Independence of the judiciary is a cornerstone of any credible legal system. Independence can either be personal or institutional. The EAC mandates that EAC Court of Justice judges hold office for a non-renewable seven years. This ensures the security of the judicial officers' jobs. The judges are appointed by the Heads of State and Government which is a political process and not the best way of appointing judges.

However, the EAC system contains internal mechanisms to ensure a more independent institution. Judges cannot be easily removed from office. Judges can only be removed after a recommendation of a committee made of commonwealth eminent jurists. This is according to Article 26(1) (3) of the EAC Treaty.

Of all the four studied RECs in Africa, this offers the most protection to the very important institution of a community legal system. The SADC Tribunal Protocol is very imprecise when compared with the EAC provisions.

The EAC fails in ensuring judicial independence by entrusting the financial security of the EAC Court of Justice to political institutions. These are the Heads of State and Council of Ministers. This creates room for manipulation of the judicial institution should the political entities be annoyed by its judgments.

One of the most important aspects of the EAC Court of Justice is that it has original jurisdiction. This means that an individual can approach the court without having gone through the domestic systems. The result of this is that more people are able to use the system. This is important for compliance and implementation of community law.

COMESA

The COMESA Treaty establishes a set of rules of conduct, identified subjects, acts as a primary source of community law and spells out an obligation for the member states to adhere to the rules. Failure to adhere to the basic tenets of the Treaty text shall be met with sanctions. One of the main institutions for the interpretation, compelling compliance and enforcement of the COMESA Treaty is the Tribunal. This is established in Article 7. The COMESA system can be described as hybrid in that it includes both coercive and consensual approaches to compliance and implementation of the Treaty.

Pivotal to the implementation of the Treaty are a couple of institutions. Like most RECs in Africa, COMESA does not have a legislature to make community laws. The Heads of States and Governments Summit is the supreme law making body. In COMESA as in the SADC and ECOWAS the community law is not supreme. The COMESA legal system is self-contained and not well linked to the domestic systems. The Treaty provides in a very non mandatory wording in Article 5 that: 'the member states shall make every effort' to ensure that it is part of their respective legal systems.

The COMESA Treaty is also not directly applicable. Its implementation and transformation into the various member states is left at the mercy of the various domestic legal systems. Some member states are dualist while others are monist. The latter which are in the minority, have no problem of implementation as the Treaty is directly absorbed into the system. Article 10 of the Treaty empowers the council of ministers to enact regulations, directives and decisions which are directly binding to the members. These decrees will have direct applicability and effect more than the whole Treaty body establishing COMESA. If there is a political will to ensure compliance then it can be argued that these directives can be used to further regional integration within the block.

Preliminary Review

The COMESA Treaty is quite unique and progressive in that it provides for the preliminary review procedure. Article 30 of the COMESA Treaty provides for this procedure. This is a procedure that allows domestic courts to seek interpretative guidance on issues affecting community law from the community legal system. This is important in that it creates an operational linkage between the community court and the domestic courts. This also creates a relationship between the individuals who would have initiated the action, the domestic court which will have decided to refer the matter to the community court and the COMESA Court of Justice. This is important for compliance with the Treaty in that it creates legal capital and legitimises the Treaty within the member states. In addition, it also helps in creating a situation in which there is a consistent interpretation of the two legal systems. This helps in harmonising the two legal systems.

COMESA Tribunal

This is established through Article 7. Its composition and institutional arrangement is elaborated in Article 20. The court has a composition of seven judges who must be drawn from judges in the domestic courts. These are appointed by the Heads of States and Government. They can serve for a five year term which is renewable. Article 22 provides that judges can be removed by the Heads of State and Government for stated reason and '...any other cause'. The COMESA Court of Justice is not the most independent one in terms of the security of judges. The fact that the terms of the judges are renewable can lead to a judge who wants to keep his or her job interpreting the law in a particular direction in order to gain favour with the appointing authority.

The provision that a judicial officer of the COMESA Tribunal can be removed for any other reasons leaves room for the abuse of the system. What is interesting from the Treaty is that the COMESA Court can be constituted as an arbitration tribunal in an investment contract. The fact that the HOS determines the budget of the court impact on institutional independence of the tribunal.

The implementation of the decisions of the court is not very convincing. Article 31 of the Treaty provides that 'a member state or the Council shall take without delay, the measures required to implement a judgment of the Court'. The language used here is quite hortatory insofar as the implementation of a judgment is concerned. The Treaty should have provided a precise timeline with regard to the implementation of the court decisions. Where the judgment is of a pecuniary nature, a member state's domestic rules of civil procedure shall be employed giving leeway for member states' court to invoke the expansive public policy principle to avoid community court judgments. This happened when Zimbabwe refused to register SADC tribunal judgments. Zimbabwean courts relied on the public policy principle to refuse registration.

Most provisions of the COMESA Treaty use the term 'undertake'. This term is not very peremptory. It has a hortatory connotation. While it creates a duty, the obligation can be fulfilled if the state is capable of fulfilment. This talks to issues of compliance. [See Articles 64, 69 (use of agree), 70, 71, 72 etc.]

4.3 A summary of key issues relating to the application of REC laws in Sub Saharan Africa

Direct application and status

The EAC, ECOWAS and SADC do not provide for the direct application of community law. The only regional economic agreement identified that has direct applicability is the Organisation for Harmonisation of Business Law in Africa (OHADA), enshrined in Article 10 of the Treaty which states: "The Uniform Acts are directly applicable and mandatory in the States parties, notwithstanding any contrary provision of the domestic law, be it anterior or posterior". Only in the EAC have all partner states legislated to give force of law to Community Acts³⁷.

Salami (2011)³⁸ extends the assessment of African RECs to look at the status of secondary legislation (see box for a description of primary and secondary legislation). While most REC treaties in Africa have a general provision requiring parties to adhere to their Treaty obligations most "do not provide for the status of REC secondary law or legal instruments in Member States"³⁹. In the case of ECOWAS, secondary regulations, which are "Decisions" or "Directions" of the Authority of Heads of States or of the Council of Ministers, the original Treaty was silent on their effect on Member States. This was clearly a problem as it was addressed in the revision of the Treaty in 1993, which made Decisions of the Authority of Heads of State or of the Council of Ministers binding on Member States and community institutions⁴⁰. However, the Treaty still did not state their precise legal effect. In SADC, Article 6 provides for Member States to give the Treaty the force of national law. However, no mention is made of secondary law, "nor did any provision cater for the treatment of such law in Member States"⁴¹.

³⁶ Alhousseini MOULOUL, Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A.), 2009.

³⁷ For example, the East Africa Community Act (2002) for Uganda.

³⁸ Salami, 'Legal and Institutional Challenges of Economic Integration in Africa' (n __).

³⁹ *ibid.* p. 670.

⁴⁰ ECOWAS Treaty 1993, Art 9(4) and 12(3).

⁴¹ *ibid.* p.671.

The EU's 'secondary legislation' is that form of legislation that affects day to day life within the EU and with which most people are familiar.

It is the kind of law made under the powers created and invested in the EU by the treaties - the EU's 'primary legislation'.

EU secondary legislation falls into four categories:

1. Regulations - Regulations issued by the EU are directly applicable and binding in all member states without the need for any legislation in the member states
2. Directives - Directives state objectives to be achieved and impose a requirement on member states to take domestic legislative action themselves to implement those objectives
3. Decisions - Decisions are binding directly in the same way as regulations, but they only apply to those to whom they are addressed - which may be member states, companies or individuals
4. Recommendations and opinions - Recommendations and opinions are not binding

www.politics.co.uk/reference/secondary-legislation-eu

A further challenge of legal harmonisation within a REC is the interrelationship between the international, regional and national levels. Within Africa, a RECs legal system needs to align itself with international law and the African Union, a problem also noted in a recent GIZ assessment of the "implementation gap"⁴².

The EAC Treaty Article 8(4) acknowledges that Community organs, institutions and law take precedent over similar national ones⁴³. COMESA largely mirrors the EU Treaty. Article 10 provides for Member States to give effect to the Treaty and give force of law to regulations to ensure force law at national level. Article 12 sets out the status of the secondary legislation – regulations, directives, decisions and recommendations/opinion – at national level. The WAEMU Treaty gives primacy to the Treaty in Member States under Article 43. Significantly, regulations are directly applicable in Member States, and the legal status of other secondary law is clearly established under Article 42.

In the case of ECOWAS, "Decisions" or "Directions" of the Authority of Heads of States or of the Council of Ministers are binding on Member States and community institutions⁴⁴. However the Treaty still did not state their precise legal effect. Within SADC, a recent ruling of a Member State Court⁴⁵ underscored the absence of supremacy of community law.

Direct effect

As noted, direct effect allows persons to pursue the rights given to them under community law in national courts. Opong notes that COMESA, EAC and ECOWAS treaties are "silent" on direct effect but he considers it significant that "the principle of direct effect is not explicitly ruled out" as it is in other trade agreements⁴⁶. With regards to SADC, Zenda argues that the *Campbell*⁴⁷ case gave direct effect to the SADC Treaty in the area of human rights⁴⁸. However, the suspension of the Tribunal following the Campbell ruling⁴⁹ the way it was handled "does not bode well for the rule of law in SADC"⁵⁰.

⁴² GIZ Sector Network Good Governance in Africa (GGA) 'Understanding the implementation-gap of pan-African and regional policies' (September 2012).

⁴³ But Salami argues, fails to define the status of the one to the other.

⁴⁴ ECOWAS Treaty 1993, Art 9(4) and 12(3).

⁴⁵ Opong (2009) contrasts supremacy with the case of *Moolla Group Ltd. V. Commission for SARS* (2003) where national implementing legislation of an agreement between South Africa and Malawi was not compliant with the agreement itself. The national court ruled that the national legislation applied.

⁴⁶ NAFTA Article 2021 prohibits private right of action under the agreement in national courts.

⁴⁷ Mike Campbell v Republic of Zimbabwe SADC (T) 2/2007 (28 November 2008).

⁴⁸ F Zenda, *The SADC Tribunal and the Judicial Settlement of International Disputes*, 2010.

⁴⁹ 'SADC Law Journal' [2011] 1–288.

⁵⁰ Erasmus <http://www.tralac.org/discussions/article/5322-why-clarity-about-sadc-law-has-become-an-urgent-matter.html>.

Institutions

COMESA, EAC, ECOWAS and SADC have established internal institutions which are supposed to assist in the implementation of the Treaty. The main institutions which cut across all the communities are the Heads of State and Government Summit, the Council of Ministers, the Tribunal (or Court) and the Secretariat. The EAC adds a legislature or Parliament as one of the main internal institutions which should lead to the implementation of the Treaty. The way these institutions talk to each other within the community determines the level of compliance which can be achieved. A constitutional analysis of these institutions and a determination of their triaspolitica illuminate the challenges they face when it comes to compliance. All have the Heads of State and Government as the executive branch, ECOWAS, SADC and COMESA have the Council of Ministers as a quasi-legislative body. EAC has a fully-fledged legislature. They all have the most important arm of a legal system which is a judiciary (leaving aside the effective suspension of the SADC Tribunal). Their judicial systems are structured in a variety of ways. Another key institution which these communities establish in order to deal with legal compliance and implementation issues is the Secretariat. The roles assigned to these institutions and how they relate to each other determines compliance at a practical level.

The Heads of State and Government

This is a very important institution for compliance in the RECs as it is the political head of these communities. From a constitutional perspective its role must be the provision of policy direction for the implementation of the treaties. This is because this institution is made up of various executives who control similar institutions as those replicated in the RECs in their respective constituencies. An analysis of this institution in all the RECs reveals that it has enormous powers and defers to no other institution within the community legal and compliance system. This institution, unlike in a proper constitutional system, does not account to the legislature or the judiciary. In all the RECs, save maybe for EAC, it has been given the powers to appoint and remove the members of the judiciary. In all the RECs there is no provision which mandates the HOS to account to any of the institutions therein.

Council of Ministers

The Council acts as a quasi-legislative organ in all the RECs except the EAC which has a proper legislature. Most of the decisions of the Council are directly binding and applicable in the respective communities. This is an interesting phenomenon as most parts of the main treaties have to be transformed into the various community law treaties before being enforced or complied with at a domestic level.

The Tribunal

The judicial aspect of the RECs is one important component of the institutional matrix inherent in the community systems. A constitutional analysis would place it above all other institutions including the Heads of States and Government and Council of Ministers. It will dictate that decisions of the Council of Ministers and those of the Heads of States be declared null and void if they violate the spirit and purport of the REC treaties. However, most treaties are structured in a way that the establishment and operation of the judicial organ of the RECs is left much to the Heads of States and Government which is an entirely political institution. This tends to undermine the institutional and personal independence of the tribunal. EAC is an exception in this regard. The fact that the tribunals are not very independent has an effect on compliance as ideally these institutions must compel compliance without fear, favour nor prejudice.

Secretariat/Commission

In theory this is supposed to be a very important organ of the RECs in terms of implementation and ensuring compliance. However, two things hamstring the secretariats of these RECs in executing their duties. The first one is that these secretariats lack capacity in terms of both expertise and also being understaffed. The second and most important handicap of the secretariats lies in the fact that the treaties give them very limited powers to oversee the implementation of the RECs agreements. The treaties are couched in a language which is hortatory when it comes to the role of the secretariats. Most of the powers lie in institutions which are largely of a political nature.

Saurombe (2012)⁵¹ stresses the importance of the SADC institutions for the implementation of SADC community law, calling for a rebalancing of power away from the Summit to other SADC institutions, in particular the Tribunal. A more realistic proposal, at least in the short run, might be for a re-alignment of the tasks allocated to the different institutions. The current situation is such that these institutions do not talk to each other making compliance within the system difficult.

⁵¹ A Saurombe, 'The role of SADC institutions in implementing SADC Treaty provisions dealing with regional integration' (2012) 15 PER: Potchefstroomse Elektroniese Regsblad.

Link to the national courts

One of the pertinent issues which could help with the compliance of the SADC Treaty in the various national jurisdictions is judicial co-operation between the SADC Tribunal and national courts. Within the SADC and Africa in general, it is only Zimbabwe which has a statute that facilitates such a co-operation. This is the Civil Matters Act of 1995. This means that the other fifteen members are in flagrant disregard of Article 6 of the SADC Treaty which provides that member states shall take all necessary steps to ensure uniform application of this Treaty. They are also in violation of Article 6 where it mandates member states to take 'all necessary steps to accord this Treaty the force of national law'.

4.4 The limited impact of the Treaties on the actual rights of private parties

At risk of oversimplification, community law – relating to trade – is only relevant in so far as it creates rights for private parties that can be enforced.

The REC considered have regional courts or tribunals that, to varying degrees, and to varying degrees of clarity, offer access to natural and juridical persons. Relevant articles under the Treaties include:

- COMESA Treaty, Article 26
- EAC Treaty, Article 30
- Protocol of the Economic Community of West African States Community Court of Justice (as amended), Article 10
- SADC Protocol on Tribunal and Rules of Procedure Thereof, Article 26

In SADC, firms cannot access regional courts to protect their rights. Regarding the Tribunal "it would have been practically impossible to protect private rights in the context of tariff preferences and the prohibition of on tariff barriers"⁵². Additionally, the panel procedures, envisaged to run along the lines of the WTO dispute settlement mechanism, remain dormant – and are not open to private parties.

In ECOWAS Access to the regional court is limited to the institutions of the Community and Member States, except in the case of human rights in which persons have representation. This limited standing to bring cases before the Court has therefore precluded individuals and corporate bodies of member states from instituting contentious action before the Court other than in instances involving human rights violations. They can only bring cases through the representation of their states. This creates a challenge of enforcing compliance. While the judgement of the Court is binding, enforcement measures have not been adopted by all member states. See box for more details.

Case Study of enforcement of community law in ECOWAS

Article 77 of the ECOWAS Treaty provides that where a Member State fails to fulfill its obligations to the Community, the Authority may decide to impose sanctions on that Member State. These sanctions may include:

- Suspension of new Community loans or assistance;
- Suspension of disbursement on-going Community projects or assistance programmes;
- Exclusion from presenting candidates for statutory and professional posts;
- Suspension voting rights; and
- Suspension from participating in the activities of the Community.

However, this provision has only being applied on peace and security issues such as in Niger, Guinea and Mali where there were coup d'états. The ECOWAS mechanism of supra-nationalism has therefore only been really active on peace and security issues. The Community is not able to take actions against non-compliance of free movement and payment of the community levy. Heads of State can only sanction by consensus. Therefore while the tools to enforce compliance are there, the political will is absent.

⁵² Erasmus, 'The COMESA Court of Justice: Regional agreements do protect private parties' (n __).

The ECOWAS Commission is dependent on National Units to report instances of non-compliance. Member States can flag issues while non-state actors can also draw the attention of the Commission. The methods for identifying non-compliance are ad-hoc and dependent on information from technical departments.

The ECOWAS Court of Justice was created pursuant to the provisions of 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS). Its structure, jurisdiction and procedure applicable before it are set out in Protocol A/P1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

The Court gives legal advisory opinion on any matter touching on the interpretation of the Community legal text. The Court also has contentious jurisdiction in cases where Member States fail to honor their obligations under the Community law involving:

- Any dispute relating to the interpretation and application of acts of the Community.
- Disputes between Institutions of the Community and their officials.
- Disputes dealing with liability for or against the Community.
- Declarations on the legality of Regulations, Directives, Decisions, and other subsidiary legal instruments adopted by ECOWAS.

Access to the Court is open to:

- All Member States and the Commission, for actions brought for failure by Member States to fulfill their obligations;
- Member States, the Council of Ministers and the Commission, for determination of the legality of an action in relation to any Community text.
- Staff of any of the ECOWAS Institutions;
- Persons who are victims of human rights violation occurring in any Member State;
- National courts or parties to a case, when such national courts or parties request that the ECOWAS Court interprets, on preliminary grounds, the meaning of any legal instrument of the Community;
- The Authority of Heads of State and Government, when bringing cases before the Court on issues other than those cited above.

This limited standing to bring cases before the Court has consequentially precluded individuals and corporate bodies of member states from instituting contentious action before the Court other than in instances involving human rights violations. They can only bring cases through the representation of their states. Therefore, this creates a challenge of enforcing compliance. Here it is the Member State that has the standing to bring the case to Court that is in breach as well as in instances where member states or the Commission are hesitant to bring cases of non compliance before the Court except in human rights violation cases.

In addition, while Article 15 (4) of the Revised Treaty provides that Judgments of the ECOWAS Court are binding on all member states, individuals and corporate bodies at the community level, there are no clear means of enforcing these judgements. In 2005, the community adopted a supplementary protocol, which requires member states to nominate an implementing authority to enforce ECOWAS judgments. To date, only three member states have nominated an authority.

Salami (2011)⁵³ points out that In contrast to the “skeletal” outline of the role of the Courts in SADC and ECOWAS⁵⁴, supremacy and power of referral are well articulated in COMESA and the EAC⁵⁵. However, up until very recently the existence of these powers in COMESA and EAC is “not known to have in anyway boosted” regional integration.

The response to the limited impact has been both legal and non legal. In legal terms there is now a move towards developing a legally binding enforcement mechanism for non-tariff barriers.

A legally binding enforcement mechanism for the elimination of Non-Tariff-Barriers (NTBs)

The EAC launched a study on the development of a legally binding mechanism for the elimination of NTBs, presented to the Sectoral Council on Trade, Industry, Finance and Investment in November 2012⁵⁶.

An assessment of the Draft EAC Bill, dated March 2013 suggests that there is a limited role of the Secretariat in bringing cases against member states and for private entities to pursue their rights in the EAC Court of Justice, which risks making the mechanism ineffective. While private entities can report NTBs (Section 8) Partner States are responsible for bringing a case (Section 12) with referral to the Council (Section 13) and the Committee on Trade Remedies (Section 14) for consideration before presentation to the Court (Section 15). However there are ambiguities which may, as discussions evolve, allow for the Secretariat to bring infringement proceedings against member states. In Annex No. 3 to the Bill the Secretariat is given the role of initiating disputes (though this is nowhere in the main text). Moreover, Section 16 allows for direct action by the “requesting party” to the Court if action provided for under sections 13 to 15. However the current draft gives little support to “requesting parties” including private agents or the Secretariat.

Unless the Secretariats or private entities are allowed to enforce the implementation of community law through the courts, the application of those laws will be in doubt. As Erasmus (2013)⁵⁷ points out “African governments do not litigate against each other in trade matters: there are no examples of inter-state disputes about violations of regional obligations”.

A landmark case in the COMESA Court of Justice

A recent ruling by the COMESA Court of Justice against the Government of Mauritius, addressed in the same paper by Erasmus gives credence to the idea that community law does give rights to private parties. This is a “landmark case” as it provides rulings relating to:

1. Article 26 of the COMESA Treaty concerning the right of private parties to bring cases to the Court if local remedies (roughly translated as national court proceedings) have been exhausted.
2. That a private party harmed by a national regulation that does not comply with the COMESA Treaty can still claim for the harm even if the national regulation is repealed.
3. The Supremacy of the COMESA Treaty.
4. And, on initial reading, the direct application and effect of the Treaty. This is demonstrated by the Court ruling that the absence of specific national legislation to affect the rights under the Treaty was not grounds for denial of these rights.

⁵³ Salami, ‘Legal and Institutional Challenges of Economic Integration in Africa’ (n __).

⁵⁴ And ECCAS and IGAD.

⁵⁵ And WAEMU.

⁵⁶ East African Community, ‘Status of Elimination Of Non Tariff Barriers in the East African Community’ (2012) VOLUME 5 1–26.

⁵⁷ Erasmus, ‘The COMESA Court of Justice: Regional agreements do protect private parties’ (n __).

Given the potential importance of this case, the press release is provided in full in the box below.

PRESS RELEASE - Companies Can Sue Governments in the COMESA Court

The COMESA Court of Justice has accepted to hear a case brought by a company against the Government of Mauritius. The Court took this decision in a unanimous ruling by five judges delivered yesterday 6 December 2012 in a case called: The Republic of Mauritius Vs Polytol Paints & Adhesives Manufacturers Co Ltd, Preliminary Application No 1 of 2012.

The company, Polytol Paints & Adhesives Manufacturers Co. Ltd, is based in Mauritius and imports paints from Egypt as part of its business of manufacturing and selling automotive paints. Both Egypt and Mauritius are in the COMESA Free Trade Area and therefore should not levy import taxes (customs duties) on products made in COMESA. However, Mauritius was charging a 40% tax on imported paints under a law adopted on 16 November 2000 but which was subsequently repealed on 20 November 2010. During that period, the company paid a total of Mauritian Rupees 13,275,261 in customs duties on the product when imported from Egypt. The company tried to challenge the law in the domestic courts of Mauritius, going up to the Supreme Court of Mauritius, but the Supreme Court decided that it could not enforce the COMESA Free Trade Area regime, saying "in the absence of any specific legislation to that effect, non-fulfillment by Mauritius as a Member State of its obligations, if any, under the Treaty is not enforceable by the national courts". Following this decision of the Supreme Court of Mauritius, the Company brought a case before the COMESA Court; seeking a declaration that the law of Mauritius under which it had been required to pay customs duties on imports from another COMESA Member State which is in the Free Trade Area, was illegal for contravening the COMESA rules; and asking for an order for refund of the taxes paid.

In the hearings before the COMESA Court, the Government of Mauritius argued that the company did not have a basis for bringing the case because the law was no longer in operation, having been repealed; and that the COMESA Court did not have jurisdiction to hear cases asking for monetary remedies against Governments. The COMESA Court did not agree with these arguments. Citing Article 26 of the COMESA Treaty, the COMESA Court set out the three requirements to be met before a company can bring a case: the case should be brought by a resident of a Member State, the case should be challenging the legality of a regulation in view of the provisions of the COMESA Treaty, and the company should have exhausted local remedies. The Court decided that the case was properly brought because the company was a resident of Mauritius, the case was challenging the legality of the regulation enacted by the Government of Mauritius on the ground that it was illegal under COMESA rules, and the company had tried to get remedies in Mauritian Courts going all the way to the Supreme Court.

The COMESA Court decided that even if the regulation being challenged has been repealed and is no longer in operation, the Court can still hear the case. The Court said, "It is the considered view of this Court that prejudice connected with an illegal Act arises at the commencement of the action. If the respondent (i.e. the company) is correct in its claim, prejudice would have arisen from the date the regulation came into operation affecting it in monetary terms on each occasion of payment of import duty. The subsequent repeal of a regulation by a Member State should not however deprive the Court of its jurisdiction under Article 26 in so far as there is a party that claims that it has been prejudiced during the time such regulation was in force. ... The repeal of the regulation may have prevented further payment of customs duties on goods imported after the repeal but does not cure previous grievances in so far as there is no recognition of the legality of the same when it was in force."

On the question of exhaustion of local remedies, that is, seeking remedies in the local courts of the Member State before going to the COMESA Court, the Court decided that there is no requirement to continue pursuing local remedies if the final court in the country has already taken a decision on the matter, since the decision binds all other courts in the country. The local remedy to be pursued should be "effective and sufficient"; and it would not be effective and sufficient if the final court has already ruled against the possibility of a remedy. The Court said, "The Supreme Court (of Mauritius) dismissed the claim on the grounds that non-fulfillment of Treaty obligations is not enforceable by the national courts in so far as there was no specific legislation to this effect. Under such circumstances, one cannot reasonably expect that the Respondent (that is, the company) would get an effective

and sufficient remedy from the courts of Mauritius. Once the Respondent obtains a decision on this matter from the final court in the land, it should not be obliged to have recourse to other courts or tribunals within the country, as such courts and tribunals being subordinate to the highest court are bound by the decision of that court.”

So, the COMESA Court has decided to hear the substantive claim by the company, which challenges the legality of the regulation passed by the Government of Mauritius and under which the company paid taxes when it was in operation.

This is a landmark case. First, because it has confirmed that companies can bring cases in the COMESA Court to challenge actions by Governments if the actions break COMESA rules, and second because it has demonstrated that it is feasible for even small companies to do this. Polytol Paints is a SME based in Mauritius. What is also significant is that the COMESA Court delivered its ruling after only one day, following the arguments of the lawyers for the company and the Government of Mauritius. This expedition by the COMESA Court is welcome and to be commended. It is a landmark judgment, for its clarity and simplicity, explaining clearly what the COMESA rules on the matter are, and opening the door to the public to have recourse to the COMESA Court in cases where some laws in the region would adversely affect and reduce trade and investment in the COMESA region. Furthermore, this judgment should encourage Member States to be clear about whether their obligations under COMESA rules have been properly accepted by their respective Governmental organs and have been domesticated into the laws and the policy and institutional frameworks of the country.

http://www.comesa.int/index.php?option=com_content&view=article&id=499:companies-can-sue-governments-in-the-comesa-court-&catid=6:press-releases&Itemid=57

4.5 Conclusions

This chapter has reviewed key legal aspects of the Treaties relating in particular to application, status and effect of community law.

Direct application, status and effect

The EAC, ECOWAS and SADC do not provide for the direct application of community law. Only in the EAC have all partner states legislated to give force of law to Community Acts.

A further challenge is the interrelationship between the international, regional and national levels. Within Africa, a RECs legal system needs to align itself with international law and the Africa Union. However, the greatest practical concern is the articulation between regional and national law.

The EAC Treaty acknowledges that Community organs, institutions and law take precedent over similar national ones. COMESA provides for Member States to give effect to the Treaty and give force of law to regulations to ensure force law at national level. In the case of ECOWAS secondary regulations, which are “Decisions” or “Directions” of the Authority of Heads of States or of the Council of Ministers, are binding on Member States and community institutions. However the Treaty still did not state their precise legal effect.

Within SADC, a recent ruling of a Member State Court underscored the absence of supremacy of community law. It is suggested that RECs pronouncing on what public policy entails at member state level could clarify where domestic law trumps regional law.

While most REC treaties in Africa have a general provision requiring parties to adhere to their Treaty obligations most “do not provide for the status of REC secondary law or legal instruments in Member States

Direct effect allows persons to pursue the rights given to them under community law in national courts. COMESA, EAC and ECOWAS treaties are “silent” on direct effect. With regards to SADC the Campbell case gave direct effect to the SADC Treaty in the area of human rights. However, the suspension of the Tribunal following the Campbell ruling brings into doubt the value of direct effect in SADC.

Institutions

COMESA, EAC, ECOWAS and SADC have established internal institutions which are supposed to assist in the implementation of the Treaty. The way these institutions talk to each other within the community determines the level of compliance which can be achieved.

1. The Heads of State and Government

This is a very important institution for compliance in the RECs as it is the political head of these communities. This institution in all the RECs has enormous powers and defers to no other institution within the community. In all the RECs, save maybe for EAC, it has been given the powers to appoint and remove the members of the judiciary. In all the RECs there is no provision which mandates the Heads of States to account to any of the institutions therein.

2. Council of Ministers

The Council acts as a quasi-legislative organ in all the RECs except the EAC which has a proper legislature. Most of the decisions of the Council are directly binding and applicable in the respective communities. This is of practical significance as most parts of the main treaties have to be transformed into the various community law treaties before being enforced or complied with at a domestic level. There is clearly a practical “application” gap which is looked at in the next chapter.

3. The Tribunal/Court of Justice

Most treaties are structured in a way that the establishment and operation of the judicial organ of the RECs is left much to the Heads of States and Government which is an entirely political institution. This tends to undermine the institutional and personal independence of the tribunal. EAC is an exception in this regard. The fact that the tribunals are not very independent has an effect on compliance as, ideally, these institutions must compel compliance without fear, favour nor prejudice.

4. Secretariat/Commission

In theory this is supposed to be a very important organ of the RECs in terms of implementation and ensuring compliance. However, the secretariats are hamstringed in executing their duties. They lack expertise and are generally understaffed in key areas (while other areas are overstaffed). Most importantly the treaties give them very limited powers to oversee the implementation of the RECs agreements. Most of the powers lie in institutions which are largely of a political nature.

5. Link to the National Courts

One of the pertinent issues which could help with the compliance of the SADC Treaty in the various national jurisdictions is judicial co-operation between the SADC Tribunal and national courts. Within the SADC and Africa in general, it is only Zimbabwe which has a statute that facilitates such a co-operation. This is the Civil Matters Act of 1995.

Enhancing compliance

Consequent to the review of the RECs, there is much that can be done to enhance the legal and institutional framework for enforcement:

Clarify the status, application and effect of community laws.

There are several areas identified where compliance could be facilitated. For example, in ECOWAS and SADC the application of community laws in dualist states could be facilitated by altering the constitutions to give supremacy to the Treaties – where supremacy is not accepted on the basis of public policy then the RECs could narrow down the meaning of public policy in so far as it relates to community law.

An independent Secretariat/Commission and Tribunal/Court of Justice

As already discussed in the section on conditioning factors, an ambitious agenda of integration supported by an “incomplete legal contract” requires strong supranational institutions if these ambitions are to be realized. The role of a Secretariat in enhancing transparency of the member states application of community law is critical. A constitutional analysis would place the Tribunal / Court of Justice above all other institutions allowing for decisions of the Council of Ministers and those of the Heads of States to be declared null and void if they violate the spirit and purport of the REC treaties. This links to the need to develop a binding mechanism/infringement procedure that can be used by independent institutions acting as custodians of the Treaty.

REC institutions have their own role to play in enhancing compliance. However, the ability of private persons to enforce their rights, without requiring their government to take up their cause in a state to state dispute is critical if a legally driven approach to integration is to be effective. This is what makes the Polytol Paints case so potentially important at least in COMESA and the EAC (given similarities in their Treaties). But the suspension of the SADC Tribunal following the “landmark” Campbell Case and the way it was handled serves as a reality check to the extent to which member states are prepared to cede sovereignty to community law.

The way forward?

There are widely voiced doubts regarding the potential for legally driven integration, in particular outside the EAC. This skepticism has resulted from (i) experience with SADC Tribunal (ii) differences in the legal enforcement mechanisms between the RECs have not, until very recently, had a noticeable impact.

The response in the EAC and COMESA has been to work towards the development of a binding mechanism focusing on removing non tariff barriers. A notable aspect is that the instrument is focused on a specific issue that is tangible for business in the region. However, the latest draft of the EAC Bill is currently unclear on the ability of private persons to enforce their rights under the Treaties.

It is noticeable that the recent efforts to enhance compliance through developing a further legal instrument are focused on an area of particular concern to the private sector – namely non-tariff barriers.

In ECOWAS the recent efforts to enhance compliance and provide a greater role for independent institutions of the Community and private parties to enforce economic rights under the Treaty.

Chapter 5

Harnessing Political Will and Champions of Change

5. Harnessing Political Will and Champions of Change

Political will and the presence of champions of change are conditioning factors for regional integration and influencing those directly is not explicitly addressed in this report. Rather, this chapter considers the issue of how to influence and harness the desire for regional integration - independent of institutional or legal imperatives. This is an important issue as, whatever the interest caused by the Polytol Paints case, the suspension of the SADC Tribunal following the “Landmark” Campbell Case⁵⁸ and the way it was handled serves as a reality check to the extent to which member states are prepared to cede sovereignty to community law⁵⁹.

Sceptics of the formal, institution-heavy approach to regional integration based on the European model, argue that the way forward is for “Champion Countries” to spearhead a less ambitious, more effective agenda that addresses immediate and tangible needs of the region. Draper (2010, 2012)⁶⁰ argues that a focus on regional public goods – in particular in relation to trade facilitation – is more likely to deliver results, at least in the short run. The benefit of such an approach is to develop support for regional integration by showing impact on the ground, and to avoid areas where countries can be divided – and where there can be significant short run winners and losers.

This approach is very much embodied in the Africa Union/NEPAD Action Plan for Advancing Regional and Continental Integration in Africa⁶¹, with a particular focus on infrastructure. Within the SADC – COMESA region, Malawi, Mauritius, Mozambique, the Seychelles and Zambia adopted in September 2012 the Accelerated Program for Economic Integration⁶², which has five pillars and 100 commitments to be undertaken in the next three years. In principle these changes do not require a significant amount of resource.

It is important to note that these initiatives take place within the context of REC commitments. This requires the RECs to recognize and condone variable geometry and variable speed to allow a subset of countries to move faster in their integration efforts. Variable speed and geometry has approved by the Joint Council of Ministers of Finance and Governors of Central Banks of COMESA and SADC and by the EAC Court of Justice⁶³.

Peer review mechanisms have also been considered a way of encouraging and channeling political will particular in Africa under NEPAD and the AU⁶⁴. The role of peer review is briefly considered in section 2.

Finally, recent case studies have highlighted the role that private sector champions can play in achieving regional integration. These are reviewed in section 3.

5.1 The impact of the Trilateral and the need for variable speed and geometry

The Trilateral between Kenya, Uganda and Rwanda was formed in June 2013 between the three Heads of State with the aim to fast track some specific EAC initiatives. The Trilateral decided on the following areas of priority: movement of people (use of ID cards as travel documents, Single Tourist Visa), regional infrastructure development (railway development, oil pipeline, investment opportunities for other EAC partners in oil refinery), energy (enhance electricity generation, alternative energy resources), trade facilitation (strengthen of single custom territory, transport corridors), East African Political Federation (drafting of East African Political Federation framework).

⁵⁸ A Afadameh-Adeyemi and E Kalula, ‘SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community’ [2010] Monitoring Regional Integration in ...

⁵⁹ Erasmus, ‘Is the SADC trade regime a rules-based system?’ (n __).

⁶⁰ Peter Draper (2010), Rethinking the (European) Foundations of Sub-Saharan African Regional Economic Integration, OECD; Draper, P. (2012) “Why Africa Needs Another Model of Regional Integration” The International Spectator, 47(1), March.

⁶¹ www.uneca.org/sites/default/files/uploads/sectors.pdf.

⁶² http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/924EBCF8F81EDC66C1257AAE0056104D?OpenDocument.

⁶³ see Section II “Variable geometry as a defining aspect of African Regional Trade Agreements” in Gathii, ‘African regional trade agreements as legal regimes’ (n __).

⁶⁴ A Reitmaier, ‘African Solutions: Best Practices from the African Peer Review Mechanism’ [2012] South African Journal of International Affairs.

Areas of responsibility were clearly divided among the three countries. The Republic of Uganda will lead on the issues of railway development and political federation; the Republic of Kenya to lead on electricity generation and distribution and oil pipeline development; the Republic of Rwanda to carry forward issues of customs and movement of people.

The Trilateral has strong political backing with the three Heads of State leading the process and heading bi-monthly meetings. Following the June meeting, meetings have been taken place in August 2013, October 2013 and January 2014 to review progress.

Tanzania and Burundi continue to feel side-lined and have fiercely criticised the resulting divide in the EAC integration process. Tanzania reportedly threatened to leave the EAC and three citizens of Tanzania filed a court case to the East African Court of Justice (EACJ). Since then, Tanzania's president has stated that it would not leave the EAC but criticized the members of the trilateral agreement for taking decisions at the EAC without consulting other members. The Court adjourned the matter to be heard in February 2014.

The EAC Treaty allows under Article 7 for 'the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds', member states are still required of notification of other member states which are not part of a sub group. According to the EAC Law Society, in the case of the Trilateral this has not happened bringing into doubt, for them, the legality of the actions.

Achievements to date include:

- 1) Transport and Infrastructure: progress has been made on the railways and pipeline projects and Mombasa port facilities. There has also been a significant reduction in non tariff barriers leading to a reduction in transit time from Mombasa to Kigali.
- 2) Single Customs Territory: progress has been made with regards to cross border customs computer systems integration; port charges and insurance; and Critical Success Factors for customs implementation have been identified.
- 3) A Single Tourist Visa has been introduced. And National identity cards can now be used as travel documents.

5.2 Peer review as a way of enhancing political commitment and compliance

Pagani (2002) defines peer review as "the systemic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed state improve its policy making, adopt best practices and comply with established standards and principles"⁶⁵. Peer review is commonly used in international economic organisations, including the OECD, IMF, WTO and most recently the G20. Within the AU context there is the African Peer Review Mechanism.

Peer review recommendations can become important measures against which to assess the progress of a country and to highlight trends and fluctuations. It also allows for the creation of a shared knowledge base and the identification of best practices and policies. In the case of the WTO, Laird (1999)⁶⁶ stressed the benefits of building up considerable information resources through the TPR process. Peer review can be a critical part of the policy development process of an organisation. It contributes to transparency and capacity building. Pagani (2002) contends that "the soft law nature of peer review can prove better suited to encouraging and enhancing compliance than a traditional enforcement mechanism" among poorly performing countries. He suggests that "peer review can create a catalyst for performance enhancement which can be far-reaching and open-ended".

Peer review can develop and harness political will towards implementation in the following ways:

- Peer review is a non-adversarial process that relies heavily on mutual trust among the states involved and confidence in the process. It is based on the concept of peer pressure both from other states as well as through public opinion (if the review process is open to the media and public).

⁶⁵ Pagani, F. (2002) "Peer Review as a Tool for Cooperation and Change", *African Security Review*, 11:4, 15-24. Routledge: London.

⁶⁶ Laird, S. (1999) "The WTO's Trade Policy Review Mechanism - From through the Looking Glass" Blackwell Publishers: London.

- Peer reviews tend to either look at one country or sub-region (customs unions in the case of the WTO) at a time or focus on a specific thematic topic against which a group of countries is reviewed on a comparative basis.
- Peer reviews often complement other monitoring mechanisms including judicial proceedings (see note below on WTO DSU), fact finding missions and reporting.

However it is important to note that a credible peer review process must be seen as objective, fair and consistent. Follow up and monitoring of changes and reform subsequent to any review is needed to ensure credibility of the process⁶⁷. Also the success of a peer review process requires cooperation from the countries participating and a strong Secretariat to support all the different steps.

The OECD peer reviews include the following structural elements: a basis for proceeding (e.g. a provision in an agreement or a decision of Council); an agreed set of principles, standards and criteria against which the country performance is reviewed; designated actors to carry out the peer review; a set of procedures leading to the final result of the peer review.

Similarly the trade policy review (TPR) at the WTO has a clearly established basis for proceedings; criteria; parties and possible consequences in the WTO agreements. The review is based on two documents – one prepared by the government under review and the other by the WTO Secretariat (Trade Policy Reviews division)⁶⁸. Both documents are made publicly available together with the Chairman’s conclusions following the review meeting that is open to all the WTO members. Discussants are part of the review meeting (like in many of the OECD processes where experts are used).

The timing or frequency of reviews undertaken differs across organisations and mechanisms. In the OECD it ranges from 1 to 7 years. In the WTO the reviews are conducted on a rotational basis with the countries with the largest share of trade subject to the most frequent reviews (every 2 years for the Quad countries).

The resources of the WTO to undertake TPRs have been placed under increasing pressure as the number of members of the organisation has expanded (Laird, 1999). Some technical assistance is provided to least-developed countries to support their participation in reviews. The WTO TPR process has been largely welcomed by members (Laird, 1999) who have seen benefits from participation both in terms of their domestic policy processes as well as their understanding of global obligations.

While peer review can be used to judge the implementation of legally binding principles, it is most often based on assessing conformity with policy guidelines. In the WTO, the TPRM is aimed at enhancing transparency. Legal compliance is dealt with separately under the Dispute Settlement Mechanism.

The African Peer Review Mechanism under NEPAD and the AU⁶⁹ has been considered an African Solution to African Problems. However the main result to date has been increased involvement of Non-State Actors in several countries⁷⁰.

5.3 Champions of change in Southern Africa

The South African Institute of International Affairs (SAIIA) and the European Centre for Development Policy Management (ECDPM) undertook case studies where the active involvement of the private sector pushed forward the regional integration agenda. They note that “[t]he private sector as a whole plays an interesting role within the Southern African region. At times private sector actors are considered the beneficiaries of all regional integration efforts and yet they can also be the implementers and drivers behind the process. At times they can hamper the process when strong lobby groups manage to influence governments in favour of certain outcomes, which do not necessarily benefit all actors or regional integration per se.”⁷¹

⁶⁷ Woods, N. and Narlikar, A. (2001) “Governance and the limits of accountability: the WTO, the IMF, and the World Bank”. UNESCO: London.

⁶⁸ Chaisse, J. And Chakraborty, D. (2007) “Implementing WTO Rules through Negotiations and Sanction: The Role of Trade Policy Review Mechanism and Dispute Settlement System”, University of Pennsylvania Journal of International Economic Law, 28:1, 153-185.

⁶⁹ A Reitmaier, ‘African Solutions: Best Practices from the African Peer Review Mechanism’ [2012] South African Journal of International Affairs.

⁷⁰ Adotey Bing-Pappoe, ‘Reviewing Africa’s Peer Review Mechanism’ [2010] Partnership Africa Canada 1–28.

⁷¹ Talitha Bertlmann-Scott, Catherine Grant and Lesley Wentworth, ‘Southern African Private Sector Drivers of Regional Integration’, Political Economy of Regional Integration in Southern Africa PERISA, 2013, 1–5.

The Communications Regulators' Association Southern Africa (CRASA) role in policy harmonisation in SADC

CRASA was established under the Protocol on Transport, Communications and Meteorology of 1997 by the national telecommunications regulators in Southern Africa. It is an implementing agency of SADC. CRASA's objective is policy harmonisation of the information and communications technologies (ICT) sector in SADC.

As noted by Bertelsmann-Scott "[p]olicy harmonisation in SADC has traditionally been a very difficult process with few successes being achieved."⁷² However, there has reportedly been significant progress in the area of Telecommunications, including the adoption of SADC Guidelines on Transparency in Roaming Services⁷³, Policy Guidelines on Interconnection for SADC Countries and Model Telecomm Regulations on Interconnection 2000 and CRASA Wireless Technologies Policy and Regulation 2004⁷⁴ and SADC ICT Consumer Rights and Protection Regulatory Guidelines⁷⁵.

Key to progress has been the active involvement of the large telecommunication companies with most governments in the region including permanent representatives from these companies in their delegations. The industry actors are represented via the Southern African Telecommunications Association. Knowledge is a key to the contribution that they make – "[i]t is often found that the national regulators do not always have expertise over new developments within the telecommunications, broadcasting and postal services. As such, they then invite industry experts and actors from the private sector to develop and put forward a national position or perspective"⁷⁶. This has been the case for roaming and digital migration in particular.

The private sector is also important to lobbying for implementation at the national level as they are significant employers and tax payers.

SADC Payment Integration System

Payment, Clearing and Settlement Systems (also known as Financial Market Utilities) allow for more timely and cheaper cross border financial transactions. Consequently an effective regional payments system also facilitates trade. As noted in Chapter 4 the payment system consists of a set of instruments, banking procedures and interbank funds transfer mechanisms.

Political commitment to establishing the SADC payments system has been patchy, reflecting the different political and economic sensitivities in the region.

In this context both the regulators and the private sector have been central to progress on implementing the commitments of the Finance and Investment Protocol commitments in this area.

The SADC Committee of Central Bank Governors is responsible for the SADC Payment Systems and has a project team made up of representatives from the central banks of all SADC member states. The South African Reserve Bank and the Committee's secretariat, the Banking Association of South Africa, have been instrumental in pushing the project forward. Some of the major private banks have assigned individual employees as In-Country Payment Leaders (IPLs) charged with "coordinating Project activities in their countries and to be accountable for project execution, for developing governance frameworks to support project implementation and for leading individual payment streams."⁷⁷

The SADC Banking Association has secured the active involvement of the corporate banking sector in piloting a single payments system within the Common Monetary Area, comprising Lesotho, Namibia, South Africa and Swaziland.

⁷² Talitha Bertelsmann-Scott, 'Regional Co-Operation in the Telecommunications Sector via CRASA', PERISA Case Study, 2013, 1–6.

⁷³ http://www.crasa.org/tempex/doc_pub_eng86.pdf.

⁷⁴ http://www.crasa.org/tempex/doc_pub_eng63.pdf.

⁷⁵ http://www.crasa.org/tempex/doc_pub_eng91.pdf.

⁷⁶ Bertelsmann-Scott.

⁷⁷ L Wentworth, 'SADC Payment Integration System' 1.

5.4 Conclusion

An alternative/parallel approach to legally driven integration is to focus on areas where there is a coalition of actors that are powerful enough and whose interests are sufficiently aligned to push for progress. This chapter briefly reviewed the Trilateral, where political will seems set to make a significant impact on regional integration in the EAC – sanctioned but not driven by the Treaty or its Institutions. Also reviewed were cases where the regulators and private sector were sufficiently unified and powerful to implement SADC commitments in telecommunications and payments, sanctioned but not driven by the Treaty or the Secretariat.

The process of peer review has been considered as a way of engendering and harnessing political will. These mechanisms have increased transparency and involvement of stakeholders. However, there is little evidence of an impact beyond this in the African context. It is also noticeable that the WTO Trade Policy Review involves greater independent scrutiny of WTO members implementation of the agreement than is generally the case for EAC, ECOWAS or SADC.

Chapter 6

Monitoring

6. Monitoring

6.1 Introduction

The rather overused saying “you cannot manage what you cannot measure” is of great relevance to compliance with community law. It is important to separate two aspects of monitoring when it comes to regional integration (1) results in terms of increased intra-regional movement of goods, services, people and capital (2) implementation of community law and co-operation agreements.

Results indicators are important in providing a check on the effectiveness of the strategy and mechanism for regional integration; and in terms of motivating support to the process. Choosing effective and appropriate indicators at the results level has been subject to continuing debate, with analysts proposing simple intra regional trade measures should be complemented by indicators that more appropriately take into account e.g. economic structure and size⁷⁸. While recognising the importance of such issues our focus is on monitoring compliance.

The importance of monitoring in a context where parties to an agreement are reluctant to take issues to dispute has been highlighted by Shelton (2010) who notes that “[c]ompliance review mechanisms are an intermediate phase in Treaty implementation, between domestic application and sanctions for non-compliance. They have a significant impact on the level of compliance, because the expectation of being identified as not complying with a norm, i.e. verification by reliable sources, helps deter violations.”⁷⁹

This chapter provides a review of the different experiences with monitoring compliance in the EAC, ECOWAS and SADC, drawing also on the EU and COMESA monitoring system.

The review begins with benchmarking the EU in section 2, identifying some of the key features of the system that makes it effective. The review highlights the extent to which the different mechanisms of the monitoring system of the EU are collectively comprehensive, provide for prioritisation and verification of barriers, and link to a dispute settlement procedure. This helps guide the review that follows of the other systems, each of which offer insights into key challenges.

Section 3 looks at the Tripartite Non-Tariff Barrier Monitoring Mechanism illustrating the importance of private sector involvement but also the limitations of an “incomplete” system with limited technical support and one that has no teeth. The EAC Common Market Implementation M&E framework highlights the challenges relating to the design and use of indicators, the verification process and the potential inefficiencies from allowing both regional and national M&E frameworks to develop. The problems of the limited access of the private sector to the regional for a is highlighted in the experience of ECOWAS with NTBs. The Technical Barriers to Trade (TBT) in SADC illustrates the advantages of a narrowly defined and technically driven monitoring framework where indicators relate to relatively precise action to be implemented. The SADC FIP illustrates the importance of developing a baseline for the monitoring system that is independently verified and allowing for prioritisation in implementation. The SADC Trade Audit, which is no longer taking place, demonstrated the advantages of a process of verification lead by technical experts. Finally, the experience of COMESA provides a system which links different processes and provides explicitly for problem identification and verification. It is also possible that monitoring will in the future be linked to a legally binding mechanism to address NTBs.

The reviews are aimed at gaining insights into what can be done to further compliance through monitoring, rather than an evaluation of the M&E frameworks of the different RECs. The final section draws on the reviews to provide a checklist for effective monitoring.

6.2 The monitoring of the EU single market

The choice of the monitoring system of the single market as a benchmark is driven by the maturity of the process and the sheer size of the challenge that it addresses. The Communication on the

⁷⁸ Innovation and Skills Department for Business, ‘Regional Integration and Trade in Sub-Saharan Africa’ [2011] Trade and Investment Analytical Papers Topic of 1–26.

⁷⁹ Dinah Shelton, ‘Introduction: law, non-law and the problem of soft law’ in *Commitment and compliance: the role of non-binding norms in the international legal system* (Oxford University 2010).

⁸⁰ ‘Communication From the Commission a Europe of Results – Applying Community Law’ [2007] 1–11.

application of Community law⁸⁰ sets out the challenge: “The body of legislation is significant – over 9000 legislative measures of which nearly 2000 are directives each requiring between 40 and over 300 measures for transposition into national and regional legislation. The EU encompasses 27 national administrations and over 70 autonomous regions. Over 500 million Europeans enjoy the possibility to query their rights under these laws.” Of the issues of compliance that arise, 70% are addressed before formal procedures and only 7% require a ruling from the Court.

The process of monitoring is explored in some detail in Pelkams and de Brito (2013)⁸¹. Charalambides (2013) compares the SADC Trade Protocol monitoring framework on Non Tariff Barriers (NTBs) with the approach in the EU. Here we present an outline of the key aspects.

The Single Market Score Board

At the heart of the monitoring process is the Single Market Scoreboard⁸² on transposition, common to both the EU and the European Free Trade Area (EFTA). The Score Board process provides a database of directives relating to the single market (in recent years we have also seen certain sectors and directives prioritised). Member States then submit their implementing legislation – the National Implementing Measure (NIM) - which then undergoes a conformity check. The Member States are then “scored” according to whether they have transposed correctly and on time.

Conformity checks and assessments are a critical part of ensuring the application of community law. These can be undertaken by the Commission but are in some circumstances undertaken by external consultancies. The box provides an example of the tasks for a compliance assessment that gives insight into the nature of the activities involved.

A Compliance Mission: The Example of the EU Prospective Directive

1. Background

1.1 The Directive

Directive 2010/73/EU (Prospectus Directive) has 6 articles. The compliance concerns the whole Directive. However, Articles 4, 5 and 6 will not be assessed being relate to empowerments for the Commission to adopt delegated or implementing measures.

The reference document of the Directive is published in the Official Journal L 327 of 11 December 2010 (p. 1-12). The compliance assessment of this Directive takes into account around 24 articles of amended Directive 2003/71/EC and 4 articles of Directive 2004/109/EC.

Should there be any case-law of the European Court of Justice relating to the Directive, it will also regarded as being part of this Directive and will be considered throughout the compliance assessment for those parts of the Directive that have been clarified.

1.2 The implementing legislation

The scope of the compliance assessment is to ensure all Directive provisions are implemented. More precisely, the assessment reports on Member States are based on the following:

a. The national implementing measures (NIMs) provided by DG MARKT

These are notified by each Member State to the European Commission according to their implementation obligations. The NIMs form the primary source for performing the compliance assessments.

b. National legislation referred to in the notified NIMs

They are referred to in the NIMs and searched by Tipik lawyers. They are referred to by Tipik lawyers as far as they are relevant, necessary and appropriate to conduct the compliance assessments in respect of those requirements of the Directive that are not addressed in the NIMs.

⁸¹ Jacques Pelkams and Anabela Correia de Brito, *Enforcement in the EU Single Market* (Ctr for European Policy Studies 2013).

⁸² http://ec.europa.eu/internal_market/scoreboard/index_en.htm.

c. Other pieces of legislation

They are searched by Tipik lawyers. They are referred to by Tipik lawyers as far as they are relevant, necessary and appropriate to conduct the compliance assessments in respect of those requirements of the Directive that are not addressed, and only those that are not addressed, in the NIMs or in the national legislation referred to in the NIMs such as referred to in the above mentioned points (a) and (b).

The compliance assessment does not extend to the way Member States intend to enforce the Directive requirements, i.e. it does not go further than the Directive requirements such as transposed in national legislation, nor does it cover the legislation of the regional entities in the federal Member States.

2. The Tasks of the Compliance Mission

Task 1 - Understanding of the Directive

This task is performed under the guidance of DG MARKT to ensure a common understanding of the act as well as of the tasks to be performed towards quality.

The understanding entails reading and analysis of the Directive (see 2.1.1) in order to understand the overall context. This includes any relevant documents that may be recommended by DG MARKT.

This task is performed in both the official language as the language in which the compliance assessment is conducted and in English as the language in which the compliance assessment report is delivered.

Task 2 - Analysing Legislation

As far as national legislation is concerned (see 2.1.2), Tipik will examine and assess the NIMs provided by DG MARKT (see 2.1.2, point a) and search for as well as examine and assess additional legislation referred to in the NIMs (see 2.1.2, point b) and/or other pieces of legislation (see 2.1.2, point c) to the extent the NIMs do not cover all the requirements of the Directive as well as the national legislation concerning offsets.

This task will lead to:

- The identification of the implementing provisions entailing the reading, understanding and analysis of the NIMs; and
- If necessary, the check and identification of transposing provisions in the national legislation referred to in the notified NIMs; and
- If necessary, the search for other pieces of legislation and identification of transposing provisions in these legislation.

That careful analysis includes reading each relevant national measures and provisions in the light of Directive 2010/73/EU and in the context of the overall national legislation. This task rests not only with the implementation of the provisions of the Directive concerned by the compliance assessment and their corresponding transposition into the national legislation but also with the spirit of the Directive and the national legislation. It aims to draw conclusions on the content of the national provisions and possible inferences and interpretations to assess compliance.

Particular issues regarding the implementing legislation should be in principle pointed out in the reports. However, those that may have an impact on the process of the compliance assessment will be raised during the process for guidance from DG MARKT.

Launched in 1997, the scoreboard has contributed to a significant improvement in the adoption of single-market legislation. The gap between the number of single-market directives that should have been notified to the commission by member states and the actual number has dropped from 6.3% in 1997 to 0.6% in 2013 for the EU.

Whenever one or more member states fail to adopt single-market legislation, they leave a gap in the EU legal framework with the single market not covering all member states. The score board tracks this via measuring the “incompleteness rate”. There has been a significant improvement in this indicator, with gaps in the single market of 4% in 2013 compared with 27% in 1997.

SOLVIT

A range of indicators and mechanisms accompanies the monitoring of transposition to track implementation, information dissemination and to facilitate solutions to specific compliance challenges (see figure). Key amongst these is SOLVIT, which will be very familiar to those familiar with the COMESA – EAC – SADC Non Tariff Barrier Monitoring Mechanism (discussed below).

SOLVIT provides a system for EU citizens and businesses to report, and resolve, problems relating to the misapplication of single-market rules by public authorities. SOLVIT is made up of an online database and SOLVIT centres in each of the member states. It was established in 2002 to deliver effective problem solving in the single market, and offers a parallel process to legal dispute. However, taking up complaints via SOLVIT does not preclude legal redress.

In 2009, 86% of the complaints reported to SOLVIT were resolved. Complaints relating to the recognition of professional qualifications accounted for 21% of the cases taken up via SOLVIT, 16% for market access for products, 14% relating to social security and 11% to taxation.

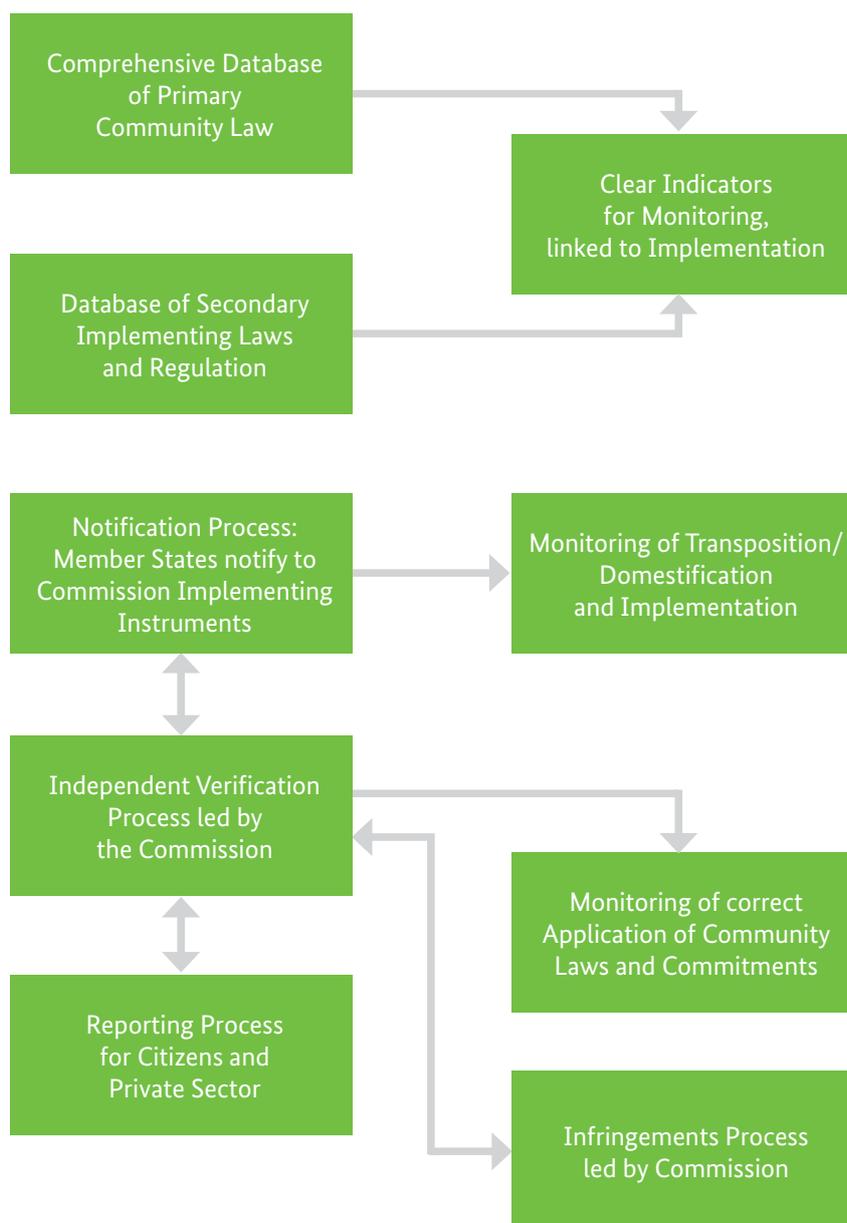
Since its establishment, SOLVIT has become a more popular route for problems relating to the single market than registered complaints. In 2003 there were 680 registered complaints versus 180 complaints using SOLVIT; by 2009 the figures were 990 and 1 550 respectively. However, the participation of the private sector has been low – the origin of only 11% of SOLVIT cases in 2009 – and this significantly weakens the system.

Establishing a benchmark for monitoring

Several factors make the EU monitoring system for the single market effective. Firstly, the indicators are based on a comprehensive database of primary community law and of secondary/implementing laws and regulations. There is a formal notification through which member states have to notify the implementing instruments. There is a guardian of the monitoring process, the Commission. If notification of implementation is not given the Commission can launch infringement proceedings that ultimately lead to sanctions against Member States. There is an independent verification process that allows the Commission to check if implementing laws correctly transpose – or domesticate – community law. There is also an independent reporting system that allows business and citizens to report when they think their rights are not being respected by member states.

Effective monitoring, therefore, is not solely within the scope of the monitoring system itself. For example, without secondary/implementing laws and regulation the indicators of the monitoring system, there are likely to be many instances where the indicators are too general or unclear. Without an infringement procedure many businesses and citizens may not bother to report problems - thinking that nothing will result from their complaint. An independent Secretariat is in practice very important to be able to independently verify the status of transposition of laws. The linkages between the transposition/ domestication process and the monitoring system are set out in the figure on page 52.

Figure 4: Features of an effective Monitoring System



Drawing on the EU framework the following features are important in an effective monitoring system that encourages compliance with Community law and commitments at a national level are:

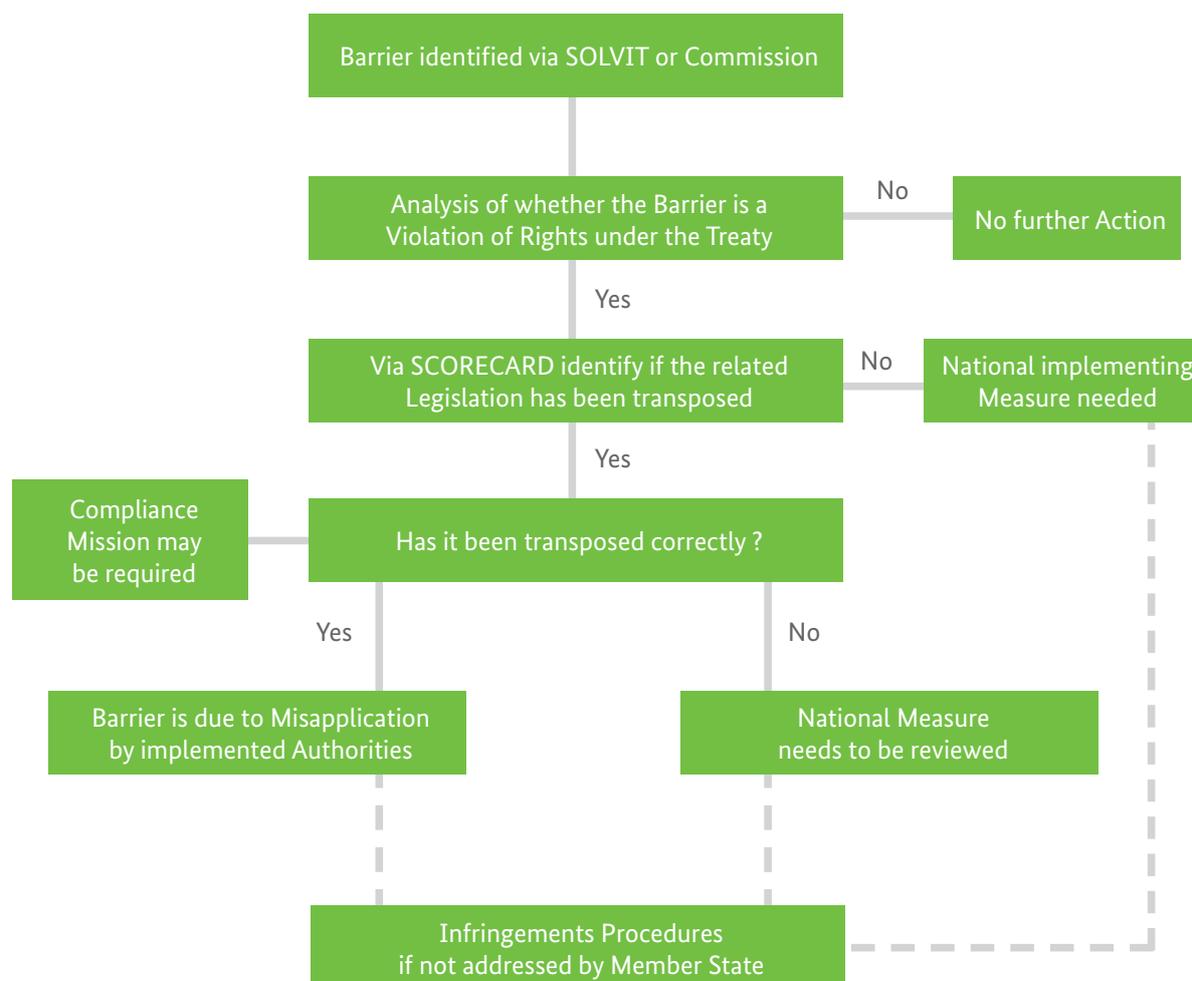
1. Indicators clearly linked to primary and secondary/implementing community legislation
2. A notification process for member or partner states to lodge their implementing regulations
3. An independent process of verification to assess, as appropriate, whether implementing regulation is actually in place and correctly implements community law and commitments at national level
4. A process for citizens, the private sector and the Commission (or Secretariats) to report when they think member or partner states are not implementing or not implementing correctly the legislation and commitments of the REC. This process should be independent of member or partner states.
5. Sanction: The entire process is given “teeth” by an infringement process that sanctions member or partner states for non compliance.

A further important aspect is that the system as a whole is collectively exhaustive, while each component focuses on different areas. The scoreboard verifies whether the required laws and regulations of the directives are gazetted by member states. The SOLVIT system allows for misapplication to be monitored and harnesses the private sector and citizens in the policing of the application of the Treaty.

The system allows a relatively easy identification of the cause of the barrier: application by officials; incorrect transposition; or no transposition (see Figure 5).

Furthermore, the monitoring mechanism is linked to a process that leads to communication between the Commission and the Member States which helps to solve the problem through co-operation. Yet, it also provides for action against Member States that fail to address the identified barriers – called an infringement procedure.

Figure 5: The SOLVIT and Scoreboard working together



This leads to a further benchmark to take into account in an effective monitoring system:

6. Comprehensive and coherent monitoring and problem identification: The system collectively monitors all aspects of compliance, from adopting or amending national laws, doing so appropriately, and correctly applying them. This allows the Commission to identify the source of the problems relating to compliance - for example it allows a relatively rapid assessment of whether a complaint is the result of a member or partner state not transposing/domesticating community law or commitments or whether it is application.

6.3 The Tripartite Non-Tariff Barrier Monitoring Mechanism

The COMESA-EAC-SADC Non-Tariff Barriers Reporting Mechanism (NTB Mechanism) was launched in Johannesburg in 2009. It is a mechanism, whose features include an online (and short-messaging-service function), for the monitoring, reporting and elimination of Non-Tariff Barriers (NTBs) within and across the three regional economic communities (RECs).

Institutional Structure

The yearly focal point meetings have created that platform in the area of NTBs. All stakeholders – government, private sector, and the REC secretariats - participate in the focal point meetings. The meetings are hosted by a National Monitoring Committee (NMC). The NMCs themselves are, firstly; a domestic institution that monitors progress on the elimination of NTBs experienced at both the national and regional levels. Their establishment has also fomented consultations with the private sector in Member States (some of whose domestic consultation systems might previously not have been robust). Additionally, there is intrinsic value in mandatory domestic consultations on policy, legislation and programmes that affect business. The first Regional Indicative Strategic Development Plan (RISDP) noted that countries which considered it mandatory to consult tended to have “better regulated and developed and business environments [that are] more attractive to both internal and external investors”.

The meetings appraise the implementation outcomes of the mechanism, and have reportedly produced:

- A high level of oversight on progress relating to the establishment and operation of the NMCs;
- Development of input to feed into the eventual institutionalisation of the mechanism;
- Follow-ups on the status and details of unresolved complaints from the countries against whom they have been reported;
- Discussions relating to operational improvements (both in respect of the NTB Mechanism and the NMCs);
- A conduit between the regional and the domestic processes of implementation (both generically, and with respect to specific complaints).

The yearly focal point meetings (which, in some of their features, resemble a committee structure in the WTO), also play a quasi-institutional role within the mechanism (see reports on www.tradebarriers.org).

Private Sector Participation

The NTB Mechanism has mainstreamed the participation of the private sector in regional integration processes. Each of the 26 (tripartite) countries has both a government and a private sector focal point attached to the system. The private sector focal point:

- receives (contemporaneously with the government focal point) all complaints that are logged against their county;
 - participates in yearly focal point meetings as part of their country’s delegation.
- Additionally, the National Monitoring Committees (NMCs) - domestic structures that coordinate the elimination of (reported) NTBs – are a bipartite government /private sector structure.

The NTB Mechanism as a Supplementary Mechanism to the rule of law

In a region such as SADC, supplementary mechanisms could be useful for buttressing the rule of law. The rules have evidently not been sufficient and there is an evolved preference for the cooperative elements of integration.

Even at the multilateral level, there is an acknowledgement of the necessity for supplementary mechanisms for dealing with the NTB challenge. That has been the premise upon which the Doha Round discussions on Non-Agricultural Market Access (NAMA) NTBs have evolved.

Some parallels can be drawn between the NTB Mechanism and the facilitative structure that has been proposed by a grouping representing 88 Members in WTO discussions on NTBs. The group has proposed that NTBs be dealt with through a “conciliatory and non-adjudicatory” mechanism. The so-called horizontal mechanism seeks to support the rules through promoting mutually agreed outcomes to NTBs, without necessary resort to dispute settlement. According to its sponsors, it responds to the recognised need for expeditious resolutions to NTB matters, without purporting to affect existing rights and obligations under any of the covered agreements.

Impact to date

The prognosis up to the point when the NTB Mechanism was established in 2009 had been that the soft approach had produced suboptimal results in the SADC region (Gilson and Charalambides 2012; SA private sector views). But in a region where for a variety of reasons, the hard approach is not yet working optimally, the NTB Mechanism can be an important component in buttressing the rules. It

can leverage the cooperative elements of integration in SADC, while still supporting the rules⁸³. The NTB Mechanism has many features that support both formal and substantive compliance with regional rules, principles, and decisions concerning the reduction (or, as appropriate, elimination) of NTBs. In particular:

- Its functionality does not end with reporting and monitoring.
- There is some evidence of follow up actions and structures to facilitate that.
- The level of institutional involvement of the private sector exceeds that in previous efforts.
- There is an increasing level of reporting and apparent buy-in by economic operators on the ground.

However, the prognosis on its actual (on-the-ground) actual contribution to elimination of NTBs is mixed. Trade Mark Southern Africa (TMSA), its administrator, reports that the mechanism has been a success (see also OECD/WTO: Aid for Trade Success Story). This has been disputed by a number of commentators.

The Southern African Trade Hub has cast doubt on its scientific pedigree and the veracity of information (particularly in relation to “resolved” complaints). The mechanism has been accused of simply taking member states word that offending measures have been rectified, or were not actionable in the first place. Some commentators excoriate the mechanism quite strongly (Jensen; newspaper article (“toothless body”). There is apparent cynicism within certain stakeholder segments (e.g. SA (organised) private sector). Even commentators with more moderate opinions, acknowledge that there is significant room for improvement (Gilson and Charalambides 2012).

Assessment

Judged against the benchmark, the system has several challenges. The primary challenge is that the monitoring mechanism is not part of a coherent and comprehensive system. There is no accompanying monitoring mechanism to identify the status of the application of community law – barriers could be the result of either misapplication or the absence of the law in member state legislation.

With regards to a verification process, the Mechanism is supported by limited technical capacity to identify underlying cause of the barrier reported, though this problem should diminish as NMCs are strengthened. And the veracity of information recorded in the matrices, particularly what constitutes “resolved” complaints, needs to be improved for the reporting to have any credibility. The 2010 focal points meeting report indicates that it is acknowledged that claims should always be backed by documentary evidence.

And the mechanism has “no teeth”. No action can be taken as a result of non compliance.

In addition to the issue identified through benchmarking, there is a practical challenge of the need for trade barriers to be addressed in a timely fashion while the NMC meets on a preordained bureaucratically driven schedule. This has meant that key problems have had to be addressed through other routes. This was an issue raised by the East African Business Council with regards to the problems faced by British America Tobacco with regards to local content requirements in Tanzania in August 2013.

6.4 The EAC Common Market Implementation M&E Framework

The EAC Common Market (CM) Implementation M&E Framework has been adopted by the five Partner States to monitor the implementation of commitments made under the Common Market Protocol (CMP). The process of designing, amending, and validating the M&E matrix has been coordinated by the EAC Secretariat, in consultation with representatives from all Partner States (directors of planning and M&E officers from the Ministries of EAC). The matrix provides a framework to monitor progress made in the implementation of protocol commitments against agreed performance indicators. For each performance indicator baseline data is collected (i.e. status as of 30th June 2010), a target date set, a responsible line ministry, department or agency (MDA) allocated, a data source specified, a status assigned using a traffic light system (pending, in progress, completed), and a narrative update on implementation progress added. Initially, updates have been agreed to be provided quarterly by all Partner States. The Secretariat consolidates country progress reports and presents bi-annual consolidated reports to the Council of Ministers responsible for EAC Affairs and Planning.

⁸³ see Gathii on complementarity between cooperation and the rules in regional FTAs.

Table 2: The Common Market M&E Framework

B	C	D	E	F	G	H
FRAMEWORK FOR MONITORING AND EVALUATING IMPLEMENTATION OF THE EAC COMMON MARKET PROTOCOL						
Narrative description / Protocol Commitment	Performance Indicators	Baseline Information (30th June / 1st July 2010)	Responsible MDA	Status (Pending, In Progress, Completed)	Implementation Progress August 2012	Comments
Enhanced research and technological advancement for acceleration of economic and social development.						
FREEDOMS AND RIGHTS						
All Free Movement of Goods						
Implementation of Common External Tariff across the board	Number of tariff lines implemented using the CET		Rwanda Revenue Authority	Completed		
	Value and category of goods accorded community tariff treatment		Rwanda Revenue Authority	Completed		
	Number of tariff lines implemented outside the CET and the reasons		Rwanda Revenue Authority	Completed		

Performance Indicators in the CM M&E Framework

What is monitored?

Initially, Partner States and the EAC Secretariat need to monitor implementation progress of all protocol commitments. They need to know whether commitments have been implemented or not, with the overall goal being full implementation of all commitments made under the CMP. If commitments have not been fully implemented, they need to know why not: Is it not clear what needs to be done to implement a commitment? Does implementation require resources that need to be allocated first? Is there a lack of political will? Does full implementation simply require more time? Therefore, progress against process indicators should be the first priority.

However, some of the performance indicators in the CM M&E matrix are higher level outcome or impact indicators. As the matrix went through numerous revisions (see moving target below), the proportion of impact indicators increased. While it might be more interesting to measure impact, it remains unclear what they are measuring the impact of unless measure implementation progress via process indicators first.

Table 3: Process vs. Impact Indicators - Examples

Protocol Commitment	Performance Indicator
1 ⁸⁴ Guaranteed freedom of movement of persons within the territories of Partner States	Number of citizens moving to other Partner States granted stay as a visitor

Indicator 1, above, is looking at the impact of full implementation of the free movement of people. However, the figure (number of people moving to other Partner States) cannot be interpreted if we do not even know whether the commitment (guaranteeing freedom of movement) has been implemented or not. The indicator at least partially reflects socio-economic factors encouraging people to move to other Partner States irrespective of the EAC (attractiveness of the labour market, quality of higher education etc). The fact that the movement of people has, or should have, become easier due to the EAC will hopefully play a role, but it is impossible to single out the impact by simply looking at the number of people moving across borders.

Accuracy and Comparability of data

To ensure that data submitted by Partner States is comparable and of need for interpretation, it is essential that performance indicators are defined clearly. What needs to be measured, and how it should be measured, has to be unambiguous. This is not only important for effective monitoring, but also crucial to ensure that all Partner States are interpreting the commitments made in the same way and know what steps need to be taken to fully implement agreements made at the regional level.

⁷⁸ Indicators have been numbered for ease of reference in this note. The numbering is not consistent with that of the CM Implementation M&E Framework.

However, not all indicators in the CM M&E matrix are unambiguous, and many are not clear on **what should be measured**, in which **unit of measurement** (e.g. value or volume of goods, total or percentage), or over what **time period**.

Table 4: Accuracy and Comparability of Data - Examples

Protocol Commitment	Performance Indicator
2 Implementation of CET across the board	The percentage of goods entering EAC at agreed CET

It is not clear what Indicator 2, above, should be measuring. Partner States quickly respond to say that 100 per cent of goods are entering the EAC at the agreed CET. Is the aim to only measure compliance broadly? If the long term goal is for all imports to enter the EAC at the agreed CET without exception, the indicator should state this more clearly: How should exemptions be treated? And products on the Sensitive Items (SI) list? What is the unit of measurement (percentage of product lines by HS code, volume, or value of goods)? As the indicator stands, the progress update was vague-as in the example of Rwanda: *All goods imported from outside the EAC were subjected to the CET, apart from a few items where Rwanda applied for stay of application e.g. Sugar, Trucks, Wheat flour, Rice.* If the focus is on process, it would be more straight forward to measure whether customs have implemented the CET or not, whether customs officials have been trained regarding the changes or not, and whether the Partner State has applied for exemptions and if so, the percentage of the value of total imports exempted etc. Indicator 1 in the previous section ‘What is monitored’ is also a good example with regard to accuracy and comparability of data. The number of people moving to Partner States is being measured, but no time period has been specified. Some Partner States may measure the total number of people since implementation of the CM (1st of July 2010), others may measure the number of people moving monthly, quarterly, or annually. Additionally, it is not clear which data source should be used. Visa applications cannot be used as an indication of regional migration since they are not required for travel in the region, data from landing cards does not seem to be centrally processed in all Partner States, and there are no regular and reliable surveys.

Compliance

Several performance indicators in the M&E matrix are trying to measure compliance by Partner States either directly or indirectly. However, Partner States are unlikely to report non-compliance themselves.

Table 5: Compliance – Examples

Protocol Commitment	Performance Indicator
3 Elimination of tariffs on internally produced goods	Zero tariffs on all internally produced goods maintained

There have been incidents of Partner States unilaterally imposing tariffs on goods from within the EAC at their borders (e.g. Tanzania and Kenya on wheat and sugar). However, all Partner States continuously report that zero tariffs are maintained on all internally produced goods. Measuring compliance with this is not effective unless there is a mechanism of quality assuring data submitted in the M&E matrix by a third party (e.g. missions from the Secretariat), or stakeholders in the region (e.g. traders).

Additionally, several indicators attempting to measure compliance do not make it clear how compliance should be measured: by incidents/reports of non-compliance (convictions for non-compliance)? Or by measuring the rate of compliance? It is very easy for Partner States to simply say compliance is 100 percent when the indicator is vague. Table 6 gives several examples of this.

Table 6: Compliance - Examples 2

	Protocol Commitment	Performance Indicator
4	Implementation of EAC Rules of Origin	Rate of compliance with the EAC Rules of Origin
5	Implementation of the SQMT Protocol and the Act, 2006	Rate of compliance with EAC SQMT Protocol and Act 2006
6	Operationalisation of the EAC Competition Act	Rate of compliance with the EAC Competition Act

Traffic Light System

The CM Implementation Framework has been designed to include a traffic light system to highlight implementation progress, i.e. implementation of commitments is either pending, in progress, or completed. However, the way many performance indicators have been defined, it is not clear when they would be completed. To use the traffic light system effectively, progress would need to be measured towards a clearly defined goal (in several cases in the M&E matrix this would ideally be done in percentages to indicate how far implementation has progressed towards the goal).

Indicator 1 in the section 'What is monitored' illustrates this issue. If this is about simply counting the number of people moving to Partner States, it is not clear when this commitment should be marked as pending, in progress, or completed. Table 7 illustrates further examples of this.

Table 7: Traffic Light System - Examples

	Protocol Commitment	Performance Indicator
7	Elimination of all forms of NTBs	Number of NTBs identified as per time bound program for the elimination of NTBs
8	Issuance of common standardised national identification documents	Number of citizens issued with standardised machine readable national IDs

Indicator 4, above, is currently counting the number of NTBs identified. The following indicator in the M&E matrix then measured the number of NTBs eliminated. While this is indeed a moving target (new NTBs are continuously being identified), the implementation progress could easily be measured if the two were combined to measure the proportion of NTBs eliminated.

Equally it is not clear when commitment 5, above, is fully implemented since the indicator is counting the absolute number of citizens issued with standardised machine-readable national IDs. The indicator could easily be redefined to measure the percentage of citizens. This would ensure that the commitment is marked as completed when 100 per cent of citizens have been issued with standardised machine readable national IDs.

Moving targets

The matrix, and in particular the performance indicators, has been revised several times. The process is coordinated by the EAC Secretariat, but representatives from all Partner States meet to amend, add to, or revise the matrix. The matrix has been revised almost bi-annually over the last couple of years. The targets are continuously moving. While many of the performance indicators could certainly be improved, there has to be a cut-off point where indicators are finalised and validated to ensure that progress can be monitored against firm targets. Table 8, on page 59, provides some examples of amendments to the performance indicators.

Table 8: Moving Targets - Examples

	Protocol Commitment	Performance Indicator
1	Implementation of protocols that may be concluded in the areas of cooperation on sanitary and phyto-sanitary and technical barriers to trade	Number of NTBs identified as per time bound program for the elimination of NTBs
	Deleted	Implementation of protocols finalised in the areas of cooperation in sanitary and phyto-sanitary and technical barriers to trade
	Added	Existence/Operationalisation of the EAC SPS protocol
2	Guaranteed freedom of movement of persons within the territories of Partner States	
	Deleted	Number of border posts with harmonised immigration procedures and regulations

National Implementation Committees (NICs)

In monitoring the implementation progress of regional agreements, projects, and programs, it is key that Partner States are monitoring progress against the same targets. A substantial amount of commitments under the CM Protocol cannot be implemented unilaterally (e.g. using electronic ID cards as travel documents in the EAC). The CM Implementation Framework, which has been agreed on by all Partner States, could be used to monitor the implementation progress of commitments made under the CM Protocol.

National Implementation Committees (NICs) have been set up in all Partner States to fast track implementation of the CM Protocol. The committees are made up of national stakeholders and implementing agencies. For example in the case of Rwanda, the NIC was originally convened quarterly. Now, meetings are held bi-annual. Ideally meetings should be held to discuss implementation progress and set priorities for the following quarter. However, given continuous additions and amendments to the M&E matrix, national NIC meetings are being used solely to repeatedly collect baseline data and status updates; it has become difficult to get any momentum and actually prioritise implementation commitments nationally.

A related challenge is the development of an additional M&E framework at Partner States level, driven in part by dissatisfaction with the regional M&E framework. Though expedient in the short run, parallel national and regional level processes will generate inefficiencies and create problems of verification and co-ordination.

Assessment

There are several challenges for the EAC M&E framework.

With regards to the indicators, they are often moving targets and it is not always clear if the targets relate to compliance or not.

The veracity of the information used is also open to question. And the system is, in practice, largely reliant on Partner State self reporting with limited resources for verification of compliance – either in terms of actual application or correct application of REC law.

In addition, national M&E frameworks are not aligned with the regional framework.

6.5 The EAC Common Market Scorecard

The first EAC Common Market Scorecard⁸⁵ was released in February 2014. The Scorecard assesses Partner States’ legal compliance with obligations to liberalise the movement of capital, services and goods.

⁸⁵ <https://www.wbginvestmentclimate.org/publications/eac-market-scorecard-2014.cfm>.

The process was led by a team of external consultants who identified the relevant legislation in partner states relevant to the commitments under the Treaty. For movement of capital, Article 24 of the Treaty provides for free movement, and Annex VI sets out the 20 operations that should be “free from legal and regulatory encumbrance”. The consultants reviewed 124 laws of partner states to assess compliance. Free movement of services is provided for in Article 16 of the Treaty and Annex V sets out the sector covered; 545 laws were reviewed to assess compliance. In the area of trade in goods, Article 5(2)(a) commits partner states to eliminate tariff and non tariff barriers, achieve a common external tariff and harmonise and mutually recognise selected trade standards; 14 laws were reviewed in assessing compliance.

In terms of the benchmark, the scoreboard assessment is not based on established indicators. Rather the external review identified and assessed partner state laws and regulations to judge partner states compliance with the commitments set out in the Treaty in the areas of capital, services and goods.

The scorecard is an independent verification process, and went beyond identifying whether domestic laws had been enacted to whether they had been transposed/ domesticated correctly.

While it has no ‘teeth’ it still appears to lead to consequences. For example, the Government of Tanzania announced in March its intention to achieve better scores in the next review⁸⁶.

The Scorecard is not integrated with the other EAC monitoring systems.

6.6 Non-Tariff Barriers in ECOWAS

No clear channels for complaints

When a company faces non-tariff barriers in ECOWAS, there are no clear channels for addressing the issue. In fact, a majority of private sector stakeholders are not aware of the ECOWAS rules and regulations. Therefore, they are not in a position to enforce their rights. In the situation that the company seeks to report an infraction, its best path would be to report to the National Unit. Yet, even then there is no way of compelling the national authorities to take the issue further, particularly in the case of isolated businesses or individuals. If, however, the barriers or infractions are major enough to affect a large section of corporations, there have been instances of the business associations or the major players applying the pressure on the national authorities in order to take up the issue with the relevant partner.

The practice among Member States is to seek bilateral dialogue to resolve the situation as happened in 2003 when Nigeria unilaterally closed its borders with Benin in flagrant violations of the ECOWAS protocols, ostensibly to curb smuggling and trafficking. Nigeria eventually reopened the border after bilateral dialogue between the two states. It is not clear what role the ECOWAS commission played in this.

There is, however, a distinction between general trade in ECOWAS and trade under the ECOWAS Trade Liberalisation Scheme (ETLS)⁸⁷. While there is no formal mechanism for addressing NTBs in ECOWAS, under the ETLS the affected business can report to the ECOWAS commission informally (through phone calls or emails). The commission will aim at resolving the matter informally and amicably through political channels.

A limited M&E Process

While the M&E Process has been put in place, it has so far focused on monitoring and evaluating the results of the activities of the Commission and other ECOWAS institutions. This is separate from the monitoring of member states compliance with key protocols and obligations. Reports of member state activities is still largely dependent on the self reporting of the national Units, which typically do not self report infractions or instances where they fail to comply with protocol requirements.

For the M&E System to be effective in monitoring member state compliance, it is important that the M&E System should also involve data and inputs from private sector stakeholders and other citizens of ECOWAS.

In addition, the M&E Performance Report is still currently restricted in its usage. It is treated as an internal document/report of the Commission, presented by the Vice President to the Commission to the President and other Commissioners to track and monitor activities of departments and units.

⁸⁶ <http://www.busiweek.com/index1.php?Ctp=2&pI=740&pLv=3&srI=67&spI=120&cl=15>.

⁸⁷ <http://www.etls.ecowas.int>.

In the sense that this type of reporting was absent in the past – this is substantial progress but it is still quite far from a system that can be effectively used to monitor member state’s compliance with protocols and obligations.

Although there is no M&E process for compliance with regulations in ECOWAS, the ETLs has an informal mechanism for putting political pressure on Member States to comply with regulations. During the meeting of the National Approvals Committee (the national structure of the ETLs), infractions of the regulations by Member States are highlighted.

6.7 Monitoring in SADC

Within SADC the Trade Audit was the main monitoring mechanism following the Mid Term Review of the Trade Protocol, and is reviewed in the first section. There are several monitoring initiatives underway or being developed. The focus is on the Finance and Investment Protocol and the TBT monitoring parts of the Trade Protocol Monitoring Initiative.

The SADC Trade Audit

The Audits on the Implementation of the SADC Protocol on Trade, a series of assessments measuring the progress of member state adherence to obligations under the SADC Protocol on Trade, were conducted by the USAID Southern African Trade Hub, commissioned by the SADC Secretariat, on an annual basis between 2007 and 2012.

The initial Trade Audit in 2007 was a comprehensive study with a country visit to all SADC Member States. The audits that followed were updates of the 2007 study as well as each year specific trade related aspects, identified by the SADC Secretariat for the respective year, would be assessed. The initial audit’s main focus was on monitoring and verifying the tariff phase downs and implementation of the SADC Trade Protocol in line with the Free Trade Area launched in August 2008.

The trade audits between 2008 and 2011 focused on specific issues, whereas the last audit in 2012 was yet again more comprehensive and will be used to build the base line for the Monitoring, Evaluation and Reporting System (MER) which replaces the trade audits. The MERs will no longer be conducted by an external body but be administered by the SADC Secretariat itself.

The Trade Audits were topic driven without predefined indicators⁸⁸ (in this regard the Trade Audit is similar to the EAC Scorecard). The methodology used for the audits is information gathering and analysis through desk research and in country visits with stakeholder on topics of priority. Each year a number of SADC countries were called on, only in 2007 and 2012, all SADC countries signatory to the Trade Protocol were visited.

Examples of topical issues considered in the different Trade Audits include;

- Adherence to tariff phase down;
- NTB- the status of resolving NTBs;
- Third party preferential treatment;
- (Revised) rules of origin;
- Transparency: understanding and access to information regarding the Trade Protocol

For example in the area of NTBs, the 2011 Trade Audit looked at the number and type of recorded resolved NTBs for each member states and then tried to establish further to what extent these NTBs have actually been resolved or not through follow up with the member states and relevant stakeholders.

The Trade Audits were at times complemented by additional analysis, as needed. For example in 2011, the SADC Secretariat commissioned further work to assess the impact of the derogation on the tariff phase down granted to Zimbabwe and Tanzania.

The Trade Audits include recommendations (e.g. a functional website with complete tariff information) and action plans but with no power to implement those recommendations. The following year’s audit does include a review of last year’s action plan (2011).

⁸⁸ Except for the tariff phase downs, to be implemented on 1 January each year, which by default were predefined as per terms of the original tariff agreements.

Monitoring of the FIP

In order to ensure effective monitoring of the implementation of the SADC Finance and Investment Protocol (FIP) in member states, a Matrix of Commitments was created and adopted by the Ministers of Finance in October 2011. This is the official framework to track progress of the implementation of the FIP. In addition a FIP Monitoring, Reporting and Evaluation System Handbook was developed to aid this monitoring process.

Indicators: relate to regional integration and compliance and are prioritised

The FIP monitoring framework clearly distinguishes between tracking regional integration in terms of economic indicators, which provide the Ministers with a “Dashboard” and compliance indicators that track progress in compliance with the FIP commitments.

There are a total of 75 indicators relating to the protocol’s 11 Annexes and two general indicators relating to ratification of the FIP and the establishment of national FIP coordinating structures. The Matrix of Commitments’ indicators measure the rate of progress of Member States’ implementation of the commitments of the FIP. Annual data is collected and compared to the baseline data which was established in 2011 and analysed for trends.

In order to ensure more effective monitoring with limited resources the indicators within the Matrix of Commitments have been further categorised according to their degree of urgency, ease of- and priority of implementation. Different indicators have different priority for different member states.

There are FIP indicators measuring commitments at regional level and ones that apply to national commitments. Member states are encouraged to establish national FIP coordination functions. To date 8 member states have consultants sitting with their Ministries of Finance advising on FIP related issues and assisting with setting up FIP coordination units in country. The SADC Secretariat is responsible for monitoring of implementation of regional commitments. The FIP sub-committees (one for each Annex) are responsible to assist monitoring both at national and regional level and report back to the Secretariat.

Implementation of the FIP by Member States is not independently validated by the Secretariat. Nor can the Secretariat instigate an infringement procedure for non-compliance. The Secretariat’s focus is transparency as a way to convince Member States to adhere.

Achievements of the FIP monitoring to date

In 2012, eight member states (Botswana, Lesotho, Malawi, Mozambique, Namibia, Seychelles, Swaziland, Zimbabwe) submitted monitoring templates and four sub committees (Investment, Tax, Macro and CISNA) submitted their monitoring templates.

The following Annexes showed the highest rate of positive change, across the eight member states: Annex 8, Annex, 4 and 5 and Annex 6. Three out of these Annexes (8, 5, and 6) fall under the CCBG. In total 18 indicators changed from not achieved (red) to achieved (green) and 18 indicators changed from partially achieved (yellow) to achieved (green) and 16 from red to yellow. At country level, Swaziland had the greatest number of achievements (9). Of the eight member states reporting, all but Seychelles reached 50% or more of their country’s commitments. With regard to the status of implementation per Annex the highest levels of implementation of the country level commitments have been achieved in Annexes 5 (Legal Frameworks for Central banks), 8 (Banking Supervision) and 1 (Investment).

Trade Protocol Monitoring of Implementation

The SADC Strategy Development, Monitoring and Evaluation Policy as approved by SADC Council in February 2012, sets out a framework for the monitoring, reporting and evaluation of the implementation of all SADC Protocols.

The Trade Protocol Monitoring, Reporting and Evaluation System is currently being developed. Guidelines have been drawn up and approved and indicator matrixes to measure compliance with the obligations under the Trade Protocol and the various annexes are being established.

Different to the other annexes, for both the TBT annex and SPS annex, baseline assessments for the initial status needed to be undertaken, concurrent to the first round of assessments.

Independent consultants were engaged in the initial TBT baseline study, at the same time training local professionals on the monitoring process. Whereas the SPS baseline study and initial assessment was conducted by people in the Member States.

TBT monitoring and SPS monitoring employ a traffic light system by obligation and member.

Strengths and weaknesses

Key strengths of the systems are:

1. Results and input indicators are separated. In the FIP there is a “dashboard” that tracks results in terms of e.g. trade flows; while implementation indicators are monitored separately.
2. For the FIP, TBT and SPS Annex a baseline for implementation has been established that has been independently verified.

Table 9: TBT Monitoring Framework Implementation Indicator

Article No.	Right/Obligation	Indicator(s)	Question(s)	Calculation(s)
8(2)	National standards bodies and other SDOs shall comply with Annex 3 of WTO TBT Agreement	The WTO TBT Secretariat was formally notified that all the Standards Development Organisations in the Member State comply with Annex 3 of the WTO TBT Agreement.	a) Have the SDOs in the Member State notified the WTO that they will follow Annex 3 of the WTO TBT Agreement? Reference: WTO/TBT/CS/.....	No = 0 Some = 2 Yes = 4
		The national standards development programme is notified to the WTO through ISONET every six months.	b) Has the NSB provided the national standards development programme to ISONET twice during the previous year?	No = 0 Once = 2 Twice = 4
		National Standards Bodies provide for a 60 days public comment period on draft national standards before approval and publication.	c) Is a 60 day public comment period allowed for national draft standards before they are approved and published?	No = 0 Some = 2 All = 4 Score for question 8(2): Score = ((a)+(b)+(c))/3 (Simple average for the 3 questions)

3. In many instances relatively clear benchmarks have been established that are not complicated to track. This enhances transparency.
4. The issues monitored are of real practical relevance, monitoring:
 - Legal implementation: for example as to whether the WTO TBT agreement has been effectively implemented (see table 9). In the FIP indicators on co-operation on investment includes countries becoming signatory to New York Convention, ICSID, MIGA.
 - The processes needed for effective implementation. For example the indicators relating to regulatory agencies as set out in table 10, as well as to SADC Institutional Structures such as the Technical Regulation Liaison Committee.

Table 10: TBT Monitoring Framework Process Indicator

Article No.	Right/Obligation	Indicator(s)	Question(s)	Calculation(s)
9(1)	(a) Pre-market approval shall only be utilised if the risks are high and detrimental to users and the environment	All pre-market approvals of products falling within the scope of technical regulations are implemented based on risk assessment results.	a) How many TRs have been promulgated in the previous year across all Ministries?	Score based on number as percentage of total = (b)*100/(a): 0 = 0 – 10% 1 = 10 – 25% 2 = 25 – 50% 3 = 50 – 80% 4 = 80% and above
			b) For how many of the TRs promulgated in the previous year has a formal risk assessment been conducted?	
			c) For how many of these TRs has pre-market approval been implemented?	Score based on number as percentage of total = (c)*100/(a): 0 = 0 – 10% 1 = 10 – 25% 2 = 25 – 50% 3 = 50 – 80% 4 = 80% and above
	(b) Regulatory agencies shall conduct market surveillance for all technical regulations	Market surveillance is conducted for all of the promulgated technical regulations.	d) For how many of the TRs promulgated in the previous year, is market surveillance conducted as a matter of course by identified regulatory agencies?	Score based on number as percentage of total = (d)*100/(a): 0 = 0 – 10% 1 = 10 – 25% 2 = 25 – 50% 3 = 50 – 80% 4 = 80% and above
	(c) Regulatory agencies shall apply sanctions when non-conforming products subject to technical regulations are detected	Regulatory agencies apply sanctions in all cases where non-conforming products falling within the scope of technical regulations are detected.	e) For the technical regulations promulgated in the previous year, are regulatory agencies mandated by law to take action in the case of non-conforming products being detected?	No = 0 Some = 2 Yes = 4 Score for question 9(1): Score = ((b)+(c)+(d)+(e))/4 (Each of the four sub-questions weighted equally)

The key weaknesses are systemic in that:

1. The link to a binding dispute mechanism that has credibility is unclear – there are no “infringement” procedures.
2. The absence of comprehensive directives and secondary implementing legislation means that many of the indicators are so general as to be of very limited utility. For example, the requirement for Member State to have a “legal framework for data privacy in place” abstracts from the fundamental challenges of which one of the different models of data protection to adopt at the regional level.

Assessment

In terms of the benchmark the SADC Trade Audit benefited from an independent verification process. However, the Audits were issue-driven and did not relate to a predetermined set of implementation indicators. The audits were not part of a comprehensive monitoring system. Moreover, although there was reporting back on progress made on action plans established through the audit process, there was no option of sanctions.

6.8 COMESA: The Transposition Report

In 2011 the Council of Ministers decided to fast track transposition/ domestication. The COMESA Secretariat undertook field missions to 17 Member States to assess the transposition of Council Decisions, Regulations and Directives under the COMESA and action under the COMESA Medium Term Strategic Plan (MTSP) 2011 -15.

Status

Teams from the Secretariat were led by the Country Officers. Data was collected using a standard template, with interviews of not just COMESA desk officers in Member States but also line Ministries and the Private Sector.

The objectives of the Transposition Report are:

- (i) “To document the level of transposition of regional decisions and commitments by Member States;
- (ii) To elaborate on the challenges and constraints of implementation or transposition faced by Member States; and
- (iii) To draw learning lessons for the observations about the status and challenges of transposition, and make the necessary policy recommendations.”

In COMESA transposition is foreseen under Article 173 of the Treaty. The article specifies that “Member States agree that the implementation of the provisions of this Treaty shall be prioritized on the basis of comprehensive and measurable programmes with clear implementation targets and effective evaluation mechanisms”.

This has been interpreted by COMESA as involving four levels, covering the actual transposition as well as its application and enforcement. The Transposition Report addresses:

- i) **Legal and regulatory framework level** - The degree of actual transposition of commitments into the national legal and regulatory frameworks required for their implementation).
- ii) **Strategic Policy Level** - The degree of integration of the commitments into the national policy frameworks, such as national plans, PRSP, sector strategies etc.
- iii) **Planning Level** - The degree of concrete transposition into the national planning tools such as Public Investment Programme and Budgetary Frameworks.
- iv) **Operational Implementation Level** - The existence of a monitoring mechanism, and the degree of actual implementation of the various commitments against an agreed roadmap and monitoring benchmarks, and including corrective measures.”

Assessment

The Transposition Report Process is at a too early stage to judge whether it is having an impact or not. Yet, it clearly has several strengths:

1. Implementation related indicators: It monitors the transposition of community laws and aims to assess whether the national implementing measures are correct.
2. Comprehensive and coherent: It accompanies the tripartite Non-Tariff Barrier Monitoring Mechanism that provides for identification of barriers to integration by the citizens. The different mechanisms stand together even though they are not yet as directly integrated. In principle the system allows an identification of the cause of the barrier – similar to the EU.
3. Information is collated and verified by the Secretariat not just the Member States.
4. Potential for sanctions.
5. The intention is to link the report to a process of communication between the Secretariat and the Member States that helps solve the problem through co-operation. In the area of NTBs the proposed binding mechanism could link failure to implement to the equivalent of an infringement procedure.

In addition the process includes

- a. Mainstreaming
- b. Resource availability

Weaknesses of the monitoring framework:

1. Comprehensive and clear set of implementing regulations: Several of the indicators are sweeping in nature capturing results rather than indicators because the specific implementing legislation is either not specified or not clearly understood or developed.
2. Currently there is no mechanism to hold Member States to account. There are currently attempts to introduce this for non-tariff barriers (see legal section on “binding mechanism”).

6.9 Conclusions

The EU framework for monitoring provides a baseline for RECs where enforcement is not driven by legal dispute (the main example of integration by legal dispute being NAFTA). It highlights the need for a collectively comprehensive system, looking at both transposition and the application of the community law, harnessing the private sector and citizens to assist with the policing of community law, and a technical capacity to proactively assist with identifying and addressing challenges and verification. The link to a binding dispute settlement/ infringement procedure is clearly critical to act as a discipline on Member States. Though it is notable that 70% of identified problems are resolved without recourse to the legal route.

Experience in the region

The Tripartite Non-Tariff Barrier Monitoring Mechanism provides a platform for the private sector to raise the issue of non-tariff barriers within the framework of the RECs. There is a process of review of the barriers. Yet, there is a limited capacity to identify the exact nature of the barriers, exacerbated by absence of a complementary scoreboard like mechanism to assess transposition. There is no associated dispute settlement/ infringement process. A further challenge relates to the need for business to quickly address barriers while the institutions of the monitoring mechanism meet biannually.

Monitoring in ECOWAS currently focuses on the activities of the Commission and ECOWAS Institutions. Compliance at Member States level is largely the responsibility of national units.

The EAC M&E Framework has been well established and shared. But there are significant challenges. With regards to design of the indicators, they are currently a mix of institutional and output indicators and can change over time. Moreover, it is not always clear that indicators are aligned with what is supposedly being monitored. The quality of the data and the process of verification are not consistent. There are parallel national and regional processes, in particular the NTBMM, which are not clearly linked to the M&E Framework. And in several Partner States the national M&E frameworks are not co-ordinated or fully compatible with the EAC M&E framework.

With the SADC Trade Audit there is a stronger approach involving consultant missions, but it was not clear how the Secretariat was meant to independently verify compliance beyond the external audit. The Audit is now replaced by the Trade Protocol Monitoring and Evaluation System. The review of the Technical Barriers to Trade (TBT) component shows considerable strengths: rooted in a substantive baseline exercise, indicators are generally focused on technical compliance requirements. With regards to the SADC FIP, indicators are prioritised and a concerted effort has been made to explicitly link them to compliance. Of note is the fact that monitoring is explicitly supported by national institutions in many Member States. Also of note is the fact that progress has been achieved in those areas where national institutions are strongest – such as those areas under the auspices of Central and Commercial Banks.

With regards to both TBT and FIP monitoring, however, in some instances the absence of jointly agreed implementing legislation means the indicators are too vague as to be of limited value. Additionally, the absence of independent verification of compliance and of a link to a clearly defined infringement procedure will likely limit impact.

COMESA could be considered to have among the strongest and most coherent approaches. The Secretariat is directly involved in verification. There is a report on status of transposition which addresses ratification and to a limited extent secondary or implementing regulation. However, some indicators are not linked to compliance – either because they are linked to results or because the lack of secondary regulation makes the indicator too general. A further strength is that the NTB Monitoring Mechanism is linked directly to the work of Committees. Furthermore, it is planned that the transposition process will be linked to the “binding mechanism” for NTBs.

A provisional checklist for monitoring systems

The review of the monitoring systems has led to the following checklist for an effective system.

- Comprehensive and coherent monitoring and problem identification:
 - Does the system, collectively, monitor all key aspects of compliance from adopting or changing national laws appropriately to their implementation?
 - Related to this is the question of whether the collective monitoring framework allows the Secretariat/Commission to identify the source of the problem (transposition or implementation).
- Design:
 - Do the indicators have a clear purpose (are they linked to results or to compliance? If both, is this clearly managed).
 - Do the indicators embody sufficient technical expertise to be confident that verification of the indicators means compliance has been achieved?
- Coverage
 - Does the monitoring cover the resources required for effective implementation?
- Quality of Information
 - Can we rely on the information used?
- Verification
 - Can we be sure that the monitoring system is able to identify “in practice” whether there is compliance or not?
 - Is compliance independently addressed or is the system reliant on Member/Partner States?
- Efficiency and comparability
 - Are the regional mechanisms built upon national systems or is there duplication and potential misalignment?
- Link to outcomes
 - Are the monitoring mechanisms linked to a process that can effect change? Are they linked together?
 - Are the processes timely?

Chapter 7

Technical and Economic Challenges of Compliance

7. Technical and Economic Challenges of Compliance

7.1 Introduction

Compliance is significantly affected by technical and economic challenges of compliance. Technical challenges relate to the practical difficulties of actually complying with Community law. Economic challenges relate to the potentially negative impact of the implementation of Community law.

7.2 Technical and Practical Challenges

The process of compliance

The process of compliance has been characterised by Treid⁸⁹ for the EU involving policy formulation at the regional level and policy implementation by Member States, supported by a regional court and monitoring and enforcement by the Commission.

We have adapted this framework for Sub-Saharan Africa, set out in the figure below. At the regional level, key decisions need to be made with regards to the treaties and the text of regional directives. There is often also a need for the development of secondary or implementing regulation.

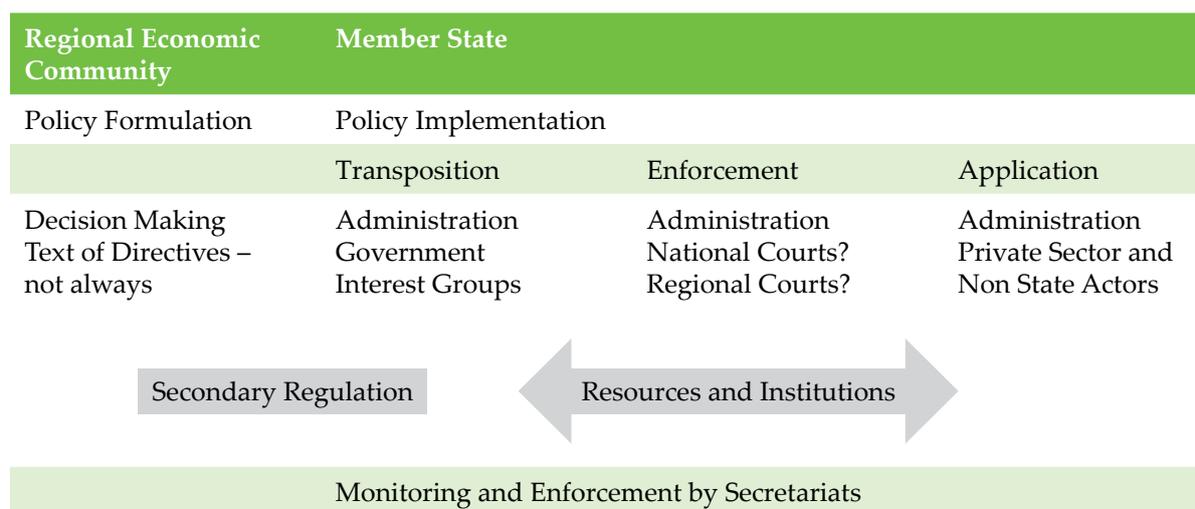
At Member State level policy implementation requires:

- Transposition: adopting or changing national laws, rules and procedures to be in compliance with community law, involving the administration, government law makers and interest groups.
- Enforcement: providing controls and penalties
- Application: providing the institutions and budgets required for administration and involving the national and regional courts.

The importance of a Secretariat in monitoring and enforcement varies according to the nature of the Regional Economic Community. As we discussed in Chapter 2, the Secretariat has been an integral part of the EU, but not of NAFTA.

For our regions, resources and appropriate institutions are key issues.

Figure 6: Process of compliance



Source: Adapted from Treid (2008).

⁸⁹ Oliver Treid, 'Implementing and complying with EU governance outputs' (2008) 3 Living Reviews in European Governance 1–30.

What body of law?

The Acquis Communautaire: the law of the regional economic community

Thorp⁹⁰ in her assessment of the EAC notes that while EAC Partner States “undertake to approximate their national laws and to harmonise their policies and systems, for the purposes of implementing the EAC Common Market Protocol”⁹¹ the exact body of common rights and obligations that constitute the EAC’s *acquis communautaire* is unclear. This challenge is particularly acute for accession to a REC.

To help address these challenges, the European Union provides a directory of community legislation in force⁹² to enhance transparency. And for accession they defined 35 chapters for compliance, which also provided a focus for technical assistance to acceding countries.

Sector Specific

The EU has generally pursued a sectoral focus on implementation of regional law, in particular with regards to the single market. For example, in relation to a single market for financial services, in 2013 the Commission adopted a legislative package on payments including the revised Payments Services Directive and the Multilateral Interchange Fees regulation⁹³. In addition to these directives, there are directives addressing secure electronic transfer and market access⁹⁴ and charges for cross border payments⁹⁵. The Commission also launched an Action Plan to prevent fraud on non cash payments. This helps member states clearly identify the body of law their national laws need to comply with in an organised and focused manner.

Secondary regional regulation

The Treaties of the REC set out the objectives and principles of community law, supplemented by Directives and Decisions on the Community institutions. However, there is often a need for further legislation to “fill in the gaps” in the regulatory framework. In the case of EU an estimated 67% of legislation adopted under single market procedures provided for the Commission together with Member States to develop “delegated legislation”⁹⁶. A further review found that in 2008 alone the EC undertook 222 measures with the Commission and experts of national governments working in 207 committees of national governments. 23 of these measures addressed advisory procedures; 59 management procedures; 83 regulatory procedures and 4 regulatory procedures with scrutiny⁹⁷.

Case study: SADC Payments Project

The development of secondary regulation is a significant challenge. An important area of success has been in the SADC Finance and Investment Protocol and their development in the area of the payments system⁹⁸.

Progress here is a strong example of co-regulation – which is the process whereby the regional agreement sets the objectives which are then implemented through stakeholders developing codes and agreements. The SADC Central Bank Governors Group (CCBG) and the Bankers Association developed a legal and governance structure. This involved the South African Reserve Bank (SARB) being appointed as the Operator of the system by the participant Central Banks. Bilateral legal agreements were signed between the Central and the Operators to this effect, and between the Operator and the participating banks to set out the contractual terms and conditions for the provision of the settlement services by the Operator. Among the participating banks there were also agreements governing the settlement of payment obligations.

⁹⁰ Teresa Thorp, ‘The Rule of Law and the Implementation of an Economic Acquis Communautaire in Sub Sharan Africa: Legal Challenges for the East African Community’ (2012) 3 *European Yearbook of International Economic Law* 485–546.

⁹¹ EAC Common Market Protocol, Art.47, para 1.

⁹² *ibid.* p. 488–489.

⁹³ http://ec.europa.eu/internal_market/payments/framework/.

⁹⁴ E Money Directive (2009/110/EC).

⁹⁵ Regulation (EC) no 924/2009.

⁹⁶ F. Franchino ‘Delegating Powers in European Community’ (2004) 34 *BJPS* 269.

⁹⁷ Damian Chalmers and others, *European Union Law* (2nd edn, Cambridge University Press 2010).

⁹⁸ SADC CCBG Payments System Sub Committee “SADC Payments System Integration Project – from Inception to SIRESS Implementation” Presentation to SADC 4th Learning Platform Workshop, Gaborone, Botswana 16th October 2013.

It is perhaps an irony that a key success in the SADC Finance and Investment Protocol was implemented using bilateral legal agreements rather than through the development of a regional agreement.

In July 2013 the SADC payment system went live; piloted within the Common Monetary Area covering Lesotho, Namibia, South Africa and Swaziland. Matongela⁹⁹ looks at the lessons of payments system and identified the following success factors:

- A dedicated team at the Secretariat level through the SADC Bankers Association.
- Implementation of the in-country Governance Structure with an identified In country Payments Leader (IPL) and a project manager within each banking institution. The IPL links the SADC Banking Association with the local banking industry.
- Reporting to Authorities was seen as “crucial” with the IPL responsible for regular reporting but with key stakeholders in the different operational areas required to provide inputs.
- Interaction at Domestic and Regional level is required by the programming of the project and with substantive information sharing.
- Clear vision: “[T]he vision statement as communicated by the regulators is very clear as far as implementation of the SADC Payments Project is concerned”.

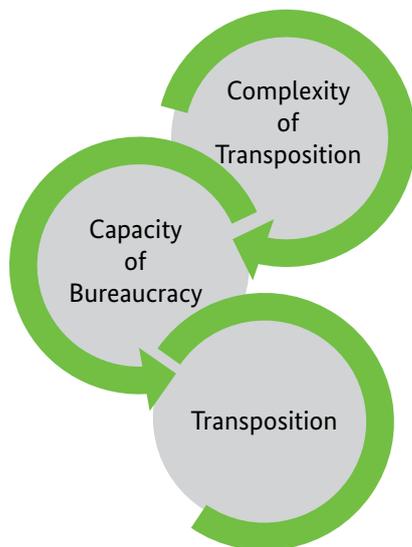
Key challenges included:

- The absence of a Regulation. There is no SADC legal instrument “that mandates members to implement the SADC Payments Project”. The current approach was one of moral suasion.
- Clear roles of stakeholders took a substantive amount of time of effort.

Transposition/Domestication

Key factors affecting the transposition, sometimes called domestication, of community law have been the complexity of the transposition and the capacity of the bureaucracy (see figure).

Figure 7: Key factors of transposition



Complexity of transposition

In our review of the status of the implementation of EAC Customs Law we found that where no supplementary law was required, community law was adopted and ratified quickly by all partners. In particular the Customs Management Act in many of its provisions provides clear and precise rights or obligations. However, where new legislation has been required, relating to anti dumping and subsidies for example, implementation has been limited, often achieved by Kenya only.

⁹⁹ A M Matongela, ‘Implementing Cross-border Payment, Clearing and Settlement Systems: Lessons from the Southern African Development Community’ [2013] Research Journal of Finance and Accounting.

The absence of domestic regulation is also a challenge for the EAC Common Market Protocol on Services¹⁰⁰.

Technical Capacity

The need for substantive “hand holding” to assist member states with compliance has been evidenced by experiences with the implementation of the WTO SPS agreement for several countries and with Pest Risk Assessments¹⁰¹.

Technical capacity constraints can also significantly distort compliance with Treaty objectives. The clearest example is with regards to Services in the EAC Common Market and the COMESA services negotiations. The Treaties themselves call for the free movement of services and are in spirit closer to the European Union than the WTO General Agreement on Trade in Services (GATS)¹⁰². But when the Treaty provisions came to be developed into implementing regulation the negotiators themselves were only comfortable with the GATS approach and this has set the framework for these agreements.

Scope for Technical Leadership in Transposition

There is significant scope for the Commission/Secretariat to provide technical leadership to assist Member States in the transposition of Community Law. This includes:

- Guidelines and templates: for example on SADC Macro-convergence, Taxation and Investment policy co-operation¹⁰³.
- Development of model laws, for example the SADC Central Bank Model Law.
- Mentoring and technical assistance: A key example here is the role played the COMESA secretariat in the development of Competition Policy and Institutions, in contrast to the experience in SADC on competition.
- The Secretariats can also play an important role by reviewing the implementing legislation of member states. In the EU in 2011 the Commission provided comments or detailed opinion on 249 draft legislation of Member States in the area of the single market¹⁰⁴.

The link between negotiations and implementation

The link between broad involvement in negotiation and implementation has been long established in the literature. Stakeholder involvement ensures a better “fit” of regional agreements to domestic norms and procedures and reduces “administrative resistance” (Knill and Lenschow 2000). Ensuring all relevant domestic actors are involved in negotiations enhances implementation as a practical matter (Lipsky 1980). Crucially, it raises awareness of resource requirements and involvement required of other implementing agencies. This was confirmed in our interviews with the EU Single Market Score board Unit.

In SADC, EAC and ECOWAS, involvement in negotiations and institutional capacity is strongly correlated in areas such as a regional payments systems, technical standards, and customs cooperation.

Implementation: resources and institutions

Resource requirement

Implementation is often constrained by the low priority given to regional issues.

We have found that where new resources and/or institutions are required to implement community laws progress is often slow, sometimes non-existent. This is the case even where such national institutions are clearly in the self-interest of Member States. A key example is that of the SACU national tariff bodies. These tariff bodies are stipulated by the 2002 agreement and involve Botswana, Lesotho, Namibia and Swaziland (BLNS) establishing an institution (the exact form of which is at the discretion of countries) to review tariff rate decisions. The EU in their support to the SACU secretariat provided finance to the Secretariat for implementation. Training of officials was provided by ITAC to several designated officials in the BLNS. However, the tariff bodies are still not established.

¹⁰⁰ Kanyangoga, John Bosco (2009). Liberalization status of the services sector in Rwanda: key considerations for the free movement of services in the EAC Common Market.

¹⁰¹ Imani Development/ Southern African Trade Hub (2013) “Study to Identify Technical Capacity Constraints that Affect SACU Export Access into the US Market under TIDCA and their Mitigation Measures”.

¹⁰² SADC Final Evaluation (2008) Project on Support to SADC Regional Integration & the Multilateral Trading System (9 ACP SAD 004).

¹⁰³ ACE (2012), Formulation of a Regional Economic Integration Support Programme for the Southern African Development Community (SADC).

¹⁰⁴ Jacques Pelkmans and Anabela Correia de Brito, Enforcement in the EU Single Market (Ctr for European Policy Studies 2013).

Trust is also a critical issue for compliance

With regards to EAC Standards and Non-Tariff Barriers, interviews suggested that mutual recognition legislation is not working because there is no mutual trust in testing (in agriculture and pharmaceuticals). The proposed solution is an EAC peer-assessment of Quality Infrastructure¹⁰⁵. In SADC co-operation on TBT has been long-standing and is relatively effective, with sustainable support from national bodies and an operational regional framework for co-operation on standards. In contrast, SPS co-operation is nascent and communication and trust between national authorities more limited.

In SADC, the form of Competition co-operation is very light; limited to co-operation as set out in the “SADC Declaration on Regional Cooperation in Competition and Consumer Policies” (2009). This is in part because the South Africa Competition Authority is wary of going beyond co-operation before capacity in other countries is developed¹⁰⁶.

The challenge of trust is significant not just in Sub-Saharan Africa but also in Europe for trade in goods (see box) and trade in services¹⁰⁷.

Communication from the Commission “Mutual recognition in the context of the follow-up of the action plan for the single market” [COM(1999) 299 final - Not published in the Official Journal].

The Communication highlighted the lack of mutual confidence in the acts of other Member States.

Most problems relate to guaranteed protection, since the country of destination is often convinced that its safety arrangements are the only good ones. The fields most affected are food, electrical engineering, vehicles, precious metals, construction and chemicals.

Proposals

Ensure credible monitoring. In order to assess progress, the Commission will prepare evaluation reports every two years, whose conclusions will be included in the single market scoreboard in order to make Member States more aware of the existing problems and to find solutions. The Commission undertakes to give greater attention to the compliance with obligations by the Member States, including the opening of infringement proceedings. Moreover, the possibilities offered by the notification procedure should be fully used to promote mutual recognition and prevent the emergence of new obstacles.

Actions targeted at citizens and economic operators. The Commission proposes two action plans, one for the Commission itself, the other for the Member States.

Action by the Commission. The Commission undertakes to facilitate dialogue between the citizens and companies. To improve information and economic analysis, the Commission proposes:

- Producing a Guide on application of the mutual recognition principle in the field of industrial products and a brochure explaining the implementation of Decision 3052/95 concerning the measures derogating from the principle of free movement of goods;
- An economic analysis of the application of mutual recognition in various different sectors in order to obtain a better evaluation (economic benefits and costs of non-implementation);
- An analysis of the national consumer protection rules for financial products.

¹⁰⁵ GIZ (2012) Regional Medicines Registration Harmonization in the East African Community Partner States.

¹⁰⁶ Sakarta (2011). For ECOWAS see Mor Bakhoum and Julia Molestina, 'Institutional Coherence and Effectivity of a Regional Competition Policy: The Case of the West African Economic and Monetary Union (WAEMU)' [2011] Competition Policy And Regional Integration In Developing Countries', Mor Bakhoum, Josef Drexler, Michal Gal, David Gerber, Eleanor Fox, eds., Edward Elgar, Forthcoming 11–17.

¹⁰⁷ Gareth Davies (2012), 'Trust and mutual recognition in the Services Directive' in Ioannis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO* (Cambridge University Press).

The Commission proposes the following training measures:

- Organize sectoral roundtables of representatives of Member States' competent authorities and professional organisations;
- Draw up specific projects at national level in order to disseminate information about the mutual recognition principle to the target public.

In order to make mechanisms for dealing with problems more effective, it is planned to:

- Use biennial reports to assess more accurately whether or not new harmonisation initiatives are needed;
- Draw up a model application form to be used between bodies responsible for application of mutual recognition and the European and national federations;
- Make it possible for economic operators to ask for reasons why an application has been rejected and improve the handling of complaints by the Commission, in particular in problem sectors;
- Extend the "package meetings" on goods between the Commission and Member States to the services sector and follow more systematically solutions proposed by Member States;
- Develop a Community network for handling complaints in the field of financial services;
- Take specific sectorial initiatives for better application of the principle in services, in particular in the sectors of air transport and telecommunications.

In order to take into account the international dimension of mutual recognition and to reduce, or even eliminate, barriers to trade, the Commission intends to conclude mutual recognition agreements under the General Agreement on Trade in Services (GATS) and in the area of trade in goods under the World Trade Organisation (WTO).

Action by Member States. As Member States are the main actors in the implementation of the mutual recognition principle, the Commission proposes that they give the following undertakings:

- To apply the judgments of the Court of Justice on including mutual recognition clauses in national legislation;
- To reply within a reasonable time to requests for the application of mutual recognition, except in particularly sensitive cases;
- To strengthen cooperation between the national administrations of Member States with the new telematics contact network, meetings of heads of coordination centres, and more systematic use of contact points as well as greater involvement of national coordinators (particularly in the area of regulated professions);
- To prepare regular reports on problems with application and potential solutions.

http://europa.eu/legislation_summaries/internal_market/internal_market_general_framework/l21001b_en.htm

7.3 Economic and Political Challenges of Compliance

Key issues

Economic and Political factors are key constraints to compliance with Community law in every part of the world; Sub-Saharan Africa is no exception.

Extensive consultations by the COMESA Secretariat regarding the Customs Union provide a useful indication of what the issues are regarding the economic challenges for implementation in the regions.

They “revealed that Member States might be discouraged to domesticate the COMESA Customs Union for broadly three technical reasons:

- **Expectations of customs revenue losses under the Customs Union:** most observers agree that most countries in COMESA will face customs revenue disruptions and losses in the transitions period as they establish the Customs Union. The magnitudes of revenue losses cannot be fully determined a priori but many Member States anecdotally expect these to be significant...
- **Expectations of adverse consumer (cost of living) effects:** this mainly applied to highly import-dependent countries ... who would have already significantly liberalized their import tariffs as they consider joining the Customs Union. These countries are likely to face higher domestic prices upon alignment to the CTN/CET as the new customs duties drive up prices. An example of a ... state that could potential face adverse consumer effects is Djibouti, which does not apply duties. Reportedly the country has bottled water (a finished good) as a key import and a sensitive product on which it would not be able apply any duties on under CET/CTN given the social ramifications of doing so...
- **Infant industry arguments:** this is the notion that liberalizing certain goods through the Customs Union would cause severe competition that would kill off local industries and debase industrial development. The “quick-fix” solution for many national Governments is to offer tariff protection to the so-called infant industries.”¹⁰⁸

Supporting Adjustment

At regional level, COMESA has the greatest experience with trying to support compliance by supporting adjustment, rather than trying to impose it. The COMESA Adjustment facility is outlined in the box below. The creation of the SADC Trade Related Facility is an important initiative in this area also.

Addressing Adjustment Costs: The COMESA Adjustment Facility (CAF)

Following the Free Trade Agreement in 2000, COMESA established an Adjustment Facility under the COMESA Fund in 2002 to provide financial support to member states to minimise the fiscal and socio-economic impact of such losses.

The Adjustment Facility is supported by the EU through the Regional Integration Support Mechanism (RISM). A Contribution Agreement for such support was signed in November 2007. Under the 9th EDF, the EU provides 78 million.

Support provided through the Adjustment Facility from the RISM as received by Burundi and Rwanda was limited to one component of the adjustment costs - revenue losses as a result of trade liberalisation. Future support from the Adjustment Facility will provide broader support for the implementation of regional commitments at the national level.

For this purpose, revised CAF operational regulations were adopted by the COMESA Fund Ministerial meeting of June 2010 and a RISM rider was developed. As a result allocation and disbursement of CAF resources are to be effected against the implementation of regional integration indicators detailed in a Regional Integration Implementation Programme (RIIP), which will outline how a country plans to implement adopted regional integration commitments. Countries will receive a fixed tranche against approved RIIP, followed by annual tranches, based on the achievement of specific indicators defined in the RIIP. The 18 indicators can be grouped into five categories as follows: (i) national institutional restructuring; (ii) revenue loss compensation considerations (FTA establishment); (iii) Customs Union and other trade related reforms (domesticating CTN, CET and CMR, eliminating NTBs, submitting SPL, and submitting TIS schedules); (iv) private sector development (adopting COMESA harmonised standards, competition Guidelines, and signing, ratifying and domesticating CCIA); and (v) land and air transport-related infrastructure provisions (HRTC, axle load and overload control certification, harmonised vehicle dimensions, carrier license, Yellow Card and air transport liberalisation).

The CAF has shifted from an approach to compensate countries for the loss of custom revenues to a facility that rewards countries for the progress made on implementing regional commitments.

¹⁰⁸ COMESA Aid For Trade Unit (April 2013) “Experiences with Regional Integration Adjustment Support in COMESA” Draft Final Report.

It is important to draw a distinction between a violation of community law through the application of e.g. a non-approved import ban and an approved derogation. An important, though as yet inconclusive, case has been the Sugar Safeguard in COMESA. With the implementation of the COMESA FTA, Kenya put in place safeguards on Sugar. The safeguards expired in February 2008 but were extended by the COMESA Council to February 2012. The Government of Kenya (GOK) was called on to make a concerted effort to reduce Kenya's sugar industry production costs and fully liberalise trade during this time. However, in 2011 the GOK petitioned to extend Kenya's COMESA safeguards until 2014. The petition was granted, maintaining the 2012 quota and tariff conditions until 2014.

The extension of these protective measures, granted in 2008/2009, was subject to certain conditions imposed by the COMESA Council and adopted by the GOK.

- Rising duty free import quota in tandem with a declining import tariff.
- Adoption of a privatisation plan.
- Implementation of a sugarcane payment system based on sucrose content instead of weight.
- The adoption of a product diversification policy (e.g. co-generation and bio-fuel).
- Increased funding for research and extension; and transport infrastructure.

With a further requirement for twice yearly reporting by the GOK to the COMESA Council on industry performance and efforts made to improve competitiveness.

The positive aspect of this is that the conditions set by the Council have largely shaped the sector's development policy in recent years, pushing the sector towards a sustainable opening up¹⁰⁹. Also non-application continues to be monitored and subject to ongoing discussion and efforts at adjustment. However, the ongoing imposition of the Safeguards means that this experience cannot – as yet – be considered a success.

7.4 Conclusions

Technical and practical issues are significant compliance variables in Sub-Saharan Africa. Challenges are at many levels and are multifaceted. They range from clarity regarding the body of law, both the acquis and the necessary secondary legislation required for implementation. Transposition or domestication is most prevalent, in the cases we have looked at, when community law is precise and can be “copied out” in domestic legislation – such as has been the case with the EAC Customs Law. Capacity of the implementing authorities or actors is, unsurprisingly, critical in particular where a high level of trust is required, such as in the area of standards and payments.

There is significant scope for technical leadership to enhance compliance with community law. This can be from ensuring involvement of all relevant stakeholders in the negotiations of regional instruments, to embodying technical knowledge in guidelines, to reviewing national implementing legislation to programmes to build capacity and develop trust.

With regards to economic and political challenges, there is growing experience in the region to support painful or politically challenging adjustment. The COMESA Adjustment Facility has been extended, and SADC has recently been equipped with a facility to assist Member States with adjustment. The experience with safeguards is in one sense encouraging in that it has resulted in domestic strategies focused on achieving liberalisation. Yet, the granting of further extensions is eroding confidence that community laws will be applied within prescribed timelines.

¹⁰⁹ http://www.fao.org/fileadmin/templates/mafap/documents/technical_notes/KENYA/KENYA_Technical_Note_SUGAR_EN_Jul2013.pdf.

Chapter 8

Conclusions and Recommendations

8. Conclusions and Recommendations

Within Sub-Saharan Africa, recent events have given some reason for optimism. Within SADC there is a growing focus on tracking implementation through monitoring processes¹¹⁰. A “landmark” ruling by the COMESA Court of Justice has demonstrated that private rights can be protected¹¹¹. In ECOWAS global indicators suggest substantial reductions in non tariff barriers in 2012¹¹².

However, the private sector still sees agreements as “on paper only” and faces significant non-tariff barriers¹¹³. Additionally, only limited progress is being made outside trade in goods. The legal status of regional agreements remains unclear and the use of litigation is generally restricted to human rights and human resources issues¹¹⁴. In terms of “results”, intra African trade remains low at 11% between 2007 and 2011, compared to 21% in Latin America and the Caribbean, 50% in Developing Asia and 70% in Europe¹¹⁵.

A further cautionary note is struck by the fact that there is a general lack of information of implementation of regional agreements. It is difficult to assess who is actually implementing what at an aggregate level.

Noting these limitations, the analysis has still provided insights into compliance with community law in the different RECs.

8.1 Conclusions

There is significant scope to improve compliance by addressing practicalities

There is evidence of slow and limited implementation:

- When new areas of legislation are involved and/or new institutions need to be funded
- When there is uncertainty regarding the “how” Treaty/protocol objectives are to be achieved. This is in part related to challenges in developing regional secondary legislation
- When trust amongst implementing authorities is required

Conversely progress is greater when more than one country’s big players have an interest, where it is easy and cheap to implement and strong institutions across the region are involved.

Member or Partner States are also more likely to comply with community laws and obligations when the appropriate stakeholders have fully participated in their development during negotiations.

There is much that can be done to enhance legal enforcement

A review of the literature and consultations revealed that much can be done to enhance the legal and institutional framework for enforcement:

- Clarify status of regional law
- ... and its application (direct effect)
- Developing an infringement procedure
- ... with a clear role for the Secretariat/Commission and Court of Justice

That said, it is important to note the scepticism of many observers regarding the scope for legally driven integration. While the recent COMESA Court of Justice case gave rights to private agents under the Treaty, this stands in contrast to the experience in SADC with the Tribunal. However, it should be noted that there is a convergence of views on the need for prioritisation and focus if regional integration is to progress.

¹¹⁰ For example, the Protocol on Finance and Investment <http://www.giz.de/Themen/en/dokumente/giz2012-en-implementation-sadc-finance-investment.pdf> and “Analysis of Monitoring Data for the Protocol on Finance and Investment” GIZ (forthcoming).

¹¹¹ Gerhard Erasmus, ‘The COMESA Court of Justice: Regional agreements do protect private parties’ [2013] *Tralac Trade Brief* No. S13TB09/2013 1–9.

¹¹² Robert Z Lawrence and others, ‘The Global Enabling Trade Report 2012 and <http://www.weforum.org/issues/international-trade/getr-2012-data-platform>.

¹¹³ Cynthia Chikura ‘Dealing with Regional Non-tariff Barriers: A Case Study of the COMESA-EAC-SADC Non-tariff Barrier Reporting Mechanism’ *South African Institute of International Affairs* (forthcoming).

¹¹⁴ Iwa Salami, ‘Legal and Institutional Challenges of Economic Integration in Africa’ (2011) 17 *European law journal* 667–682 and Gerhard Erasmus, ‘Is the SADC trade regime a rules-based system?’ [2011] 1–18.

¹¹⁵ UNCTAD, ‘Economic Development in Africa’ (UNCTAD 28 June 2013) http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf.

Monitoring mechanisms can be improved

Monitoring of compliance is receiving much greater attention in Southern and Eastern Africa, though not so in West Africa. For those regions that have or are developing Monitoring and Evaluation systems there are areas for improvement:

- Not all M&E frameworks distinguish between monitoring of transposition of regional law and policies into national ones and the results
- To include resourcing and institutional aspects not just transposition
- A need for an enhanced role of secretariat/ commission in assessment of actual compliance (both assistance and policing role)
- Ensure mechanisms for monitoring and for addressing issues are linked (results from monitoring linked to work of Committees)

There is a significant role for technical leadership by the Secretariats

The analysis has shown that there is a significant role for the Secretariats to play in supporting compliance through providing technical leadership. This technical leadership can be:

- Embodied in the texts of the agreements themselves
- In the form of guidelines for specific areas
- Manifest in the development/negotiation of those agreements
- In the development of secondary legislation
- In assisting with national implementation through the review of national implementing legislation
- In assistance with safeguards and adjustment of the economy to facilitate compliance

8.2 Recommendations

Politically astute prioritisation

The regional integration agenda needs to prioritise relatively high impact areas that are of clear benefit to a relatively broad range of countries. This is particularly important in the context of Southern and Eastern Africa where no country is prepared to “underwrite” integration and mitigate directly uneven development within the region.

Prioritisation should take into account where there are relatively strong champions, in more than one country, in support of the issue.

A prioritised approach will make it more feasible to realise integration in key areas. The ambitious agenda and “incomplete legal contract” of the RECs in Southern and Eastern Africa requires a heavy institutional structure and bureaucratic resources, which Member and Partner States are often unwilling to fully fund.

A greater focus on implementing regulation, supported by a Secretariat with a greater legal capacity

While the agenda of regional integration probably needs to narrow, more resources are needed to support the development of implementing regulation. This is best led by the Secretariats in co-operation with Member and Partner States.

Developing implementing regulation is critical. Many countries have very limited capacity to develop appropriate regulation to transpose/domestify and this has had a negative impact on compliance.

The absence of clear implementing regulation also impacts the ability of monitoring system to track transposition domestication of community laws and commitments.

This is an area where there are efficiency gains from the Secretariats taking a leading and co-ordinating role. It is an irony that one of the successes of SADC, the payments mechanism, was concluded on the basis of bilateral agreements when a regional agreement would probably have been lower cost. However, it is unlikely that, given its current legal capacity, the Secretariat would have been able or trusted to lead this process.

An independent verification process

It is notable that, with the exception of the EAC’s Single Market Scorecard and SADC’s now defunct Trade Audit, there is a lower level of verification of compliance to REC commitments than for the World Trade Organisation (WTO).

This is a key role for the Secretariat to at least co-ordinate. There are positive steps being taken in terms of monitoring, but an independent verification process of the situation on the ground in Member or Partner States will need greater resourcing.

Linking regional funds to compliance challenges, and strengthening the capability of the Secretariat to support economic adjustment

With several of the RECs receiving regional funds to support Member States in the context of regional integration, there is an opportunity to enhance implementation by linking these funds to challenges of compliance. Currently the focus has been on fiscal challenges, for example with COMESA's adjustment support programme. While the regional funds need to continue to support economic adjustment (see below) there is a need to support Member or Partner States in the practicalities of transposing/domesticating regional laws and commitments.

Where lack of implementation is a result not of practical challenges but of economic costs from e.g. liberalisation, the use of regional funds becomes a critical factor. The development of regional funds, such as the Trade Related Facility for SADC, provides an opportunity for the Secretariat to link support to economic adjustment directly to implementation of community laws and regulations. And derogations should be managed according to the Treaties. For example the stay of application of tariff liberalisation should be managed within the context of a safeguard mechanism and accompanied by adjustment support. This would build confidence in the private sector that the non-application of community law and commitments is transparent and managed.

In most of the Secretariats this will require a significantly greater technical capacity, even to implement and oversee adjustment support and the application of the safeguard mechanism.

Clarification of the legal status of Community law at national level

The report has covered a lot of detail regarding this issue and several specific issues have been raised. The issues considered have included the ability of private actors to claim the freedoms offered the different RECs directly in national or regional courts.

While such issues are critical to the likely impact of the RECs, they are largely political decisions – in practice if not in principle.

What is required, irrespective of the broader political direction, is a clarification of the legal status of community law at national level. Currently the rights offered under the different Treaties and Protocols are uncertain and do not create the transparency and certainty that would promote cross border economic activity.

Coherent and co-ordinated monitoring mechanisms

Several of the monitoring mechanisms of the difference RECs have been reviewed and benchmarked. There are several generic issues that need to be addressed.

The first is the need for appropriate indicators that are linked to transposition/domestication of community laws and commitments. This challenge can be met relatively easily if implementing regulation has been developed. Where it has not monitoring will involve missions to assess member state laws and regulation - in such cases the distinction between monitoring and verification is slim.

Second, the monitoring systems need to be coherent. In the EU, different monitoring systems perform different but coherent roles allowing the Commission to relatively effectively identify both the challenge and the underlying problem – transposition/domestication, implementation or application by officials. For the RECs reviewed there are no frameworks for ensuring that the different monitoring systems collectively provide a clear and more comprehensive picture of implementation.

Much more can be said

Given a subject as multifaceted and complex as compliance with Community laws, there is always more that could be said, and any conclusion reached is by its nature subject to review as circumstances change. The analysis has attempted to provide insights on practical measures that can be implemented at technical level by the RECs themselves. Even narrowing the analysis in this way, there are many areas that should be further explored: For example the scope for the private sector to act as champions for regional integration.

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